Anti-Immigrant Legislation, Social Justice, and the Right to Equal Educational Opportunity

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In the debates over policies seeking to exclude illegal immigrant youth from public education, complex issues related to the human and legal rights of this group have often been reduced to cost-benefit analyses, to partisan polemics about multiculturalism and national identity, and to campaign posturing about tax burdens and crime. This article presents a contextual analysis of such policies and the related legal standards, with a focus on social justice and equality issues that are raised by the exclusion of any distinct group of children from educational opportunity. Our main thesis is that every individual's interest in meaningful public education is fundamental, in a constitutional sense, and that this interest does not depend on citizenship or economic status. We begin with an analysis of California’s Proposition 187 and related Supreme Court decisions, most notably Plyler v. Doe (1982) and San Antonio v. Rodriguez (1973), and move to connections with school finance litigation. We continue with an appraisal of the potential of current federal and state case law to address issues of justice that legislation such as Proposition 187 might raise in the future. Finally, we present an argument for the strengthening of Fourteenth Amendment protections in the domain of education and give special attention to the formulations of Justice Thurgood Marshall in several pertinent cases.
California's 1994 Proposition 187 is the most prominent example of recent state and federal legislative initiatives seeking to limit the access of immigrants to public services. This initiative, which sought to prevent undocumented immigrants from receiving health, education, and welfare benefits, was passed by a large margin of the electorate. Enforcement of the consequent statutes, however, was immediately blocked by the courts, and in 1997 a federal district court found most of the provisions of Proposition 187 unconstitutional.\(^1\) As with its affirmative action cousin, Proposition 209, this voter initiative served as a pretext for political actors to pursue agendas in the context of which important legal and ethical concerns were marginalized or made to disappear.\(^2\) This was particularly the case when discussion turned to the proposed exclusion of undocumented immigrant youth from public education. Complex issues related to the human and legal rights of this group of prospective students were reduced to cost-benefit analyses (in which the question of whose benefit and whose loss was seldom raised), to partisan polemics about multiculturalism and the national identity, and to political campaign posturing about tax burdens and crime. While conservatives were extremely vocal about their desire to exclude undocumented youth from public schools, and liberals objected, the explanations on both sides seemed to operate within a mental state of emergency that precluded reflection or sustained reasoning from principle. In this mental state of emergency, the presumed legitimacy of economic self-interest and cultural prejudice went virtually unchallenged, until it seemed to become "obvious" to a large segment of the populace that undocumented workers and their children simply have, or should have, no rights at all, least of all the right to a free public education.\(^3\)

It ought to be a significant relief to those on the left that most of Proposition 187, including all of the education provisions, has been found unconstitutional by the federal district court and that the proposed Gallegly Amendment (H.R. 1377) to the Immigration in the National Interest Act of 1996 (H.R. 2202)—which would have made Proposition 187 a federal law—was dropped under threat of presidential veto. Still, neither the district court ruling nor the recent federal legislation on immigration goes very far toward protecting or defining the civil and constitutional rights of undocumented immigrants. On the contrary, the legal and political climates remain decidedly cold for this group of cultural and economic, if not legal, citizens. Recent legislation limits access of immigrants to welfare benefits and, by emphasizing self-sufficiency, discourages them from seeking social benefits even when they qualify. For instance, many Mexican and Central American immigrants, documented and undocumented, have been discouraged from seeking the social benefits to which they are entitled by law, including public education.\(^4\) And the Supreme Court's ambivalence about the status of education—that is, the lack of clear indication by the court as to whether public education is a constitutionally protected right or a benefit that can be curtailed by the state—provides support to political efforts such as Proposition 187 that seek to restrict the access of immigrants to public education.
Rationale

In this article, we seek to counter this legal agnosticism with respect to the right to educational opportunities. Our main thesis is that all individuals' interest in meaningful public education is fundamental, in a constitutional sense, so educational policies must aim at providing equal educational opportunity and access for everyone. The constitutional fitness of any policy that legitimates the unequal distribution of educational opportunity should be looked upon with skepticism, except perhaps in those cases in which "discrimination" corrects current or previous inequalities. Accordingly, we argue against the presumption that discrimination against undocumented residents of the United States is somehow less irrational and unethical than discrimination against U.S. residents who are legal citizens or immigrants. Whether a child possesses the right papers should not be a legal or ethical justification for discriminatory educational policies. We would like to propose, instead, a contextual analysis of policies such as Proposition 187 focusing on the many issues raised by the exclusion of this distinct class of children from educational opportunity. Toward these ends, we undertake a reading of recent legislation and litigation related to the question of whether education is a right and the relevant precedents. We also refer to recent case law at the state level concerning educational funding issues in order to demonstrate the inadequacies of existing case and statutory law at the federal level.

We begin with a review of anti-immigrant legislation and an analysis of the United States District Court's 1995 and 1997 rulings in LULAC v. Wilson, which initially blocked the implementation of Proposition 187 and then found most of its provisions unconstitutional. These rulings primarily focused on the supremacy notion under which the federal government can be said to occupy the field of immigration, retaining sole jurisdiction to determine immigration status and regulate access to public benefits based on such status. Specifically, the District Court relied on the 1974 De Canas v. Bica Supreme Court decision and the Personal Responsibility for Work Opportunity Reconciliation Act of 1996. Our main interest here, though, is in the Fourteenth Amendment issues raised by Proposition 187's denial of education to the children of "illegal aliens." Such issues were central to the 1982 Supreme Court decision in Plyler v. Doe, to which Proposition 187 was intended by its authors and backers as a direct challenge. We want to go beyond the majority opinion in Plyler, which itself settled finally on the primacy of economic issues under the rubric of "substantial interest of the state," to address the question of whether the children of undocumented immigrants have a protected interest in educational opportunity. This leads us to consider Justice Marshall's dissent in the 1973 Supreme Court decision in San Antonio Independent School District v. Rodriguez—a decision cited repeatedly in Plyler—in which he takes up the question of education as a fundamental right in the context of "invidious classifications." This dissent focuses on the moral and social issues raised by state policies that deprive children of equal educational opportunity on the basis of wealth. Consequently, it exemplifies the kind of contextual analysis that we want to
propose regarding state policies that would deprive other distinct classes of children (e.g., the children of undocumented immigrants) from equal educational opportunity. In the end, we hope to offer an informed—and not especially optimistic—appraisal of the potential of Plyler and LULAC to address issues of justice that legislation such as Proposition 187 might raise in the future and to advocate for the strengthening of Fourteenth Amendment protections in the domain of education.

Anti-Immigrant Legislative Initiatives and Related Court Decisions

Proposition 187 was a ballot initiative submitted to the voters of the state of California in the November 8, 1994, general election. It proposed banning undocumented immigrants from receiving social benefits, including public education. California, the state with the largest legal and illegal immigrant population, was then the site of violent racial conflict, persistent recession, increasingly wide and increasingly visible gaps between the rich and the poor, and disintegration of what had once been a model public school system. This situation in the schools was brought on by a combination of increased enrollment and student diversity and decreased public expenditure. Proposition 187 obligated state officials to investigate and verify the immigration status of any person who applied for benefits or public services and was reasonably suspected of being an illegal alien. Accordingly, public school officials were required to investigate and verify the immigration status of each child enrolling in the state’s public schools. In addition, school officials were required to verify the immigration status of a parent or guardian with a child attending school if they determined or reasonably suspected that the parent or guardian was violating federal immigration laws. Finally, school districts were compelled to inform the state superintendent of public instruction, the state attorney general, and the United States Immigration and Naturalization Services (INS) about children and parents or guardians who were determined or suspected to be violating federal immigration laws. Voters approved Proposition 187 by a 59% to 41% margin, although the demographics of the voting public were not representative of general state demographics. Voters from the middle and upper middle classes were disproportionately represented, and only a small percentage of eligible Mexican American voters appeared at the polls. Before it could be put into effect, a federal judge issued an injunction that blocked the proposal until its constitutionality could be determined.

The Immigration in the National Interest Act (1996)

At the same time, intense and often acrimonious debate in the U.S. Congress about immigration reform resulted in the passage of the Immigration in the National Interest Act in the summer of 1996. On March 20 of that year, the House of Representatives passed an amendment sponsored by Representative Elton Gallegly (R-California) that gave states the option of denying free public education to the children of illegal immigrants. However, this amendment was later defeated in the Senate. President Clinton had announced previously that he would veto the bill if it contained this amendment. Had the
Gallegly Amendment passed, it would have transformed portions of California's Proposition 187 into federal law. Notably, House Speaker Newt Gingrich (R-Georgia) backed the proposed amendment in these words: "Offering free, tax-paid goods to illegals has increased the number of illegals... This used to be the land of opportunity; now it's the land of welfare." The final version of the bill, although it did not contain the education provisions, did limit access of legal immigrants to welfare benefits, increased enforcement efforts by the INS, and increased militarization of the border between the United States and Mexico. Based on the act of 1996, Congress passed a national policy concerning welfare and immigration on October 6, 1997. This policy emphasizes that noncitizens should have limited access to public benefits. However, with regard to "eligibility for a basic public education," it yields to Plyler, discussed at length next.


In November 1995, a year after voters had approved Proposition 187, the United States Court for the Central District of California, in the person of Mariana Pfaelzer, addressed issues about its constitutionality. The case was a consolidation of five separate actions filed against Pete Wilson et al. in Wilson's capacity as governor of the state of California. In addition to the organizations LULAC (League of United Latin American Citizens) and Children Who Want an Education, the court permitted several other parties, which involved some state employee associations and also educational and religious organizations, to intervene as plaintiffs. The plaintiffs petitioned the district court for declaratory and injunctive relief, seeking to bar the state of California from enforcing the provisions of Proposition 187. Their challenge was that Proposition 187 violated the Supremacy Clause of the Constitution's Sixth Article—that is, the federal government's exclusive authority to regulate immigration.

