COMMENT

THE NATIONAL SCHOOL LUNCH PROGRAM

I. INTRODUCTION

A. Statutory Framework

The National School Lunch Program provides thousands of free or reduced-cost meals daily to needy children across the country. Originating during the Depression as an informal arrangement to utilize the nation's schoolchildren as consumers of surplus farm products, the program was designed primarily to dissipate the glut in the agricultural markets. After World War II, selective service investigation of draftee rejections revealed a significant correlation between physical deficiencies and childhood malnutrition, highlighting the program's nutritional benefits. Congress then enacted the National School Lunch Act of 1946.

Under the Act, the Department of Agriculture continued to administer the program. The Act also retained provisions for the purchase of surplus agricultural commodities and codified and regularized direct


2 The Act applies to all nonprofit schools, both public and private. 42 U.S.C. § 1760(d) (7) (1964).

3 The Agricultural Appropriations Act of 1935, 7 U.S.C. § 612c (1964), reserves 30% of gross customs receipts for use by the Secretary of Agriculture to promote domestic consumption of farm products. Portions of these funds are available for school meal programs.

4 During the Depression, the Works Progress Administration and the National Youth Administration purchased surplus commodities and distributed them to impoverished persons. Wartime demand eliminated most of the agricultural surplus, and transportation shortages made deliveries of government-purchased commodities uncertain. The Government then resorted to direct indemnification of schools for food purchases. See S. Rep. No. 553, 79th Cong., 1st Sess. 10-11 (1945) [hereinafter cited as S. Rep. No. 553].


6 The Act is still administered by the Department of Agriculture. In August 1969, the School Lunch Program became the responsibility of the Food and Nutrition Service of the Department, but rules, regulations, licenses, and approvals were unaffected by this shift. 34 Fed. Reg. 13119 (1969).

The White House Conference on Food, Nutrition, and Health urged the transfer of all food programs from the Department of Agriculture to the Department of Health, Education, and Welfare, N.Y. Times, Dec. 5, 1969, at 14, col. 4, but this change has not been effected.
wartime appropriations to state school agencies for the purchase of non-surplus, nutritionally qualified foods. During the ensuing decade, the statute was erratically funded and indifferently administered. But in the early 1960's, as popular and governmental concern for the victims of poverty and hunger increased, the Act's potential usefulness became evident—it could provide needy schoolchildren with at least one nutritionally adequate meal per day.

In 1962, the Act's original cash allocation mechanism, formulated according to the state's per capita income and number of school-age children, was restructured. Based upon state per capita income and rate of child participation in the various lunch programs, the new formula rewarded states which had demonstrated a readiness to develop and promote lunch programs.

Section 1759a, also added in 1962, gave special assistance to participating schools drawing students from poverty areas to enable them to provide significantly larger numbers of needy children with a free or reduced-price meal. This assistance was also designed to relieve the poorest schools of the difficult task of allocating a limited number of meals among a larger number of equally needy children.

The 1962 amendments heralded the beginning of a shift in congressional focus from the economic hardships caused by the agricultural surplus to the problems of poverty and hunger. The Food Stamp Act of 1964 and the Child Nutrition Act of 1966 marked stages of the

---


8 See, e.g., M. Harrington, The Other America (1962).


10 42 U.S.C. § 1759a (1964), as amended, Act of May 14, 1970, Pub. L. No. 91-248, § 7, 84 Stat. 211-12. Section 1759a established a formula for disbursing special funds to especially needy schools. The formula was based upon the number of free or reduced-price lunches served in the state during the preceding year. Congress revised this formula in 1970 to allocate funds according to the ratio of the number of children in the state between the ages of 3 and 17 whose families have incomes of less than $4,000 per year to the number of such children nationally. Act of May 14, 1970, Pub. L. No. 91-248, § 7, 84 Stat. 211-12.

