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The authors wish to acknowledge and express their appreciation to Julie Rieder and Hugh Zanger, members of the Benjamin N. Cardozo School of Law's Class of 1995, for their invaluable assistance in researching and preparing this article.

THE JUDICIAL SYSTEM & EQUALITY IN SCHOOLING

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Introduction

Judicial participation in the process of policy making in public education has become commonplace in America. From defining constitutional issues as in *Brown v. Board of Education*,[1] the landmark 1954 decision declaring racially segregated public school systems "inherently unequal,"[2] courts have increasingly been called upon to resolve education issues beyond the constitutional realm.[3] Statutes and the administrative regulations of state and local educational institutions have come under judicial scrutiny with increasing frequency. For as regulations themselves have grown in

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

2. *Id.* at 495.

3. *See, e.g.*, Mrs. A. J. v. Special Sch. Dist. No. 1, 478 F. Supp. 418, 431 (D. Minn. 1979); Eberle v. Bd. of Pub. Educ., 444 F. Supp. 41 (W.D. Pa. 1977), *aff'd*, 582 F.2d 1274 (3d Cir. 1978) (Both cases interpret the Education of the Handicapped Act, Pub. L. No. 91-230, tit. VI § 601, 84 (1970), *amended by* The Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 774 (1975), *amended by* The Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1491 (1990)).

number and scope—many regulations in the form of the now dreaded "mandates"—parties have sought judicial intervention to sustain the rights that they have urged.

Nevertheless, all too often judicial intervention has shown itself to be inattentive to a philosophy of education and a sense of what school effectiveness is about. For with all of the new judicial activity and with all of the effort to guarantee rights—particularly for students—the quality and effectiveness of public education, especially in our urban schools, has stalled.[4] It is troubling—indeed, tragic—that notwithstanding the increased participation of the courts, our schools seem to be deteriorating.[5]

Whatever the other benefits of judicial decisions, the courts, as they have become more involved with schools, have often been inattentive to, or even in opposition to, many practices that could be of great help in permitting schools to be better places for children. For while the courts have often identified the basic issues of student rights most appropriately, the solutions they have proposed have a stifling effect upon the development of good school practice in at least two significant ways.

First, an activist judicial role has resulted in excessive legal entanglement in the daily affairs of those charged with running public schools.[6] Although not a legal maxim, the notion that "too many cooks spoil the broth" can be said to describe this phenomenon. Often, through the use of court orders and judicially supervised consent decrees, the courts have had their impact on the classroom while teachers and administrators are left without room for their

4. No single body of data can document the state of American education; perhaps the best single source is the National Assessment of Educational Progress, the so-called "nation's report card." While there has been some recent progress, in mathematics, for example, overall the results remain limited. For example, almost a third of the nation's high school seniors cannot answer accurately basic geography questions, nearly two-thirds fail similarly basic history questions, and even in mathematics, where there has been some improvement, only 16 percent of seniors meet the requirements set by the National Educational Goals Panel.

5. *See, e.g.,* Mike Bowler, *Scores Rise Where Suburbs Grow*, BALTIMORE SUN, Jan. 24, 1995, at 2B; Sharon L. Bass, *Connecticut Q & A: John Dow Jr.*, N.Y. TIMES, Oct. 9, 1988, at 12CN3; Robert Conot, *Carnegie Panel Calls for Urban School Reforms*, L.A. TIMES, Mar. 16, 1988, at 3.

6. For example, the New York City Public Schools face court orders or consent decrees concerning teacher assignment, student placement, school finance, special education, and bilingual education. *See, e.g.,* Lora v. Bd. of Educ., 587 F. Supp. 1572 (E.D.N.Y. 1984) (order regarding the education of emotionally disturbed children); Aspira of New York Inc. v. Bd. of Educ., 423 F. Supp. 647 (S.D.N.Y. 1976) (regarding consent decree entitling New York City public school students of Hispanic origin to a program of bilingual education).

decision making. There is the sense that there are too many court-ordered rules and directives to be observed.[7] In many ways, courts have sought judicial solutions with respect to issues regarding public education where prudence has dictated greater restraint.

In addition to the courts extending the hand of justice directly into the classroom, judicial "offsprings," judicial remedies, the administration of consent decrees, and the excessive supervision to guarantee compliance, seem to be ever present. What too many in the judicial system fail to realize is that when their case has been concluded—by decision, or negotiated settlement—the task of implementation has just begun. If an educator is looking for an excuse not to be effective in the classroom, the specter that the courts have preempted the matter of how the instruction should be carried on, real or imagined, is enough to justify that inaction.

Classroom teaching is affected by what educators are told they must do, and what they cannot do. Often the judicial system makes educators feel unimportant, or not responsible, in the schooling of youngsters. Thus, rather than seeking to implement the student's rights, the educator often feels that the task has been taken away. This has occurred precisely at the point in time when the literature of school improvement is calling upon them to exercise greater responsibility in the schooling of our children.

A second negative consequence of judicial activism in education is that educational policy making itself has been influenced more by the need to deal with the articulated legal rights of individuals than by the need to advance good school practice for all students within the larger definition of those rights. An overly active judiciary has suggested that courts have more answers to student success than they actually do. In that regard, they devalue the critical importance of the usual school activity. The result of this is seen in the differences in expenditures between students classified as handicapped and the typical student.[8]

The court's priorities are based upon legal entitlements, so that student rights are "given" by the law. In the literature of school improvement, however, students are called upon to empower themselves, and to assert their rights in the learning community.[9] They are successful when they take charge of their lives, not when

7. *Id.*

8. *See infra* text accompanying note 79.

9. *E.g.*, Dorothy Kerzner Lipsky, *We Need a Third Wave of Educational Reform*, 22 SOC. POL'Y 43, 44-45 (1992).

they are passive in the process.[10] They are successful when they associate with other students, not when they are isolated from them, or are specially treated.[11] Yet, judicial rules about special education,[12] bilingual education[13] and entitlements of one type or another have come to take students out of their interaction with others.[14]

Because judicial activism in public education has had a negative impact on school effectiveness, this Article seeks to define a proper role for the courts in education policy—a role that would be more effective in obtaining quality education for our nation's youngsters. It is based on the assumption that equality is a basic principle that governs both sound law and sound educational policy. It further proceeds on the assumption that the goal of education, at least from the students' perspective, is to permit them the fullest attainment of educational benefits. Thus, the Article examines and compares how the right to an education within a framework of equality has been defined by both educators and the courts. Unlike most analyses of the cases dealing with education, this Article examines them in the context of what educators have determined is good school practice. With this backdrop, the Article examines whether the development of the law of public education has been as positive as it could be. It further analyzes where the development of the law has and has not been compatible with the strategies for school improvement which have been shown to be most effective.

This Article also examines how the concept of equality has played out in the efforts of the courts to define student rights in several important areas. These include school prayer and flag salute cases, racial discrimination, cases concerning students whose native language is not English, and cases concerning students with disabilities. The common denominator in each of these areas is the way in which differences among students are treated and how the notion of equality has been considered in the context of those differences. Thus, the Article examines how, in these areas, differences are first conceptualized and then addressed by the courts.

Part I of this Article discusses good school practices and addresses the educational methods which have been proven to be effective. The common thread in effective educational doctrine is

10. *Id.*
11. *Id.*
12. *E.g.*, Jose P. v. Ambach, 669 F.2d 865 (2d Cir. 1982).
13. Aspira of New York, Inc. v. Bd. of Educ., 423 F. Supp. 647 (S.D.N.Y. 1976).
14. *See* discussion *infra* parts I.E, II.C, II.F.

that programs which integrate and include students are often the most effective educational method on many levels. Part II discusses the Supreme Court's approach to education. This part shows that the Court has not always been clear in enunciating a policy of equality in the classroom. Part III contains our opinions on what to do to improve education jurisprudence. Our conclusions require the law to alter its thinking in educational matters, and change its approach to one that substantially appreciates the need for equality in our schools.

I. Defining Good School Practice

A. Educational Perspectives on Equality

Research regarding school effectiveness clearly indicates that the students' sense of participation and belonging profoundly affects educational outcomes for children.[15] If children are made to feel unequal, and undervalued, their capacity to be educated is severely diminished.[16] For a school to be effective, its students must also be convinced that not only can they succeed, but that teachers and other school personnel believe they can succeed.[17] Indeed, for a school to be effective students must sense that these adults feel a responsibility toward the achievement of student success.[18]

Thus, understanding the student's own role in the learning process is critical for successfully improving our schools. The student must be seen as an active participant in the learning process;[19] the student cannot be viewed as a funnel into which the teacher's knowledge is poured or as a passive consumer. Rather, the student must be viewed as the "producer" of his or her own learning. While teachers and others can teach, it is only the student who can learn. The student is thus a "worker" in her or his own learning.

> As generations of teachers have realized, they cannot learn for their students; it is the student who must do the learning. Giving students respect, building upon their knowledge, providing them control over the learning process and appropriate materi-

15. The basic research is that of Ronald R. Edmonds, with many subsequent studies. *See* Ronald R. Edmonds, *Effective Schools for the Urban Poor,* 37 EDUCATIONAL LEADERSHIP 15, 18, 20-24 (1979); Ronald R. Edmonds, *Some Schools Work and More Can,* 9 SOC. POL'Y 28, 28-29, 31 (1979).

16. Ronald R. Edmonds, *Effective Schools for the Urban Poor,* 37 EDUCATIONAL LEADERSHIP 15, 15-18, 20-24 (1979).

17. *Id.*

18. *Id.*

19. ALAN GARTNER & FRANK REISSMAN, THE SERVICE SOCIETY AND THE CONSUMER VANGUARD (1974); Lipsky, *supra* note 9, at 43-45.

> als, helping them to see the connection between subjects, encouraging cooperation among students—these are the necessary predicates to increases in student learning, the bases for significant improvement of our schools.[20]

The courts have a responsibility to insure at least that their decisions establishing student rights do not interfere with sound pedagogic practices which place enormous responsibility upon the student working within the school community. This Article first examines the educational literature on classroom success, it examines the education cases, and, finally, the connection (and disconnection) between the two.

