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Adelante Juntos: The Federal Class Action as an Instrument for Securing Equal Protection for Minorities in State Schools

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NOTES

ADELANTE JUNTOS*: THE FEDERAL CLASS ACTION AS AN INSTRUMENT FOR SECURING EQUAL PROTECTION FOR MINORITIES IN STATE SCHOOLS

Children of minority descent are consistently outperformed by their white counterparts in this country's school systems. This fact is well documented,[1] and is illustrated in a recent report issued by the U.S. Commission on Civil Rights.

> For every 10 Mexican-American students who enter the first grade, only six graduate from high school. By contrast, nearly nine of every ten Anglo students remain in school and receive high school diplomas.[2]

The seriousness of this problem cannot be over emphasized, and it ultimately affects every American. A citizen is more likely to be productive if he is well educated; and his productivity, or lack thereof, will certainly have an effect upon the country's crime rate, welfare rolls, etc. The Supreme Court noted the importance of an education in the landmark case of *Brown v. Board of Education of Topeka.*[3]

> Today, education is perhaps the most important function of state and local governments.
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> It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the

*"Forward Together"

1.

> ... New Mexico public schools are doing an adequate job of educating the college-bound student but are not meeting the needs of minority children. These findings are not new and are not limited to New Mexico. There are now a number of studies which document the failure of the American school system in this respect. The situation is particularly critical in New Mexico because minority children represent a relatively large proportion of all school children in the state.

A Report On The Success Of New Mexico High School Students by Marchia Meeker, Research Division, New Mexico State Department of Education, summary page, (February 1971).

2. U.S. Commission on Civil Rights, Mexican American Education Study, Report VI: Toward Quality Education For Mexican Americans, page 2 (February 1974). [hereinafter cited as Civil Rights Commission Report VI].

3. 347 U.S. 483 (1954) [hereinafter cited as Brown].

> opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[4]

For obvious reasons, discussions pertaining to this subject tend to be highly emotional; and the situation is only worsened by a lack of understanding as to the meaning of such concepts as "ability to learn" and "intelligence."[5] There has been an increasing tendency of the courts, however, to hold that the "substandard" performance of minority children is largely due to a denial of equal protection in the state schools. The Civil Rights Commission Report VI concluded that Mexican-Americans will be denied equal protection in that:

> Their children will be isolated from Anglo children.
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> Their language and culture will be excluded.
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> Schools to which their children are assigned will be underfinanced.
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> Teachers will treat their children less favorably than Anglo pupils.[6]

GENERAL BACKGROUND

This discussion considers recent developments in class actions which allege denials of equal protection to minorities in state schools.[7]

In order to maintain a successful class action in the Federal courts, it is necessary to define the class. This is a twofold operation. On the one hand it is desirable to define a class which is "suspect"[9]; and on the other hand the class must be identified with enough certainty

4. 347 U.S. at 493.

5. Newsweek, *The Great IQ Controversy*, Dec. 17, 1973, page 109.

6. Civil Rights Commission Report VI at page 3.

7. Special attention will be devoted to cases which have considered the problems of "Mexican-Americans." This group of persons has also been referred to at different times as "Hispanic," "Indo-Hispanic," "Spanish" and most recently the term "Chicano" has enjoyed popular usage.

8. The Federal courts are usually preferred over the State courts for several reasons. It is often felt that Federal court judges are in a position to act where their locally elected counterparts in the State courts are not. Also, the Federal Rules of Civil Procedure may be easier to work with. For example, Federal Rule 23 was amended in 1966 in order to abolish the unwieldy "spurious-hybrid-true" distinctions, but the corresponding state rule of the New Mexico courts remains unchanged.

9. The courts have held that classifications which are based upon sex, race or national origin are "suspect," and they have subjected these classifications to "close judicial scrutiny." Kramer v. Union Free School District, 395 U.S. 621 (1969) and San Antonio School District v. Rodriguez, 411 U.S. 1, 36 L. Ed.2d 16, 93 S.Ct. 1278 (1973). [hereinafter cited as Rodriguez].

to insure the "adequate representation" which is required in a class action.[10]

It is also necessary to pinpoint the state activity which is impinging upon the equal protection rights of the class. In selecting the state activity which is to be challenged, an attempt should be made to ascertain whether a "fundamental right"[11] is affected.

