Recent Developments in the Law of Equal Educational Opportunity

BETSY LEVIN*

INTRODUCTION

Beginning with Brown v. Board of Education\(^1\) in 1954, the intervention of the courts into the field of education has been unprecedented. In the two decades since Brown, the federal courts have been concerned with implementing the constitutional requirement that no student is to be denied equal educational opportunity because of his race. But in the late sixties, courts also became involved in other, non-racial areas of equal educational opportunity, although the real impact of this litigation was not to come until the first half of the present decade. Unequal resources, the failure to provide appropriate education (or any education at all) for the handicapped, and the tracking and classifying (and misclassifying) of students all became the subjects of legal attack. The law has evolved, or is evolving, so rapidly in these areas that there is still a great deal of uncertainty as to just what the law is.

This article provides a brief overview of the current legal scene as it pertains to Equal Educational Opportunity. To do that requires some definition of that phrase. The number and variety of definitions of Equal Educational Opportunity, however, are legion—and one man’s Equal Educational Opportunity may well be another man’s law suit. Nevertheless, for the purposes of this article, the definitions will be grouped into three basic categories: equal treatment of the races, equal access to educational resources, and equal educational outcomes.\(^2\)

The first definition—equal treatment of the races—is concerned with

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* Associate Professor of Law, Duke University School of Law; LL.B. Yale Law School. This article is an edited and footnoted version of a speech delivered at a conference of superintendents and board members from school districts in Louisiana, sponsored by the Educational Resource Center at Tulane University.

\(^1\) 347 U.S. 483 (1954).

\(^2\) For a thorough and enlightening treatment of the various definitions of equal educational opportunity, see Yudof, Equal Educational Opportunity and the Courts, 51 Tex. L. Rev. 411 (1973).
non-discriminatory treatment for all public school students, regardless of race; and now one might add, regardless of sex.

The second definition focuses on equal access to school resources—whether the measure be dollars, facilities, or services. This definition or theory, as one astute commentator has put it, assumes that if the state provides equal exposure to school resources, each student will have an equal probability of academic, and presumably life, success. Where the inequalities are blatantly obvious, such as when blacks or other minorities or the poor are uniformly excluded from college preparatory tracks or are given physics textbooks written before the discovery of the atom, judicial intervention clearly seems appropriate. When students are completely excluded from the public schools, particularly when such a sanction is administered without any procedural safeguards, the courts should find little difficulty in seeing this as a clear denial of equal educational opportunity. It has further been argued that when children are taught in a language—English—that they cannot understand, or when students are unable to pay fees for textbooks or other items essential for an education, the courts should treat this as the functional equivalent of exclusion. But where the inequalities are less clear or perhaps have some educationally relevant basis, it becomes difficult for the courts to find judicially manageable standards for intervention.

The third definition of equal educational opportunity—equal educational outcomes—is the most difficult one as it focuses on the effectiveness of the educational process. Under this definition, the state has an affirmative obligation to compensate for inequalities among individuals. "[It is not equal treatment if] the able bodied and the paraplegic are given the same state command to walk." This doctrine thus permits wide disparities in the allocation of education resources, so long as the different needs of children are being met in a way that results in equality in the outcomes or results of the schooling process.

Each of these definitions of equal educational opportunity has much to recommend it; indeed, on occasion, all three of these doctrines can and should come to focus at one time. However, the courts have more readily addressed inequalities of the first and the second type, than of the third.  

3 Id. at 473.
5 See, e.g., Yudof, supra note 2; Roos, The Potential Impact of Rodriguez on Other School Reform Litigation, 38 LAW & CONTEMP. PROB. 566 (1974); Lau v. Nichols, 483 F.2d 791, 803 (9th Cir. 1973) (Hill, J., dissenting); id. at 805 (Hufstedler, J., dissenting from denial of hearing en banc).
6 Lau v. Nichols, 483 F.2d at 806.
7 See McInnis v. Shapiro, 293 F. Supp. 327, 331 (N.D. Ill. 1968), aff'd. mem. sub nom. McInnis v. Ogilvie, 394 U.S. 322 (1969), where the plaintiffs had asked that public school expenditures be allocated according to student needs. The court ruled that no discoverable
The current judicial perspective of equal educational opportunity as it concerns equal treatment of the races (and the sexes) is presented in Part I of this article. Part II deals with the law as it relates to that theory of equal educational opportunity reflected in the demand for equal access to educational resources. In Part III, litigation concerned with equal educational opportunity for the handicapped is reviewed, including the potential impact of the Rodriguez decision on future litigation of this type. Finally, Part IV discusses the most recent Supreme Court decision on the constitutionally-required procedural safeguards in student suspensions and expulsions.

I

EQUAL TREATMENT OF THE RACES (AND SEXES)

Racial Discrimination

The issues involved in school desegregation which concern the courts today are clustered around three substantive areas. The first deals with the violation of a substantive constitutional right—the circumstances under which the segregated pattern of schools is a violation of the equal protection clause of the fourteenth amendment, giving rise to a duty to desegregate. The second area focuses on the nature and extent of the remedy that will be required once the duty to desegregate is established. The third area looks to what have been termed second-generation problems—problems that arise after the public schools have officially been "de-segregated" which continue to frustrate the equal educational opportunities of minority students.

The violation

The Swann case is undoubtedly typical of what will be found in the South: a past history of district-wide de jure segregation and a failure to completely disestablish a formerly dual school system. In this situation, the Court presumes a causal connection between a school district's admitted past discrimination and the present segregated pattern. What kinds of evidence are needed to show that in a specific school district there are "vestiges" of past state-imposed segregation? How are and manageable standards existed for it to make this determination. Id. at 335. See also Yudof, supra note 2.


8a For an expanded treatment of the issues in this section, see Levin & Moise, School Desegregation Litigation in the Seventies and the Use of Social Science Evidence, 39 Law & Contemp. Prob. No. 1, __ 1975.

9 "No state shall... deny to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1.

causal links to the past to be established? In *Swann*, the Court points out that past discriminatory conduct of the school board might have contributed to the creation and maintenance of segregated residential patterns which, when coupled with the present use of geographic proximity as the basis for assignment, produce segregated patterns of student attendance.\(^{11}\)

**The remedy**

The more significant issue today, at least as far as the public is concerned, is the *extent* of integration that will be required and the methods by which that integration must be brought about, once a violation of the equal protection clause has been found. The Court is fairly categorical about the objective: the greatest possible degree of actual desegregation, taking into account the "practicalities" of the situation.\(^{12}\) What are the remedies that are available to the plaintiff and when do they become "impractical?"

*Racial balance or mathematical ratios.* To what extent is "racial balance" required? We are told in *Swann* that

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\text{"[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.} \\
\text{...[t]he use made of mathematical ratios was no more than a starting point} \\
\text{in the process of shaping a remedy, rather than an inflexible requirement...Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. ..."}\(^{13}\)

**Busing.** The Court has said that busing is to be used where feasible, but the times and the distances should not be "so great as to either risk the health of the children or significantly impinge on the educational process."\(^{14}\) But what must a school board show as evidence that busing is harmful to the health of the children? In a recent Virginia case involving a desegregation plan which included busing, the district court permitted children in kindergarten and the first and second grades to remain in their neighborhood schools on the basis of a pediatrician's testimony that such young children would be "physically and psychologically affected" by compulsory busing for long periods of time.\(^{15}\) Another question is whether

\(^{11}\) *Id.* at 7, 20-21.
\(^{12}\) *Id.* at 26.
\(^{13}\) *Id.* at 24-25.
\(^{14}\) *Id.* at 30-31.
\(^{15}\) Thompson v. School Bd., 363 F. Supp. 458, 460 (E.D. Va. 1973). The decision was upheld on appeal. 498 F.2d 195 (1974). Judge Winter, in his dissenting opinion, found reliance on the pediatrician's testimony inappropriate:

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\text{...I record my suspicion of the basis on which the district court approved retention of a} \\
\text{dual system for grades 1 and 2. It relied heavily on the testimony of Dr. Hogge, a}
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the extraordinary costs attributable to busing in a system which is already seriously financially hard pressed—requiring cutbacks in educational programs or increases in class size to free up money for the purchase and operation of buses—can be seen as "impinging on the educational process."

**Faculties.** The Supreme Court has required that teachers in segregated schools be reallocated throughout the school system so that the composition of each school's staff approximates that of the entire system.\(^1\) Compared to the position the Court has taken on the use of mathematical ratios to balance the racial composition of the students of each school, the Court has been much less cautious and equivocal when it comes to balancing faculty.\(^2\)

"**White Flight.**" If the remedy will precipitate "white flight" from the community or from the public school system altogether, making ultimate achievement of integration impossible, will a lesser remedy be substituted? The Fourth Circuit has had extensive debate over whether desegregation orders should be drawn to minimize the "white flight" phenomenon.\(^3\) It

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pediatrician, to the effect that the health of students in kindergarten and the first and second grades would be adversely affected if they were not permitted to attend neighborhood schools. But as I read the testimony of Dr. Hogge, it was—beside the obvious that there are limits to the physical endurance to children in grades 1 to 7, and if transportation, coupled with the usual school day, exceeded those limits, the effect would be deleterious to the child—that the effect of transportation on the physical and mental health of a child depends upon whether he is happy which, in turn, depends upon whether he is transported to a school "of his choice or his parents' choice." If the child is unhappy, i.e., not transported to a school of his choice or his parents' choice, "then it follows from there, as the night does the day, that you're just going to have a poor situation." Acceptance of Dr. Hogge's thesis, it seems to me, would be to require application of the equal protection clause to depend upon a plebiscite by parents. This is a novel doctrine which I do not think finds support in the authorities.

