Effective Schools and Federal and State Constitutions: A Variety of Opinions

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I came into adult life equipped with an essentially romantic ethic . . . believing . . . that salvation lay in extreme and doomed commitments, promises made and somehow kept outside the range of normal social experience. I still believe that, but I have trouble reconciling salvation with those ignorant armies camped in my mind.

Joan Didion**

My experience is that law review articles are more frequently dead than read.¹ More than a decade after the publication of Equal Educational Opportunity and the Courts,² I was astonished to learn that Gershon Ratner had written a 100-page rejoinder, taking issue with my conclusion that courts should not attempt to blend social science scholarship and a normative commitment to equality of educational outcomes with the asserted constitutional rights of students.³ Even as Ratner seeks to revise my judgments in the light of more recent developments in educational research, I am flattered by his attention.

I always had assumed that academia's ardor for such scholarly contributions cooled in about the same length of time that it took for the universe to cool a few thousand million degrees—about fourteen seconds according to Professor Weinberg.⁴ Mr. Ratner has saved my work, at least temporarily, from this frigid fate.⁵ But before embarking on his new venture, perhaps he should have reconsidered Samuel Johnson's ad-

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3. See also Yudof, School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court, LAW & CONTEM. PROBS., Autumn 1978, at 57.


5. See generally ARISTOTLE, RHETORIC bk. III, ch. 3, 405b 1. 34, 406a 1. 8 (discussing the manifestation of frigidity in "the employment of strange words"). For an even more remarkable resurrection of an earlier scholarly work, see Powell, Book Review, 94 YALE L.J. 1285 (1985) (reviewing J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Boston & Cambridge 1833)).
monition to Boswell. As Boswell recounts it: "I was at first inclined to answer this pamphlet; but Johnson who knew that my doing so would only gratify Kenrick, by keeping alive what would soon die away of itself, would not suffer me to take any notice of it."\textsuperscript{6}

But snug scholarly satisfaction at provoking a reawakening of my slumbering prose will not suffice. I have been asked by the editors to respond to Ratner's \textit{A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills.}\textsuperscript{7} Such an undertaking poses obvious difficulties. The role of a proselyte is an uncomfortable one. I am reminded of Pangloss, who painfully adhered to his "first opinion"; "for after all I am a philosopher; and it would be unbecoming for me to recant."\textsuperscript{8} Yet even philosophers, and certainly law professors, should be obliged to respond to new evidence. What to do? To decline to continue the dialogue would only lead to the prompt reburial of the so recently resurrected.

Though I normally eschew mere positivism,\textsuperscript{9} imagine my delight when I discovered a draft of a state supreme court decision directly on point. And not only did the case deal with the very same subject as the Ratner \textit{magnum opus}, but the justices, unable to temper their scholarly enthusiasm and recognizing the complexities of the issues, wrote a number of sage and provocative opinions. While I cannot imagine how I came to possess this extraordinary document—perhaps it may be accounted for by the labors of an overzealous research assistant—the justices are fully attentive to the subtleties of the matter under consideration. No need for my own inadequate prose; it is enough for me to cast the light of scholarly attention on their remarkable analyses.

The learned justices never published their unfootnoted opinions.\textsuperscript{10} Deciding that discretion lay in holding that the writ of certiorari was "improvidently granted," they permitted the case to disappear from their docket. There is not a trace of a lower court opinion—even the West Publishing Company occasionally errs—and an untimely catastrophe destroyed all the records in the case. Rather than deprive the bench and bar of the court's handiwork, I have taken the liberty of reproducing it in the pages of the \textit{Texas Law Review}, appropriately edited for brevity and style. History demands no less. To paraphrase Emerson's comment

\begin{itemize}
  \item \textsuperscript{6} J. Boswell, \textit{The Life of Samuel Johnson} 341 (Modern Library ed. 1952).
  \item \textsuperscript{7} 63 Texas L. Rev. 777 (1985).
  \item \textsuperscript{8} Voltaire, \textit{Candide}, in \textit{CANDIDE, ZADIG AND SELECTED STORIES} 15, 96 (D. Frame trans. 1961).
  \item \textsuperscript{9} See, e.g., M. Yudof, \textit{When Government Speaks: Politics, Law, and Government Expression in America} (1983).
  \item \textsuperscript{10} I have taken the liberty of adding appropriate citations to bolster their arguments. Cf. N. Meyer, \textit{The Seven-Per-Cent Solution} 15 (1974) ("Knowing that footnotes are especially irksome... I have deliberately kept them to a minimum... ").
\end{itemize}
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about Carlyle, if genius were cheap, we might do without Saxton v. Norden Independent School District. In the existing population of legal precedents, it cannot be spared.¹¹

Despite my commitment to revelation, I have no wish to disturb the anonymity of the good justices. Their views might well have evolved from their initial formulation, with the strength of their convictions weakened by the press of argument and counter-argument in chambers. Hence I have carefully masked their identities, those of the parties, and that of the jurisdiction. Any apparent resemblance to real persons and places is entirely accidental. Hopefully, these measures will protect the innocent while enlightening the misguided.

Saxton v. Norden Independent School District

Greenwood, Chief Justice

"Today, education is perhaps the most important function of state and local governments."¹² An educated citizenry is essential to the preservation of democratic institutions and values.¹³ Industrial productivity, economic growth, and national defense are dependent on literate and adequately trained citizens.¹⁴ Equally as important, education enables the young to mature into autonomous, law abiding, and economically independent adults.¹⁵ For a nation that prides itself on equality of opportunity, education is the foundation for socioeconomic advancement and self-realization.

