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Equal Educational Opportunity and the Courts

Mark G. Yudof*

I. The Judicial Role

It is typically American that the most significant modern attempt to achieve racial equality, Brown v. Board of Education,¹ involved the schools. Americans insist that education offered on some equitable basis will permit the economically and culturally deprived to improve their lot and to claim their fair share of society’s status and income rewards.² They see fundamental political, social, and economic changes in educational terms. Education—or more precisely schooling—will resolve conflicts, change attitudes, and diminish inequalities.³ Teach-ins, driver training, and black studies courses hold the key to salvation. As one commentator has noted, “in other countries, when there is a profound social problem there is an uprising; in the United States, we organize a course.”⁴

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¹. 347 U.S. 483 (1954).

². F. KEPPEL, THE NECESSARY REVOLUTION IN AMERICAN EDUCATION 5-6 (1966); Wilson, Social Class and Equal Educational Opportunity, 38 HARV. EDUC. REV. 77 (1968).


⁴. L. CREMIN, supra note 3, at 11.
Accompanying the exalted status of education in this society is a more or less general consensus that equal educational opportunity is of paramount importance. As an abstract principle, equal educational opportunity occupies a position in the pantheon of widely shared values equal to monopoly regulation, monogamy, and peace. In planning and implementing specific policies and programs, however, the consensus has broken down, in part because of the difficulty of defining the goal of equal educational opportunity. While the definitions are as numerous as those who have written on the subject, they fall into three basic categories: equal access, equal treatment of races, and equal outcomes.

According to the first definition, derived from classic liberal principles, equal educational opportunity means that each child must have equal access to schooling resources; absent a showing of a compelling state interest, equal dollars or equal facilities and services must be provided to each pupil. The second definition—the most familiar if not the most traditional—demands nondiscriminatory treatment for all public school students, regardless of race. The third definition of equal educational opportunity focuses on the effectiveness of the resources and processes of schooling. According to this view, the state has an affirmative obligation to compensate for inequalities among individu-
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als, when those inequalities lead to unequal benefits from publicly provided schooling.

Each of these theories of equal educational opportunity has much to recommend it. In seeking guides for legal action, however, the lawyer must be concerned not only with what is socially desirable but also with what is appropriate for judicial consideration. It is the thesis of this article that the courts should redress inequalities of the first and second type, but not the third. While the judiciary can bring about some equity in the distribution of education resources and services and help redress racial discrimination, it should not adjudicate rights in terms of schooling outcomes. Because of the functional limitations of courts in considering matters of broad social policy and because of the vulnerability of the relevant social science data, the concept of equal educational opportunity defined as equal educational achievement is an inappropriate basis for judicial intervention.¹

Certain clear constraints limit the courts' ability to promote social reform. Even apart from considerations of judicial craftsmanship and the needs for principled decisions,¹² courts are institutionally incapable of performing a full-fledged legislative role. For one thing, courts cannot make factual determinations as readily as legislatures and administrative agencies, which can hire staffs, hold extended hearings, commission lengthy studies, and examine in detail every aspect of a complex problem, giving all the conflicting interests an opportunity to be heard. A court, on the other hand, is restricted to the case before it; it does not have a huge staff; it probably lacks expertise in the area; and its processes are ill-suited to unraveling complicated facts as a basis for setting broad policy.¹³ Furthermore, administrators and legislators are at least theoretically free to alter decisions as new information reveals their flaws. Courts do not enjoy this luxury. A constitutional decision, once reached, is not likely to be overturned quickly. Moreover, because court decisions often have an anti-majoritarian im-

11. See generally Bell, supra note 7, at 64-68.
13. The court in McInnis v. Shapiro, 293 F. Supp. 327, 336 (N.D. Ill. 1968), aff'd sub nom. McInnis v. Ogilvie, 394 U.S. 322 (1969), a suit concerning the allocation of educational resources, was clearly cognizant of these dangers: "[T]he courts simply cannot provide the empirical research and consultation necessary for intelligent educational planning."
pact, protecting minorities at the expense of the majority, courts will be reluctant to substitute judicial wisdom for that of elected officials absent compelling reasons. Historically, the reasons have been compelling only when the injured class—for example, poor or minority children and their parents—are unrepresented or substantially underrepresented in the political process.

Even assuming the possibility of decisions that are both right and acceptable under democratic principles, courts are limited in their ability to promote social reform. Professor Kurland has suggested that a broad social policy decision based on the equal protection clause will be effective only if it meets at least two of three basic criteria. First, the constitutional standard must be simple. The complexities of the situation must not prevent the Supreme Court from formulating an intelligible rule that can be communicated to the parties and to the lower courts. Second, the courts must be able to enforce their decisions. If a particular result is constitutionally required, the courts must be able to affect men, resources, and policies in a manner calculated to achieve their ends. Third, there must be "public acquiescence" in the principle as announced and applied.

The Kurland approach to the judicial role in equal protection cases, reflective of increasing scholarly criticism of judicial activism, deals only with the immediate and tangible impact of a court decision. It ignores the equally important symbolic consequences of judicial action. The distinction between the instrumental and symbolic functions of courts is crucial in evaluating the courts' role:

We readily perceive that acts of officials, legislative enactments, and court decisions often affect behavior . . . through a direct influence on the actions of people . . . . The instrumental function of such laws lies in their enforcement; unenforced they have little effect. Symbolic aspects of law and


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government do not depend on enforcement for their effect. They are symbolic in a sense close to that used in literary analysis. The symbolic act "invites consideration rather than overt reaction." . . .

. . . Law can thus be seen as symbolizing the public affirmation of social ideals and norms as well as a means of direct social control.19

The symbolic affirmation of values and the designation of certain activities as deviant20 help create the very consensus that Kurland deems critical to the enforcement of equal protection decisions. Many commentators have noted the role of the courts, particularly the Supreme Court, as educational bodies, or the "ultimate interpreter[s] of the American code" of social ideals and morality.21 As "symbols of an ancient sureness and a comforting stability,"22 the courts play a significant part in the formulation of public policy. A court decision often represents an appeal to the public conscience or to public idealism that may be accorded enormous weight in the legislative and political processes.23 The desegregation cases demonstrate that a judicial decision which is unenforceable at the outset may create the conditions necessary for its ultimate enforcement. As Paul Freund once stated, "The moral quality of law is itself a force toward compliance and the change of attitudes."24

A court decision that serves a symbolic function has another value, for a symbolic victory may have significant consequences for a political group at a particular point in time.25 In the absence of tangible bene-

22. Lerner, Constitution and Court as Symbols, 46 Yale L.J. 1290, 1291 (1937) (the reference was specifically to the Supreme Court).
25. See J. EDELMAN, supra note 18, ch. 2; J. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT (1963); Gusfield, supra note 19, at 308, 310.
fits the morale of an organization working for governmental reform may depend on judicial success, a reaffirmation of the "rightness" of their position. The symbolic utterances of the courts have an impact not only on the culture at large but also on specific constituencies that are working for reform. Whether or not the pretermination hearing requirement of Goldberg v. Kelly[^26] has led to a decrease in the number of welfare recipients who are refused public assistance, the decision certainly has given strength, and to some extent legitimacy, to the efforts of the National Welfare Rights Organization, enabling it to organize more effectively and to seek political change more aggressively.

The conclusion that the symbolic function of a court decision is important raises a number of questions. What determines the symbolic impact of judicial action? Under what circumstances will a consensus be created or organized constituent groups strengthened? Can the symbolic consequences of specific court decisions be predicted in advance? These questions are difficult to answer, in large part because the presence of the "symbolic impact" of court decisions is difficult to verify empirically.[^27]

Aside from being resistant to verification, the symbolic impact of court decisions is particularly difficult to anticipate. A host of factors contribute to the symbolic impact of governmental actions, including such elusive qualities as language and setting.[^28] Occasionally the language of the opinions has a marked influence on their symbolic effect; the phrases "one man, one vote," and "separate is inherently unequal" were rallying cries supplied by the Supreme Court itself. At other times language shows its effects more obliquely. The school prayer decisions contained no popular refrains, yet the language used by others to describe them indicated their symbolic impact.[^29] Most often, however,

[^29]: The school prayer decisions have been publicly characterized as, among other things: "a deliberately and carefully planned conspiracy to substitute materialism for spiritual values"; "the most extreme ruling the Supreme Court . . . ever made in favor of atheists and agnostics"; "most pleasing to a few atheists and world Communism." Beaney and Beiser, Prayer and Politics: The Impact of Engel and Schempp on the Political Process, in IMPACT, supra note 27, at 21-22.
the determinants of symbolic impact are much less conspicuous, but are so interwoven with the whole fabric of society that they frustrate any judge attempting to manipulate them to achieve particular ends.30

There are, of course, dangers in urging courts to decide cases merely for their symbolic impact. With some hyperbole, Professor Kurland has characterized this process as "Run the flag up the pole. See if anyone salutes." A "futile display of morality," he argues, may contribute to a waning public confidence in the courts and a growing disrespect for the law.31 This argument, however, is circular. If the purposes of judicial action include educating the public as to what constitutes acceptable conduct under the American code of ideals or morality, then by carrying out their symbolic function the courts may be performing precisely according to popular expectations. In the words of Professor Levy, "[t]he American people often dislike Court decisions that protect obnoxious or despised members of society, but the people respect appeals to their conscience or idealism."32 It is also less than clear that a court decision that is unenforceable in the short term results in a measurable decline in some fixed indicator of public confidence. Such ringing indictments of judicial behavior sound as if they ought to be true, yet proof of their truth is elusive, and the courts continue to survive as respected institutions in our society.

A more substantial risk in exercising the symbolic function is that the courts may generate expectations with respect to social change that simply cannot be met. The very concept of a "revolution of rising expectations" implies that demands on societal institutions will continue to grow no matter how great the actual progress in improving the quality of life.33 If those expectations embody an expanded concept of equality, as they most often do, the results are obvious: "[J]ust as there is no point at which the sea of misery is finally drained, so, too, there is no point at which the equality revolution can come to an end, if only because as it proceeds we become ever more sensitive to smaller and smaller degrees of inequality."34

The open-endedness of rising expectations and expanding notions

30. T. ARNOLD, SYMBOLS OF GOVERNMENT (1935); Lerner, supra note 22; Stumpf, supra note 27, at 49.
31. Kurland, supra note 6, at 598-600.
32. Levy, supra note 23, at 41-42.
34. Glazer, supra note 33, at 53.
of equality alone should not deter the judiciary; the existence of other inequalities or unrealized ideals need not prevent the courts from addressing the specific issues of a particular case. Sadly, however, there is the further problem of the severe limits on the ability of our institutions and the social sciences to achieve the goals we set for ourselves. Whether from a lack of basic knowledge, a shortage of resources, a dearth of qualified experts, or an overprofessionalization of services, most of the complex and difficult social problems of this society remain unsolved.

Given this pattern of judicial strengths and weaknesses in handling equal protection cases, it is inappropriate for the courts to intervene in the educational process in an effort to equalize schooling outcomes. The issues involved in such an endeavor are so complex and the state of our knowledge so backward that the courts cannot presently formulate or enforce rules that will achieve that purpose. Nor is there much to be gained from a symbolic affirmation by the courts of the equal outcomes standard. There probably already exists within our society a consensus that race and poverty should not be determinative of academic success or failure; at least there is little overt opposition to the proposition. The problem is not that the populace or the educational institutions are unwilling to countenance outcome equality. The problem is that they are unable to achieve that goal within the present limits of knowledge and resources. Unlike desegregation, the problem here is not one of "will not" but one of "cannot." There is no deviant behavior to attack, no blame to be assessed. A judicial affirmation of the equal outcomes definition simply will not

35. Compare D. Moynihan, Maximum Feasible Misunderstanding 191, 193 (1970) ("The role of social science lies not in the formulation of social policy, but in the measurement of its results"), with P. Goodman, supra note 21, at 44 ("Social sciences are purposive and activist. The political execution of their social values is part of their scientific problem . . . ").
37. Glazer, supra note 33.
38. Id.
move us closer to that equality; it can only increase the frustrations of those whose expectations have been raised but left unsatisfied.

By contrast, the courts are a proper forum for the adjudication of the constitutional issues raised by inequities in access to school resources and by racial discrimination. In resource allocation and racial discrimination cases the courts are called upon to determine what goes into the process, not the effects of those inputs on educational achievement. They can avoid the empirical vagaries of outcome equality and resist the temptation to mold inflexible constitutional standards out of tidbits of social science research. Unequal access and racial discrimination are the products of the unwillingness of those responsible for the public schools to change, not of their inability to do so. Thus, even if resource allocation and antidiscrimination decrees cannot immediately be enforced, their symbolic significance may affect attitudes and interested constituencies enough to increase greatly the probability of change.

II. Equal Educational Opportunity: Outcome Equity

The equal outcomes definition of equal educational opportunity had its genesis in the mid-1960's with the publication of the now-famous Coleman Report and the passage of the first federal compensatory education program. The equal outcomes doctrine 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 effects of the schooling process. The concern is not


with new buildings, smaller classes, or fancy equipment, but with the results those things generate.45

Beyond this basic statement, however, outcome equality is a vague, protean concept with no crisp prescriptive norms.46 Apparently no one is willing to urge the preposterous notion that equal educational opportunity requires that every child, regardless of ability, perform at the same level.47 But should every child reach some minimum level of achievement? Should achievement be measured by test scores, or by the sense of personal self-worth and fulfillment, or by life prospects as measured by status and income?48 Some commentators have urged that every child should develop to his or her full potential,49 or to a minimum necessary for civic efficiency or for economic survival.50 But potential for what, and how is potential to be measured? How should limited resources be divided between encouraging the so-called gifted child and raising the underachieving child up to the norm?

A. The Socialist Model for Educational Reform

These extraordinarily difficult questions have been largely ignored by those concerned with equal educational opportunity defined in terms of outcome equality. Instead there has emerged what can be called the "socialist model" for educational reform.51 This model is the culmination of the efforts of reformers to substitute their own notions of equality and faith in technocratic expertise for a clear understanding of the complex issues underlying the beguiling notion of outcome equity.

The socialist model views schooling as a process designed to sever what is deemed to be an illegitimate relationship between family back-

45. Coleman, Equal Schools or Equal Students?, PUB. INTEREST, Summer 1966, at 72; Kirp, supra note 6, at 651.
47. B. RUSSELL, EDUCATION AND THE GOOD LIFE 17 (1957).
49. E.g., H. RICKOVER, EDUCATION AND FREEDOM 155 (1960); Stodolsky & Lesser, Learning Patterns in the Disadvantaged, 37 HARV. EDUC. REV. 546, 587 (1967); Wise, supra note 8, at 42 (quoting John Gardner).
50. E.g., C. SILBERMAN, supra note 3, at 62; Armor, School and Family Effects on Black and White Achievement: A Reexamination of the USOE Data, in F. MOSTELLER, supra note 3, at 171; Gordon, supra note 46, at 431-32.
51. See Bell, supra note 7, at 48, 58.
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ground—race and class—and educational success. The model assumes that the capacity to learn is randomly distributed between races and socio-economic groups, and cites the nonrandom distribution of success and failure in public school as proof that poor and minority group children are not performing to their full capacities. A properly functioning educational system is one in which failure—poor achievement and lack of access to further schooling—cannot be correlated with race, class, or wealth. Significantly, an educational system that treated all students shabbily would satisfy the socialist model. The target evil is discrimination and not the deprivation of an essential right.

The socialist model further assumes that everyone accepts a single definition of educational success. Test scores measure educational performance, high test scores allow access to additional years of schooling, and both are prerequisites to the good life—that is, status and income. In the words of one commentator, "the value of education is seen as instrumental, leading to ends extrinsic from the processes of formal instruction itself. We get an education now so that at some later time we can earn money, vote intelligently, raise children, serve our country and the like." The socialist model rejects a healthy pluralism of educational ends in favor of a single goal—improved achievement as measured by tests. Arguments about the possible cultural bias of the most commonly used tests and about the efficacy of school performance as a predictor of life performance are disregarded. The untestable aims of education—instilling a sense of community, maximizing individual liberty, creating self-respect, and fos-

52. See, e.g., J. Guthrie, supra note 3, at 138; Horowitz, supra note 10; Wise, supra note 8.
53. D. Morgan, supra note 44, at 114-20; F. Keppel, supra note 2, ch. 3; D. Rogers, 110 LIVINGSTON STREET 1-14 (1969); C. Silberman, supra note 3, at 62-69.
56. Newmann & Oliver, Education and Community, 37 HARV. EDUC. REV. 61 (1967).
tering intellectual growth—are ignored.

The boldest assumptions of the socialist model, the ones most directly affecting judicial intervention, are as follows: first, that our technology can identify precisely what factors affect schooling outcomes; second, that there are experts who can and will perform this function; and third, that society is obliged to heed the advice of these experts in formulating the scope of constitutional rights. Defining the ideal school system as one that eliminates differences in achievement arising from racial and socio-economic background factors, the socialist model assumes that we know how to intervene in the schooling process to bring about that result.

B. The Education Production Function

Unfortunately, the advocates of the socialist model are wrong. The truth is that we know very little about the relationship between particular resources and policies and educational outcomes, what economists call the education production function. Instead, it is far from clear that schools modify in any way the effect of socio-economic, cultural and family influences on achievement. The Coleman Report noted that “whatever may be the combination of non-school factors—poverty, community attitudes, low educational level of parents—which put minority children at a disadvantage in verbal and nonverbal skills when they enter the first grade, the fact is the schools have not overcome it.”62 The Report went on to find that after controlling for six student socio-economic background factors, differences in resources

60. See J. Dewey, Democracy and Education (1968); Dyer, supra note 57.
61. See generally Coleman Report, supra note 42; Rand Corporation, How Effective is Schooling? (1972) (Final Report to President's Commission on School Finance) [hereinafter cited as School Finance]; F. Mosteller, supra note 3. But see J. Guthrie, supra note 3, ch. 4. The discovery of the relationship between educational inputs and outputs is further handicapped by the lack of coherent theory about the learning and instructional processes. Id. at 64-65.
62. Coleman Report, supra note 42, at 21. Of course, this does not mean that schools have no impact:

In sum, the [Coleman Report] found that schools receive children who already differ widely in their levels of educational achievement. The schools thereafter do not close the gaps between students aggregated into ethnic/racial groups. Things end much as they begin. To the simple of mind or heart, such findings might be interpreted to mean that “schools don't make any difference.” This is absurd. Schools make a very great difference to children. Children don't think up algebra on their own . . . . But given that schools have reached their present levels of quality, the observed variation in schools was reported by [the Coleman Report] to have little effect upon school achievement.

Mosteller & Moynihan, supra note 3, at 21.
and policies between schools accounted for less than 1 percent of the average pupil achievement differences.63

Interestingly, Coleman, as well as his successors who analyzed the same data, discovered that the intra-school variations in student achievement were nine times greater than the inter-school variations.64 This phenomenon might be explained in several ways: by genetic differences among children;65 by the “differences in the way the same school treats different children”;66 by variations in the ability to benefit from a uniform curriculum or expenditure pattern or to survive in a competitive environment; or by inadequate and inaccurate social science research.67 In any event the implication is clear:

In the short run it remains true that our most pressing political problem is the achievement gap between Harlem and Scarsdale. But in the long term it seems that our primary problem is not the disparity between Harlem and Scarsdale but the disparity between the top and the bottom of the class in both Harlem and Scarsdale. Anyone who doubts this ought to spend some time talking to children in the bottom half of a “good” middle-class suburban school.68

Some evidence indicates that socio-economic integration tends to boost the performance of disadvantaged children.69 The theory is deceptively simple: if a poor child, disadvantaged by a background that is not supportive of education, is assigned to a school where his fellow students come from superior socio-economic backgrounds, his performance is likely to improve. In some sense, the motivations and aspirations of the middle-class youngsters rub off on the poor child; he may learn more from his peers than from his teachers.

Although the evidence on socio-economic integration is to some degree consistent, the inferences to be drawn from it are ambiguous. Perhaps the poor who reside in poor school districts are in some measurable and unmeasurable ways “poorer” than those in middle class districts; for example, “poor families who send their children to middle-class schools may also be more achievement oriented and more competent than poor families who send their children to lower-class

63. Mosteller & Moynihan, supra note 3, at 16 (citing COLEMAN REPORT); cf. Jencks, supra note 59, at 104-05. But see J. GUTERIE, supra note 3, at 84.
64. Mosteller & Moynihan, supra note 3, at 19; Jencks, supra note 59, at 69, 86.
65. Jensen, supra note 44.
66. Jencks, supra note 59, at 87.
67. Id.
68. Id. at 86.
69. COLEMAN REPORT, supra note 42, at 302; Jencks, supra note 59, at 87.
schools.\footnote{70} Or perhaps middle-class schools are superior in resources that are poorly quantified by survey research, such as teacher attitudes, administrative competence, guidance counseling, or sensible policies.\footnote{71} Recent evidence suggests, though not conclusively, that lower-class children fall behind middle-class children during summer vacations; the latter group apparently continues to have learning experiences even in the absence of formal instruction.\footnote{72} Moreover, given the large overlap between race and social class in most areas of the country,\footnote{73} it is difficult to isolate the independent effects of racial integration from those of socio-economic integration.