498 F. 2d at 198-99.


\(^{18}\) Judge Craven, concurring and dissenting in Brunson v. Board of Trustees of Sch. Dist. No. 1 of Clarendon Cty, 429 F.2d 820 (4th Cir. 1970), after noting that in 1969, when there were 2,408 black students and 256 white enrolled, 110 white students "fled the public school system in favor of a parochial private school," and 100 more applied for admission for the following fall, said that judges in fashioning remedies cannot successfully ignore reality....[S]ome degree of moderation in selecting a remedy is more likely to accomplish the desired result, a unitary, non-racial public school system, than is unyielding fidelity to the arithmetic of race....

The threat of flight from the public school system ordinarily should not be allowed to influence the selection of the plan or its judicial approval. It is relevant here only because the whites constitute such a small minority....

[A] practical approach to the problem would...greatly diminish the temptation to flee the system....

Id. at 821-22.
has been suggested, however, that the silence of the majority in *Milliken v. Bradley*, taken together with Justice Marshall's dissent in that case, "means that white flight can never be a relevant factor in considering the appropriate remedy for dismantling a dual school system." The Supreme Court, in *Wright v. Council of the City of Emporia*, recognized the phenomenon of "white flight," but not in the context of minimizing the impact of a desegregation plan by compromising the plan in an effort to retain whites who might flee if there were total desegregation. Instead the Court prohibited a city from withdrawing from an existing county school district which was still under federal court order to disestablish a dual school system. The possibility of "white flight" from the county school system to the proposed city system was one of the factors the Court felt "would actually impede the process of dismantling the existing dual system."

**Remedies which disproportionately burden minorities.** Some cases have raised the issue of the disproportionate busing burden borne by blacks. Courts have accepted "one-way" busing as a component of a desegregation plan, meaning that it is only the black children who are bused to white neighborhoods to attend schools. While formerly all-

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Judge Sobeloff, in a separate concurring opinion, responded:

The dissenters agree that the Board's freedom of choice plan is deficient, but they consider the remedy too strong. As they point out, we are threatened in this case with an exodus of white students that tends to convert the court-ordered integration into an exercise in futility.

It would ... astonish the *Brown* court to learn that 16 years later ... it was seriously being contended that desegregation might not be required insofar as it threatened to impair majority white situations. ...

The dissent's exposition of the white majority thesis is only in connection with its perception of a serious "white flight" problem. ...

"White Flight" is one expression of resistance to integration, but the Supreme Court has held over and over that courts must not permit community hostility to intrude on the application of constitutional principles. ... [D]issidents who threaten to leave the system may not be enticed to stay by the promise of an unconstitutional though palatable plan. ... [T]he road to integration is served neither by covert capitulation nor by overt compromise. ...

The purported restriction of the thesis to extreme white minority-white flight situations is really no limitation at all. Rather it offers a premium for community resistance. More to be feared than white flight in Clarendon County would be any judicial countenancing of the suggestion that abandoning or qualifying a desegregation program is a legally acceptable way to discourage flight. ...

**Id.** at 824, 826-27.


* Id. at 801-02.


* Id. at 466.

* Davis v. Board of Sch. Comm'rs of Mobile Cty, 483 F.2d 1017 (5th Cir. 1971); Norwalk
black schools can be closed for "non-racial reasons," the courts have held that they cannot be closed on the basis of "racial considerations." For example, in a case originating in Jacksonville, Florida, the Fifth Circuit upheld the closing of five formerly black schools on the ground that there were sufficient non-racial reasons: all were deteriorated; one was located between a slaughterhouse, a polluted creek, and a city incinerator; and in three schools the incidence of vandalism and intrusion were so frequent and serious that teachers and children were locked in their rooms for safety. This particular issue of the disproportionate burden has not yet been treated by the Supreme Court.

Metropolitan area relief. The Supreme Court, in its decision in Miliken v. Bradley, indicated that there may be limits as to remedy, despite a clear-cut violation of the equal protection clause. In the Detroit case, the Supreme Court accepted the lower court's finding that the system was segregated as a result of actions of school officials, making it a de jure segregation violation. Nevertheless, an acceptable desegregation plan could not include parts of fifty-three suburban school districts when there was no evidence that they had contributed to the segregation of the Detroit school system. The Court, however, left open the possibility—and this is particularly evident when one reads Justice Stewart's concurring opinion—that certain circumstances could arise when metropolitan consolidation or inter-district busing would be an appropriate remedy.

The belief that the Supreme Court has not totally closed the door on an inter-district remedy finds additional support in its treatment of a recent Sixth Circuit decision ordering cross-district busing for Louisville, Kentucky. The initial decision in this case was appealed to the Supreme Court just as the Detroit case was being decided. Rather than overturning the Louisville decision right then and there along with its decision in the Detroit case, the Supreme Court sent it back to the Sixth Circuit, asking it to reconsider the Louisville case in light of Miliken v. Bradley. The Sixth Circuit did reconsider the case. The Court concluded that the prob-
lem in *Milliken* was that the remedy "was broader than the constitutional violation" but that in the case of Louisville (with a pupil population fifty percent black) and Jefferson County (with a pupil population only four percent black), "the situation presented is that of two districts in the same county of the state being equally guilty in failing to eliminate all vestiges of segregation..." Accordingly, the Sixth Circuit noted that on remand of the case, the district court's order could include an inter-district remedy.

**Second-generation problems**

It seems likely that not much new legal ground will be broken in the next few years as to whether or not a violation of the equal protection clause exists (certainly as far as the South is concerned), and as to what is acceptable as a remedy—with the possible exception of the question of how wide the Supreme Court has left open the door to an inter-district approach after the Detroit case. The real issues for the next few years will center around the so-called “second-generation” problems. Following are some of the second-generation problems which have already surfaced:

**Student discipline.** When a school system has newly desegregated, often a disproportionate number of black students seem to be suspended, expelled, or otherwise disciplined. There is evidence that suggests that such sanctions are being used in a discriminatory manner. The judge in *Hawkins v. Coleman,* a recent case involving the Dallas, Texas school system, found that blacks were systematically suspended more frequently, endured longer suspensions, and were also subjected to corporal punishment much more often than whites—particularly in schools where whites were a majority. The superintendent of the Dallas school district testified that this was attributable to "institutional racism." Other testimony indicated that black students would become more frustrated as the institution continued to refuse to respond to their needs and ambitions and that this frustration would be reflected in one of two attitudes: either increased passivity or increased hostility, the latter of course, resulting in increased "suspendable" behavior. The court also found that conduct by blacks that would not be "unusual" or "offensive" in a black environment becomes, to many teachers, "disruptive" or "suspendable conduct." The court ordered a total overhaul of procedures by the school system.

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32 Id. at 1333–35.
33 Id. at 1336.
34 Id.
35 Id.
Tracking and ability grouping. An important case in which the use of ability grouping and testing was challenged is Hobson v. Hansen. In that case the court abolished the tracking system used in the public schools of the District of Columbia which placed minority students in the lower levels of the standard curricula. The court noted that although "the intent was not to make pigeonholes into which pupils would be permanently sorted like mail of different classes," the evidence conclusively demonstrated that once a student was placed in a lower track, there was rarely any upward movement. The four-track system, according to the court, had degenerated into a "four-rut system." Students were assigned to a particular track on the basis of standardized achievement test scores. The court found that the tests used were biased against Negro and other low-income students:

When standard aptitude tests are given to low income Negro children, or disadvantaged children, the tests are less precise and less accurate—so much so that test scores become practically meaningless. Because of the impoverished circumstances that characterize the disadvantaged child, it is virtually impossible to tell whether the test score reflects lack of ability—or simply lack of opportunity. Moreover, the probability that test scores of the Negro child or the disadvantaged child will be depressed because of somewhat unique psychological influences, further compounds the risk of inaccuracy.

This seems to be a much stronger attack on tracking per se than any other decision to date, probably due, in part, to the extreme inflexibility of the tracking system in the District of Columbia, which extended as far down as the early elementary grades. Most courts have intervened in this area only when it is obvious that school officials are using the device of tracking children in order to prevent integration. Thus, the courts have held that when a formerly dual, segregated school system has just recently been, or is in the process of being dismantled, pupil assignment by standardized test scores is prohibited when the result is the perpetuation of the dual system. This is true for segregation within the system, within individual schools or within individual classrooms. The problem has

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Id. at 464.

Id. at 485.


been to develop remedies that cure civil rights violations without interfering with legitimate educational judgments about the need to group children by ability.

Resegregation. To what extent will school officials be held responsible for resegregation ("white flight" either from the school district or from the public school system)? There are several factors that are within the control of school officials that might encourage or inhibit resegregation: the overall quality of the educational offering; improvement of older physical plants; and the preparation of teachers, students, and the community for the process of desegregation. While some of these factors have been incorporated in court-ordered desegregation plans, it is not clear whether courts will find independently that there is a legal duty upon school officials to retard resegregation.

