CONSTITUTIONAL LAW—EQUAL PROTECTION—INDIGENT PUBLIC SCHOOL STUDENTS DENIED FREE RIDE—*Kadrmas v. Dickinson Pub. Schools*, 108 S. Ct. 2481 (1988).

School bus transportation is an integral component of this country's public education system.[1] Busing has also been employed as a tool to remedy constitutional violations and to secure equal educational opportunities.[2] Providing adequate busing, however, poses several financial and practical difficulties for school districts.[3] The problems are especially severe for sparsely populated school districts. In these districts the students must be bused great distances at substantial cost to the school district.[4] To recompense this cost, some school districts charge families a fee to bus their children to school while other districts do not exact a fee for the same service.[5] In a recent decision, the Supreme Court considered whether such a fee policy violated the equal protection clause of the fourteenth amendment.[6] In *Kadrmas v. Dickinson Public School District*,[7] the Supreme Court held that there was no constitutional violation where a student was denied access to transportation because her family could not afford the fee.[8]

In an attempt to provide superior educational facilities and adequate transportation for children located in the less populated areas of the state, North Dakota encouraged school districts to reorganize and consolidate into larger districts.[9] Notwith-

---

1 *See* North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971) (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971)).

2 Swann v. Charlotte-MecKlenburg Bd. of Educ., 402 U.S. 1, 30 (1971).

3 Kadrmas v. Dickinson Pub. Schools, 402 N.W.2d 897, 900-01 (N.D. 1987) (citing Seiler v. Gelhar, 209 N.W. 376, 379 (N.D. 1926)), *aff'd*, 108 S. Ct. 2481 (1988).

4 Herman v. Medicine Lodge School Dist. No. 8, 71 N.W. 2d 323, 325 (N.D. 1955).

5 *See, e.g.*, N.D. CENT. CODE § 15-34.2-06.1 (1981 & Supp. 1987).

6 *See* Kadrmas v. Dickinson Pub. School Dist., 108 S. Ct. 2481 (1988). The equal protection clause provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

U.S. CONST. amend. XIV, § 1.

7 108 S. Ct. 2481 (1988).

8 *Id.* at 2487.

9 *Id.* at 2484. The North Dakota Legislature determined that larger school districts provide superior educational facilities for students. Herman v. Medicine

standing the state's plan, Dickinson Public Schools, one of the more populated public school districts, chose not to reorganize.[10] Moreover, North Dakota imposed no restriction as to the manner of transportation adopted by nonreorganized school districts.[11] In 1973, Dickinson Public School District (Dickinson) discontinued free "pick-up point" bus transportation for students in outlying regions[12] and, following a referendum of Dickinson bus users,[13] instituted the present policy of charging a fee for door-to-door service.[14] Six years later, in 1979, the North Dakota Legislature endorsed Dickinson's policy by enacting a statute which allowed school districts which have not reorganized to assess a fee for the transportation of students to and from school.[15] This state statutory endorsement formed the basis of

---

Lodge School District No. 8, 71 N.W.2d 323, 328 (N.D. 1955). Because reorganization plans necessarily augment district size, the Court recognized that any reorganization must include the means of transportation to be employed. *Kadrmas*, 108 S. Ct. at 2484. Furthermore, the majority noted that the transportation scheme as a whole must be accepted by the voters of the proposed new district. *Id.* (citing N. D. CENT. CODE § 15-27.3-10 (Supp. 1987)).

10 *Id.*

11 *Id.* at 2485.

12 *Id.* at 2484-85. Free bus service to outlying regions was terminated because many of the pickup points were too far from the students' homes. *Id.*

13 *Id.* At the period relevant to this dispute approximately 13 percent of Dickinson students utilized school bus transportation. *Id.* at 2485.

14 *Id.* Pursuant to the door-to-door service program, students were driven to and from their homes, as opposed to intermittent pick-up points which were used in the previous route. *Id.* at 2484-85. In Dickinson, the charge for this door-to-door bus service was $97 per year for families with one child and $150 per year for families with two children. *Id.* at 2485. This amount generated approximately 11 percent of the total cost to maintain the service. *Id.* Dickinson absorbed the balance of transportation cost. *Id.*

15 *Id.* The legislation which enabled nonreorganized districts to assess a transportation fee is the subject of equal protection scrutiny in this action. *Id.* The statute prescribes:

> The school board of any school district which has not reorganized pursuant to chapter 15-15.1, may charge a fee for school bus service provided to anyone riding on buses provided by the school district. For school bus service which was started prior to July 1, 1981, the total fees collected may not exceed an amount equal to the difference between the state transportation payment and the state average cost for transportation or the local district's cost, whichever is the lesser amount. For schoolbus service started on or after July 1, 1981, the total fees collected may not exceed an amount equal to the difference between the state transportation payment and the local school district's cost for transportation during the preceding school year. Any districts that have not previously provided transportation for pupils may establish charges based on costs estimated by the school board during the first year that transportation is provided.