Pfaelzer sided for the most part with the plaintiffs, finding that nearly every provision of the initiative was in violation of the Constitution. Referring to *De Canas*, she maintained that Proposition 187 sought to grant state control over a federal function (i.e., regulation of immigration) in violation of the Supremacy Clause. According to *De Canas*, the constitutionality of a state statute or policy is determined by three tests. First, does the state require its agents to make independent determination of who is and who is not in this country in violation of immigration laws, report such determination to state and federal authorities, or cooperate with INS, solely for ensuring that such persons leave the country? Second, is there an independent showing that Congress intended to occupy the field that the statute attempts to regulate? Third, do the provisions of the state statute or policy make compliance with federal laws impossible? An affirmative answer to any of these questions nullifies the legitimacy of the statute.

Referring to the first and second *De Canas* tests, the *LULAC* court maintained that state agents can determine the eligibility of a person to participate in benefits programs when they use INS information obtained through the Systematic Alien Verification Entitlement program but not when
they engage in independent determinations of the immigration status of an applicant. Thus, the court found that those provisions of Proposition 187 that acted to deny state-funded benefits (e.g., welfare or Medicaid disbursements) to persons who are unlawfully present in the United States were not impermissible when the state agent could rely on information from the INS to verify the immigration status of the applicant. The court found, however, that Proposition 187's verification, notification, and cooperation/reporting requirements in all other instances violated the first and second De Canas tests because they sought to directly regulate immigration by creating an independent set of criteria by which to classify individuals. That is, the statute would have required state agents to make determinations of immigration status independently of INS information. Therefore, these provisions were preempted. The court also decided that provisions of Proposition 187 that denied benefits to persons who under federal law were eligible to be in the United States, or who were identified by federal law as eligible for these benefits regardless of their immigration status, violated the third De Canas test. Finally, to evaluate the elementary and secondary education provisions of Proposition 187, the court relied on Plyler, concluding that the denial of a public education based on the immigration status of the child or the child's parent or guardian violated this ruling of the Supreme Court.


On November 14, 1997, the district court issued its final order invalidating nearly all sections of Proposition 187 except the sections concerned with punishing those who use and/or manufacture false citizenship or residency documents and the section concerning procedures for amending the proposal after becoming a law. In this latest ruling, the court referred to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and Title IIX of 1997 in which Congress stated the national policy pertinent to the act. Here the judge argued that the act "only serves to reinforce the District Court's prior conclusion that substantially all of the provisions of Proposition 187 are preempted under De Canas v. Bica." The judge also referred to Section 1643 of Title IIX in which Congress clarified that eligibility for a basic public education should continue to be determined according to the ruling in Plyler:

Though basic public education clearly must be classified as a government benefit, just as health care is, the (1996 act) does not purport to deny it to non-qualified aliens. Proposition 187 cannot do that either under the present state of the law.

In general, the LULAC court relied on De Canas, ruling that Proposition 187 was an attempt to grant state control over a field occupied by the federal government (i.e., regulation of immigration) in violation of the Supremacy Clause. The court also embraced the reasoning in Plyler to evaluate those parts of Proposition 187 concerning public education. It confirmed that no national policy supported the state in denying children of undocumented immigrants
public education benefits and that, according to *Plyler*, such a denial would not further any of the state's substantial goals. Nevertheless, the *LULAC* decision left open the possibility for the state to rely on federal data to determine eligibility status (see citizenship) and then deny certain services—services that are wholly state funded and do not directly relate to a child's opportunity for a basic public education—because such a denial would serve some legitimate goal of the state. For example, the state may still argue for some state-funded extracurricular and tutorial services to be provided only to its documented legal citizens. A state policy in this case would aim at saving the state funds that could be used to increase the overall quality of its educational system without completely denying some children a basic education. The rationale for not excluding children of undocumented workers from public schools and the dangerous exceptions that might theoretically be allowed within the scope of that particular rationale are spelled out in *Plyler*, to which we now turn.


In *Plyler*, the Supreme Court discussed the constitutionality of a Texas law that, like California's Proposition 187, attempted to deny to undocumented school-aged children the free public education that the state provided to children who were citizens of the United States or legally admitted aliens. Justice Brennan, writing for the majority, maintained that illegal aliens can claim all of the benefits of the Equal Protection Clause. The majority opinion also held that if the state were to deny a discrete group of innocent children the free public education it offered to other children residing within its borders, that denial should be justified by a showing that it furthered some substantial state interest. But the court found that "whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation," and therefore the Texas law was a breach of the Equal Protection Clause. Despite its progressive tone, this reasoning was in line with the court's usual interpretation of Fourteenth Amendment protections, an interpretation often criticized as unyielding with respect to educational opportunity.

Prominent among these "unyielding" interpretations is the 1973 decision in *San Antonio Independent School District v. Rodriguez*, where the Supreme Court examined the constitutionality of the Texas system of financing public education. This decision served in several instances as a precedent for *Plyler*. As is still the case in nearly every state, the public school finance scheme of Texas in the early 1970s relied on local property taxes. The result was proportionately lower per-student spending for districts with weaker tax bases. The state claimed that the goal of its financing scheme was to provide local communities with greater control over the function of public schools. In their initially successful suit before a federal district court, the parties attacking this scheme based their challenge on two contentions. First, they argued that the Texas scheme operated to the disadvantage of a "suspect class," that is, a class of low-income people who resided in districts with a low tax basis and low per
student spending. Suspicious classification, in a Fourteenth Amendment context, refers to means of discriminating between groups of individuals for the purpose of dispensing governmental benefits that are invidious and irrational. To deny some persons educational opportunities on the basis of their race, for example, is an expression of invidious and irrational bias, and it indicates a suspicious classification; to detain some and not others on the basis of whether they have been convicted of murder, however, is not irrational. That is, classifying persons on the basis of whether they have committed murder, and dispensing benefits or punishment on the basis of that classification, is not suspicious. Second, they argued that the school financing system interfered with the exercise of a fundamental right, that is, the right to education. They asserted that this right was implicitly guaranteed in the Constitution because of a positive relationship, a nexus, between education and the rights of voting and free speech. The Supreme Court dismissed both claims and reversed the lower court’s decision, and it found the school finance scheme to be constitutional.

A major factor in the San Antonio decision was the court’s determination of the appropriate standard of judicial scrutiny to apply when educational opportunity is at issue. The majority maintained that when a state law or policy operates to the disadvantage of some “suspect class” or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, strict judicial scrutiny is required to determine whether the state law or policy violates the Equal Protection Clause. This means that, in disputes involving such issues, the burden of proof is on the state to demonstrate that its laws or policies further some compelling governmental interest. By contrast, if a law or policy discriminates against individuals who are not members of an identifiable suspect class and individual fundamental rights are not affected, the state has only to show that there is a direct relationship between the law or policy and the goal that the state is attempting to achieve. Using this interpretation, the court argued that educational policies that discriminate against the poor do not call for strict judicial scrutiny since no suspect class of individuals is involved and education is not a fundamental right. Finally, the court ruled that the Texas policy rationally furthered some legitimate state purpose and did not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

Taking into consideration the two standards discussed in San Antonio—known as the strict scrutiny and rational basis tests—the majority in Plyler found that state policies denying public education benefits to children of illegal immigrants did not call for strict judicial scrutiny. Arguably, one should expect that the rejection of the strict scrutiny standard would lead the majority in Plyler to side with the state. But, in a new twist, the court went on to say that “the deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual” and that “[denying enrollment in public schools to children not legally admitted to the country] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status.” This discrimination, the court argued, “can hardly be
considered rational unless it furthers some substantial goal of the State. 26 This approach pleased Justice Marshall, who had written in his San Antonio dissent that prior court decisions conflicted with the majority opinion that “equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality.”27 The opinion in Plyler represented a less rigid interpretation of these standards of review. Yet, in agreeing with the Plyler majority in this regard, Marshall also restated his convictions about the right to education (which he had originally stated in his San Antonio dissent), convictions at odds with the majority in Plyler. “An individual’s interest in education is fundamental...[and] a class-based denial of public education is utterly incompatible with the Equal Protection Clause of the Fourteenth Amendment.”28

Hence, despite its support for educating the children of illegal immigrants, the Plyler ruling echoed the conservative argument of the San Antonio decision—that education is not a fundamental right because no right to education is explicitly or implicitly guaranteed by the Constitution. And like the San Antonio court, which claimed that poverty has “none of the traditional indicia of suspectness,”29 Justice Brennan found in Plyler that aliens of undocumented or illegal immigration status are not members of a “suspect class” in need of “extraordinary protection from the majoritarian political process.”30 Of course, “aliens of undocumented or illegal immigration status” have been repeatedly abused, physically and psychologically, by the custodians of the majoritarian political process. Notwithstanding the historical facts or his refusal to see discrimination against the children of undocumented immigrants as suspicious in a legal sense, Brennan demonstrates considerable sympathy for the plight of these students and little patience for the arguments of the state in favor of their exclusion:

By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.31

Given the Plyler court’s extensive reference to San Antonio for determining the appropriate standard of judicial scrutiny, it seems fair to read Justice Brennan’s statement as addressing primarily issues concerning the efficient means of achieving specific societal and political goals—namely, fiscal health and public order—rather than as an answer to questions about a person’s interest in educational opportunity or the classification employed to selectively limit these opportunities. The problem with this orientation becomes apparent when he goes on to contend that “the exercise of congressional power might well affect the State’s prerogatives to afford differential treatment to a particular class of aliens”32 and that:

in the area of special constitutional sensitivity presented by these cases, and in the absence of any contrary indication fairly discernible
in the present legislative record, we perceive no national policy that supports the State in denying these children an elementary educa-
tion.\textsuperscript{15}

It is this line of argument in \textit{Plyler} that, more than two decades later, raised hopes among the supporters of Proposition 187 that the Supreme Court—in light of later congressional actions to enforce immigration laws—might reex-
amine the \textit{Plyler} issues and perhaps even overturn its holdings.\textsuperscript{14} The fact is that in 1997 Congress specified that: "nothing in [the Personal Responsibility for Work Opportunity Reconciliation Act of 1996] may be construed as addressing alien eligibility for a basic public education as determined by the Supreme Court of the United States under \textit{Plyler v. Doe}.\textsuperscript{32} This part of the federal statute was used by the 1997 \textit{LULAC} court to find that no national policy supported the state in denying children of undocumented immigrants public education benefits and that, according to \textit{Plyler}, such a dental would not further any of the state's substantial goals. Unfortunately, the phrase "eligibility for a basic public education" means that states are not obliged to provide to people more than what Texas was providing the children of \textit{San Antonio}.\textsuperscript{33}

