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## The Judiciary and Education Reform: A Reassessment

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# THE JUDICIARY AND EDUCATION REFORM: A REASSESSMENT

JUDITH AREEN\*

*The past 20 years has experienced increased judicial activism in the field of education. The desegregation cases of the 1950's and 1960's evolved into the school finance decisions of the early 1970's. Professor Areen examines the judicial attempt to provide equal educational opportunity, and questions the basic premises upon which judicial intervention is based. The author concludes that judicial efforts to equalize educational opportunity have been misdirected. The goals sought to be attained by judicial intervention must be reconsidered before an effective education can be provided for all.*

For years the judiciary was content to leave control of education almost exclusively in the hands of state legislators and administrative officials.<sup>1</sup> But beginning with *Brown v. Board of Education*<sup>2</sup> in 1954, the

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<sup>1</sup> Public schooling did not spawn much litigation because compulsory attendance laws did not emerge until after 1850 and few people attended public school before that time. As late as 1910 less than nine percent of the eligible children finished high school. BUREAU OF CENSUS, UNITED STATES DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES COLONIAL TIMES TO 1957 Table H 223-33, at 207 (1960). Today, by contrast, over 90 percent of the eligible children attend at least one year of high school and 80 percent graduate. BUREAU OF CENSUS, UNITED STATES DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1971 Tables 192-93, at 124-25 (92d ed. 1971).

A few state courts held there were some limits to the states' power to operate and compel attendance at public schools. See, e.g., *Trustees of Schools v. People*, 87 Ill. 303, 29 Am. R. 55 (1877) (inability to pass grammar examination no bar to pupil's admission to public school); *State ex rel. Sheibley v. School Dist. No. 1*, 31 Neb. 552, 48 N.W. 393 (1891) (reinstatement of child ordered despite refusal to study grammar); *School Bd. Dist. No. 18 v. Thompson*, 24 Okla. 2, 103 P. 578 (1909) (reinstatement of child ordered despite refusal to participate in music class). Most state courts, however, upheld the right of school authorities to prescribe certain courses. See, e.g., *Samuel Benedict Memorial School v. Bradford*, 111 Ga. 801, 36 S.E. 920 (1900); *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256 (1854); *Guernsey v. Pitkin*, 32 Vt. 224, 76 Am. Dec. 171 (1859). The discretionary power of school authorities to regulate pupil conduct in disciplinary matters has also been recognized. See *Salem Community School Corp. v. Easterly*, 275 N.E.2d 317 (Ind. App. 1971); *Andrews v. Webber*, 108 Ind. 31, 8 N.E. 708 (1886) (suspension of student for refusal to study music constitutes act within discretion of school board); *Tanton v. McKinney*, 226 Mich. 245, 197 N.W. 510 (1924).

On several occasions, the Supreme Court cautioned states with respect to their control of education. For example, in *Pierce v. Society of Sisters*, the Court held that states could not force students to attend public schools, while in *West Virginia State Board*

judiciary began repeatedly to intervene in this previously sacrosanct area. Cases involving a variety of issues were considered, with three issues receiving particular attention: 1) racial integration of schools; 2) fair distribution of public funds among schools and school districts; and 3) allocation of public resources to nonpublic schools.<sup>3</sup> Each of these judicial forays was initiated in response to groups who claimed to speak for the best interests of the children involved. These groups also claimed that by granting the actions they requested, the courts would promote equality of educational opportunity. But their claims now seem in doubt.

With the benefit of hindsight and the aid of new social science data, the first part of this article will survey the extent to which the three major types of intervention have in fact promoted equality of educational opportunity. The second part will then explore what future judicial measures, if any, might best further that goal.

## LOOKING BACK

### THE QUEST FOR RACIAL INTEGRATION

Nearly 19 years have passed since the Supreme Court declared in *Brown* that "in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."<sup>4</sup> Yet debate continues to rage regarding implementation of the *Brown* mandate. The debate does not focus for the most part on what Professor Alexander Bickel has termed the "minimal rule" of *Brown*<sup>5</sup>—that state sponsored segregation is unconstitutional. *Brown's* minimal rule was soon followed by other decisions outlawing state sponsored segregation in everything from restaurants to golf courses.<sup>6</sup> There was of *Education v. Barnette* the Court held that students could not be forced to salute the flag in violation of the first and fourteenth amendments. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639-42 (1943); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). For the most part, however, the Court did not interfere with the way in which states operated public schools.

<sup>2</sup> 347 U.S. 483 (1954).

<sup>3</sup> Cases involving these three issues are now pending before the Supreme Court. See *Keyes v. School Dist. No. 1*, 445 F.2d 990 (10th Cir. 1971), *cert. granted*, 404 U.S. 1036 (1972) (No. 71-507) (integration); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 350 F. Supp. 655 (S.D.N.Y. 1972), *prob. juris. noted*, 41 U.S.L.W. 3409 (U.S. Jan. 22, 1973) (No. 72-694) (tax credits for parents of students in nonpublic schools); *Rodriguez v. San Antonio School Dist.*, 337 F. Supp. 280 (W.D. Tex. 1971) (per curiam), *prob. juris. noted*, 406 U.S. 966 (1972) (No. 71-1332) (resource allocation).