N.D. CENT. CODE § 15-34.2-06.1 (1981 & Supp. 1987).

the constitutional challenge in *Kadrmas*.[16]

Paula Kadrmas and her daughter Sarita, a Dickinson student, lived approximately sixteen miles from the elementary school that Sarita attended.[17] Prior to 1985, the Kadrmas family paid the fee for door-to-door service to bus Sarita to school.[18] Because the family's annual income bordered on the poverty line, they found it impossible to continue paying the fee.[19] In 1985, the Kadrmases refused to enter into an agreement to pay the fee and consequently, the school district refused to transport Sarita to school.[20] During the years of 1985 to 1987, the Kadrmas family provided transportation for Sarita.[21] In the spring of 1987, Paula Kadrmas resumed using Dickinson bus service and continued to pay for the service through the next school year.[22]

In September of 1985, the Kadrmases filed an action in the state court of North Dakota,[23] seeking to enjoin Dickinson from collecting a fee for door-to-door bus service.[24] Following dismissal on the merits, the Kadrmases appealed to the Supreme Court of North Dakota.[25] The state court rejected contentions that the statute violated either the federal or the North Dakota Constitution.[26] The United States Supreme Court noted probable jurisdiction,[27] and affirmed the Supreme Court of North Dakota's decision.[28] The Supreme Court held that the North Dakota busing statute was economically motivated and rationally related to a legitimate governmental objective, and therefore, the statute did not violate the equal protection clause of the fourteenth amendment.[29]

---

16 *See Kadrmas*, 108 S. Ct. at 2484.

17 *Id.* at 2485.

18 *Id.*

19 *Id.* At the time of trial, the Kadrmas family lived off the income of Mr. Kadrmas, who worked sporadically in the oil fields of North Dakota. *Id.*

20 *Id.*

21 *Id.* During the years when the Kadrmases did not use Dickinson school buses, they incurred $1,000 in expenses, ten times the amount charged by Dickinson. *Id.*

22 *Id.*

23 *Id.* The original action also included Marsha Hall, a mother of children who attended school in Dickinson. Kadrmas v. Dickinson Pub. Schools, 402 N.W.2d 897, 898 (N.D. 1987), *aff'd* 108 S. Ct. 2481 (1988).

24 *Kadrmas*, 108 S. Ct. at 2485.

25 *Id.*

26 *Id.* The state court conclusively determined that article VIII, § 2, of the North Dakota Constitution "does not require the state or school districts to provide free transportation for students to and from school." *Kadrmas*, 402 N.W.2d at 902.

27 108 S. Ct. 63 (1987).

28 *Kadrmas*, 108 S. Ct. at 2491.

29 *Id.* at 2489.

The Supreme Court first interpreted the equal protection clause in the *Slaughter-House Cases*.[30] In the *Slaughter-House Cases* the Court applied the clause to a Louisiana statute that, in effect, granted one slaughter-house a twenty-five year monopoly over all meat business in New Orleans.[31] The employees of the excluded slaughter-houses brought an action contending that the act violated their right to equal protection.[32] The Supreme Court rejected this argument, holding that the fourteenth amendment only protected "the newly emancipated negroes."[33] Despite the equal protection clause's initial limited interpretation in *Slaughter-House*, the Supreme Court subsequently extended the reach of the equal protection clause,[34] applying the clause to legislation that confined a specific class[35] or threatened a particular right.[36]

In 1942, the Court employed an equal protection analysis to invalidate a statute that permitted certain criminals to be sterilized.[37] In *Skinner v. Oklahoma*,[38] the majority determined that the right to procreate was one of the primary civil rights of man, "fundamental to the very existence and survival of the race."[39] Due to the importance of the right involved, the *Skinner* Court

---

30 83 U.S. (16 Wall.) 36 (1873).

31 *See id.* at 42-43.

32 *Id.* at 56. The claim alleged that the act deprived the butchers of New Orleans "of the means by which they earn their daily bread." *Id.*

33 *Id.* at 81. The Supreme Court's decision in the *Slaughter-House Cases* represented the Court's primary reluctance to view the scope of the equal protection clause liberally. *See* Note, *Illegal Aliens Have Right to Free Public Education: Plyler v. Doe*, 61 WASH. U.L.Q. 591, 593 (1983).

34 For several decades following the decision in *Slaughter-House*, the equal protection clause remained largely dormant. Note, *supra* note 33, at 593. Recognizing this latency, in 1927, Justice Holmes wrote that the equal protection clause "is the usual last resort of constitutional arguments to point out shortcomings of this sort." Buck v. Bell, 274 U.S. 200, 208 (1927) (Virginia statute permitting mental institutions to sterilize mentally retarded inmates not equal protection violation).

35 *See, e.g.*, Pickett v. Brown, 462 U.S. 1 (1983) (illegitimate children); Craig v. Boren, 429 U.S. 190 (1976) (gender); Graham v. Richardson, 403 U.S. 365 (1971) (resident aliens).