State School Financing Litigation

The question of whether education is a fundamental right of individuals or a benefit provided by the government continues to be central to the nearly ubiquitous school funding litigation at the state level. At least 42 of the 50 states have undergone or are undergoing challenges to their public school funding schemes, and, as of 1997, 18 had been declared unconstitutional in whole or in part, some more than once.\textsuperscript{36} This is only one of the questions at issue in these complex and varied cases, and the kinds of questions have evolved substan-
tially since 1973's only federal ruling in this area in \textit{San Antonio}.\textsuperscript{37} Plaintiffs and defendants in these cases are engaged in arguments about equity, adequacy, separation of powers, and the relations between private and public property. In looking at the constellation of issues raised in these cases, we can easily see their direct relevance to the educational clauses of Proposition 187. From the beginning, the authors of the initiative maintained that they were not inter-
ested only in whether undocumented immigrants should receive the same social benefits as legal immigrants or citizens; they also meant to raise the larger question of who was responsible to pay for social benefits generally and whether the "rights" of private property (i.e., the rights and privileges of those who owned the larger share) did not deserve more protection than the "rights" of those who were portrayed as not being able or willing to pay for these benefits themselves.\textsuperscript{38} The campaign literature repeatedly cited statistics about the cost of educating undocumented immigrants alongside statistics about who was paying this cost.\textsuperscript{39} This is, of course, the core issue in all school funding litigation, seen from the side of those representing wealthier districts or those representing constituencies with no immediate stake in public education at all. Many states have found, like the court in \textit{San Antonio}, that their constitution does not call for the kind of redistribution of wealth that school equity
necessitates. Clearly, in the domain of public education, questions of economic means are never far from questions of cultural privilege and racial equity.

Since *Rose v. Council for Better Education,*40 school financing schemes have most often been invalidated on the basis of the failure of the legislature to fulfill its obligations under education clauses to provide an adequate education for some significant portion of the state's students. Some courts have also articulated the belief that education is a right, and others have made equal protection rulings based on the requirement that educational opportunities across a state be “uniform.” In these cases, strict scrutiny of the financing schemes has been invoked, but some courts have refused to take up the strict scrutiny versus rational basis rubric altogether.42 Courts that have not invalidated school financing schemes have neither found education to be a right nor found wealth-based disparities to be constitutionally suspicious. Also, while they have generally not disputed the fact of the wealth-based disparities or the requirement of the respective education clauses, they have ruled that education financing is the business of the legislature and/or that the proposed remedies would result in undesirable erosion of local control of education. Virtually every combination of rulings can be found in state decisions, particularly if one examines concurrences and dissents.

Space limitations preclude more than a snapshot of current threads of argument running through school funding litigation. We look briefly at a single recent case—*DeRolph v. Ohio,*43 where the state supreme court invalidated Ohio's school funding scheme—in which all of these threads are tangled and point to the relevance of this case to our more general discussion. In Ohio in 1993, great disparities of several kinds existed between local school districts. Some schools boasted state of the art facilities and educational resources unmatched anywhere in the world, while others resembled facilities one would find in impoverished developing and postcommunist nations.44 Faced with the set of material circumstances that seems to invariably accrue from property-tax-based school financing schemes, state courts have a number of options for argument, and the preferences in this regard have changed substantially since, and in response to, the ruling in *San Antonio.* Prior to *San Antonio,* and in some cases afterward, the preference for state courts ruling school funding schemes unconstitutional was to make equal protection arguments similar to those made by the plaintiffs in *San Antonio* itself. The power of these arguments is severely limited by *San Antonio,* which denied that education is a fundamental interest and that disparities based on economic classifications are suspicious.45 Like the federal Constitution, state constitutions do not expressly name education as a protected right. But unlike the federal Constitution, every state constitution except Mississippi's contains an “education clause” that mandates the creation of a public school system that is thorough and efficient. Constitutions such as Wyoming's contain further descriptors—"complete and uniform"—that can ground arguments from equity. In addition, children and teens are required in all 50 states to attend school, and the Supreme Court ruled this requirement constitutional in its 1925 decision in *Pierce v. Society of Sisters.*46
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The 4-3 decision in *DeRolph* is particularly interesting with respect to issues raised in Proposition 187 because it studiously avoids addressing questions of individual rights and equity while taking a rather strong position with regard to the respective duties of the court and the legislature. The funding scheme in Ohio was declared unconstitutional insofar as it was not "thorough and efficient" and left some districts "starved for resources." To the disappointment of two concurring justices, the majority opinion was silent on the question of whether education is a positive right in Ohio, relying instead on *Board of Education of Cincinnati v. Walter*—a decision *DeRolph* reversed on most points. Not surprisingly, the *Walter* court followed *San Antonio* in deciding that wealth-based disparities in educational spending did not have an impact on a protected right, and therefore strict scrutiny was not warranted. The court also eschewed any redistribution of resources between districts. That is, the court found no compelling state interest in uniformity of educational opportunity across districts and discouraged remedies such as "recapture," where tax revenues raised in wealthy districts are diverted to poorer districts to offset disparities in funding. According to the court:

We do not advocate a "Robin Hood" approach to school financing reform. We are not suggesting that funds be diverted from wealthy districts and be given to the less fortunate. There is no "leveling down" component in our decision today. Moreover, in no way should our decision be construed as imposing spending ceilings on more affluent school districts.\(^4\)

The mandate to the legislature was to reform the scheme through which state education funds are raised and distributed so that the funding reflected real operating costs and to take a more active role in underwriting the building and other capital needs for districts with dilapidated facilities that had already met or exceeded debt limits.\(^5\)

The proponents of Proposition 187, however, could not have objected to the *DeRolph* court's refusal to acknowledge education as a right or to rule that wealth-based disparities per se constituted suspicious classifications. What the court proposed in *DeRolph* was not the sort of equalization of educational opportunity mandated in *Brown* but, rather, a raising of the bottom limit of educational opportunity to the undetermined level of "adequacy," a minimal standard, a relatively narrow response to specific language in the Ohio constitution's education clause. Notwithstanding the good faith, and empirically successful, efforts of many school systems to improve education in response to these mandates, inequalities in both base opportunities and outcomes are accepted as given. There is the potential in such decisions of legitimating an ameliorated form of *de jure* educational apartheid based on wealth that would substitute for the prevailing, *de facto* apartheid based on disparities of wealth that currently is the rule, as the evidence produced during the *DeRolph* case amply demonstrated. That this form of systemic discrimination is precisely what the Fourteenth Amendment was meant to preclude is the main point of
Marshall's dissent in *San Antonio*, written more than 20 years earlier, to which we return later.

**Educational Opportunity, Social Justice, and the Fourteenth Amendment**

State school funding cases reinforce some of the central lessons about the constitutional right to equal opportunity in education, and the lack thereof, taught at the federal level in * Plyler* and * San Antonio*. First, they bring to our attention again the undisputed fact that children do not receive anything resembling equal opportunities for educational achievement in public schools and that certain classes of children (e.g., the poor, recent immigrants, cultural and ethnic minorities) invariably receive less than a full share of public resources. Second, these cases remind us that “local” interpretive decisions may have disproportionately large effects within the system of jurisprudence and policy. For instance, not explicitly affirming that education is a protected right or not finding certain classifications based on wealth to be unconstitutional may serve to legitimate the enactment of social policies that further institutionalize systemic inequalities. Third, and perhaps most germane to our enterprise, is the observation that these interpretive acts do not occur in some abstract moral space but, rather, are stubbornly contextualized—historically, socially, and textually. This goes both for what we would call “bad readings” of the Constitution, in which abstract principles of justice appear distorted by partisan interest or bias, and for “good readings,” in which abstract principles of justice are made congruent with historical contingencies.

In seeking to provide an interpretation of the latter sort with respect to the legal and moral questions of educational opportunity, we attempt to show how abstract principles—of justice, education, social opportunity, and so forth—can be brought into coherent contact with related contingent historical principles and realities through a particular kind of contextualized interpretive strategy. Key to this strategy is a satisfactory solution to the problem of the “level of generality” at which we should make particular constitutional interpretations. We draw on Tribe and Dorf’s work to guide us, and then we move on to show how Marshall’s reasoning in *San Antonio* and * Plyler* exemplifies this contextualized approach to reading the Constitution and results in findings that are both just and justified.

**Philosophies of Justice and the Right to Education**

Philosophers of education since Plato have sought to address questions related to society’s responsibility to educate its citizens, and the corollary “right” of citizens to this education, in the most general way, so as to arrive at formal and universally applicable principles of fairness and equality. In philosophical discussions about equality, educational opportunity is often associated with a person’s inalienable right to a fair beginning in life, although not necessarily the right to predefined competencies or other end products. For example, Green argues that:

> schools cannot eradicate the effects of economic inequality nor
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"equalize" the conditions of the mass.... [For schools] the focus ought to be on the beginnings, not the end-points or products or pre-defined competencies with which we are preoccupied today. Beginnings, the taking of initiatives in inquiry and learning, the reflective pursuit of meanings that may illuminate lived lives: these ought to be the concerns of schools committed to equality.\(^5\)

Others have focused on educational opportunity as it relates to conceptions of justice and one's right to meaningful opportunities later in life. Rawls\(^5\) and Nozick\(^5\) articulate well-developed and contrasting views on these issues that often, in less well-developed and articulated forms, support public discourse about the role of the state in protecting basic liberties and whether education should be counted as a fundamental right of individuals.

Rawls argues that the main role of the state is the sustenance of institutions under two fundamental principles of liberty. First, society must promote the most extensive overall system of equal basic liberties—such as political freedom, freedom of conscience and thought, the right of a person to own property and to be secure in his or her possessions—which is compatible with a similar system of liberty for all. Second, social and economic inequalities must be organized to result in the greatest benefit to the least advantaged members of society so that, in the end, everyone has fair equality of opportunity to occupy all offices and positions in society. Rawls maintains that in a well-ordered society, one designed to advance the good of its members, the rules of assigning rights and duties and of defining the appropriate distribution of the benefits and burdens of social cooperation are the rules that rational and free persons would choose if they did not know their class position and social status, their fortune in the distribution of natural assets and abilities, intelligence, strength, and the like.