B. The Effective School

What do we know about effective schools? More precisely, what do we mean by an "effective school"? First, we define school effectiveness in terms of academic, social, and behavioral outcomes for students. Second, we are concerned with equity issues and must compare the outcomes for *all* students, including non-white children, those whose families are poor, those whose first language is not English, and those with disabilities.

There is neither an established platform for effective schools nor a universally agreed upon list of characteristics of school effectiveness.[21] Nonetheless, it is possible, for the purposes of this Article, to distill the characteristics of effective schooling. By way of illustration, a survey assessing the results of the decade following the publication of *A Nation at Risk*[22] reports that:

> [T]he reform movement at all levels has had positive impacts on a number of areas, including changes in course-taking, classroom instruction, and the teacher pipeline, as well as improvements in dropout rates, achievement as measured by test scores, student eligibility for higher education and equality.[23]

Regarding "equity" issues, defined as improvements among minority and majority students, and between male and female students,[24] the authors of this survey noted studies which reported that dropout rates have declined faster for minorities than for

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20. Lipsky, *supra* note 9, at 43.

21. FRANK J. MACCHIAROLA & THOMAS HAUSER, FOR OUR CHILDREN 9 (1985).

22. NATIONAL COMMISSION FOR EXCELLENCE IN EDUCATION, A NATION AT RISK, U.S. Government Printing Office (1983).

23. M.W. Kurst & C. Kelley, *Positive Impacts of Reform Efforts in the 1980s*, A NATION AT RISK: TEN YEARS LATER (1993).

24. *Id.*

other students;[25] that basic skills as well as SAT test scores have risen more rapidly;[26] that course-taking patterns have changed as well, with large increases for minority students,[27] and increases in mathematics and science for female students which outpace increases for males.[28]

More than a decade ago, Ronald R. Edmonds[29] identified five factors that characterize effective schools. These are:

1. The principal's leadership and attention to the quality of instruction;
2. A pervasive and broadly understood instructional focus;
3. An orderly, safe climate conducive to teaching and learning;
4. Teacher behaviors that convey the expectation that all students are expected to obtain at least minimum mastery; and
5. The use of measures of pupil achievement as the basis for program evaluation.[30]

Lawrence Lezotte, who directs the National Center of Effective Schools Research and Development, notes that, "Since that initial listing, many other studies have cross-validated the original findings. Some of the more recent studies have added additional factors, and others have sought to make the original Edmonds factors more explicit and more operational."[31]

Lezotte further expanded upon Edmonds' five factors. First he holds the conviction that the primary mission of the public schools should be learning for all and this conviction is predicated upon three beliefs:

> First, all students can learn. Second, the individual school has control of enough of the critical variables to assure such learning. Third, schools should be accountable to do so.[32]

Turning from the characteristics of effective schools, Lezotte then identifies five guiding principles for creating such schools:

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25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. Ronald R. Edmonds, *Programs in School Improvement: An Overview*, 40 EDUCATIONAL LEADERSHIP 4 (1982).
30. *Id.* at 4.
31. Lawrence W. Lezotte, *School Improvement Based on the Effective Schools Research*, BEYOND SEPARATE EDUCATION: QUALITY EDUCATION FOR ALL 29 (Dorothy Kerzner Lipsky & Alan Gartner eds., 1989).
32. Lawrence W. Lezotte, *Learn From Effective Schools* 22 SOC. POL'Y 3, 34 (1992).

1. Preserve the single school as the strategic unit for the planned change;
2. Principals, though essential as leaders of change, can not do it alone and, thus, teachers and others must be an integral part of the school improvement process;
3. School improvement, like any change, is best approached as a process, not an event. Such a process approach is more likely to create a permanent change in the operating culture of the school that will accommodate this new function called continuous school improvement;
4. Research, to be useful in facilitating the change process, must include suggestions for practices, policies, and procedures to be implemented as part of that process; and
5. Like those at the original effective schools, those improving schools must feel as if they have a choice in the matter and, equally as important, they must feel as if they have control over the process of change.[33]

Herbert J. Walberg and Herbert J. Walberg III provide powerful evidence in support of Lezotte's first principle.[34] Citing studies that control for educational costs and student demographics, they conclude that, "[s]tates with large districts and large schools, and which pay more of the costs of primary and secondary education, tend to have the lowest student achievement."[35] Despite these findings, during the past half-century, states have created ever-larger schools and districts, and have increasingly concentrated funding responsibility on state rather than local authorities.[36] Walberg and Walberg, in noting this trend, conclude that "[t]heory, previous research, and the new analysis reported here strongly suggest that these trends have been counterproductive for education's chief purpose—learning."[37] In explaining this, they suggest that:

> The worrisome trends identified here may be a part of a larger problem: "intergovernmentalism," which means making more levels and units of government responsible for the affairs of individuals. Common sense tells us that when all are nominally responsible, none is truly responsible. In writing on this subject, John Kincaid concluded: 'Virtually all of the factors most associated with academically effective education are school- and

33. Lezotte, *supra* note 31, at 31
34. Herbert J. Walberg & Herbert J. Walberg III, *Losing Local Control*, 53 EDUCATIONAL RESEARCHER 19, 19-26 (1994).
35. *Id.*
36. *Id.*
37. *Id.*

> neighborhood-based. Yet, we have shifted more control and funding of education to state and national institutions.'[38]

Moreover, in a significant way, this drive toward greater control outside of the individual school has been encouraged by judicial decisions which have driven toward equality in funding formulas as well as equality in the classroom setting. Size itself, of course, is not the issue. Rather, it is what small size leads to that makes a difference for students. We learn from Walberg and Walberg's study that in smaller schools, students who would otherwise be marginalized are noticed and encouraged to participate.[39] The results of participation are clear: students' achievement, empathy and social skills improve and they are less likely to use drugs, be deviant and feel lonely.[40] This is in part due to the greater incidence of mixed aged grouping, peer tutoring and reciprocal teaching that is found in a small school setting.[41]

Other lessons Walberg and Walberg gleaned from their observations of small schools include the fact that teachers and students are more likely to focus on substance because both are free from burdens of school bureaucracy.[42] Parents are more likely to be involved in a small school and know their child's teachers and principal. Students have better attendance records and are more likely to participate in school activities.[43] And, as a qualitative matter, smaller high schools promote student satisfaction and sense of belonging.[44] In most respects, Walberg and Walberg's study shows that the community orientation fostered in smaller schools improves students' likelihood of having a successful and socially beneficial scholastic experience.[45] It is clear that among those who study effective schools, the amount of resources alone available to each school is not as powerful an indicator of school success as one might think.

C. Effective School Practice: Reconsidering Intelligence and Knowledge

Assessing effective school practice must focus on pedagogy—instructional practices, curricula, school and class organization. Re-

38. *Id.* at 26.
39. *Id.*
40. Walberg & Walberg, *supra* note 34.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*

cent literature challenges our traditional notions of what constitutes intelligence and knowledge. The impact of these new theories is that we must reconsider the effectiveness of our current pedagogical methods.

1. Reconsidering Intelligence

Historically, schools have been organized based on "the concept of intelligence as a single general capacity which equips its possessor to deal more or less effectively with any situation."[46] However, Howard Gardner[47] has developed the concept of "multiple intelligences" (MI), which paints a more variegated and contextualized picture of intelligence by positing a number of intelligences.

MI theory suggests some compelling alternatives to current educational practices in several areas. According to MI theory, traditional school focuses upon linguistic and logical-mathematical intelligences should be reconsidered to address other human abilities and talents.[48] This shift in educational emphasis should be complemented by an attendant shift in instructional conditions.[49] Moreover, according to MI theory, standardized, machine scored, multiple choice tests are inadequate measures of intelligence because they do not address each intelligence.[50] Theoretically, MI theory indicates that anything less than independent analysis of each intelligence is an insufficient measure of intelligence.

MI theory emphasizes the concept of the learner; each individual has a highly individualized way of learning due to their distinctive combination of intelligences. In this regard, MI theory calls into question prevailing educational policies. Fundamentally, Tina Blythe and Howard Gardner hypothesize that using the same methods and materials for all students may be an ineffectual way of teaching.[51] Gardner's MI theory demands a sophisticated approach to education based upon the recognition of students' individuality.

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46. Tina Blythe & Howard Gardner, *A School for All Intelligences*, 47 EDUCATIONAL LEADERSHIP 33, 33 (1990).

47. HOWARD GARDNER, FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES (2d ed. 1985).

48. *Id.* at 3-4.

49. *Id.* at 10, 388-92.

50. Blythe & Gardner, *supra* note 46, at 34.

51. Blythe & Gardner, *supra* note 46.

2. Reconsidering Knowledge

Just as Gardner asserts that students possess multiple intelligences, Gaea Leinhardt believes "that knowledge varies both within and across subject-matter areas"[52] and that there is a social nature of learning.

> First, learning is an active process of knowledge construction and sense-making by the student. Second, knowledge is a cultural artifact of human beings: we produce it, share it, and transform it as individuals and as groups. Third, knowledge is distributed among members of a group, and this distributed knowledge is greater than the knowledge possessed by any single member.[53]

Under Leinhardt's model, teachers are guides. Their role is to escort the student through the group's knowledge ("metaknowledge") and to debate ideas and interpretations of the students.[54] The ultimate question, according to Leinhardt, is how to use knowledge to help individuals and groups gain more knowledge.[55]

D. The Impact of Expectations in Education Theory

In surveying the research on compensatory and remedial programs, Lorin W. Anderson and Leonard O. Pellicer state that these "programs are often so poorly coordinated with regular programs that student learning is actually impeded."[56] They also point to the low expectations that teachers in these programs have for their students and a tendency to teach to their present levels of functioning rather than to the levels they will need to be successful in the future.[57]

This same issue of low expectations is cited by Adam Gamoran in addressing the equity issues of ability grouping.[58] According to Gamoran, not only do teachers have lower expectations for "low-track" students, but students' expectations for themselves differ

52. Gaea Leinhardt, *What Research on Learning Tells Us About Teaching*, 49 EDUCATIONAL LEADERSHIP 20, 20 (1992).

53. *Id.* at 23.

54. *Id.* at 24.

55. *Id.* at 23.

56. Lorin W. Anderson & Leonard O. Pellicer, *Synthesis of Research on Compensatory and Remedial Education*, 48 EDUCATIONAL LEADERSHIP 10, 11 (1990).