In addition to student body composition, the conventional wisdom has identified an array of imposing, time-tested components of quality education. Yet according to the accumulated social science evidence none of them are demonstrably and substantially related to the relative academic performance of school children.\footnote{74}

1. Facilities and Curriculum.—Both the Coleman Report and the studies by Christopher Jencks found that physical facilities such as the age of the school building, the presence of auditoriums, cafeterias, gyms, laboratories, typing rooms, infirmaries, and movie projectors account for relatively little variation in pupil achievement as measured by standard tests.\footnote{75} Both studies also found little correlation between achievement and the curriculum offerings.\footnote{76} In addition, research indicates that preschool kindergarten and nursery programs generally have only a marginal impact on achievement.\footnote{77} Those preschool programs that have demonstrated substantial achievement gains are quite

\footnote{70} Jencks, \textit{supra} note 59, at 87-88.

\footnote{71} Id.


\footnote{74} See \textit{COLEMAN REPORT, supra} note 42; F. Mosteller, \textit{supra} note 3; \textit{SCHOOL FINANCE, supra} note 61; C. Jencks \textit{et al.}, \textit{Education and Inequality: A Preliminary Report to the Carnegie Corporation of New York, 1970} (unpublished report for Center for Educational Policy Research, Harvard University); Light & Smith, \textit{supra} note 44, at 437-43. \textit{But see I. GUTHERIE, supra} note 3.

\footnote{75} \textit{COLEMAN REPORT, supra} note 42; Jencks, \textit{supra} note 59, at 76, 93-94.

\footnote{76} \textit{COLEMAN REPORT, supra} note 42; Jencks, \textit{supra} note 59, at 96. The frequency of IQ testing showed a small but consistent relationship to improved performance on verbal achievement tests, but almost no relationship to reading or mathematics achievement, and the frequency of achievement tests bore no relationship to performance on any achievement tests. \textit{Id.}

\footnote{77} Jencks, \textit{supra} note 59, at 92. Jencks adds, however, that highly structured preschool programs, focusing on cognitive skills, may have a greater impact. \textit{Id.} The Coleman Report data proved insufficient to test this hypothesis.
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expensive, and the children in the programs often lose their advantage once they enter the regular public schools.\textsuperscript{78} Differences in achievement attributable to differing access to library books and textbooks are “so uniformly trivial that one is tempted to dismiss them entirely.”\textsuperscript{79} Nor has research demonstrated a significant positive correlation between the serving of free lunches in the schools and verbal achievement.\textsuperscript{80} Supportive services such as food, clothing, and medical care may well be vital in early childhood, even before birth, but their actual effect on achievement has simply not been isolated.

Neither Coleman nor Jencks found any evidence that reducing class size would significantly improve the in-school performance of disadvantaged children.\textsuperscript{81} A reduction in class size from 36 to 20 pupils was related to only two weeks to three months of verbal achievement, and even less for reading and math scores. Class size appears to be related to overachievement only between school districts, rather than among schools within a single district, suggesting that class size may disguise other, unmeasured differences between children or resources in small class districts and large class districts. It is also difficult to establish any causal relationship because districts with large numbers of high or low achievers may create special small classes for them. Given the virtual doubling of per pupil costs necessary to reduce class size from 36 to 20 students, the conclusion is inescapable: “while reductions in class size can often be justified in terms of teachers’ sanity, pleasant classroom atmosphere, and other advantages, they are hard to justify in terms of test scores.”\textsuperscript{82}

Educators almost universally favor ability grouping of students. Under this scheme children are separated according to ability into homogeneous tracks, each with a distinct curriculum to provide the differing educational services required by the students.\textsuperscript{83} Although a great deal of research has been done on ability grouping, the accumulated

\textsuperscript{79} Jencks, \textit{supra} note 59, at 95.
\textsuperscript{80} Id. at 94. \textit{But see} Wiseman, \textit{The Manchester Survey}, in \textit{Children and Their Primary Schools} (Plowden Report) (1967).
\textsuperscript{81} Coleman Report, \textit{supra} note 42; Jencks, \textit{supra} note 59, at 97-98.
\textsuperscript{82} Jencks, \textit{supra} note 59, at 97-98.
\textsuperscript{83} C. Jencks, \textit{supra} note 74, ch. 6; Hall, \textit{On the Road to Educational Failure: A Lawyer’s Guide to Tracking}, 5 \textit{Inequality in Educ.} 1 (1970); Jencks, \textit{supra}
evidence is simply too contradictory and confusing to support any conclusion as to the effects of ability grouping on the tested performance of students.84

2. Expenditure Levels.—Although the Coleman Report found almost no relationship between total per pupil expenditures and achievement, the report ignored the very real possibility that expenditures between schools in the same district might vary substantially.85 Subsequently, Jencks attempted to estimate the expenditures at the individual school level, and found that a $100 per pupil increase in spending was associated with up to one month of verbal overachievement. He concluded that these small gains reflected reductions in teacher-pupil ratios and that “[a]n increase in the salary of the average teacher was as likely to be associated with underachievement as with overachievement.”86 Increases in teacher salaries may be rationalized as necessary to give teachers adequate compensation for their efforts and allow them a reasonable standard of living, but no evidence suggests that the economic interests of teachers and the educational interests of parents and children are coincident.87

3. Teacher Recruitment and Training.—There is little evidence that better teacher recruitment or training improves student performance:


Many commentators have examined the stigmatizing effects of ability grouping. E.g., C. Jencks, supra note 74, ch. 6; Smith, supra, at 263; cf. R. Rosenthal & L. Jacobsen, PYGMALION IN THE CLASSROOM (1968); Rist, Student Social Class and Teacher Expectations: The Self-Fulfilling Prophecy in Ghetto Education, 40 HARV. Educ. Rev. 411 (1970).


86. Jencks, supra note 59, at 90-91.

87. But see J. Guthrie, supra note 3, at 134; H. Rickover, supra note 49, at 106-09.
Effective teachers are about equally likely to be born rich or poor, black or white, male or female. They appear no more likely to graduate from liberal arts colleges than from teachers colleges, to major in academic subjects rather than education, to attend what they view as "good" rather than "bad" colleges, or to hold higher degrees. Verbally fluent teachers may be slightly more effective than verbally inept teachers, but it is not clear whether they are better at teaching their pupils or only at negotiating their way into schools where pupils overachieve for other reasons. Moreover, the relationship between achievement and the professional characteristics of teachers—professional experience, tenure, certification, and membership in professional associations—is negligible.

4. The Child's Self-Assurance.—The Coleman Report found that a child's sense of "control of his environment" bore a significant relationship to verbal achievement: that is, students who have confidence in themselves and their ability to cope with the traumas of schooling have that confidence rewarded by overachievement. Some commentators have emphasized this relatively unpublicized finding as an argument in favor of community control and direction of black schools:

Under community-directed schools, the educational environment is far less likely to be hostile or intimidating to the minority child. He will thus have a sense of being able to function in the school environment and, in turn, a greater sense of internal control—the prime prerequisite to effective learning.

The problem, of course, is the nebulous causal relationship: students who are self-assured may perform well, or those who already perform well may then be self-assured. Other evidence indicates that large numbers of black and white students already "have a healthy, even an exaggerated, sense of their ability," and motivation may significantly

88. Jencks, supra note 59, at 101-02. Jencks concluded that devices used to weed out incompetent teachers or applicants are at best inefficient, at worst counter-productive. Id. at 100. The devices may also be used punitively by desegregating school districts to terminate black teachers. E.g., Armstead v. Starkville Municipal Separate School Dist., 331 F. Supp. 567 (N.D. Miss. 1971); Baker v. Columbus Municipal Separate School Dist., 329 F. Supp. 706 (N.D. Miss. 1971); Barber, From Intransigence to Compliance is Two Steps Forward and Two Steps Back, 5 INEQUALITY IN EDUC. 13 (1971).
89. Jencks, supra note 59, at 100-03.
90. COLEMAN REPORT, supra note 42, at 319.
91. M. FANTINI, supra note 3, at 193.
92. Mosteller & Moynihan, supra note 3, at 25.
93. Id. at 26.
increase when unrealistic aspirations are blunted, as sometimes occurs in a desegregation context.94

5. Racial Integration.—Much debated in the political context, the relationship between student achievement and racial integration has also been the object of considerable social science investigation.95 The Coleman Report found no independent effect of racial integration on student achievement,96 but the United States Commission on Civil Rights, which reanalyzed the Coleman data, and many later researchers have reached the opposite conclusion.97 Several caveats must accompany the evidence on the impact of racial integration. First, even those studies that have found a positive relationship between achievement and racial integration have cautioned about its magnitude; one study concluded that assigning black students to mostly white classrooms would eliminate less than one sixth of the difference between average black and white achievement in the schools at grade twelve.98 Second, whatever favorable results do occur come only where the classrooms within a school are integrated.99 To the extent that ability groupings or other devices separate the races within integrated schools, the benefits of integration are largely obviated. Finally, although researchers have hypothesized that the degree of racial hostility within which desegregation takes place may be crucial,100 to date the social science evidence is unclear on that point.101


96. COLEMAN REPORT, supra note 42, at 28-30.

97. 2 RACIAL ISOLATION, supra note 9, at 86-87; Cohen, Pettigrew & Riley, supra note 73, at 358.

98. Cohen, Pettigrew & Riley, supra note 73, at 358; Light & Smith, supra note 44, at 441-43.


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6. Community Control of Schools.—Many black leaders in recent years have proposed that large districts be broken up and black parents given a greater voice in making educational policy, including the selection of administrators, teachers, textbooks, and curriculum.\textsuperscript{102} The available empirical data, however, indicates very little relationship between parental involvement in educational decision-making and student achievement.\textsuperscript{103} To be sure, these findings have been roundly attacked. PTA attendance, the measure of parental participation used in the Coleman Report, has been criticized as a highly inappropriate indicator of social involvement of ghetto parents.\textsuperscript{104} The relevance of the evidence may also be attacked because of the tendency of researchers to adopt a definition of educational outputs that focuses on the acquisition of academic skills, not on "the development of human beings with a sense of self-worth and an ability to function affirmatively and humanely with their fellow men."\textsuperscript{105} Community control of schools may be highly desirable as a matter of social policy,\textsuperscript{106} but the weakness of the empirical basis for restructuring educational institutions to improve academic performance underscores the essentially political rather than educational nature of the debate.

C. Lessons From the Social Science Evidence

One might conclude that since the social scientists have answered the pleas for solutions with empirical ambiguity, lawyers, judges, and others who rely on the judiciary for social change should act on the basis of their own perceptions of what is socially and politically desirable. Political life often demands that decisions of great moment be made without reliable information as to their consequences. Surely


\textsuperscript{103} Cohen, supra note 78, at 23; Jencks, supra note 59, at 89-90.

\textsuperscript{104} A. ALTSCHULER, supra note 102, at 54.

\textsuperscript{105} M. FANTINI, supra note 3, at 183.

\textsuperscript{106} Community control may restore the confidence of blacks alienated by the public schools and revive perceptions of the schools as legitimate social institutions. It may render teachers and administrators accountable to students and parents, and it may allow taxpayers to monitor the expenditures of the school administration more carefully. It may also provide black children with models of successful black adults as blacks assume key administrative, teaching, and guidance positions. More important, it may provide patronage for the black community. Cohen, supra note 78, at 23, 26, 28-29; Hamilton, Race and Education: A Search for Legitimacy, 38 HARV. EDUC. REV. 187, 190, 196 (1969).
the educational process should not grind to a halt merely because of confusion over which course to pursue. On the other hand, the social scientists have not failed completely. They teach the need for humility and the foolishness of relying on a pseudo-scientific learning. Moreover, the literature on the education production function yields useful insights for policymaking, albeit often in a negative fashion. Most of these insights, however, demonstrate the need for experimental activities which in their breadth and complexity, are beyond the reach of the judiciary.

The fundamental lesson must be that because the social science research taken as a whole reveals a general lack of conclusiveness regarding the factors contributing to educational attainment, it is inappropriate for courts to intervene in the schooling process to promote the performance goals of the socialist model. The point is worth emphasizing, for at least one suit has already been filed seeking damages from school authorities for failing to provide a high school graduate with basic educational skills.\(^{107}\) Courts simply cannot formulate any simple standard that would assure improvement in the schooling outcomes of the disadvantaged, nor can any other institution. Even assuming that a standard could be formulated, the massive difficulties inherent in judicial attempts to manipulate educational resources and policies would make enforcing such a broad equal protection decision nearly impossible. In short, accepting the ideology of the socialist model and molding it into a cogent constitutional argument do not make a case for judicial action.\(^{108}\)

The proponents of the outcome equalization model might point to some outrageously blatant denials of educational opportunity—the non-English speaking child taught only in English, the girl who is expelled for being pregnant, the student who cannot afford books or pencils or gym fees—to justify courts acting without definitive findings from social scientists and educators. Perhaps the judiciary should take a common sense view of these extreme cases and not demand formal proof of the obvious truth that these students will not perform as well as their peers. Yet the social science evidence teaches that what seems obvious to laymen, including judges, with respect to education may prove to be

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less than obvious in fact, as for example with the common sense notions about the value of reduced class size or homogeneous ability groupings. Barring extraordinary empirical advances, there is simply no margin of safety in judicial notice. More important, most of these blatant inequalities may be cured under an equal access rationale focusing on the denial of an equal opportunity without resort to the more volatile premises of outcome equity.

More social science research is clearly necessary. The failure of current research to identify school resources and policies that positively affect achievement does not necessarily mean that such factors do not exist. Some scholars, for example, have attacked the Coleman Report on methodological grounds, arguing that no policy conclusions should be drawn until a more careful analysis has been performed. Responding to this criticism, a number of scholars at Harvard undertook a reanalysis of the Coleman data employing more sophisticated techniques, and verified nearly all the major conclusions of the report. Another criticism of the Coleman data is that it related resources to achievement at a single point in time and failed to examine gains over time as might be done by comparing resources and performance over a number of grades. According to this argument, a "longitudinal approach" would not only allow for more accurate correlations, but would also permit examination of dropout, transfer, and assignment influences. It has also been suggested that substantial intraschool variations in achievement can be explained only by determining access to resources and measures of achievement for specific individuals as well as for aggregates. Finally, since achievement scores are not the only goal of schooling, "[in]multiple outputs must be specified."

Another major shortcoming of current survey research such as the Coleman Report is probably inherent. Descriptions, samplings, and

111. The reanalysis was published in F. Mosteller, supra note 3.
112. Jencks, supra note 59, at 70.
113. Smith, supra note 84, at 315-16. See also Bowles & Levin, supra note 110.
114. Smith, supra note 84, at 316.
115. Id.
observations are important and contribute to useful knowledge; ultimately, however, our ability to comprehend the complexities of schooling and the nexus between outcomes and resources will depend upon large-scale experiments conducted under rigid controls. Those controlled experiments that have been done have been too restricted to yield conclusions of general applicability. Fundamentally what is needed is the money and the political will to conduct broad and innovative educational experiments, to free educators from the narrow confines of tradition and bureaucracy so that they can plan and implement programs embodying the whole range of educational theory. Resources and policies that affect achievement may exist that have never been evaluated because they have never been tried on a broad scale.

The existing social science evidence suggests many possible experiments. Socio-economic and racial integration of the classroom without homogeneous ability grouping may yield positive results, especially if accompanied by counseling for students and in-service training programs for teachers and administrators designed to improve student self-image and reduce interracial hostility. Summer programs for the economically disadvantaged and year-round supportive services—food, clothing, medical care—should be tried. Academic performance may improve with a recognition that education may take place outside the confines of the school building—in an automobile mechanic’s garage, or before a radio or television in the home. Emphasis on the linguistic problems of the poor may be appropriate, for some evidence indicates that speech therapists have a significant impact on achievement. More radically, early and direct intervention by the state in
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the family setting may be necessary; the early relationship between mother and child and the development of linguistic skills in the preschool years may be far more crucial for learning than the twelve years spent in the classroom.\textsuperscript{122}

A promising approach advocated by many progressive educators is to create a more sympathetic, less structured, less coercive environment for education.\textsuperscript{123} Informal, open classrooms without the constant emphasis on authority, silence, and order may facilitate learning. John Dewey argued that the educational process must be centered on the intrinsic needs and activities of school children, must rely on their existing interests and abilities, and must relate to their present experiences.\textsuperscript{124} Since "learning is something which happens to an individual at a given time and place," its success may depend on the palatability of the experience itself and not on the mastery of those things that are dear to the hearts of adults.\textsuperscript{125} The creation of a fit and humane educational environment, treating schooling as an aspect of life itself rather than simply an instrument for achieving societal goals, may lead to improved school performance.\textsuperscript{126}

Currently, however, the prospects for broad scale experimentation are bleak. The public schools are pervaded by an almost uniform unwillingness to try new approaches that disturb established routines or violate traditional notions of orderliness or educational efficacy.\textsuperscript{127} They are characterized by a preoccupation with order and control and a reluctance to divert monies from traditional expenditure categories such as administrators, teachers, and textbook companies. Local control of education through autonomous local school districts appears to


\textsuperscript{123} E.g., G. Dennison, The Lives of Children (1969); J. Dewey, supra note 60; E. Friedenberg, Coming of Age in America (1965); P. Goodman, The Community of Scholars and Compulsory Miseducation (1966); J. Holt, The Underachieving School (1969); J. Neill Summerhill (1960); C. Silberman, supra note 3.

\textsuperscript{124} J. Dewey, supra note 60, at 107-08.

\textsuperscript{125} Id. at 108-110.

\textsuperscript{126} G. Dennison, supra note 123, at 9.

\textsuperscript{127} C. Silberman, supra note 3, at 122, 144.
generate a mindless parochialism rather than diversity. Nor has federal intervention stimulated innovation and experimentation.

The perplexing, ambiguous data generated by social science research casts serious doubt on the efficacy of judicial attempts to foster outcome equity. Clearly, experimentation will be required to develop techniques for improving academic performance of the poor and racial minorities. Equally clearly, the courts are simply not equipped to stimulate or oversee this kind of experimentation. They lack the knowledge, the flexibility, and the will to do so. It is preposterous to deal with the uncertainties of social science experimentation in the framework of constitutionally protected rights. Creating schools without walls and counseling students in an effort to improve their self-image—as advantageous as they may be—must await legislative and administrative action. They require a degree of supervision and control that the courts cannot provide.

III. Equal Educational Opportunity and Race

In Brown v. Board of Education the Supreme Court declared that "[s]egregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive[s] the children of the minority group of equal educational opportunities." This statement of the constitutional principle seems simple enough, but closer examination suggests a number of questions about the holding. Did the Court mean that segregation was unconstitutional not only because it was morally abhorrent but also because it adversely affected the chances for educational success? Was the Supreme Court primarily concerned with the different resources made available to black and white schools? Was it treating the student peer group as a resource that must be equalized? Or was the Supreme Court's response designed to mitigate white dominance in the governance of public schools by meshing the educational fortunes of black and white children?

A. The Sociological Interpretation of Brown

One possible interpretation of Brown is that it was fundamentally

addressed to the disparity in achievement between black and white children. The Court referred to segregation as generating "a feeling of inferiority [among blacks] as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 130 It quoted with favor the finding of the lower court that "segregation with the sanction of law . . . has a tendency to [retard] the educational and mental development of Negro children. . . ." 131 In the now-famous footnote eleven the Court cited what it called modern authority on the effects of segregation on black children. 132

These references have given support to what might be called a sociological interpretation of Brown. Professor Owen Fiss is perhaps the most eloquent spokesman for this reading of the case. 133 Fiss argues that the constitutional case against racially imbalanced schools must rest on a claim that the educational opportunities afforded black children forced to attend such schools are unequal to those afforded children attending other public schools. According to this scheme, a court must determine first whether the opportunity afforded black children is significantly inferior, and then whether there is an adequate justification for the difference.

