EDUCATIONAL POLICY AND THE LAW

I. Decision-makers in Education Policy and The Law

A. Schooling and the State

I. Pierce Compromise and Compulsory Education

Three Options of Education Control:
1. State Monopoly over Education-socialization, ensure all students get good education, equal education opportunity
2. Abolish Compulsory Education-too standardized, family should be able to make the decision
3. Compulsory but Choice ("Pierce Compromise")-parents choice may be unfair to child, government wants educated citizenry

Pierce v. Society of Sisters- US Supreme Court, 1925
-Compulsory Education Act in Oregon was challenged (required every parent to send children between 8-16 yrs to a public school) by Society of Sisters (private school/corporation) and military academy
-Primary and high schools and junior colleges, religious instruction of Roman Catholic
-Claims: 1. Rights of Parents to choose schools to get appropriate religious training
2. Rights of Schools and Teachers to engage in useful business or profession
3. Repugnant to Constitution
4. 14th Amendment Corporations rights-irreparable injury will result (deprivation of property without due process of law
-State has power to regulate all schools, inspect, supervise, etc.
-BUT the Act unreasonably interferes with the liberty of parents to direct upbringing and education of children
-COMPROMISE: **State may compel attendance at some school, but parents get to choose between public and private** (balances state, family, and private schools---balancing)
Private Schools have a property interest, Parents have a liberty interest in education of the child in other than public schools

Farrington v. Tokushige-US Supreme Court, 1927
-Hawaii Act made no foreign language schools allowed unless under written permit, pay fee, etc.
-Claims: 1. Deprivation of liberty and property without due process of law (5th Amendment) (members of various associations conducting the foreign language schools)
-No public funds, many students also attend public or private high school sin addition to foreign language schools
-Court held that school act goes beyond regulation of private schools, give affirmative direction
-**Rights of owners, parents, and children in respect of attendance upon schools by the Fourteenth Amendment**
Questions: Why does the court find there are no adequate reasons for the law?
Meyer v. Nebraska-US Supreme Court, 1923
-struck down Nebraska statute imposed criminal penalties on teachers who taught in language other than English or who taught language other than English to students below high school
-Legislation interfered with teachers right to engage in his profession and parent's rights to encourage such instruction

Questions Raised: If you're required to go to school, does the state have duty to be sure time is well spent? Does It mean students may opt out of certain activities? What about equal educational opportunity? Should state make private schools harder and more regulated (Farrington)? Easier (vouchers, etc)?

II. Compulsory Schooling, Public Policy, and the Constitution

Wisconsin v. Yoder, US Supreme Court, 1972
-Yoder and Miller-Amish children, aged 14 and 15, parents wouldn't send to school even though law required school until 16, no private school either, charged of violating the compulsory education law
-Claim: law violated their rights under 1st and 14th Amendments **Free Exercise Clause**-(WIS. SC-State failed to make adequate showing that its interest in establishing and maintaining and education system overrides the defendant's right to free exercise of their religion)
-Believed attendance was contrary to Amish religion and way of life, would be exposed to dangerous community, danger their salvation, experts about the Amish belief, etc.
-Court discusses Amish religion, way of life, firmly grounded in "central religious concepts"
-SC-State can impose reasonable regulations for control of basic education, but it must also yield to rights of parents to provide equivalent education in privately operated system (**BALANCING PROCESS** when it impinges on fundamental rights, such as free exercise)
-**Test/Free exercise-** 1. doesn't interfere with free exercise of religious belief or 2. there is a state interest of sufficient magnitude to override free exercise interest (compelling interest)
-impact on Amish religion is sever and inescapable because the statute compels them to act at odds with fundamental tenants of their religious belief, threat of undermining Amish community as it exists today
-states reasons for compulsory-need education to prepare citizens to participate effectively and intelligently in order to preserve freedom and independence and they need to be self-reliant and self-sufficient

court's response-one or two years won't serve these interests for Amish, separate community is keystone of Amish faith, Amish have been highly successful, they are productive members of society, even Amish children that decide to leave would not really be burdens on society because of educational short coming, Amish provide vocational education for their children, HISTORY and long successful segment of American society

-Dissent-not parents decision alone, look also to children, parental power of children,