57. *Id.*

58. Ability grouping refers to "divisions among students for particular subjects, such as special class assignments for math or within class groups for reading." Adam Gamoran, *Synthesis of Research: Is Ability Grouping Equitable?*, 50 EDUCATIONAL LEADERSHIP 11, 13 (1992).

across tracks and ability groups. In summarizing the data on ability grouping, he concludes, "grouping and tracking rarely add to overall achievement in a school, but they often contribute to inequality."[59] Thus, determinations that youngsters are entitled to special status actually have a negative impact.

In a survey of "what works" to prevent early school failure, Robert E. Slavin, Nancy L. Karweit, and Barbara A. Wasik conclude that learning disabled children will only need intensive intervention for a short period, not to last beyond their first grade.[60] Thereafter, the authors perceive that what is really needed in every elementary school classroom is a general improvement in the quality of classroom instruction and that achieving this goal is simply a matter of resource allocation. They found that:

> [V]irtually every child can succeed in the early grades *in principle*. The number who will succeed *in fact* depends on the resources we are willing to devote to ensuring success for all and to our willingness to reconfigure the resources we already devote to remedial and special education and related services.[61]

Their research indicated that "early school failure is fundamentally preventable."[62] And theoretically, they argue that school failure can be entirely eradicated. The solution, focuses upon *all* children.

E. Inclusive Programs

The National Center on Education Restructuring and Inclusion[63] has evaluated data concerning school restructuring efforts that affect outcomes for all students, including those with disabilities. These inclusive education schools and communities believe that schools can only be equitable if all of their students are in general education classrooms, being educated alongside of each other.[64]

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59. *Id.* at 13.

60. Robert E. Slavin, Nancy L. Karweit, & Barbara A. Wasik, *Preventing Early School Failure: What Works?*, 50 EDUCATIONAL LEADERSHIP 10, 16 (1992).

61. *Id.*

62. *Id.*

63. The National Center on Educational Restructuring and Inclusion was established at The Graduate School and University Center, The City University of New York, to address issues of national and local policy; disseminate information about programs, practices, evaluation, and funding; provide training and technical assistance; build a network of inclusion districts; identify individuals with expertise in inclusion and restructuring; conduct research; and infuse inclusion into educational restructuring.

64. NATIONAL CENTER ON EDUCATIONAL RESTRUCTURING AND INCLUSION, THE GRADUATE SCHOOL AND UNIVERSITY CENTER, THE CITY UNIV. OF NEW YORK, NATIONAL STUDY OF INCLUSIVE EDUCATION (1995).

Given the limited time period in which inclusive education programs have been implemented, there have been relatively few full-scale evaluations of outcomes. There are statewide studies underway, however, in Massachusetts, Oregon, Texas, Utah and Vermont.[65] Michigan's Inclusive Education Recommendations Committee, based on a comprehensive survey of the literature, stated: "While there is currently little quantitative data of statistical significance to support full inclusion, there are clear patterns among the research that indicate improved outcomes as a result of integrated placements."[66]

Summarizing a number of individual studies, Gretchen B. Rossman and Janet Salzman[67] report that where students came from separate classes, there was a substantial increase in time in general education classrooms; students with learning disabilities made academic gains as reflected in scores on criterion-referenced tests and report cards;[68] students with significant disabilities had greater success in achieving IEP goals[69] than did matched students in traditional programs;[70] benefits to students with disabilities occurred without curtailing the educational program available to nondisabled students;[71] and gains occurred in student self-esteem, acceptance by classmates, and social skills.[72]

A multi-year study of inclusive education in Vermont, the state with the most extensive inclusion programs, reports grades for students served in general education settings were not significantly different than their grades had been in separate special education programs;[73] and that general education teachers, special educators, parents, and the students themselves judge students to have comparable performance in the general education class settings in all

65. Dorothy Kerzner Lipsky & Alan Gartner, *The Evaluation of Inclusive Education Programs*, NCERI BULLETIN 2 (1995).

66. DEP'T OF EDUC., LANSING, MI, FINAL REPORT OF THE INCLUSIVE EDUCATION RECOMMENDATIONS COMMITTEE: FINDINGS AND RECOMMENDATIONS 5 (1993).

67. Gretchen B. Rossman & Janet Salzman, *Evaluating Inclusive Education Programs: A Survey of Current Practice* (1994). (A paper prepared for the National Center on Educational Restructuring and Inclusion invitational conference on inclusive education, Wingspread (WI) Conference Center).

68. *Id.*

69. IEP goals are the goals set for the individual student on her/his Individualized Educational Program.

70. Rossman & Salzman, *supra* note 67.

71. *Id.*

72. *Id.*

73. VERMONT DEP'T OF EDUC., VERMONT'S ACT 230: THREE YEARS LATER, A REPORT ON THE IMPACT OF ACT 230 (1994).

categories measured (e.g., behavior, social interactions, classroom performance, and overall success).[74]

Edward T. Baker, Margaret C. Wang and Herbert J. Walberg summarized the findings from three meta-analyses concerning the most effective setting for the education of students with disabilities.[75] "These effect sizes demonstrate a small-to-moderate beneficial effect of inclusive education on the academic and social outcomes of special-needs children. . . . [This] means that special-needs students educated in regular classes do better academically and socially than comparable students in noninclusive settings."[76] Debbie Staub and Charles A. Peck addressed the outcomes for nondisabled students in inclusive settings, and report that inclusion does not reduce their academic progress, that they do not lose teacher time or attention, and that they do not learn undesirable behaviors.[77]

Based on the above discussed studies of education and learning, we can draw several conclusions which should be included in our legal dialogue. First, inclusion is a key to more successful programs. Students function best in an environment where they are the drivers of the educational process. Second, inclusive programs, where students learn from and with each other, as well as from the teacher, give students the more active role they need in the education process. Such programs, not surprisingly, are routinely better programs than segregated alternatives. Finally, inclusive programs are more important than additional resources used for other purposes.

II. Judicial Approaches to Education Policy

Although educational researchers report gains by students educated in inclusionary settings, particularly by special education students, the courts have not always ruled in accordance with these findings. Indeed, all too often parties in court proceedings have discouraged inclusionary settings. Plaintiffs want greater entitlements and more resources spent, and defendants want to craft special settings for the students. Thus, for example, increased isolation

74. *Id.*

75. Edward T. Baker, Margaret C. Wang, and Herbert J. Walberg, *Synthesis of Research: The Effects of Inclusion on Learning,* 52 EDUCATIONAL LEADERSHIP 33 (1994).

76. *Id.* at 34.

77. Debbie Staub & Charles A. Peck, *What Are the Outcomes for Nondisabled Students?*, 52 EDUCATIONAL LEADERSHIP 36, 36-37 (1994).

for special education and bilingual education students rather than inclusion and increased effectiveness for all students has too often been the result of judicial intervention.[78] Because both parties seek something special, courts are left in a position where they are incapable of constructing appropriate remedies based upon equity for all students. Rather, the courts try to achieve equity for some students and inevitably fail. Unfortunately, all too often the remedy that courts produce—particularly in bilingual education or special education cases—tends to maximize the differences among students and be more costly. For example, New York City's current per pupil cost of $6,394 compares with a per pupil cost of $19,288 for special education youngsters[79] who because of judicial, legislative and administrative mandates, are often educated in segregated settings.[80] The New York City problem in special education is based on a court order, *Jose P. v. Ambach*,[81] that has resulted in practices of exclusion despite the mounting evidence that suggests that inclusion—where children are treated equally—creates better outcomes for students.[82]

In *Ambach*, the Second Circuit affirmed a finding that the New York City and State school authorities had failed to meet the standards set by the Education of the Handicapped Act.[83] The Court also affirmed the lower court's appointment of a special master to develop a plan to insure that the schools "take all actions reasonably necessary to accomplish timely evaluation and placement in appropriate programs of all children with handicapping conditions."[84] The irony of the district court's resolution is that its order was based upon sound legal policy—to insure that the rights of children with disabilities are protected—yet it opted for an obvious panacea rather than good educational policy such as the policies of inclusion.[85]

The courts did not begin their intervention into public education with a drive to set new policy in many areas of education. Indeed, the Supreme Court has declared that there is no Constitutional

78. *See* discussion *infra* parts II.C, II.F.

79. These figures come from the school system's data.

80. OFFICE OF BUDGET OPERATIONS & REVIEW, NEW YORK CITY BD. OF EDUC., CHANCELLOR'S BUDGET REQUEST FOR 1994-1995 (1995).

81. Jose P. v. Ambach, 669 F.2d 865 (2d Cir. 1982).

82. *See supra* part I.

83. 20 U.S.C. §§ 1401-1461 (1986), *amended by* Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1491 (1990); *Ambach*, 669 F.2d at 868.

84. Ambach, 669 F.2d at 867.

85. *Id.*

right to an education because it is not "explicitly or implicitly guaranteed by the Constitution."[86] Nevertheless, at the same time, the Supreme Court provided a framework for the consideration of certain student rights. It has praised public education as an institution "intrinsic to American national identity and culture"[87] and has intervened frequently and profoundly "to implement such far reaching reforms as":

> [R]acial desegregation of the public schools, the delineation of the extent of students' free speech rights and freedom of belief while in the schoolhouse, protection of public schools' discretion to include evolution in the science curriculum, and protection of the right of school-age illegal alien children to free public schooling.[88]

This judicial activism and philosophy is hardly in keeping with the passive spirit enunciated in *San Antonio Independent School District v. Rodriguez*.[89] However, these cases reflect that when important basic principles have been described, the goals of public schooling have usually involved notions of equality and integration. According to most who have examined the issue, "[t]he public schools have, indeed, been agents of assimilation,"[90] assimilating groups who are participating in a larger society.[91] Yet, a more important function of public education is to facilitate a child's growth and learning in a safe, inclusive environment where the child is truly respected in the process. As to these important purposes of education, legal scholars are often in agreement with educators. For example, courts have recognized that:

> Attention must also be given to the emotional effects that substitution or exclusion may have on the child. Children, particularly teenagers, are acutely conscious of differences among

86. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).

87. Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis,* 86 NW. U. L. REV. 550, 589 (1992) (citing Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)).

88. *Id.* at n.232-35 (citing Plyler v. Doe, 457 U.S. 202 (1982); Edwards v. Aguillard, 482 U.S. 578 (1987); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982)).