As a description of Brown or a strategy for attacking de facto segregation, the Fiss position makes some sense. As a rule of law, however, it simply will not stand. It suggests that courts must undertake a case-by-case analysis to determine the injury to black students and that the degree of injury will determine the extent of the school system's obligation to integrate. Yet Fiss fails to supply a standard for determining when black students have been injured and thus deprived of equal educational opportunity. Fiss' answer to this objection is more rhetorical than responsive. Referring to the stigma and insult of segregation, he offers a laundry list of psychological harms: "a lessening of motivation, alienation of the child from the educational institution, distortion of personal relationships, and various forms of antisocial behavior." 134 He also asserts that segregated schools are academically inferior, concluding that "[t]his academic inadequacy seriously impairs

130. 347 U.S. at 494.
131. Id.
132. Id. at 494-95.
the Negro's ability to compete in society and deprives society of an appre-
ciable amount of talent.\footnote{135} Finally, he argues that segregation
may perpetuate social barriers between the races, but fails to identify
the specific injury that results from the social isolation of the races.\footnote{138}

The obvious question, of course, is how does Professor Fiss know
all these things. One study of the psychological impact of segregation
on black children has found that the black child's self-concept is "in-
versely related to the proportion of white students in the school; the
whiter his school the lower the black child rated himself.\footnote{137} Other
studies have reached the opposite conclusion.\footnote{138} Studies of the rela-
tionship between personality development and segregation are similarly
conflicting.\footnote{139} Even the evidence that the Brown court cited has been
roundly criticized on methodological and interpretive grounds.\footnote{140} One
commentator has concluded that "the social science writings and testi-
mony offered in support of the psychological findings of harm in Brown
had little probative force."\footnote{141} The point is familiar: our
knowledge of the psychological consequences of segregation is quite
limited, the data permits conflicting hypotheses and conclusions, and
it is absurd to think that the courts can perform the scientific miracle
of establishing the requisite degree of harm. Moreover, available
studies are inconclusive as to whether integration in fact accelerates
academic achievement.\footnote{142} Further complicating the evidence are the
many additional variables that may alter the effect of integration or
segregation: the degree of interracial hostility, the percentage of black
students in relation to the school population, the socio-economic makeup
of the student body, the existence of ability grouping, and the atti-
tudes of parents, teachers, and administrators.\footnote{143} In sum, the courts

\footnote{135} Id. at 570.
\footnote{136} Id.
\footnote{137} COLEMAN REPORT, supra note 42, at 323-24, cited in Goodman, supra note 129, at 409.
\footnote{138} E.g., Allport, supra note 95. See generally Goodman, supra note 129, at 408-12.
\footnote{139} Cohen, Pettigrew & Riley, supra note 73, at 363-66; Goodman, supra note 129, at 409.
\footnote{140} E.g., Cahn, A Dangerous Myth in the School Segregation Cases, 30 N.Y.U.L. Rev. 150 (1955); Garfinkel, supra note 95; Van den Haag, Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark, 6 Vill. L. Rev. 69 (1960).
\footnote{141} Goodman, supra note 129, at 279.
\footnote{142} E.g., Cohen, Pettigrew & Riley, supra note 73, at 359; Goodman, supra note 129, at 408-26.
\footnote{143} E.g., Cohen, Pettigrew & Riley, supra note 73, at 359-66; Katz, supra note 100.
are not capable of performing the task that Fiss has assigned them, regardless of the force of his constitutional doctrine.

1. Explaining Footnote 11 and All That.—The Brown Court's troublesome references to educational and psychological harm have been explained in various ways. Some have viewed the findings as unessential to the result. According to this view the Court "did not need the cold empirical foundation that would have been required had constitutional imperatives truly hinged upon them." This explanation is the simplest, and may be the soundest. It may also be argued that the findings of harm were self-evident and thus subject to judicial notice. This view, however, is unpersuasive. It should be clear that virtually nothing about the educational process is self-evident. The theory of self-evident injury may rely upon empirically unverifiable notions as to how a just society should function, and thus amount to little more than a statement of ethical preferences grounded in history.

Finally, the findings may have been a way of saying that the state had drawn a racial classification and failed to meet its burden of showing that racial separation is consistent with equality. According to this explanation, the state could survive the strict scrutiny of racial classifications only by showing that racially segregated education was totally harmless to the members of the minority group, an impossible task that the defendants did not even attempt. Under this analysis, where the evidence is vague or dubious, the state loses. First espoused by Professor Pollack in his brilliant draft of an "adequate" opinion for Brown, this approach has met with increasing popularity among civil rights lawyers and scholars; for with a slight twist it has been used to attack school segregation in the North, where official discrimination may often be difficult to prove. Paul Dimond has summarized the argument as follows: Schooling is compulsory, the public schools are supported almost entirely by the state, and school administrators annually assign all pupils and personnel to particular schools. Thus any

144. Goodman, supra note 129, at 280.
145. Id.
146. Id.
147. Id. at 282.
149. See, e.g., Dimond, School Segregation in the North: There is But One Constitution, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 5 (1972); cf. Fessler & Haar, Beyond the Wrong Side of the Tracks: Municipal Services in the Interstices of Procedure, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 441 (1971).
school segregation results from some degree of state action. Moreover, the state is responsible for the natural, probable, and foreseeable consequences of its policies and practices. Accordingly, proof of substantial segregation should create a prima facie case of state-imposed segregation. The state can rebut the prima facie case only by demonstrating that segregation is necessary to promote a compelling state interest that cannot be promoted by less segregative alternative actions.

The argument is forceful, though hardly irresistible. Confronted with the argument, many Northern courts have refused to find state action where segregation has resulted from neighborhood assignment policies. Instead, these courts have demanded proof of a segregationist motive, or explicit racial policies, or conscious gerrymandering to isolate black students. Moreover, even without considering the possible role of school authorities or other state agencies in perpetuating segregated neighborhoods, a court might well find that the preservation of the neighborhood school is itself a compelling state interest. Regardless of the ultimate fate of the Dimond approach, however, it ignores the fundamental question lurking behind the whole analysis: why should the burden of justifying segregation be shifted to the state? Why should de facto segregation resulting from neighborhood assignment policies be treated as a de jure racial classification? Perhaps those seeking to change the educational system should bear the burden of demonstrating the need for the change. Casting the analysis of desegregation cases in the formalistic legal mold of burdens of proof obfuscates the critical underlying social and political issues.

Mr. Dimond provides no ready answers to these questions. Finding the social science evidence inconclusive, he invokes a litany of unexplained phrases: segregation constitutes "a living racial insult" and violates a "higher constitutional morality." Although these ambiguous phrases imply that the whole suspect classification argument is premised on unarticulated concepts of equality, Mr. Dimond has probably retreated to the only defensible position. Like the self-evident

151. Dimond, supra note 149, at 4-6.
152. E.g., Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967); Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964), cert. denied, 380 U.S. 914 (1965); Bell v. School City, 324 F.2d 209 (7th Cir. 1963).
153. Dimond, supra note 149, at 18.
154. Id.
155. Id. at 18.
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harm thesis, the shifting of burdens approach ultimately reduces to the proposition that segregation is somehow ethically unacceptable. If this is the case, then the first reading of *Brown* is vindicated—the references to social science literature and to psychological and academic harm must be viewed as unessential to the result.  

The post-*Brown* judicial experience confirms this hypothesis: the courts have consistently and adamantly refused to countenance, in Judge Wisdom's words, "the popular myth that Brown was decided for sociological reasons." With rare exceptions, courts have not allowed school boards or white intervenors to introduce social science data and testimony to contradict the *Brown* result. They have simply not been interested in proof suggesting that integration is injurious or that segregation is not harmful. Some commentators have advised the opposite course, but the courts, especially the Fifth Circuit Court of Appeals, have remained cryptic and to the point on the issue:

Insofar as the opinions of experts in the fields of psychology and anthropology, in deposition, book and pamphlet form, may constitute an attack upon the major premise [that separate educational facilities are inherently unequal], they are rejected out of hand.

2. Brewer and Brunson.—Perhaps the most instructive example of the attitude of the courts toward social science evidence on integration and segregation is *Brewer v. School Board of the City of Norfolk*. The district judge had ruled that testimony from experts in education, social sciences, and psychology was appropriate because it had provided the basis for the *Brown* Court's repudiation of *Plessy v. Ferguson*. The district court had before it the extended testimony of some


162. 308 F. Supp. at 1279 n.6.
cial psychologist Thomas Pettigrew that because all children perform best in middle-class schools and because of the high correlation between race and socio-economic class, educational achievement would be maximized in schools with a 70-30 ratio of white to black students. Relying heavily on this testimony, the court concluded that integration was educationally beneficial only where white students were in the overwhelming majority in the student body. Although the school board plan approved by the court contained these goals, the small number of available white students would have left 76 percent of all-black elementary students in one-race schools and nineteen out of fifty-two schools all-black.

The Fourth Circuit, sitting en banc, reversed the order approving the school board's plan. The majority opinion chose not to evaluate the expert testimony or question its admissibility; indeed, it apparently missed the point of the testimony altogether. The district court had explicitly found that blacks would be no worse off in all-black schools than in predominantly black schools, and that they would perform significantly better in integrated schools with a high percentage of white students. The district court saw the choice as one between a system in which every school was inferior because of its black-white ratio and one in which some schools were superior and the rest not demonstrably worse than they would have been under a more far-reaching plan. Instead of grappling with these difficulties, the Fourth Circuit majority simply concluded that the plan failed to create the required unitary system. Only Judges Sobeloff and Winter seemed piqued: "The new, and spurious, 'principles' devised by the Board and endorsed by the Judge as justification for the failure to desegregate fly in the face of Brown . . . and are simply new rationalizations for perpetuating illegal segregation."

Brewer did not, unfortunately, sound the death-knell of the Pettigrew thesis. In Brunson v. Board of Trustees of School District No. 1 of Clarendon County, the Fourth Circuit reversed a freedom of choice plan that had led to only token integration of the district's six schools. Since only 256 out of the 2664 pupils in the district were

163. Id. at 1280-92.
164. Id. at 1281-82, 1290-91.
166. 434 F.2d at 411.
167. Id. at 413, 414 (Sobeloff & Winter, JJ., concurring specially).
168. 429 F.2d 820 (4th Cir. 1970) (en banc).
white, random distribution of the white pupils throughout the system created a heavy black majority in each school. In a separate opinion, Judge Craven, joined by Judges Haynsworth and Bryan, labeled the result desegregation, not integration, and decried both the court's failure to recognize the danger of white flight and its preoccupation with "body count." Quoting at length from Professor Pettigrew's testimony in *Brewer*, Judge Craven concluded that the optimal 70-30 ratio should be established in two of the schools and that the rest should continue as black institutions. In an eloquent concurring opinion, Judge Sobeloff took dead aim at Judge Craven's reference to the social science evidence from *Brewer*. Although cast in terms of the desirability of middle-class schools, the Pettigrew thesis, argued Judge Sobeloff, "rests on the generalization that, educationally speaking, white pupils are somehow better or more desirable than black pupils." For Judge Sobeloff this was a serious misreading of *Brown*:

The inventors and proponents of this theory grossly misapprehend the philosophical basis for desegregation. It is not founded upon the concept that white children are a precious resource which should be fairly apportioned. It is not, as Pettigrew suggests, because black children will be improved by association with their betters. Certainly it is hoped that under integration members of each race will benefit from unfettered contact with their peers. But school segregation is forbidden simply because its perpetuation is a living insult to the black children and immeasurably taints the education they receive. This is the precise lesson of *Brown*. Were a court to adopt the Pettigrew rationale it would do explicitly what compulsory segregation laws did implicitly.

Allowing Clarendon County to avoid integration through the talisman of optimal ratios and the specter of white flight, he concluded, would lead to frustration of the unitary school principle throughout the South.

The Brewer-Brunson litigation illustrates the resistance the appellate courts still show toward social science testimony in integration cases. The cases also exemplify the strong prointegration stand that the courts have taken in reviewing the desegregation plans of Southern school districts. *Brown* and its progeny are interpreted as requiring

169. *Id.* at 820-23.
170. *Id.*
171. *Id.* at 826.
172. *Id.*
173. *Id.* at 827. Cf. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24 n.8 (1971) (a school board plan imposing a 60-40 white/black ratio in each school is "an arbitrary limitation negating reasonable remedial steps").
immediate and total integration, and any plan, theory, expert, or evidence that counsels to the contrary is repudiated.\textsuperscript{174} Finally, there is an undercurrent of judicial frustration with the progress of desegregation, a feeling that school boards and legislatures, acting in bad faith, have erected a series of obstacles to desegregation.\textsuperscript{175} This frustration, most aptly expressed in the separate opinions of Judge Sobeloff,\textsuperscript{176} is heightened by the fact that so many years after the Brown decision black children remain in segregated schools, whatever the rationale; the fruits of the judiciary’s desegregation labors, in the face of official and popular obstinacy often appear fragile and elusive.\textsuperscript{177} This, in turn, may account for the hardening of the courts’ integrationist position.

3. Keyes and Bradley: Judicial Retreat?—The sound judicial policy of rejecting empirical evidence on the injuries and benefits of integration has been jeopardized by several recent decisions in lower federal courts. Unlike Brewer and Brunson, these decisions have used social science evidence to justify desegregation rather than to circumcribe it. Most clearly represented by Keyes v. School District No. 1, Denver,\textsuperscript{178} the decisions focus on equality of schooling outcomes as an adequate basis for judicial intervention to achieve integration. Although the district court in Keyes found de jure segregation in a number of schools, it reached the remaining schools by using an equal educational opportunity theory built in part on the testimony of James Coleman, coauthor of the Coleman Report. Coleman had argued that the educational stimulation provided by the family significantly affects a child’s ability to learn. Even though it may not be per se inferior, Coleman continued, a racially isolated school must inevitably provide unequal educational opportunity, because it contains a student body drawn from uneducated and deprived backgrounds.\textsuperscript{179} Citing

177. As Judge Wisdom stated in United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 847 (5th Cir. 1965), aff’d on rehearing en banc, 380 F.2d 385 (5th Cir. 1967), “A national effort, bringing together Congress, the executive, and the judiciary may be able to make meaningful the right of Negro children to equal educational opportunities. The courts acting alone have failed.”
179. 313 F. Supp. at 94.
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lower achievement scores of blacks in segregated Denver schools, the
district court concluded that "the only hope for raising the level of these
students and for providing them the equal education which the Con-
stitution guarantees is to bring them into contact with classroom asso-
ciates who can contribute to the learning process."180

The lower court decision in Keyes contained a number of defects. For one, the court's articulated rationale conflicted with the result it reached: it ordered racial, not socio-economic, integration.181 Though a racial classification may greatly overlap with a socio-economic one, under Keyes the school system may properly integrate blacks with poor white students. On the other hand, at least the court did not try to determine the optimal balance of races or classes necessary to im-
prove schooling outcomes. The decision in fact rested on the principle
that the very existence of racially segregated schools denies black chil-
dren equal protection of the laws. By relying on evidence of unequal
achievement, the court sought to make a compelling case for desegre-
gation even absent traditional indicators of racially motivated official
conduct.182 Resting the case for desegregation on educational achieve-
ment, however, may have serious debilitating effects on the court's
capacity to enforce its desegregation order. Indeed, similar evidence
could theoretically be used on another day to block integration.183 The Tenth Circuit, which affirmed the lower court on all points except
the unequal outcomes holding, recognized an even more serious dan-
ger.184 If at some future point the manipulation of resources, includ-
ing the student peer group, fails to raise test scores and to lead to equality
of achievement, the premise that it is the system that is flawed when
the poor and minorities do badly may be brought into question. This
inquiry in turn might lead away from a theory of institutional responsi-
bility for educational failure to a theory of individual responsibility—
from a desire for institutional reform to genetic or cultural fatalism.

Although ultimately reversed by the Fourth Circuit, the action of
the district court in Bradley v. School Board of Richmond185 is an-
other recent example of misplaced judicial reliance on social science
data. Finding that black students were denied equal protection of the

180. Id. at 96-97.
181. Id. at 97-99.
182. 313 F. Supp. at 73.
184. 445 F.2d 990, 1004-06 (10th Cir. 1971).
laws by being forced to attend school in the predominantly black Rich-
mond school district, the court ordered the merger of Richmond and
two largely white suburban county districts into a metropolitan district
with a single board of education. In the new, consolidated district, 97
percent of the blacks would attend schools that were between 20 and
40 percent black. As there was no evidence that the state had gerry-
mandered boundaries to create segregated school districts, the court
adopted the sociological interpretation of Brown and argued that the
case had been premised on the damage done to children in segregated
schools. For support, the court turned to the expert testimony of
many social scientists—including the omnipresent Professor Pettigrew
—to demonstrate that segregation from any source is injurious to
school children. Unfortunately, the court viewed the evidence quite
selectively. As a whole, the evidence could easily have supported a
contrary conclusion. The decision also posed the now-familiar risks of
limited promise of black achievement gains, a backfire when the gains
fail to materialize, and a standard much too indefinite to permit easy
judicial enforcement. If metropolitan desegregation plans are ever to
gain widespread judicial recognition as a remedy, they must be
grounded on a more forthright and substantial legal and policy analy-
sis.

4. The Failure of the Sociological Approach.—The empirical
evidence of injury to black children undoubtedly played an important
part in convincing the Supreme Court to declare unconstitutional the
deliberate separation of the races in the public schools. Once the
decision was reached and desegregation became a legitimate—if con-
troversial—policy alternative, however, the importance of proof of in-
jury to black children diminished. This, in part, reflected the tendency
of lower courts to treat Brown as conclusive as to both law and fact, but, in larger part, it reflected the unworkability of the sociological ap-
proach. Those courts that have eschewed the social science evidence

186. 338 F. Supp. at 80.
187. Id. at 193-98. According to the Bradley court Professor Pettigrew would
not allow use of the 60-40 white/black ratio to perpetuate all black schools where there
are simply not enough whites in the system to achieve that ratio in each school, an
apparent turnabout from his testimony in Brewer. Id. at 194.
188. Goodman, supra note 129, at 282-83; Pollack, supra note 12, at 27. But see
Jackson Municipal Separate School Dist. v. Evers, 357 F.2d 653, 654 (5th Cir. 1966).
See also Black, supra note 9, at 430 n.25.
189. See, e.g., Stell v. Savannah-Chatham County Bd. of Educ., 333 F.2d 55, 61
(5th Cir. 1964); Armstrong v. Board of Educ., 333 F.2d 47, 51 (5th Cir. 1964).
in desegregation cases have been wise. The evidence is too complex, unreliable, unpersuasive, and contradictory to allow the fashioning of broad constitutional principles, even if it were possible to disentangle the psychological and educational components of segregation and attribute injurious consequences to either. A rule of law that makes school desegregation a function of empirical proof of injury or benefit—a prerequisite almost wholly lacking in other equal protection cases—is a non-rule. Recalling Professor Kurland’s discussion of the enforcement of broad equal protection decisions, there are no simple or even intelligible standards that can be formulated; there is little prospect for ensuring that the educational and psychological ills thought to flow from segregation would be cured. Rather the sociological view, in its resistance to judicial manageability, inevitably would lead to a reaffirmation of the status quo.

Apart from considerations of manageability and enforcement, a constitutional rule must not depend on the lively dynamics of new social science “discoveries.” The already precarious position of the desegregation decisions would be even more unstable if the ebb and flow of social science data were to determine their outcome. Recently a Harvard sociologist, Dr. David J. Armor, published a research report that found that desegregation does not benefit black children. He was widely criticized for making the report public and supplying ammunition to opponents of desegregation and busing. It is absurd to argue that he should not have published his report—why should information relevant to public policy be suppressed just because it might influence that policy? It would be equally absurd to reverse two decades of desegregation decisions on the basis of the disputed Armor findings, although at least one court has come perilously close to this position. The social consequences accompanying the creation and implementation of constitutional rights are important, but the present state of knowledge and the foreseeable accretions to that knowledge in the future suggest that courts cannot safely rely on them to determine desegregation policy.

190. See generally Goodman, supra note 129, at 408-12.
191. Armor, supra note 119.
194. One court has found a dubious resolution of the problem by allowing evidence on achievement disparities to support integration but not to preserve segregation. Monroe v. Board of Com’nrs, 427 F.2d 1005, 1008 (6th Cir. 1970).
B. The Desegregation Cases and Ethical Principles

The difficulties inherent in defining equal educational opportunity in terms of benefit and injury lead me to believe that *Brown* and its progeny are fundamentally based on ethical principles. As used here, ethical principles are defined as normative, or mixed normative and factual, statements about how a just society should function. Ethical principles or social ideals may be explicitly adopted as legal principles, or they may exist independent of legal institutions. Basic ethical principles assert the truth of facts that cannot be proven, in other words, barring the most extraordinary advances in learning, even the most scientific among us must rely upon rather unscientific interpretations of historical experience. Indeed because ethical principles are not necessarily dependent on empirical verification, they can operate as standards that relieve courts of the obligation to reweigh social science data in every case. If desegregation decisions are to be stable, consistent, and manageable, courts have little choice but to rely on ethical principles. The cases can be explained only by reference to such principles.