11 7 U.S.C. §§ 2011-25 (1964). The Food Stamp program authorizes the Secretary of Agriculture to provide needy families with coupons redeemable for food. Id. § 2013. The eligible family purchases the stamps for an amount equivalent to its usual, prestamp expenditure for food, id. § 2016(b), but the stamps may be redeemed for a larger quantity of food at a participating retail store. Id. § 2013(a).

shift. The enactment of the Vanik Program in 1968 as a part of the National School Lunch Act completed the transition. Although still intended to supply a market for farm surplus commodities, the National School Lunch Act now also reflects a strong concern with the nutritional problems of impoverished schoolchildren.

From the Act's inception, state and federal governments have shared responsibility for its administration and funding. Federal guidelines lodge significant discretion in the hands of local and state authorities, subject only to initial federal approval and periodic review. School district as well as state participation is entirely optional, and withdrawal from the program, although politically inexpedient, is largely unrestrained.

Receipt of federal funds is conditioned upon disbursement of three state dollars for every federal dollar contributed. The federal money available in any fiscal year for a particular state's use depends in part upon the number of meals served under the program in that state. That number—the state's participation rate—is multiplied by the state's assistance need rate, a figure based upon the state's per capita income. For each state with a per capita income equal to or in excess of the national average, the need rate increases from five to a ceiling of nine—the poorest states have need rates closest to nine. The product of the assistance need rate and the participation rate coefficients is an index for that particular state. Each state shares the federal funds appropriated in the same proportion as its index bears to the sum of the indices for all states.

---


16 Los Angeles is the program's most prominent dropout. Presently maintaining its own program, the city withdrew in 1955 when the federal per-meal subsidy was reduced from the statutory maximum of 96 to 43. Independent charitable organizations provide a limited number of free lunches for the city. COMMITTEE ON SCHOOL LUNCH PARTICIPATION, THEIR DAILY BREAD 114-16 (1968) [hereinafter cited as THEIR DAILY BREAD].


19 Id. § 1760; 7 C.F.R. § 210.2 (1970).

20 The following example illustrates the allocation process:

Assume that the nation is divided into two states, A and B, of equal population; that the national per capita income is $6,000 per year; and that each state served
Federal funds are intended to cover only the costs of food and certain nonfood and administrative expenses, and may not be applied to the cost of any building expansion, land acquisition, or rent for buildings necessary to furnish food service. State or local funds must pay for those facilities.

The heavy burdens imposed upon the states by these limitations on the use of federal money and by the matching requirements of the Act have been shifted to local, participating school districts; only twelve states currently bear any portion of the Program’s costs. State educational agencies and personnel act chiefly in administrative and supervisory capacities as liaisons between the local and federal levels, determining both initial and continuing eligibility of local units and

1-million lunches under the program during the past year. State A has a per capita income of $8,000; state B, $4,000. The share of each state is determined by the following formula:

\[ (\text{assistance need rate}) \times (\text{participation rate}) = I_s \]

Where \( I_s \) is the index figure for state \( s \).

\[ S_s = \frac{I_s}{I} \]

Where \( S_s \) is the share of state \( s \) in the federal funds and \( I \) is the sum of the index figures for all the states.

Applying that formula to states A and B:

**Assistance need rate** (42 U.S.C. § 1760(c) (1964)):
- State A: 5
- State B: 5 (6000/4000) = 7.5

**Participation rate**:
- State A: 1-million
- State B: 1-million

**Index figure**:
- State A: \( I_a = (\text{assistance need rate}) \times (\text{participation rate}) = 5(1,000,000) = 5,000,000 \)
- State B: \( I_b = 7.5(1,000,000) = 7,500,000 \)

**Share**:
- State A: \( S_a = \frac{I_a}{I_a + I_b} = \frac{5,000,000}{(5,000,000 + 7,500,000)} = 0.4 \)
- State B: \( S_b = \frac{7,500,000}{(5,000,000 + 7,500,000)} = 0.6 \)

Thus, state B would receive 60% and state A would receive 40% of the total federal appropriation.


22 See 7 C.F.R. § 210.7(b) (1970). In 1962, an amendment was proposed to extend the program to urban schools unable to participate because of inadequate facilities, but a study program to develop methods of furnishing meals to such schools was substituted for the amendment. S. REP. No. 2016, at 11.


executing the participation agreements with the Department of Agriculture. Thus the local school districts are responsible for financing and administering the bulk of the program. But because participating districts rely mainly on pupil contributions to defray expenses, the pupils themselves actually finance the state's portion of the program's costs.