<sup>4</sup> 347 U.S. at 495.

<sup>5</sup> A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 118 (1970).

<sup>6</sup> See, e.g., *Johnson v. Virginia*, 373 U.S. 61 (1963) (per curiam) (segregated seating facilities in courtroom); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (segregation of restaurant located in public building); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (mem.) (segregated public golfing facilities).

wide-spread resistance to Court mandates, for a time of course, but certainly the overall public consensus, as demonstrated by the Civil Rights Act of 1964,<sup>7</sup> has been to support this aspect of the *Brown* mandate. Rather, the current debate focuses on whether the reasoning of the *Brown* line of cases should be extended to ban all school desegregation, whatever its causes. There were after all intimations in the *Brown* opinion that segregated schools are per se inferior.<sup>8</sup> But social science studies have not provided much support for this extension of *Brown*.

In 1965, the Coleman report<sup>9</sup> appeared to lend some support to the integrationist position.<sup>10</sup> Commissioned by Congress, this landmark survey did confirm the Court's holding that the *Plessy v. Ferguson*<sup>11</sup> doctrine of "separate but equal" would not suffice to improve the educational opportunities available to disadvantaged or minority students when it demonstrated that school facilities had little if any impact on student achievement.<sup>12</sup> The Coleman report further showed that the only factor which was significantly tied to achievement was the socio-economic background of a student's classmates.<sup>13</sup> For example, the report found that while the average northern black sixth grader was about 18 months behind the average white sixth grader on tests of verbal ability, reading comprehension, and arithmetic skill, black sixth graders attending 50 percent to 75 percent white schools were only about 12 months behind.<sup>14</sup>

But as the Kiesling article documents earlier in this Symposium, subsequent studies revealed that busing black students into white schools did not necessarily raise their test scores.<sup>15</sup> The Coleman report had uncovered a correlation, in other words, but one that apparently did not involve a simple cause and effect relationship.<sup>16</sup>

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<sup>7</sup> 42 U.S.C. §§ 1971, 1975a-75d, 2000a to 2000h-6 (1970).

<sup>8</sup> The Court quoted with approval a statement by a lower court that the detrimental consequences of school segregation were merely increased, and not caused, when the segregation was sanctioned by law. 347 U.S. at 494.

<sup>9</sup> OFFICE OF EDUC., UNITED STATES DEP'T OF HEALTH, EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966). The Coleman report was one of the largest social science research projects in history; 570,000 students and 60,000 teachers were surveyed, while information on facilities available in 4,000 schools was gathered in elaborate detail. ON QUALITY OF EDUCATIONAL OPPORTUNITY 5 (F. Mosteller & D. Moynihan eds. 1972).

<sup>10</sup> See OFFICE OF EDUC., *supra* note 9, at 28-29.

<sup>11</sup> 163 U.S. 537 (1896).

<sup>12</sup> See OFFICE OF EDUC., *supra* note 9, at 316.

<sup>13</sup> *Id.*

<sup>14</sup> See Jencks, *Busing—The Supreme Court Goes North*, N.Y. Times, Nov. 19, 1972, § 6 (Magazine), at 118, col. 5 (based on Jencks reanalysis of Coleman report data).

<sup>15</sup> Kiesling, *The Value to Society of Integrated Education and Compensatory Education*, 61 GEO. L.J. 857, 863 (1973).

<sup>16</sup> The problem of distinguishing correlations from cause reoccurs throughout the area of education statistics. For example, the Coleman report found a small but statistical-

There are several possible responses to these revelations. One, adopted by Kiesling, is to qualify the significance of the social science findings. Thus, as he points out, achievement tests are "potentially dangerous guides to social policy" because they do not measure all the valuable aspects of education.<sup>17</sup> A more affirmative response is to question why the findings should ever have been thought to be dispositive of the issue in the first place. In other words, the same constitutional and moral reasons that justified *Brown* initially may well provide a sufficient basis for future integration orders, whatever the findings on academic achievement. The later court opinions prohibiting segregated golf courses or restaurants, for example, did not require proof that the people involved would be happier or more productive. The social science findings therefore need not settle the case for more integration.<sup>18</sup> They do, however, demonstrate that integration orders to date have done little, if anything, to improve equality of educational opportunity to the extent that we can now measure it.