1. Racial Neutrality Principle.—According to one formulation, the desegregation cases rest on the simple proposition that the state may not treat blacks differently from whites in the operation of the public schools merely because of their race. In the words of Judge Sobeloff,
Certainly *Brown* had to do with the equalization of educational opportunity; but it stands for much more. *Brown* articulated the truth that *Plessy* chose to disregard: that relegation of blacks to separate facilities represents a declaration by the state that they are inferior and not to be associated with.\(^{202}\)

An affirmation by the state that whites are superior to blacks is ethically unacceptable, regardless of any particular harm that may result: it simply does not comport with widely shared notions as to how a just society should function. This principle is in part grounded in historical experience. The history of separatist legislation indicates that it was designed to relegate blacks to an inferior position in society, and in fact school segregation did operate as a vital component of a larger caste system.\(^{203}\) The principle has been adopted as a rule of law by the courts in many fields. Classification by race has been held to violate the constitutional imperative of equality under the laws in areas unrelated to public schooling, ranging from public golf courses and parks to public beaches,\(^{204}\) without reference to the "specifically hurtful character of segregation, as a net matter in the life of each segregated individual."\(^{205}\)

As an explanation of judicial behavior in the post-*Brown* desegregation cases, however, the principle that blacks may not be treated according to their race in the operation of the public schools is troublesome. The constitutional wrong identified in those cases was the exclusion of blacks from white schools.\(^{206}\) The logical remedy for this injury is the admission of blacks to the schools from which they were ex-


Judge Sobeloff's argument finds support in Strauder v. West Virginia, 100 U.S. 303, 307-08 (1879):

*The words of the [14th] amendment . . . contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society. . . .*


\(^{205}\) Black, *supra* note 9, at 428.

cluded because of their race. Yet since its 1968 decision in *Green v. County School Board* the Supreme Court has moved well beyond this limited remedy. Admitting blacks to formerly all-white schools is not enough; courts must also order the abolition of racially identifiable schools. Even where segregation may not be a result of prior de jure policies but rather reflects rational and racially neutral classifications—for example ability groups, freedom of choice plans, or neighborhood assignment policies—the courts have required integration of virtually every school in the offending school district. The dilemma, of course, is that this remedy bears little relationship to the original wrong. Why should a racially neutral classification be impermissible if it does not violate the underlying ethical principle? How have the courts managed to transform a requirement of racially neutral admissions and assignment policies into an affirmative, and painfully costly, obligation to integrate the public schools?

Proponents of the racial neutrality principle have explained the relationship between the remedy of integration and the wrong of denying blacks admission to white schools in various ways. According to one explanation, premised on the bad faith response of many school boards to *Brown*, the duty to integrate “might be justified as a prophylactic, a way of making certain that a school board's policy of racial segregation has in fact been discarded.” Despite its initial appeal, the prophylactic theory finds little support in the case law. The recalcitrance of many school boards and the realization that the requirement of racially neutral classifications would not lead to profound changes in the plight of black children may have led to the promulgation of more sweeping remedies, but this is more a description of the dynamics of judicial psychology than a persuasive and logical rationale supporting an integration remedy. Moreover, if racial classifications are forbidden and a school district has abandoned its policy of making such classifications, its good or bad faith motivation is irrelevant. By any objective measure, the offending conduct has been cured; subjec-

207. See Bickel, supra note 9, at 212; Goodman, supra note 129, at 286.
209. The Court has not yet said whether the obligation requires the elimination of all racial imbalance, or only the elimination of severe racial imbalance. See Wright v. Council of City of Emporia, 407 U.S. 451 (1972). See also Goodman, supra note 129, at 292.
211. Goodman, supra note 129, at 293.
212. Id.
tive bad faith can be inferred only from the failure to achieve integra-
tion, a splendid example of circular reasoning.

A more cogent explanation is that the integration remedy in for-
merly de jure districts is designed to eliminate the discriminatory effects
of prior segregationist practices. This hypothesis finds substantial
support in the case law; an attentive reading of Green v. County School
Board and the de jure cases that follow it makes it clear that the
federal courts, in fact, relied on a remedial theory. Chief Justice
Burger described the problem in Swann v. Charlotte-Mecklenburg
Board of Education as follows:

The objective today remains to eliminate from the public
schools all vestiges of state-imposed segregation. Segrega-
tion was the evil struck down by Brown I. . . . That was
the violation sought to be corrected by the remedial measures
of Brown II. That was the basis for the holding in Green
that school authorities are "clearly charged with the affirm-
itive duty to take whatever steps might be necessary to con-
vert to a unitary school system in which racial discrimination
would be eliminated root and branch."

. . . .

Once a right and a violation have been shown, the scope
of a district court's equitable powers to remedy past wrongs is
broad, for breadth and flexibility are inherent in equitable
remedies.

Thus, where formerly de jure school districts have adopted racially
neutral assignment policies, district courts have the remedial power to
overturn those policies in order to create a unitary school system.

Unfortunately, the Supreme Court has been less than candid
about whether the remedy of integration is mandatory or discretionary.
In Davis v. Board of School Commissioners, a companion case to
Swann, the Supreme Court reversed the appellate court's approval of a
desegregation plan that relied on geographic zones and left a number of
identifiably black schools. Although the Chief Justice identified the
failure of the lower courts to consider the alternatives for achieving

on the Judiciary, 92d Cong. 2d Sess., Ser. 32, pt. 3, at 1631, 1632 (1972) (Statement
of Prof. Wright) [hereinafter cited as Wright Statement]; Cox, The Role of Congress
Goodman, supra note 129, at 285-90.
integration rather than the failure to integrate as the reason for the reversal, in the very next sentence he invoked *Green*.\(^{218}\) His reference to the need for a plan that "promises realistically to work, and promises realistically to work now" implied that the district court was required to enter an order that would integrate the school system.

On the other hand, the Supreme Court has been consistent in what it has done rather than in what it has said: in every case since *Green*, it has invalidated any plan that failed to create a unitary school system in formerly de jure districts.\(^{219}\) Whenever the Court has addressed itself to the scope of a district court's power to remedy the effects of past discrimination, it has grounded its discussion in the mandate "to eliminate dual school systems and establish unitary systems at once." The message has not been lost on the courts of appeals, particularly the Fifth Circuit; they have stubbornly reversed district court judges who have approved plans that did not result in total integration.\(^{220}\)

The viability of an integration remedy under the racial neutrality principle depends upon pinpointing the effects of past discrimination and identifying a nexus between effects and remedy. Unfortunately, the evidence on both issues is unclear, and in the end the party bearing the burden of proof—black plaintiffs or school board—will fail. In a remedial context courts often resolve factual ambiguities against the wrongdoer, and the desegregation cases offer no exception to this principle.\(^{221}\) Nevertheless, it is peculiarly inappropriate to make important social policy judgments, involving massive institutional changes, turn on the legal formalism of the burden of proof. In general the allocation of the burden of proof is perhaps less serious in a remedial framework than when identifying the wrongdoer, yet the social implications of restructuring whole education systems are of an entirely different order than the remedial processes in a simple tort or contract action. Moreover, forthright articulation of the principles underlying

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218. *Id.* at 38.
220. *See*, e.g., Gaines v. Dougherty County Bd. of Educ., 465 F.2d 363 (5th Cir. 1972); Boykins v. Fairfield Bd. of Educ., 457 F.2d 1091 (5th Cir. 1972); Bivens v. Bibb County Bd. of Educ., 424 F.2d 97 (5th Cir. 1970); United States v. Board of Educ., 423 F.2d 1013 (5th Cir. 1970).
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desegregation decisions is preferable, and the burden of proof approach may well obfuscate rather than illuminate such principles. The absence of articulated reasons for shifting the burden of proof makes the job of predicting future decisions especially treacherous.

The remedial theory has been applied in a number of post-*Brown* cases, but the theory remains unsatisfying as an explanation of the decisions. Cases involving ability grouping provide a good example of the theory's weaknesses. School boards operating under desegregation decrees have argued that they should be permitted to assign students to classes or schools on the basis of their tested achievement—notwithstanding that the lower achievement scores of blacks would inevitably allow substantial segregation. While this practice is widely accepted by educators, federal courts, without challenging the reasonableness of ability grouping or the cultural neutrality of the tests, have invariably struck down such plans.\(^2\)\(^2\)\(^2\)\(^2\)\(^2\)\(^2\)\(^2\)\(^2\)\(^2\)\(^2\)\(^2\)\(^2\)\(^2\)\(^2\)\(^2\) The only sound basis for forbidding ability grouping under the racial neutrality principle is that the prior discrimination may have caused lower black achievement. Thus, despite its neutral gloss, assignment according to ability may be discriminatory. The integration remedy then would guarantee racially neutral student assignment policies and eliminate the educational deficits caused by past practices. This reasoning is appealing, although its premises are unproven. The evidence is conflicting as to whether blacks were psychologically or academically harmed by segregation. It is also difficult to argue that black children attending school in 1972 are victims of the discrimination of the 1950's directed against other black children. Even assuming a lingering injury, there is conflicting evidence as to whether integration will undo that injury. Nonetheless, in the absence of persuasive evidence to the contrary, courts have steadfastly rejected ability grouping as an adequate response to the *Brown* mandate.

Another example of the application of the remedial theory is *Swann v. Charlotte-Mecklenburg Board of Education*.\(^2\)\(^2\)\(^2\) In *Swann* the Supreme Court held that the district courts may employ a whole range of remedies, including extensive busing, consolidation of schools,

\(^2\)\(^2\)\(^2\) 402 U.S. 1, 27-31 (1971).
pairing of schools, and rearrangement of attendance zones, where assignment of students in accordance with a neighborhood attendance plan does not produce integration. According to Swann, segregation resulting from neighborhood assignment policies is unconstitutional where it can be shown that private residential decisions and public decisions as to school location were influenced by the segregated nature of the school system.\footnote{224} Under these circumstances, neighborhood schools are simply a more subtle means of carrying out official policies of segregation.

The difficulty with the remedial interpretation of Swann is that it is theoretically plausible but empirically speculative.\footnote{225} There is no evidence that segregated schools materially influenced racial isolation by neighborhood in Southern communities. Where the whole structure of society reflects the inferior status assigned to blacks, it is difficult to say that any particular practice or institution caused segregated neighborhoods. Additionally, segregated housing is far more prevalent in the North where officially sanctioned school segregation was relatively rare. Only when the burden of persuasion is placed upon school boards that previously discriminated against blacks can it be presumed that there is some connection between that past discrimination and segregation resulting from neighborhood assignment plans.\footnote{226} This "is a frail basis on which to construct a remedial duty of such mammoth proportions."\footnote{227}

In Green v. County School Board, perhaps the most important post-Brown desegregation decision, the Supreme Court held unconstitutional a freedom of choice plan that allowed students to choose their own schools because the plan failed to create a system without racially identifiable schools.\footnote{228} Green poses an even greater challenge to the remedial explanation than Swann. Despite the heavy burden of proof that courts require the state to meet, the waiver of constitutional rights has often been permitted.\footnote{229} Particularly in a remedial context it is difficult to see why black children and black par-


\footnote{225}{Goodman, supra note 129, at 294-95.}

\footnote{226}{Fiss, supra note 224, at 701.}

\footnote{227}{Goodman, supra note 129, at 295.}

\footnote{228}{391 U.S. 430 (1968).}

\footnote{229}{See D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185 (1972).}
ents should be forbidden from choosing predominantly black schools. More important, it is not clear what effects of past de jure practices the Court was remedying.

The Supreme Court has required that the waiver of constitutional rights be knowingly and intelligently exercised, and there are a number of reasons for arguing that this did not occur under "freedom of choice" plans. First, the choices of blacks may have been influenced by the prior de jure practices. Having become accustomed to separate educational facilities, blacks, through inertia and acceptance of the dominant social mores, were reluctant to choose integrated schools. Second, even where blacks had overcome these factors, the white community influenced the choices of blacks by subtle—or sometimes overt—physical or economic coercion. Because of the clear superiority of integrated schools in the eyes of the community, right-thinking blacks, given the opportunity, would invariably choose integrated schools.

The argument that past segregation practices influenced current choices about school assignment is plausible even if it lacks empirical proof. The inquiry itself, however, seems somewhat beyond traditional judicial analysis. The courts do not generally concern themselves with the prejudices, fears, values and other subjective factors that may lead a person to choose a particular course of conduct. If blacks were not coerced into accepting predominantly black schools, but rather their choices reflected values and prejudices accumulated over the years, it would seem most inappropriate for the courts to play the role of judicial psychoanalyst. The courts are ill-equipped to determine when the decisions of black people are truly "voluntary" and when they are dictated by values and perceptions, which were formed in response to unconstitutional wrongs.

The argument that economic and physical threats on the part of the white community significantly altered the school assignment choices of blacks is more compelling, but the Green court expressly denied that its holding was premised on such coercion. In addition, the Court's strong affirmative language requiring total integration does not lend itself to a case-by-case factual inquiry as to whether the choices of blacks were coerced or were voluntarily made. Nothing in

230. Id.
232. 391 U.S. at 440 n.5.
the opinion suggests that the difficulties of such a factual inquiry led the Court to adopt a per se rule against freedom of choice plans.

The notion that black parents, voluntarily making choices about their children’s education and untouched by economic or physical coercion or force of habit, would choose integrated schools is probably the strongest argument for the remedial explanation, and it brings us back to the heart of the racial neutrality principle. In the end, the principle rests on the supposition that segregation, regardless of its genesis, is peculiarly injurious in districts that formerly separated children according to their race, and thus the choice of all-black schools is irrational. De jure segregation of the schools may have “helped to shape the attitudes of the community, both black and white, toward Negroes and Negro schools,” perceptions that may persist even after official racial classifications have been abolished. Thus the courts should not abide by the irrational choices of black parents; for integration is remedially necessary to alter these distorted perceptions and to rid segregation of “its psychological sting.”

Unfortunately, the evidence in support of this “curative” argument is far from conclusive. In terms of the historical chronology, slavery preceded by many years the founding of public schools in the South, and thus it seems likely that the schools were more the beneficiaries of already existent attitudes than molders of new theories of racial inferiority. Furthermore, many whites whose experiences are limited to school districts without a history of racial discrimination in pupil assignment may view blacks and all-black schools as inferior, thereby stigmatizing blacks. In short, there is great difficulty in isolating the effects of de jure segregation in the schools from the whole fabric of society, especially in the South. In the absence of empirical proof of causal relationship between past de jure practices and present attitudes toward blacks and black schools, the courts may simply have accepted the position of the victims of the unconstitutional conduct.

A final question is whether an integration remedy based on the racial neutrality principle will positively change the community’s perceptions of blacks and black schools. With regard to white percep-

234. Id. This argument would also support the result in Swann.
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tions much may depend on the circumstances in which integration takes place. The hostility of parents of all races, the ages of the children, the attitudes and expectations of the teachers, the degree of cooperation and sympathy of school administrators are all important. It seems sensible, if not overly hopeful, to think that racial stereotypes and prejudices will break down in an integrated setting, but this has not been conclusively demonstrated. Whether blacks will be cognizant of changes in white attitudes toward them also seems questionable. In addition, black self-image may actually suffer as black children are placed in academic competition with white children.

Determining community attitudes toward black schools is a tricky business. If black schools are inferior because "inferior" children attend them, then it seems self-evident that these perceptions of inferiority will diminish when one-race schools are eliminated. The white community, however, may view a school as inferior in proportion to the size of its Negro enrollment. If some schools in a district enroll a lesser percentage of blacks than other schools—courts often have remonstrated that exact racial percentages are not constitutionally required—they may be perceived as "better" schools. All-white schools in other political subdivisions may be looked upon as "better," or the recently eliminated all-white schools may be remembered as superior to the integrated schools of today. Thus, the immediate effect of integration may be to achieve a perverse equality by randomly distributing the stigma of attending inferior schools; for now black and white children will share that dubious distinction in the eyes of the community. These, however, may only be short-term consequences of integration. Under the compulsion of sending their children to racially mixed schools, white parents may reexamine their conception of quality education. Since no court can know whether integration will trigger changes in racial perceptions and attitudes, the best answer may be for the courts to resolve their factual uncertainties in favor of the victims of the past unconstitutional discrimination, allocating the burden of proof to the school boards in the absence of persuasive evidence.

Explanations of many of the post-*Brown* decisions in terms of a remedial theory of integration remain unpersuasive. This in turn suggests that the racial neutrality principle is insufficient as a rationale of judicial behavior. Perhaps the Court in *Brown* believed that the ap-

application of a racial neutrality principle would inevitably lead to integrated schools, but if so, its optimism was quickly blunted. Perhaps, in response to this disappointing experience or for unrelated reasons, an ideological shift occurred, with the Supreme Court abandoning its former position and demanding total integration of the public schools in formerly de jure school systems. But the difficulties in enforcing the Brown decision also took their toll. For all of Brown's historical significance, and notwithstanding its symbolic impact on the whole fabric of American society, the courts found that the standard of racial neutrality, applied to inventive and recalcitrant school officials, was unenforceable. Black children can be described, with a high degree of accuracy, in many ways—by their socio-economic background, by their test scores, by the neighborhoods in which they live, by the preferences of their parents. Accordingly, school officials had relatively little difficulty in devising racially neutral classifications that included nearly all black children. These classifications were not irrational; traditional educational wisdom favors special, albeit separate, treatment for children falling within each of these categories. The courts then were placed in an awkward position. If Brown prohibited only explicit racial classifications, its impact on the operation of school systems, regardless of its symbolic significance, would be largely semantic: black children would continue to attend separate classes, but under a racially neutral rationale. The courts apparently were unwilling to accept this result. Rather, in order to cope with the dilatory and evasive practices of local school authorities, the courts were compelled to adopt rules that struck at racially neutral assignment policies that continued the isolation of black children.

2. An Alternative Principle: The Universalist Ethic.—It seems clear that the ethical principle that school districts may not employ racial classifications—even accompanied by a complex remedial structure and a dash of judicial impatience with evasive school board reactions—does not fully explain the judicial actions in the post-Brown cases. The strong prointegration language in Green, the consistency with which the Supreme Court has opted for the remedy most advancing the cause of integration, and the reluctance to open any avenue of escape for recalcitrant Southern school districts all suggest that the Supreme Court is attaching a positive value to integration and not merely remediying unconstitutional segregation.237 The impression is

given that black people should be placed in a "better" position than they would have been if they had not been the victims of an unconstitutional wrong, and "better" somehow means that they should be afforded the opportunity of an integrated education.

Through it all the actions of the Court in the desegregation decisions seem curiously evocative of the liberal, progressive intellectual tradition that demands a universal society undiminished by racially identifiable institutions. The cornerstone of the liberal, progressive thinking is what might be called a universalist ethic, the basic premise of which is that a stable, just society, without violence, alienation, and social discord, must be an integrated society. Segregation of the races in public institutions, employment, and housing will inevitably lead to conflict and the destruction of democratic values and institutions. In short, the goal is a shared culture in which all segments of the population participate.

To be sure, the universalist principle fails as a photograph of reality. Rather it is a statement of a social ideal—some would say a utopian vision—and as such ignores the debate over the extent of actual assimilation of minorities. It is also a controversial ideal. It does not rest on the consent of the minorities, and it faces a resurgent "community consciousness," which "flagrantly violates the traditional liberal ethic of universalism." Blacks, frustrated by the historical experience with integration, have begun to challenge the universal ideal and to question the legitimacy of institutions, even integrated institutions, exclusively controlled by whites. White ethnic groups too have been critical of "[l]iberal education [that] tends to separate children from their parents, from their roots, from their history, in the cause of a universal and superior religion." Yet despite these signs of disenchantment, some liberal intellectuals, often abandoning historical alliances, have clung to their vision of the good life and society.

239. Cf. id. at 90.
241. Fein, supra note 238, at 91.
242. Id.
244. See Fein, supra note 238, at 91.
Support for the universalist ideal will not be found in the text of the Brown opinion. The decision is cast not in ethical terms, but in more traditional equal protection language, dwelling on the supposed injury flowing from state-imposed segregation of the races in the public schools. Nor have post-Brown courts, relying primarily on remedial theories, often referred to the vision of a society in which “black and white people come to know and understand each other as one people in one nation.”\(^{245}\) Possibly this reluctance may be explained by doctrinal difficulties in so interpreting the equal protection clause: if all persons, both blacks and whites, are deprived of the benefits of an integrated society, wherein lies the denial of equal protection of the laws? Or perhaps it may be explained by political timidity. As an alternate constitutional standard for the desegregation cases the universalist principle may not serve, but as an explanation of those cases and as a guide for predicting future decisions it is appealing.

The very choice of the public schools as the arena for the Supreme Court’s most significant thrust in integration and the sustained emphasis on this thrust in the years after Brown suggest the operation of the universalist principle. The public schools historically have been the primary focus of those committed to the universalist ideal.\(^{246}\) Horace Mann, the “father of American public education,” envisioned the common school, the school common to all people, as the instrument for creating a new sense of community and a new common value system shared by all Americans in which diversity might flourish.\(^{247}\) Moreover, universalism was inherent in progressive educational theories, which stressed the need to create schools that were small democratic communities in which children of all classes and ethnic backgrounds would be brought together. It is no accident that John Dewey’s major work was entitled Democracy and Education.