Federal aid to participating schools reimburses them for expenditures made in connection with the program to a maximum level of nine cents per meal, although the federal contribution has remained well below the maximum in recent years. The average cost to assemble, prepare, and serve each meal is approximately fifty-seven to sixty cents, but schools rarely charge the full cost to any pupil, regardless of ability to pay. A lunch is ordinarily priced between thirty-five and forty-five cents; the higher prices are charged in secondary schools, which generally serve larger portions.

The heart of this complex administrative scheme is section 1758, which requires that participating institutions serve free or reduced-cost lunches to children determined "by local school authorities to be unable to pay the full cost" of the meal. The loosely drawn federal standards of eligibility are only advisory: local authorities have broad discretion to determine who is eligible, although the Act does require that a child receiving a free lunch may not be treated differently from his paying schoolmates.

But the local emphasis of the program is not always compatible with the Act's purpose of providing nutritious, free lunches to needy children. Schools without proper food preparation facilities, even in participating school districts, are commonly excluded from the pro-

26 Id. § 210.3(c).
27 See note 23 supra.
28 7 C.F.R. § 210.10(b) (1970). The 9c maximum applies to type A lunches, the basic meal served by most schools. Section 1759a provides for special assistance to poorer schools, and the regulations promulgated thereunder allow a maximum of 20c for a type A meal. Id. § 210.10(c).
30 Id. 49.
33 Children from families on AFDC or from households receiving welfare benefits through local programs are considered automatically eligible, 33 Fed. Reg. 15675 (1968), and the state educational agency must compel local school authorities to issue written policy statements of criteria to determine eligibility, see Act of May 14, 1970, Pub. L. No. 91-248, § 6, 84 Stat. 210-11. Other than these specific limitations, few additional controls circumscribe local discretion.
gram's benefits unless supplied with lunches prepared elsewhere. Originally constructed as "neighborhood" schools, older, urban schools lack the lunchrooms or cafeterias of their newer, suburban counterparts. Theoretically, students at such neighborhood schools are able to return home for a noon meal, but this assumes that the child returns to a household able to provide him with a nutritious meal, an assumption indeed questionable in many ghetto areas. Further, the chronic economic problems besetting most urban areas have resulted in significant reductions in expenditures for all school building programs, including the addition of cafeteria facilities to existing school buildings. Tight money, the high cost of land, and the unavailability of federal funds all contribute to the reluctance of local authorities to furnish lunchrooms in present schools and sometimes even in new school buildings. Consequently, those children whom the school lunch program is intended to benefit most directly are frequently denied its assistance. These and other apparent inequities in the program have produced a number of suits, most of which are currently pending in the federal courts. A brief examination of one adjudicated case will indicate some of the legal problems presented.

B. Briggs v. Kerrigan

Briggs v. Kerrigan arose in the District Court for the District of Massachusetts as an action for declaratory and injunctive relief to compel federal, state, and local administrators of the school lunch program to make lunches available to impoverished Boston elementary school pupils represented by the plaintiffs. Although the city participated in the program, plaintiffs all attended schools which lacked lunchrooms or cafeterias and consequently were unable to join in the program. Plaintiffs challenged the administration of the system on statutory and constitutional grounds.

35 Of any major city, New York City supplies the highest proportion of its pupils with free lunches and also bears a substantial share of the cost. All meals are prepared at a central kitchen on Long Island and trucked to schools within the five boroughs. Their Daily Bread 71-74.


40 307 F. Supp. at 299.

41 Briggs Complaint 8-9.

42 Id. 8.
Arguing that the Act established a priority in favor of nutritionally and economically deprived children, the plaintiffs read the Act to require that this priority apply throughout the participating school district. The defendants' failure to make meals available at the poorer, inadequately equipped schools violated the Act and the regulations promulgated thereunder. According to the plaintiffs, the defendants' administration of the Act—because not rationally related to the Act's purpose—also violated the equal protection clause of the fourteenth amendment. The resulting discrimination against the poorer students was unconstitutional.