#### THE FAULTY METAPHOR

If the academic world did not provide sufficient statistical support for the fight for more racial integration of schools, it almost single-handedly nurtured the next stage of judicial opportunity: the resource revolution. The inequalities of present patterns of resource allocation appear to have been mentioned first in a short article published by Arthur Wise in 1965.<sup>19</sup> Of the flood of articles, dissertations and books which followed, undoubtedly the most influential was *Private Wealth and Public Education*,<sup>20</sup> published in 1970 by Professors John Coons, William Clune, and Stephen Sugarman. The three scholars there argued that current patterns of distributing funds to school districts should be declared unconstitu-

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ly significant difference in mean achievement between schools with experienced and inexperienced teachers. But in fact the cause and effect relationship involved turns out to reflect the opposite of what one might expect. It was not that experienced teachers were in fact more competent, rather they appear to have used their bargaining power to transfer to schools with overachieving students. See Jencks, *The Coleman Report and the Conventional Wisdom*, in *ON EQUALITY OF EDUCATIONAL OPPORTUNITY* 82-83 (F. Mosteller & D. Moynihan eds. 1972).

<sup>17</sup> Kiesling, *supra* note 15, at 877.

<sup>18</sup> Other data may be relevant here. Southern black family income rose from 46 percent of the Southern white family average in 1959 to 57 percent ten years later. Jencks, *supra* note 14, at 120, col. 5. None of this can be attributed directly to desegregation, for few of the blacks who attended desegregated schools had reached the labor force by 1969. Nonetheless the gain may well reflect the fact that *Brown* has wrought a considerable transformation of the political and social mores of the South. *Id.* at 121.

<sup>19</sup> See Wise, *Is Denial of Equal Educational Opportunity Constitutional?*, 13 ADMINISTRATOR'S NOTEBOOK 1 (1965).

<sup>20</sup> J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH & PUBLIC EDUCATION* (1970).

tional if they make the quality of public education a function of wealth other than the total wealth of the state.<sup>21</sup>

This argument was accepted by the California Supreme Court in *Serrano v. Priest*<sup>22</sup> in 1971. In the words of the attorneys for the state of Texas in *Rodriguez v. San Antonio Independent School District*,<sup>23</sup> the *Serrano*-like case now pending before the Supreme Court, "rarely, if ever, in the history of the Republic has a novel idea proceeded in such a short time from announcement by imaginative scholars to enshrinement in the Constitution of the United States."<sup>24</sup>

Perhaps more remarkable, however, is the fact that *Serrano*-like cases swept the country with little or no challenge to the questionable premise on which they were built.<sup>25</sup> Most cases, that is, simply assumed that quantity of funding relates directly to quality of schooling. These cases used a simple factory model: money was the input and educated students the output. The weakness in this approach, however, was that social scientists had for some time proven this simplistic input-output model faulty. In the words of the Coleman report:

Differences in school facilities and curriculum, which are the major variables by which attempts are made to improve schools, are so little related to differences in achievement levels of students that, with few exceptions, their effects fail to appear in a survey of this magnitude.<sup>26</sup>

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<sup>21</sup> *Id.* at 304.

<sup>22</sup> 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

<sup>23</sup> 337 F. Supp. 280 (W.D. Tex. 1971) (per curiam), *prob. juris. noted*, 406 U.S. 966 (1972) (No. 71-1332).

<sup>24</sup> Brief for Appellants at 8, *San Antonio Independent School Dist. v. Rodriguez*, No. 71-1332 (U.S., filed Apr. 17, 1972).

<sup>25</sup> See *Hollins v. Shofstall*, Civil No. 253,652 (Super. Ct. Ariz., June 1, 1972); *Caldwell v. Kansas*, Civil No. 50,616 (Dist. Ct. Kan., Aug. 30, 1972).

<sup>26</sup> OFFICE OF EDUC., *supra* note 9, at 316. Similarly, an analysis of Project Talent, an earlier survey of 5,000 high school students, found that when impoverished high schools were compared with schools that spent twice as much, scores of students in rich schools were no higher than those of students in the poor schools. See C. JENCKS, M. SMITH, H. ACLAND, M. BANE, D. COHEN, H. GINTIS, B. HEYNS & S. MICHELSON, *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* 94 (1972). At the extreme there is of course a relationship: no money means no school. Evidence indicates that when schools are closed, learning drops. Furthermore, disadvantaged students would probably fall even more behind their advantaged classmates if only family education was available. Thus, in Holland during World War II when many elementary schools were closed, the IQ scores of children entering one secondary school after the war dropped about seven points. When schools were closed in Prince Edward County during the early 60's in order to avoid court desegregation orders, black children who did not attend school for several years scored substantially lower than most black children of their age. Similarly New York City reported a drop in test scores the spring following the fall 1968 teachers' strike. *Id.* at 87.