In large part the universalists’ and the Court’s attraction to the schools may simply reflect the popular mystique surrounding public education—“the great school legend”\(^{248}\)—that schooling can cure all of society’s ills. There may be another reason: if an integrated society is the desired end, the schools were the most logical as well as the most traditional place to begin the process of integration. The public

\(^{245}\) Brunson v. Board of Trustees, 429 F.2d 820, 823 (4th Cir. 1970) (Craven, J., concurring and dissenting).
\(^{246}\) Fein, supra note 238, at 90.
\(^{248}\) C. GREER, supra note 240.
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schools touch virtually every child: schooling is compulsory and free.\textsuperscript{249} Most children spend 12 or more years in the public schools, a significant portion of a person's life. Integration of the schools therefore would involve more people over a greater period of time than the integration of virtually any other public or private institution: it probably would accomplish more toward the creation of an integrated society than any other single measure. In addition, the preadult years are a peculiarly appropriate time to attempt integration. The assumption is that the schools may be able to influence the social behavior of children, who are more flexible, more malleable, and less captive of prejudice than adults whose value systems are relatively fixed. There is some empirical evidence to support this assumption.\textsuperscript{250} Less charitably, adults may wish to hold children to a social ideal with which the adults are incapable of complying—before the children become old enough to challenge it. Finally, despite the many difficulties over the years in enforcing desegregation decisions, integration of the public schools may be more manageable than integration in housing and employment, the other logical starting places toward an integrated society. Both housing and employment exact a price—either dollars or ability. They are both affected by principles of supply and demand that often compel denials of access, and they are both diffuse in the sense that they involve millions of decisionmakers. The public schools, in theory at least, are available to all, regardless of wealth or ability,\textsuperscript{251} and they are managed by a relatively small number of decisionmakers.\textsuperscript{252}

3. The Choice Between the Racial Classification and Universalist Principles.—Whether the issue is the scope of the remedy in a de jure segregation suit or the constitutionality of de facto segregation, future desegregation decisions will depend more upon the acceptance and evolution of ethical principles than on a new scienticism or empiricism.

\textsuperscript{249} J. Coons, \textit{supra} note 15, at 416-17. There is, of course, a right to substitute a private education for a public education, Pierce v. Society of Sisters, 268 U.S. 510 (1925), but obviously many parents and children are not in a financial position to take advantage of this right. In the fall of 1970, 45.9 million pupils were enrolled in public elementary and secondary schools. \textit{National Center for Educational Statistics, Statistics of Public Schools: Fall 1970}, at 4 (1971) [hereinafter cited as \textit{Statistics}].

\textsuperscript{250} See A. Morrison, \textit{supra} note 122, at 106-25.


\textsuperscript{252} In 1970, there were 17,995 school districts in the United States, which represented a 23% decrease from the number in operation in 1966. \textit{Statistics, supra} note 249, at 3.
The vagaries of the predictive sciences will of necessity yield to judicial perceptions as to what is just and good for society. The racial neutrality and universalist principles, however, will lead to very different results. The universalist ethic will lead to an invalidation of all forms of segregation in public schools, barring constitutional amendments. The racial neutrality principle will allow substantial school segregation to survive.

Although the universalist ethic may be preferable, both as a guide to national growth and as a qualitatively superior way of life, the pendulum appears to be swinging the other way; for the ethic of racial neutrality is consistent with a resurgent communitarianism. Nathan Glazer has captured the sense of this new ideological alliance:

There is a third path for liberals now agonized between the steady imposition of racial and ethnic group quotas on every school in the country—a path of pointlessly expensive and destructive homogenization—and surrender to the South. It is a perfectly sound American path, one which assumes that groups are different and will have their own interests and orientations, but which insists that no one be penalized because of group membership, and that a common base of experience be demanded of all Americans. It is the path that made possible the growth of the parochial schools, not as a challenge to a common American society, but as one variant within it. It is a path that, to my mind, legitimizes such developments as community control of schools and educational vouchers permitting the free choice of schools.

The movement for community control of schools, the popularity of almost romantic philosophical works lamenting the loss of community in a technological age, the establishment of communes, the emphasis on community participation in federal programs, the development of federal revenue sharing with local and state governments all underline the difficulties in adopting and implementing the universalist ethic.

The ultimate outcome of the clash between the universalist and communitarian ethics in the context of the desegregation litigation is difficult to predict. Efforts to anticipate the legal response are complicated by the recent ideological shift in the Court's make-up, by the

254. See Fein, supra note 238, at 91.
255. Glazer, supra note 210, at 52.
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difficulties in recognizing community interests under a legal system responsive to individual rather than group rights, and by the lack of explicit textual recognition in the Constitution of a nonreligious community interest. It is further complicated by the complex relationship between the Court's policymaking role and public opinion; for it is unclear whether the Court will accommodate itself to the demands of the larger society or exercise its considerable influence to retard the communitarian movement. In the absence of organized elites supporting universalism, the former may emerge as the only conceivable judicial response. Moreover, in the context of desegregation suits, an otherwise potent judicial universalism may yield to the political realities of governmental and popular opposition to the integration of the public schools.256

In the early years of the twentieth century the Supreme Court drew a delicate, indefinite balance between universal values and communitarian notions, between homogeneity and diversity, but clearly left the states with wide powers to mold their children according to their notions of productive citizenship. In Pierce v. Society of Sisters the Court declared that a state could not compel attendance at a public school, deeming the liberty of parents to choose a private school for their children too essential for state prohibition.257 In Meyer v. Nebraska the Court held that a state could not prohibit the teaching of German in a private school.258 In both decisions the Court clearly and strongly recognized the power of the states in the name of patriotism, good citizenship, and common values to compel attendance at some school and to regulate private schools.259

In the years since Pierce and Meyer the Court has continued to reaffirm universal values, although it has placed limits on the states' ability to require uniformity in the public schools. In West Virginia State Board of Education v. Barnette, in which the Court held the compulsory flag salute unconstitutional, the Court went to great lengths to approve the state's efforts to inculcate universal values, while denying its right to make the unwilling recipient publicly declare those val-

258. 262 U.S. 390 (1923). See also Hamilton v. Regents of the Univ. of Calif., 293 U.S. 245 (1934).
259. 268 U.S. at 534; 262 U.S. at 402.
ues. In *School District of Abington Township v. Schempp* the Court carefully grounded its conclusion that the required reading of school prayers violated the Establishment Clause of the first amendment on the necessity for separation between church and state and avoided any suggestion that the state could not attempt to homogenize its children in a universal secularism. Even in *Wisconsin v. Yoder* support for the universal ideal emerged. Though it ruled that "enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of [the Amish families'] religious beliefs," the Court carefully circumscribed its opinion by emphasizing the importance of the compulsory school laws and by rejecting the notion that other groups objecting on nonreligious grounds could escape them. Thus, with few exceptions, all of which are arguably based on the Free Exercise or Establishment clauses, the Supreme Court has affirmed the power of the states to accomplish the goals of the universalist ethic: a common school in which the inculcation of a common culture takes place.

Any attempt to decide how the courts should choose between the universal and racial neutrality principles must begin with the frank recognition that at least in the short run an ordered society may exist under either. This means that society has a large range of choices and is not restrained by impending calamity from choosing one or the other. It is not enough, however, to intuit that one ethical principle is superior to another. A consideration of the marginal costs of alternative principles and courses of action is necessary. Thus, if the courts are to choose rationally between the universalist and racial neutrality ethics they must weigh relative costs against the benefit likely to be derived.

263. Id. at 219.
264. Id. at 215-16, 235-36.
265. See id. at 213-14.
266. Because they both embody a morality "of excellence, of the fullest realization of human powers," these two principles fall within what Professor Fuller terms the "morality of aspiration" rather than within the "morality of duty." According to Professor Fuller, "[o]n the level of duty, anything like economic calculation is out of place. In a morality of aspiration, it is not only in place, but becomes an integral part of the moral decision itself." L. FULLER, THE MORALITY OF LAW 5-6, 44 (1967).
267. Id. at 44.
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Most of the costs in implementing the universalist ethic are obvious. There are the costs involved in transporting children from their neighborhoods to integrated schools, the opportunity costs of the time spent on a bus, and the costs of social disruption as significant elements of the community object. There is an ethical cost in that the accomplishment of the universal ethic often will involve the assignment of children by race in violation of the racial classification ethic. The universalist ethic also exacts a greater price in terms of individual liberty:

One understands that the people do not vote on what the Constitution means. The judges decide. But it is one thing for the Constitution to say that, despite how the majority feels, it must allow black children into the public schools of their choice; and it is quite another for the Constitution to say, in the words of its interpreters, that some children, owing to their race or ethnic group alone, may not be allowed to attend the schools of their choice, even if their choice has nothing to do with the desire to discriminate racially.

Weighing these costs against the limited costs of retaining the status quo, it would appear that the racial neutrality ethic should be favored since it would involve fewer institutional adjustments. The difficulty with this analysis is that it is not the costs per se that are determinative; rather it is the marginal costs, the expenditure of resources necessary to produce a quantum of benefit. The process is two step: the decisionmaker must have a well-defined aim and he must know the relationship between the objective and the factors he can control. The problem of course is that the measure and likelihood of symbolic or real benefits are unclear, for the causal relationships are largely unknown. This is, at least in part, why the racial neutrality and universalist theories are described as ethical rather than factual.

268. See NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., IT'S NOT THE DISTANCE, IT'S THE NIGGERS 4-5, 26-32 (1972); U.S. DEPARTMENT OF TRANSPORTATION, REPORT ON SCHOOL BUSING (1972).
269. But see Coles, Does Busing Harm Children, 11 INEQUALITY IN EDUC. 25 (Mar. 1972) ("[p]hysically, psychologically, educationally, the experience of busing was . . . neutral"). For a summary of the history of pupil transportation in the United States, see Smith, Pupil Transportation: A Brief History, 11 INEQUALITY IN EDUC. 6 (Mar. 1972).
270. A Gallup poll found that 76% of the respondents opposed school busing. Glazer, supra note 210, at 41.
271. Id. at 45.
principles. Thus, ignorance of causal relationships, which originally made ethical theories seem so attractive, resurfaces as an impediment to rational choice between competing ethical theories. There is a conflict between our limited ability to discover empirical explanations and the necessity for taking “social action based on deliberate conscious choice.” Until comparison between the benefits of the universalist and racial classification principles becomes possible, a cost analysis is impossible. Yet we cannot avoid the necessity of making such choices; for even inaction constitutes a choice in favor of the status quo. In the end the consideration of marginal costs becomes a part of the moral decision itself.

C. The Impact of the Desegregation Decisions

If considerations of judicial administration and enforcement help illuminate the ethical underpinnings of the desegregation decisions, how does one explain the fifteen-year delay in the implementation of Brown? The answer lies in part with the sins of the judiciary. The Supreme Court’s decision in Brown II squarely placed the responsibility for desegregation in the hands of district courts and local school boards, and many lower federal courts were unenthusiastic about or openly hostile to Brown. More important, the Supreme Court has too often failed to supply clear guidance to the lower courts. Instead of simple, precise standards for implementing its decrees, it has left questions. What is a “prompt and reasonable start toward full compliance”? Is there an affirmative obligation to integrate? What is the connection between the creation of a unitary school system and the original wrong of state-imposed racial segregation? What is a unitary school system? When has a school district completed its obligation to dismantle the dual school system? Is de facto segre-

273. Id.
274. See generally H. Rodgers & C. Bullock, Law and Social Change ch. 4 (1972) [hereinafter cited as H. Rodgers].
276. G. Orfield, supra note 256, at 15-17; H. Rodgers, supra note 274, at 77-78; R. Sarratt, The Ordeal of Desegregation 200 (1966); C. Woodward, supra note 203, at 152-53.
277. G. Orfield, supra note 256, at 18.
279. Mr. Justice Black once stated that the “deliberate speed” formula “delayed the process of outlawing segregation” and that “the Court should have forced its judgment on the counties it affected that minute.” W. Lockhart, Y. Kamin & J. Choper, Constitutional Law 1208-09 (1970).
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gation constitutionally permissible? These ambiguities have been resolved, if at all, not by clear and cogent prose, but by a series of Supreme Court reversals, each of which has indicated what is not satisfactory while failing to identify fully what is required. Thus, much of the fifteen years has been consumed by the task of converting nebulous doctrine into understandable and administrable constitutional law.

Much of the delay also may be attributed to the failure of the Executive and Congress to follow the lead of the judiciary. Because of the awesome political ramifications of Brown, the dual school system could be dismantled only with the active assistance of the federal executive. In the early years after Brown, this support never materialized. Until the enactment of the Civil Rights Act of 1964, Southern school districts and legislatures actively defied Brown, and the federal executive played virtually no role—apart from the isolated Little Rock incident—in bringing them into compliance with the law. Popular opposition to school desegregation, supported by political leaders playing on the race issue, often resulted in massive resistance to the enforcement of Brown. The myriad of new pupil assignment laws, “interposition” plans, and other ingenious schemes demonstrated the truth of the popular saying—“as long as we can legislate we can segregate.”

Significant progress toward the achievement of integration in the South came only with what has been characterized as the “administra-

280. See G. Orfield, supra note 256, at 16-17; J. Peltason, supra note 256, at 12-13; H. Rodgers, supra note 274, at 76-77.
283. By 1964 in seven of the eleven Southern states, less than 1% of the black students attended integrated schools. H. Rodgers, supra note 274, at 74-75.
286. Laws were enacted that closed desegregated schools, withheld state funds from integrated school districts, forbade school officials from desegregating schools, and offered tuition grants “to parents of white children wishing to send their children to private schools to avoid desegregation.” H. Rodgers, supra note 274, at 72. See generally B. Muse, Ten Years of Prelude: The Story of Integration Since the Supreme Court's 1954 Decision (1964); J. Peltason, supra note 256, at 96-98; Bickel, supra note 9.
The 1964 civil rights legislation empowered the Department of Health, Education, and Welfare to cut off federal funds to districts that continued to discriminate against blacks and gave the Attorney General authority to file desegregation suits on the complaint of private citizens. HEW promulgated guidelines requiring school districts in the South to make a good faith start toward integration. Moreover, the Supreme Court rejected freedom of choice plans and demanded immediate integration of the schools. All of these steps provoked significant change, despite later vacillation by the Nixon administration. Although the Executive in 1970 claimed that 97 percent of all Southern school districts were operating under voluntary or judicially imposed desegregation plans, a more realistic appraisal of the situation was that about 40 percent of black school children in the South attended integrated schools in 1971. Compared with the progress made in the first ten years after Brown, these statistics evi
dence remarkable change in the structure of educational systems in the South. Yet much remains to be done to meet the announced goal of creating unitary school systems.

In the light of this history, the ultimate question is whether Brown was wisely decided. Although empirical proof of the proposition is lacking and likely to remain so, the symbolic consequences of Brown, transcending the immediate difficulties in securing compliance, have surely contributed significantly to the creation of a political and social environment in which racial justice became possible. The costs of Brown in terms of social dislocation, controversy, delay, and judicial energy were great: one commentator has noted that Brown was “costly

287. H. Rodgers, supra note 274, at 18.  
293. See W. Murphy & J. Tanenhaus, The Study of Public Law 38 (1972) [hereinafter cited as W. Murphy]; Frantz, Is the First Amendment Law?—A Reply to Professor Mendelson, in JUDICIAL REVIEW, supra note 21, at 161; Rostow, The Character of Judicial Review, in id. at 74, 88-89.
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indeed, if it convinced libertarians that the judicial process is an effective tool of libertarianism. 294 None of the factors necessary for the enforcement of the Court's mandate were present when the decision was announced, and the early gains were negligible. Yet there has been tremendous progress in achieving racial equality in the almost 20 years since Brown. 295 This progress has manifested itself not only in the integration of the public schools, but also in voting, employment, and housing. There has been increasing public acquiescence in the Brown principle, 296 and a mounting racial pride among blacks who formerly accepted the inferiority of their race.

Too often judges and lawyers ignore a fundamental truth that is obvious to laymen and politicians: regardless of the formal rules of constitutional adjudication, a judicial declaration that a state law is constitutional is "likely to enshrine it as the recommended solution of a difficult question of public policy." 297 Certainly, Plessy v. Ferguson 298 serves as a constant reminder of this proposition. Although certainly not a golden age of race relations, the early post-Reconstruction years saw a clumsy search for accommodation between the "old heritage of slavery and the new and insecure heritage of legal equality." 299 It was a time of experimentation and testing in which blacks found a place in society they had never before enjoyed. Yet as the twentieth century approached the trend reversed, heralded by widespread adoption of Jim Crow segregation legislation and a refusal by the Supreme Court to uphold the civil rights of blacks. 300 The culmination was Plessy v. Ferguson in which the Supreme Court legitimated the abandonment of black rights, placing the judicial seal of approval on a racial ostracism that reached all phases of life. 301 The Court not only created a doctrinal justification for racist policies, but symbolically af-

296. One poll found that two-thirds of all Americans approve of desegregated schools. NEWSWEEK, Mar. 13, 1972, at 24.
298. 163 U.S. 537 (1896).
299. C. WOODWARD, supra note 203, at 31-33, 43, 65.
301. C. WOODWARD, supra note 203, at 7.
firmed that whites were indeed superior to blacks. This judicial coup de grace certainly accounts, at least in part, for the lack of progress toward racial justice in the decades after Plessy. A reaffirmation of Plessy in Brown might well have portended a similar blow to racial equality and the civil rights movement—not only in the courts but also in the legislatures, the voting booths, the universities, and in the job and housing markets. 302

On the other hand, the judicial declaration that discrimination by race in pupil assignment was unconstitutional ultimately may have helped to mold public opinion and to prod the legislative and executive branches of government into action. Certainly governmental pleas for racial justice predated the Brown decision. Under the separate-but-equal doctrine the Supreme Court had struck down a number of racially discriminatory practices in the late post-Plessy period, 303 and in 1948, President Truman had courageously declared: "We shall not . . . finally achieve the ideals for which this Nation was founded so long as any American suffers discrimination as a result of his race, or religion, or color, or the land of origin of his forefathers." 304 Numerous private groups, including the National Association for the Advancement of Colored People, worked forcefully for the protection of Negro rights, and the political consciousness of blacks rose dramatically. 305 The combination of private and public movement toward racial justice may well have enabled the Supreme Court to do in 1954 what it was apparently incapable of doing in 1896. 306 But cause and effect merge; 307 whatever the forces that brought Brown into being, those forces were strengthened by the decision itself. In the early years after Brown, reform proposals that would have allowed the Attorney General to sue local school boards that engaged in segregationary practices were seriously considered. Proposals for federal aid to education that would have strengthened the dual school system were defeated. Secretary of Health, Education, and Welfare Abraham Ribicoff inserted nondiscrimination clauses in contracts with colleges participating in National

302. See Frantz, supra note 293, at 161.
305. J. Vander Zanden, supra note 281, at 60-61.
306. G. Orfield, supra note 256, at 22.
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Defense Education Act programs. Federal funds were denied to local school districts which forced children living on military bases to attend segregated schools.\(^{308}\)

Perhaps the most immediate result of *Brown* was to arouse black organizations and their white liberal allies: "*Brown* . . . awakened a new consciousness of group identity among blacks and a fresh awareness of the possibilities of removing the discrepancy between their supposed and actual rights."\(^{309}\) In turn this effect may have led to the confrontations between the civil rights groups and the Southern political leadership.\(^{310}\) The impact of those dramas on American public opinion and on the federal leadership was profound, ultimately leading to the adoption of the 1964 Civil Rights Act, the greatest blow to Southern resistance to desegregation.\(^{311}\)

To say that *Brown* caused this change in public opinion, in social behavior, and in the role of the federal government is simplistic.\(^{312}\) Many complex factors led to the civil rights revolution, but it would be foolish to deny the role of the Supreme Court:

Can one doubt . . . the immensely constructive influence of the series of decisions in which the Court is slowly asserting the right of Negroes to vote and to travel, live, and have a professional education without segregation? These decisions have not paralyzed or supplanted legislative and community action. They have precipitated it. . . . The cycle of decisions in these cases . . . have played a crucial role in leading public opinion and encouraging public action. . . . The Negro does not yet have equality in American society or anything approaching it. But his position is being improved, year by year. And the decisions and opinions of the Supreme Court are helping immeasurably in that process.\(^{313}\)

\(^{308}\) G. Orfield, *supra* note 256, at 22, 27, 28, 30.

\(^{309}\) W. Murphy, *supra* note 293, at 38. *See also* G. Orfield, *supra* note 256, at 356; J. Vander Zanden, *supra* note 281, at 60-62; King, *Crisis in Montgomery*, in H. Commager, *supra* note 295, at 97, 98. Zanden argues that "the emergence of the new Nations of Africa" and "the prosperity of the war years and the 1950's [that] gave quite a few Negroes a taste of 'the good life,' of the affluent society" were also important factors in the stimulation of the integrationist movement. J. Vander Zanden, *supra*, at 60, 62.


\(^{313}\) Rostow, *supra* note 21, at 88-89.
The impact of Brown as a symbolic decision that helped create the conditions necessary for its enforcement stands in stark contrast to the aftermath of Swann. The outcry against forced busing is probably greater now than at any time since Brown; elections in both the North and South have been conducted and ultimately won or lost on the issue, and demands and proposals for statutory and constitutional prohibitions on busing proliferate.\textsuperscript{314} The prospects for further integration, particularly where housing patterns and neighborhood school assignment plans combine to produce segregation, appear weak even in the face of lower court decisions that blur the lines between de jure and de facto segregation.\textsuperscript{315} The explanation lies largely in the difference between a prohibition on racial classifications and an affirmative obligation to integrate. Public support could be generated so long as Brown was viewed as simply prohibiting the exclusion of black youngsters from schools they were otherwise eligible to attend; exclusion by race, especially where helpless children are concerned, is widely recognized as reprehensible. After Swann the issue became the necessity for racial balance in the public schools, and the moral force of a principle requiring universal integration of public schools is less compelling. It is costly, inconsistent with such communitarian concepts as the neighborhood school, destructive of individual choice, and in conflict with the traditional competitive model of schooling.\textsuperscript{316} Despite the careful but ambiguous language of Swann and the proffered explanation of the decision in terms of remedial theories, the decision appeared to place the judicial seal of approval on substantial busing to achieve racial balance, thus arousing the antipathy of the public and political leaders. Additionally, Swann has accelerated the pace of change. More districts, more children, and more busing were involved; the tokenism that followed Brown was no longer sufficient to satisfy the courts. This is particularly evident where Northern districts have, for the first time, become the targets for desegregation suits. The result is that more toes are stepped on and more opposition is generated.