Nozick, on the other hand, argues that society is composed of "individual people, different individual people, with their own individual lives...[who do not] get some overbalancing good from [their sacrifices or gains]."\(^4\) He maintains that social products do not fall like "manna from heaven" and thus should not become the collective property of people as they enter the social contract. Rather, Nozick insists, many goods, such as economic resources, arise as prior claims of possession. He suggests that each member of society is entitled as an individual to possess the goods that he or she acquires without injustice—-inherited property or natural endowments, for example. Accordingly, the only morally justifiable functions of the state are the common defense and protection against crime and the protection of a person's entitlement to his or her holdings. Both Rawls and Nozick develop their theories in the most abstract conceptual space, leaving it to others to apply their lessons to concrete instances.

The disparity between these abstract positions is taken up by Weitz\(^5\) as a starting point in an attempt to address issues of state power and control in the context of educational opportunity, although her focus is nearly as general as that of Rawls and Nozick. She first notes that although, historically, equality and liberty have been seen as compatible aims for a democratic society, they

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have come to contradict each other in contemporary political discourse. This contradiction is crystallized in the polarity of the egalitarian stance of Rawls and the libertarian stance of Nozick. Weitz goes on to explore the moral implications for educational practice and policy of Rawls's principles of difference—that is, in a just society, inequalities are permitted when they are to the advantage of the least advantaged person—and Dewey's belief that the proper goal of education is the development of a person's natural talents to the maximum. She is concerned with how Rawls's principles of difference would work in education, where helping students to further develop their natural talents is the primary goal. She finds that the application of these principles is morally problematic because it legitimates the state's means of distributing educational resources by extending or restraining a person's developmental potential. One can see the shadow of this principle at work in the "DeRolph decision of the Ohio Supreme Court." Weitz instead agrees with Dewey that the task of education in a democratic society is to provide, universally, the optimum means for individuals to realize their widely diverse and differing talents and abilities, which may preclude the use of Rawls's rational metrics of permissible difference if the final goal is social justice.

Whether education is the right of individuals in a democracy is a somewhat different (although closely related) and narrower question than the issues of justice and distribution of social benefits considered by Rawls and Nozick. That is, the question of whether education is a right is asked within particular historical, if still rather general, social contexts. Imber and Namenson, for instance, suggest that within current thinking there are three competing answers to this question, which they term the free market answer, the egalitarian answer, and the human rights answer. The free market answer is that education is not a right of any sort and that individuals may legitimately be limited to whatever education they can purchase or obtain through charity or other private means. This answer is closest to the principles laid out in Nozick's libertarianism. The egalitarian answer is that education is not a right per se, but if particular educational services are provided to any of a society's members, then these services become—under certain specified conditions—the right of all members. This is closest to Rawls's position. The positions staked out during the debate about the education of undocumented immigrants in California were circumscribed by these two alternatives, with conservatives asserting that education is not guaranteed and liberals asserting an inclusive ideal.

Imber and Namenson dismiss the free market answer on the basis that it is grounded in an overly narrow conception of human rights, namely that there are only negative rights that are no more than limitations of what governments may legitimately do. Examples are the constitutionally enumerated rights to freedom of speech and assembly. Yet, they argue, there must be positive rights as well, those that require a specific action on the part of society to make possible the fulfillment of constitutionally established negative rights. For example, food, shelter, employment, health care, minimum income, and education could be counted as positive rights inasmuch as their provision
makes freedom of speech, assembly, religion, and so forth possible and meaningful.  
Imber and Namenson also argue that the egalitarian answer is inadequate, because it relies on the individual’s abstract claims to equal treatment rather than on a positive right to education per se.

The last alternative, the human rights answer, consists of the notion that there is some set of educational services or goods that is a right of all human beings. This would correspond to the principles propounded in international human rights instruments such as the United Nation’s (1989) Convention on the Rights of the Child, to which the United States is not a signatory. The human rights position allows for two alternate claims. Either education is a fundamental right, or education is a derived right implied by other fundamental rights and the conditions of a particular society. Drawing on well-established constitutional principles with regard to the delineation of unenumerated rights, in conjunction with the argument that the expression of fundamental negative rights implies the provision of supporting positive rights, Imber and Namenson support the latter claim, that education is a derived right of Americans. As a point of interest, Article 28 of the Convention on the Rights of the Child adopts the stronger claim that education is an inviolable—although often violated—fundamental right, regardless of social conditions or the existence of other rights from which a right to education could be derived. In Imber and Namenson’s framework, international acceptance of this convention (at least in spirit) might constitute further backing for their claim that education in the U.S. context must be considered a derived right.

Examples From the Field

While we wish to argue that abstract philosophical analyses and universalizing political pronouncements are of limited value in the interpretation of the law in specific cases, they do enter directly into policy discourse and offer players in this drama coherent and convincing frameworks for arguments on every side of every issue. The readiness with which philosophical views on social justice and education are incorporated into partisan political discourse warrants in itself some skepticism about the value of universal and ahistorical principles of positive jurisprudence, given the general agreement that interpretations of the Constitution should not be simple reflections of the interpreter’s political position, whether that position is on the left or right. That is not to say that philosophical and political values of interpreters can or should be kept out of legal decision making or to resort to a crude pragmatism in which philosophical ideas could be rejected because they did not “do” anything; rather, in matters of law, these values require grounding in the specific conditions in which the legal and philosophical questions arise. We offer here two instances of debates on policy issues intimately related to the issues of educational equity raised in Proposition 187—opportunity-to-learn standards (OTL) and school finance—in which the philosophical views described thus far have played a significant role. Our interest is in showing that the deployment of these ideas tends in practice to legitimate previously staked out political positions rather than leading to insight into or resolution of outstanding legal questions.
Guiton and Oakes, for instance, discuss the recent use of OTL standards, which include rubrics for determining not just what students have learned but the availability of opportunities to learn, in student assessment. Incorporating indices of opportunity into normative measures of achievement has clear Fourteenth Amendment implications, inasmuch as they might suggest that blame or credit for student outcomes be attributed to systemic factors and not exclusively to the internal makeup of individual students, which has been the historical practice. Guiton and Oakes argue that the current debate on whether or not OTL standards should be incorporated into student outcome indicators—as potential sanctions or incentives—reflects quite vividly the individual ideologies of the participants, which are often articulated in the philosophical frameworks sketched out earlier. Libertarian, liberal, and democratic liberal conceptions of what counts as a just distribution of social goods manifest themselves in differing views of what OTL measures are appropriate and in judgments about the proposed uses of OTL. Specifically, Guiton and Oakes ask commentators from distinct ideological positions to answer questions about the equity of racial, socioeconomic, and gender distributions of math track placements. The distributions used in their study derive from data on the math achievement of more than 5,000 eighth-grade public school students across 93 different school districts and 12 years of longitudinal student data from three public school systems involved in desegregation litigation.

Predictably, the data show that non-White, poor, and female students tend to be segregated in lower tracks. Guiton and Oakes report that libertarians tend to overlook the role that "arbitrary factors"—such as students' race, gender, or social class—play in an inequitable distribution of educational opportunity. Liberals and democratic liberals, in contrast, take seriously the barriers these factors signal in the distribution of educational opportunity. Liberals call for policies that require the removal of barriers related to race, gender, and social class. And democratic liberals go a step further, advocating compensatory education for those who face, and are most likely in the future to face, such barriers. There are, of course, reasonable reasons to adopt each of these perspectives, and their respective philosophical foundations provide the logical framework for the ensuing arguments. But at the level of generality at which each argument operates—individual responsibility, equal opportunity, affirmative action—there is little justification for choosing one over the other, except that they accord more or less with one's own ideological predilections.

As we discussed earlier, philosophical issues of equity, justice, and states' responsibility are central to questions of school finance. Hackney argues that, in deciding such cases, the courts have tended to adapt either a democratic/egalitarian or libertarian position, the former corresponding to a Rawlsian theory of justice as fairness and the latter corresponding to Nozick's advocacy of a minimal state. Hackney suggests that the ideal theories of neither are adequate—without significant modification—for application to the real-life problems of school funding. Their deficiency derives from an absence in both Rawls and Nozick of a thorough treatment of the structurally persistent inequalities in the social distribution of wealth or a reconciliation of these
inequalities with their ideals of justice. This is not necessarily a failure of these philosophers, although it could be maintained that consideration of the historical inequalities in the social distribution of wealth should be part of any discussion of social justice. Certainly they cannot be faulted for not speaking directly to the issues of American public education at the beginning of the new century.

Hackney suggests that the legitimacy and usefulness of the universalist values judges bring to the bench—found in their most elaborated forms in philosophers such as Rawls and Nozick—depend on the success of the judges’ application in the specific social contexts out of which litigation arises. His view is that this success depends, in turn, on the more abstract understanding of why education is fundamental to liberty, individuality, and democracy within particular social, political, and economic contexts. The development of this nexus is a particularly pressing concern in light of continuing large disparities in spending and educational quality between rich and poor school districts and the new reformisms that tend to focus more on “maximizing investment” than on issues of justice.66 As we saw with the court in DeRolph, the arguments for getting the most bang for the educational buck presume first that even state-mandated redistributions of wealth are not “ethical”; that resources for social programs, insofar as they require taxation, ought to be minimal; and that the value of providing every student with an adequate education is primarily economic. That is, poor and at-risk students who are educated are more likely to be social assets than social liabilities.