Sex Discrimination

The law regarding sex discrimination is much less settled than that regarding race discrimination. There are, however, a number of federal statutes concerned with sex discrimination in schools, most of them dealing with discrimination in employment. But the most important piece of legislation, if one is speaking of equal educational opportunity, is Title IX of the Education Amendments of 1972, which, while it also deals with sex discrimination in employment in education, is primarily concerned with the differential treatment of students on the basis of sex in regard to curriculum, extra-curricular activities, and student discipline regulations. The comments made in this article concerning Title IX requirements are based in large part on the revised proposed regulations, although further changes in these regulations are likely.

In many situations, however, a claim of constitutional rather than statutory violation can be made. This section of the article first discusses the Supreme Court's treatment of gender-based discrimination in general in order to enable a clearer understanding of lower court decisions which have dealt specifically with sex discrimination in school-related matters.

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45 On June 20, 1974, the Department of Health, Education and Welfare published proposed regulations for implementing this Title, and invited comment on the regulations. By October 15, they had received 9700 responses. The regulations were then revised and sent to the President for approval. After the President approved the regulations, they were returned to Congress, which has forty-five days in which to act. The revised regulations appear in 40 Fed. Reg. 24128 (1975).
The second part of this section suggests the kinds of situations to which Title IX might apply.

The Supreme Court and Sex Discrimination

Between 1868, when the fourteenth amendment was ratified, and 1971, not a single statute which discriminated on the basis of sex was found by the Supreme Court to be in violation of the fourteenth amendment. Legislation which discriminates on the basis of sex appears to be grounded either on the need to protect women or on assumed differences between the sexes in ability. A review of the cases presenting challenges to such sex distinctions indicates that, historically, Supreme Court justices have had a deep-seated belief in woman's "separate place." In large part, the Supreme Court justified its denial of equal opportunities to women by emphasizing their unique role in bearing children.

In 1873, a state's refusal to admit women lawyers to the bar was held not unconstitutional by the Supreme Court. Justice Bradley's concurring opinion indicates the status which women were to be afforded:

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex ... unfits it for many of the occupations of civil life. The constitution of the family organization ... indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.46

This attitude of the judiciary prevailed well into the twentieth century.47 Then, more than a century after the ratification of the fourteenth amendment, the Supreme Court—for the first time—held that a statute establishing a classification based solely on gender violated the equal protection clause. Before describing this case, titled Reed v. Reed,48 a brief review of the tests used to determine whether or not a particular statute violates the

46 Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873). In the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), the Supreme Court had confined the equal protection clause, "in light of the [amendment's] history ... and [its] pervading purpose ...", to situations in which the "newly emancipated negroes" had been discriminated against. Id. at 71. In the Bradwell case, therefore, the denial of admission to the bar was attacked on the basis that the privileges and immunities clause of the fourteenth amendment had been violated.

More than two decades later, a similar case was again appealed to the Supreme Court. In this case, the plaintiff had been admitted to the District of Columbia bar and had sought admission to the Virginia bar under a statute providing that any "person" who had previously been admitted to practice in any other state or the District of Columbia could practice law in Virginia. The state's highest court construed "person" to mean "male," and this was unanimously upheld by the U.S. Supreme Court. In re Lockwood, 154 U.S. 116 (1894).


equal protection clause of the fourteenth amendment may help to understand the positions of members of the Court on gender-based discrimination. The traditional equal protection analysis is utilized in such areas as economic and business regulations in which there is a strong presumption of constitutional validity. The legislature has wide discretion in assessing the problems to be dealt with and in deciding what classifications are reasonable; only if the classification is totally irrational and arbitrary will the classification be found to be impermissible.

A different equal protection test is applied to certain "suspect" classifications. In these cases, the classification is subjected to close scrutiny by the Court. The classifications termed suspect—such as race or national origin—are required to have more than a rational connection with a legitimate state purpose. Thus a suspect classification requires that the state have a compelling governmental interest, meaning that it must show that there is no other less onerous, less discriminatory means by which it could achieve its legitimate objective.

The Court has articulated a number of tests or criteria by which to determine whether a class is "suspect":

1. Does the class have an immutable characteristic?
2. Has there been a history of invidious discrimination against the class in question?
3. Is the class a discrete and insular minority?
4. Is the class politically powerless?
5. Does the classification stigmatize members of the class as inferior?

The obvious question, then, is are the similarities between race and sex classification sufficient to warrant treating both as suspect?

Clearly classification on the basis of sex meets the first test—sex is an immutable characteristic.

What differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.

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49 For a very thorough treatment of the two-tiered equal protection analysis, see Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969).

50 The close judicial scrutiny given statutes which classify on the basis of characteristics deemed suspect has its origin in the suggestion of the Court that a "narrower scope for operation of the presumption of constitutionality" may be dictated when reviewing "statutes directed at particular religious, or national, or racial minorities."

51 Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities and which may call for a correspondingly more searching judicial inquiry. United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938).

The second test, a history of invidious discrimination, is also met since there is a long history of sex discrimination in which the same restrictions have been imposed on women as were once imposed on blacks under the pre-Civil War slave codes. Among other restrictions, women were prevented from making a contract, were denied the right to vote, could not hold office or serve on juries, and if married, could not hold or convey property.\textsuperscript{52}

Women do not \textit{literally} meet the third test—rather than being a “discrete and insular minority,” they are a statistical majority. But their access to the political decision-making process has been so limited that one could say that, in effect, they \textit{are} both “an insular minority” and—the fourth test—“politically powerless,” thus entitling them to special protection of the Court.\textsuperscript{53}

But the last test—whether separation of the sexes in certain activities stigmatizes women as separation of the races stigmatizes blacks—is more difficult to satisfy. In the case of racial separation in the school system, such separation in itself connotes stigma. Further, racially separate schools were also unequal in fact. Thus an absolute prohibition of separate but equal in the race context seems appropriate. But does the argument apply equally in the sex context? Consider these examples: Do single sex high schools necessarily stamp women with a badge of inferiority? Similarly, while it would be impermissible for a high school to have separate black and white teams, is there the same stigma if women have their own teams and compete among themselves rather than with the male students? Or take public restrooms—does the same stigma attach to women when there are separate Ladies’ and Men’s rooms as attached when the signs read White Women/ Colored Women?

In the \textit{Reed} case, the Court struck down an Idaho statute which gave mandatory preference to men over women when, as members of the same entitlement class (parents), they applied for appointment as administrator of an estate. Chief Justice Burger, writing for a unanimous court,\textsuperscript{54} found that this was an arbitrary legislative choice even though “the objective of reducing the workload on probate courts by eliminating one class of contests was not without \textit{some} legitimacy.”\textsuperscript{55} Thus while the Court says it is applying the minimal rational basis test, under which the Court has almost invariably upheld the validity of statutes, the Court seems to be using a somewhat different standard to reach its result. Some commentators have suggested that this decision signals a major departure from the Court’s

\textsuperscript{52} \textit{Id.} at 684–85.

\textsuperscript{53} \textit{Id.} at 686 n. 17.

\textsuperscript{54} Neither Justice Powell nor Justice Rehnquist had yet been sworn in so the unanimous Court consisted of only seven justices.

\textsuperscript{55} 404 U.S. at 76.
traditional approach of extreme deference to such legislative line-drawing. Whether or not this really was a complete departure remains to be seen.

To return then to the initial question, do racism and sexism differ significantly from each other and should such differences, if they exist, have constitutional consequences? Only four of the nine justices currently on the Court think that classifications based on sex should be treated in the same manner as those based on race—that is, requiring an extraordinary justification on the part of the state. \textit{Frontiero v. Richardson}—the next sex discrimination case after \textit{Reed v. Reed} to reach the Supreme Court—concerned a challenge to government regulations which permitted service-men to claim their wives as dependents and thus obtain additional funds without having to show that over half the wife's support came from the husband, while women serving in the armed forces had to demonstrate that their husbands actually were dependent upon them financially. The regulations were struck down, but only because the remaining justices (with the exception of Rehnquist, who dissented) felt that the same result could be reached based on the \textit{Reed} standard without having to face the question of whether a classification based on sex was "suspect," since the only justification the government had offered for its dissimilar treatment of similarly situated people was "administrative convenience." \textsuperscript{58}

These cases, plus several others which came to the Supreme Court in 1973 and 1974,\textsuperscript{59} indicate that as yet there is no clear majority in favor of treating sex discrimination in the same manner as race discrimination is now treated at law. If \textit{Reed} really represents a midpoint standard between the suspect classification and the minimal relationship standards, women should find greater protection from the fourteenth amendment. But the later opinions of the Court seem to narrow its holding: only if administrative convenience is the sole purpose of the discrimination will the statute be found to violate the equal protection clause of the fourteenth amendment.

\textsuperscript{56} See, e.g., Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972). See also San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 107 (1973) (Marshall, J. dissenting) which states that the Court, in \textit{Reed}, did use a "more stringent standard of equal protection review."

\textsuperscript{57} 411 U.S. 677 (1973).