Another reason for the difficulty in enforcing Swann relates to the breakdown in the traditional alliance of groups supporting desegre-

\textsuperscript{314} See Glazer, supra note 210.
\textsuperscript{316} Glazer, supra note 210, at 41, 45, 52.
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gation. The moral uncertainty surrounding \textit{Swann}, the impact of de-
segregation beyond the rural South, and the practical difficulties at-
tendant to desegregation have dampened the enthusiasm of white lib-
erals for integration. Racial hostilities have not immediately disap-
peared as black and white children have been mixed; violence has con-
tinued as an aspect of school integration; friction between adminis-
trators, teachers, and parents has not diminished.\textsuperscript{317} In short, the
hopes of both black and white parents that desegregation would
promptly lead to a more humane educational experience have not been
realized. The frustration of these goals of integration, perhaps de-
scribable as Utopian, has been most sharply felt by blacks who, in
many cases, have been compelled to bear the greater part of the burden
of integration. While the antibusing leadership is often white, gen-

era
lly it is black children who have been bused out of their neighbor-
hoods and black schools that have been closed.\textsuperscript{318} The result is that
the black masses that formerly supported integration enthusiastically
have now weakened in their resolve.

Finally, the opposition of the Nixon administration to school de-
segregation is significant. In \textit{Alexander v. Holmes County Board of
Education}\textsuperscript{319} the Supreme Court rejected the administration’s request
for a one-year delay in desegregation of Southern schools and ordered
the immediate integration of previously de jure school districts. A
joint Health, Education, and Welfare, and Department of Justice state-
ment on school desegregation, noteworthy for its lack of clarity, was
widely interpreted as signifying a slow-down in the desegregation proc-
ess.\textsuperscript{320} Subsequently, antibusing legislation was proposed to Con-
gress which would have forbidden any increase in busing to achieve
integration for children in the sixth grade and under. While expressly
approving the \textit{Brown} decision, the President made it clear that he was
opposed to forced busing to achieve racial balance.\textsuperscript{321} In effect, he

\textsuperscript{317} See, e.g., Smith v. St. Tammany Parish School Bd., 448 F.2d 414 (5th Cir.
1971); Baker v. Columbus Municipal Separate School Dist., 329 F. Supp. 706 (N.D.
Miss. 1971). See generally H. Rodgers, \textit{ supra} note 274, at 94, 97; Barber, \textit{ supra} note
88; Bell, \textit{Integration: A No Win Policy for Blacks?}, 11 \textit{INEQUALITY IN EDUC.} 35

\textsuperscript{318} See, e.g., Norwalk Corp. v. Norwalk Bd. of Educ., 298 F. Supp. 213 (D.
Fears}, 11 \textit{INEQUALITY IN EDUC.} 22, 23 (Mar. 1972).

\textsuperscript{319} 396 U.S. 19 (1969). \textit{See also} Carter v. West Feliciana Parish School Bd.,

\textsuperscript{320} H. Rodgers, \textit{ supra} note 274, at 89-90.

\textsuperscript{321} Id. at 92-93.
approved the racial classification view and rejected the universalist ethic. The result, of course, is that courts that deviate from neighborhood assignment plans and order busing to achieve integration cannot rely upon the assistance of the federal executive in enforcing their decrees. More important, since presidential decisions as well as court decisions have a symbolic effect, the President's actions legitimate opposition to integration and encourage resistance to court decrees. Thus, even more than in the post-\textit{Brown} days when the Eisenhower administration took a hands-off attitude, the active opposition of the Executive makes dubious the ultimate enforcement and acceptance of \textit{Swann}.

IV. Equal Educational Opportunity and Resources

The proposition that, absent some substantial justification for deviation from equality, schooling resources must be distributed equally has in recent years received an enormous amount of attention. A subject of extended comment even before reaching the courts, the issue has been exhaustively analyzed since the courts began to speak.\textsuperscript{322} Although the court decisions on the issue have been comparatively few, they have been widely identified as landmarks.

\textsuperscript{322} J. \textsc{Berke}, A. \textsc{Campbell} \& R. \textsc{Goettel}, \textit{Financing Equal Educational Opportunity: Alternatives for State Finance} (1972); C. \textsc{Benson}, \textit{The Economics of Public Education} (1961); R. \textsc{Cook}, \textit{The Question of School Finance, Recent Selected References} (1972); J. \textsc{Coons}, \textit{ supra} note 13; C. \textsc{Hudson}, \textit{Understanding Public School Finance in Nebraska} 1971-1972 (University of Nebraska, 1971); D. \textsc{Morgan}, \textit{ supra} note 44; \textsc{State Department of New York, Fleishman Commission Report} (1972); \textsc{Texas Research League, Texas Public School Finance: A Majority of Exceptions} (1972) [hereinafter cited as \textsc{Texas Finance}]; J. \textsc{Thomas}, \textit{School Finance and Educational Opportunity in Michigan} (1968); A. \textsc{Wise}, \textit{ supra} note 5; \textsc{Bateman} \& \textsc{Brown}, \textit{Some Reflections on Serrano v. Priest}, 49 \textsc{J. Urban L.} 701 (1972); \textsc{Bloomfield}, \textit{Equality of Educational Opportunity: Judicial Supervision of Public Education}, 43 \textsc{S. Cal. L. Rev.} 275 (1970); \textsc{Carter}, \textit{An Evaluation of Past and Current Legal Approaches to Indication of the Fourteenth Amendment's Guarantee of Equal Educational Opportunity}, 1972 \textsc{Wash. U.L.Q.} 479; \textsc{Goldstein}, \textit{Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and Its Progeny}, 120 \textsc{U. Pa. L. Rev.} 504 (1972); \textsc{Horowitz}, \textit{ supra} note 10; \textsc{Horowitz} \& \textsc{Neitling}, \textit{Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within a State}, 15 \textsc{U.C.L.A. L. Rev.} 787 (1968); \textsc{Johnson}, \textit{Serrano in Indiana: Legal Rationale, Social Reflections, Political Response}, 5 \textsc{Ind. Legal F.} 231 (1972); \textsc{Karst}, \textit{Serrano v. Priest: A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law}, 60 \textsc{Calif. L. Rev.} 720 (1972); \textsc{Kirp}, \textit{ supra} note 6; \textsc{Ratner}, \textit{Interneighborhood Denials of Equal Protection in the Provision of Municipal Services}, 4 \textsc{Harv. Civ. Rights-Civ. Lib. L. Rev.} 1 (1968); \textsc{Silard} \& \textsc{White}, \textit{Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause}, 1970 \textsc{Wis. L. Rev.} 7;
A. Defining Equal Access to School Resources

This definition of equal educational opportunity assumes that the educational process is essentially competitive and that no child should receive an unfair competitive advantage from the state. If the state provides equal access or exposure to schooling, each student will have an equal probability of academic, and presumably life, success.323 Merit, as measured by raw ability and diligence, is to be the final arbiter, and the state has no affirmative obligation to provide differential services to cure deficiencies peculiar to particular individuals or groups. State-afforded equality of opportunity is the operative concept.

Defined in terms of equal access, equality of educational opportunity clearly does not permit the allocation of fewer resources to inner city or poor or blue-eyed children, or the exclusion of blacks from college preparatory tracks or advanced mathematics courses. Beyond the obvious inequalities, however, the meaning of the equal access concept is ambiguous. Does it require that every child be exposed to the same curriculum, the same services, the same teachers? Does it forbid any effort to respond to the different cultural, linguistic, and family background of students? Does it imply or command a mindless uniformity and the demise of pluralism and excellence?

1. The Availability of Educational Services.—Equal access to schooling resources might be defined as relative equity in the availability of educational services—teachers, courses, and the other things that money buys for schools. The most egregious denial of access occurs when students are completely excluded from the public schools, often without procedural safeguards or periodic review of their status.324 The most cogent reasons for denying a public education to particular groups of children are that they cannot benefit from public schooling or that immense costs are involved that will precipitate drastic cutbacks in services for "normal" children. Children are classified as untrainable, retarded, emotionally disturbed, pregnant, handicapped, non-English speaking, aliens, or whatever and thus exempted from the requirements of state compulsory attendance laws. Roughly one million children are excluded from a public education in

323. Coleman, supra note 6; Kirp, supra note 6, at 647.
324. See generally Elliot, Grossman, & Morse, The Systematic Exclusion of Children from School: The Unknown, Unidentified, and Untreated [unpublished manuscript], cited in Herr, supra note 251, at 1002.
Mounting evidence suggests, however, that almost all children will benefit from a public education. Some may learn only to dress themselves and cook their own meals, while others may learn skills that enable them to become self-supporting, but virtually all will benefit significantly in some fashion. Accordingly, the courts have become increasingly unsympathetic to complete denials of access to the public schools, and operating under both state and federal constitutions, they have ordered the readmission of excluded children, or at a minimum, the imposition of administrative safeguards.

Courts and commentators have largely ignored the basic underlying issue of the extent to which resources should be diverted from programs for normal children when the benefit to special children and to society may be relatively small, especially when the cost of special education is considerably higher than that for normal children. In their desire to attack the perceived inequity of exclusion, they have overlooked the problem of the marginal utility of schooling dollars—whether a dollar for the education of a retarded youngster yields as much public benefit as a dollar spent on a "normal" or "gifted" child. In view of the paucity of knowledge about the education production function, a precise answer to the marginal utility problem is impossible. An intelligent, though rough and empirically unproven, solution may be to require school authorities to offer a public education to special children unless school authorities can demonstrate that these children will not materially benefit from an expenditure of resources equal to the average per pupil expenditure in the school district. Such a rule would not mandate any particular services or any particular level of expenditure, but instead would simply indicate when exclusion by school authorities was justified. At the same time, it would attempt to balance

325. Herr, supra note 251, at 995-96.


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in an equitable manner the competing demands of "normal" and special children for public school monies.

Equality of access to services requires not identity in the educational offering to each child, but rather substantial equality in the quantity and quality of resources made available. Remedial and other special programs designed to meet the specialized needs of students are perfectly acceptable, so long as they are not employed as a device for denying equal access to schooling. While the state has no affirmative obligation to provide compensatory or remedial services, the equal access standard does not require that the voluntary offering of such services be eliminated. Moreover, the propriety of some differential treatment may be implied from the very notion of equal access: there can surely be no equal access for students who speak only Spanish if classes are taught exclusively in English, or for a blind child if no special provisions are made for books in braille or for readers. The equal access interpretation of equal educational opportunity generally rejects any reference to differential needs or schooling outcomes, but blatant denials of equality that effectively block access to the resources of the educational system may logically come within its purview.

Beyond these blatant instances of exclusion, the equal access doctrine defined in terms of school services is quite difficult to apply. Surely equality of access requires not uniformity of services, but only some substantial equivalence in the quantity and quality of the services. But what do these terms mean? What if a school system permits retarded or physically handicapped students to attend school but provides only custodial care and fewer hours of reading instruction? Is there a legally cognizable discrimination if some children in a school have more experienced teachers or fewer study periods than


others? What of the slow learner whose parents wish to place him in the college track? How could a court evaluate an assertion by the state that an advanced English class plus an algebra class are functionally equivalent to calculus and world history in terms of the educational benefits derived by the students? More important, even assuming it could conclude that inferior services were being made available to particular students, how could a court satisfy itself that some compelling interest justified the differentiation of services?

The inherent difficulties posed by judicial intervention to secure equality in the distribution of school services in the absence of a complete denial of access suggest a number of conclusions. First, the courts may act where total exclusion or the functional equivalent of exclusion is at issue. This may include under appropriate circumstances custodial care and instruction in a language that is unintelligible to the students. Second, if traditionally disfavored groups such as poor and minority pupils are the alleged victims of unequal access, the courts should be particularly careful that superficially neutral standards are not being employed to further race or class discrimination. In the legal jargon, such "suspect" classifications require the state to meet the heavy burden of demonstrating a "compelling" state interest. Third, if the denial of access is not total, if it involves no "suspect" classification, and if school authorities present substantial reasons for their actions, the courts should not intervene to alter the allocation of services. Evaluating whether a student should attend a regular or advanced class or ordering administrators to admit Johny to a home economics class instead of woodshop is perilous business for courts. The standards for decision are every bit as vague and indeterminable as under the equal outcomes theory of equal educational opportunity; the likelihood of frustrated enforcement just as great. The need to draw minute qualitative distinctions would force the courts into the awkward task of determining who needs what. Ultimately, that process would lead full circle to some form of outcome determination.

2. The Availability of Dollars.—An alternative means of measuring access to school resources focuses on the number of dollars that a district or school spends on each pupil for current operating expenses and treats disparities in the dollar offering as prima facie evidence of discrimination.332 Candidly conceding the danger of equat-

332. See, e.g., id. at 25-26; Horowitz, supra note 10; Kirp & Yudof, Serrano in the
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ing the cost and the quality of education, the proponents of this view argue that a dollar measurement is acceptable precisely because it avoids the vagaries of the services approach.\textsuperscript{333} The premise that dollars are an appropriate measure of educational inequalities has led to a number of theories for ascertaining when these inequalities become constitutionally impermissible. To understand these theories and the ethical and factual assumptions underlying them requires some familiarity with the leading judicial decisions on school resources. The cases readily if imprecisely divide themselves into two classes: those that challenge unequal distributions of educational dollars according to race and those that challenge disparities according to wealth.\textsuperscript{334}

The leading modern race decision is \textit{Hobson v. Hansen},\textsuperscript{335} involving the District of Columbia school system. The median per pupil expenditures in the district’s predominantly black elementary schools were $100 below those in its predominantly white elementary schools.\textsuperscript{336} Although the system pointed to the superior quality of young, lower paid teachers and the movement of blacks into older neighborhoods with older schools to justify the difference,\textsuperscript{337} Judge Skelley Wright found that the inequalities violated the equal protection clause of the Constitution.\textsuperscript{338} Apparently believing that the redis-
tribution of "volunteering" Negro students and the integration of faculties would ameliorate the inequalities in expenditures, Judge Wright did not order the equalization of resources.839 Despite the limited remedy, Judge Wright expressly denied that irrational inequalities even between culturally homogeneous white schools would be constitutional, thus emphasizing that constitutional principles went beyond severing the nexus between race and educational expenditures to reach all resource discrimination that lacked a substantial justification.840

Almost three years after Hobson I, the plaintiffs returned to Judge Wright to seek further relief and enforcement of the original decree.841 The assumption that integration "would have the secondary effect of equalizing overall resource distribution" had turned out to be false: per pupil expenditures in the elementary schools that despite voluntary busing had remained predominantly white were $108 more than schools in the rest of the city and $140 higher than those in the poorest, blackest section of the city.842 Judge Wright rejected the system's defense that economies of scale caused lower per pupil costs in the larger, predominantly black schools and that higher teacher salaries in predominantly white schools were unrelated to educational opportunity.843 Judge Wright's conclusion as to the denial of equal protection was the same,844 but this time he ordered the school board to equalize per pupil teacher expenditures between elementary schools within a specified deviation of 5 percent, to be exceeded only in the case of some "adequate justification" such as special programs for the mentally retarded, the physically handicapped, or the educationally deprived.845

In contrast to Hobson, the school financing cases that have examined variations in per pupil expenditures according to wealth focus primarily on interdistrict rather than intradistrict inequalities.846 The

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839. *Id.* at 517.
840. *Id.* at 497.
842. *Id.* at 846, 848-49.
843. *Id.* at 852-53, 855.
844. *Id.* at 860. In the light of Supreme Court cases decided after Hobson I that cast doubt on the vitality of poverty as a classification deserving of special solicitude, e.g., James v. Valtierra, 402 U.S. 137 (1971); Dandridge v. Williams, 397 U.S. 471 (1970), Judge Wright appeared to retreat from his prior position that socio-economic discrimination in resource allocation was constitutionally cognizable. 327 F. Supp. at 860.
845. 327 F. Supp. at 863-64.
846. Much of the description of the inter-district resource allocation cases is taken from Kirp & Yudof, *supra* note 332. See Rodriguez v. San Antonio Independent
two leading interdistrict resource allocation cases are *Serrano v. Priest*,\(^{347}\) decided by the Supreme Court of California, and *Rodriguez v. San Antonio Independent School District*,\(^{348}\) decided by a three-judge federal court in Texas. Both cases employed similar reasoning in declaring their respective state school financing systems unconstitutional, but the *Serrano* opinion provided a more precise analysis of the legal and policy issues. The *Serrano* court held that California’s school financing plan violated the equal protection clause of the United States Constitution because students in poor districts were systematically denied equal treatment in the allocation of public resources for education.

Like most other states, California has chosen to delegate to local school districts not only the power to administer the public schools, but also the major responsibility for raising school revenues.\(^{349}\) In turn local districts have largely relied on the property tax.\(^{350}\) Thus wealthy communities generously supported public schools with little tax effort, while poor communities taxed themselves three or five times more heavily only to raise fewer dollars per child. California made flat grants to all districts, but these grants in operation benefited only rich districts. It had also embarked on a program of “equalizing” grants designed to close the gap between districts, but in fact poor districts were guaranteed only two-thirds of the educational dollars per student spent by the median district in the state.\(^{351}\) The reliance on local property taxes for the great bulk of educational revenues placed a premium on the differing capacities of local districts to supplement the state grants. Thus in California, as in Texas and elsewhere, the distribution of public dollars for public education turned directly on the wealth of each particular school district as measured by the assessed property valuation per student. Predictably, in California spending

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\(^{347}\) 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).


\(^{349}\) J. COONS, supra note 15, at 16.

\(^{350}\) Fifty-two percent of all school revenues are provided from local sources, and roughly 98% of the local share is derived from property taxation. NATIONAL EDUCATIONAL FINANCE PROJECT, FUTURE DIRECTIONS FOR SCHOOL FINANCING 9 (1971).

\(^{351}\) 5 Cal. 3d at 594 n.9, 487 P.2d at 1247 n.9, 96 Cal. Rptr. at 607 n.9.
ranged from about $400 per pupil in poor districts to more than $2500 per pupil in wealthy districts.\textsuperscript{352}

The constitutional theory of \textit{Serrano v. Priest} finds its genesis largely in the writings of Professors Coons, Clune, and Sugarman, who assert in their landmark book that it is constitutionally impermissible for the quality of education to be a function of wealth other than the wealth of the state as a whole.\textsuperscript{353} "Quality of education" is defined in terms of dollars per pupil,\textsuperscript{354} and the thrust of their constitutional argument is that a family's or a district's economic means are illegitimate and irrational criteria for the state to employ in distributing funds for education.\textsuperscript{355} The Supreme Court of California substantially adopted this theory. In reaching its conclusion, the court reasoned that education is a fundamental interest that cannot be denied the poor or children living in poor districts absent some compelling justification.\textsuperscript{356}

A crucial element in the equation was the conclusion that education is a fundamental interest. Viewing education as a "major determinant" of an individual's prospects for economic and social success, a "unique influence" on the development of a child as a participant "in political and community life," and essential to "free enterprise democracy," the court concluded that the state had recognized the fundamental nature of education by making it universal and compulsory.\textsuperscript{357} The court even suggested that "a child of the poor assigned willy-nilly to an inferior state school takes on the complexion of a prisoner, complete with a minimum sentence of 12 years."\textsuperscript{358}

\textsuperscript{352} \textit{Id.} In Texas school district tax bases range from less than $30,000 assessed property value per student to over $200,000 assessed property value per student; per pupil expenditures range from less than $400 to over $1000. TEXAS FINANCE, supra note 322, at 36, app.

\textsuperscript{353} J. Coons, supra note 15, at 2.

\textsuperscript{354} \textit{Id.} at 25.

\textsuperscript{355} \textit{Id.} at 152-55.


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Another crucial element in the equation was the holding that classifications that unequally burden the poor are constitutionally suspect. Citing cases that assertedly struck down wealth requirements with respect to the criminal process, voting, interstate travel, and divorces, the court found that the poor were entitled to similar protection in relation to public schooling. The court accepted the plaintiffs' allegation that there was indeed a strong correlation between poor districts and poor children, but it further held that discrimination against wealthier children living in poor districts also constituted an equal protection violation.

B. The Basis of Judicial Intervention

1. The Irrelevancy of Schooling Outcomes.—Except in the case of complete exclusion from public school services, judicial action to promote equal educational opportunity defined in terms of access to schooling resources cannot rest on considerations of equality of educational outcomes. Otherwise, courts will be saddled with the two-fold task of determining when resource inequality hinders or promotes achievement equality and of devising distribution systems that will achieve the goal. In short, they will have to try to distribute resources according to the educational needs of each child, a job that will result only in unmanageable judicial standards and frustration.