Though all youngsters in this state are required to attend public or private school from ages six to sixteen, our educational system does not treat all of its students equally well. For some the dream quickly turns into a nightmare. Plaintiffs and the class that they represent, poor and predominantly minority students in the Norden Independent School District, are ill-served by current approaches to education in their public schools. They, like more than half of their classmates, are one or more years behind their appropriate grade levels. After an extensive trial, the learned trial judge, demonstrating remarkable insensitivity,¹⁶ denied

¹¹. For a decision unearthed in similar fashion, see Fuller, The Case of the Speluncean Explorers, 62 Harv. L. Rev. 616 (1949).
plaintiffs any relief. The intermediate court affirmed. Convinced of the
rightness of plaintiffs' cause, we reverse and remand.

The Norden School District is a densely populated urban school dis-
trict, with an overwhelmingly poor and minority clientele. In compari-
son with most suburban schools and with some urban schools with
similar student populations, it has been notable for its failure to bring
achievement levels to national standards. Since 1972, the voters of Nor-
den have elected predominately minority boards of education. The
Board and its appointed superintendent, however, for reasons that are
difficult to fathom and are perhaps best known to them, 17 have chosen to
continue the pattern of inadequate educational offerings.

When stripped of its veneer of sophistication, the School District
essentially argues that it does not know how to do its job. It speaks of
the high rate of illegitimacy, the number of single-parent families, crime,
low income, inadequate state funding, poor housing and nutrition, the
lack of qualified teachers, and other factors external to the school system.
If defendants are to be believed, society—and perhaps even some par-
ents—must bear the responsibility for the defendants' failures.

It is regrettable that professional educators are incapable of ac-
cepting the very same personal responsibility for their actions that they
seek to instill in students. Having spent many hours reviewing the "ef-
effective schools" literature, 18 the testimony and affidavits submitted be-
low, and the writings of noted legal experts, this Court stands ready, if
only reluctantly, to clarify the constitutional responsibilities of boards of
education in this state. A brazen and self-serving confession of ignorance
is no defense to the obligations imposed by our state and federal constitu-
tions. 19 In the words of Gershon Ratner, "Capacity requires perform-
ance"; for "the law does not shrink from imposing important duties
merely because their accomplishment is difficult." 20

The source of plaintiffs' legal rights need not long detain us. Since
education is vitally important both to the individual and the polity, it is
easily classified as a fundamental interest under the equal protection
clause of the fourteenth amendment. Similarly, since poor and minority
students are disproportionately injured by present policies, and because

17. See generally Note, Reading the Mind of the School Board: Segregation Intent and the De
18. See generally Purkey & Smith, Effective Schools: A Review, 83 Elementary Sch. J. 427
(1983).
20. Ratner, supra note 7, at 809, 811.

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Board members and administrators knew or should have known that this was the inevitable impact of their wrong-headed policies, we hold that there is discrimination against a suspect class. Under such circumstances, the School District must proffer a compelling state interest to justify its educational policies. Clearly, the District has no legitimate interest, much less a compelling one, in perpetuating the ill-treatment of so many of its young citizens. Moreover, as we shall discuss below, its assertion of impossibility is implausible, not sustained by the relevant evidence, and fails even the rational basis test. No rational bureaucratic organization would purposefully design a system of education that results in massive miseducation, and miseducation itself hardly qualifies as a legitimate state goal.

Defendants would have us believe that the United States Supreme Court's decision in *San Antonio Independent School District v. Rodriguez* is to the contrary. In the context of a constitutional attack on the Texas school financing system, the Court there held that children in poor districts were not a suspect class and that they were not denied a fundamental right to education. Reliance on *Rodriguez*, however, is nothing short of an assault on the legal imagination; only the pedestrian lawyer would take legal reasoning so far.

In *Rodriguez*, children in poor school districts, who were not necessarily poor themselves, received some education. Their education, while inferior to that of more fortunate children in affluent districts, was at least minimally adequate, and no contention was made that poor and minority children frequently have lower achievement levels than middle class and white children. Obviously, both the Court and the parties were entirely unaware of this fact. Indeed, the Court, relying on now dated social science evidence, seemed unconvinced of the link between educational resources and student outcomes. Further, Justice Powell admitted that a complete denial of all educational opportunities (or perhaps a less than minimal education) to a definable class of indigent children might well trigger a higher level of constitutional scrutiny. These critical factual differences serve to distinguish *Rodriguez* from the case at hand.

Defendants urge that plaintiffs are receiving some education, indeed the same education as children in the same classes who are not behind grade level. They also argue that they are receiving substantial benefits,

24. 411 U.S. at 25 n.60.
though they are not doing as well as some others. But such contentions overlook the conceptual underpinnings of *Rodriguez*. To have a minimum of something, that something must be minimally adequate. If the education is not minimally adequate, it is not a something; it is a nothing. Therefore, plaintiffs, admittedly a definable class of children from poor and minority families, are receiving nothing. We decline to play a zero-sum, lawyers' game with *Rodriguez*.

Our conclusion is bolstered by the Supreme Court's more recent decision in *Plyler v. Doe*. In that case the Justices finally realized that children of undocumented aliens, precluded from attending public school by virtue of tuition charges that their families could not afford to pay, received no education. To be sure, the Court did not discuss entitlements to particular educational outcomes. But those in the majority must have assumed that alien children would learn more in school than out. Why else order them in? The analogy between *Plyler* and the present litigation, while imperfect, is persuasive.