After an extended discussion of the Act's provisions and legislative history, the court rejected both arguments. Any statutory priority of the Act in favor of poor children applied only to children in the participating school, not in the participating school system. Under this view of the statute, the Boston school system met the requirements of section 1758 and related provisions of the Act. The court also found that proper consideration of the legislative purposes did not support plaintiffs' contentions: the statute was intended to create a market for surplus agricultural commodities as well as to provide nutritious meals to both rich and poor schoolchildren. Congress would have more clearly expressed any priority favoring participation by poor schools.

The court also denied plaintiffs' constitutional claim. Exclusion of schools without cafeterias or lunchrooms did not unreasonably classify plaintiffs, for it did not implement a pattern of segregation according to wealth, but reflected a proper legislative allocation of resources.

This Comment will consider the constitutional and statutory issues raised by nonprovision in a participating school and by nonparticipation of a school within a participating district.

II. Nonprovision in the Participating School

Section 1758 requires schools participating in the National School Lunch Program to supply free or reduced-cost meals to all eligible children. Local school or welfare officials must determine eligibility requirements and must develop a policy statement setting forth the criteria for eligibility.

[A]s a minimum, [such criteria] shall include the level of family income, including welfare grants, the number in the

43 Id. 8-9.
44 Id. 8.
45 307 F. Supp. at 301.
46 Id. at 300.
47 Id. at 301.
48 Id. at 302-03.
family unit, and the number of children in the family unit attending school or service institutions . . . .

In administering the program, however, schools commonly set a single, reduced price for each meal served, regardless of the individual’s ability to pay, and the neediest children may be unable to pay this price. Even if the school dispenses free lunches to the poorest pupils, the number of “eligible” children may exceed the number of available free lunches. Children unable to pay the lunch price must either go without lunch or accept a free lunch according to some method of rotation among the eligible children. But the failure of a participating school to provide a free lunch to an eligible child clearly violates the provisions of the Act.

The issue of nonprovision in a participating school was central to the district court’s decision in *Shaw v. Governing Board of the Modesto City School District.* The plaintiffs sought to enjoin the implementation of the school district’s free lunch eligibility standards because the standards were based upon the district’s financial resources rather than upon a child’s ability to pay for a lunch. The court held that the Act required defendants to determine eligibility according to the need of the child without regard to the district’s cost. If the resulting cost exceeded the federal grant, the district could pay the deficit from its general funds, raise the price of the meals to paying students, or employ some combination of those two methods. Each of these solutions presents problems, however.

The cost of free lunches to a school is most likely to exceed the federal funds contributed in schools with a high proportion of eligible children. Often situated in lower income areas where property values are low to moderate, such schools lack sufficient reserve funds to make up the deficiency in the program budget. In addition, taxpayers in such areas would probably be unable to increase property taxes sufficiently to raise the necessary money. By definition, families in such a neighborhood are relatively poor and would be hard pressed to bear additional financial burdens. The economic condition of the area also makes futile increasing the price of the lunches to the paying students. Because most students would be eligible for the free lunches, the few remaining students would face rather substantial price increases to offset

50 See Complaint at 5, Marquez v. Hardin, Civil No. 51446 (N.D. Cal., filed June 5, 1969).
51 See *Hearings on Malnutrition,* supra note 36.
54 Id. at 1285.
the cost of the free lunches. But even the paying students are likely to be unable to sustain a significant cost increase. Consequently, they would be compelled to find alternative sources of supply. As these consumers leave the program and the demand for lunches decreases, the total revenue available to subsidize the free lunches will also decrease. Clearly, the poor school's search for funds to pay for free lunches will be difficult. If the school finds itself unable to overcome the deficit resulting from an insufficient federal grant and thus unable to comply with the statute, it must withdraw from the program.55

The practical problems raised by nonprovision in the participating school do not lend themselves to judicial resolution. Increased federal and state contributions to the school lunch program are essential to an adequate solution.

III. Equal Protection and the Nonparticipating School in the Participating School District

The failure of a participating school to provide a free lunch to a needy, eligible child clearly violates the Act.56 But a school electing not to participate in the program denies a meal to a potentially eligible child without violating the statutory mandate, for participation is purely voluntary. Although perhaps appropriate when each school functions autonomously, this result is more difficult to justify when the decision to participate is made for an individual school by a central authority such as a district school board.