36 *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (right to interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote); Griffin v. Illinois, 351 U.S. 12 (1956) (right to access the courts). *See generally* Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969) (outlining the development of the equal protection clause).

37 Skinner v. Oklahoma, 316 U.S. 535 (1942). The statute enabled the state to sterilize individuals that were found guilty, two or more times, of "felonies involving moral turpitude." *Id.* at 536.

38 316 U.S. 535.

39 *Id.* at 541.

subjected the Oklahoma statute to strict judicial scrutiny.[40] The majority held that the statute was not necessarily related to a compelling state interest because it permitted sterilization for crimes not related to biologically inheritable traits.[41]

Twelve years later, in *Brown v. Board of Education*[42] the Supreme Court applied an equal protection analysis to evaluate segregation in public schools, acknowledging the central role that education plays in our society.[43] Providing the cornerstone by which cases concerning a student's access to education will be adjudicated, Chief Justice Warren posited that a child who is denied the opportunity to receive an education will have little hope for prosperity.[44] Relying on this concept, the Court determined

---

40 *Id.*

41 *Id.* The strict scrutiny standard of review set forth in *Skinner* was also applied to legislative distinctions that involve suspect classes. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429 (1984) (lower courts' denial of custody to mother solely because she co-habitated with negro held erroneous); Loving v. Virginia, 388 U.S. 1 (1967) (statute that prevented inter-racial marriages was unconstitutional); Korematsu v. United States, 323 U.S. 214 (1944) (legislation that permitted evacuation and detention of Japanese-American citizens because of their race passed strict scrutiny analysis). To satisfy strict scrutiny review, the classification must be necessary to further a compelling state interest. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1451 (1988). *See also* Rodgers v. Lodge, 458 U.S. 613, 617 (1982) (system of at-large voting districts held invalid).

Cases that do not involve a fundamental right or a suspect class will receive lower scrutiny. L. TRIBE, *supra*, § 16-2, at 1439. Most classifications are prone to the minimum standard of review. *Id.* These cases involve economic or social distinctions, and must only be rationally related to a permissible governmental objective. *Id.* at 1439. *See, e.g.*, Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Morey v. Doud, 354 U.S. 457 (1957); Railway Express Agency v. New York, 336 U.S. 106 (1949).

The Court has also developed an intermediate standard. L. TRIBE, *supra*, § 16-24, at 1556. This middle level scrutiny is usually applied to classifications dealing with gender and illegitimacy. *See* Craig v. Boren, 429 U.S. 190 (1976); Pickett v. Brown, 462 U.S. 1 (1983). Legislative distinctions affecting these groups must be substantially related to an important governmental goal. *Craig*, 429 U.S. at 204.

42 347 U.S. 483.

43 *Id.* at 493.

44 *Id.* Specifically, Justice Warren stated:

> 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. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. 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

that the "separate but equal" doctrine[45] did not apply to public educational facilities.[46] Therefore, public school students who were segregated into different educational facilities on the basis of race were denied equal access to an education.[47]

While the *Brown* opinion articulated the importance of education, the Court in *San Antonio Independent School District v. Rodriguez*[48] subsequently refused to elevate that holding by recognizing education as a fundamental right.[49] In *Rodriguez*, the parents of children who attended school in San Antonio brought a class action on behalf of the students,[50] challenging Texas' method of funding public school education.[51] The parents contended that fewer funds were expended on poorer districts, and therefore, their children were denied equal opportunity for an education.[52] Justice Powell, writing for the *Rodriguez* majority, first determined that the scheme did not operate to the detriment of a suspect class.[53] The Court then held that despite its impor-

---

undertaken to provide it, is a right which must be made available to all on equal terms.

Id.

45 The "separate but equal" doctrine first appeared in Plessey v. Ferguson, 163 U.S. 537 (1896). In *Plessey*, the Supreme Court upheld a Louisiana statute that required separate but equal accommodations for blacks and whites. *Id.* at 550-51. The Court determined that this statute did not violate the fourteenth amendment. *Id.*

46 *Brown*, 347 U.S. at 493.

47 *Id.* The separate accommodations were not equal even though many of the discernible factors, such as the physical facilities, may have been comparable. *Id.* The Court resolved that separating students solely due to their race would spawn beliefs of inferiority. *Id.* These beliefs could have an irreversible influence on the hearts and minds of the students. *Id.* at 493-94.

48 411 U.S. 1 (1973).

49 *Id.* at 35.

50 *Id.* at 4-5. The members of the class included minority school children who are poor and live in school districts that have lower property tax bases. *Id.* at 5.

51 *Id.* at 15 n.38. This scheme essentially relied on *ad valorem* local property taxes. *Id.* The plan resulted in greater expenditures per pupil to affluent districts that paid higher property taxes. *Id.* Conversely, the impoverished districts that paid comparatively less property taxes received proportionately smaller renumerations for education. *Id.*

52 *See id.* at 25.