\textsuperscript{58} Id. at 691-92.


\textit{Lafleur} concerned school board rules which require teachers to take leave without pay at a fixed point in their pregnancy—generally five months before the expected date of birth. Justice Stewart, writing for a majority which included Justices White, Brennan, Marshall, and Blackmun, held that "the freedom of personal choice in matters of marriage and family life
The lower court cases

The only cases before the Supreme Court involving sex discrimination against students have been cases concerned with admission to institutions of higher education. Thus the recent decisions of the lower courts are the only authority to date in this area.

Interscholastic athletic competition. The Eighth Circuit recently handed down a decision in a case in which an action had been brought to enjoin enforcement of a rule promulgated by the Minnesota State High School League barring females from participating with males in high school interscholastic athletics. The female plaintiffs wanted to participate in non-contact interscholastic sports: one in tennis, one in cross-country skiing and cross-country running. The court held for the plaintiffs because their high schools did not provide teams for females in these sports. Thus the court did not face the question of whether the schools can constitutionally provide separate but equal facilities for females in interscholastic athletics. And since the sports were non-contact sports, the court did not need to determine if females could constitutionally be precluded from competing with males in such contact sports as football.

Curriculum. In many school districts, women are barred from taking shop or vocational courses. The reasons for such exclusion have been characterized as follows: "tradition," "the asserted inappropriateness of such courses for women," and "concern that the allegedly less-coordinated female student might be more injury-prone than her male counterpart." Several women students have successfully challenged such practices; in each instance, the case has been settled before judicial decision.

Admission to selective high schools. The admission standards of an elite academic high school in San Francisco—the only high school in that

is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Since there was a conclusive presumption affecting every pregnant teacher—regardless of her physical capability to continue teaching—rather than an individualized determination—the regulation was held to be unconstitutional. There was no discussion of gender-based discrimination per se.

Geduldig v. Aiello, the majority opinion again written by Justice Stewart, was concerned with a state disability insurance program which excluded normal pregnancies from its insurance scheme. As the majority saw it, no one was being excluded from a benefit because of gender; rather, it merely removed one physical condition from the list of compensable disabilities. The line-drawing by the legislature was between pregnant women and nonpregnant persons—the first group being exclusively female but the second group including members of both sexes. This time the dissenters were Justices Douglas, Brennan, and Marshall. They saw the program "singling out for less favorable treatment a gender-linked disability peculiar to women." 417 U.S. at 501.


city where admission is based upon grade point averages—was recently challenged. When a group of female applicants was denied admission despite the fact that they had higher grades than male students who were admitted, they filed suit. The cut-off point for admitting female students had traditionally been higher than for males. It was estimated that if the same cut-off point were used for both sexes, 60% of those admitted would be female. In reviewing the allegation of sex discrimination, the Ninth Circuit Court of Appeals referred to the Supreme Court decisions of Reed and Frontiero for the proposition that sex classifications must be examined with more care than is usually applied under the traditional “rational relation” test, without having to determine whether the “strict judicial scrutiny” applicable to “suspect classifications” such as race, is appropriate. Even under the less strict Reed standard, the circuit court found that the difference in admission standards could not be justified. It found no support for the assertion that an equal ratio of the sexes is required for good education. Moreover, the court noted that the evidence that females get better grades in early school years but that males catch up in high school was inconclusive.

Title IX

The next question is how the regulations under Title IX would deal with some of these same problems. First, it should be noted that the sex discrimination provisions of Title IX resemble quite closely those of Title VI of the Civil Rights Act of 1964 which prohibits discrimination against the beneficiaries of all federal monies on the basis of race, color, and natural origin but not sex. Title IX, on the other hand, prohibits sex discrimination in federally funded educational programs. Both Title VI and Title IX are enforced by HEW’s Office for Civil Rights. The sanctions for noncompliance are the same: school systems which are out of compliance can have their current funds revoked, or they can be barred from eligibility for future awards. In addition, the Department of Justice may bring suit at HEW’s request. However, unlike Title VI, Title IX contains exemptions and deferments which reflect significant

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62 Berkelman v. San Francisco Unified Sch. Dist., 501 F.2d 1264 (9th Cir. 1974).
63 Id. at 1269.
64 Id. at 1269 n. 8. An additional claim in the Berkelman case was that despite a special minority admissions program with a lower cut-off point, the percentages of black, Spanish-surname, and low income students admitted were substantially below the percentages of these students in the entire system. The Ninth Circuit held, however, that there was no evidence of racial and ethnic discriminatory intent, and minority students were not stigmatized or subjected to psychological harm by having to attend one of the comprehensive high schools. Id. at 1268.
popular as well as judicial indecision about the equation of sex and race discrimination.

**Curriculum.** No school may provide any course from which students of either sex are barred, nor require a course for one sex and not the other, including health and physical education courses, home economics, or business and technical courses. The regulations would not be satisfied, for example, by providing a boys' shop class and a girls' shop class, nor is the school allowed to justify exclusion from any program on the basis of lack of employment opportunities in that field for members of one sex.

Sex-stereotyping in educational materials, beginning with the first-grade primer "Dick and Jane"—which portrays females as timid, unimaginative, and unproductive—and on through high school texts in history, which often do not mention female contributions at all, has been recognized as a serious problem by HEW. However, HEW has declined to deal with this problem for fear that censorship of school materials might raise serious first amendment questions. The regulations do cover testing and counseling materials, which may not differ for the two sexes.  

**Extracurricular activities (particularly athletics).** The proposed regulations initially provided that no one be barred from athletic participation on the basis of sex, though separate but equal (in terms of facilities and equipment) teams for each sex were permitted when selection was on the basis of competitive skill. The revised regulations, however, are considerably weaker. Women may not try out for men's teams in the case of contact sports (defined as boxing, wrestling, rugby, ice hockey, football, and basketball), even if the men's teams are the only teams. And the school is not required to start a woman's team in any of the contact sports. Women may try out for men's teams in non-contact sports, such as swimming, if there is no women's team. Schools do not have to make "affirmative efforts" to increase the interest and participation of women students in sports where they have had little opportunity in the past, nor need there be equal spending for men's and women's teams or programs.

The sharpest battle had been over the requirement that gym classes must be offered on a non-discriminatory basis—in effect, cutting out sex-segregated gym programs. Under the revised regulations, physical edu-

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6. A recent cartoon suggests the kind of conduct that may now be prohibited. This cartoon shows a man sitting behind a very large desk with the title "career counselor" on it; seated across from his desk is a girl to whom the counsellor is saying "There are enormous opportunities for a young girl today—first of all, how fast can you type?" Martinez, *Sexism in Public Education: Litigation Issues*, 18 INEQUALITY IN EDUCATION 5, 9 (1974).


8. Id.

9. Id.

10. Id. § 86.41 (c) at 24143.
cation classes may be segregated for contact sports and for sex education, when it is taught as part of the physical education class.\textsuperscript{71}

\textit{Student discipline.} Many schools have traditionally applied different behavior and dress codes to male and female students. This is now forbidden under the Title IX regulations.\textsuperscript{71a} Presumably, therefore, if women are allowed to wear long hair, male students would also be allowed to wear their hair to the same length. School officials are forbidden from punishing any student because he or she is married or is a parent. The pregnant girl cannot be excluded from her school or from any school activity (unless she wishes it or her doctor certifies that it is necessary).\textsuperscript{71b} After the birth of her child, she must be immediately reinstated to her original status.

\textit{Employment.} Finally, it is worth noting that in the case of any outside agency that discriminates, schools are required to prevent such an agency from offering school-sponsored services to students. A school's distributive education program or work-study program may not place its students with an employer who will hire only one sex and exclude the other.\textsuperscript{71c}

\section*{II}

\textbf{EQUAL ACCESS TO RESOURCES}\textsuperscript{72}

In discussing fiscal inequity, it should be noted that there are at least three levels of inequality in the distribution of education resources:

\textit{Inter-State Inequality.} The difference in per pupil expenditures among the states has long been a subject of discussion. By and large, the southern states spend less per pupil than states in other parts of the country. Alabama has the lowest statewide average per pupil expenditure level and New York the highest, if Alaska is excluded, the gap between the two being $858 per pupil.\textsuperscript{73} The issue of "leveling up" the lower-spending states is one that the federal government has attempted to address through the Title I formula.

However, these dollar expenditure comparisons probably overstate the differences in resources for education. The gap in educational spending per pupil between the predominantly urban, industrial states of the North and the more rural states of the deep South, is explained partly by cost differences for equivalent educational services.\textsuperscript{74}

\textsuperscript{71} Id. §§ 86.34 \(c\)(e) at 24141.
\textsuperscript{71a} Id. § 86.31 \(c\) (4)–(5) at 24141.
\textsuperscript{71b} Id. § 86.40 at 24142.
\textsuperscript{71c} Id. § 86.31 \(c\) at 24141.
\textsuperscript{72} For a more extensive treatment of many of the issues dealt with in Section II of this article, see Levin, School Finance Reform in a Post-Rodriguez World, PROCEEDINGS OF THE 1974 NOLPE CONVENTION (1975) (forthcoming).
\textsuperscript{73} NATIONAL EDUCATION ASSOCIATION, RESEARCH DIVISION, ESTIMATES OF SCHOOL STATISTICS, 1971–72 (1971).
Intra-State Inequality. The gap between the highest and lowest spending districts within the State of New York was over $1,200 per pupil in 1969-70. Differences between high and low spending districts within a state not uncommonly are as much as three or four to one, and in some states, they are as much as twenty to one.