The input-output issue was not resolved in *Serrano* because the case reached the California Supreme Court on demurrer. Hence the court merely assumed a direct relationship between quality and money for the purpose of ruling on the propriety of the demurrer.<sup>27</sup> Proof of the relationship is being tested only now at the trial level.<sup>28</sup>

Professor Levin similarly dismisses this key issue with only a footnote,<sup>29</sup> before plunging into a lengthy discussion of the technicalities of present patterns of school finance and possible alternatives. Despite her disclaimer, however, she later appears to assume the relationship in her discussion of ideal financing schemes. She argues for example that state aid formulas "should . . . recognize the high cost of educating . . . the educationally disadvantaged student,"<sup>30</sup> a proposition which seems reasonable only if one assumes that more money can indeed provide more quality.<sup>31</sup>

Professor Levin also asserts that the *Serrano* line of cases have all held that "the level of spending for a child's education may not be a function of wealth other than the wealth of the state as a whole."<sup>32</sup> In fact most decisions, including *Rodriguez*, the case now pending before the Supreme Court, use the phrase "quality of education" rather than "spending" in stating what it is that may not be a function of wealth as a whole.<sup>33</sup> The opinions then, it is true, focus on "spending" in fashioning orders, but this is because of the questionable implicit assumption that "spending" and "quality of education" are interchangeable concepts.

To be sure, social science findings concerning the relationship between spending and quality of education should not necessarily be conclusive on the matter of resource allocation. While they may cast doubt on the legal theory used in *Serrano* and *Rodriguez*, basic notions of fairness and justice nonetheless may justify reduction of extreme interdistrict disparities in school expenditure levels. Judicial support for this view can be found in *Hawkins v. Town of Shaw*<sup>34</sup> where the United States Court of Appeals for the Fifth Circuit held that the Constitution requires public officials to reduce disparities in the provision of municipal services to

<sup>27</sup> See *Serrano v. Priest*, 5 Cal. 3d 584, 601 n.16, 487 P.2d 1241, 1253 n.16, 96 Cal. Rptr. 601, 613 n.16 (1971).

<sup>28</sup> See *id.* at 619, 487 P.2d at 1266, 96 Cal. Rptr. at 626.

<sup>29</sup> See Levin, *Alternatives to the Present System of School Finance: Their Problems and Prospects*, 61 Geo. L.J. 879, 880 n.3 (1973).

<sup>30</sup> *Id.* at 925.

<sup>31</sup> See note 26 *supra*. Kiesling also discusses the relationship between money and quality of education. Kiesling, *supra* note 15, at 866-71.

<sup>32</sup> Levin, *supra* note 29, at 895-96.

<sup>33</sup> See 337 F. Supp. at 285.

<sup>34</sup> 437 F.2d 1286 (5th Cir. 1971), *aff'd en banc*, 461 F.2d 1171 (5th Cir. 1972).

black and white citizens.<sup>35</sup> In *Hawkins*, no claim was made that equalizing services—which included street lighting and sewage disposal—would in some way change the behavior or future earning power of the citizens involved; rather proof of the existence of a correlation between race and the level of services provided was considered sufficient to trigger application of the equal protection clause.<sup>36</sup>

Significantly, one of the post-*Serrano* opinions challenged inequality of school “inputs” alone. In *Van Dusartz v. Hatfield*,<sup>37</sup> the court rephrased the *Serrano* standard to hold “the level of spending may not be a function of wealth other than the wealth of the state as a whole.”<sup>38</sup>

Whether this revised standard will prove more justiciable in light of the formidable proof problems involved in resource challenges<sup>39</sup> remains to be seen. But the fact remains that *Serrano* type cases whether based on spending alone or on quality—whatever that means—will apparently do little to improve the education provided in public schools.<sup>40</sup>

#### THE PRIVATE SCHOOL DILEMMA

No examination of the judiciary’s role in public education is complete without consideration of judicial involvement in the private school sector which presently serves one out of every eight children in elementary school.<sup>41</sup> Unfortunately, because private schools are overwhelmingly sectarian, courts and commentators tend to approach legal issues involving nonpublic schools as church-state conflicts. As a consequence,

<sup>35</sup> *Id.* at 1292.

<sup>36</sup> *See id.* at 1287, 1292.

<sup>37</sup> 334 F. Supp. 870 (D. Minn. 1971).

<sup>38</sup> *Id.* at 872.

<sup>39</sup> *Hawkins* involved discrimination based on race rather than income. Protection has been extended to the poor when certain fundamental rights are at issue. *See, e.g.,* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1965) (right to vote without paying poll tax); Douglas v. California, 372 U.S. 353 (1953) (right to counsel on appeal). Whether the amount of public funds spent on education will qualify as such a fundamental right therefore remains an open question.

An alternative approach which might prove more fruitful in the long run would be to challenge the statutes which link allocation of school funds to district wealth on the grounds that the classification used is so arbitrary as to violate the rational purpose test of the fourteenth amendment.

Either approach is subject to the objection that it is district wealth rather than family wealth which is at issue, and the two are not interchangeable because many poor families live in rich districts. *See* notes 53-55 *infra* and accompanying text.

<sup>40</sup> A recent article suggests *Serrano* cases may even exacerbate some current problems by increasing the trend toward statewide bargaining units for teachers and the concomitant loss of local control over local schools. *See* Simon, *The School Finance Decisions: Collective Bargaining and Future Finance Systems*, 82 YALE L.J. 409 (1973).