While we have no difficulty sustaining plaintiffs' claims under the federal constitution, we are not content to rest our decision on that ground alone. Our state constitution compels the same result. Article V, section 4 of the Constitution of 1884 provides that the "legislature shall perpetually provide for the maintenance and support of a free, thorough, efficient, and first-class educational system, wherein all students shall have the opportunity to maximize their potential." This Court has not previously construed this clause, and the records of the constitutional convention of 1883 provide no relevant insights into the meaning intended by its framers. The debates of that era largely focused on the need for universal and compulsory education and ignored the larger issues of our day.

In disregard of Chief Justice Marshall's maxim, defendants would have us believe that our education clause is a nullity, that it is entirely hortatory, that the good framers did not know what they were talking about. They assert that the "free, thorough, efficient, and first-class" clause, at best, requires the state to fund a system of public education, open to all students without charge. We decline this opportunity to employ atavistic interpretive devices that bring us to the brink of nihilism.

The Court is reminded of the answer that a well-known atheist gave

when asked whether he believed in prayer. He calmly stated that he had seen it done. So too, we have seen it done. Other state supreme courts have breathed life into their education clauses, embracing noninterpretivism and rejecting the defeatism of formalism. The West Virginia Supreme Court has interpreted its state constitutional provision to embody a requirement that there be equality of result in the development of each child's capacity to master basic skills, to be literate, and to do arithmetic. So too, in Robinson v. Cahill I through VII, the New Jersey Supreme Court, again and again, has endorsed similar principles, though limiting itself to discrepancies in the funding of education among school districts. There is no reason to believe that the framers of our state constitution, many of whom emigrated from New Jersey and West Virginia to this bountiful state, entertained a lower order of moral certainty about the obligation to provide for the young.

With these legal principles in mind, we at last turn to the evidence. The evidence establishes that basic skills are vitally important to students and to the state and nation and that our state government and local school districts fully comprehend that importance. Our state constitution, school finance laws, compulsory attendance laws, and other enactments fully attest to our profound commitment to education. Despite that commitment, many schools and school districts, for many years, "have failed to educate millions of their students adequately." Failure, as measured by years behind grade level, is rampant, and the Norden School District is an active participant in this national disgrace. Further, low achievement is not random in Norden's schools; rather it is associated with low income and minority status. Only ten percent of white and middle class students are one or more years behind their appropriate grade level.

Can Norden justify "its continuing failure to educate . . . [its] poor and minority children in basic skills?" The answer is an emphatic no. In the words of one scholar, "Enough public schools serving sizable populations of poor and minority students in enough different locations

32. Ratner, supra note 7, at 787.
33. Id. at 794.
nationwide have successfully taught the vast majority of these students basic skills . . . that the purported justifications for failure are no longer defensible.”34 “The claim that it cannot be done is refuted by the fact that it has been done.”35 One distinguished scholar has argued to the contrary, but his analysis has not withstood the test of time.38 Many advances in knowledge have occurred since he wrote, more than a decade ago. Today there is only one relevant question. What are the “appropriate changes”39 in educational pedagogy and method that vindication of appellants’ constitutional rights would require?

Reluctant as we are to displace our state legislature and local boards of education, and recognizing our lack of expertise to interpret the educational evidence, we nonetheless cannot shirk our sworn duty to uphold the constitution and laws of this state. Our task is to identify those characteristics of schooling success that “are peculiarly within the power of schools to create”; for the Norden School District has a legal duty “to incorporate the practices of effective schools.”42 Once we have identified what Norden’s administrators are doing wrong and what they need to do right in the future, equitable relief will be “direct and efficacious in eliminating substandard education for the large class of deprived students.”43

Relying on the research of Professor Edmonds on the characteristics of effective schools44 and on the works of other scholars, plaintiffs have proven that there are five necessary ingredients to success in Norden. First, principals must demonstrate leadership, be attentive to the quality of instruction, spend more time in classrooms, and make alternative pedagogical suggestions to teachers.46 When the trial court enters its order

34. Id. at 796.
35. Id. at 800.
37. See Yudof, supra note 3.
38. See Ratner, supra note 7, at 779-80.
39. Id. at 863.
40. Cf. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (boards of education “have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights”).
41. See id.
42. Ratner, supra note 7, at 780, 781.
43. Id. at 810.
45. See generally Purkey & Smith, supra note 18 (reviewing the literature in the area).
46. See, e.g., E. BOYER, HIGH SCHOOL 219 (1983) (“In schools where achievement was high and where there was a clear sense of community, we found, invariably, that the principal made the difference.”); see also M. RUTTER, B. MAUGHAN, P. MORTMORE, J. OUSTON & A. SMITH, FIFTEEN THOUSAND HOURS: SECONDARY SCHOOLS AND THEIR EFFECTS ON CHILDREN (1982); TASK FORCE ON EDUCATION FOR ECONOMIC GROWTH, EDUCATION COMM’N OF THE STATES, ACTION FOR EXCELLENCE 40 (1983) [hereinafter cited as ACTION].
in conformity with this opinion, it might consider a number of steps.

Copies of this opinion might be distributed to all of Norden's principals to compel their recognition of the need for leadership. An in-service training program might be initiated, with compulsory assignment of books on the lives of great school administrators. Applicants for positions as principals might be screened for their leadership potential, or perhaps leadership achievement tests might be administered. Principals might also be ordered to spend more time in classrooms—say, two or three hours a day—and to exert more energy in supervising teachers. In performing these tasks, principals will not succeed unless they have clearly identified educational goals, such as effective teaching. Each principal should be directed to develop an educational impact statement, identifying appropriate goals and the means of achieving them.