Intra-District Inequalities. The issue of the inequalities in the distribution of resources among schools within a single district, especially large urban school districts, is particularly important today in view of Title I comparability requirements—that state and local resources be distributed equally on a school-by-school basis, so that these federal funds for the disadvantaged supplement rather than supplant state and local funds.

This section focuses on the legal treatment of intrastate disparities in educational resources. School finance systems which rely in part upon the local property tax (which means every state with the exception of Hawaii), because of the variation in the distribution of property wealth, result in substantial disparities in expenditures per pupil. A comparison of two school districts within the same county was used by the California court in Serrano v. Priest to illustrate the inequalities: the Beverly Hills school district, with a per pupil property value of $50,885, raised $1,107 per pupil with a tax rate of only $2.38 per $100 assessed valuation. Baldwin Park, with a high proportion of disadvantaged students and serious educational problems has a per pupil property value of $3,706, which, with a tax rate of $5.48 per $100 assessed valuation, raised only $2.70 per pupil. The state offsets some of the disparities: Beverly Hills gets an additional $125 per pupil and Baldwin Park receives $307 per pupil. But the gap between these two Los Angeles County school districts is still $655 per pupil. The Serrano court, surveying this situation, commented that affluent districts can have their cake and eat it too: they can provide a high quality education for their children while paying lower taxes. Poor districts, by contrast, have no cake at all.

Legal Challenges to School Financing

While there has been pressure for reform of school finance since the beginning of the century, it was only in the late 1960's that the courts were turned to as the vehicle for reform. And not until August 1971 was legal victory attained in the form of a negative standard: that the quality of a
pupil's public education may not be a "function of the wealth of...[a pupil’s] parents and neighbors." 79 This came to be called the principle of "fiscal neutrality." 80 Reform-minded lawyers eagerly seized upon this standard and headed for the nearest courthouse. Between the Serrano and the Rodriguez decisions, some fifty-two actions were filed in thirty-one states.

The California Supreme Court, in Serrano v. Priest, held that California’s system of financing public schools violated the equal protection clause of the fourteenth amendment. The use of the local property tax, even with state subventions, resulted in substantial disparities among school districts in per-pupil revenues so that the system discriminated on the basis of property wealth, which the court treated as a “suspect classification.” 81 The court also concluded that education was a “fundamental right” which could not be conditioned on wealth. This permitted the court to use the compelling state interest standard of equal protection, meaning that the state bears the heavy burden of showing a compelling interest in the discriminatory system of school finance; the state failed to meet this burden. With little variation, courts in other states, including a three-judge district court in Texas, paralleled this analysis.

San Antonio Independent School District v. Rodriguez82

The Texas case became the vehicle for a Supreme Court examination of the way in which we finance our public schools. On March 21, 1973, a five-to-four decision was handed down, concluding that while “the need is apparent for reform,” 83 the Texas school finance system did not discriminate against any definable class of poor persons.84 Moreover, education was not entitled to claim the status of a fundamental right since it is neither explicitly nor implicitly guaranteed by the Federal Constitution.85 Thus the Court applied the rational basis or traditional equal protection test.86 Finding that the Texas system rationally furthered a legitimate state purpose—that of local autonomy—the Court held it not to be unconstitutional. With Rodriguez, therefore, the first phase of the school finance reform movement came to an abrupt halt.

The Shift to State Constitutional Provisions

Education Clauses. Less than a month after the Rodriguez opinion was handed down, the New Jersey Supreme Court found that New Jersey's
school finance statutes violated that state's constitution, which commands the legislature to provide a "thorough and efficient system of free public schools." 87 Robinson v. Cahill 88 thus was the first decision to indicate that alternative litigation strategies might be successfully pursued, if only the state courts, rather than the federal, were the arena.

The New Jersey court construed the state constitution's mandate as requiring equal educational opportunity. The court actually went even further—a "thorough and efficient" system is one that provides "that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market." 89 What the New Jersey court meant by this standard of "equal educational opportunity," however, is far from clear. Nor is it clear how one would measure it or what kind of finance system would embody it. It sounds somewhat like the "equal educational outcomes" definition of equal educational opportunity. 90

The court gave the legislature until the end of 1974 to enact legislation which would define "the content of the educational opportunity the Constitution requires," 91 and which would ensure that this educational opportunity would be provided equally to all students, regardless of where they live in the state. When the legislature failed to meet the deadline, the court extended it and the state legislature is now wrestling with the problem.

**Equal Protection Clauses.** On remand of the Serrano case to the trial court, the judge took a different approach from the New Jersey court. The New Jersey State Supreme Court had declined to ground its decision on the state equal protection clause, 92 basing the decision solely on the education clause of the constitution. The Serrano judge, however, held that the substantial disparity in the ability to raise local revenues for education was a violation of California's equal protection clause.

The Rodriguez case itself may actually be helpful to Serrano-type plaintiffs. 93 The constitution of almost every state in the Union contains an explicit educational provision. The Supreme Court's holding in Rodriguez that education is not a fundamental right because it is not explicitly or even implicitly mentioned in the federal constitution need not necessarily impede a state court's finding with regard to the fundamentality of education based on the state's constitution. Indeed, this is just what the Serrano trial court did on remand from the California Supreme Court. The judge found that education was a fundamental right under the

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87 N.J. Const. art. VIII, § 4, para. 1.
89 62 N.J. at 515, 303 A. 2d at 295.
90 See discussion supra at 3.
91 62 N.J. at 516, 303 A. 2d at 295.
92 62 N.J. at 492-93, 502, 303 A. 2d at 283, 288.
state constitution; thus, conditioning this right on the wealth of a district, absent a compelling state interest, was unconstitutional.

To sum up the school finance litigation efforts, it appears that while Rodriguez may have seriously hampered attempts by federal courts to restructure school finance systems, a variety of state constitutional provisions may become the springboards to judicial reform. Decisions are now pending in California, Idaho, Massachusetts, and New York. In Connecticut, the lower court has recently held that state’s system of financing schools to be a violation of the state constitution.94

The Cost-Quality Issue

An important issue in both the California and New Jersey cases was the relationship of the level of per-pupil expenditures to the quality of education. In the Robinson trial, when the cost-quality issue was raised, the plaintiffs introduced the testimony of several nationally known school finance experts, educators, and educational testing experts. The trial court found that there was a “correlation between educational expenditures and pupil achievement over and above the influence of family and other environmental factors.”95 The court also found that a large number of pupils were not getting “an adequate education” due to low per-pupil revenues in many poor districts despite high tax rates.96 The New Jersey Supreme Court, with very little discussion, agreed with the trial court as to the relationship of disparities in expenditures to educational quality.97

A much more extensive exploration of the cost-quality issue was undertaken in the Serrano trial.98 The plaintiffs attempted to argue that pupil

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There have also been some disappointing failures. A year and a half after Northshore School District v. Kinnear, 84 Wn. 2d 685, 530 P. 2d 178 (1974) was argued before the Washington Supreme Court, a decision which the dissent characterized as “a legal pygmy of doubtful origin” that “cannot withstand a critical analysis either factually or legally” was handed down. 84 Wn. 2d at 732, 530 P. 2d at 204. A majority of the court held that a review of the record indicated that plaintiffs had not introduced sufficient evidence to prove their case. A plurality opinion by three of the six justices in the majority stated that the plaintiffs did not show that “children who live in school districts with low assessed valuation of property per pupil” were unconstitutionally disadvantaged compared to children in affluent districts or that “differences in assessed value among the districts denies equal protection to the taxpayer.” 84 Wn. 2d at ___, 530 P. 2d at 191. See generally Morris & Andrews, Ample Provision for Washington’s Common Schools: Northshore’s Promises to Keep, 10 GONZAGA L. REV. 19 (1974). Another disappointing decision was that handed down in Olsen v. Oregon, Case No. 72-0569 (Lane County Circuit Court, Ore., Feb. 25, 1975).

95 118 N.J. Super. at 253-54.

96 Id. at 257.

97 62 N.J. at 481-83, 303 A. 2d at 276-77.

98 For a complete analysis of the plaintiffs’ arguments on this issue, see McDermott & Klein, The Cost-Quality Debate in School Finance Litigation: Do Dollars Make a Difference? 38 LAW & CONTEMP. PROB. 415 (1974).
achievement scores on standardized tests were an inappropriate measure of education output. The court, after reviewing the voluminous social science testimony, agreed that educational research on the question had

not reached that degree of reliability that it can be said with any degree of certainty as to the precise part which the various factors of home, school or genetics play separately upon pupil achievement in the standardized reading, mathematics, language, or other achievement-measurement tests.\(^9\)

However, that was not sufficient to deter the trial judge from concluding that

a school district’s per-pupil expenditure level does play a significant role in determining whether pupils are receiving a low-quality or a high-quality education program as measured by pupil test-score results on the standardized achievement tests.\(^{10}\)

The plaintiffs in the *Serrano* trial were helped by the testimony of school officials from wealthy districts that their high per-pupil expenditures were essential to provide high-quality education.\(^{10}\)

Despite the ambiguous nature of much of the research in the cost-quality area, it can be seen from these quotes from the *Robinson* and *Serrano* trial court opinions that neither of the trial judges had much difficulty in determining that there was a relationship between dollars spent per pupil and the quality of educational opportunity.