53 *Id.* at 28. The Court distinguished the instant matter from prior holdings where the Supreme Court invalidated statutes which denied fundamental rights. *See id.* at 20-22 (citing Bullock v. Carter, 405 U.S. 134 (1972) (right to run for political office); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote); Douglas v. California, 372 U.S. 353 (1963) (right to counsel on appeal); Griffin v. Illinois, 351 U.S. 12 (1956) (right to trial transcript)).

The Court resolved that the wealth classification "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

tance, education should not be classified as a fundamental right.[54] Because education is not explicitly or implicitly protected by the Constitution, the majority reasoned that it was not within the Court's dominion to afford it such status.[55] The majority, utilizing the lowest level of review, adjudged that the financing scheme did not violate the equal protection clause because the scheme was rationally related to a necessary governmental end.[56]

In 1981, the Supreme Court determined the appropriate standard of review for cases which entirely denied education to a certain class.[57] In *Plyler v. Doe*,[58] the plaintiffs challenged a Texas statute which denied free education to children illegally residing in this country.[59] While referring to its previous ruling in *Rodriguez*, the Court stressed that education serves an important function.[60] The majority contemplated the effect that a complete denial of education would have on this class of children.[61] Because of the important interest at stake, the Court held that

---

protection from the majoritarian political process," and therefore, it was not a suspect classification. *Rodriguez*, 411 U.S. at 28. Thus, the Court determined that a wealth distinction, absent the presence of a fundamental right, was not enough to invoke strict judicial scrutiny. *Id.* at 29.

54 *Id.* at 30. The *Rodriguez* Court stated:

> The key to discovering whether education is "fundamental" is not to be found in the comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

Id. at 33-34.

55 *Id.* at 35. Further, the Court reasoned that the fact that education is imperative to the effective discharge of other rights is immaterial. *Id.*

In his dissenting opinion, Justice Marshall disagreed with the test that the majority advanced to conclude that education is not a fundamental right. *Id.* at 103 (Marshall, J., dissenting). He stated that the test should be the interrelationship that the interest has with rights that are explicitly guaranteed by the Constitution. *Id.*

56 *See id.* at 28-29.

57 Plyler v. Doe, 457 U.S. 202, 224 (1982).

58 457 U.S. 202 (1982).

59 *Id.* at 205. The statute specifically withheld state funds for the education of the children of illegal aliens and permitted schools to deny admittance to these children. TEX. EDUC. CODE ANN. § 21.031 (Vernon 1987).

60 *Plyer*, 457 U.S. at 223. The Court stated that education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." *Id.* at 221.

61 *Id.* at 223. Due to the importance of education, the Court declined to adjudicate the issue solely on the basis of whether the statute withheld a fundamental right, or whether a suspect class was being discriminated against. *Id.*

heightened scrutiny was appropriate.[62] Therefore, the statute would be considered valid only if it furthered a substantial state goal.[63] The Court concluded that the State's objectives were insufficient to support the denial of education to these students.[64]

Prior to *Kadrmas v. Dickinson Public School District*,[65] the Supreme Court refused to recognize education as a fundamental right.[66] The Court, however, established that legislation which denied a certain class complete access to education will receive heightened scrutiny.[67] In *Kadrmas*, the Court refused to apply the rational of *Plyler* to a school bus user fee.[68] In so doing, the Court held that a denial of transportation is not comparable to a complete denial of access to an education.[69]

Justice O'Connor, writing for the majority in *Kadrmas*, began her analysis of the merits[70] by rejecting the Kadrmas' contention that the fee imposed by Dickinson for the bus service deprived indigent children of "minimum access to education."[71] The Court found that Sarita remained in school during the period that she was deprived of bus transportation, and therefore, she was not denied education.[72] The Court interpreted the Kadrmas' attack on the busing fee as a barrier to an education for the poor as opposed to a complete deprivation of education.[73]

---

62 *Id.* at 224.

63 *Id.*

64 *Id.* at 230.

65 108 S. Ct. 2481 (1988).

66 *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1972).

67 *See* Plyler v. Doe, 457 U.S. 202, 224 (1981).

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

69 *Id.*

70 Justice O'Connor refused to dismiss the action on procedural grounds. *Id.* at 2486-87. The Court rejected Dickinson's position that the Kadrmas' were estopped from proceeding with their claims because they enjoyed the benefits of the bus service after instituting this action. *Id.* at 2486. The majority surmised that plaintiffs are not forbidden to challenge an act because they are receiving some benefit from it. *Id.* Moreover, the Court determined that the fee was a burden as opposed to a benefit. *Id.*

The Court also disagreed with the school district's view that the execution of the busing contracts caused the case to be moot. *Id.* at 2486-87. The Court reasoned that there existed a present tangible controversy between the parties. *Id.* A decision in the Kadrmas' favor could exempt them from paying the amount owing on the 1987 contracts. *Id.*

71 *Id.* at 2487 (quoting Brief for Appellants at i, *Kadrmas*, 108 S. Ct. 2481 (1988) (No. 86-7113)).