Second, a successful school must have "a pervasive and broadly understood instructional focus." Administrators, teachers, parents, and students must understand that the inculcation of basic skills is the "chief mission of the school." Many administrators become so ensnared in bureaucratic minutia that they lose their educational focus. Some teachers become fixated on orderliness or on peripheral skills. Many parents may treat the public school system as if it were a baby-sitting service. Students may think of schooling as an experience to be endured, not as a learning experience. All of this must and will change in Norden.

Students and faculty should be reminded of the instructional focus through daily announcements on the public address system, appropriate assemblies, and billboard displays. School officials might also consider establishing an Instructional Focus Television (IFTV) channel in cooperation with the local cable television company. Further, each teacher's daily lesson plan should include a least a few minutes spent articulating and explaining the instructional focus to students. Conferences with parents must stress the importance of the acquisition of basic skills to the career prospects of their children. In short, students are not in school to "mess around"; rather they are there for the serious purpose of acquiring essential skills that will stand them in good stead as adults. They, and their parents and teachers, need to be fully cognizant of that vital fact.

Third, Norden school officials need to create and foster "an orderly,

48. Id. at 801.
49. As one prominent task force has urged, "The principal should be freed from distractions; encouraged to give priority to improving classroom instruction; given sufficient discretion over personnel and fiscal planning; and put squarely in charge of maintaining the school's morale, discipline and academic quality." ACTION, supra note 46, at 40.
safe climate conducive to teaching and learning.” In-service training must be offered so that all teachers learn to “take responsibility for all students, all the time, everywhere in the school.” In this regard, the trial court also might consider ordering Norden to assign more teachers to areas outside of the classroom. Whether teachers encounter unruly behavior in the library, rest rooms, gymnasium, hallways, or elsewhere, they must learn to respond decisively, rapidly, fairly, and firmly. Miscreant students must be informed that they are not in school to cause trouble; they are in school to acquire basic skills. To these ends, teachers should be required to take a course on school law, with the mandatory reading of leading due process, search and seizure, and corporal punishment cases. This learning experience will stand them in good stead. It should enable them to realize that the goals of disciplinary policies should not be deterrence, incapacitation, or punishment; rather they should be rehabilitation, reinforcement of the learning culture, and adherence to law.

A safe learning environment also requires that physical and verbal attacks on students and teachers be kept to a minimum, and the trial court should so order school officials. In addition, buildings should be well-heated in the winter, broken windows promptly replaced, and graffiti promptly removed. School buses should be kept in good repair, drivers properly trained, and disruptive student behavior aboard buses eliminated. While, no doubt, the Norden School District subconsciously recognizes the need for safety, it, like Avis, needs to try harder.

Fourth, the District needs to encourage “teacher behaviors that convey the expectation that all students are expected to obtain at least minimum mastery” of basic skills. In an age of ethical relativism and anomie, belief is difficult to instill. While it is tempting simply to order parents, teachers, and administrators to believe in their charges, the freedom to formulate one’s own beliefs is fundamental to a free society. Belief and action should not be confused. The emphasis must be on “behaviors.” School teachers must act as though they have confidence in the learning abilities of their students, irrespective of the prejudices that may lurk in their minds.

50. Ratner, supra note 7, at 801 (citing Edmonds, supra note 47, at 4).
55. Ratner, supra note 7, at 801 (citing Edmonds, supra note 47, at 4).
57. See id. at 655-56 (Frankfurter, J., dissenting).
Defendants urge that some teachers may have lower expectations for those children who do not do well in school, that the teacher must take into account the individual characteristics of each child. We reject such unbridled fatalism. Rather we conclude that “[s]chool personnel’s expectations . . . directly affect the level of student achievement.”58

In our opinion, there are many examples of gifted individuals who are able to convey the impression of firmly held beliefs and great expectations. Political leaders routinely affirm their belief in the wisdom and will of the people, though they often disregard them. Evangelical charlatans effortlessly persuade their flocks of their belief in the Almighty. Some captains of industry convincingly assert their belief in the efficacy of their products, ignoring the spiritual dampening of the Federal Trade Commission. Critical legal theorists affirm their belief in the possibility of a modern society without illegitimate hierarchy, inequality, conflict, or bureaucracy—an antihegemonic future.59 If the trial judge is able to draw on the experiences of such true believers,60 or at least those who appear to believe, we are optimistic that Norden’s teachers will learn to treat all children with the same expectations of educational success.

The social science evidence also suggests that children must be called on randomly; there must be no favoring or disfavoring of any particular group.61 Feedback must be firm, fair, accurate, positive, and random. To accomplish these ends, the trial court, after considering the opinions of educational experts, should order the District to establish a Confidence and Randomness Monitoring Association (CARMA). Members of CARMA, drawn from community volunteers, should be charged with making unannounced and random visits to classrooms and with documenting the failure of teachers to convey expectations of success. Recalcitrant teachers should be placed in special programs that encourage self-criticism, so that they can learn the injury caused by lowered expectations. If such reorientation programs do not expeditiously change their behaviors, they should be disciplined or, if necessary, dismissed. Our constitution requires no less.

Finally, the School District must learn to rely on measures of pupil

58. Ratner, supra note 7, at 802.
61. See Ratner, supra note 7, at 803.
achievement for program evaluation. School officials should administer standardized tests on basic skills, relying on the results of those tests as indicia of whether students are being successfully educated and “adjust[ing] instruction accordingly.”62 At a minimum, school officials must not mislead students or their parents into believing that the students are progressing satisfactorily when they are not.63 Teachers must learn to convey high expectations, to be positive and encouraging, and forthrightly to communicate when students have failed. Optimally, the measure of any educational program will be student test scores, and programs that fail to raise such scores should be abandoned.