Places Burden of Proof on State to Show Compelling State Interest of universal compulsory education
Use of Yoder for other religions precedent unsuccessful because court narrowly defined
Religion is constitutional status as First Amendment Right when parents and students contest state action (compelling reason to deny religious belief)

1. Individual beliefs are religious and sincerely held
2. State practice unduly restricts religious practices
3. State has no compelling interest that is important enough to overcome ind. Right

III. State Regulation of Non-Public Schools

-different regulations in different states

Fellowship Baptist Church v. Benton-8th Cir., 1987
-Baptist church schools challenge Iowa's compulsory school law
-Requirements of law: annual reports listing names of students, teachers, etc., public school or equivalent instruction by certified teacher, not entitled to Amish exemption
-Court examines religious beliefs
-Reporting Requirements-burden is very minimal on schools, outweighed by state's interest in receiving reliable information about students
-Teacher Certification-nothing requires agreement or acceptance of belief or value of others in the certification statute or regulations, human relations course doesn't advance or inhibit religion
-Equivalent Instruction-remanded because state recently adopted new standards
-Amish Exception-When same factors placed on balance that were considered in Yoder, the opposite conclusion is reached. Even though sincerity of belief, their believes much less woven into every day life, not as isolate, will compete for jobs, live in society, etc.

State of Ohio v. Whisner-Ohio St., 1976
-Claim Ohio compulsory statute infringes on their free exercise of religion as guaranteed by 1st and 14th Amendments
-minimum standards (born again Christians, biblical training, etc.), gave minimum times in which they could work on certain subjects, must conform to board of education policies, cooperation with school and community, etc.
-Must determine whether a regulation neutral on its face offends constitutional requirement for governmental neutrality because it unduly burdens free exercise of religion
-Minimum standards overstep boundary of reasonable regulation of non-public schools
-general education of high quality could be achieved by less regimented regulations
-rights of parents deprived because no more distinction between public and private
Denied Parents freedom of religion and right to direct children education, no compelling state interest for such burdens

IV. Home Schooling

-grew out of 1960s and 1970s reformers and grew significantly in 1980s.
-reasons: pedagogues (less structured, more experiential), ideologues (more structured and formal, values and beliefs, religious, etc.)
-Not generally considered to meet compulsory school attendance, authority to exempt home school must be given statutorily expressed
-States refusal to allow home instruction as valid exemption from compulsory school is not violation of equal protection of 14th amendment (rational relationship test) but still must be clear so as not void for vagueness
-conflicting authority on whether home school instructors must be certified, but majority says yes so long as standards don't encroach too much on religious beliefs

Care and Protection of Charles, Mass. S.C., 1987
-Children home schooled children but charged with truancy because the children were without necessary care and discipline and parents unable or unwilling to give such care
-question of accommodating parents rights with the governmental interest in education
-denied ability to home school because parents not competent to teach, children would spend less time on formal instruction and didn't want school to monitor or test children to see if they were making progress
-parents claim: statute void for vagueness because doesn't' provide standards and as unlawful delegation of legislative power to superintendent and school-also claim violation of RIGHT TO EDUCATE OWN CHILDREN by 14th Amendment (requiring school approval infringes on their right to control upbringing of children)
test-is the statute so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application?
-court says no, purpose is to ensure that all children should be educated, still protected from withholding approval for religious reasons, legislature may delegate to a board or officer the working out of policy details

-**liberty interests protected by 14th Amendment extends to activities related to child rearing and education (Pierce) but this right is not absolute and must be balanced with state interest**
-in order to ensure all children properly executed, the approval process is necessary
-still insists on procedural safeguards

Stephens v. Bongart, NJ, 1937
-Parents charged with failing to send children to public schools and no equivalent instruction
-statute required that they attend public school or equivalent instruction and during same times as public
-parents claim: violates 14th amendment because unreasonably infringes liberty
-test: does statute unreasonably infringe?
-legitimate exercise of police power (purpose-create educated citizenship, prevent ignorance, illiteracy),
-second issue was whether the home schooling was equivalent; court says no
-old textbooks, none in spelling, language, etc., instruction interrupted for household duties, visitors, etc., no daily papers or tests, etc., no organized supervision
-education of youth is of such vast importance and schools have important responsibility
-attributes of school attendance include social interaction, appropriate facilities, and other features, student interaction is an essential ingredient of school

State v. Massa-NJ, 1967
-parents charged with failure to send kid to school or provide equivalent instruction
-test scores higher than median, basic subject material in basic subject books, tests taken and lowest grade was B, state only focused on mother's lack of teaching certificate
HOLDING: state has not shown beyond reasonable doubt that there was failure to provide equivalent education

Issues Raised: Socialization? Testing? Do home schoolers have right to attend selected public school classes? College Admission?