89. 411 U.S. 1 (1973).

90. Kenneth L. Karst, Essay, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 334 n.202 (1986) (citing M. GORDON, ASSIMILATION IN AMERICAN LIFE 23 (1964)).

91. *Id.*

> students. Requiring a student to leave class in front of peers is often embarrassing, and the child may be subject to challenge or ridicule later. Even if the student could go directly to the alternative location, class absences might still be questioned by other students.[92]

Thus, the law recognizes that children excluded from classroom activities will routinely experience feelings of isolation and confusion, but the law's sense of such an issue seems to be poorly developed and often contradictory. For instance, preventing student isolation in the traditional civil rights cases after *Brown v. Board of Education*,[93] has been central to the philosophy of the courts. In *Brown v. Board of Education*,[94] the Supreme Court attacked a critical and historically recognized facet of isolation which occurs in instances of racial segregation. In holding that deliberate separation of minority students violates the equal protection clause, the Court found that "[s]eparate educational facilities are inherently unequal."[95]

In support of its holding, the *Brown* Court spoke of the injury to segregated children from the imposition of a feeling of inferiority.[96] The central aim of *Brown* was the elimination of the developmental harm to segregated students resulting from a loss of the intangible benefits of an equal and integrated education.[97] Over time, however, that goal has been sacrificed. It has certainly been lost in the bilingual education cases, to be discussed later, where it appears that segregation has been practically mandated. Furthermore, it has now been lost in the traditional civil rights cases as well, where the focus has been on acts of segregation, rather than on the goals of integration.

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92. Kiply S. Shobe, Note, *'Public Education in Shreds': Religious Challenges to Curricular Decisions*, 64 IND. L.J. 111, 118 (1988). *See also id.* at 118 n.38 (noting that this rationale has been central to judicial decisions in education cases which involved Establishment Clause issues, including Abington Township Sch. Dist. V. Schempp, 374 U.S. 203 (1963) (school prayer); Engel v. Vitale, 370 U.S. 421 (1962) (school prayer); Wallace v. Jaffree, 472 U.S. 38 (1985) (moment of silence in classroom); Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (mandatory flag salute)).

93. 347 U.S. 483 (1954).

94. *Id.*

95. *Id.* at 495.

96. *Id.* at 494.

97. William L. Christopher, Note, *Ignoring the Soul of Brown: Board of Education v. Dowell*, 70 N.C. L. REV. 615, 627 (1992).

A. The Civil Rights Cases

In the 1991 decision of *Board of Education v. Dowell*,[98] the Supreme Court considered the question of when judicial supervision of segregation should end. The Court's language backed away from the standard of equality that was presented in *Brown v. Board of Education* and instead focused upon the issue of state action that had been the basis for requiring desegregation. In his dissent in *Dowell*, Justice Marshall maintained that any standard for the dissolution of a desegregation decree must reflect the primary aim of *Brown*: to eliminate the "stigmatic injury" of inferiority implicit in segregated education.[99] Thus, Justice Marshall espoused the view that the Court's analysis should focus on the results of the desegregation decree. Yet the majority ignored the effectiveness of the order and looked at the actions of the school district and assessed the district's role in maintaining segregation.[100] The district could not stem the white flight that resegregated the schools in the district.[101] The *Dowell* case represents the Supreme Court's inability to prevent the increasing "return" to separate, segregated schools notwithstanding the promise of *Brown*. The *Dowell* Court endorsed terminations of court-ordered desegregation so long as good faith compliance with desegregation orders are shown, regardless of the level of continuing segregation.[102] As a result, the Supreme Court decided that on remand the district court could enter findings that while one-race or racially identifiable schools may resemble segregation, they do not constitute the pre-*Brown* mode of segregation so as to render them unlawful, since the segregation is a result of private choice rather than state action.[103] There are now several districts where desegregation orders are being set aside,[104] not because segregation has ended, but because such orders have lost their meaning. In a legal sense, state action responsible for segregation has not happened. In a political sense, we have lost interest in racial equality.

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98. 498 U.S. 237 (1991).
99. *Id.* at 251.
100. *Id.* at 249-50
101. *Id.* at 242-43, 250.
102. *Id.* at 249-50.
103. *Id.* at 237, 249-51.
104. *See, e.g.*, Riddick v. The Sch. Bd. of the City of Norfolk, 784 F.2d 521, 543-44 (4th Cir. 1986), *cert denied,* 479 U.S. 938 (1986), where the court found that white flight from public schools, and the representative black population in classroom percentages indicated that de jure segregation did not exist, and the school board acted reasonably in adopting its integration plan over the desegregation plan.

The result in *Dowell* is certainly understandable in terms of judicial precedent. In *Liddell v. Missouri*,[105] the court refused to order city and suburban districts to share the task of integration.[106] For those who believe in inclusion, the appropriate analysis would better turn on whether the public school systems in place are denying students an equal opportunity. The integration of all students within a restructured and unitary school system might be the only remedy available if the goal of equality and the need for inclusion is treated as a primary value. "Although not always mentioned explicitly, 'denial of equal opportunity' is typically a central, underlying concern in Fourteenth Amendment litigation that involves such volatile areas as school desegregation, school finance, handicapped rights (including the rights of AIDS-infected students), standardized testing and bilingual education."[107] However, when those issues are secondary to an analysis of state action, the courts have effectively allowed the basic education rights of students to be sacrificed.

B. Sound Educational Policy, the Law, and Minority Students

The failure of the courts to promote the principle of equality helps to explain why growing numbers of African-American parents are "turning away from this integrative ideal" and favoring all-black schools or predominantly African-American neighborhood schools.[108] The integration that had been promised since *Brown*, but so sparingly delivered, has not resulted in integration in many of our urban schools and it has not produced the hoped for improvement of the quality of educational opportunities for African-Americans.

However, the failure to implement *Brown* fully should not lead to a return to segregation and yet it seems to be doing so. The message of *Brown* and the message of good school practice are abundantly clear: the stigma associated with segregation does affect a child's educational achievement. Although judicial approaches to desegregation may have produced unsatisfactory results, integration and equality remain to be tried as a legal standard. *Brown*'s relatively narrow legal message was that a state

105. 731 F.2d 1294 (8th Cir. 1984), *cert. denied*, 469 U.S. 816 (1984).

106. *Id.* at 1326.

107. Stuart Biegel, *Reassessing the Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy After Kadrmas v. Dickinson Public Schools*, 74 CORNELL L. REV. 1078, 1082 (1989).

108. Drew S. Days, III, *Brown Blues: Rethinking the Integrative Ideal*, 34 WM. & MARY L. REV. 53, 54 (1992).

could not enforce discriminatory policies; state action, rather than the racial composition of schools, was the triggering concept for judicial protection of students. This limited view adopted by the Court flies in the face of public perceptions of *Brown* and a sense of how momentous the decision actually was. Thurgood Marshall's broad, forceful vision of equality in the classroom has yet to be given effect.[109]

The problem goes beyond questions of white flight and urban schools. The problem of achieving Marshall's vision is further complicated by the fact that even in schools with a racially mixed student body, classrooms are racially segregated.[110] As Drew S. Days, III notes: "In many schools, racially segregated classes make it unlikely that children of different races will have meaningful interaction during the school day."[111]

Too many African-American children are still receiving the pre-*Brown* message that they "don't belong." In addition, there is an identifiable pattern whereby disproportionately large numbers of nonwhite students are being labeled as mentally retarded or emotionally disturbed.[112] Such practices result in increased segregation, for "[a]s a consequence of these labels, students are settled into programs that are segregated on the basis of stigmatizing labels."[113]

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109. In their brief to the Supreme Court, in *Brown v. Board of Education*, the appellants' counsel (which included a then-attorney Thurgood Marshall) summarized their position as follows:

> The phrases—"privileges and immunities," "equal protection," and "due process"—that were to appear in the [Fourteenth] Amendment had come to have specific significance to opponents of slavery. . . . When they translated the antislavery concepts into constitutional provisions, they employed these by now traditional phrases that had become freighted with equalitarian meaning in its widest sense.

Brief for Appellants In Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument at 235, Brown v. Board of Ed., 347 U.S. 483 (1954), 81 UNITED STATES SUPREME COURT, RECORDS AND BRIEFS, October Term 1954.

Justice Marshall, subsequently interpreted *Brown*, in Bd. of Educ. of Oklahoma City v. Dowell, 498 U.S. 237, 252 (Marshall, J., dissenting) where he stated, in considering whether to lift a desegregation decree, "I believe a desegregation decree cannot be lifted so long as conditions likely to inflict the stigmatic injury condemned in *Brown I* persist and there remain feasible methods of eliminating such conditions."

110. Days, *supra* note 108, at 55 (footnote omitted).

111. *Id.*

112. Finesse G. Couch, *Not Just Another Brown Analysis: A Call for Public Education Reform*, 20 N.C. CENT. L.J. 143, 158 (1993).

113. *Id.*

C. Sound Education Policy versus the Law: Bilingual Education

The same issue regarding minority isolation appears in the controversy over bilingual education as well. From the standpoint of its advocates, bilingual education represents a clear right and benefit. "Undoubtedly the issue of bilingual education touches the sense of belonging, and undoubtedly that sense is vital to every person's identity and self-esteem."[114] Some advocates believe that, when placed in English-speaking classes, children who are of limited English proficiency are effectively precluded from receiving a meaningful education.[115] On the other hand, critics of bilingual programs feel that these programs have segregative effects that are clearly wrong, if not unconstitutional.[116] Such disagreements have heavily involved the courts, and the statutes and administrative regulations that have ensued.

In *Lau v. Nichols*,[117] non-English speaking Chinese students in San Francisco alleged that teaching classes in English only deprived them of a meaningful education.[118] The Supreme Court agreed, ruling that Title VI of the Civil Rights Act of 1964[119] required compensatory programs for the students.[120] The Court, in an opinion by Justice Douglas, noted that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."[121]

As a result of *Lau*, many have assumed that the Supreme Court ordered bilingual education; the Court, in fact, did not do so. Rather than mandating bilingual education, the Court acknowledged that there is a wide variety of ways to handle the special needs of non-English speaking students.[122] It said "[t]eaching English to the students of Chinese ancestry who do not speak the lan-

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114. Karst, *supra* note 90, at 356.