The attempt to equalize access to resources in terms of equality of outcomes is also deadly for would-be litigators of the issue, as the decision of a three-judge court in Illinois in *McInnis v. Shapiro* amply demonstrates. The plaintiffs in that suit simply told the court that "only a financing system which apportions public funds according to the educational needs of the students satisfies the Fourteenth Amendment." Assuming that students "need" whatever resources are re-


363. 293 F. Supp. at 331 (emphasis in original).
quired for them to do well in school, the plaintiffs were asking the
court to make a child-by-child, district-by-district, survey of the effec-
tiveness of resources on educational achievement. The McInnis court
politely declined the invitation.\textsuperscript{364} Instead, it held that the "lack of
judicially manageable standards [made] the controversy nonjusticiable"
because the concept of a court-ordered distribution of education re-
sources according to individual "needs" was simply too nebulous.\textsuperscript{365}
In a similar suit in Virginia, the court was even more emphatic:
"[T]he courts have neither the knowledge, nor the means, nor the
power to tailor the public moneys to fit the varying needs of these
students throughout the State."\textsuperscript{366}

In contrast to McInnis, the plaintiffs in Hargrave v. Kirk\textsuperscript{367} made
little effort to tie educational expenditures to educational outcomes. In
that case the plaintiffs attacked a Florida state law that made any
county imposing more than ten mills in \textit{ad valorem} property taxes for
educational purposes ineligible for state minimum foundation program
funds for the support of education. Counties with low property values
needed to tax in excess of the maximum state rate in order to raise
the same amounts for education as more affluent counties, but be-
cause of the law twenty-four counties were forced to lower their tax
rates with a concomitant loss of fifty million dollars in education rev-
enues. The defendants argued, \textit{inter alia}, that the financing system
was constitutional because the differences in dollar offerings did not
necessarily produce differences in educational quality. The court con-
cluded, however, that arguments over whether additional resources
would affect educational policy were irrelevant; the law prevented the
poor counties from providing the same monetary support for public
education that the wealthy counties were able to provide. The court
found McInnis inapplicable because the plaintiffs in the case at bar
sought not a reallocation of funds based on the educational needs of the
students but a declaration that the "Equal Protection Clause \textit{forbids}
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a state from allocating authority to tax by reference to a formula based on wealth. 368 Since the state offered no rational justification for making per pupil expenditures turn on county wealth, particularly where poor counties voluntarily chose to provide as good an education as rich counties, the court held the law unconstitutional.

In Serrano the California Supreme Court relegated the issue of the impact of resource inequality on the performance of school children to a footnote. Although it declined to enter the "controversy among educators over the relative impact of educational spending and environmental influences on school achievement," 369 the court did refer to a number of court decisions holding that more dollars did affect the quality of education. It also quoted, without comment, a passage from Hobson v. Hansen suggesting that since those who fund and administer the public schools value experienced teachers more by paying them higher salaries and value new equipment and books by budgeting for them, they cannot argue that the beneficiaries of a resource inequality have gained no advantage. If dollars do not matter, then the wealthier communities should have no hesitation in yielding their false advantage. 370 Thus the court avoided the issue largely by casting the state back upon its own legislative and administrative assumptions.

2. Proof of Injury.—Because the relationship between expenditures and the quality of education remains unclear, arguably courts should defer to legislative judgment about school resource allocation. If, as Kurland suggests, judicial power should be used sparingly to strengthen respect for law and if courts should interfere with legislative and administrative decisions only where the need for intervention is great, surely the exercise of judicial power to redress perceived inequalities in the distribution of education dollars is inappropriate in the absence of any proof that the class discriminated against has been injured in some immediate sense. 371

368. 313 F. Supp. at 949 (emphasis in original).
369. 5 Cal. 3d at 601 n.16, 487 P.2d at 1253 n.16, 96 Cal. Rptr. at 613 n.16. The court cited, inter alia, COLEMAN REPORT, supra note 42, and J. GUTERIE, supra note 3.
370. Cf. Van Dusartz v. Hatfield, 334 F. Supp. 870, 873-74 (D. Minn. 1971) ("it would be high irony for the State to argue that large portions of the educational budget authorized by law in effect are thrown away"). See also J. COONS, supra note 15, at 30.
The most general response to this argument is, as Judge Dyer noted in *Hargrave v. Kirk*, that some finding of ultimate injury is unnecessary to a holding that there has been a violation of the Equal Protection Clause. In constitutional adjudications, as in life itself, we rarely can know the specific and long-term consequences of a discrimination. The injury, of necessity, can be described only with reference to the resource discrimination itself—fewer street lights, less experienced teachers, lack of a transcript. It is virtually impossible to determine the long-term impact that absolute or relative denial will have on a person's life. If the class discriminated against has the burden of demonstrating some ultimate harm beyond the discrimination itself, it will rarely if ever succeed in constitutional litigation. The courts have wisely concluded that in the absence of a rational or compelling justification, those who engage in the discrimination must bear the burden of demonstrating its harmlessness. Where they are unable to do so because of conflicting social science evidence, they should not prevail.

Regardless of the long-term consequences of increments in educational expenditures, judicial intervention may be appropriate simply to remedy gross inequities in the schooling environment. Most children are required to attend public school for ten or twelve years; throughout that period inequality in access to school resources may greatly alter the quality of life in the public school they are compelled to attend. Fewer education dollars may mean less adult supervision (with the added risk of injury through accident), unheated or unairconditioned rooms, broken windows, malfunctioning instructional equipment, inadequate lavatories, fewer hours of instruction, crowded classrooms, and inferior cafeteria facilities. None of these things necessarily or even probably will affect achievement, but all contribute to making some schools a good deal less desirable and less habitable than others. Perhaps the need to create a fit physical environment in the public schools fits more readily

372. Professor Black makes the point eloquently:
It is true that the specifically hurtful character of segregation, as a net matter in the life of each segregated individual, may be hard to establish. It seems enough to say of this, as Professor Pollack has suggested, that no such demand is made as to other constitutional rights. To have a confession beaten out of one might in some particular case be the beginning of a new and better life. To be subjected to a racially differentiated curfew might be the best thing in the world for some individual boy. A man might ten years later go back to thank the policeman who made him get off the platform and stop making a fool of himself. Religious persecution proverbially strengthens faith. We do not ordinarily go that far, or look so narrowly into the matter.
Black, *supra* note 9, at 428 (citations omitted).
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into the framework of a minimally adequate rather than an equal educational opportunity. On the other hand, as long as education is compulsory and universal, it may be argued that there is an entitlement to an equally habitable and not simply a minimally adequate educational environment. That swimming pools may not be educationally essential does not justify a discriminatory decision to make them available to some students but not to others. Moreover, identifying a minimum involves grave definitional problems, and a minimum can probably only be ascertained with reference to what other children are receiving. Otherwise, we must begin a largely hopeless search to separate out the essential from the frills in the public schools. All of these arguments suggest that the courts should be permitted to rectify resource inequities even without proof of "ultimate" injury.

C. Principles For Rationalizing Judicial Action

The cases requiring equality of access to school resources cannot be based on a reasonable anticipation of improved academic performance or even on measuring the effect of resources on academic achievement. Nor is the absence of proof of immediate injury fatal to judicial intervention. The assertion that, absent some substantial justification, the state is obligated to distribute its education dollars equally must, therefore, find support in legal or ethical theories about how a just government should behave in a democratic society. Considerations of judicial manageability demand it. Several theories might explain judicial behavior in these cases.

1. Inequality of Budgetary Options.—According to one school of thought, the conclusion that the state may not distribute its education resources according to the wealth of individuals or school districts relies on a number of dubious propositions. First, the court must determine that education is a fundamental interest. One can certainly argue that education is more important than other municipal services in view of its economic and first amendment overtones, but this argument seems hollow when interests such as housing and welfare have been held not to be constitutionally fundamental. If the courts term

373. Michelman, supra note 55, at 58.
374. See Goodman, supra note 129, at 350-52.
education a fundamental interest, they may be forced to confront unequal allocations of a whole range of municipal services. The cases that allegedly find poverty to be a suspect classification were dealing with individual poverty and not the poverty of political subdivisions such as school districts. For the plaintiffs to prevail in a resource allocation suit they must thus demonstrate that the poor live in poor districts—in many instances a dubious proposition. More important, the Supreme Court's decision in James v. Valtierra, has cast doubt on the argument that poverty will be treated as a suspect classification to the same extent as race. Third, it makes no sense to treat education in a vacuum. People living in poor districts are deprived of the ability to allocate funds for a whole range of municipal services, and the exclusive focus on education distorts and narrows what is really a much broader problem of municipal governance.

Drawing conclusions largely from the interdistrict resource allocation and political reapportionment cases, these theorists have largely sought the impetus for addressing school financing problems outside the ambit of education. Advocates of this fiscal approach, most notably Professor Schoettle, propose that a municipal financing system is unconstitutional where "irrational allocations of taxable property . . . afford the taxpayers and voters of different school districts

381. Schoettle, supra note 380, at 1409-11.
382. See id. See also Carrington, On Egalitarian Overzeal: A Polemic Against the Local School Property Tax Cases, 1972 U. ILL. L.F. 232.
unequal budgetary options, solely because of their place of residence." The constitutional wrong lies not in the fact that some students receive fewer dollars for their education than other students without any substantial justification; rather the wrong lies with the unequal distribution of tax bases, which means that some taxpayers must bear a greater tax burden than others in order to provide the same level of benefits. Suppose two communities that wish to spend $250 per capita on education, one with per capita assessed property value of $5000, the other with per capita assessed property value at $50,000. The first can raise $500 per capita for municipal services by taxing itself at $10 per $100 of assessed valuation, the second by taxing itself at one dollar per $100 of value. Assuming an equal distribution of school age children between the districts, there has been no denial of equal educational opportunity in the sense of unequal access to resources. Professor Schoettle, however, would challenge the constitutionality of this system since the taxpayers in the first community bear a tax burden ten times greater than those in the second community in order to raise the same sums for education and other municipal services. Moreover, barring a near confiscatory tax rate, districts with very low, assessed property values per capita will be systemically incapable of providing the same level of municipal benefits as the two districts in the original hypothetical.

The principle strength of the Schoettle approach lies in its consistency with a truly expansive notion of local control. Under his approach, some form of "district power equalizing" by which the state through redistricting or subsidies guarantees each district the same revenue return at each rate of taxation would leave each district free to determine its own priorities in preferring particular municipal services. In the previous hypothetical case the state might guarantee $500 per capita to each district taxing itself at $2 per $100 of assessed

383. Schoettle, supra note 380, at 1407. By "unequal budgetary options" Schoettle appears to mean that taxpayers in one district must make a greater sacrifice than taxpayers in other districts in order to achieve a particular level of municipal services. He does not argue the case of districts that are completely incapable of providing such services at any tax rate. Thus despite Schoettle's criticism of tax effort concepts as "slippery," id. at 1411, it is difficult to differentiate the equal budgetary options analysis from a more straight-forward "equal benefit for equal tax effort" analysis.

384. Id. at 1405-12. See also Note, Equalization of Municipal Services: The Economics of Serrano and Shaw, 82 YALE L.J. 89, 119-21 (1972).

385. Schoettle, supra note 380, at 1406-07.

386. Id. at 1411.
property value per capita. The first district would reduce its rate to $2
per hundred, raising only $100 per capita, and the state would make
up the $400 difference; the second would raise its tax rate to $2 per
$100, thereby raising $1000 per capita, of which $500 per capita
would go to the state treasury for eventual payment to districts like the
first one. There are numerous variations on this scheme, some more
politically palatable than others, but their purpose is to equalize tax
borders between districts so as to allow taxpayers an equal opportunity
to fund municipal services. 387

The legal arguments for constitutionally mandated district power
equalizing are troublesome. The adoption of this principle would
bring revolutionary changes to the allocation of all municipal services
that would dwarf the reforms envisioned in litigation limited to educa-
tion. 388 Moreover, there is little evidence the Supreme Court would
be sympathetic to an argument based on inequality in tax burdens
between taxpayers in different districts. The federal courts have hesi-
tated to strike down tax classifications 389 and, on occasion, the Su-
preme Court has upheld geographic classifications that result in some
taxpayers bearing a heavier tax burden than others. 390 Tested by the
rational basis standard of equal protection, the interest of the state in
administrative convenience or local control might well justify the prac-
tice. In any event, it is a dubious wisdom that raises proportional or
progressive taxation to the status of a constitutional entitlement. In
addition, it seems undesirable to put the courts in the business of
scrutinizing the nexus between tax burdens and municipal benefits. 391
One of the strengths of our structure of municipal governance is that
legislative bodies are free to allocate services without regard to the tax
contributions of the recipients. Often this favors the poor in that they
receive services such as welfare, police protection, and education
greatly in excess of their tax contributions.

Apart from doctrinal considerations, there is much to commend

387. See generally J. Coons, supra note 15, at 201-42.
388. See Comment, supra note 332, at 1351.
F.2d 887 (6th Cir. 1972); Randolph v. Simpson, 410 F.2d 1067 (5th Cir. 1969).
390. E.g., Toyota v. Hawaii, 226 U.S. 184 (1912); Chappell Chemical Co. v.
391. See, e.g., Memphis & Charleston Ry. v. Pace, 282 U.S. 241 (1931); Butters v.
Oakland, 263 U.S. 162 (1923). See also Myles Salt Co. v. Board of Comm'rs, 239
U.S. 478 (1916).
the Schoettle approach. From the standpoint of judicial administration, there is no insurmountable barrier since the remedy would go to the budgetary process and not to the outcomes produced by the various allocations. Unfortunately, whatever the merits of the Schoettle theory, it does not explain what the courts have done in the school resource allocation cases. The courts in Serrano, Rodriguez and Hobson were quite careful in limiting their holdings to education. While the Serrano court mentioned inequality in tax effort between rich and poor districts, the thrust of the three decisions went to the importance of education and the unfairness of giving less to some children because of the accidents of where they lived, the wealth of their parents, the wealth of their community, or their race. In short, the courts largely view themselves as dealing with educational and not tax inequities. To say that a system that provides equality of treatment in the distribution of schooling dollars is unconstitutional because of variations in tax burdens, as Schoettle would, perverts the underlying judicial basis for intervention. Conversely, a power-equalizing scheme may result in poor and minority students receiving fewer dollars for their education (if people in poor districts place a lower value on education than those in more affluent districts), and the Schoettle standard would affirm this system without any reservations.

2. Poverty Theory.—A second possible rationale for the school financing cases may be termed the “poverty theory.” Like the attacks on racial classifications, the poverty theory challenges state discrimination against the poor in the allocation of education funds because of the stigmatizing effect of the discrimination. Even in the absence of proof of injury, unequal treatment collides with widely accepted ethical notions as to how a just government should act in apportioning public services. While the poverty theory is a tenable ethical notion, it presents several problems as a hypothesis for explaining the interdistrict financing cases. For one, under the poverty theory, the success of the cases must depend on the existence of a correlation between poor persons and poor districts, at least so long as the poverty of the district does not give rise to a separate constitutional claim. Poor districts may be poor because the people within them have low incomes and therefore do not own much taxable real and personal property, but they may also be poor because they lack industrial property to broaden

the tax base,\textsuperscript{393} and the trier of fact will have to determine which is the case. In terms of judicial manageability, any discrimination against poor districts can readily be determined by comparing the tax rates, property tax bases, and expenditures per pupil for each district in the state. Especially where there are equalized property assessment ratios, this a relatively simple task that may be performed using data that nearly all states publish annually.\textsuperscript{394} On the other hand, the legal arguments based on the poverty theory are founded on the personal poverty of the victims of the discrimination. Therefore, unless the courts delve into the complex factual issues surrounding the causes of school district poverty, their decisions cannot stand. Yet the moment the courts begin this inquiry, they have destroyed the most appealing aspect of the Coons, Clune, and Sugarman formulation—its simplicity and manageability. This conundrum represents the essential dilemma of the Coons, Clune, and Sugarman approach.

A court motivated by the poverty theory might determine that while the poor do not always live in poor districts, those poor persons who do live in poor districts are the ones most severely injured by current school financing schemes.\textsuperscript{395} Affluent families living in poor districts have the option of moving to property-rich districts where tax rates will be lower and educational expenditures higher. The poor have no such option; their lack of economic means limits their ability to change places of residence in this fashion. The obvious weakness of this argument is the absence of systematic discrimination against the poor: there are simply some poor people, possibly a very small number, who bear the brunt of a system which is otherwise distributing resources in a constitutionally acceptable manner. The propriety of reshaping an entire educational structure on this basis is questionable.

Another approach might be to shift the focus away from poor districts entirely. Assuming the data is available, the court might require that the plaintiffs show the correlation between family income and educational expenditures. Each school child would be placed in a particular income category ($4000-$6000, $6000-$8000, $8000-$10,000, etc.) and the average per pupil expenditure calculated for each such category. If children in the lower income classification systematically received fewer dollars, the school financing scheme

\textsuperscript{393} See Comment, supra note 332, at 1343.
\textsuperscript{394} J. Coons, supra note 15, at 306-07.
would be unconstitutional. This approach would certainly test the factual assumptions of the poverty standard, and it would deal with interdistrict and intradistrict discriminations simultaneously. But any gains would cost a great deal because of the great factual complexity, and many courts would hesitate to resolve school financing issues cast in such terms.

Beyond the problem of judicial factfinding, the poverty standard fails as a complete explanation for the equality-of-access decisions. The opinions indicate a genuine concern for the plight of the poor when they are the victims of a discriminatory resource allocation scheme, but the case law goes well beyond such classifications. In *Hobson v. Hansen*, Judge Wright indicated that he would be hesitant to uphold the constitutionality of any resource formula that arbitrarily discriminated even among racially and culturally homogeneous children. The California Supreme Court was even more emphatic. It held that California's school financing system was unconstitutional even in the absence of proof that the poverty of the district reflected the individual poverty of its residents:

> We think that discrimination on the basis of district wealth is equally invalid. The commercial and industrial property which augments a district's tax base is distributed unevenly throughout the state. To allot more educational dollars to the children of one district than to those of another merely because of the fortuitous presence of such property is to make the quality of a child's education dependent upon the location of private commercial and industrial establishments. *Surely, this is to rely on the most irrelevant of factors as the basis for educational financing.*

3. **The Rationality Standard.**—The preceding quotation from the *Serrano* court suggests that a basic rationality standard may lie at the heart of all the equality-of-access cases. The rationality standard requires that the state may not discriminate against any child in the allocation of public funds for education without a substantial and rational justification. The criteria for distributing the resources must relate to the characteristics of the beneficiaries of the service, the children, or to the costs of the programs required to meet their needs as the state perceives them. The amount of industry in a school district, the wealth

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of a child's neighbors, and the race of the child are fortuities that have nothing to do with the educational needs of children. These criteria are as irrational as distributing dollars on the basis of the incidence of sun spots or the number of hospital admissions in a particular area. While the court will not and should not determine the needs of school children, it may intervene to ensure that the state employs educationally relevant criteria for making school resource allocation decisions.

The rationality approach has a number of advantages. It frees the courts from the need to define and sanction the suspect classification/fundamental interest labels. The Burger Court has become increasingly wary of these labels, returning in recent opinions to a revitalized rational basis test for passing on state statutory classifications.\(^{398}\) Balancing the legitimate state interest that the classification promotes against the fundamental personal rights that the classification threatens,\(^{399}\) the Supreme Court could with limited damage to precedent hold that the criteria for distributing school dollars must be educationally related.

The rationality approach also frees the courts from the extensive factual determinations required by the other interpretations of equality of access. Apart from intradistrict inequalities, the constitutionality of a school financing scheme could be resolved by looking at the face of the statute itself. If the statute made educational expenditures a function of property wealth, personal wealth, race, or other criteria unrelated to program and student needs, the statute would be unconstitutional. No longer would the outcome depend on a confrontation between armies of social scientists, each of whom had amassed data on the correlation between race, personal wealth, district wealth, and educational expenditures.

As a related political benefit, school finance litigation would no longer seem inspired exclusively by a concern for the poor and minority groups. The aim would be rationality in governmental resource allocation policies. Everyone being victimized by the financing system would have an equal claim to rationality in state government. This might well broaden the political base of support for reform of current educational financing practices. Historically, leg-

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399. *See*, *e.g.*, Reed v. Reed, 404 U.S. 71 (1971).
islatures have defaulted on their obligation to set forth coherent edu-
cational priorities, allowing the happenstance of a district's prop-
erty wealth to determine the type of education that a school child
would receive. Judicial intervention might force them to reexamine
educational policies to determine what each child should receive,
whether the gifted or the musically talented should receive supple-
mental services, whether vocational or compensatory education is worth
the added expenditure. The rationality in allocation policies that we
strive for in other areas would at last apply to the public schools.