In school finance cases, state courts and their legislative counterparts have had difficulty reconciling universalist principles and historical contingencies with any consistency or effectiveness. And this has resulted in most states in the perpetuation of grossly unequal conditions in educational settings, with the inequalities distributed rather nakedly along lines of race, class, and gender—often even when the Supreme Court has invalidated funding schemes. The legal remedies to this situation, by all appearances, continue to be insufficient to produce significant change. The federal courts have contributed little clarity or commitment in this area, having taken up no school funding cases in the past 25 years. It is our position that litigation at the state level cannot resolve what is at the core of the issue, namely Fourteenth Amendment questions of social justice. Without guarantees of equal treatment at the federal level and strict scrutiny of any public educational arrangement, current inequities may well persist, and the legitimation of other “rational” inequities such as those embodied in Proposition 187 will be invited. These arrangements include school funding, integration, tracking, and other schemes that appear to make what the Supreme Court has called “invidious distinctions,” precisely the kinds of distinctions documented by Guiton and Oakes in their math class tracking data.

This state of affairs brings us back to the question of whether the Constitution, and the Fourteenth Amendment in particular, can be interpreted as protecting the right to equal educational opportunity. Unless we can answer this question in the affirmative, it seems nearly inevitable that states will
continue to place their perceived fiscal interests (in not redistributing social wealth) above individuals’ interests in fair treatment. The legal and rhetorical processes that officially legitimate this protection of wealth- and status-based disparities in access to educational opportunities tend to obscure the discriminatory nature of policies that are the material result of these processes; that is, students are placed in radically unequal educational settings on the basis of their race, class, gender, and immigration status.

**Concepts of Liberty and Equal Protection: Levels of Generality and Unifying Principles**

In *Reading the Constitution*, Tribe and Dorf describe a method of constitutional interpretation that embraces evolutionary concepts of liberty and equal protection. Through a discussion of how the Supreme Court justices have reasoned in several landmark cases, they develop a mode of contextual analysis that neither rewrites the Constitution to conform to the subjective values of the reader nor leaves the document meaningless without a system of values at least partly external to it. They point out that while parts of the Constitution were added at widely separated points in American history, these parts are immersed in a larger whole and cannot be looked upon as disconnected from the entire document. The authors warn against one-sided readings of the Constitution that rely heavily on the “original intent” of the framers, on “the text itself,” or on the historical contingencies under which a constitutional provision was written. They caution that the Constitution is “a text to be interpreted and reinterpreted in an unending search for understanding.” And rather than trying to find ways to eliminate judicial value in defining constitutional guarantees, they propose ways to discover how the Constitution, in conjunction with the body of decisions written by the Supreme Court, channels value choice—that is, how the Constitution guides the reader to choose “constitutional” values in a historically sensitive fashion rather than reading the Constitution as a reflection of his or her personal and historically conditioned values.

**Levels of Abstraction and Explicit and Unenumerated Liberties**

Central to Tribe and Dorf’s study is the question of how to solve the “problem of generality.” In their introduction, they state that

> the problem of generality is this: virtually any form of behavior, when described in sufficiently general terms, will qualify as part of the “liberty” protected by the Constitution and the Supreme Court’s earlier cases. How then are justices to choose a level of generality without merely imposing their own values?

In subsequent chapters, they return to this issue with reference to two categories of fundamental liberties: the category of unenumerated rights of the Ninth Amendment and the category of rights explicitly stated in the text of
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the Constitution. The question of generality, or "level of abstraction," is relevant to issues of educational opportunity in connection with these two categories.

With regard to unenumerated rights, Tribe and Dorf remind us that the Ninth Amendment is a text that "tells each reader: whatever else you are going to do to explain that [there are no rights protected in the Constitution] you cannot advance an argument that those rights are not there just because they are not enumerated in the Bill of Rights." Thus, although the right to education may not be explicitly stated in the Constitution, this right could still fall under the unenumerated rights to which the Ninth Amendment refers. Defending against the familiar argument that education is not a fundamental right because it is not mentioned in the Constitution, Tribe and Dorf maintain that:

what the Ninth Amendment counsels against is the portrayal of the enumerated rights as isolated islands of special protection, elevated above the surrounding sea of possible unenumerated rights "retained by the people," for to elevate the enumerated in this way would surely "disparage" those that remain submerged.... The Ninth Amendment thereby affirmatively acts as a presumption in favor of generalizing."

With respect to enumerated rights, Tribe and Dorf urge readers to search for underlying values without which the literal requirements of the text would become incoherent. Searching for these values is crucial because regardless of the individual approach to reading the Constitution, readers are directed toward interpretive choices by an appeal to widely shared values. These widely shared values underlie a certain kind of society that protects or abridges the claimed right and to which readers likewise commit themselves. This is true even when the reader believes that only the constitutional text itself is the law.

Because descriptions of guaranteed constitutional liberties at any level of generality presuppose a choice of values, the problem of generality can be understood as a question of how the Constitution channels value choice. "In law," Tribe and Dorf argue, "the criteria for judging whether a fundamental right should be articulated at a sufficiently abstract level to include the claimed right...are political, moral, and...legal." What does this mean exactly? In seeking to determine, for instance, whether education falls within the scope of some constitutionally protected liberty, the reader has to search for the proper level of generality at which the relevant constitutionally protected liberties must be described. So, hypothetically for the moment, if education is considered to fall within the scope of the enumerated right to free speech, we must be able to describe free speech at a level of generality sufficient to understand education as necessary for its expression. That is, if we understand free speech at a higher level of abstraction in which it refers to the ability and right of citizens to intelligently call government actions into question, then it makes sense to regard education as prerequisite to the exercise of this right. If we regard free speech in a narrow context, where it consists of the right to utter a particular sentence in a particular setting, then perhaps education would not be vital to its exercise. The more abstractly an already-protected right (free
speech) is stated, the more likely it is that the claimed right (education) will be protected under its rubric. But when a protected right is described at a level of generality that is very broad, no constitutional guidance is provided.

How a claimed right is described is also relevant because to describe it in very specific terms is to disconnect it from previously established rights. “How should the [Supreme] Court go about reading the Constitution,” Tribe and Dorf ask in this connection, “to determine if an asserted right is fundamental?” In Griswold v. Connecticut, for instance, the Supreme Court held that—as it applied to married couples—a Connecticut law banning the use of contraceptives constituted an impermissible invasion into the privacy of the family. They ask whether the protected right recognized in Griswold should be understood as the narrow right to use contraception or as the broader right to make a variety of procreative decisions. “Obviously, the descriptive choice will affect how other cases—for example, those involving abortion—are decided.” The court in this case described the right in the latter, very broad sense, which allowed the court 8 years later, in Roe v. Wade, to recognize a woman’s unenumerated right to choose to abort her pregnancy.

From Brown to San Antonio

That crucial relationships exist between constitutionally protected liberties and education has never been at issue in the Supreme Court, particularly since Warren’s well-known declarations in Brown v. Board of Education:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces.

The appellees in San Antonio, following in the tradition of Brown, argued that education is a fundamental right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. They claimed that Texas’s school funding scheme curtailed this fundamental right of poor children, while it did not similarly affect the same right of the affluent.

In finding in favor of the state, the majority of the Supreme Court in San Antonio neither disputed the important role that education plays in exercising constitutional rights nor denied that the state’s scheme unequally distributed educational opportunity among poor and better-off children. But the majority refused to accept that education is a fundamental right on the basis that it bears significantly on the exercise of other rights. In their words, “we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice.” The majority of the court identified as the question before them whether the Constitution protects a right to the best possible education the state can provide, not whether everyone has the right to the same quality of education.
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Justice Powell, writing for the majority, answered that:

whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where...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 political process.74

He did not in this case elaborate on different dimensions of abstraction, such as the specific level of generality at which education would need to be described to affirm that it was a right. Powell found that the attempt to search for such a level in itself implies the possibility of untenable constitutional guarantees to "the most effective speech or the most informed electoral choice." He argued that it is difficult to perceive any logical limitations to a theory proposing that the interest in educational opportunity is fundamental because of the significance of education to the exercise of constitutional liberties. "How, for instance," he wrote, "is education to be distinguished from the significant personal interests in the basics of decent food and shelter...if significance is the criterion?"75 For Powell and the majority, there seems to exist an implicit tendency to consider "the rights of speech and of full participation in the political process" at a relatively low level of generality—insofar as adults can exercise them adequately after an education that provides the opportunity only to acquire "the basic minimal skills." But in issues of governmental interference in the exercise of freedoms of thought and political conscience—which the court viewed as the primary danger in finding for the appellant children—there seems to be a tendency to understand these same freedoms at a higher level of generality. Is this how the Constitution channels value choice?

When an issue is articulated as requiring a decision between a society where the government tells the people how to achieve the most effective speech and a society where the government is kept from interfering with freedom of thought and conscience, and the outcome determines the criteria for determining which rights ought to be constitutionally protected, resolving the conflict is not very difficult. Clearly, the values of the latter society are more consistent with the enumerated constitutional guarantees and must per force guide the court in the delineation of liberties at the proper level of generality. However, it is possible that the main issue has been misidentified in this case; it might not be whether the Constitution protects the right to the best possible education that the state can provide but, as Justice Marshall suggested in his San Antonio dissent, "one of discrimination that affects the quality of the education which Texas has chosen to provide its children.76 On Marshall's reading of the case, the issue appears very similar to the issue the Supreme Court addressed in Brown. The question then becomes whether the San Antonio and Brown cases raise different issues and, furthermore, whether the core questions underlying Brown, San Antonio, and Plyler diverge sufficiently
to justify the Supreme Court's decision to treat them as substantively different. The answer bears crucially on Tribe and Dorf's admonition that claimed rights not be described too narrowly, with the result that they are disconnected from rights established in the relevant precedential cases. In fact, Marshall consistently brought this criticism to bear against the conservative majority in civil rights cases in the 1970s and 1980s in which previous Fourteenth Amendment rulings, in particular, were not judged applicable.

What are the differences between how the justices in Brown and San Antonio read the Constitution with regard to Fourteenth Amendment protections, how did they determine respectively the effects of discrimination on public education and students, and how did they address the claim that educational opportunity is a fundamental and protected interest? In other words, in these two cases, how did the Constitution channel the value choices of the justices in thinking about discrimination, inequality, and educational opportunity? In a unanimous decision, the Brown court ruled that, in order to determine the effect of segregation on public education, the Fourteenth Amendment must not be read in the context of the conditions existing when it was adopted. In an often-quoted statement, Warren argued that

we cannot turn the clock back to 1866 when the [Fourteenth] Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. 81

The court used the generally held values of the society—that education "is the very foundation of good citizenship"—as criteria for the articulation of Fourteenth Amendment protections. The justices pointed to the cultural, political, and practical significance of education in a child's life, concluding that

in these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. 82

In Brown, education is considered at a high level of generality, as are the protected freedoms to which education contributes. The court posits a nexus between unenumerated and explicitly guaranteed liberties, in the context of current community values, and arrives at the conclusion that any discrimination in the field of public education is precluded by the Fourteenth Amendment on the implicit (but unstated) understanding that equal educational opportunity is a right.