72 *Id.*

73 *Id.* Specifically, the majority stated:

> Appellants must therefore mean to argue that the busing fee unconstitutionally places a greater obstacle to education in the path of the poor than it does in the path of wealthier families. Alternatively, appellants

The majority asserted that they were disinclined to apply a strict or heightened standard of review in light of their interpretation that Sarita Kadrmas had not been denied an education.[74] The Court recapitulated their view that statutes discriminating on the basis of wealth alone will not be exposed to strict equal protection scrutiny.[75] Moreover, the majority reasoned that education is not recognized as a fundamental right, and therefore, strict scrutiny is not appropriate when a state encroaches on an individual's access to education.[76]

The Court next addressed the argument that the statute should be open to heightened scrutiny in a manner similar to the analysis set forth in *Plyler*.[77] The Court noted that the *Plyler* holding has not been extended beyond the unique circumstances of that case.[78] Distinguishing *Plyler* from the facts of *Kadrmas*, the Court noted that unlike the children in *Plyler*, Sarita Kadrmas had not been punished by the state for the illegal conduct of her parents.[79] The majority reasoned that Kadrmas was only denied the right to use the school bus because her parents did not agree to pay the fee for the service.[80] Further, unlike the statute challenged in *Plyler*, the user fee could in no way be deemed to "promot[e] the creation and perpetuation of a sub-class of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."[81] To substantiate this position the Court quoted the North Dakota statute that permitted the school board to waive any fee that the parents could not afford to pay.[82] Thus, because *Plyler* was easily distinguished,

---

> may mean to suggest that the Equal Protection Clause affirmatively requires government to provide free transportation to school, at least for some class of students that would include Sarita Kadrmas.

Id.

74 *Id.*

75 *Id.* (citing Harris v. McRae, 448 U.S. 297, 322-23 (1980); Ortwein v. Schwab, 410 U.S. 656, 660 (1973)).

76 *Id.* (citing Papasan v. Allain, 478 U.S. 265, 284 (1986); Plyler v. Doe, 457 U.S. 202, 284 (1982); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16 (1973)).

77 *Id.*

78 *Id.* at 2488 (quoting *Plyler*, 457 U.S. at 239 (Powell, J., concurring)).

79 *Id.*

80 *Id.*

81 *Id.* (quoting *Plyler*, 457 U.S. at 230 (Powell, J., concurring)).

82 *Id.* (quoting N.D. CENT. CODE § 15-43-11.2 (1981) (in pertinent part, the statute states: "[a school] board may waive any fee if any pupil or his parent or guardian shall be unable to pay such fees. No pupil's rights or privileges, including the receipt of grades or diplomas, may be denied or abridged for nonpayment of fees.")).

the Court did not apply the middle level scrutiny advanced in *Plyler*.[83] The Court was also disinclined to expand the rational of *Plyler* to the circumstances in *Kadrmas*.[84]

The majority then considered the contention that North Dakota withheld important benefits from those who were not able to pay for them.[85] The majority found that the Kadrmas' reliance on cases including *Griffin v. Illinois*[86] was inappropriate.[87] The Court distinguished *Griffin* and like cases which involved requirements that barred indigent litigants access to the courts in situations where no alternative to litigation was available.[88] The *Kadrmas* majority reasoned that, unlike *Griffin*, North Dakota did not possess a monopoly on the method of getting children to school.[89] Because alternate means of transportation were available to the Kadrmas family, the Court held that the equal protection clause had not been violated.[90]

The Court therefore held that the minimal standard of equal protection review would be appropriate.[91] Justice O'Connor espoused three factors that demonstrated that the statute was constitutionally permissible under this standard.[92] First, Justice O'Connor postulated that the fact that bus service is not required at all by the Constitution supported the proposition that the ser-

---

83 *Id.*

84 *Id.*

85 *Id.*

86 351 U.S. 12 (1956).

87 *Kadrmas*, 108 S. Ct. at 2488. The Kadrmases also cited to Smith v. Bennett, 365 U.S. 708 (1961) (filing fee required for application for writ of habeas corpus denied equal protection), Boddie v. Connecticut, 401 U.S. 371 (1971) (indigent barred from divorce because of failure to pay court fees denied equal protection) and Lindsey v. Normet, 405 U.S. 56 (1972) (posting of bond required for appeals of certain landlord-tenant cases violated right to equal protection). *Kadrmas*, 108 S. Ct. at 2488.

88 *Id.*

89 *Id.*

90 *Id.* The Court concluded:

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

Id.