115. Fred M. Hechinger, *Coming to Terms with Bilingualism in New York City Public Schools*, N.Y. TIMES, Apr. 10, 1988, at Sec. 4, p. 6; Edward B. Fiske, *The Controversy over Bilingual Education in America's Schools; One Language or Two?*, N.Y. TIMES, Nov. 10, 1985, at Sec. 12, p. 1.

116. Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CAL. L. REV. 1249, 1256-57 (1988).

117. 414 U.S. 563 (1974).

118. *Id.* at 566.

119. 42 U.S.C. §§ 2000(d)-(e)(16) (1988).

120. *Lau*, 414 U.S. at 566-68.

121. *Id.* at 566.

122. *See id.* at 565 (pointing out that Section 71 of the California Education Code "permits a school district to determine 'when and under what circumstances instruction may be given bilingually.'").

guage is one choice. Giving instruction to this group in Chinese is another. There may be others."[123] Justice Douglas's failure to be precise allowed for separation of the Chinese students in San Francisco and began a disastrous path for believers in equality.

Educators and ideological advocates of bilingual education soon realized that it would be difficult to design compensatory programs in an integrated setting which would meet the duty imposed by *Lau*.[124] Did *Lau* imply that a remedial program providing separate but more than equal education to minorities was constitutionally acceptable, or did it require that remedial education be integrated? As indicated, the precise nature of a bilingual program, if any, was not spelled out in *Lau*. There was room for some to say that a school may teach a child solely in the native language, because the essence of *Lau* went to the right to an effective education. Beyond that, isolating foreign language speakers was not necessarily opposed by many advocates of bilingual education, and by mainstream educators who sought to exclude the foreign language speakers.

The pressure soon mounted, largely at the instigation of ideological advocates of bilingual education, to provide for separate bilingual programs with the additional goal of maintaining cultural identity. Further, in providing these programs, the tendency was to ignore issues of segregation when dealing with bilingual programs. As a result, bilingual programs that are intended to segregate can be found to satisfy quality of education standards under the way the law has been read. Yet a broader and fuller reading of 'equal opportunity education' recognizes that participation in an integrated classroom and the absence of stigmatizing separation is crucial to a child experiencing a truly equal learning experience.

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123. *Id.*

124. Justice Douglas provided no guiding legal standard to govern school practice. Instead, he phrased the duty in the negative: the San Francisco school district had a contractual duty — based on its receipt of federal funds — not to violate the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d, 2000d-1). *Id.* at 566-69. Under contractual requirements, the school needed to comply with the duties imposed by federal regulations enacted to effectuate the goals of the Civil Rights Act. 414 U.S. at 568-69 (citing regulations 45 CFR §§ 80 *et seq.*). Such regulations included the requirements to ensure that non-English speaking students be given sufficient special treatment to level the playing field and be judged by standards which accounted for their initial language deficiency. *Id.* Schools also had the duty to ensure that students were not discriminated against and not deprived of benefits. *Id.* Indeed, Justice Douglas refused to define the limits of federal authority to dictate school practices (based upon the contractual duty) stating simply that "they have not been reached here." *Id.* at 569. Moreover, Justice Douglas provided no overarching framework which reflected sound education policy.

The limited English-speaking child has the right to obtain a meaningful education in an integrated environment. For some this means that "[o]nly those children whose inability to comprehend English results in their absolute exclusion from effective participation in schooling are eligible for bilingual education programs."[125] While bilingual segregation is protected under the law,[126] some educators believe that a great deal of damage results from the belief that one "inferior" group is incapable of learning with another "superior" group.[127]

In the instances when the conflict between desegregation and bilingual education have been squarely presented to the courts, the rulings have tended to support *Brown* and desegregation, implying that inclusion is a primary goal of American education.[128] But this perspective has not been promoted in school practice. Any bilingual program that does not result in the return of the child to an integrated classroom serves further to exclude the child, flies in the face of equality, and is against sound school practice. Yet, it is a common phenomenon, with students captured in separated settings by political interests. Justice Douglas focused on remedying the problem of teaching students who did not speak English. Pursuant to that end, he provided alternative possible solutions for the problems facing non-English speaking student. The imprecision of the decision has allowed for schools to adopt the exclusive options provided in the opinion.

D. Judicial Sensitivity in Religion in the Classroom Cases

As with bilingual programs that segregate, religious programs in the public school have the danger of excluding some children from full participation. As Kenneth Karst states:

> The Supreme Court's decisions on schoolhouse religion are understood easily. The problem of officially sponsored school prayer—even watered-down "nondenominational" prayer—is not merely that it lends some perfunctory government support

125. Terri Lynn Newman, Comment, *Bilingual Education Guidelines for the Courts and the Schools*, 33 EMORY L.J. 577, 599-600 (1984).

126. *See, e.g.*, Lau v. Nichols, 414 U.S. 563, 565 (1973).

127. *See supra* part I at pp. 411-14 .

128. *See* Newman, *supra* note 125, at 621 (citing Keyes v. Sch. Dist. No. 1, 521 F.2d 465, 480 (10th Cir. 1975) (the students have the right to the opportunity to learn in English), Martin Luther King Junior Elementary Sch. Children v. Ann Arbor Sch. Dist. Bd., 473 F.Supp. 1371, 1372 (E.D. Mich. 1979) (the goal of the school must be to teach students in English).

> to Christianity, to Judaic-Christian monotheism, or to religion in general.
>
> Additionally, government sanctioned prayer tells school children who do not share the dominant religious faiths represented by the prayer that they are outsiders, that they do not belong as full members of the community. . . . The school board's message to the religious outsider is clear: 'This is our town.'[129]

The Supreme Court decisions on religion in the public schools have reflected this concern. In *Engel v. Vitale*,[130] the Court invalidated the practice of government-sponsored prayer in the public schools.[131] The practice was invalidated despite the fact that the prayer was denominationally neutral and despite the fact that students who did not wish to participate were excused from doing so or permitted to leave the classroom.[132] The Court had little regard for these precautions and held the New York rule constituted a state sponsored religious practice in the classroom which violated the First Amendment.[133] And the Court clearly annunciated First Amendment policy in striking the rule— to protect against the division, ostracism and scorn which occasions minorities living under a governmentally mandated religion.[134]

A year after *Engel*, in *School District of Abington Township v. Schempp*,[135] the Supreme Court ruled that a law requiring all public schools to begin the day with a reading from the Bible was unconstitutional.[136] Once again, a provision allowing students who did not wish to participate to leave the classroom or remain silent did not save the practice.[137] The Court did the same in *Chamberlin v. Dade County Board of Public Instruction*[138] a year later by suc-

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129. Karst, *supra* note 90, at 358-59.

130. 370 U.S. 421 (1962).

131. *Id.*

132. *Id.* at 423-24.

133. *Id.* at 430 (stating that "[t]here can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer.").

134. According to Justice Black, this policy was basic to the critical First Amendment goal of protecting minorities from the scorn and ostracism they would indubitably suffer should a governmentally mandated religion exist:

> [t]he history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.

Engel, 370 U.S. at 431.

135. 374 U.S. 203 (1963).

136. *Id.*

137. *Id.* at 205-207.

138. 377 U.S. 402 (1964).

cintly holding that a state practice of reciting the Lord's Prayer in public schools is unconstitutional even though the school allowed children for whom objection was taken the option of being excused. The guiding policy of the First Amendment was delineated in *Schempp*, where the Court clearly stated that religious minorities were protected against any state invasion, however minor, of their right to religious freedom.[139]

Essentially, the legal rationale for these Supreme Court decisions was that government sponsored religious activities violated the Establishment Clause in that their purpose and primary effect was to aid religion.[140] The issue of religious programs in schools has, in fact, been part of the larger question of church and state where the Supreme Court has taken a strong stance that some commentators charge as discrimination against religious practice. In *Engel*, however, Justice Black also made mention of the 'coercion' factor.[141] He suggested that "laws officially prescribing a particular form of religious worship [may in fact] involve coercion," for "[w]hen the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[142]

When considering the issue of school prayer, at least from a child's viewpoint, coercion has become a critical factor. Commentators agreeing with the results of the *Engel* and *Schempp* decision have mentioned the coercion issue as a policy concern apart from the scope of the legal Establishment Clause analysis.[143] The coercion issue recently has taken on importance not only as a policy concern but also as a legal factor in determining an Establishment Clause violation. Under *Lee v. Weisman*,[144] decided in 1992, "coercion" has moved from a policy issue outside an Establishment Clause test to become a central component of the test itself.[145]

139. Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963).

140. Engel v. Vitale, 370 U.S. 421, 430-31 (1962); *Schempp*, 374 U.S. at 224; *Chamberlin*, 377 U.S. at 402.

141. *Engel*, 370 U.S. at 429-33.

142. *Id.* at 431.

143. Geoffrey R. Stone, *In Opposition to the School Prayer Amendment*, 50 U. CHI. L. REV. 823, 835 (1983).

144. 505 U.S. 577 (1992)

145. *Id.* at 587 (Justice Kennedy states "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.' " (citing Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

Although the *Engel* court did not base its decision on the coercion factor, in today's Establishment Clause jurisprudence, it is appropriate to return to, and focus upon, the coercion aspect of school prayer. In a sense, then, in these school prayer cases, there has been judicial recognition of the importance of inclusion in the school's activities, and the negative impact of exclusion.[146]

In *Lee*, the Court held that a practice of directing a school-initiated and monitored graduation prayer violated the Establishment Clause by coercing participation in a religious practice within the public school setting. Justice Kennedy observed that prayer in the public school setting raises "heightened concerns with protecting freedom of conscience from subtle coercive pressure."[147] According to Justice Kennedy, "[t]he undeniable fact is that the school district's supervision and control of the high school graduation ceremony places public pressure, as well as peer pressure, on attending students. . . ."[148] Once again, the voluntary nature of participation could not save the practice. Despite the fact that both attendance at the ceremony and participation in the prayer were voluntary, the school's choice to have the prayer was seen as imposing illegitimate social, or peer pressure.[149] The students who objected would have to exclude themselves.