V. Discrimination and Private Education

Runyon v. McCrary-US SC, 1976
-Does 42 USC 1981 prevent private schools from denying admission to Negro children?
-Negro parents responded to add in yellow pages, applied, form letter saying unable to attend because school was not integrated, another school sent in mail addressed to resident and when parents called, they explained that they only admitted white students
-found discrimination, violates § 1981, which prohibits racial discrimination in the making and enforcement of private contracts, property, etc. (applies to private acts as well as public)
-Does § 1981 as apply violate free association and privacy or parents right to direct education of children?
Freedom of Association-Parents have right to send kids somewhere that promotes idea that racial segregation is desirable and children have equal right to attend such institutions but the practice of excluding racial minorities is not protected by same principle.
Parental Rights-**While parents have constitutional right to send children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide children school education unfettered by governmental regulation**
HOLDING: Private schools that advertise publicly cannot discriminate on basis of race
14th amendment requires state action, § 1983, which implements 14th amendment, also requires state action, but if you're performing a public function then subject to both 14th and § 1983.
-but under Pierce, schooling is not strictly a public function
-if private schools were considered state actors, then the line between public and private would blur and take away parent rights
-court's approach-§ 1981 enforcement under 13th amendment which does not require state action

Brown v. Dade Christian School, 5th Cir. 1977
-challenged Dade Christian School under § 1981, claiming racial discrimination in denying admission to school, Dade said religious beliefs that socialization of races equal interracial marriage and that the free exercise clause should prevail against private interests
-plurality-where alleged discriminatory action taken by institution, it was inappropriate to scrutinize individual beliefs, violates § 1981
-major vs. minor religious interests
-free exercise balancing test

Ohio Civil Rights Commission v. Dayton Christian Schools, US SC, 1986
-Schools brought action under § 1983, seeking to enjoin state proceeding against Dayton by civil rights commission
-Claims: free exercise clause and establishment clauses prohibit commission from exercising jurisdiction over it or from punishing it for engaging in employment discrimination

-teachers contract not renewed because of belief that mothers should state at home with preschool aged children, teacher contacted attorney who send letter to superintendent, suspended immediately for challenging decision in a manner inconsistent with normal dispute resolution doctrine
-teacher filed complaint with Ohio civil rights commission-sex discrimination
COURT-Dayton will have oppty to present claims, but even religious schools not exempt from state regulations, claims can be raised in state court therefore no injunction

VI. State Aid to Private Schools

-Pierce extended: right to state financed non-public education?
-must a government subsidize parental choices to send kids to private schools?

A. Vouchers

I. Zellman case

Zellman v. Simmons-Harris-SC US, 2002
-Does the voucher program violate the Establishment clause of the Constitution? NO
-Financial assistance to attend private schools and tutorial aid for students remaining
-any private school may participate
-Establishment Clause of 1st Amendment, applied to states through 14th Amendment, cannot enact laws that have "purpose" or "effect" of advancing or inhibiting religion
-purpose clearly to provide educational assistance to poor children in failing public school system
-so issue: does the law have the effect of advancing or inhibiting religion?
-Don't provide aid directly to religious schools, but rather a question of private choice (gov't reaches religious schools only as result of independent individual choices), financial incentives don't skew choices
CONCUR-program of true private choice does not violate establishment clause
-all schools able to participate, no financial incentive, no implication of government endorsement
-majority and dissent agree on how to look at money spent
-should it matter that 96% vouchers go to religious schools
Thomas-establishment clause doesn't apply because state and Congress is not making a law/choice
MAJORITY-1. Free Choice and Neutrality-Constitutionally permitted
2. Thomas-constitutionally required
DISSENT-Establishment clause requires separation
-do private schools now become public