<sup>41</sup> U.S. DEP’T OF HEALTH, EDUC. & WELFARE, DIGEST OF EDUCATION STATISTICS 21 (1969).



the overall impact of such decisions upon educational opportunity generally has been ignored.

In fact, private schools bear significantly on the question of integration. The United States Commission on Civil Rights found that in 1960 nearly 40 percent of the central city white elementary students in 15 large metropolitan areas attended predominantly white nonpublic schools.<sup>42</sup> Because most nonpublic schools are sectarian, at least in the North, it is therefore apparent that segregation involves religious as well as racial questions.

Nonpublic schools also are inextricably related to the question of resource allocation since they provide education to substantial numbers of children who would otherwise be supported entirely out of public tax funds. Not surprisingly, the spectre of large numbers of private school shutdowns in the face of rising school costs has prompted taxpayers of many faiths to favor providing some aid to these students. Significantly, both major party candidates in the 1972 presidential campaign endorsed the concept of aid to parochial schools.<sup>43</sup>

Unlike the groups favoring integration or resource allocation, supporters of aid to nonpublic schools in the post-*Brown* era initially focused their efforts on state legislatures. They succeeded in obtaining passage of several laws which provided for direct aid to nonpublic schools. The first challenges to these new statutes were heard by the Supreme Court in the spring of 1971 when the Court, in *Lemon v. Kurtzman*,<sup>44</sup> struck down Pennsylvania and Rhode Island aid statutes as unconstitutional violations of the separation of church and state.<sup>45</sup> This past fall the Court similarly affirmed a lower court opinion holding unconstitutional an Ohio statute which attempted to surmount the *Lemon* barrier by reimbursing parents of nonpublic school children rather than funding the schools directly.<sup>46</sup> Recently, however, a three judge federal district court in New York upheld state income tax credit for a portion of the tuition paid by students in nonpublic schools, despite a dissent which argued there is no economic difference between such tax credits and the Ohio parent reimbursement scheme previously rejected by the judiciary.<sup>47</sup>

<sup>42</sup> U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS table 8, at 39 (1967).

<sup>43</sup> See, e.g., Shannon, *For God and Mr. Nixon*, N.Y. Times, Aug. 17, 1972, at 35, col. 1; N.Y. Times, Aug. 22, 1972, at 36, col. 6; *id.* Aug. 21, 1972, at 21, col. 5; *id.* Aug. 18, 1972, at 37, col. 6.

<sup>44</sup> 403 U.S. 602 (1971).

<sup>45</sup> *Id.* at 607-08, 610.

<sup>46</sup> *Wolman v. Essex*, 342 F. Supp. 399, 403 n.3 (S.D. Ohio 1972), *aff'd*, 41 U.S.L.W. 3182 (U.S. Oct. 3, 1972) (No. 71-1664).

<sup>47</sup> *Committee for Public Educ. & Religious Liberty v. Nyquist*, 350 F. Supp. 655 (S.D.N.Y. 1972), *prob. juris. noted*, 41 U.S.L.W. 3409 (U.S. Jan. 22, 1973) (No. 72-694).

The position which the Supreme Court takes with respect to tax credits, therefore, will be a critical factor in determining not only the future of nonpublic schools, but distribution of access to and the benefits of nonpublic schools. It does seem apparent that a voucher or credit of only \$100 or \$200 will for the most part directly benefit only the children now enrolled in nonpublic schools, most of whom are white, from middle or upper income families, and Catholic. In fact, only a program which provided enough funding, whether by parent reimbursement statutes, vouchers, or tax credits, to enable poor and middle income parents of all faiths to enroll in the nonpublic schools of their choice—including new schools they might form—could avoid benefiting a predominantly sectarian class of schools. It was on this basis that a three judge federal panel in Ohio recently rejected a tax credit scheme.<sup>48</sup>

The Supreme Court, however, may be persuaded more by form—or possibly taxpayer pleas—than economic wisdom<sup>49</sup> or concepts of equal opportunity. The nonpublic school aid issue therefore remains a loophole which not only may not help but may in fact undermine efforts to increase equality of educational opportunity.

#### LOOKING FORWARD

After almost two decades of judicial involvement in the quest for more equal educational opportunity, the basic problems appear to remain untouched. No decisions to date have gone to the heart of the problem of providing a better education for a given child in a particular classroom, a better teaching situation for most teachers, or a more responsive school administration for most parents. The increasing involvement of the judiciary in the issues of racial integration, resource allocation, and nonpublic school aid seems to have done little to provide more equal educational opportunities for the children involved. Certainly

<sup>48</sup> *Kosydar v. Wolman*, 41 U.S.L.W. 2348 (S.D. Ohio, Dec. 29, 1972).

<sup>49</sup> Professor Paul Freund has observed:

A voucher plan providing for limited grants would simply be a variation in form from aid directed to pupils and parents. But a voucher plan as conceived by some proponents of new departures in education would provide total-cost grants per pupil that would enable a family to broaden its range of choice to include a variety of educational enterprises, old and new. Such a full payment plan, whereby a voucher would be usable at public, private, church-related, cooperative, and other experimental kinds of schools, might be viewed as a measure whose principal impact would not be on church-related schools but on a significantly wider constituency. In this respect a full-cost voucher plan would differ in its effect from direct subsidies or fiscal supplements to families for non-public school education.