By contrast, the U.S. Supreme Court found that it was impossible to make such a determination. Justice Powell drew attention to the division of opinion among “scholars and educational experts” on “the extent to which there is a demonstrable correlation between educational expenditures and the quality of education,” referring to the works of Professors Jencks, Coleman and others.\(^{10}\) In Justice Powell’s view, since such questions were “not likely to be divined for all time even by the scholars who now earnestly debate the issues,” the judiciary should

refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of everchanging conditions.\(^{10}\)

**The Legislative Arena**

Obviously, litigation is not the goal but a means to attain the goal, which is *legislative* revision of the present methods of financing schools. In

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\(^{10}\) *Id.* at 89.

\(^{10}\) *Id.* at 89–90.


\(^{10}\) *Id.* at 43.
a number of states, new legislation was adopted under the stimulus of the Serrano decision, prior to the Supreme Court’s decision in Rodriguez. But even in the wake of Rodriguez, a number of states continued to examine alternative, more equitable ways of financing education.

Among the reforms enacted during the 1972–73 legislative year, were the following:\textsuperscript{104}

*Increased state share of the total education dollar,* thus shifting away from reliance on the local property tax, resulting in a reduction in disparities in per-pupil expenditures among school districts.

*Ceilings on tax rates and revenue levels,* which also tend to reduce disparities among districts.

*Property tax reform and relief measures* have been adopted in a few states. Maladministration of this tax substantially contributes to its regressivity and to the disparities in per-pupil revenues among districts. Some states have also adopted a “circuitbreaker” provision to provide tax relief for low-income homeowners and renters.

*Cost and need differentials* have been incorporated into Florida’s newly enacted school finance formula. A major problem with school aid distribution formulas in the past has been their failure to take into account cost differentials among districts in providing similar educational programs. Central city school districts, because of higher prices or wage rates, often have to spend more per pupil than rural or suburban school districts in order to provide a comparable educational program. For example, cities have to pay more than rural areas for teachers of equivalent experience and education levels. Cities are also burdened (in the financial sense) by having a higher proportion of teachers with advanced degrees and years of experience—putting them at the upper end of the salary schedule. Finally, site acquisition costs and the unit costs (cost per square foot) of constructing a school facility are substantially higher in central cities than in either suburban or rural areas.

One problem with the “fiscal neutrality” principle is that it also fails to recognize the fiscal problems of central cities. The fiscal neutrality or wealth-free standard was devised in response to a system in which high property values correlated significantly with high per-pupil expenditures. Cities, however, have relatively high property values and often higher than average per-pupil expenditure levels. The fiscal problems of central city schools, in most cases, stem not from low property values, but from higher costs for education for the reasons given above and from having a larger proportion of students from poor and disadvantaged families, who may require additional resources to “compensate” for the disadvantaged

\textsuperscript{104} A more detailed analysis of the various features of 1972–73 school finance legislation can be found in Grubb, *The First Round of Legislative Reforms in the Post-Serrano World,* 38 LAW & CONTEMP. PROB. 459 (1974).
background they bring to school.\textsuperscript{165} The Florida law provides for a cost-of-living adjustment and adjustments for certain pupils who require additional resources.

This brief review of school finance reform suggests that despite the seeming setback of the \textit{Rodriguez} decision, the advocates of reform can still claim a significant victory. If nothing else, they succeeded in exposing the inequalities that exist in most school finance systems, and, to quote Justice Stewart, encouraged the movement toward less “chaotic and unjust” systems.\textsuperscript{108}

\section*{III}

\textbf{EQUAL EDUCATIONAL OPPORTUNITY FOR THE HANDICAPPED}

While the immediate consequence of the decision in \textit{Rodriguez} was to foreclose a federal attack on certain inequitable school financing programs, the fact that the majority in that case held that education was not a fundamental interest, since it was neither explicitly nor implicitly guaranteed by the Constitution, threatened the success of other educational reform litigation then under way. However, the Supreme Court’s opinion in \textit{Rodriguez} distinguishes inter-district financing inequities—which lead to relative differences in the quality of education—from a state “financing system [that] occasioned an absolute denial of educational opportunity to any of its children.” \textsuperscript{107} Does this then mean that it is unconstitutional to exclude a class of children such as the mentally retarded from the public schools? Secondly, if there is a \textit{constitutional} principle of non-exclusion, can the principle be extended to cover those children enrolled in public schools who are “functionally excluded”—that is, effectively denied meaningful access to school services? One such category of children is those whose native language is not English, but who are nonetheless compelled to attend schools where only English is spoken.

\textit{Handicapped}

There are large numbers of handicapped children who continue to be totally excluded from school. The first legal breakthrough in this area was in \textit{Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania}.\textsuperscript{108} In that state, a retarded child could be barred from receiving an education if he were deemed “ineducable.” Overwhelming evidence was

\begin{thebibliography}{99}
\item See generally B. Levin, T. Muller, & C. Sandoval, \textit{The High Cost of Education in Cities} (1973).
\item \textit{Id.} at 37.
\end{thebibliography}
produced by the plaintiffs to show that all children are educable to some extent. Two legal theories were advanced by the plaintiffs: (1) Procedural due process is violated when no hearing is provided prior to exclusion; both the importance of the interests denied (all education) and the stigma which attaches to the excluded child dictate the need for a prior hearing. (2) Given the vagueness of the "ineducable" concept, the statutory exclusion of handicapped students also violates the equal protection clause.

Although the case was settled by consent order, and affirmed by the court, the court noted that: "having undertaken to provide a free public education to all its children, including its exceptional children, the Commonwealth of Pennsylvania may not deny any mentally retarded child access to a free public program of education and training." Under the consent order, the state of Pennsylvania is to provide a free, public program of education and training appropriate to the child's capacity, within the context of the presumption that, among the alternative programs of education and training required by the statute to be available, placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training.

In another leading case dealing with the retarded and the emotionally disturbed—Mills v. Board of Education—the court held that denying plaintiffs and their class not just an equal education but all education, is violative of the due process clause of the Constitution. Mills also requires that there be a hearing prior to the placement of any particular child in a class for handicapped children, and that education "appropriate to the needs" of the handicapped children must be provided. Mere placement in an inadequate program would not meet the mandate of the decision.

The case of Lebanks v. Spears, filed in the eastern district court of Louisiana on April 24, 1973, has also been settled by a consent decree in which the parties agreed that all retarded children should receive an appropriate education and that procedural safeguards would be established to insure the propriety of any placement out of a regular classroom. Like the PARC and Mills decisions, the Lebanks agreement assumes that a child should be placed in a regular classroom if possible and that, if not, the child should be assigned to a setting which resembles a normal classroom as much as possible.
Although the Mills and PARC cases were decided before Rodriguez, it would seem that nothing in that decision would affect this category of cases.

**Misclassification**

Related to litigation on behalf of the retarded is that which deals with the misclassification of children. The major decision in this area is Larry P. v. Riles, a case brought in a federal district court in California, in which the plaintiffs challenged the placement of a disproportionate number of black children in classes for the educable mentally retarded (EMR) on the basis of "culturally biased" tests. The court held that, given the fact that IQ tests were the primary basis for placement in EMR classes and given the fact that there was a disproportionate number of blacks in these classes, the burden shifted to the school district to show that "IQ tests are rationally related to the purpose of segregating students according to their ability to learn in regular classes, at least insofar as those tests are applied to black students." The school district could not meet this burden.

A number of other cases which have challenged placement in EMR classes on the basis of culturally and/or linguistically biased testing procedures have been settled, after the suits were filed, by consent. Stipulations in some of these cases acknowledge that large groups of Spanish-speaking children have been inappropriately placed in EMR classes on the basis of such tests. Litigation of this type, which really focuses on procedural due process in the placement of children into special classes for the handicapped, appears not to be threatened by the decision in Rodriguez.

**Linguistically Handicapped**

Can it be argued that the "linguistically-handicapped" cases should be treated similarly to those cases involving total exclusion? If the educational process is the communication of ideas, then the child who speaks no English is absolutely deprived of an education by being compelled to be educated in a classroom in which he cannot communicate. The result, therefore, is *functional* exclusion from the classroom. And since it is an education: whether it is better for children with special problems to be placed together in a special class, with a teacher specifically trained to deal with their handicaps, or whether isolating children from regular school experiences and from normal children will serve to reinforce their disabilities, lower their self-esteem and, coupled with the low expectations of teachers, will make them become self-fulfilling prophecies. These courts have come down clearly on the side of "mainstreaming" the handicapped.

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Id. at 1314.


There is yet another category of cases which can be thought of as the "functional exclusion"
ethnic minority that is being discriminated against by the failure to provide special assistance, the refusal can be measured against the compelling state interest test—the stricter test of constitutional scrutiny.