91 *Id.* at 2489. Under the minimum standard of review the "statute is upheld if it bears a rational relation to a legitimate governmental objective." *Id.*

92 *Id.*

vice need not be offered for free.[93] Second, the majority determined that there was a legitimate state purpose in encouraging school districts to furnish bus transportation.[94] Finally, the Court reasoned, that requiring schools to fund the full expense of the bus service would deter school districts from providing transportation.[95]

The majority next addressed the contention that the user fee violated the Kadrmas' equal protection rights even if the Court applied the minimal standard of review.[96] The Court considered the Kadrmas' assertion that the statute was unconstitutional because it permitted the imposition of a user fee only in school districts that have chosen not to reorganize.[97] The Court refused to rule that this distinction alone would prove that the statute was not rational.[98] To support this proposition the majority reiterated the well established principal that the equal protection clause would not invalidate a statute because it is limited to a specific geographical area.[99] Justice O'Connor stated that the fourteenth amendment would be violated only if the geographical classification was not related to the achievement of the governmental objective.[100] The Court also noted that a presumption of rationality followed all social and economic legislation.[101] The Court determined that this presumption would only be surmounted by a plain showing of arbitrariness.[102]

Advancing the minimum standard of review, the majority recognized that it was the burden of the attacking party to show the statute was irrational and arbitrary.[103] The Court then determined that the Kadrmases failed to carry this heavy burden.[104] In so concluding, the Court relied on the North Dakota Supreme

---

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.* (quoting Fort Smith Light Co. v. Paving Dist., 274 U.S. 387, 391 (1927)).

100 *Id.* (quoting McGowan v. Maryland, 366 U.S. 420, 425 (1961); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947)).

101 *Id.* (quoting Hodel v. Indiana, 452 U.S. 314, 331-32 (1981)).

102 *Id.* The Court held that statutes will not be overturned "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Id.* (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).

103 *Id.* at 2490.

104 *Id.*

Court's holding on the purpose of the statute.[105] The majority accepted the state court's determination that the purpose of the statute, which treated reorganized and nonreorganized school districts differently, was to promote school district reorganization.[106] The majority determined that the reasoning of the state court, the school district,[107] and the state of North Dakota[108] was sufficient to rebut the Kadrmas' argument.[109] Justice O'Connor additionally offered the Court's analysis of the difference between the treatment of reorganized and nonreorganized school districts.[110] In the case of nonreorganized school districts, the Court stated that "local school boards may impose a bus service user fee on their own authority, while the direct approval of the voters would be required in reorganized districts."[111] The majority concluded that the different treatment of reorganized and nonreorganized districts was not sufficient to render the statute arbitrary or irrational.[112]

In dissent, Justice Marshall perceived the Court's holding in *Kadrmas* as a continued retreat from the commitment of equal educational opportunity.[113] He restated the concern he set forth in his dissenting opinion in *Rodriguez*.[114] Justice Marshall believed that the Court should not condone discrimination against the indigent with respect to education which he identified as "perhaps the most important function of state and local governments."[115]

---

105 *Id.*

106 *Id.* The Supreme Court specifically noted the state court's determination that "[t]he legislation provide[d] incentive for the people to approve school district reorganization by alleviating parental concerns regarding the costs of student transportation in the reorganized district." *Id.* (quoting Kadrmas v. Dickinson Public Schools, 402 N.W.2d 897, 903 (N.D. 1987), *aff'd* 108 S. Ct. 2481 (1988)).

107 *Id.* at 2490. The Court also accepted the more elaborate explanation given by the school district. *Id.* The district's position alleged that the statute was in no way related to the reorganization of school districts. *Id.* The purpose, under Dickinson's theory, was to have those who use the bus service recompense a modest portion of the cost. *Id.*

108 The Court determined that the State's explanation was similar to that of the school district's. *Id.* at 2490.

109 *Id.* at 2490-91.

110 *Id.* at 2491.

111 *Id.*

112 *Id.*

113 *Id.* (Marshall, J., dissenting).

114 *Id.* In *Rodriguez*, Justice Marshall "wrote that the Court's holding was a 'retreat from our historic commitment to equality of educational opportunity and [an] unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential.' " *Id.* (quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 71 (1973) (Marshall, J., dissenting)).

115 *Id.* (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

The dissent questioned the manner in which the Court addressed the case.[116] He noted that the majority viewed the North Dakota statute from the perspective of a denial of transportation.[117] Justice Marshall perceived that the Court was then free to conclude that there was no denial of education, only a refusal to permit students to utilize the bus service without payment of the fee.[118]

The Court's "facile analysis," in Justice Marshall's opinion, forgot that the fourteenth amendment "is concerned with 'sophisticated as well as simple-minded modes of discrimination.' "[119] Justice Marshall interpreted the case as involving governmental action that hampered the poor in their pursuit of an education.[120] He reasoned that children who live a great distance from school can only obtain public education if adequate transportation is available.[121] Thus, Justice Marshall determined that the imposition of a fee for bus service for students in the Kadrmas' position had the same practical effect as imposing a fee directly on education.[122] Further, the dissent reasoned that the fee discriminated against the Kadrmases because it was more of a burden for the poor in North Dakota than it was for wealthier families.[123] Justice Marshall determined that the issue in this case was whether North Dakota may enact a statute that "discriminate[d] against the poor in providing access to education."[124]

Justice Marshall then repeated what he believed to be the proper examination of equal protection claims.[125] The inquiry, according to Justice Marshall, should not be premised on choosing the proper label to categorize a claim.[126] Rather, the dissent recommended that the Court identify and analyze the character

---

116 *Id.*

117 *Id.*

118 *Id.* Justice Marshall also noted:

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

Id. at 2491 n.1 (Marshall, J., dissenting) (citations omitted).