II. Book notes on Vouchers

-some promote school choice and say that private schools are autonomous, principals are strong leaders, different environment, private schools possess more effective characteristics
-Experiments in Milwaukee and Cleveland, both challenged in court
-Wisconsin SC upheld constitutionality that includes religious schools, SC declined to hear it (didn't violate establishment clause even though states sent money directly to religious schools including nonreligious) because checks had to be endorsed by parents for school, so funds flowed only as a result of independent choices
-this argument was rejected in Maine and Vermont and found the direct payments of tuition was an impermissible establishment of religion
-Arizona-tax credit is fine
-Other legal challenges: Ohio SC-single subject issue (Zellman case)
-supporters of vouchers-give poor kids a chance to get ahead, competition would improve public schools
opponents-voucher plans would skim off brightest students and most involved parents and further undermine public schools
-mixed results of research, varying conclusions, problems of unmeasured selection bias, equal opportunity, etc.

B. Educational Governance and the Law

-how education should be governed
-traditionally state and local control mostly; federal was limited, but recently there has been more of role for federal government

I. No Child Left Behind Act

Principles-increased accountability for results (standards, annual testing, etc.), more choices for students (if in under achieving school, have oppty to transfer to adequate school), greater flexibility for states, districts, and schools with federal funds, focus on what works
-regulate only when necessary , flexibility incentives, competitive grant programs
-Criticism-requirement of testing could undermine requirements to have standards based assessment systems, gives too much flexibility that may cause children to be left behind, problems with students with limited English, voucher issues (free establishment, exercise, affordability, civil rights, accountability), small amounts of resources
-problems with testing: too standardized, states may design own tests, leads to skewed results, pressure on teachers and students, teach the tests, not the class, etc.

-effort to walk fine line between state an local control
-National standards-testing/accountability, transfer in failing schools

Testing: purpose-find out how well school is doing. Issues: who develops the test? Can we protect children form results? Experiment? Teaching to test?

II. Educational Malpractice

Peter W. v. San Francisco Unified School District, Cal. App., 1976
-Can a person who claims to have been inadequately educated while a student in a public school system, state a cause of action in tort against the public authorities who operate and administer the system? HOLDING: NO
-claimed: negligence, carelessness, for allowing him to pass grades, not finding reading disabilities, placed in wrong classes, allowed him to graduate
-Court: public entity vicariously liable only if employee would be personally liable
-new tort liability only if comprehensible and assessable within existing judicial framework
-this is not the case here-no readily acceptable standards of care, cause, or injury and ultimate consequences is beyond calculation
Problem with delineating an actionable duty, cannot identify workable rule of care

III. Charter Schools: A Hybrid Model
-school choice move prompted innovation of charter school, which seeks to foster choice and experimentation in the public education system
-Differences in charter schools throughout the states
-policy reasons: some are to provide outlet for students unhappy with public schools, others are a way to educate at risk students, incubators for new ideas that can be adapted by public schools
-California-second state to adopt, teacher union politics liberalized the law, charter schools are of significant presence
-Arizona-state abdicates it regulatory role; broadest and most charter promoting statute in nation, multiple routes to grant charters, no limit to total number, no teacher certification standard, testing and anti-discrimination regulations are waived, fixture in landscape, public accountability distinguishes charter schools from vouchers, parents are real regulators and states role should be limited to financial oversight, funds given directly to schools (each school is its own district)
-no serious judicial challenge, but some critics question its effectiveness
-public or private?

IV. Other Privatization Initiatives
1. For Profit Management of Public Schools-contracting out, which have had mixed reviews
examples: Education Alternatives, Inc., Edison Project
2. Commercials in the Classroom: The case of Channel One
-schools enter into marketing agreements with business in exchange for support
-Channel One-ten minutes of current events programming and two minutes of commercials broadcast daily in classrooms, can get expensive technical equipment for free if they agree to show it, directed at a captive audience (legal challenges and legislative action
Dawson v. East Side Union High School District-Cal., 1994
-Channel One was challenged saying it had not incidental to the educational value but court upheld because students could opt-out
-other issues with commercialization in schools (sponsorship of athletic events, sole contracts with certain companies, soda, etc)
-privatization covers a wide array of market initiatives in public education, some designed to promote systematic reform, others provide infusion of funds on ad hoc basis
-ongoing interest in decentralization of educational policy making, authority back to legislators and administrators and away from courts and willingness to experience with private alternatives.