The San Antonio court, in contrast, advocated a judicial agnosticism with regard to the significance of public education in assuring the democratic operation of society's institutions or, as Green would put it, its function in securing for all an equal start in life. Setting a pattern for state school funding cases, the majority held the state responsible for providing educational opportunities adequate to meet only minimal requirements for the exercise of
protected liberties and did not insist on equity. Their decision featured a selective approach to interpreting the essential facts about the treatment of children in Texas, which guided the court in *Plyler* in their determination of what facts were essentially at issue. Specifically, the *San Antonio* majority understood the situation of the children who were the original plaintiffs as very distinct from the situation of the children involved in *Brown*. The former was seen to be about the education of the poor, and the latter was seen as about the education of Black children. With parallel reasoning, the court in *Plyler* interpreted the essential facts of their case as distinct from those in *San Antonio*, as well as distinct from those in *Brown*, identifying the new issue as the education of immigrant children.

This selective approach to the identification of the key issue at stake signals an interpretive weakness and has had a debilitating effect on the ability of subsequent courts to bring either the equal protection or the due process clauses of the Fourteenth Amendment to bear in cases where states are clearly not providing equal educational opportunity to all students.89 First, the *San Antonio* majority disregarded the fact that, unlike welfare or public housing, for instance, education has been universally recognized by states and localities as one of their major functions, because of its direct and immediate relationship to constitutional and societal concerns. Second, it defined the issues of the case in such specific terms that it was in effect disconnected from what might well have been the controlling precedent in *Brown*. As a consequence, legal precedent became immaterial for the interpretation of the Fourteenth Amendment protections in the domain of public education. Rather than confirming the social, historical, and constitutional values articulated in *Brown* and other contemporaneous civil rights cases, Powell’s majority opinion in *San Antonio* indicates a very different set of guiding values. They rely on an interpretive tradition within which constitutional liberties are reduced to the very specific list of rights explicitly stated in the text.

For instance, justices in this tradition look critically at any government interference in political speech or press. The primary social value that seems to be reflected in this decision with respect to claimed but unenumerated rights is that they can be confirmed insofar as they have the support of the majority—or at least of a minority with the requisite cultural power to enforce the claim that its values are those of the majority—via a governmental interest that is satisfied through the protection of the claimed right. For example, the right of immigrant children to educational opportunity granted in *Plyler* depends on the rational and substantial interest of the state in not excluding this class of children from schools, because of the social and economic harm—disproportionate to the actual cost of educating these children—that this exclusion might eventually cause the state.

**Justice Marshall, Unifying Principles, and the Problem of Generality**

This way of reading the Constitution, and accounting for contemporary social values and conditions in making law, is quite different than that practiced by Marshall in *San Antonio* and his other opinions. Tribe and Dorf suggest that
decisions such as *San Antonio* are constitutionally deficient because they fail to seek or find rationalizing (i.e., unifying) principles to link disparate decisions, relying instead on subjective political and philosophical preferences. Their target of criticism is most often conservative justices such as Scalia, whom they accuse of “judicial nihilism,” but the principle they articulate applies to jurists of all stripes. They offer the 1985 case of *Bowers v. Hardwick*—in which the Supreme Court held that the state of Georgia could criminalize private consensual adult sodomy—to illustrate this point. Their view was that *Hardwick* constituted a moral fiat—immensely popular with the Reagan administration and its constituents—completely disconnected from previous rulings on privacy and family life. The dissenters to Justice White’s 5–4 majority claimed that the ruling was far too narrow in its assertion that there was not a protected right to engage in sodomy, and they argued that the real issues at stake were similar to the quite abstract issues argued in *Roe v. Wade* and *Griswold*. In explaining how one arrives at a unifying principle for constitutional interpretation, Tribe and Dorf write that

to the extent that coheres with our experience to view decisions about child rearing and family, decisions about marriage, and decisions about procreation as concerning completely isolated areas of life—as did the *Hardwick* majority—we will not seek an underlying unifying principle. However, if presumptively excluding government from these areas of life appears to be a connected project, then we might well connect the “points of liberty in the way the *Hardwick* dissenters did.”

Marshall’s dissent in *San Antonio*, in which he argues for Fourteenth Amendment protections in the domain of public education, provides an example of the kind of judicial “connecting the points of liberty” that Tribe and Dorf advocate. His presumption in reading the Constitution and the relevant case law was that a class-based denial of public education must be seen as inconsistent with the Equal Protection Clause. His connected project leads from the Constitution to the writing of the Fourteenth Amendment itself, through the civil rights cases following the Civil War to *Plessy v. Ferguson*, to *Brown* and its children, stopping finally amid the concrete social and economic circumstances that characterized the lives of economically disprivileged children in the United States of the 1970s. His project connects the protection of the right to educational opportunity for the children in *Brown*, *San Antonio*, and *Plyler* and supersedes judicial interpretations that fail to rise to the standard established in *Brown* that “the opportunity of an education, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”

**Education as a Constitutionally Protected Interest**

Few have pursued more forcefully than Justice Marshall—in his *San Antonio* dissenting opinion—the claim that educational opportunity is an interest that enjoys constitutional protections. In this opinion, Marshall addresses the
level-of-generality problem in the context of a wealth-based "denial" of public education by linking educational opportunity to "the right of every American to an equal start in life" and to a principle under which "[t]he quality of public education may not be a function of wealth, other than the wealth of the state as a whole." Regarding the guarantees of the Equal Protection Clause, he argues that:

the Equal Protection Clause is not addressed to the minimal sufficiency, but rather to the unjustifiable inequalities of state action. It mandates nothing less than that "all persons similarly circumstanced shall be treated alike."[51

As Marshall later asserts in his Plyler concurrence, his main argument in San Antonio is about the fact that "a [not necessarily economic] class-based denial of public education is utterly incompatible with the Equal Protection Clause of the Fourteenth Amendment," a contention countered in Powell’s majority opinion. In San Antonio, Powell writes that the financial disparity was not a protected classification and that the plaintiffs alleging discrimination on the basis of financial status

have none of the traditional indicia of suspectness: the class is not saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection.[53

This reasoning, which relies on a relatively narrow scope of suspect classification that includes, most prominently, race, is extended in Plyler (to Marshall’s displeasure) to the case of undocumented immigrant children. In this latter case, however, the state’s interest in denying equal education opportunities is subjected to a more rigorous (if not strict) scrutiny that, in the court’s opinion, makes denying educational benefits to undocumented children irrational. But the fact that Texas chose to treat this class of students differently than others was not, in Plyler, found to be suspicious. The important point with reference to Marshall’s argument is that the reasoning behind these two decisions relies on a restricted reading of the Equal Protection Clause that he finds constitutionally unsound.

Seeking an Appropriate Level of Generality

In following Marshall’s argument that children of undocumented immigrants have a protected interest in educational opportunity, we return to Hackney’s advice about linking universal principles to concrete instances. It will not do, for instance, to simply invoke Article 26 of the Universal Declaration of Human Rights—which states that "everyone has a right to education...[and] shall be directed to the full development of human personality and to the strengthening of respect for human rights and fundamental freedoms"—because the specific form that education must take and the identity and circumstances of
the students are left unspecified. The human rights claim at this level of
generality is equal in validity to the counterclaim that "illegal aliens" have no
right to governmental benefits, including education. The "truth" of both
statements, as Tribe and Dorf maintain, is a reflection of the personal and
cultural values of the individuals making the claims, and neither is defeasible
or provable with respect to constitutional guarantees until they are connected
in more than a theoretical way with historically concrete social practice or
previous case law.

Marshall addresses this problem in his San Antonio dissent by insisting that
the socioeconomic conditions within which educational discrimination occurs
are relevant to the application of general principles. That is, he maintains—
against the majority—that the general principles of the Fourteenth Amend-
ment can be applied to situations wherein discrimination on the basis of
socioeconomic class exists and that such application is consistent with previous
judicial and cultural practice, as well as being consistent with the general moral
and philosophical issues that underwrite the constitutional text. Marshall ties
this point to the question of levels of judicial scrutiny in his Plyler concurrence
(citing his own San Antonio dissent):

"I believe the facts of these cases demonstrate the wisdom of rejecting
a rigidified approach to equal protection analysis, and of employing
an approach that allows for varying levels of scrutiny depending
upon the "constitutional and societal importance of the interest
adversely affected and the recognized invidiousness of the basis
upon which the particular classification is drawn."94

The "rigidified approach" to which Marshall refers is one that does not allow
for the constant interpretation and reinterpretation of the Constitution called for
by Tribe and Dorf. It does not seem that the fundamentalism of which Marshall
accuses his colleagues on the court should be taken to signify that its
proponents are operating in a "vacuum of values," as Tribe and Dorf some-
times put it; rather, it seems reasonable to suggest—given the facts about how
the distribution of wealth affects the schooling provided in cases like DeRolph—
that not applying the Fourteenth Amendment to issues of socioeconomic class
is an expression of class interests, that is, of specific values.

Unifying Principle of the Right to Education

Marshall's dissent in San Antonio reveals the unifying principles that could link
pre-San Antonio decisions with the notion that "a class-based denial of public
education is utterly incompatible with the Equal Protection Clause of the
Fourteenth Amendment." A validation of these unifying principles would
support our contention that the rationales embodied in Plyler and LULAC,
which do not take sufficient account of the principles, lack per force the
potential to address issues of justice that legislation such as Proposition 187
might raise in the future. In his attempt to find the unifying principles that link
earlier Supreme Court decisions to the idea that educational opportunity is a
fundamental, constitutionally protected right, Marshall invokes *Brown* in asserting that:

the fundamental importance of education is amply indicated by the prior decisions of this Court, by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values.  