119 *Id.* at 2491-92 (Marshall, J., dissenting) (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).

120 *Id.* at 2492 (Marshall, J., dissenting).

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.*

of the classification, the true interests at stake and the rationale behind the state action.[127] In this light, Justice Marshall determined that the North Dakota statute violated the equal protection clause of the fourteenth amendment.[128]

Justice Marshall determined that the statute discriminated on the grounds of economic status.[129] The Justice recognized that the Court refused to view economic classifications as suspect.[130] He noted, however, that the Court had frequently invalidated statutes which disfavor the poor.[131] In Justice Marshall's view, the Court has not favored policies that burden indigents' access to governmental benefits which might enable them to improve their status.[132] According to the dissent, the North Dakota statute impaired indigents ability to improve their circumstances, and therefore, Justice Marshall required the Court to apply "exacting scrutiny."[133]

Justice Marshall's dissent then addressed the importance of the interest at stake.[134] His analysis found that the statute burdened an indigent's interest in education.[135] Citing to *Brown* and *Plyler*, Justice Marshall observed the vital role that education plays in our society.[136] He reasoned that the holding in *Plyler*, which recognized the importance of education, was directly applicable to the North Dakota statute at issue in *Kadrmas*.[137] Justice Marshall opined that the fact that *Plyler* involved a classification based upon alienage did not necessarily distinguish

---

127 *Id.* Specifically, Justice Marshall wrote:

> [T]he Court should focus on "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."

Id. (quoting Dandridge v. Williams, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting) (citing San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting)).

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.* (citing Little v. Streater, 452 U.S. 1 (1981); Bullock v. Carter, 405 U.S. 134 (1972); Griffin v. Illinois, 351 U.S. 12 (1956)). Justice Marshall recognized that the Court will usually invalidate such statutes when they bar indigent's access to the judicial and political process. *Id.*

132 *Id.* at 2493 (Marshall, J., dissenting).

133 *Id.* Justice Marshall reasoned that "[w]hen state action has the predictable tendency to entrap the poor and create a permanent underclass" the intent of the fourteenth amendment is frustrated. *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.*

the two cases.[138] He perceived the holding in *Plyler* to rest upon the Texas statute's "differential treatment of a discrete and disadvantaged group of children with respect to the provision of education."[139] As in *Plyler*, Justice Marshall asserted that North Dakota legislated to hinder the educational opportunities of a deprived group of children who required an education to succeed in society.[140]

The dissent next turned to the rationale for the policy of charging a user fee for bus service.[141] Justice Marshall noted that North Dakota permitted school districts, such as Dickinson, to charge the fee in order to recover a portion of the costs of the bus service.[142] He reasoned that the money collected from indigent families represented only a small portion of the total cost of the bus service, and therefore, exempting indigent families from this fee would not significantly affect the funding or operation of the bus service.[143] In Justice Marshall's opinion, North Dakota's interest was insubstantial and did not justify the discriminatory effect of the challenged statute.[144] Justice Marshall viewed the Court's holding as overlooking the indigent's need for unbridled access to an adequate education.[145]

In a separate opinion, Justice Stevens dissented on the basis that North Dakota lacked any rational basis to enact the user fee statute.[146] He agreed with Justice Marshall's identification of the resulting harm to the disadvantaged class who could not afford the fee.[147] Justice Stevens also accepted the North Dakota Supreme Court's explanation of the purpose behind the statute.[148] The Justice considered the state legislature's two pur-

---

138 *Id.*

139 *Id.*

140 *Id.* at 2494 (Marshall, J., dissenting).

141 *Id.*

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.* Justice Marshall concluded:

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

Id.