If this analysis is true for a one-time prayer at a high school graduation ceremony where attendance is voluntary, then there is certainly undue coercion in a daily prayer in public schools where attendance is compulsory. The "coercion" reasoning in *Engel* and, more explicitly, in *Lee*, recognizes that "voluntary" is a highly relative term. Simply allowing an exit option for a child does not justify the prayer. The price the child must pay for not participating is exclusion (whether physical or symbolic), and this is too high a price. Children who are members of a religious minority are especially sensitive to the indirect coercion which comes from peer

146. The Court is certainly sensitive to protecting the child's right to be included in school activity in a manner that it does not necessarily grant adults. On the issue of a religious invocation in a school graduation ceremony, Justice Kennedy stated:

> [i]nherent differences between the public school system and a session of a State Legislature distinguish this case from *Marsh v. Chambers*, 463 U.S. 783 (1983). . . .

The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend. *Lee*, 505 U.S. at 596-97.

147. *Id.* at 592.

148. *Id.* at 593.

149. *Id.* at 593-94.

pressure, and the pressure to conform.[150] Students will often succumb to this pressure and act in ways contrary to their true beliefs.[151]

As Justice Frankfurter explained in his concurrence in *McCollum v. Board of Education*:

> That a child is offered an alternative [to participation] may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to [conform].[152]

Justice Stevens cited Justice Frankfurter in another school prayer case, *Wallace v. Jaffree*.[153] In *Jaffree*, the Court invalidated an amended Alabama statute which required that each school day open with a moment of silence for meditation "or voluntary prayer." Justice Stevens noted that while the availability of nonparticipation served to " 'reduce the constraint, it does not eliminate the operation of influence by the school. . .outside [of its] domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children.' "[154]

The stigma of exclusion from the classroom has also been raised in the context of religious challenges to curricular decisions. Some suggest that children leave the classroom when "objectionable" literature is assigned. In rejecting this "exclusion" option, one commentator notes that children and teenagers who are separated from their peers generally suffer humiliation and indignity brought on by the subsequent cruelty from mainstream classmates.[155]

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150. Stone, *supra* note 143, at 836. *See also* Lee v. Weisman, 505 U.S. 577, 592-94 (1992); Engel v. Vitale, 370 U.S. 421, 430-31 (1962).

151. Stone, *supra* note 143, at 836.

152. 333 U.S. 203, 227 (1948).

153. 472 U.S. 38 (1985).

154. *Id.* at 61 n.51 (quoting J. Frankfurter).

155. Attention must also be given to the emotional effects that substitution or exclusion may have on the child. Children, particularly teenagers, are acutely conscious of differences among students. Requiring a student to leave class in front of peers is often embarrassing, and the child may be subject to challenge or ridicule later. . . . Besides this awkwardness, ostracism is inherent in a remedy of exclusion.

Shobe, *supra* note 92, at 118-19.

Of course, when the issue turns to the right of children to organize their own activities within school, and unsponsored by school officials, the Court has been understandably more tolerant both from the standpoint of exclusion and from the Establishment clause as well. After all, an important component of the First Amendment is the Free Exercise clause that extends substantial freedom to individuals to

In sum, analysis of the Supreme Court's jurisprudence in the area of school prayer yields the conclusion that the Court positively attempts to act in a manner which has good educational policy ramifications.[156] In defending the First Amendment, the Court has tangentially leaned toward adopting inclusionary policies.

E. Judicial Sensitivity in Patriotism Cases

The issues of coercion and exclusion are also raised in the cases which have dealt with the practice of saluting the flag in the classroom. In this situation, the Court reached something of a different result, by permitting flag salute. Because in *Barnette*,[157] the government was using the school to foster allegiance to the state, a legitimate function of the government, the Court was willing to offset the children's competing interest of being free of pressure to conform. Although the results may seem different from the prayer cases, the underlying concern of the Court in both the prayer cases and in *Barnette* is the same: to avoid, as much as possible, a situation wherein a child must conform or leave the classroom.

Although the Supreme Court would not ban the pledge of the flag entirely and eliminate any coercion, it did ban *mandatory* flag saluting, thereby eliminating the need for the non-conforming child to actually leave the classroom or pledge. The Supreme Court seems to have been very sensitive to the plight of the child who "undoubtedly feels confused and isolated when she is told that she cannot participate in class activities such as . . . the daily routine of a flag salute."[158] And the Court has been sensitive to both coercive state and peer pressures which students might face.[159]Justice O'Connor best described the dilemma facing a student whose be-

exercise these rights to practice religion. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981) (where the Court protected a religious students' group's right to meet on a University campus after hours). *See also* Stone, *supra* note 143, at 845.

156. Indeed, in the *Lee v. Weisman* school prayer case, the Court looked to non-legal materials in an attempt to accomodate students' special needs. Specifically, Justice Kennedy considered several sociological studies on the role and effects of peer pressure in school. Lee v. Weisman, 505 U.S. 577, 593-94 (1992).

157. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

158. Shobe, *supra* note 92, at 119.

159. *See supra* notes 145-46 and text accompanying note 134. In the *Barnette* case, the Court considered a primitive and awkward flag salute rule, which was grounds for the discipline and expulsion of non-complying Jehovah's Witnesses. *Barnette*, 319 U.S. at 629. Writing for the Court, Justice Jackson delivered the following, oft-repeated constitutional doctrine:

> [i]f there is any fixed star in our constitutional contstellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by

liefs conflict with a school-mandated practice. She said that the student is "left with the choice of participating, thereby compromising the nonadherent's beliefs, or withdrawing, thereby calling attention to his or her nonconformity".[160]It is clear that the Supreme Court's jurisprudence with respect to school prayer and flag salute, understands that the public school classroom must be a place where all children are made to feel that they belong.

F. The Disability Cases

Inclusion seems to be receiving a great deal of interest in the area of educating children with disabilities. After a long history of exclusion from public school,[161] followed by a period of placement in isolated school settings, the concept of the "least restrictive environment"[162] as fully inclusive appears to be gaining momentum. Although the federal special education law, the Education of the Handicapped Act (EHA)[163] has been law since 1970, its implementation has been inconsistent. Early cases, in fact, focused on providing educational services and on permitting students with severe handicapping conditions to attend school.[164] More recently, how-

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word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Id. at 642.

160. Shobe, *supra* note 92, at 118 n.38 (citing Wallace v. Jaffree, 472 U.S. 38 (1985)).

161. *See* Martin A. Kotler, *The Individuals with Disabilities Education Act: A Parent's Perspective and Proposal for Change*, 27 U. MICH. J.L. REF. 331, 343 n. 40 (1980) (discussing numerous statutes from a variety of states, including Pennsylvania (PA. STAT. ANN. tit. 24, § 13-1375 (1962)), Nebraska, (NEB. REV. STAT. §§ 79-201, 79-202 (1971)), and Nevada (NEV. REV. STAT. §§ 115-165 (1966)) which all provided for the exclusion of children with disabilities from public schools).

162. *See* 20 U.S.C. § 1412(5)(B) and 34 CFR §§ 300.550-.556 (1995). 34 C.F.R. §§ 300.550(b)(1)-(2) spells out the clear statutory purpose:

> (1) that to the maximum extent appropriate, children with disabiliites, including children in public or private institutions or other care facilities, are educated with children who are non-disabled; and
>
> (2) that special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. §§ 300.550(b)(1)-(2) (1995).

163. 20 U.S.C. §§ 1400 - 1491 (1990). The Individuals with Disabilities Education Act was originally enacted in 1970 as the "Education of the Handicapped Act" (EHA), Pub. L. No. 91-230, tit. VI § 601, 84 and amended in 1975 by "The Education for All Handicapped Children Act" (EAHCA), Pub. L. No. 94-142, 89 Stat. 774 (1975). *See also* Kotler, *supra* note 161, at 331 n. 3.

164. *See, e.g.,* Eberle v. Bd. of Pub. Educ., 444 F. Supp. 41, 43 (D. Pa. 1977), *aff'd*, 582 F.2d 1274 (3d Cir. 1978)(inter-preting the main purpose of the act to be to provide funding for special education schools) and Mrs. A. J. v. Special Sch. Dist. No. 1, 478 F.

ever, the emphasis has been on justifying why handicapped students should not be included in regular classes rather than segregated in self-contained classes only for special education students.[165] Realizing that students in segregated settings do not do as well as when they are in integrated settings, parents of these youngsters and their advocates have been demanding school systems justify the unequal placement of these youngsters.

Such a position, of wanting students with disabilities in the regular classes, has taken extraordinary courage on the part of many of these advocates. These parents and their advocates are sacrificing input measures of education[166] for one that—if properly developed—results rather in more integrated and better lifelong outcomes for these youngsters.

The Supreme Court's first foray into the matter of interpreting the EHA occurred in *Board of Education v. Rowley*,[167] where the Court rejected the notion that free appropriate education means maximizing each child's potential commensurate with all other children. Instead, the Court held that the EHA only required that disabled children gain access to individually designed specialized instruction and related services fashioned to provide educational benefit to the disabled.[168] The emphasis in *Rowley* was on access, rather than on the substantive quality of the education received.[169]

Supp. 418, 431 (D. Minn. 1979)(stating that the EHA "was enacted to insure that all handicapped children are afforded a free appropriate public education which concentrates on the unique needs of the individual student."). The court also viewed the EHA as a mechanism providing handicapped students with procedual protection relating to parents' and students' decisions relating to the students' right to a "free appropriate public education."). *Mrs. A. J.*, 478 F. Supp. at 431.

165. *See* 20 U.S.C. § 1412(5)(B); 34 C.F.R. §§ 300.550-.556. *See, e.g.*, Oberti by Oberti v. Bd. of Educ., 995 F.2d 1204, 1207 (3d Cir. 1993) (holding that IDEA's mainstreaming requirement prohibited a school from placing a child with disabilities outstide of a regular classroom unless integrated education could not be achieved satisfactorily by the use of supplementary aids); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1045 (5th Cir. 1989) (discussing the Congressional requirement that a school district, to the maximum extent reasonably possible, attempt to teach handicapped students alongside their non-handicapped peers).

166. Input measures of education are usually more costly and in a staff intensive isolated setting.

167. 458 U.S. 176 (1982).