The Ninth Circuit Court of Appeals, in Lau v. Nichols,118 a case arising in San Francisco, held that in the absence of state action contributing to English language deficiencies suffered by 2,850 Chinese-American students, the claims that these students have been denied equal educational opportunity could not be upheld. The majority said there could be no denial of equal educational opportunity since the non-English speaking students of a child from the classroom, not because of his race or ethnicity but because of his indigency. The charging of fees for items deemed essential to schooling has been successfully attacked as a violation of various state constitutional and statutory provisions. See, e.g., Granger v. Cascade County School District, 499 P. 2d 780 (Mont. 1972) (fees for workbooks and materials and for athletic equipment used in mandatory physical education course); Bond v. Public Schools of Ann Arbor, 383 Mich. 693, 178 N.W. 2d 494 (1970) (fees for textbooks and supplies for specialized courses such as art and home economics); Paulson v. Minidoka County School District, 93 Idaho 469, 263 P. 2d 933 (1970) (transcript withheld for non-payment of fees for textbooks).

In Johnson v. New York State Education Dep't, 449 F.2d 871 (2d Cir. 1971), vacated and remanded to determine if moot, 409 U.S. 75 (1972), indigent children were unable to pay the fees required for textbooks. Justice Marshall's concurring opinion poignantly states the indigent child's dilemma:

"Textbooks were available upon the payment of a fee, which petitioners were unable to afford. The practical consequence of this situation was that indigent children were forced to sit "'bookless, side by side in the same classroom with other more wealthy children learning with purchases[d] textbooks [thus engendering] a widespread feeling of inferiority and unfitness in poor children [which] is psychologically, emotionally and educationally disastrous to their well being.'"

Indeed, an affidavit submitted to the District Court indicated that in at least one case, an indigent child was told that "he will receive an 'F' for [each] day because he is without the required text-books. When the other pupils in the class read from text-books, the teacher doesn't let him share a book with another pupil, instead she gives him paper and tells him to draw."

This case obviously raises questions of large constitutional and practical importance. For two full school years children in elementary grades were denied access to textbooks solely because of the indigency of their families while these questions were being considered by the lower courts. . . .

Id. at 76–77.

Indigent students in Alabama recently challenged the collection of school fees as a condition to enrollment in specific courses or extra-curricular activities, the issuance of texts or supplies, or the receipt of grades. The plaintiffs contended that the Alabama state law permitting the collection of certain fees discriminated against them on the basis of wealth in violation of the equal protection clause of the fourteenth amendment. The parties settled the suit, agreeing that there would be a fee exemption procedure which would include the following: (1) the use of OEO poverty income guidelines to determine ability to pay; (2) a screening committee which would include representatives of AFDC recipients; and (3) provision of the same materials and supplies to school children from exempted families as are provided to children for whom fees have been paid.

The use of fees is still quite widespread, however. See CHILDREN'S DEFENSE FUND, CHILDREN OUT OF SCHOOL IN AMERICA 78–84 (1974) [hereinafter cited as CHILDREN'S DEFENSE FUND]. Among other barriers to school attendance attributable to poverty are lack of clothing and lack of free transportation. Id. at 85–89.

118 483 F.2d 791 (9th Cir. 1973), rev'd on other grounds, 414 U.S. 568 (1974).
receive "the same education made available on the same terms and conditions to the other tens of thousands of students in the San Francisco Unified School District." The court stated that
every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system. That some of these may be impediments which can be overcome does not amount to a "denial" by the Board of educational opportunities within the meaning of the Fourteenth Amendment should the Board fail to give them special attention, this even though they are characteristic of a particular ethnic group.

The court went further and said that the difficulty the children had was "the result of deficiencies created by the appellants themselves in failing to learn the English language."
The dissent responded:
The plaintiffs in this case are small, Chinese-speaking children.... To ascribe some fault to a grade school child because of his "failing to learn the English language" seems both callous and inaccurate. If anyone can be blamed for the language deficiencies of these children, it is their parents and not the children themselves. Even if the parents can be faulted (and in many cases they cannot, since they themselves are newly arrived in a strange land and in their struggle for survival may have had neither the time nor opportunity to study any English), it is one of the keystones of our culture and our law that the sins of the fathers are not to be visited upon the children.

On appeal from the Ninth Circuit, the Supreme Court avoided the constitutional issue by holding that §601 of the Civil Rights Act compelled a school district receiving federal funds to establish some form of supplemental assistance for children who have English language deficiencies.

\[\text{\textsuperscript{119}} \text{Id. at 793.} \]
\[\text{\textsuperscript{120}} \text{Id. at 797.} \]
\[\text{\textsuperscript{121}} \text{Id. at 805.} \]

Another member of the court, when a request to hear the case en banc was denied, stated as follows:
[access to education offered by the public schools is completely foreclosed to these children who cannot comprehend any of it. They are functionally deaf and mute.... Discriminatory treatment is not constitutionally impermissible [the majority says], because all children are offered the same educational fare, i.e., equal treatment of unequals satisfies the demand of equal protection. The Equal Protection Clause is not so feeble. Invidious discrimination is not washed away because the able-bodied and the paraplegic are given the same state command to walk. Id. at 805-806.

\[\text{\textsuperscript{122}} \text{42 U.S.C. § 2000d (1970).} \]

The Court cited the HEW guidelines, promulgated under the Civil Rights Act, which provide that

Where inability to speak and understand the English language excludes national origin-minority children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

\[\text{\textsuperscript{35}} \text{C.F.R. 11595 (1970).} \]
The Court reserved judgment on the equal protection arguments, however, leaving intact the legal conclusion of the court of appeals that there was no constitutional right to bilingual education.

Developments in the Tenth Circuit Court of Appeals, however, represent a different judicial trend. In *Serna v. Portales Municipal Schools*, a New Mexico case, the court held that providing identical education to groups which are not identical is a denial of equal protection. Thus the court rejected the concept that a school merely takes students as it finds them and held that the school authorities' failure to establish a meaningful bilingual educational program constituted a denial of equal education to Chicano students. The finding of inequality was based on the results of I.Q. tests administered to all first and fifth grade students, and the testimony of an educational psychologist that language difficulties accounted for 80% to 85% of the achievement difference between Anglo and Chicano children.

It is apparent from the *Lau* and *Serna* decisions, that the issue of whether bilingual or compensatory education is constitutionally required is far from settled.

IV

STUDENT SUSPENSIONS: A DENIAL OF EQUAL EDUCATIONAL OPPORTUNITY?

Before the Supreme Court decision in *Tinker v. Des Moines Indep. Community School District*, in 1969, nearly all challenges to the disciplinary authority of school officials were litigated in state courts. The cases relied upon statutory or common law and almost always the ruling was in favor of school officials. The burden of proof was clearly on the plaintiff student to show that a particular regulation was arbitrary and capricious. Between 1969 and 1975, however, the intervention of the federal courts in the area of discipline has been unprecedented, culminating in the recent Supreme Court decision of *Goss v. López*, which held...
that certain procedural safeguards are *constitutionally* required, even with a suspension for one to ten days.

School authorities have a relatively small number of sanctions which they can use in attempting to control a broad spectrum of activities. The principal sanctions are punishment (e.g., being sent to a detention hall or corporal punishment); restrictions on extra-curricular activities; and suspension and expulsion. The focus in this article will be on suspensions—which deny the child the opportunity to receive an education.

**The Impact of Suspension on a Student**

It should be noted that suspending or expelling a student does nothing by way of educating him. It is significant, perhaps, that other disciplinary measures are designed to increase the student's desire for education. Suspensions and expulsions, however, serve to prevent him from receiving an education in the following ways:

1. The child is unable to participate in academic work for the period of the suspension. If the student is already doing poor work, the missed classes, assignments and exams may mean he will fail completely. In some schools, for each day of suspension, his grade is zero, so that if he is given frequent short-term suspensions, he may fail an entire academic year. Suspensions end up pushing children out of school permanently—if they are out for a couple of months, they can't really make up the work, and the "incentive to return to school under the heavy educational handicap which such a long suspension obviously inflicts, must be very small indeed." 129

2. Suspensions merely remove difficult children. Suspension is too often used to dump behavior problems on the communities rather than to discipline students in order that they may benefit from the educational system. Even though for the sake of the education of other children in the class, the removal of a disruptive child from the class, or even from the school, is justified, school authorities should still be under an obligation to educate the child who has been removed. Moreover, the child should be receiving diagnostic or supportive services which might deal with the causes of the child's misbehavior. 130

3. Suspension stigmatizes a child while in school and in later life. The fact of suspension will remain in the child's permanent record and could affect his future educational and employment prospects.

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128 *See generally*, CHILDREN'S DEFENSE FUND.
130 CHILDREN'S DEFENSE FUND at 135.
(4) Suspensions are highly correlated with juvenile delinquency by leaving children idle and on the streets with no supervision. Yet it is these very children, whose behavior led to suspension, who may need supervision the most.131

How Pervasive Is the Use of Suspension?

A review of some statistics relating to suspension and expulsion may provide some perspective on Goss v. Lopez. Until a few years ago, suspension and expulsion were legitimate, discretionary administrative processes—often undertaken by the principal of a school with minimal, if any, procedural safeguards. Thus the magnitude of the phenomenon remained hidden from the public, which still tends to think that suspensions are confined to a few extremely disruptive troublemakers.