C. Socialization and Student and Teacher Rights
-If American system of government is to survive and the nation is to be secure, it is necessary to educate and socialize each new generation in those values and attitudes essential to the operation of American democracy.
-this is strong enough to warrant compulsory education but the question may be one of balance with personal freedom and individual autonomy.
-debates over authority and legal entitlements in public education
Legal Issues with Socialization are different with respect to public and private schools
-courts use much more demanding "state action" test for private schools (Rendell-Baker), has to be some state action that is the basis of the complaint (can't just be enough that it is a state agency), immunizes private schools from many socialization challenges

I. State Action:
-Except for 13th Amendment the Constitution guarantees of individuals only from governmental action, so private schools control student and teacher behavior in ways and for reasons denied to public schools
-Even if private schools regulated by state or financial support from government, they still may not be considered governmental action

-Within the context of public schools, state action doctrine has been interpreted to include actions of principals and teachers even when not expressly authorized by the school board or legislature

example: Rendell-Baker v. Kohn- counselor hired under federal grant and five teachers discharged by nonprofit institution located on privately owned property who served children that had problems in completing public high school, epical needs, etc., all students had been referred to it by public school districts or department of health, 90% of funding was public, held that they did not act under the color of state law (Burger-core issue is whether the school's action can be seen as state action)-not compelled or influenced by any state regulation

II. Religious, Political, and Moral Socialization

-After WWII, religion in public schools began to change dramatically

examples: Engel- 22 word prayer used daily in NY classrooms was unconstitutional as violation of establishment clause, Schempp-Bible reading and school prayer violate establishment clause

A. Secretarian Socialization

School Prayer and Moments of Silence

Wallace v. Jaffree- US SC, 1985

-Alabama statute that authorized a moment of silence for meditation or voluntary prayer was held unconstitutional as a violation of the establishment clause

-(made applicable to states by 14th amendment)

-**First Amendment intended to curtail power of Congress to interfere with the individual's freedom to believe, worship, and express himself—14th Amendment- prohibits any state from depriving any person of liberty without due process of law-this imposes same substantive limitations on states power to legislate that 1st Amendment always imposed on Congress**

-individual freedom of conscience protected by 1A embraces the right to select any religious faith or none at all

-freedom to choose own creed is counterpart to right to refrain from accepting a creed established by the majority

-Lemon test-1. secular legislative purpose; and 2. principal or primary effect must not advance or inhibit religion; and 3. no excessive government entanglement with religion

-In this case, the first criteria is most plainly implicated, and don't even have to consider the second or third criteria

-**Purpose Test-Was the government's actual purpose to endorse or disapprove of religion?**

-in this case-yes. Motivated entirely for religious purposes, no secular purpose

-legislative record-purpose was to return voluntary prayer to schools, no other

-relationship with other two statutes

-Concurrences: Discusses the tests, one says only good working test

-Dissent: First Amendment doesn't include statues authorizing moments of silence because same result as if a student merely asked "May I pray?"

-Dissent (Rhenquist): establishment clause was only meant to be a wall of separation between church and state, which has now become a "useless" guide; Lemon test-problems with it, not grounded in first amendment, not adequate standards, state has secular interest in regulating manner in which public schools conducted, etc.

-District Court validated and said states can do whatever they want (Thomas opinion in Zellman-establishment clause is different when applied to states vs federal government)

-Court of Appeals reverses and says violates, SC agrees

Lee v. Wisman, US SC, 1992

-clergy members are allowed to speak at invocation and benediction prayers as part of graduation

-Issue: Is including clerical members who offer prayers as part of the graduation ceremonies a violation of the First Amendment?

-Holding: yes

-graduation ceremony is voluntary, but not really (peer pressure, etc.)

-government involvement is pervasive, doesn't matter if good faith,

-heightened concerns about protecting freedom of conscience from coercive, subtle pressure

-must either participate or protest

-violation of establishment clause (school is compelling a student to participate in a religious exercise)

-concur-coercion doesn't matter-state shouldn't do it at all (engage or participate)

-concur-endorsement of religion

-Dissent-meaning of establishment clause is to be determined by reference to historical practices and undertakings, must be construed in light of government policies of accommodation, etc of religion that is part of our history/TRADITION

What prong of Lemon test does coercion represent?

Scalia-majority doesn't look to history and it would destroy longstanding traditions

-What about giving off school for other religious holidays?