168. Kotler, *supra* note 161, at 337.

169. At issue in *Rowley* was whether Amy, a deaf child, required a sign language interpreter in her classroom. The school board designed an indivdualized education program (IEP), per 14 U.S.C. § 1414(a)(5), which included both integrated classroom education (supplemented by the use of a hearing aid) and additional, non-integrated, outside tutorial and speech therapy education. After employing an interpreter for two weeks, the Board concluded that an interpreter was unecessary. Amy's parents, who were in favor of the employment of an interpreter, challenged the decision in

Regarding whether Amy Rowley was receiving an "appropriate" education as required under the 1975 Education for All Handicapped Children Act (EAHCA),[170] the Supreme Court held that the EAHCA "was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."[171]

This represented a very limited reading of the EHA.

> In its search for the congressional intent in passing [the EHA], the Court also ignored a major indication of that intent—the Congressional Findings—which speaks of 'full equality of opportunity'.[172] Instead, the Court looked at the legislative history and stressed references to exclusion from education as evidence that mere access was the legislative goal.[173]

Subsequent Supreme Court interpretations of the statute, however, show support for the principle of inclusion. In *Honig v. Doe*,[174] the Court was faced with the question of how a school board should treat emotionally disturbed children who behaved disruptively. The Supreme Court interpreted a "stay put" provision of EAHCA[175]—a provision which provides that the child remain in regular class pending the outcome of an EHA proceeding brought to determine if the education methods need be altered—be enforced even under dangerous circumstances.[176] It supported

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federal court. Rowley v. Bd. of Ed., 483 F. Supp. 528, 529-531 (S.D.N.Y. 1980). The Supreme Court affirmed the educators' decision, and reasoned that "when the 'mainstreaming' preference of the act has been met and a child is being educated in the regular classrooms, the system itself monitors the educational progress of the child." Hendrick Hudson Dist. Bd. Of Educ. v. Rowley, 458 U.S. 176, 202-03 (1981).

170. Education of the Handicapped Act, as amended 20 U.S.C. §§ 1400 - 1491 (1990).

171. *Hendrick Hudson*, 458 U.S. at 192. *See also* Patricia Young Taylor, Note, *An 'Appropriate' Education for the Handicapped — Board of Education v. Rowley*, 26 How. L.J. 1645, 1659 (1983).

172. *See* 20 U.S.C. § 1400(b)(3), which states that

> "more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity."

173. Philip William Clements, Note, *Education — Board of Education v. Rowley: The Supreme Court Takes a Conservative Approach to the Education of Handicapped Children*, 61 N.C. L. REV. 881, 894 (1983).

174. 484 U.S. 305 (1988).

175. 20 U.S.C. § 1415(e)(3).

176. *Honig*, 484 U.S. at 323. Congress subsequently modified the statute to provide that disabled children who have brought a firearm to school may be removed from class for not more than 45 days, pending the outcome of an EHA proceeding to determine how the child should be educated. 20 U.S.C. §§ 1415(3)(A) & (B).

the legislature's disinclination to exclude a child while placement proceedings were pending.[177]

Since 1989, a series of decisions in lower federal courts have demonstrated the judiciary's willingness to promote the cause of inclusion in the education of students with disabilities.[178] The decisions in these cases—which require that before denying the student the opportunity to be in an inclusive setting that the school districts must demonstrate that placement in the regular class setting with appropriate support services and supplementary aids will not provide educational benefit—demonstrates a great sensitivity to the educational value of inclusion.[179] As indicated throughout this Article, such cases demonstrate the extent to which equality has great significance for some courts and for educators. The Supreme Court decisions seem to send a message that we must be on guard against measures which 'fence out' children from the classroom community and give them the feeling that they do not belong. The public school classroom environment must embrace all children, and not limit them to segregated environments wherein they must seek 'solace for exclusion.' "[180]

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177. *Honig*, 484 U.S. at 323-27. Justice Brennan refused to imply a "dangerousness" exception to the "unequivocal" language of the statute. *Id.* at 323.

178. *See, e.g.,* Union School Dist. v. Smith, 15 F.3d 1519 (9th Cir. 1994), *cert. denied* 115 S.Ct. 428 (1994) (holding that state standards of quality which are higher than IDEA's standards are enforceable in federal court under IDEA); Oberti by Oberti v. Bd. of Educ., 995 F.2d 1204 (3d Cir. 1993); Greer by Greer v. Rome City School Dist., 950 F.2d 688, 695-96 (11th Cir. 1991), *opinion withdrawn,* 956 F.2d 1025 (11th Cir. 1992), *opinion reinstated in relevant part,* 967 F.2d 470 (11th Cir. 1992) (holding that *Rowley* was irrelevant to "mainstreaming" determinations under IDEA); *see* discussion *supra* note 165.

For a detailed analysis of other recent caselaw, *see* DIANE LIPTON, NAT'L CTR. ON EDUC. RESTRUCTURING AND INCLUSION, THE GRADUATE SCHOOL AND UNIV. CTR., THE CITY UNIV. OF NEW YORK, THE "FULL INCLUSION" COURT CASES: 1989-1994, BULLETIN OF THE NATIONAL CENTER ON EDUCATIONAL RESTRUCTURING AND INCLUSION, Vol. 1, No. 2 (1994).

179. *See, e.g.,* Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1045 (5th Cir. 1989) where the court stated:

> [i]n short, the Act's mandate for a free appropriate public education qualifies and limits its mandate for education in the regular classroom. Schools must provide a free appropriate public education and must do so, to the maximum extent appropriate, in regular education classrooms. But when education in a regular classroom *cannot* meet the handicapped child's unique needs, the presumption in favor of mainstreaming is overcome and the school need not place the child in regular education. (Emphasis added).

See also Greer, 950 F.2d at 695-96 (11th Cir. 1991) (which adopted the Fifth Circuit test).

180. Karst, *supra* note 90, at 327.

The Supreme Court should be commended for recognizing the value of inclusiveness in the education process when it does so. And it has effectuated this policy well in areas of religion and patriotism in the classroom. In cases regarding educating non-English speakers and students with disabilities, the Court has not adopted the same inclusive policy as clearly as it has in cases of racial segregation of students. The Court should adopt a unifying, inclusionary education policy. In its approach to education cases, the Court should start from the position that it is better to include and integrate children than to separate them.

III. Thinking About Difference(s)

The cases discussed above—school prayer and flag saluting, racial discrimination, students whose native language is not English, and students with disabilities—have, at bottom, a common concern with how to treat difference; indeed, how to formulate and understand difference, what Martha Minow calls "the dilemma of difference."[181]

> The dilemma of difference may be posed as a choice between integration and separation, as a choice between similar treatment and special treatment, or as a choice between neutrality and accommodation. Government neutrality may be the best way to assure equality, yet governmental neutrality may also freeze in place the past consequences of differences. Do the public schools fulfill their obligation to provide equal opportunities by including all students in the same integrated classroom, or by offering some students special programs tailored to their needs?[182] Special needs arise from 'differences' beyond language proficiency and physical or mental disability. Religious differences also raise questions of same versus different treatment.[183]

Minow captures the tension which faces policy makers, courts, and administrators when they focus on the issue of equality. "The problems of inequality can be exacerbated both by treating mem-

181. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 20 (1990).

182. This presents a false dichotomy. Inclusive education programs, that is those which place students with disabilities in general education classes with the necessary supplementary aids and supports, provide both integrated placement *and* attention to "difference." NAT'L CTR. ON EDUC. RESTRUCTURING AND INCLUSION, THE GRADUATE SCHOOL AND UNIV. CTR., THE CITY UNIV. OF NEW YORK, NATIONAL STUDY OF INCLUSIVE EDUCATION (1995).

183. *See* MINOW, *supra* note 181, at 20-21.

bers of minority groups the same as members of the majority and by treating the two groups differently."[184] Section 15 of the Canadian Charter of Rights and Freedoms, adopted in 1982,[185] seeks to strike a balance between traditional equality and attention to "difference;" it states:

> 1. Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.
>
> 2. Subsection (1) does not preclude any law, program, or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

Addressing this balance in the context of disability, which has been an area of growing controversy, Robert Funk, a founder of the Disability Rights Education and Defense Fund (DREDF), argues that equal opportunity programs must be based upon the realities facing the disabled and that remedial programs must account for that reality to maximize those students' potential.[186]

Although this balance marks an advance over the current equation of "difference" with deviance, it perpetuates the formulation that the "difference" resides in the individual with its pernicious consequences.

> Few tragedies can be more extensive than the stunting of life, few injustices deeper than the denial of opportunity to strive or even to hope, by a limit imposed from without, but falsely laying as within. . . . We inhabit a world of human differences and predilections, but the extrapolation of these facts to theories of rigid limits is ideology.[187]

So, too, disability- rights theoreticians challenge the traditional paradigm of disability, rejecting the individual deficit model, which sees the disability in terms of the individual's shortcoming. They argue for a sociopolitical definition, one which regards the disability as a common problem that requires us all to deal with it, rather

184. *Id.* at 20.

185. CAN. CONST. pt. I, § 15.

186. Robert Funk, *Disability Rights: From Caste to Class in the Context of Civil Rights*, IMAGES OF THE DISABLED: DISABLING IMAGES 7, 24 (Alan Gartner & Tom Joe eds.) (1987).

187. STEPHEN JAY GOULD, THE MISMEASURE OF MAN 28-29 (1981).

than see it as someone else's problem. This has the effect of diminishing an individual's particularistic rights, and proposing an entitlement to a level of what is seen as a common good.

Minow calls for a "social-relations approach," as providing an alternative to traditional legal treatments of difference.

> This approach especially rejects distinctions drawn between people which express or confirm the distribution of power in ways that harm the less powerful. The social-relations approach has its roots in a dramatic shift of attention during the twentieth century—across the sciences, social sciences, and humanities—toward relationships rather than to the discrete items under observation. For many, this shift has brought a new focus on relationship between people within which individuals develop a sense of autonomy and identity. For others, the shift turns to the relationship between the knower and the known. . . . Another topic of attention is the relationship between the parts and the wholes, and still another is the mutual dependence of theory and context. From work in relativity theory and the indeterminacy principle in physics to deconstructive strategies in literary interpretation, these relational concerns are occupying scholars in challenges to the assumptions of their fields.[188]

This approach allows for switching from a focus on the "different" person to the social and legal construction of differences.