To minimize its total expenditures while benefiting from the program, a district containing both a school serving a relatively wealthy area and a school situated in a poorer area might implement the program only at the wealthier school. In that school, the majority of the program's costs would be absorbed by pupil contributions from paying students,57 but in the poorer school the contributions of the paying students would be insufficient to pay for the larger number of free lunches distributed. The poorer school might also lack the facilities necessary to prepare and distribute lunches.58 Although the district might elect to utilize student contributions from both schools to offset the cost of all free lunches supplied to schoolchildren in the school system, the statute does not compel that approach.

Relevant in any equal protection analysis are the nature of the individual or group interest involved, the status of the complainants, the

55 See id. at 1286. Under the Shaw rationale, a school would probably be unable to adjust its determination of need to the size of the federal grant.


57 See note 23 supra; text accompanying note 27 supra.

effect of the challenged classification on the complainants, and the reasonableness of the official action in light of its purposes. Depending chiefly upon the interest at stake and upon the challenged classification, one of two standards of review will be utilized by the reviewing court. The court will either consider the legitimacy of the legislative purpose and the rationality of the method chosen to achieve that purpose (restrained review) or, if the interest affected is “fundamental” or the classification “suspect,” search for some “compelling state interest” to justify the discriminatory classification (active review).

A. Restrained Review: The Case for a Priority for the Poor

A reaction to a period of active Supreme Court review of economic regulations, restrained review accords considerable deference to legislative judgments and is useful primarily in cases involving economic regulation or similar use of the police power. Restrained review analyzes an equal protection argument in terms of the purpose of a particular state action and the reasonableness of the means chosen to achieve that purpose. If the method chosen to achieve a legitimate state purpose is reasonable, a court will sustain a challenged classification despite its allegedly discriminatory effect and despite the availability of alternative classifications which would effectuate the state’s purpose.

64 See id. 1077-87.
68 See Developments—Equal Protection 1087-1132.
69 Id. 1087.
Here the state's purpose is to provide meals under the National School Lunch Act. To challenge successfully the present administration of the school lunch program, plaintiffs must show that their inability to obtain a free meal because their school does not participate in the program is contrary to the Act's primary purpose. If the Act accords priority to feeding poor schoolchildren per se (and not simply to poor children attending a participating school), administrative action denying those children free lunches while permitting more affluent pupils to participate in the program is open to challenge as irrational.

But neither the Act's language nor its legislative history evidences an intent to favor poorer students regardless of whether they attend participating or nonparticipating schools. The purposes of the Act are to provide schoolchildren in participating schools with nutritionally adequate noon meal and to provide farmers with consumers of surplus agricultural commodities.

These purposes are inextricably entwined. Congressional reports issued shortly before the passage of the Act manifest an acute concern with remediating nutritional deficiencies in children, a concern motivated in part by the high proportion of draftee rejections traceable to poor childhood nutrition. But this concern embraces children of all economic strata who may receive nutritionally inadequate meals at home, not merely poor children. Further, the Act's objective of creating a viable market for surplus produce is best obtained through broad economic support and wide participation by pupils contributing financially.

---

68 Plaintiffs would be unlikely to challenge the Act's constitutionality. A declaration that the Act was unconstitutional would certainly not secure to impoverished pupils the benefits of the program.

69 The 1970 amendments to the Act discuss a priority for needy children:

In providing meals free or at reduced cost to needy children, first priority shall be given to providing free meals to the neediest children.

Act of May 14, 1970, Pub. L. No. 91-248, § 6(b), 84 Stat. 210 (emphasis added). This provision only erects a priority favoring eligible, needy children in schools voluntarily participating in the program. The problem of the nonparticipating school in the participating district remains unresolved.


71 The term "schoolchildren" is used broadly. Congress was primarily concerned with assisting children transported great distances to school or who had working mothers, and neither of these burdens is unique to poor children. See H.R. Rep. No. 684, supra note 4, at 2.