The unifying principle at work here occupies the nexus between specific constitutional guarantees and education, to return to our earlier discussion of the relationship described by Tribe and Dorf between explicit and unenumerated rights. The Supreme Court has acknowledged such a nexus by asserting the importance of education in four interrelated domains. The first domain is that of democratic government, for which education serves an essential function. This function was described by the majority in the *Brown* and *Wisconsin v. Yoder* decisions. The second domain is that of First Amendment rights: Education ensures the ability of children to learn to exercise their freedoms of speech, religion, and assembly and to pursue whatever interests bring them happiness. That is, it ensures the right of students “to inquire, to study and to evaluate, to gain new maturity and understanding” in a “marketplace of ideas.” The third domain is that of the relationship between education and the political process. Marshall, referring to *Sweatt v. Painter*, argues that

the political process, like most other aspects of social intercourse, is to some degree competitive. It is of little benefit to an individual from a property-poor district to have “enough” education if those around him have more than “enough.”

Finally, the demonstrated effect of education on the exercise of the franchise by the electorate is one more manifestation of the closeness between education and the rights that the Constitution protects.

The unifying principle that links earlier Supreme Court decisions to the idea that state policy might create a suspect classification—and thus require strict judicial scrutiny—depends on the importance of the interest affected by the classification. Here Marshall argues that

given the importance of that interest, we must be particularly sensitive to the invidious characteristics of any form of discrimination that is not clearly intended to serve it, as opposed to some other distinct state interest.... Particularly in the context of a disadvantaged class composed of children, we have previously treated discrimination on a basis which the individual cannot control as constitutionally disfavored.

For children who happen to live in districts with low taxable property, the “inevitable opposition from significantly advantaged districts that have a strong vested interest in the preservation of the status quo” adds to their disadvantages. The same opposition is present when it comes to the rights of
undocumented workers and their children, in which case the legal niceties about residency and citizenship integrate with "a strong vested interest in the preservation of the status quo." The case in California, where support for Proposition 187 and other earlier money-saving, discriminatory initiatives came primarily from property-d classe, is of course exemplary.

**Proposition 187 and the Right to Education**

Marshall's principled claims that education is a fundamental, if derived, right and that the Fourteenth Amendment requires a broadening of judicial understanding of suspicious classification (for recognition of the invidiousness of discrimination on the basis of socioeconomic class and immigration status) stand in contrast to the rationale on which the education provisions of Proposition 187 were found unconstitutional. Relying on *De Canas*, *Plyler*, and, by precedent, *San Antonio*, the *LULAC* courts consented to neither of Marshall's points. The implied finding was that the education provisions of Proposition 187 probably constituted an illegitimate attempt to control immigration and certainly did not provide a rational means of achieving a legitimate purpose of the state, that is, the control of spending for education. This remedy for California's fiscal woes, the court said, was irrational because of the terrible cost imposed on the intended subjects of the initiative, the children of undocumented workers. In making this determination, the *LULAC* court did indirectly confirm the special importance of public education, as well as affirming the injustice that implementation of Proposition 187 would have visited upon the affected youth. But in doing so, it made no commitment to confirming that education is a protected right or that treating this class of children differently because of their immigration status was, by constitutional principle, invidious. We suggest that going only this far closes the door only temporarily to draconian measures such as Proposition 187 and that judicial assertions of the principles articulated by Marshall are necessary to keep that door closed.

**Conclusion**

Just over 200 years before Proposition 187 was offered to California voters, another landmark in civil rights legislation was enacted, The Naturalization Act of 1790. Like its recent counterpart, it sought to satisfy the contradictory desires of promoting the "principles of Republicanism" and limiting membership to the political community. The "worthy part of mankind" welcomed into citizenry was remarkable for its exclusions. New citizens had to be White, and they had to show the ability to earn an honest living, which is to say that owning property was highly valued. Indians were considered as what Takaki calls "domestic foreigners," what might be called these days inside outsiders. They were not eligible for citizenship. Women also were consigned to less than full participation in the "republic." In this era of slavery, indenture, and genocide, most of these noncitizens had no rights at all, human or legal. They also constituted a majority of the population in many states, particularly in the South and West. The situation was analogous to, although significantly worse than, that of the South African apartheid that drew American censure. And
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while selling certain classes of children into lifelong servitude rather than sending them to school must strike most of us now as more than suspicious, it appears to have seemed "natural," if not a transparent expression of God's will, to those who were privileged to full membership in the polity. Jefferson expressed guilt at owning slaves (though not to their mistreatment) and promised on many occasions to free them as soon as he had paid off his debts, which, unfortunately for his slaves, never happened.

Mexican-born workers are in many respects today's domestic foreigners, encouraged under threat of chronic unemployment and abject poverty to emigrate to the United States, where they have historically done the work that "citizens" would not do for wages below the legal minimum in frequently "terrible conditions. But it continues to seem natural to large portions of the U.S. populace that these individuals and their children are entitled to few legal protections and have no right to the same benefits as other residents. This deep-seated perspective endures despite the Fourteenth Amendment's unambiguous provision that a state shall not "deny to any person within its jurisdiction the equal protection of the laws." Justice Burger, dissenting in Plyler, demonstrated that this perspective is not limited to the lay public.

Without laboring what will undoubtedly seem obvious to many, it simply is not "irrational" for a state to conclude that it does not have the same responsibility to provide...for persons whose very presence in the state and this country is illegal as it does to provide for persons legally present. By definition, illegal aliens have no right whatever to be here, and the state may reasonably, and constitutionally, elect not to provide them with governmental services at the expense of those who are legally in the state. 104

It is not merely inflammatory to maintain that this line of reasoning is of exactly the same sort that might have been used to justify the state's treatment of Blacks in 18th-century Virginia or 20th-century Johannesburg. What makes them analogous is the tendency to define citizenship—a multidimensional construct connoting membership in a culture or society—in narrow, historically contingent ways that serve the purposes of one segment of the society. Without venturing too far into the complex area of de facto and de jure citizenship in a transnational world, we can say that a person's legal standing cannot be considered the sole, or even the most important, determinant of membership in a society. The use of this narrow legal classification—as we see in Burger's statements—can be made to appear "natural" and rational, but within the psychological world in which Jefferson lived, for instance, classifications based on skin color were equally natural and rational.

How does this relate to Marshall's contention that educational opportunity is a fundamental right? We find that this relationship turns on the question of "for whom" educational opportunity is a right. Marshall and many others from diverse philosophical and political perspectives have provided eloquent testimony about the significance of the cultural knowledge and skill that may be acquired in schools and, perhaps, in no other cultural site. In a constitutional
context, what is most essential is the relationship between schooling and the ability to exercise other protected rights, such as the right to free speech and assembly, not to mention the more ambiguous right to the pursuit of happiness. By virtue of this connection, relevant public education must be considered a derived and protected right. But those who would deprive certain classes of prospective students of educational opportunities do not question the value of education per se; they question the need for it to be universal and equal, and given this necessary limitation on its availability and quality, the right remains conditional rather than fundamental. And this position is argued from the perspective that the "needs of the market" and the perquisites of private property continue to have precedence over issues of civil or personal rights. In a cynical but ultimately realistic fashion, one might say that the right to equal treatment and equal opportunity cannot coexist peacefully with the right to exploit others for profit. As Burger continues, once we dispense with the question of whether education is a fundamental right and whether we can legitimately discriminate against a particular group of students, we can focus our attention on whether the proposed exclusions bear a "rational relationship to a legitimate state purpose," which in both the San Antonio and Plyler cases, as well as in the case of Proposition 187, is economic. Davis makes the claim that, in California at least, this legitimate state purpose amounts to little more or less than "affluent homeowners... engaged in the defense of home values and neighborhood exclusivity."105

From a psychological perspective, however, arguing that a group of long-standing members of the society are not entitled to an essential governmental service such as education depends on the ability to see them as unworthy of full citizenship.106 Marshall's view—following and extending Fourteenth Amendment reasoning—is that equal educational opportunity is a fundamental right of any child who happens to be present in the jurisdiction, because without education a child has little chance to become a full member of a community. All cultures provide their young with appropriate and relevant education, whether formal or informal, because it ensures the survival and growth of the culture itself. Race, gender, socioeconomic class, and immigration status should not figure at all in the provision of these opportunities, unless, of course, the organization of the culture depends on undemocratic distributions of power and resources, in which case it is not desirable or efficient that every child be prepared equally. In that case, children are prepared for what they will be allowed to become, even as they are promised unlimited opportunities. This is much closer to the reality of American public education, where inequality of access and resources, tracking, and high leaving rates continue to be endemic.

Justifying this situation, like justifying the exclusion of the children of undocumented workers from schools, requires that members of the society who are deprived of opportunities be viewed as outsiders, as "domestic foreigners," rather than as associate members to whom one has ethical and practical responsibilities. In short, the idea of equal educational opportunity being a right makes sense only on the presupposition that the creation of a
just society—just in an economic as well as political sense—is an ultimate goal. However, while this may be the professed desire of most Americans, it is not a desire that is much acted on, by the court or in the street.

This is the context in which Proposition 187—and the failures of the court in Plyler and San Antonio to find education to be a fundamental right or to extend the range of strict judicial scrutiny—must be considered. The unconstitutionality of excluding undocumented youth rests now on the weakest of judicial foundations. The state has failed thus far to show that its economic motivations are sufficient to justify the potentially justifiable exclusions or limitations of opportunity. Classifications for the purpose of overt discrimination based on immigration status and, in San Antonio, socioeconomic status are not viewed by the Supreme Court as invidious. A person's fundamental interest in relevant and appropriate education has not been affirmed, and protection against unequal distribution of educational resources has been in effect weakened.

We would like to encourage, in response, the kind of activism disparaged by the dissenters in Plyler and current members of the High Court such as Justice Scalia. This would be an activism that affirms what Goethe called "the better angels of our nature," which would mean in practice returning to the principles of justice spelled out in the Fourteenth Amendment and decisions such as Brown v. Board of Education. It would mean in practice eschewing the nationalist nativisms that justify injustice in the name of economic necessity and cultural harmony, to wake up from the dream of the founders represented in the Naturalization Act of 1790 and to open our eyes to the multicultural, transnational community we have always shared but seldom seen.