There is no settled formula for testing the constitutional validity of a challenged state action.[12] Basically, the courts attempt to balance the personal rights of the individual against the public goal sought to be attained by the state.[13] The court usually makes a threshold evaluation of the case in order to determine which standard of "reasonableness" to use.[14] Ordinarily a wide latitude is afforded the state, and there exists a presumption of constitutional validity.[15] Under this "traditional test" the challenging party bears the burden of showing that the state goal is not legitimate, or that the state classification does not bear a reasonable relation to the state goal.[16] But, wherever the initial court inquiry discloses that a "suspect class"[17] or a "fundamental interest"[18] is involved, the burden shifts, and the state is required to prove that its action relates to the furtherance of a compelling state interest.[19] This standard of review has been referred to as "strict judicial scrutiny"[20] or "the strict equal protection test."[21]

Defining a class and selecting a state activity involve overlapping considerations in that different actions by the state will necessarily affect different classes of people. However, the two procedures are discussed separately below in order to better evaluate the court guidelines which have developed in this area.

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10. Dierks v. Thompson, 414 F.2d 453 (1969), Eisen v. Carlisle and Jacquelin, 391 F.2d 555 (1968) and Shulman v. Kitzenberg, 47 F.R.D. 202 (1969).

11. Among those rights which have been characterized as "fundamental" are the right to interstate travel, the right of free speech and the right to participate in elections on an equal basis with other citizens in the jurisdiction. Rodriguez, *supra* note 9 at 42, 43.

12. McDonald v. Board of Election Com. of Chicago, 394 U.S. 802 (1969).

13. U.S. Department of Agriculture v. Murry, U.S. , 37 L.Ed.2d 767, 93 S.Ct. (1973).

14. Dunn v. Blumstein, 405 U.S. 330 (1972).

15. 394 U.S. 802 (1969).

16. Rodriguez, *supra* note 9, Graham v. Richardson, 403 U.S. 365 (1971); Frontiero v. Richardson, 411 U.S. 677, 36 L.Ed.2d 583, 93 S.Ct. 1764 (1973).

17. 395 U.S. 621.

18. Eisenstadt v. Baird, 405 U.S. 438 (1972); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).

19. 405 U.S. 330.

20. 395 U.S. 621; Rodriguez, *supra* note 9.

21. 405 U.S. 330.

SELECTING A CLASS

As stated above, "selecting a class" for purposes of claiming Fourteenth Amendment protection is not necessarily the same as "selecting a class" for purposes of maintaining a class action.

A. Fourteenth Amendment considerations

The Fourteenth Amendment and its accompanying statutes were adopted for the protection of Black people in the post Civil War South. But the Supreme Court has not hesitated to apply the provisions of the Fourteenth Amendment where other groups were accorded unequal treatment on account of their ancestry.[22] In *Hernandez v. Texas,*[23] plaintiff sought reversal of a murder conviction on the grounds that Mexican-Americans had been systematically excluded from the jury. The state of Texas argued that the Fourteenth Amendment contemplated only two classes of people, White and Negro; and that plaintiff was a White person convicted by a White (Anglo) jury. The Supreme Court rejected this argument, and noted that the Texas community did not hesitate to distinguish between "White" and "Mexican."

> The participation of persons of Mexican descent in business and community groups was shown to be slight. Until very recent times, children of Mexican descent were required to attend segregated schools for the first four grades. At least one restaurant in town prominently displayed a sign announcing "No Mexicans Served." On the courthouse grounds at the time of the hearing, there were two men's toilets, one unmarked, and the other "Colored Men" and "Hombres Aqui" ("Men Here").[24]

The same issue arose, this time in a civil context, in *Keyes v. School District No. 1.*[25] Plaintiffs brought a class action against a school district in Denver, Colorado, seeking to end the segregation of Anglo students from "Hispanos" and Blacks. The school district maintained that Hispanos were White, and therefore, schools which consisted mainly of Hispano and Black students were considered to be integrated. The Supreme Court noted its earlier decision in *Hernandez,* and ordered the school district to abolish its dual system. *Keyes* is the latest in a line of school desegregation cases which began before *Brown.* Federal courts in California,[26] Arizona[27] and

22. *See* Truax v. Raich, 239 U.S. 33 (1915), Takahashi v. Fish & Game Commission, 334 U.S. 410 (1947) and Hirabayashi v. United States, 320 U.S. 81 (1942).
23. 347 U.S. 475 (1954). [hereinafter cited as Hernandez].
24. 347 U.S. at 479, 480.
25. U.S. , 37 L.Ed.2d 548, 93 S.Ct. (1973).
26. Westminster v. Mendy, 161 F.2d 774 (1947).
27. Gonzales v. Sheely, 96 F. Supp. 1004 (1951).