Freund, *Public Aid for Church-Related Education: Federal Constitutional Problems* 97-98, in OFFICE OF EDUC., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, LEGAL AND CONSTITUTIONAL PROBLEMS OF PUBLIC SUPPORT FOR NONPUBLIC SCHOOLS 101-02 (1971).

social science findings have cast doubt on most recent judicial activity by demonstrating that neither equalization of facilities nor busing will raise significantly the test scores of disadvantaged children. Even more discouraging is the finding of a study conducted by Professor Jencks and his colleagues at Harvard that even if test scores were changed there would be little reduction in the disparities of adult income, because there appears to be little relationship between school achievement and an individual's adult income.<sup>50</sup>

The charge of failure is difficult to make, however, because the groups involved have been pursuing important goals, albeit not education reform per se. Thus, the integrationists seek increased racial harmony; the resource allocationists see a more equitable distribution of school resources; and the church school enthusiasts seek preservation of religious liberties. But progress on these fronts should not be confused with movement in basic education reform.

At a minimum, the weight of current evidence demonstrates the need to reevaluate the focus of litigation allegedly aimed at improving the quality of educational opportunity available to the disadvantaged—or to all children for that matter. Too often schools and children are used as means to achieve some long term end. Thus, students have been bused allegedly to achieve a variety of long term goals ranging from the lessening of racial prejudices to the development of higher adult incomes. Social science data suggest, however, that school reform should be an end in itself; the ability to control more long term changes in behavior is simply too doubtful at present to justify any other focus.<sup>51</sup>

It is ironic that in a country which is supposedly very child centered, children are in fact not given much protection by legal or legislative policies. Why should it ever have been considered necessary to produce higher test scores to justify providing all children with decent school buildings and competent teachers? They should be entitled to this kind

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<sup>50</sup> C. JENCKS, *supra* note 26, at 8, 220-25.

<sup>51</sup> None of the evidence we have reviewed suggests that school reform can be expected to bring about significant social changes outside the schools . . . . If all elementary schools were equally effective cognitive inequality among sixth graders would decline less than 3 percent. If all high schools were equally effective, cognitive inequality among twelfth graders would hardly decline at all, and disparities in their eventual attainment would decline less than 1 percent. Eliminating all economic and academic obstacles to college attendance might somewhat reduce disparities in educational attainment, but the change would not be large. Furthermore, the experience of the past 25 years suggests that even fairly substantial reductions in the range of educational attainments do not appreciably reduce economic inequality among adults.

*Id.* at 255.

of protection even if no direct benefits can presently be demonstrated. If nothing else, self-interest dictates such a course. As Professor Urie Bronfenbrenner recently observed:

If the children and youth of a nation are afforded opportunity to develop their capacities to the fullest, if they are given the knowledge to understand the world and the wisdom to change it, then the prospects for the future are bright. In contrast, a society which neglects its children, however well it may function in other respects, risks eventual disorganization and demise.<sup>52</sup>

But even if the emphasis of education reform were to shift to more direct concern for the total health development and general welfare of children while they are in school, it is difficult to envision what role, if any, the judiciary should assume. As a practical matter, courts will always be limited by their inherently passive nature; they cannot direct reform openly, but can only respond to the cases brought before them. Because their primary function is the resolution of specific cases and controversies in an adversary context, their view on an issue is for the most part limited to whatever the parties present in evidence. Courts therefore are generally not in a position to examine fully the factual bases for most policy determinations—at least in comparison to legislatures which have broad investigative powers or to school boards which oversee school activity on a regular basis.

The scope of possible judicial remedies is also limited—again, at least in comparison to the panoply of possible actions available to a legislature. Certain education reforms therefore seem clearly beyond the scope of judicial competence. Consider the issue of resource allocation. While it is true that rich districts tend to spend more on education than poor ones, many poor families live in rich districts and vice versa. Therefore expenditures on rich and poor children do not differ as much as one might expect. For each \$1000 difference in two families' incomes, their districts' average expenditure per pupil will only differ by an average of about \$7.50 per year.<sup>53</sup> Overall, the richest fifth of all families have their children in schools that spend about 20 percent more than the schools serving the poorest fifth.<sup>54</sup> As the Jencks study noted, "[i]n a country where the top fifth of all families receive 800 to 1,000 percent more income than the bottom fifth, the fact that children from these same families attend schools whose expenditures differ by only 20 percent seems like a triumph of egalitarianism."<sup>55</sup>

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<sup>52</sup> U. BRONFENBRENNER, *TWO WORLDS OF CHILDHOOD, U.S. AND U.S.S.R.* 3 (1970).