Defendants assert that our order to adjust instruction “accordingly” lacks precision, that it fails to illumine the path to schooling success. If they and their attorneys would simply consult any standard dictionary, they would learn that “accordingly” means “in due course.”64 In other words, they must follow the course that is “due,” just as they must afford the process that is “due” when students are suspended or expelled. Unless defendants are to embrace the ill-considered view that “due process” has no meaning for them, they must admit that our standard has equal clarity. To be sure, there is no mechanical yardstick to judge what course is due;65 for the totality of the circumstances, including the actual test results, must be taken into account as the various interests are balanced.66 But we remain confident that experienced educators, acting in good faith,67 can produce the necessary results.

But what if, despite the successes of a handful of schools across the country, the defendants are unable to bring up the performance levels of their poor and minority children? This prospect is difficult to imagine or contemplate in the absence of educational malevolence, but in the light of our deference to the presumed willingness of the Norden School District to conform its actions to the opinion of this Court, we feel obligated to respond.

We have no desire to impose a form of strict liability on public school officials.68 If test scores fail to rise in Norden’s schools, the burden of justification will fall on the School District. If it can prove that it has implemented the five elements common to successful schools and

62. Id.
64. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (unabr. ed. 1969).
68. See Ratner, supra note 7, at 857-58, 859.
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that the anticipated educational gains failed to materialize despite those best efforts, defendants will be relieved of their obligations—at least until new commonalities emerge from the educational research literature.

We conclude on a philosophical note. These are difficult times. An eminent federal commission recently warned us that our nation is at risk due to the failure of our public educational system to dedicate itself to the basic skills, discipline, homework, and excellence. This Court takes judicial notice of the nation’s declining productivity, of the competitive pressures on American goods in world markets, of our astronomical budget deficits, and of military conflicts around the globe. If these crises are to be alleviated, our institutions must be perfected—public schools foremost among them. Reform must begin somewhere. We have chosen to begin here. Just as God chose Abraham “to keep the way of the Lord,” we have chosen Norden that it may instruct its children to do “what is just and right.”

The judgment is reversed and the case remanded to the trial court. Justices Kip, Morden, Ogilby, and Speed concur.

Justice Speed, concurring

“The mistakes we make through generosity are less terrible than the gains we acquire through caution.” I concur in the majority opinion because I believe that denying relief to the plaintiffs would be more damaging to public education and to our children than the risks of the course the Court has chosen to pursue.

Despite a widespread commitment to equality of educational opportunity, the sad fact is that poor and minority group children often do less well in school than other children. They arrive in the first grade well behind their middle class peers, and subsequent years of schooling do little if anything to close the gap. The unhappy truth is that one can predict much about the likely educational success of an infant in a crib if one knows the income, race, and socioeconomic status of the parents. Middle class parents can offer their children many advantages that the

70. See Nat’l Comm’n On Excellence In Education, supra note 14.
72. But see E. Burke, supra note 59.
poor cannot, and school resources and policies do not easily overcome that initial disparity. The philosopher John Rawls, for example, has suggested that an individual's merit "depends in large part upon fortunate family and social circumstances for which he can claim no credit," and he does not view such contingent talents as appropriate criteria for allocating rewards.\footnote{76. J. Rawls, A Theory of Justice 104 (1971). See generally, M. Sandel, Liberalism and the Limits of Justice ch. 2 (1982).}

In modern America the doctrine of equality of opportunity represents our democratic aspiration to mediate between the commitment to individual merit and talent and the commitment to equality of persons, irrespective of race, class, and social circumstances. If opportunities are equally open to all, then the fairness of the process legitimates some inequalities in outcomes. The problem, as this case amply demonstrates, is that efforts to achieve equality of educational opportunity have not succeeded in severing the link between socioeconomic background and schooling success. The results of this failure are truly tragic. The nation loses the productive powers of many of its citizens, and the promise of social and economic mobility for all persons appears beyond its grasp. Inevitably, some social critics are driven to embrace a thoroughgoing concept of equality of outcome, ignoring individual differences, while others embrace the status quo as both inevitable and normatively acceptable.

Plaintiffs come perilously close to advocating outcome equality for all children and to stretching the notion of equality of opportunity to the breaking point. They largely ignore socioeconomic and other factors extrinsic to the public schools of Norden and individual differences among children. Motivation, perseverance, ambition, and other factors bearing on life chances are not mentioned. In their lexicon, parents, children, and communities do not fail; they bear no responsibility for lagging achievement. Only school officials fail. Despite these misgivings, I prefer to attempt to vindicate plaintiffs' claims. Symbolically it is critical to affirm our national commitment to all children and to reject a fatalism that heralds only a perpetuation of a permanent underclass. If our course today poses risks, if the commonalities of effective schooling may not bring forth the New Jerusalem, that is the lesser evil. This Court cannot sit idle while plaintiffs and their class languish in an educational purgatory.\footnote{77. Cf Hobson v. Hansen, 327 F. Supp. 844 (D.D.C. 1971).}

My view is reinforced by the fact that, for all of plaintiffs' expression of concern about educational outcomes, the reality is that they propose...
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little more than the manipulation of educational inputs. Defendants are not so much held accountable for improving basic skills as they are held accountable for doing those things that educational experts believe will improve the performance of poor and minority students. Norden must adopt the five characteristics of successful schools. But if it does so, and if test scores do not rise, it can rebut the inference that it has failed to act appropriately by proving that it has done all within its power to implement in good faith the court's order.78