A recent report by the Children's Defense Fund analyzed data from five states collected by HEW's Office of Civil Rights in the fall of 1973.132 These data show that in those five states, 152,904 children were suspended at least once during the 1972–73 school year—approximately one out of every twenty school-age children.133 The Children's Defense Fund's own survey reveals the following reasons for suspensions:134

(1) 24.5% of the suspensions were for offenses related to truancy and tardiness;
(2) A substantial percentage of the suspensions, 13.6%, were behavior problems, characterized as "acting out," "bad attitude," insubordination, disobeyed teacher, inattentive in class, cursing, in school bus at the wrong time, cutting in lunch line, went to lunch without permission;
(3) 8.5% of the suspensions were for arguments or some kind of verbal confrontation: insulting teacher, talking back, disrespect for teacher or principal, swore at teacher, arguments between students, calling other students bad names;
(4) 5.6% of the suspensions were for smoking, and 4.1% were for punishment-related offenses (e.g., student refused to stay for detention or refused to clean the grounds as ordered);
(5) Less than 3% were suspended for use of drugs and alcohol.

Thus, a majority of the suspensions, nearly sixty-five percent of those in the states surveyed, were for offenses that were not dangerous. The remainder of the suspensions, 36.6%, were for fighting with teacher, fighting on bus, fighting with another student.

131 Id.
132 The five states are Arkansas, Maryland, New Jersey, Ohio and South Carolina. Id. at 124.
133 Id.
134 Id. at 120, Table I.
Racial and Class Discrimination

There is evidence that racial discrimination is involved in the use of suspensions. In the five states surveyed, over 50% of suspended students were minority, though less than 40% of the total enrollment was minority. In one hundred of the districts surveyed, at least ten percent of the black student population was suspended. At the secondary school level, black students are suspended more than three times as often as white males. In six areas surveyed, over twenty percent of black secondary school-age males were suspended and in three areas, over thirty percent. Black females were suspended over four times as often as white females. The Children's Defense Fund report also notes that in school districts where there are few blacks, Puerto Ricans, or Chicanos, it is the lower-income [white] children who often bear the disproportionate brunt of school officials' disciplinary action. It is almost as if some group of children must be scapegoated by some officials.

Procedural Safeguards

Since suspension has usually been the prerogative of the principal, to be exercised at his discretion, few districts have had substantive or procedural guidelines governing suspensions. It was not until 1961 that the Fifth Circuit, in a case involving a student from a state college, held that due process requires notice and some opportunity for a hearing before a student is expelled for misconduct. Subsequent cases extended the holding to include suspension from a state college, expulsion from a high school, and then suspension from a public high school. By the beginning of this decade, courts began to require prior hearings for suspensions of varying length. The question of what the minimal period of suspension would be to trigger due process requirements seemed to vary from court to court, one going so far as to note that a suspension of even one hour could be quite critical to an individual student if that hour encompassed a final examination that provided for no "make-up."
All of the foregoing is by way of background for the Supreme Court's intervention into the area of student suspensions in *Goss v. Lopez*, on January 22, 1975. That case arose in Columbus, Ohio as a result of a period in which there had been widespread student unrest. The Ohio statutes provided for a hearing or an appeal to the School Board in the case of an expulsion, but there was no procedure for suspensions. Thus a high school student could be temporarily suspended without a hearing.

The three-judge district court held that it was a denial of due process of law not to provide at least some "minimum requirements of notice and hearing prior to suspension, except in emergency situations," and the Supreme Court affirmed, with Justice White writing the opinion for the Court, joined by Justices Brennan, Douglas, Stewart, and Marshall. Justice Powell wrote the dissent, joined by the Chief Justice, and Justices Blackmun and Rehnquist.

The Court pointed out that even though education is not a constitutional right (as held in *Rodriguez*), the State of Ohio, having chosen to extend the benefit of education to all children between the ages of six and twenty-one, cannot withdraw the benefit on the grounds of misconduct without providing for some constitutionally fair procedure through which one can determine whether or not the misconduct actually occurred. The Court treats this as a property right which cannot be infringed without due process of law. The Court also points out that if a student is suspended and the charges are recorded, the student's standing is damaged with his present and future teachers, and it may interfere with his later opportunity for higher education and employment.

The Court notes that a short suspension—one of less than ten days—is certainly a milder "deprivation" than expulsion, but "in view of the importance of education" it is not a "trivial period" but a "serious event" in the life of the suspended child:

Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.

But, as the Court points out, "once it is determined that due process applies, the question remains what process is due." "At the very minimum, . . . students facing suspension . . . must be given

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Id. at 572.

Id. at 574.

Id. at 575.

Id. at 576.

some kind of notice and afforded some kind of hearing." 150 although the timing and the content of the notice and the nature of the hearing will depend upon "appropriate accommodation" of the competing interests involved.151 What are these interests? On the one hand, the student wants to avoid unfair or mistaken exclusion from the educational process.152 On the other, the school system must be able to maintain discipline and order so that the educational process can continue. In addition, the Court recognizes that suspension is "a valuable educational device." 153 Thus, imposing elaborate hearing requirements in every suspension case would be a problem.

What this boils down to is that the student who faces a temporary (10 days or less) suspension must be "given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." 154 Under certain circumstances, this opportunity need not be granted prior to the suspension but as soon as practicable thereafter.155 Justice White indicates that longer suspensions might require much more formal procedures which, at some point, could include the right to counsel, to confront and cross-examine witnesses, and to call his own witnesses to verify his version of the incident. Indeed, the Court suggests that there even may be some unusual situations involving only a short suspension which will require something more than the rudimentary procedures outlined in Goss.156

The dissenting opinion makes about five major points:

(1) Justice Powell does not disagree with the Court that the right or entitlement to education created by the statutes and constitutional provisions of Ohio is an entitlement that must be protected in a proper case

150 Id. at 579.
151 Id.
152 The Court illustrates the problem by referring to a student (Lopez) who was suspended, along with many others, in connection with a disturbance in the lunch room. Lopez insisted that he was not involved in the disturbance but was a mere bystander. However, he was not only not given an opportunity to explain his presence in the lunch room, he was never told the basis for the belief that he was involved. The Court also refers to a case in which a student was suspended for conduct which did not even occur on school grounds. A disturbance occurred at another school, and there were mass arrests, of which she was one. As the Court points out, this "hardly guarantee[s] careful individualized fact finding by the police or by the school principal." The student not only claimed not to have been involved in any misconduct, but also alleged that she was suspended for ten days without being told what she was accused of doing or given an opportunity to explain her presence among those arrested. Id. at 580 n. 9.
153 Id. at 580.
154 Id. at 581.
155 Id. at 582.
156 Id. at 584.
by the due process clause. The disagreement is over whether this particular case is "a proper case." A suspension of not more than ten days is not a serious detriment or loss, and does not begin to assume "constitutional dimensions." 157

(2) Secondly, Justice Powell expresses his concern that the Court is going back on its prior decisions which have held that "school authorities must have broad discretionary authority in the daily operation of public schools." 158

(3) Justice Powell also points out that the educational rights of children and teenagers are not equivalent to the rights of adults or even to those accorded college students. Even in the case of the first amendment, as Tinker159 itself indicates, the rights of children are not coextensive with those of adults.

(4) It is clear that the dissent views the case from a very different perspective, emphasizing the right of other pupils to a properly functioning public school system, rather than the individual rights of the suspended student which the majority emphasizes.

(5) Finally, the dissenting opinion raises the "parade of horribles" that may follow from Goss v. Lopez. Courts will intervene in such decisions as how a teacher is to grade the student's work, whether a student passes or fails a course, whether he is to be promoted, whether he is required to take certain subjects, whether he may be excluded from interscholastic athletics or other extracurricular activities, whether he may be removed from one school and sent to another, whether he may be bused long distances when available schools are nearby, and whether he should be placed in a 'general,' 'vocational' or 'college-preparatory' track.160

As the ultimate horrible, the dissent says that federal courts will substitute their judgment "for that of 50 state legislatures, 14,000 school boards, and 2,000,000 teachers who heretofore have been responsible for the administration of the American public school system." 161

CONCLUSION

This article has focused on the courts and equal educational opportunity litigation. Since there are differing notions of what equal educational opportunity is, litigation strategies are many and varied. In the course of

157 Id. at 587.
158 Id. at 589.
160 419 U.S. 597.
161 Id. at 599.
reviewing the case law in this area, several theories of equal educational opportunity have been examined—equal treatment of the races and of the sexes; equal access to school resources; equal educational opportunity for the handicapped, including those who are totally excluded from public schooling and those who are placed in inappropriate and sometimes damaging programs; and finally, equal educational opportunity for those who are "functionally excluded" either because of a language barrier or through disciplinary procedures such as multiple suspensions.

However one defines Equal Educational Opportunity, the ultimate objective should be to ensure that every child in a state—regardless of his race, sex, socioeconomic background, physical or mental handicap, or place of residence—has "that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market." And one might add to this: to equip a child to have a meaningful and satisfying life with the maximum feasible options that only an adequate education can give.

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