<sup>53</sup> C. JENCKS, *supra* note 26, at 27.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

There is a greater discrepancy, however, if one looks at lifetime expenditures. Today only about 20 percent of the population graduates from college,<sup>56</sup> and a very high percentage of these graduates come from middle or upper income families. In 1967, for example, 87 percent of all high school graduates whose families earned \$15,000 or more entered college as compared to only 20 percent of those whose parents earned less than \$3,000.<sup>57</sup> When the total lifetime amount spent per person is examined, America spends roughly twice as much on the children of the rich as on the children of the poor,<sup>58</sup> clearly a much larger disparity than occurs between school districts. On the other hand, lifetime expenditures hardly seem amenable to the equalization decree remedy sought in the *Serrano*-type cases unless courts want to force people to stay in school. A better solution, for example, would be to charge the beneficiaries of this public subsidy. The Jencks report suggests a surcharge on the income tax of those who go to school beyond 16.<sup>59</sup> The largest inequalities in resource allocation in short appear to require solutions that courts are not competent to provide.

Yet cataloguing the limitations of judicial action does not foreclose the issue. Certainly intervention is appropriate when a statute or regulation is not being implemented by public school authorities, or when those authorities act in violation of a constitutionally protected right. As Justice Jackson stated in *West Virginia State Board of Education v. Barnette*:<sup>60</sup>

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself, and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.<sup>61</sup>

Many current school problems, however, do not appear to stem from violations by school officials of specific statutory or constitutional duties

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<sup>56</sup> *Id.* at 19.

<sup>57</sup> *Id.* at 19-20.

<sup>58</sup> *Id.* at 27.

<sup>59</sup> *Id.* at 39.

<sup>60</sup> 319 U.S. 624 (1943).

<sup>61</sup> *Id.* at 637. In *Barnette*, the Court upheld the right of children of Jehovah's Witnesses not to salute the flag, based on first and fourteenth amendment grounds. *Id.* at 639-42.

so much, as from the structure of governance which generally denies parents and students an effective voice in the way schools are run.

With older students, then, the judiciary should provide increased protection of their first amendment and due process rights.<sup>62</sup> A beginning was made in *Tinker v. Des Moines Independent Community School District*,<sup>63</sup> where the Supreme Court upheld the right of students to wear arm bands in protest of the Vietnam War. The Court stated:

Where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. . . . State-operated schools may not be enclaves of totalitarianism.<sup>64</sup>

One problem with this holding is that the "material disruption" test is so vague that it can be invoked in most situations by school officials. *Tinker*, therefore, has proved to provide little protection of student rights. Furthermore, direct protection of "individual rights" seems a foolish concept when young children are at issue.

A more promising approach at least where young children are involved would be fresh judicial support for parental rights in education to serve as a counterweight to the almost unchecked power now possessed by state and local officials to operate schools. In theory, parents presently may "participate" by taking their suggestions or grievances to their local school board or state legislature. But because enormous amounts of time, energy, and money are required to change schools by this process, in practice only relatively affluent parents retain any effective voice in their children's education by virtue of their ability to move, if necessary, to districts with better public schools or to afford private schools.

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<sup>62</sup> Most student rights cases of late have involved the question of whether schools may forbid long hair on male students. There is a conflict among the courts of appeals at present. Students have prevailed in two and lost in three. *Compare Crews v. Cloncs*, 432 F.2d 1259, 1263 (7th Cir. 1970) (fourteenth amendment liberty protects student) and *Richards v. Thruston*, 424 F.2d 1281, 1284-85 (1st Cir. 1970) (fourteenth amendment liberty) with *Freeman v. Flake*, 448 F.2d 258, 262 (10th Cir. 1971), *cert. denied*, 405 U.S. 1032 (1972) (school regulations do not implicate basic constitutional values) and *Jackson v. Dorrier*, 424 F.2d 213, 217 (6th Cir.), *cert. denied*, 400 U.S. 850 (1970) (first amendment, procedural due process satisfied) and *Ferrell v. Dallas Independent School Dist.*, 392 F.2d 697, 703 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968) (first amendment, substantive and procedural due process satisfied). Hair length hardly seems a vital issue in terms of fundamental school reform so it is not clear whether one should be encouraged or discouraged by the controversy which it has engendered to date.

<sup>63</sup> 393 U.S. 503 (1969).

<sup>64</sup> *Id.* at 509-11.

Imagining the specific form of support which the judiciary might provide is more difficult. Protecting the right of individual families to exclude their child from a course they find particularly objectionable could quickly get out of hand. Protecting the rights of a sizeable group of families is perhaps more feasible. For example, what if 40 percent of the parents in a particular school and 30 percent in two others would prefer to have their children taught by the Montessori method rather than the "traditional classroom approach" in current use? If school officials arbitrarily refused to make the administrative changes required to convert one building to the Montessori approach, should the court agree to intervene on behalf of the children and parents? Should a court intervene if these same parents and children left the public system, formed a "private" Montessori school, and requested the share of public funds which would otherwise have been spent on those children in public school?