> [T]he assumptions about difference [are] deeply entrenched in our social institutions, and in the legal rules that govern them. One assumption treats difference as inherent in the 'different' person rather than a function of comparisons; another assumption establishes as the norm for comparison the experience of only some people, such as English-speaking students,[189] or white men, or able-bodied persons; a third assumption imagines an 'objective' observer who can see without a perspective, uninflu-

188. *See* MINOW, *supra* note 181, at 379-80.

189. When a majority fails to acknowledge and respect a minority's difference, children know it and the message damages their self-esteem and ability to succeed. Leonard Covello, the first New York City Public School principal of Italian heritage, describes his experiences at the beginning of the century.

> The Italian language was completely ignored in the American school. In fact, throughout my whole elementary school career, I do not recall one mention of Italy, or the Italian language or what famous Italians had done in the world, with the possible exception of Columbus. . . . We soon got the idea that 'Italian' meant something inferior, and a barrier was erected between children of Italian origin and their parents. This was the accepted process of Americanization. We were becoming Americans by learning how to be ashamed of our parents. Quoted in CHARLES E. SILBERMAN, CRISIS IN THE CLASSROOM 58 (1970).

> enced by situation or experience. Differences perceived by judges, employers, and school administrators seem natural and inevitable. . . .[190]

At its core, the solution when it gets to the Supreme Court requires that the Court not just decide the case, but that it point us—the citizenry—in a certain direction, and that we try to keep faith with the rule of law. The urge toward equality has to be encouraged and we must be charged with framing its meaning.

A. Reframing Perceptions: Proposed Approaches

The difference dilemma becomes less paralyzing if we question the assumptions regarding difference and try to look at the issue from another point of view. For example, in *City of Cleburne v. Cleburne Living Center*,[191] Justice Stevens, concurring with the Court's decision to strike a Cleburne, Texas, ordinance which barred a group home for mentally retarded people, wrote, "I cannot believe that a rational member of this disadvantaged class could ever approve of the discriminatory application of the city's ordinance in this case."[192]

Hahn, a leading disability rights theorist, frames the issue as one of how we view and treat difference, as an abnormality or as an aspect of the human condition.[193] He points out, that as with other disadvantaged groups (e.g., women, African-Americans, Latinos, Native Americans, Asian-Americans, gays and lesbians, and aging individuals), people with disabilities are striving to translate previously devalued personal characteristics into a positive sense of self-identity.[194] He writes, "a consciousness that disability simply signifies another human difference instead of functional restrictions

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190. *See* MINOW, *supra* note 181, at 375.

191. 473 U.S. 432 (1985). This case involved an application for a permit for a group home for the mentally handicapped, which had been rejected by the City Council of Cleburne, Texas. In rejecting the Home's equal protection arguments, the Court held that the mentally handicapped are not a quasi-suspect class and thus are not subject to heightened judicial scrutiny under the equal protection clause. Yet, applying the rational-relation test, the lowest level of Equal Protection scrutiny, the Court found that the City of Cleburne offerred no rational reason for rejecting the permit application and indeed, found the denial was the result of "an irrational prejudice against the mentally retarded," and ordered the ordinance be struck. *Id.* at 450.

192. *Id.* at 455.

193. Harlan Hahn, New Trends in Disability Studies: Implications for Education Policy 19/8 (1994) (A paper prepared for the National Center on Educational Restructuring and Inclusion, Invitational Conference on Inclusive Education at the Wingspread Wisconsin Conference Center).

194. *Id.*

might form the basis . . . to promote an increased appreciation of diversity and heterogeneity in everyday life."[195]

Minow, too, connects the experience of people with disabilities with that of women and minority group members.[196] The fundamental dilemma, under Minow's paradigm, is that disabled people are deemed "different" under our current educational policies.[197] The challenge facing our education system, according to Minow, is to expand the definition of "normal" to include people with disabilities.[198] A system of inclusion, from an early age stands the best chance of broadening that definition.[199]

Biklen, addressing issues of program implementation, says, "How schools see integration is critical: Is integration understood as an outsider coming in, or as creating a school culture so that it accepts all comers?"[200] Biklen's use of the word "integration," with its connotation of race relations, is significant. It reminds us that real integration can be achieved not by "allowing" persons of color into the existing white society but only as that society is itself transformed. This point is echoed by Minow: Integration alone will fail unless minorities are accepted as equals, and outmoded stereotypes and biases are eliminated.[201] Current school practices often appear to be inattentive to the issue of the full meaning of equality, to enshrine a negative conceptualization of difference, especially in procedures for "certifying" students as "handicapped" and in need of special education services. A litany of "due process" requirements provide a patina of fairness, while perpetuating the stigma of difference. "Impartiality is the guise that partiality takes to seal bias against exposure."[202] Although such procedures challenge the exclusion of "different" people from schools and

195. *Id.*

196. *See* MINOW, *supra* note 181, at 90-93.

197. *Id.* at 81-82.

198. *Id.* at 94-97.

199. *Id.* at 95.

200. IS THERE A DESK WITH MY NAME ON IT? THE POLITICS OF INTEGRATION 3 (1993).

201. Integration . . . offers no solution unless the majority itself changes by sharing power, accepting members of the minority as equal participants and resisting the temptation to attribute as personal inadequacies the legacy of disadvantage experienced by the group. Neither separation nor integration can eradicate the meaning of difference in a minority group that does not fit the world designed for the majority.

MINOW, *supra* note 181, at 25.

202. *Id.* at 376.

other public programs, they "fail to supply a basis for remaking those institutions to accommodate difference."[203]

"Forging ways out of the difference dilemma requires remaking institutions so that they do not establish one norm that places the burden of difference on those who diverge from it."[204] Programs of inclusive education (i.e., providing opportunities in general education classes for students with disabilities) offer examples of ways to overcome the difference diemma. They go beyond a "readiness" model which, as Stephen J. Taylor[205] points out, requires that students with disabilities "prove" their readiness to be in an integrated setting, rather than seeing that setting as the norm, both as a moral standard and a pedagogic desiratum. And programs of inclusive education go beyond programs of "mainstreaming," which posit two separate systems, general and special education. Rather, inclusive education programs require a restructured school system, one which is unitary and successful for all, one in which all the children are in the mainstream.

Minow points out that the options considered in providing services for Amy Rowley (of *Rowley v. Board of Education*[206]), a deaf student, "assumed that the problem was Amy's: because she was different from other students, the solution must focus on her."[207] Implicit here was a conceptualization of teaching and learning that posited a one-to-one relationship between teacher and student: the teacher teaches and the student learns. Instead, however, one can conceptualize the class as a learning community and Amy as a collaborative "worker" with her classmates. This shifts the focus from Amy and makes the problem—and the remedy—one that involves all the students. It is impossible for any court to mandate such a result. Under a model of inclusion that is encouraged by our belief in equality, Amy would learn, in sign language, alongside her peers, and in that process her peers would learn to communicate with Amy.[208] The benefits of this approach are numerous: students would have the benefit of interacting with and learning from Amy; students would benefit from learning to communicate

203. *Id.* at 377.

204. *Id.* at 94.

205. Stephen J. Taylor, *Caught in the Continuum: A Critical Analysis of the Principle of Least Restrictive Environment*, 13 JOURNAL OF THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS, 41 (1988).

206. 458 U.S. 176 (1982)

207. *See* MINOW, *supra* note 181, at 82.

208. *Id.* at 84.

in a different way; and they would benefit from striving to overcome the obstacles of learning differently.[209] Moreover:

> when students in the majority avoid the experience of not being understood, or not understanding what others say, they fail to learn about the limits of their own knowledge. They miss a chance to discover the importance of learning another language. By their very comfort in the situation, they neglect the perspective of any student they consider different from themselves.[210]

This active involvement of students in their learning process embodies the effective pedagogic approaches noted earlier.[211] Such collaborative efforts provide benefits not only in schooling but in life beyond the school house. In the post-industrial society, there is emphasis on collaboration, mutual adjustment, and developing a community of interests among the organizations' members. Taking responsibility for their education and learning how to collaborate with one another, Thomas Skrtic asserts, is essential to students' later success in the post industrial era. Those educated for life in this era need to learn to interact with people who have different backgrounds, skills and experiences.[212]

Conclusion

Addressing the role of the adults, Edmonds stated,

> (a) We can, whenever and wherever we choose, successfully teach all children whose schooling is of interest to us;
> (b) We already know more than we need to do that; and
> (c) Whether or not we do it must finally depend on how we feel about the fact that we haven't [done it] so far.[213]

Echoing Edmonds's point about who matters, Dianne L. Ferguson and others state:

> The purpose of schooling is to enable all students to actively participate in their [school] communities so that others care

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209. *Id.*

210. *Id.* at 29. Staub and Peck similarly identify benefits to nondisabled students of participating in inclusive classes, including reduced fear of human differences accompanied by increased comfort and awareness; growth in social cognition; improvements in self-concept; development of personal principles; and warm and caring friendships. Staub & Peck, *supra* note 77, at 37.

211. *See supra* part I (discussion of effective educational methods).

212. Thomas M. Skrtic, *The Special Education Paradox: Equity as the Way to Excellence*, 61 HARV. EDUC. REV. 148, 181 (1991).

213. Ronald R. Edmonds, *Some Schools Work and More Can*, 9 SOC. POL'Y 28, 29 (1979).

> enough about what happens to them to look for a way to include them as part of that community. [214]

Inclusion in the classroom is a matter of concern both to the courts and educators. A question arises as to the appropriate division of responsibility between the two. The courts' role is to make explicit the extent of students' rights and the nature of institutional responsibilities. And the Supreme Court has clearly addressed these issues in its religion and patriotism-in-the- classroom cases: students have the right to be included, if reasonably possible, and to be treated similarly to their peers. By so defining the meaning of equality it can both effectively guide states on the appropriate legal policy, yet leave educators room to do their jobs effectively. We therefore urge the judiciary to make decisions which account for the policies of equality inherent in *Brown*, and which accord with sound education practice.

214. Dianne L. Ferguson, *et al.*, *Figuring out What to do with The Grownups: How Teachers Made Inclusion 'Work' for students with disabilities,* 17 JOURNAL OF THE ASSOCIATION FOR PERSONS WITH SERIOUS HANDICAPS 218 (1992).