Texas[28] have held that Mexican-Americans are an identifiable ethnic minority class subject to the protection of the Fourteenth Amendment.[29]

B. Class Action Considerations

The class action is an ancient concept of English common law. Courts of equity have long allowed such actions where the prospective number of litigants is so large as to make joinder impracticable.[30] In order to qualify as a class action, Rule 23 of the Federal Rules of Civil Procedure requires that: (1) the class be so numerous that joinder of all members is impracticable, (2) there be questions of law or fact common to the class, (3) the claims or defenses of the representative parties by typical of the claims or defenses of the class, and (4) the representative parties fairly and adequately protect the interests of the class.[31] Although the courts often state that Rule 23 should be given a liberal rather than a restrictive interpretation,[32] the 1966 amendment which abolishes the spurious-hybrid-true distinctions has made judges more wary. Class actions are an exception to the general rule that only parties or their privies are bound by a judgment. The courts are therefore careful to scrutinize each action for the requisite elements as set forth above. This is especially true of the "adequacy of representation" which is necessary to assure due process.[33]

In *Tijerina v. Henry*,[34] it was held that "Spanish-Americans" do not constitute a group capable of maintaining a class action under Rule 23. Plaintiff sought to bring about reapportionment of the State Boards of Education and to have all subjects taught both in Spanish and English. Plaintiff alleged that he was a Spanish-American and he sought to represent all Spanish-Americans within the State of New Mexico.[35] The court held that plaintiff had failed to define the class of people which he sought to represent with enough certainty to provide them with adequate representation. His assertion that

28. Cisneros v. Corpus Christi Independent School District, 330 F. Supp. 1377, 467 F.2d 142 (1972) and United States v. Texas Education Agency, 467 F.2d 848 (1972).

29. In holding that people of Mexican descent constitute a group subject to the equal protection provisions of the Fourteenth Amendment, the court in Cisneros v. Corpus Christi Independent School District, *supra* note 28, noted their physical characteristics, language, predominant religion, distinct culture and Spanish surnames.

30. 59 Am. Jur. 2d, Parties, § 47.

31. 414 F.2d 453; 391 F.2d 555.

32. 391 F.2d 555.

33. 391 F.2d at 562.

34. 48 F.R.D. 274 (1969). [hereinafter cited as Tijerina].

35. Plaintiff also attempted to represent a class of "poor" people, as defined by the statute prescribing the qualifications for free legal process.

they were Spanish surnamed was dismissed as being too vague to be meaningful. Likewise, his statement that they were of Mexican, Indian and Spanish ancestry was held so vague as to be meaningless; and his attempt to describe the group by maternal language was held to be inadequate.[36]

Subsequent to *Tijerina,* it was held in *Serna v. Portales Municipal Schools,*[37] that plaintiff could adequately represent a class comprised of all Mexican-American students within the Portales Municipal School system. The *Serna* case was brought by three children and a Chicano youth association seeking to end racial discrimination and gain the benefits of a bilingual educational program. *Serna* succeeded where *Tijerina* failed largely because a more suitable class of plaintiffs was selected. Rather than seeking to represent Mexican-Americans across the state, it limited the scope of the group to a single school district. This also eliminated the task of defining the defendants as a class; and it enabled plaintiffs to convince the court that the proceedings and remedies would be manageable.

SELECTING A STATE ACTION

The Fourteenth Amendment prohibits the states from acting in a way which discriminates against any class of people unless the state action bears a reasonable relation to the furtherance of a legitimate state goal.[38]

> . . . there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." . . . That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy.[39]

The validity of the state action hinges not merely upon the wording of the statutory scheme behind the action, but also upon the application of the statute by the states;[40] and the courts have indi-

36. As the years go by, it will become harder to argue that Spanish is the maternal language of Mexican-Americans. See the Comment in 3 NMLR 364 which states at page 370 that: "In 1906, roughly fifty percent of New Mexico's population was Spanish speaking, with the public schools employing interpreters in the classrooms."

37. 359 F. Supp. 1279 (1972). [hereinafter cited as Serna].

38. Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959).

39. 358 U.S. at 527, 528.

40. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or applied, single out that class for different treat-

cated that administrative rulings and regulations, legislatively created classifications and judicially imposed conditions are all considered to be within the definition of the term "state action."[41] The actions of school boards and school officials clearly come within this broad definition. School actions which are typically attacked as denials of equal protection include: (1) segregation, (2) suppression of maternal language and culture, (3) underfinanced schools and (4) unfavorable treatment by school teachers.[42]

Brown[43] has firmly established the proposition that the equal protection provisions of the Constitution guarantee the individual some quantum of educational opportunity; but it failed to establish the notion that the right to an education is "fundamental." As a practical matter, this has made it more difficult to challenge state actions successfully because, procedurally, the state actions are presumed to be reasonable.

In *San Antonio School District v. Rodriguez*[44] a class action was instituted in order to challenge the state's statutory scheme for financing public education. Plaintiffs alleged that schools which were attended by heavy concentrations of Mexican-American pupils were not financed on an equal footing with predominantly Anglo schools. The initial issue before the Supreme Court was whether or not right to education was "fundamental." If the court had found that a fundamental right was at stake, the State of Texas would have been saddled with the burden of showing that the discrepancy in financing was reasonable. The state admitted that it was incapable of carrying this burden. The court reaffirmed its historic dedication to the concept of equality in education, and the importance of an education was noted. But it was determined that the importance of a service does not determine whether a substantive constitutional right is involved.

> Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.
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> Education, of course, is not among the rights afforded explicit

ment not based on some reasonable classification, the guarantees of the Constitution have been violated.

Hernandez at page 478.

41. State action, for purposes of the Equal Protection Clause, may emanate from rulings of administrative and regulatory agencies as well as from legislative or judicial action.

Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179 (1972).

42. *See* note 2, *supra.*

43. *See* note 3, *supra.*

44. *See* note 9, *supra.*

> protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this court to depart from the usual standard [traditional test] for reviewing a state's social and economic legislation.[45]

Having decided this procedural question, the court went on to apply the "traditional test" and hold that the financing scheme in question had not been shown to be unreasonable. It was heavily influenced in its decision by a lack of desire to tamper with a system of taxation and distribution which had enjoyed such widespread use for so long.[46]

Thus far the discussion has centered upon the scope of protection offered by the Fourteenth Amendment. A recent case illustrates the importance of the federal statutes which have been enacted to enforce equal protection. In *Lau v. Nichols*[47] students of Chinese descent brought a class action in an attempt to force the state schools to institute special educational programs. Significantly, the Supreme Court did not reach the question of whether or not the state's refusal to provide special programs was a violation of the Fourteenth Amendment. Instead, the court relied upon Section 601 of The Civil Rights Act of 1964[48] and the Health and Education Welfare (HEW) Guidelines promulgated thereunder.

> The school district involved in this litigation receives large amounts of Federal financial assistance. HEW, which has authority to promulgate regulations prohibiting discrimination in Federally assisted school systems in 1968 issued one guideline that "school systems are responsible for assuring that students of a particular race, color, or national origin are not denied the opportunity to obtain the education generally obtained by other students in the system. 33 CFR Sect. 4955.
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> Discrimination is barred which has that effect even though no purposeful design is present. . . .

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45. *Id.* at 43, 44.

46. Thus we stand on familiar ground when we continue to acknowledge that the justices of this court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. Yet we are urged to direct the states either to alter drastically the present system or to throw out the property tax altogether in favor of some other form of taxation. No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact.

Id.

47. U.S. , 39 L.Ed.2d 1, 94 S. Ct. (1974). [hereinafter cited as Lau.]

48. 42 U.S.C.A. § 2000d.

* * *

> Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.[49]

In effect, *Lau* held that Congress has exercised its power to enact legislation which conceivably offers a wider scope of protection than that afforded by the Fourteenth Amendment.

CONCLUSION

The courts have shown that they attach great importance to the concept of equal opportunity in education; and the Fourteenth Amendment enables them to enforce some degree of equal protection. Mexican-Americans constitute a group subject to the protection of the Fourteenth Amendment, and they have successfully carried out a number of class actions. They are most likely to succeed where the geographical scope of the suit is limited.

However, the Fourteenth Amendment cannot guarantee equal opportunity in all respects; and this is especially true in light of the court's failure to characterize the right to education as "fundamental." Nonetheless success is still possible in the courts, and now the Congress has enacted legislation which gives the judicial branch a stronger hand in the struggle for equality. Broad powers have been granted to the U.S. Office of Civil Rights of the Department of Health Education and Welfare; and this agency has demonstrated an ability to force state corrective action—under threat of losing federal funds.[50] There are indications that this activity by HEW will continue into the future on a much larger scale.[51] Interestingly, the

49. Lau, *supra* note 47, at 4, 5.

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> Whereas litigation and court orders had produced little desegregation in the years 1954 to 1964, in the five years following enactment of Title VI the number of children placed in desegregated schools increased tenfold. These results were obtained primarily through voluntary negotiations between HEW and formerly segregated school districts in which HEW's position was strongly supported by its ability to use administrative enforcement proceedings under Title VI.

Civil Rights Commission Report VI at pages 128, 129.

51. The U.S. Office of Civil Rights has directed the New Mexico State Education Department to help school districts in Albuquerque, Central, Espanola, Gallup, Las Cruces and Santa Fe develop bilingual programs. The Federal Agency indicated that it felt the decision in Lau delegates the task of promoting bilingual education to HEW. Albuquerque Tribune, April 15, 1974, pages 1, 3, Section A.

greatest pressure for special programs often comes from the parents of Anglo children.[52]

The following quote of the Spanish author, Miguel Cervantes, appears over the doorway of the University of New Mexico School of Law.

> Si acaso doblares la vara de la justicia, no sea con el peso de la dadiva, sino con el de la misericordia.

If the present trend in special educational programs continues, it is possible that one day most of the law students who enter through that doorway will understand the meaning of this passage.

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52. Albuquerque News, April 25, 1974, page 1.