Perhaps this case should be viewed in historical context. In the 1960s and 1970s, reformers pressed for a fairer and more equal distribution of dollars for poor and minority children and for those living in poor school districts.79 That effort had limited success.80 The United States Supreme Court was not responsive.81 Most students of the education production function agreed that differences in resource allocation, beyond a difficult to specify minimum, did not appear to have a significant impact on student achievement.82 Plaintiffs propose an alternative strategy. They are less concerned with gross expenditures differences among schools and school districts, and more concerned with the subtle pedagogical techniques, within schools, that appear to influence achievement. In short, they eschew macro-strategies and seek to alter the classroom variables that appear to matter.83 While we cannot be certain that this approach will fare any better than its predecessor,84 it is worth trying.85

Effective equality of opportunity may require unequal resources.86 One child may require glasses, while another can see the blackboard without such devices. A physically handicapped student may require a ramp to enter the same school that other students may enter by climbing steps. Perhaps middle-class children will often perform well in school despite the absence of adequate leadership, commitment to basic skills, teacher expectations of competence, and periodic testing. Their parents may invest in tutors, in trips to museums and libraries, and in books and

78. See Ratner, supra note 7, at 863.
82. See authorities cited supra note 75.
83. See generally Purkey & Smith, supra note 18.
84. See id.
magazines for the home. Many poor children may not be the beneficiaries of such private investment; they may not have two parents at home, adequate medical care, and a nutritious diet. Equality of opportunity, if it is not to be a meaningless formalism, requires that the public schools amass equally effective resources to enable those children to acquire basic skills.

I also believe that *Rodriguez* was wrongly decided and readily seek to avail myself of our state's distinct constitutional traditions. In my judgment, education is fundamental in a democracy, and children, who are not born rich or poor—they are born to parents with such characteristics—are deserving of special constitutional solicitude. For me that is the lesson of the recent *Plyler* decision, and *Plyler* stands as a sub silentio refutation of the legal and moral blindness of *Rodriguez*.

**Justice Morden, concurring**

I begin my consideration of the present case with radically\(^87\) different hermeneutic assumptions than my liberal colleagues.\(^88\) I view the language of the law and legal reasoning as almost infinitely elastic. I have never decided an important or interesting case in which the words or history of a constitutional provision or statute determined the outcome.\(^89\) In a liberal society without shared understandings,\(^90\) the application of the law to the facts is always indeterminant. But I am not a nihilist.\(^91\) As I will discuss below, I am committed to particular values that I am perfectly willing to articulate and defend.\(^92\) But I am not constrained by the language of the fourteenth amendment or of our state education clause. The present controversy could as easily be decided under our home rule or uniform taxation clauses as under the provisions cited by the Court.\(^93\) My colleagues, both in the majority and dissent, seem "stuck in [a] dialectic of clarity and lucidity,"\(^94\) while I seek to

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demystify law\textsuperscript{95} and “to transform and overcome false ways of perceiving reality.”\textsuperscript{96}

I am also under no illusion but that the unstated, or perhaps even unconscious, result of “legal reasoning” is judicial approval of a society infused with illegitimate hierarchy, hegemony, bureaucracy, and inequality. The purported commitment to objectivity and neutrality in adjudication cloaks incoherence and contradiction.\textsuperscript{97} Our “neutral” jurisprudence, seeking to free judges of moral choices, is merely an ideological technique for legitimating an illegitimate social, economic, and political order.\textsuperscript{98} In the present case, we must cut through these liberal artifices\textsuperscript{99} and recognize that law and politics are a unity.\textsuperscript{100} Public education in this state not only perpetuates alienation and inequality, it also instills a false consciousness in its victims, teaching them to believe that their plight is inevitable and just.\textsuperscript{101} Liberal legalism blinds us to this reality.\textsuperscript{102}

In order to overcome the illegitimate hierarchies in public schooling, we must reject the false distinctions that we are asked to embrace. Where is it written that we must distinguish between basic and other skills, between competence and incompetence, between schooling and other learning experiences,\textsuperscript{103} between performance at grade level and performance below? These are false dichotomies that would not exist in a community without false consciousness, conflict, competition, and scarce resources.\textsuperscript{104} And why should we reify the private/public distinc-

\textsuperscript{95} See, e.g., Kennedy, The Structure of Blackstone's Commentaries, 28 BUFFALO L. REV. 205 (1979).

\textsuperscript{96} Gabel & Kennedy, supra note 94, at 42. “Intersubjective zap” is another vehicle for attacking falsification. See id. at 10-11.

\textsuperscript{97} See Singer, supra note 92, at 6 n.10; cf. Fuller, supra note 11, at 631 (“My mind becomes entangled in the meshes of the very nets I throw out for my own rescue.”).


\textsuperscript{101} See F. NIETSCHE, THE GAY SCIENCE 115 (W. Kaufmann trans. 1974) (“Where the poor power of the eye can no longer see the evil impulse as such because it has become too subtle, man posits the realm of goodness . . . .”).

\textsuperscript{102} See generally R. UNGER, LAW IN MODERN SOCIETY (1976).

\textsuperscript{103} See generally I. ILLICH, DESCHOOLING SOCIETY (1970).

\textsuperscript{104} And in that blessed city there shall be this great blessing, that no inferior shall envy any superior, as now the archangels are not envied by the angels, because no one will wish to be what he has not received . . . as in the body the finger does not seek to be the eye, though both members are harmoniously included in the complete structure of the body. . . .