Such interventions might at first seem to exceed the limits of the prudent use of judicial power. Yet such judicial protection of parental rights may be the only approach which can protect children against abuses which are now "too small" for public policy but nevertheless of major importance in the development of a particular child. For example, a child languishing in a school with a traditional curriculum or the classroom of a teacher who reinforces the child's own fears of being inept or incompetent might improve rapidly simply by being moved to a different school or teacher. No operational structure will prevent all abuses, of course; but placing somewhat greater reliance on the judgment of a child's own parents should generally be not only as good but often better than the present arrangement which matches most children and schools on the very impersonal basis of residence.<sup>65</sup>

There is some judicial precedent for protecting parental rights in education, though it may prove insufficient to justify the hypothetical interventions raised above. In *Meyer v. Nebraska*,<sup>66</sup> the Supreme Court held unconstitutional a statute which prohibited teaching modern foreign languages to any student who had not yet passed the eighth grade. The Court acknowledged that at least three rights were at issue: 1) the occupation rights of modern language teachers, 2) the opportunities of pupils

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<sup>65</sup> The federal government has begun testing a program in San Jose, California, in which parents are allowed to choose between different public elementary schools. See A PROPOSED EXPERIMENT IN EDUCATION VOUCHERS (OEO No. 3400 N-1, 1971). Assuming the program survives the dismantling of OEO this spring, we may at last have some specific information on what choices different parents will make if they are provided with both information about the schools and the right to select which schools their children will attend.

<sup>66</sup> 262 U.S. 390 (1923).

to acquire knowledge, and 3) the power of parents to control the education of their own children.<sup>67</sup> Two years later, in *Pierce v. Society of Sisters*,<sup>68</sup> the Court struck down an Oregon statute which required all students to attend public schools. Although the plaintiffs were private schools, the Court again spoke of the rights of parents and children in holding that “[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.”<sup>69</sup> More recent protection is found in the 1965 decision of *Griswold v. Connecticut*.<sup>70</sup>

The right to educate a child in a school of the parents’ choice—whether public or private or parochial—is [not mentioned in the Constitution] . . . . Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

By *Pierce v. Society of Sisters* . . . the right to educate one’s children as one chooses is made applicable to the States by force of the First and Fourteenth Amendments. By *Meyer v. Nebraska* . . . the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. . . . [W]e reaffirm the principle of the *Pierce* and *Meyer* cases.<sup>71</sup>

When *Pierce* was decided, no attention was focused on the fact that the “right” to choose nonpublic schools was meaningless to poor families. More recently, courts have extended protection to the poor when certain “fundamental rights” were at issue. If *Pierce* were held to involve such a “fundamental right,” then the hypothetical interventions raised above might be more appropriate.

The only recent case to challenge the power of the state to dictate the scope of education by virtue of compulsory attendance laws is *Wisconsin v. Yoder*.<sup>72</sup> In *Yoder* the Court was willing to exempt Amish children from attending school after the eighth grade. The Court emphasized that the Amish had sustained the burden of demonstrating the

<sup>67</sup> *Id.* at 401.

<sup>68</sup> 268 U.S. 510 (1925).

<sup>69</sup> *Id.* at 535. See also *Farrington v. Tokushige*, 273 U.S. 284, 298-99 (1927) (invalidating a Hawaii statute on the ground that it deprived parents a fair opportunity to procure for their children instruction which the parents thought important).

<sup>70</sup> 381 U.S. 479 (1965).

<sup>71</sup> *Id.* at 482-83.

<sup>72</sup> 406 U.S. 205 (1972).



adequacy of their mode of continuing informal education in terms of precisely those interests that the state had advanced in support of its program of compulsory education.<sup>73</sup> The Court seemed impressed by the Amish record which showed that “[i]ts members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms.”<sup>74</sup> Thus, despite language which might seem to support less drastic challenges to compulsory attendance laws<sup>75</sup>—requests for alternative forms of formal education as opposed to total exemption from public school—the opinion does not indicate support for future challenges to state control over the style or content of public schooling. In the Court’s words, “[i]t cannot be over-emphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some ‘progressive’ or more enlightened process for rearing children for modern life.”<sup>76</sup>

#### CONCLUSION

It undoubtedly will be difficult for courts to try to grapple with the elements that really affect the quality of education available to a child. These elements are bound to be less identifiable and less measurable than the input dollars challenged in *Rodriguez* or the racial balance of students and teachers. Perhaps such efforts are ultimately too elusive for judicial protection. But at the least, the judiciary has an obligation to make clear that its interventions in education to date are wide of the mark. The illusion of progress must be unmasked if the real work is to begin.

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<sup>73</sup> *Id.* at 235.

<sup>74</sup> *Id.* at 222.

<sup>75</sup> *Id.* at 214. The Court further stated:

[A] state’s interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on other fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment and the traditional interests of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, ‘prepare [them] for additional obligations.’

*Id.*

<sup>76</sup> *Id.* at 235.