The rationality standard implies a rather limited judicial review
of state classification decisions. The courts should not decide whether
the retarded need more services than others or whether a music program
is preferable to a science laboratory. Rather, if the classification does not
arbitrarily discriminate on the basis of such educationally irrelevant
criteria as geographic location or race, the courts should uphold it, even
if particular groups of children are afforded inferior educational op-
portunity as measured by dollar input. For example, if a state decided
to spend more on children with intelligence test scores of over 130,
and if this decision systematically favored the more affluent, the
scheme would pass constitutional muster under the rationality formula-
tion.

The most serious drawback of the rationality approach is that it
draws no clear distinction between education and other municipal ser-
ices. If the principles applicable to education are also applicable to
police and fire protection, hospital care, and street lights, courts may
be faced with the forbidding prospect of challenges to the distribution
of all municipal services. Under a flexible equal protection standard,
however, a court might conclude that education is a more important
personal interest than other services. First, education more than any
other municipal service deals with children, who are at the mercy of
the state with respect to the allocation of school resources. They are
represented by their parents in the political process, but children have
little influence on the economic situation of their family, on the de-
cision where to live, or on the choice of a particular state financing
system. In short, the powerlessness of children may argue for in-
creased judicial sensitivity to inequalities in education dollars and ser-

241 (1972) (Mr. Justice Douglas, dissenting in part); Ginsberg v. New York, 390
U.S. 629 (1968).
have no choice but to attend the public schools, except those in a family with the economic means to seek out a private alternative. When a child is compelled to spend six hours a day for twelve years of his life in the public schools, it is particularly outrageous to allow irrational favoritism. The discrimination has a more sustained and consequential character than discrimination in a public service that is less a part of a child's everyday life. The compulsoriness of education may well create a reciprocal obligation on the state to provide minimal and roughly equal educational quality.\textsuperscript{401} Further, although the data is unsettled, there is at least a colorable argument that increments in school resources affect academic performance and ultimately income and status. The possibility that they do may serve as a sufficient basis for treating education differently from other services, which can make no claim to having significant instrumental effects. Education, moreover, may be sufficiently intertwined with political participation and speech activities so as to justify special treatment. Education allows the individual to understand ideas and concepts, to protect his political associations, to communicate with his fellow citizens, and to exercise his right to vote intelligently. In short, education deals with matters of the mind and not simply with matters of the stomach or property, however important these interests may be.

Based on the evidence of the education production function, I am skeptical of any claim for special treatment for education that is based on its instrumental effects. The case for treating education differently from other services must finally rest on the special characteristics of the immediate beneficiaries—the children. As an ethical matter, there are strong reasons for treating children equally. Children, in a sense, are less blameworthy and less responsible for their circumstances, and, in turn, they are less able to alter them. They are not born rich or poor; they are simply born into families that share these characteristics.\textsuperscript{402} Thus, despite tremendous differences in temperament and ability, there is less reason to differentiate among children on any basis other than their personal characteristics—in this case, their educational needs.\textsuperscript{403}

Another drawback to the rationality standard is the potential collision with the principle of local community control. If to be characterized as a rational scheme public services must be distributed in ac-

\textsuperscript{401} Goodman, \textit{supra} note 129, at 349.
\textsuperscript{403} J. Coons, \textit{supra} note 15, at 419-20.
Equal Educational Opportunity

cordance with relevant characteristics of the beneficiaries of the service, what is left of the American ideal that each community should determine its own priorities in allocating funds for public services? The question, in short, is whether we are willing to accept a less rational distribution of public services, in this case schooling resources, in order to maximize the competing value of local community choice.

Two observations are necessary. First, local control that permits only affluent school districts to make choices about educational spending is not a worthy objective. Whatever value we place on decentralization of decisionmaking in education dissipates as it becomes a vehicle for discrimination rather than local discretion. Poor districts currently spend less on the public schools not because they value education less, but because they are fiscally incapable of doing otherwise. Thus local control could be a justification for deviation from the rationality standard only for a state with some form of district power equalizing. Second, the need to balance the interests in local control and rationality in educational expenditures is not a reason for assuming that judicial intervention in school financing is improper. In the end either local control is preferred or it is not, and the courts are quite capable of making that decision. Whatever the decision, the school finance cases would remain readily manageable.

Arguing that "there is nothing simple-minded or bizarre about the principle that government should ordinarily leave decisionmaking and administration to the smallest unit of society competent to handle them,"404 Professors Coons, Clune, and Sugarman offer a number of justifications for local control of education.405 One line of argument focuses at least in part on the notion that local public officials, parents, and taxpayers have superior insight into the workings of the educational process and the particular needs of their children. Tested by measurable educational gains this assertion appears to be false. Social scientists have found virtually no causal relationship between the degree of decentralization of decisionmaking or parental involvement and improved academic performance. Given the paucity of knowledge about the education production function, it is hardly surprising that the claims of local persons to expertise are no greater than those of others.

A second line of argument to support community control rests on the theory that a community should be free to choose municipal ser-

404. Id. at 41. See also C. Benson, Economics of Public Education 226-29 (1961).
vices other than education in order to meet the social policy goals that it has set for itself. This reasoning is particularly persuasive in light of the unclear relationship between educational expenditures and income once socio-economic background factors have been taken into account. A state government might wish to draw on this evidence in determining how much to spend for education in relation to other governmental services. The problem with the argument is more basic. Whether local communities should be allowed to spend fewer education dollars in order to increase allocations for other services depends entirely on one's view of education. If education is no different from other public services that address social and economic problems, it is difficult to justify a constitutional requirement giving priority to education in the face of community sentiment to the contrary. If education is special in the sense that it exclusively involves children, that it is universal and compulsory, and that it is intimately tied to basic constitutional rights, then local communities should not be permitted to disadvantage their children by diverting funds to other services. On balance, the latter view seems preferable.

The strongest argument for local control rests on basic democratic principles. In the absence of compelling reasons to the contrary, individuals or the smallest aggregate of individuals capable of addressing a problem should make decisions affecting their lives. This proposition derives not from the contention that they have superior expertise, but from the notion that people will be more satisfied with decisions if they have a greater hand in making them. In other words, people may tend to accept particular institutional arrangements and decisions when they accept the way in which institutional decisions are made. This conception of democratic decisionmaking appears inconsistent with a theory of equality of educational opportunity that rejects geographic classifications and demands the equal treatment of school children except where program or child characteristics require otherwise. On the other hand, the rationality requirement is a rather limited intrusion into the sphere of democratic decisionmaking. It prevents a community from spending less on its children without reference to their educational needs and forbids the state to allow one community to make available a superior educational offering, measured in dollars, simply because the community's taste does not run to other services. This leaves the structure of local control largely intact. A com-
munity may make a myriad of choices concerning its educational system, including administrative, curricular, and personnel decisions. Conversely, given the great importance of education to its youthful beneficiaries, they have a substantial interest in securing equal treatment that surely outweighs the relatively slight interference with community prerogatives.

The potential inconsistency between the rationality standard for defining equal educational opportunity and the principle of local control may be irrelevant. Since no state currently employs a power-equalizing method of financing public education, no state can logically offer local control as a justification for deviation from the rationality standard. Thus the local control question is not before the Supreme Court in *Rodriguez v. San Antonio Independent School District*, and the school financing issues may be resolved without regard to the problem. A decision by the Court that present educational financing schemes are unconstitutional might lead states to enact district power-equalizing plans, though the political acceptability of power equalization is unclear. If they do, that will be the time for the Court to address the constitutionality of these plans. In any case, the Supreme Court’s recent glowing approval of local control may well presage a resolution of the conflict heavily weighted in favor of that value.407

D. The Symbolic Impact of School Financing Decisions

The last few years have seen mounting criticism of both the local property tax and state formulae for distributing education revenues. The focus of these criticisms has often been the poor administration of the property tax, but the quality of education offered in the property-poor school districts has also been of increasing concern. This concern has not been limited to the academic community. Public opinion, once dormant, is stirring, and the dawn of school finance reform may be near. Reform legislation has been introduced in Minnesota, Michigan, and Kansas.408 Political leaders, including a number of governors and former Secretary of Health, Education, and Welfare Elliot Richardson, have addressed themselves to the problem. Study commissions in New York, Michigan, and Texas409 have recommended

408. THE NATIONAL LEGISLATIVE CONFERENCE SPECIAL COMMITTEE ON SCHOOL FINANCE, A LEGISLATOR’S GUIDE TO SCHOOL FINANCE 4 (1972). More recently, the Kansas Legislature has adopted a form of district power equalizing.
409. J. THOMAS, SCHOOL FINANCE, AND EDUCATIONAL OPPORTUNITY IN MICHIGAN
vast changes in school financing. In a California poll, 83 percent of those surveyed felt that children in poor districts should receive the same amount of money for their education as those in affluent districts.\textsuperscript{410} Such prestigious groups as the National Governors' Conference, the National Legislative Conference, the National Education Association, the American Federation of Teachers, the League of Women Voters, the United States Civil Rights Commission and innumerable other private and public organizations have endorsed a restructuring of school financing to ensure greater equity in the distribution of public funds.\textsuperscript{411}

Most of the reform efforts materialized only after well publicized judicial decisions that invalidated state financing plans. Before the courts spoke, there was little but harping from the academic malcontents. There is no empirical evidence to support the proposition, but it seems likely that the courts played a vital role in leading public opinion. To be sure, the courts were not alone in this battle; there were rumblings from many quarters. But by articulating their decisions in consistent and reasoned opinions, by lending their prestige to equalization efforts, by helping to publicize the inequities, and by forthrightly identifying the constitutional infirmities of current financing schemes, the courts have contributed significantly to the outcome of the debate over equality of educational opportunity. In the best sense of the words, the courts have acted as schoolmasters and not simply as antidemocratic institutions attempting to foist an unpopular point of view upon an unsuspecting public.

The symbolic consequences of judicial involvement in the school financing cases thus far suggest two predictions about the future. First, the treatment of \textit{San Antonio Independent School District v. Rodriguez} by the Supreme Court is critical. A decision that the Texas financing scheme comports with the requirements of the fourteenth amendment may well be interpreted by the public and by state officials as an approval of current state financing practices. Distribution of education dollars according to district wealth may be viewed as the

\textsuperscript{410} Kirp & Yudof, \textit{supra} note 332, at 147 n.8.

\textsuperscript{411} See, \textit{e.g.}, \textit{National Educational Finance Project, Future Directions for School Financing} (1971); \textit{United States Commission on Civil Rights, Mexican American Education in Texas: A Function of Wealth} (1972).
preferred solution and not simply as one constitutional alternative among many. This means that the great impetus for change that has been building up in the country may be deflated, and legislative reform may become less likely. In this sense, the cause of school finance reform has been jeopardized simply by the Supreme Court's decision to hear the Rodriguez case.

Second, the coincidence of judicial activity and public sentiment holds forth great hope for the manageability and enforceability of a Supreme Court decree declaring state school financing systems unconstitutional. Viewed from either the rationality or poverty approaches, such a decision would certainly be amenable to compliance by state officials. More important, the public enthusiasm for change may be such that state legislatures may rapidly fall into line once the present systems have been invalidated. The years of enforcement difficulties that followed Brown may not be repeated if there is an affirmance by the Supreme Court in the Rodriguez case, assuming of course that the Court achieves a clarity in its school financing opinion that was wholly lacking in the early desegregation cases.

V. Conclusion

In his novel God Bless You, Mr. Rosewater, Kurt Vonnegut describes a character as suffering from the disease of "samaritrophia," an hysterical indifference to the troubles of those less fortunate than oneself. One who catalogs the institutional and empirical factors limiting judicial capacity to treat the crisis in public education may at first appear to suffer from that malady. After all, the public schools are beset with problems; poor and minority students perform less well than other students and are often treated unfairly. But the diagnosis is faulty. The courts should not attempt to address the inequalities in academic performance between socio-economic and racial groups, they should respond where racial inequality or unequal access to school resources is demonstrated. In terms of the historic role of the federal courts in defining political and social ideals, in terms of the symbolic impact of race and resource decisions, and in terms of the feasibility and enforceability of those decisions, judicial intervention in these areas is appropriate. The arguments for racial and resource equality, pursued creatively and carefully, may lead to substantial and positive changes in the public schools.

VI. Epilogue

On March 21, 1973, the Supreme Court decided *San Antonio Independent School District v. Rodriguez*. In a five to four decision, the Court upheld the Texas school financing scheme, which allows substantial interdistrict disparities in the allocation of education monies. Mr. Justice Powell, writing for the majority, held that because the case involved neither a suspect classification nor a fundamental interest, the traditional rational basis standard of equal protection review should be applied. With respect to the alleged wealth classification, he identified three possible classes of children adversely affected by the Texas scheme: (1) those in families with incomes below some designated poverty standard ("functionally 'indigent'"); (2) those who are only relatively poorer than others; and (3) those who reside in poor districts irrespective of the personal income of their families. He found that only the first definition identified a suspect classification consistent with earlier wealth cases, which he interpreted as requiring a complete inability to pay and an absolute denial of the service. The plaintiffs had shown neither absolute denial of access to the public schools nor the existence of the requisite class:

[A]ppelees have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level. Indeed, there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts.

Even if relative wealth were an appropriate conceptual basis for the designation of a suspect class, the Justice reasoned, the correlation between individual wealth and district wealth in Texas was positive only at the extremes—in the richest and poorest districts—and did not hold for the 90 percent of the districts in the middle. He also denied that children living in poor districts could constitute a suspect class whose members historically had been subjected to unequal treatment or had been politically powerless.

The majority held that education is not a fundamental interest because it is not explicitly or implicitly recognized in the Constitution.

413. 93 S. Ct. 1278 (1973). The author of this article was co-counsel for the appellee in the *Rodriguez* case before the Supreme Court.

After the decision of the Supreme Court in *Rodriguez*, the New Jersey Supreme Court held that state's system of financing public schools to be unconstitutional under the New Jersey Constitution. *Robinson v. Cahill*, Civil No. 8618 (N.J., Apr. 3, 1973).

414. 93 S. Ct. at 1291.
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Although education may be important to the exercise of rights such as voting and free speech, this also is true of other interests such as subsistence and shelter, which have not been deemed fundamental in a constitutional sense. In any case, the Court could find no indication in the record that the present levels of education were inadequate "to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."415

Applying the rational basis test, the majority held that the Texas system assured a basic education for every child while encouraging local control of education. Notwithstanding the inability of poor districts to exercise meaningful budgetary control over their schools, the majority concluded that the "existence of 'some inequality' in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system."416 The complexity of financing a statewide system of public schools suggested to the majority the possibility of various constitutionally permissible solutions open to state legislatures within the limits of rationality. For additional support, the majority pointed to the debate over whether increments in dollars available to public schools lead to qualitatively superior educational opportunities.

In a dissent, joined by Justices Douglas and Brennan, Mr. Justice White argued that a principled application of the rational basis test would lead to the invalidation of the Texas financing scheme.417 According to Justice White, the only possible justification for unequal school expenditures between districts is the desire to allow local school districts to choose how much they wish to spend for education. This justification, however, implies an equal ability to choose; and the State's attempt to maximize local initiative by permitting school districts to resort to the property tax if they wish fails in districts with property tax bases too low to allow rich or poor parents to augment school district revenues. Justice White wrote:

Requiring the State to establish only that unequal treatment is in furtherance of a permissible goal, without also requiring the State to show that the means chosen to effectuate that goal are rationally related to its achievement, makes equal protection analysis no more than an empty gesture.418

415. Id. at 1299.
416. Id. at 1305-06.
417. Id. at 1312.
418. Id. at 1314.
In a separate dissenting opinion, Mr. Justice Marshall, joined by Justice Douglas, sharply attacked the factual and legal analysis of the majority.\(^{419}\) While echoing Justice White's conclusion that the State's interest in local control was insufficient within the present factual framework, Justice Marshall attacked the majority's carefully drawn distinction between fundamental rights that are implicit or explicit in the Constitution and all other interests. He urged the adoption of an ad hoc approach that weighs the gravity of the individual's deprivation, the constitutional importance of the individual's interest, and the gravity and importance of the legitimate interests of the state in the classification. Justice Marshall then concluded that the Texas school financing system was unconstitutional under his proposed standard for reasons closely paralleling those suggested in Part IV of this article:

[I]t must be recognized that while local district wealth may serve other interests, it bears no relationship whatsoever to the interest of Texas school children in the educational opportunity afforded them by the State of Texas. . . . [G]roup wealth . . . represents in fact a more serious basis of discrimination than does personal wealth. For such discrimination is no reflection of the individual's characteristics or his ability. And thus—particularly in the context of a disadvantaged class composed of children—we have previously treated discrimination on a basis which the individual cannot control as constitutionally disfavored.\(^{420}\)

Finally, Justice Marshall sought to rebut the majority's reference to the complexity of the school financing issue and the lack of agreement between scholars as to the gain to be derived from increments of education dollars. Since its task was to enforce the Constitution, not resolve debates over educational theory, he wrote, the Court should examine the question of discrimination in terms of what the State provides its children, not what the children might do with what they receive.

The *Rodriguez* decision is troubling in many ways. The majority suggests that only rights that are explicitly or implicitly recognized in the Constitution are fundamental for the purposes of equal protection analysis. Yet as Justice Marshall plaintively asks, where does the Constitution refer to privacy, interstate travel, or the right to participate in state elections? The majority reformulates the wealth cases in terms of an absolute inability to pay rather than in terms of relative wealth.

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419. *Id.* at 1315.
420. *Id.* at 1342-43.
In *Harper v. Virginia Board of Elections*, however, the Supreme Court struck down the poll tax for all citizens, not simply for those too poor to pay. The majority rejects the evidence that the most affluent live in property-rich districts and the least affluent live in property-poor districts only because the correlation does not hold for districts not at the extremes. The majority relies on a standard of minimum sufficiency of educational levels in poor Texas districts, yet offers neither a manageable judicial standard for determining when that minimum has been met nor any conceptual justification for a retreat from traditional constitutional notions of equality. Finally, the majority relies on local control as a rationale for interdistrict inequalities although present financing schemes provide local control only for the property-rich districts.

The analysis of equal educational opportunity suggested in this article eschewed doctrinal considerations in favor of a focus on the appropriate judicial role, the limits on judicial manageability, and the dictates of public policy. In terms of this analysis the *Rodriguez* decision evidences two important trends. First, the Supreme Court seemed quite concerned, in expounding constitutional doctrine, to place severe limits on the extent of judicial intervention. If it had declared education to be constitutionally fundamental, the Court might have been called upon to intervene with respect to nearly all the primary functions of municipal government. A contrary decision in *Rodriguez* might have portended a new era of judicial activism, a step the Burger Court was unwilling to take. The Court's unwillingness to treat education with the solicitude that proponents of equal educational opportunity would demand may have grave consequences for future education cases, factually distinguishable from *Rodriguez*, which attack intradistrict resource disparities, school exclusions, and ability grouping practices.

Second, the majority opinion in *Rodriguez* is filled with references to the lack of proof of injury to children in poor school districts. Again and again Justice Powell referred to the considerable dispute among educators as to whether "the difference in quality between two schools can be determined simplistically by looking at the difference in per pupil expenditures." Although the Court did not rely directly upon this ground, it seems probable that the case was lost because the majority—or at least Mr. Justice Powell—did not believe that the requisite

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422. 93 S. Ct. at 1291 n.56.
degree of injury had been established where the State allegedly provided a minimum educational opportunity.

In effect, the Court focused upon a variant of the "outcome equality" analysis, which has been rejected throughout this article. Unless the plaintiffs can establish that some other method of financing schools would inevitably lead to substantially higher achievement scores for the previously disadvantaged group, they cannot succeed. The test is not equality in terms of the resources that the state makes available for education; rather the test is the provable impact of the deprivation or the amelioration of the deprivation. Such a test completely ignores the ethical underpinnings of the equal protection clause; that is, the interest in assuring rationality in government and the nonstigmatization of discrete groups. Moreover, few of the Court's prior decisions could withstand such analysis. In *Sweatt v. Painter*, 423 should the Court have decided not only that resources and facilities and intangible factors were unequal between the black and white law schools, but also that Mr. Sweatt would have been a more successful student and lawyer if he were permitted to attend the white institution? Must the reapportionment decisions fall if proof is not forthcoming that reapportioned legislatures act more responsibly and pass qualitatively superior legislation? Were the voting rights cases wrongly decided in the absence of proof that they would result in the election of different candidates?

In a sense, the Supreme Court is a victim of the new age of empiricism. When *Brown* was decided, the Court could reassure itself that its wisdom was consistent with both a constitutional morality and the tidbits of scholarly research then available. When *Rodriguez* arose, the simple truths of prior days had yielded to a morass of conflicting studies and reports impervious to sound generalizations. As a result, the social sciences no longer played a supportive role; instead they led to a decisional paralysis in which the issues seemed so complex and unclear that the Court saw no choice but to reaffirm the status quo. Since nearly all areas of social policy are beneficiaries of the new scientism, 424 *Rodriguez* may well portend a general judicial retreat from broad equal protection decisions.

424. See, e.g., Cassell, Disease as a Way of Life, COMMENTARY, Feb. 1973, at 80: "[T]here may . . . be good reason to dispute 'the underlying belief among both the lay public and people in the technical professions that the quantity and quality of medical services are directly related to the health status of the population.'"