Neither are we to suppose that because sin shall have no power to delight them, free
tion by imposing duties on public school officials while letting parents, medical professionals, and corporate America off the hook? If plaintiffs suffer from inept childrearing, low incomes, private discrimination in employment and housing, inadequate medical attention, and the like, the decision of this Court not to intervene is as much a "public" decision as the policies of the Norden School District. The sharp distinction between public and private only serves to perpetuate the inequalities of which plaintiffs complain.

Perhaps the most disconcerting distinction that defendants would have us make is that between the possible and the impossible. The possible/impossible distinction is an arcane artifact of a culture ridden with the false dialectic between individual and community. In colonial America space travel was assertedly impossible; in twentieth century America it is not only possible but it has been accomplished. If we can imagine a world in which the possible is impossible and the impossible is possible, then there is no reason to accept the notion that the two operate in separate spheres. Thus, whatever the evidence of what is possible in Norden's school, if we can imagine a Norden School District in which education is effective for all students, all of the time, that dream or vision fully supports a sweeping remedy in this case.

For me, the bottom line in this or any controversy is which decision and remedy will advance the cause of socialism. The question is a close one here. I would prefer a simple decree that ordered Norden to equalize educational outcomes among all classes of students. In my darker moments, I am inclined to advocate no remedy, bringing us closer

will must be withdrawn. It will, on the contrary, be all the more truly free, because set free from delight in sinning to take unfailing delight in not sinning. . . . In that city, then, there shall be free will, one in all the citizens, and indivisible in each.

St. Augustine, The City of God bk. XXII, ch. XXX. See generally Unger, supra note 59.


107. "The real trouble with the up-down distinction is that it serves to make us believe that people move in different directions. We have to recognize once and for all that there are no individuals moving in different directions. There is only the group, and it only goes one way." Id. at 467. See generally R. Unger, Knowledge and Politics (1975).

108. See generally Singer, supra note 92.


111. But see P. THEROUX, THE OLD PATAGONIAN EXPRESS 376 (1979) ("The Incas were the only people on earth, as far as we know, who worshipped the rainbow.").
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to the day when people will rise up against their public schools. But pragmatist that I am, I reluctantly concur in the Court's decision.

*Justice Bowen, joined by Justice Wells, dissenting*

The majority's decision is almost entirely legislative in character, finding little support in the text of constitutional provisions, precedent, or logic. For all its "legal reasoning," the unavoidable truth is that no decision of the United States Supreme Court or of this Court lends credence to the claim that poor and minority children have a constitutional right to perform at their appropriate grade level. I will not dwell, however, on the majority's sloppy legal reasoning. The opinion of Justice Morden, the *enfant terrible* of our bench, makes it abundantly clear that this Court is substituting its own educational policies and preferences for those of elected school officials, administrators, and teachers. But even as legislation, the Court's decision is bad legislation.

The majority seeks refuge from earlier educational studies, which demonstrated that the intuitively obvious relationship between education dollars and student outcomes is highly uncertain, by focusing on the softer variables of the educational environment. Instead of counting dollars, books, teachers, students, and language laboratories, the majority focuses on teacher expectations, discipline, and leadership. Ironically, while it looks only to "hard" measures of student achievement—results on standardized tests—the Court seeks to manipulate a host of subjective variables that are virtually impossible to measure.

In its rush to judgment, the majority places its stamp of approval on the "effective schools" literature. A legislature would be unwise to do so, except perhaps as a basis for a pilot study. The effective schools research tends to be highly anecdotal, based on subjective observation, and difficult to replicate. Equally as important, it tends to be vague. Who among us is opposed to fair but firm discipline, gifted leadership, or education with a clear instructional focus? Do Norden school officials reject

112. See Gabel & Kennedy, *supra* note 94, at 36 ("I'm saying every time you bring a case and win a right, that right is integrated within an ideological framework that has as its ultimate aim the maintenance of collective passivity.") (comment of Professor Gabel).

113. Plaintiffs may be asserting a "destabilization right," the vindication of which "oblige[s] government to disrupt those forms of division and hierarchy that, contrary to the spirit of the constitution, manage to achieve stability only by distanc[ing] themselves from the transformative conflicts that might disturb them." Unger, *supra* note 59, at 612.


117. See Purkey & Smith, *supra* note 18.
such goals? But what do such ambiguous goals portend in operational terms? How does a legislature or school board, much less a court, devise a system that extends the methods of our best and brightest teachers and administrators to the more ordinary personnel who occupy most positions in any large-scale public enterprise? I fear that the Court's order will not raise the standards of education schools or the scholastic achievement test scores of education majors. It certainly will not enhance the status of the teaching profession and create financial and other incentives for more talented individuals to enter teaching.

As if these problems were not enough, plaintiffs and their supporters on this Court adopt an animistic view of the implementation of court orders. They naively assume that if you preach to a complex organization and to the people who run it, change is inevitable. But the evidence of the last twenty years is that the introduction of change and new routines into a complex organization is a difficult matter, often leading to serendipitous results. The hortatory approach to school reform may lead to surface changes, such as more in-service training programs and leadership conferences, but it may do little to alter the actual delivery of educational services. And if the new wisdom fails, the temptation will be to heap even more of the blame on the children and their parents.