72 See id. 3. Congress apparently did not perceive the relationship between low income and insufficient consumption of costly, nutritious foods. See S. Rep. No. 553, supra note 3, at 9. This lack of perceptivity still persists, see House Comm. on Agriculture, 90th Cong., 2d Sess., Hunger Study and Hunger Study Supplement (Comm. Print 1968), despite forceful empirical studies demonstrating that poverty is the most important impediment to a proper diet. See Citizens' Bd. of Inquiry Into Hunger & Malnutrition in the United States, Hunger, U.S.A. (1968).

73 See S. Rep. No. 553, supra note 3, at 8-9, 12.

74 Sources cited note 4 supra.
to the program. A priority favoring poor children would require the use of a greater percentage of appropriated funds to supply free lunches, resulting in less money being spent to purchase agricultural commodities.\(^5\)

The statutory mechanism for implementing the program also indicates that the Act does not establish an unqualified priority favoring poor children, for the emphasis is on local control, leaving to the individual school the choice whether or not to participate. Poor children have an explicit statutory remedy only if denied a free lunch in a participating school.\(^7\)

The debates on the bill which became the National School Lunch Act do not suggest a priority for the poor. Congress focused almost exclusively on fears of governmental extravagance in a period of post-war dislocation,\(^7\) on potential, undesirable increases in the federal bureaucracy,\(^7\) and on fears of eventual federal control of the public schools.\(^8\) References to the poor were peripheral,\(^8\) and mention of a priority absent.

Legislative activity in the 1960's further undercuts the argument for an across-the-board priority in favor of the poor. Although the Child Nutrition Act of 1966 explicitly provided that first consideration be accorded to economically deprived areas,\(^8\) Congress made no similar change in the provisions of the National School Lunch Act and no Department of Agriculture regulation has attempted to implement such a policy.

Assuming that the Act does not embrace a priority favoring all poor children, a school district may deny free lunches to impoverished

---


\(^7\) Some ambiguity inheres in the term “school” for the purposes of the Act. Although defined in the statute to include only individual attendance units, see 42 U.S.C. § 1760(d) (7) (1964), the regulations promulgated under the Act employ the terms “school” and “attendance unit” in distinct contexts. See 7 C. F. R. §§ 210.2 (c-1), (m) (1970). Assuming “attendance unit” represents the smaller unit, plaintiffs in Briggs alleged that “school” meant “school district” as used in the Act. Points and Authorities in Support of Plaintiffs’ Motion for a Preliminary Injunction at 7-9, Briggs v. Kerrigan, 307 F. Supp. 295 (D. Mass. 1969). Although admittedly perplexed by the apparent discrepancy, the Briggs court utilized the statutory definitions. 307 F. Supp. at 301.

\(^8\) See, e.g., 92 Cong. Rec. 1451 (1946) (remarks of Representative Arends); id. 1459-60 (remarks of Representative Clevenger).

\(^7\) See id. 1466-67 (remarks of Representative Gwynne).

\(^8\) See id. 1476 (remarks of Representative Smith); id. 1505 (remarks of Representative Sumners); id. 1461 (remarks of Representative Wadsworth); id. 1465 (remarks of Representative Taber).

\(^8\) See id. 1453 (remarks of Representative Sabath); id. 1458 (remarks of Representative Hall); id. 1471 (remarks of Representative Voorhis). But see id. 1468 (remarks of Representative Holifield); id. 1469 (remarks of Representative Biemiller); id. 1494 (remarks of Representative Powell).

pupils in a nonparticipating school. This denial is reasonably calculated to implement the congressional purpose; the school district simply responds to the omnipresent problem of economic scarcity. Thus, unless the local administrators intentionally discriminate in implementing the Act, a school district's failure to provide lunches to all potentially eligible children will probably not be held unconstitutional under the restrained review standard.

B. Active Review: Fundamental Interests and the Nutritionally Adequate Meal

Active judicial review in fourteenth amendment cases has developed along two distinct lines. Active review is appropriate when the state statutory or administrative actions are apparently based upon classifications viewed as inherently suspect, such as race, or upon classifications abridging certain fundamental interests. Because classifications based upon wealth—like those resulting from the administration of the school lunch program—have never been clearly recognized as sufficiently questionable to permit active review, examination of the equal protection problems posed by the nonparticipating school in the participating district is most useful if based upon consideration of fundamental interests abridged by a classification based upon wealth. Here too, however, the argument is not at all promising.