146 *Id.* at 2494 (Stevens, J., dissenting). Justice Blackmun joined in this dissent. *Id.*

147 *Id.*

148 *Id.*

poses in enacting the statute.[149] First, Justice Stevens determined that the State's attempt to alleviate parental concerns regarding the costs of student transportation by encouraging reorganization showed that the state realized that free bus transportation was a vital element of public education in a scarcely populated state.[150] Otherwise, in Justice Stevens' view, a significant number of parents would not have been motivated to vote for a reorganization plan.[151] Second, because the voters had a substantial amount of time to consider whether to choose reorganization,[152] there was no reason to permit the imposition of the user fee in those districts which had chosen not to reorganize.[153] Thus, Justice Stevens resolved that the North Dakota statute lacked the elements of legitimacy needed for it to be considered rational.[154]

In light of the manner in which the majority analyzed *Kadrmas*, the decision was sound. Education is not a fundamental right guaranteed by the Constitution. Moreover, statutes that discriminate on the basis of wealth alone have not been considered suspect.[155] Under the *Kadrmas* analysis, the statute need only satisfy the minimal scrutiny level of review. Although the reasoning of the Court's decision, as applied, is not questioned, the way in which the Court framed the issue can be challenged.

The Court refused to accept the argument that the fee for the bus service deprived Kadrmas of "minimum access to education."[156] Because Kadrmas remained in school during the period she was deprived of access to the bus, the Court determined that "appellants must therefore mean to argue" that the North Dakota statute placed a greater barrier to an education for the poor.[157] This "facile analysis," as Justice Marshall's dissent asserted, is inadequate in light of the facts presented.[158] The stat-

---

149 *Id.*

150 *Id.* at 2494-95 (Stevens, J., dissenting).

151 *Id.* at 2495 (Stevens, J., dissenting).

152 *Id.* Justice Stevens noted that the majority recognized that the state legislature had encouraged this reorganization since 1947. *Id.* (citing *Kadrmas*, 108 S. Ct. at 2484).

153 *Id.* at 2495 (Stevens, J., dissenting). In Justice Steven's view "there is no longer any justification at all for allowing the nonreorganized districts to place an obstacle in the paths of poor children seeking an education in some parts of the State that has been removed in other parts of the State." *Id.*

154 *Id.*

155 *See, e.g.*, San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1 (1972).

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

157 *Id.*

158 *Id.* at 2491 (Marshall, J., dissenting).

ute compelled a family that lived sixteen miles from school to pay a fee to bus their child to school.[159] It is difficult to discern the Court's reasoning that this fee is not identical, in practical effect, to placing a fee directly on education.[160] Thus, by placing a heavier burden on the Kadrmases, who could not afford to pay the fee, the statute discriminated against indigents' access to state educational facilities.[161]

The Court's cursory treatment of *Plyler* must also be drawn into question. The majority refused to apply the middle level scrutiny used in *Plyler* to the *Kadrmas* situation on the basis that the two cases were distinguishable.[162] The Court reasoned that Sarita Kadrmas was denied transportation to school because "her parents would not agree to pay" the fee.[163] Thus, the Court determined that, unlike the children in *Plyler*, Sarita Kadrmas was not being punished for the illegal conduct of her parents.[164] Here, the Court appeared to forget the essence of the controversy. First, the Kadrmases did not refuse to pay the user fee as a matter of choice. Rather, they did not pay the fee because they could not afford it. Second, under the North Dakota statute, Sarita Kadrmas was being punished for her parents financial situation, which was in no way related to illegal conduct. The holding of *Plyler* should not be distinguished and, in fact, the analysis should be extended to cover the situation in *Kadrmas*.

The Court also cited to the North Dakota "waiver" statute[165] in further support of its position that the user fee could not be considered to "promote the creation and perpetuation of a subclass of illiterates within our boundaries."[166] The presence of this statute should have no bearing on this action. The statute permitted the board to waive a fee if the parent cannot pay. The statute did not require such action by the board.[167] The existence of this waiver did not modify the ultimate effect of the user

---

159 *Id.* at 2485.

160 *See id.* at 2492 (Marshall, J,. dissenting).

161 *See id.*

162 *Id.* at 2487.

163 *Id.*

164 *Id.* at 2488.

165 N. D. CENT. CODE § 15-43-11.2 (1981). *See supra* note 82 for pertinent text of the statute.

166 *Kadrmas*, 108 S. Ct. at 2488 (quoting Plyler v. Doe, 457 U.S. 202, 239 (1982) (Powell, J., concurring)).

167 The appellants, in fact, stated that "no waiver has ever been granted in the fifteen years the Dickinson busing fee has existed. Nor has anyone's income ever been considered in the imposition of the busing fee." Reply brief for Appellant at 2, *Kadrmas*, 108 S. Ct. 2481 (1988) (No. 86-7113).

fee, which was the denial of bus transportation to those who could not afford it.

It is difficult to comprehend how the *Kadrmas* majority could interpret, in such a finite manner, a case that involved an entitlement the Supreme Court previously considered to be "perhaps the most important function of state and local governments."[168] Justice Marshall recognized the Court's continued retreat from the commitment of equal educational opportunity.[169] A retreat that now includes the proclamation that a student is not considered to be denied access to an education when she cannot afford to reach the schoolhouse gate.

Robert Anthony Burke

---

168 *Kadrmas*, 108 S. Ct. at 2488 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

169 *Id.* at 2491 (Marshall, J., dissenting).