The majority should also realize that if the commonalities isolated by the effective schools research turn out to be efficacious, they are likely to spread of their own accord. If anything, educators often show themselves to be too uncritical in embracing the latest vogue in school reform—whether it is open classrooms, back to basics, the new math, or competency testing for students and teachers. As Professor John Meyer, a noted organizational theorist, has stated, "[T]he rapid flow of change through diffusion processes is especially characteristic of American education" because of the "organizationally decentralized" nature of public schools. A top-down order, imposed by an external agency like a state supreme court, is perhaps the least promising strategy for implementing the policy wisdom of the effective schools literature.

In my view, this Court will long regret the day that it chose to impose its vision of educational opportunity on the public schools of this


120. Meyer, INNOVATION AND KNOWLEDGE USE IN AMERICAN PUBLIC EDUCATION, in J. MEYER & W. SCOTT, supra note 119, at 233, 240.

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state. I predict that this case will return to this Court on many occasions, that we will needlessly arouse the ire of the legislature, and that, in the last analysis, our efforts will fail. While I have no less sympathy than the Chief Justice and the concurring justices for the plight of poor and minority children, we have a responsibility to avoid the imposition of a seat-of-the-pants policy judgment on public school systems. In the end, we may only do further injury to those we seek to save.

I respectfully dissent.

Justice Moll, dissenting

I object to the majority's decision on many grounds. I do not perceive that constitutional rights run to groups rather than to individual members of groups who have been victimized by discrimination. The vindication of plaintiffs' claim leads us down the path to a society in which equality of groups takes precedence over individual liberty. In such a "utopia," personal responsibility for one's own actions and choices is cast aside in favor of a childish concern for equality.

I also do not believe that defendants intentionally discriminated against the plaintiffs. With respect to nearly any public service, equal access inevitably results in some disproportionality of benefits and burdens. The federal Elementary and Secondary Education Act may provide more educational benefits to the poor than to the rich; the deduction for the three-martini business lunch may reduce the tax bills of affluent whites more than minority business people; and public transportation or hospital emergency rooms may be used by one group more than another. The political process and not the judicial process is more appropriate for resolving such questions of distributive justice. Whatever our hopes for an educational order that severs the tie between family background

123. See generally Fiss, Groups and the Equal Protection Clause, 5 J. PHILOS. & PUB. AFF. 107 (1976) (arguing that the underlying principle of the Equal Protection Clause is the prohibition of group-related discrimination as opposed to individual discrimination).
124. See J. PIAGET, THE MORAL DEVELOPMENT OF THE CHILD 284-85 (1965), describing the three stages of development of a child's idea of justice:

During the first stage, justice is not distinguished from the authority of law: "just" is what is commanded by the adult. . . .

During a second stage, equalitarianism grows in strength and comes to outweigh any other consideration. Finally, during a third stage, mere equalitarianism makes way for a more subtle conception of justice [which establishes] . . . grades of equality.

and student performance, the failure to achieve random results is not a constitutional violation.

Along the way, the majority sees fit to embrace the latest social science findings and to read them into our constitutional provisions.128 Perhaps the Court should establish an educational research center so that the justices can stay abreast of the most recent research developments. It would hardly do for us to be embarrassed in the education journals and in the corridors of Harvard and Stanford for espousing anything less than the most current “scientific” wisdom.

But perhaps what disturbs me most about the Court’s decision is its willingness to bring the norms of the legal system and of adjudication to the educational process. To be sure, courts have ordered the desegregation of public schools, enforced collective bargaining agreements with teachers’ unions, and mandated due process hearings before tenured teachers may be dismissed. Never before, however, have legal norms been so intertwined with education in the classroom. Enthusiasm for teaching and expectations of success are no longer simply valuable elements of effective pedagogy; they are legal requirements. Principals who fail to lead are not only inept, they are in contempt of court; they have violated someone’s constitutional rights. The use of standardized tests is not a judgment call for professional educators, it is a legal imperative.

Successful learning takes place in an atmosphere of mutual trust, with students and teachers feeling a sense of shared community and purpose. Legal rules and law suits are simply inconsistent with the informal relationships that must be established.129 They also undermine the authority of teachers and administrators, empowering students to assert rights against them—even with regard to pedagogical choices in the classroom.130 Whatever the strengths of the adversary principle in settling disputes in other settings, it has a limited place in public education. Even if the majority has chosen wise policies for Norden’s children, the further legalization of the educational process cannot but do lasting damage to public education. I dissent.

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Justice Halley, dissenting

The Court's opinion is premised on the idea that poor and minority children are locked into Norden's public school system. There is no reason to assume, however, that the educational strategies employed by the District do not reflect the preferences of parents and voters. If the public schools needed to be reformed, the voters would have reformed them. A school board that is not responsive to the will of the people is at great risk.\textsuperscript{131} The people are perfectly capable of electing school board members with a more responsive educational philosophy.

If plaintiffs are dissatisfied with the educational services offered their children in Norden, and if they have failed to persuade the majority of voters of the rightness of their views, then they should consider moving to a school district that is more attentive to their preferences.\textsuperscript{132} While perhaps the market is imperfect, there nonetheless is a market in the public education sector.\textsuperscript{133} Each school district in the Norden metropolitan area offers citizens a particular package of educational benefits and tax burdens.\textsuperscript{134} Parents may choose for their children. To the extent that today's decree is expanded to include all school districts in this state, the Court's intervention will only have succeeded in depriving parents of the ability to make their own considered choices about educational consumption, choices already constrained by the existence of a public school system.\textsuperscript{135}

\begin{itemize}
\item 133. See generally Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416 (1956).
\item 134. See generally Inman & Rubinfeld, The Judicial Pursuit of Local Fiscal Equity, 92 Harv. L. Rev. 1662 (1979).
\end{itemize}