Notes

1 In November 1995, in a summary judgment, the district court invalidated major portions of Proposition 187 (see LULAC v. Wilson, 508 F Supp. 755, U.S. District Court, Central California). Two years later, in November 1997, the same court in effect revoked Proposition 187 in its final verdict (see LULAC v. Wilson, 1997 U.S. Dist. LEXIS 18776).
6 Based on the fact of 1996, Congress issued its statements of national policy in 1997 (see Title IIX of the U.S. Code). The passed policy limits the accessibility of noncitizens to public benefits, but, with regard to "eligibility for a basic public education," it yields to the 1982 Supreme Court ruling in Plyler v. Doe (see infra).
8 See, for example, L. T. Izumi and A. Nelson, How California Can Lead the Way Against Illegal Immigration (Claremont, Calif.: Claremont Institute, 1992).
11 Title IIX, for example, states: "The Congress makes the following statements concerning national policy with respect to welfare and immigration: (1) Self-sufficiency has been a basic principle of United States immigration law since this century's earliest immigration statutes. (2) It continues to be the immigration policy of the United States
that—(A) aliens within the Nation's borders do not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and (B) the availability of public benefits not constitute an incentive for immigration to the United States." (See 8 U.S.C., at 1601 (1)-(2), 1997.)

13 See LILAC, 808 F. Supp., 763.
14 Ibid., 763-764.
15 The Systematic Alien Verification for Entitlement program is used to verify status for various federal-state cooperative programs (for instance, the Aid to Families with Dependent Children and Food Stamps programs) under which eligibility is dependent on lawful immigration status.
17 Ibid., 769-770.
19 Ibid., 28-29.
20 Plyler, 457 U.S., 265.
21 Ibid., 215.
22 Ibid., 230.

23 See, for instance, Miechta v. Ogilvie, 394 U.S. 322 (1969), where the Supreme Court affirmed the lower court's ruling that funding public schools through property taxation—thus resulting in wide variation in per student expenditures—does not violate the Equal Protection Clause; see also San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), and Hodel v. Locke, 485 U.S. 588 (1988), where the court rejected the claim that poverty creates a suspect class and education is a fundamental right.
24 In San Antonio and Plyler, the Supreme Court has clarified the meaning of "suspicious classification" in a Fourteenth Amendment context. According to the majority's opinion in these two cases, some classifications created by governmental policy or practice are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of legitimate objectives. Therefore, certain groups have been subjected to a history of purposeful unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process (see San Antonio, 411 U.S., 28, and Plyler, 457 U.S., n.14, 216); An individual who belongs to any of these groups is a member of a "suspicious classification." A clear example of "suspicious classification" is race.
26 Ibid., 224.

27 In Plyler, Justice Marshall argued that the facts of the case demonstrated "the wisdom of rejecting a rigidified approach to equal protection analysis, and of employing an approach that allows for varying levels of scrutiny depending upon the constitutional and societal importance of the interest adversely affected and the recognized invasiveness of the basis upon which the particular classification is drawn" (Plyler, 457 U.S., 231, Justice Marshall concurring).
31 Ibid., 223.
32 Ibid., 224-225
33 Ibid., 226.

34 See, for instance, commentary by Dan Stein in the February 1995 issue of the American Bar Association Journal, 61(42).

37 Swinford, 1994.
38 See, for example, Thomas G. West, Property and the Public Good (Claremont, Calif: Claremont Institute, 1997).
40 790 S.W.2d 186 (Ky. 1989).
42 See Board of Education of Cincinnati v. Walter, 390 N.E.2d 813 (Ohio 1979), for example, the case overturned by DeRolph.
44 Winterhoff, 1998. One of the more interesting things about DeRolph is that there is no dispute about the facts at issue. The defendant state board of education actually provided to the plaintiffs—a group of nearly destitute small rural and large urban districts—most of the information marshaled in the complaint. For example,

the Nelsonville York Elementary School in Athens County is sliding down a hill at a rate of an inch a month... At Eastern Brown High School, the learning-disabled classroom is a converted storage room with no windows for ventilation... In the Dawson-Bryan school system, where a coal heating system is used, students are subjected to breathing coal dust which is emitted into the air and actually covers the students' desks after accumulating overnight. Band members are forced to use a former coal bin for practice sessions where there is no ventilation whatsoever.... The Northern Local School District has also been plagued with... outdated sewage systems which have actually caused raw sewage to flow into the football field... and the presence of arsenic in the drinking water.... Appellant Christopher Thompson described... plaster falling off the walls and cockroaches crawling on the bathroom floors... a flooded library and gymnasium... a leaky roof where rainwater dripped from the ceiling like a waterfall... and inadequate heating (which resulted in students [wearing] coats and gloves to classes and being) subject to kerosene fumes from kerosene heaters which were used when the building became very cold. (DeRolph v. Ohio, 677 N.E.2d, 748)

The school financing system in Ohio that resulted in these conditions was similar to that of most other states in that—simplified—a base portion of operating costs, more or less equalized across districts, was supplied by the state, while the remaining costs were provided through local property taxes. Capital and building costs were the responsibility of local districts, although the state provided some loans and guarantees. A variety of formulas and other programs exist that are supposed to ameliorate to some extent the disparities between wealthy and poor school districts. Their effect in this regard is minimal, however, as some schools in wealthy districts spend more than three times as much per pupil as some poor districts.

45 In one of the first major school funding cases, Serrano v. Priest, 487 P.2nd 1241 (Cal. 1972).
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1971; a California court found that the state funding system violated the plaintiffs' equal protection rights under the federal Constitution and that classifications based on wealth were suspicious; however, this case was reversed 5 years later, in Serrano v. Priest, 557 P.2d 925 (Cal. 1976)—after the ruling in San Antonio—where it was found that the claim for education being a right could be grounded only in the California Constitution and case law. The court stated that "our state equal protection provisions, while 'substantially the equivalent of' the guarantees contained in the Fourteenth Amendment to the United States Constitution, are possessed of an independent vitality" (Serrano, 557 P.2d, 950). But many other states were inhibited by San Antonio from pursuing equal protection and suspect classification arguments. See K. R. McMillan, "The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and Courts' Lingering Institutional Concerns," Ohio St. L. J. 58:8167 (1958), for a full accounting of these developments.

46 268 U.S. 510 (1925).
47 390 N.E.2d 813 (Ohio 1979).
48 Deroof, 1226.

92 What was most disturbing to the dissenting justices was that the majority dismissed out of hand the legitimacy of claims about the benefits of local control of education and gave the original trial court authority to oversee the legislature's compliance with the court's order, a step that raises issues of separation of powers (Heise, 1990). Separation of powers and local control issues are also at the heart of the Proposition 187 controversy. The federal appeals court that invalidated Proposition 187 relied largely on De Canas v. Bica, which concerns issues of states' "invading" the jurisdiction of the federal branch in matters of immigration control.

53 Ibid., 32–33.
55 Ibid., 421.
57 One should note here that Rawls's rule of difference is not a principle of redress, it is only a process for distribution that, in the long term, is expected to favor those least well off. For an interpretation of Rawls's rule of difference in educational law, see Hackney, 1993, infra.
59 Ibid., 100–101.
60 The authors' argument could be summarized in the following lines. If we define education as an organized process that aims to impart specified knowledge and skills to its clientele, in the context of modern America education is an individual right and a societal duty. First, given the specific social, economic, and psychological conditions of modern-day America and Americans, education is a derived right of Americans (i.e., it is not a right in itself but one that is instrumental to the realization of more fundamental rights, such as the right to life and security and the right to own property and express oneself openly and freely). Second, for this right to be meaningful, all members of society have the duty to share the expenses and efforts that are necessary to make it accessible to all (i.e., all members of society should, according to their ability, contribute to a system of public education and responsibly participate in its activities).
64 Tribe and Dorf, 1991.
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62 Ibid., 33.
63 Ibid., 4.
64 The enumeration in the Constitution of certain rights shall not be construed to deny or
disperage others retained by the people (United States Constitution, Amendment IX).
65 Tribe and Dorf, 54.
66 Ibid., 111.
67 Ibid., 85.
68 Ibid., 73.
69 381 U.S. 479 (1965).
70 Tribe and Dorf, 73.
71 410 U.S. 113 (1973).
73 San Antonio, 36.
74 Ibid., 35–37.
75 Ibid., 37.
76 Ibid., 116.
77 Brown, 492–493.
78 Ibid., 493.
79 P. Smith, "Addressing the Plight of Inner-city Schools: The Federal Right to Education
80 Tribe and Dorf, 98.
82 Tribe and Dorf, 78.
83 Brown, 493.
84 San Antonio, 70–133.
85 Ibid., 71.
86 Ibid., 96.
87 Ibid., 89.
88 Plyler, 231 (Justice Marshall concurring).
89 San Antonio, 28.
90 Plyler, 230 (Justice Marshall concurring).
91 San Antonio, 111 (Justice Marshall dissenting).
93 In Yoder, decided only a year before San Antonio, the Supreme Court considered the
issue of whether Amish children should be exempted from the state's compulsory formal
education requirement after the eighth grade. While deciding for the parents, the court
affirmed the importance of public education and the right of states to require schooling.
94 Here, Marshall refers to the decisions in Sweezy v. Hampshire, 354 U.S. 234 (1957), and
95 Sweezy v. Painter, 399 U.S. 629 (1950)—one of the important precursors to Brown—
certified the segregation of law schools in Texas. Marshall argued this case, for the
plaintiffs, in the Supreme Court.
96 San Antonio, n.72, 113 (Justice Marshall dissenting).
97 Ibid., 122–123.
98 Ibid., 123.
99 Ronald Takaki, A Different Mirror: A History of Multicultural America (Boston: Little,
Brown, 1993).
100 Plyler, 250 (Justice Burger dissenting).
102 See Marcelo M. Suarez-Orozco, "California Dreaming: Proposition 187 and the Cultural
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Manuscript received February 17, 1998
Revision received January 19, 1999
Accepted February 26, 1999

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