See generally Developments—Equal Protection 1087-1120.

See id. 1087-91.

See generally id. 1120-23. The decisions employing active review focus on a narrow group of fundamental interests, see note 61 supra, but unfortunately fail to articulate a comprehensive or consistent theory explaining what interests will or will not be deemed fundamental. See Developments—Equal Protection 1130. See also Cox, The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 95 (1965). Despite the apparent lack of objectivity in deciding which interests are sufficiently critical to trigger active review, interests closely related to those presently deemed fundamental (and probably only those interests) are likely to achieve the necessary status to require active review. Cf. Black, The Supreme Court, 1966 Term, Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 60, 97-102 (1967); Karst & Horowitz, Reitman v. Mulkey: A Telophase of Substantive Equal Protection, 1967 S. Ct. Rev. 39, 57 (1967).


Classifications based upon wealth have been challenged most successfully when fundamental interests are infringed. See sources cited note 62 supra. Thus, a criminal defendant's inability to purchase a transcript abridged his fundamental interest in a criminal appeal, Griffin v. Illinois, 351 U.S. 12 (1956), the inability to pay a poll tax denied a citizen his right to vote, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966), and the inability to receive welfare benefits until a residency requirement was satisfied restricted the right to travel freely, Shapiro v. Thompson, 394 U.S. 618, 629 (1969).
Assuming that poor schoolchildren have no fundamental legal interest in securing a nutritious meal, active review is inappropriate to assess the administration of the Act unless a free lunch can be deemed essential for a poor student to enjoy a fundamental interest. Never expressly recognized by the Supreme Court as fundamental, equal educational opportunity hovers unsettlingly on the borderline between fundamental and other interests. Arguably, the provision of a free lunch to a needy child is necessary for him to obtain an equal educational opportunity, for a hungry child cannot benefit from the instruction offered by his school.

The doctrine of equal educational opportunity emerged from the dicta of *Brown v. Board of Education*, decided by the Supreme Court in 1954. Since then, similar dicta have appeared in other cases dominated by the racial element. Judicial scrutiny has frequently extended beyond simple condemnation of racial classifications to an analysis of the impact of the alleged discrimination upon poor children, both black and white. In *Hobson v. Hansen*, Judge J. Skelly Wright strongly

---


90 This reasoning is analogous to that implicit in *Griffin v. Illinois*, 351 U.S. 12 (1956), in which the Supreme Court held that a state statute providing full appellate review of criminal convictions only upon presentation of a transcript which must be paid for by the appellant violated the equal protection clause when the requirement effectively denied full appellate review to the indigent. The "fundamental interest" protected was not an indigent's right to a transcript, but rather the right not to have his guilt or innocence be determined by his economic status. *See id.* at 19 ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."). Although a poor schoolchild has no fundamental legal interest in securing a free lunch, the equal protection clause may nonetheless preclude a school district from distributing lunches under the National School Lunch Act in a manner impairing the ability of a poor schoolchild to exercise a recognized fundamental interest.


92 Food is unique in that an adequate amount of it in childhood is essential for the future health of the individual. It is a fundamental requirement, unlike any other need. Without adequate nutrition the most carefully devised educational system will be ineffective.

S. REP. No. 553, supra note 3, at 12; *see H.R. REP. No. 684, supra note 4, at 2.


criticized the District of Columbia school system, asserting that educational opportunities should not be qualified by either race or poverty. Both conditions produced equally detrimental effects which the District had the duty to remedy.\footnote{Id. at 407, 493, 506.} Despite its rather broad language, however, \textit{Hobson} was primarily concerned with a system of de jure racial classification; racial overtones pervaded much of the court's discussion of the school system's impact on the poor.

A more recent case dealt explicitly with the issue of equal educational opportunity. In \textit{McInnis v. Shapiro}.,\footnote{293 F. Supp. 327 (N.D. Ill. 1968), \textit{aff'd per curiam sub nom.} \textit{McInnis v. Ogilvie}, 394 U.S. 322 (1969).} a three-judge district court rejected plaintiffs' argument that the Constitution compelled recognition of an equal educational opportunity. The plaintiffs in \textit{McInnis} were schoolchildren living in urban ghettos and attending schools which spent far less per pupil than more affluent schools throughout the state. They contended that the state statutes permitting this wide variation in educational expenditures unconstitutionally denied them equal protection of the laws, and sought an injunction forbidding distribution of funds under the statutes.\footnote{Id. at 329.} The district court dismissed the suit for failure to state a claim upon which relief could be granted, holding that the problem was essentially legislative and beyond the competence of the judiciary\footnote{Id. at 335-36.} and that the Constitution did not require states to allocate funds on the basis of the "educational needs" of students.\footnote{Id. at 331-35.} The court's decision rested on its belief that no manageable judicial standard could be devised to evaluate the constitutionality of school funding statutes. The only possible standard, the court felt, would require equal per pupil expenditures, an approach much too rigid to deal with varying local problems and student needs.\footnote{Id. at 335-36.} The Supreme Court affirmed this decision in a memorandum opinion.\footnote{McInnis v. Ogilvie, 394 U.S. 322 (1969).} Although the Court's action may only reflect its judgment that the issue was not ripe for review,\footnote{See Shanks, supra note 91, at 264.} judicial acceptance of a doctrine of equal educational opportunity in the near future is improbable. And until the Court holds that equal educational opportunity is a fundamental interest not to be abridged by discriminatory classifications based upon wealth, plaintiffs asserting a denial of equal protection because their school in a participating district does not provide them with free lunches are unlikely to prevail.
The problems created by a constitutional requirement that free lunches be distributed according to a uniform intradistrict standard reinforce judicial reluctance to hold the present administration of the National School Lunch Act unconstitutional. The expansion of the presently underfunded program would require substantial restructuring of the entire administrative apparatus and would necessitate local government expenditures for new or improved cafeteria facilities to meet the constitutional and statutory mandates. Rather than shoulder these added burdens, a district might elect to withdraw entirely from the program; in a period of inflation, tight money, and taxpayer revolt, withdrawal might be politically feasible. Under current appropriation levels, intradistrict uniformity would require drastic cutbacks in the quality or quantity of lunches provided.\textsuperscript{104}

\textbf{CONCLUSION}

The answer to the school lunch dilemma is likely to come from legislative action rather than judicial intervention. Increasing funding at all levels of government and a restructuring of the statutory scheme to provide lunches first to needy children throughout a school district would help eliminate some of the program's most pressing problems.

To remedy the deficiencies of the National School Lunch Act, this Comment suggests greater federal participation in funding the program and the adoption of the following amendments:

1. The second sentence of section 1757 of the Act is amended to read: "Such disbursement to any school shall be made only for the purposes of reimbursing it for the cost of obtaining agricultural commodities and other foods for consumption by children in the school lunch program and nonfood assistance in connection with the program or for the purpose of enabling any school to construct the cafeteria or other facilities necessary to enable it to participate in the school lunch program."

2. Section 1760(d)(7) is amended by striking out that paragraph and substituting the following: "‘School’ means any public or nonprofit private school of high school grade or under, any school district or similar entity controlling directly or indirectly one or more public schools of high school grade or under and, with respect to Puerto Rico, shall also include nonprofit child-care centers certified as such by the Governor of Puerto Rico."

\textsuperscript{104} Although the regulations require food programs to meet certain nutritional standards, 7 C.F.R. § 210.9 (1970), a school now providing meals exceeding that minimum level might have to reduce the nutritional value of the meals to the statutory minimum.
The first amendment would authorize the expenditure of school lunch funds for the construction of cafeterias, lunch rooms, or food preparation facilities to enable presently nonparticipating schools to enjoy the program's benefits. The second would amend the definition of "school" to include school districts. Local school governing bodies would be required to choose between participating entirely in the program or not at all; if one school in the district participates, all schools must. This would effectively establish a priority for needy children on a districtwide basis.

Sheila A. Taenzler