-how to establish neutrality

Student led prayer at football games-Santa Fe v. Doe-violation of establishment clause vs. student's right to free expression?

Evolution and Creationism issues

Edwards v. Aguillard-US SC, 1987

-LA statute-forbids teaching of evolutionism unless also teaching creation science

-parents of children, teachers, and religious leaders, challenged the act saying violates establishment clause
-legislature says purpose of act is secular, to protect academic freedom
-Lemon Test- 1. secular purpose 2. primary effect neither advances nor inhibits religion 3. no excessive entanglement (if violates any one, it is invalid)
-Reasons to apply to schools-families entrust schools with education of children with the understanding it won't be use to advance religious views, students are impressionable, attendance Is involuntary, state has great authority and power over mandatory attendance and teachers are role models and children face peer pressure
-PURPOSE-promotion of religion in general or advancement of particular religious belief
this is the case here; no secular purpose; even though state says to promote academic freedom of teachers to teach, the court found this wasn't the case, etc
-legislative history-purpose was to narrow science curriculum, wanted neither to be taught, which does not promote comprehensive scientific education
-no flexibility given to teachers that they didn't already have
-Analogous to statute in Wallace-no secular purpose identified that wasn't already served by another statute in place
-CONCUR: Act is unconstitutional but states and school boards should have responsibility for determining policy of public schools, and similar statutes may be okay, but this statute legislative history and language shows that the purpose is to advance a particular religious belief
-DISSENT-legislation shouldn't be invalidated purely for motive but rather for effects
-this does not advance religion, and even if it did, it may be required by free exercise,
Lemon test is wrong
-PURPOSE TEST-majority assumes the purpose is teacher's academic freedom.
-Scalia's dissent says its not teachers academic freedom, but students
-IF the goal is neutrality, what other law could there be?
Smith v. Board of School Commissioners of Mobile County, 11th Cir., 1987
-Alabama public schools approved textbooks, which were argued to establish the religion of secular humanism and violation of 1A
-district court found secular humanism was a religion, SC has never provided test to explain what it was
-no showing of violation in this case
-using three prong Lemon test, no question of religious purpose or excessive entanglement, so the issue is whether the use of the textbooks has the primary effect of advancing or inhibiting religion
-**Effect Test-irrespective of government's purpose, does the practice under review in fact convey a message of endorsement or disapproval?**
-books-purpose is undisputedly nonreligious and the message conveyed is not one of endorsement of secular humanism or any religion, but rather values such as independent thought, tolerance of views, maturity, self respect, self reliance, etc
. -just because some material is offensive doesn't make it violation of establishment
-establishment clause doesn't require equal time for religion (no affirmative obligation to speak about religion)
-What constitutes a religion? Is secular humanism a religion?

Mozert v. Hawkins County Board of Education, 6th Cir., 1987
-Holt reading series was adopted, critical reading issues, stories about mental telepathy, etc.
-Born again Christians challenged, found themes objectionable, alternative reading program, later the school board voted to disallow all alternative reading programs and require the Holt series
-Claim: sincere religious beliefs contrary to values taught or inculcated by the books and it is violation of religious beliefs to permit their children to read them, because they were forcing to read the books, it is a violation of the free exercise of religion protected by 1 and 14th amendments.
-Court: Must decide if a governmental requirement that a person be exposed to ideas he finds objectionable on religious grounds violates the free exercise clause of the First Amendment
-element of compulsion-didn't have to declare a belief, communicate by words and sign their acceptance or make an affirmation of a belief and attitude of mind
-no showing they had to do role play, make up chants, read aloud, etc.
-Plaintiffs try to say Yoder held that mere exposure to materials that offend religion is unconstitutional, but court says that Yoder is not a general rule and was only based on those specific facts, narrowness of holding, and parents in that case didn't want kids to go to school at all, here parents could send to private school, church school, home school (no impossibility of reconciling the goals of public education with the religious requirements)
-values of public school teaching are essential for democratic society, including tolerance of viewpoints
-no unconstitutional burden on free exercise of religion
-CONCUR-even if reading books were a burden on religion, they serve a compelling state interest
-District court-mere exposure to materials violated free exercise clause
-Distinguished from Yoder because isolated community, etc.
-Why isn't opt out provisions constitutionally compelled?
-What about child's own interest in their future?
-Why common to allow opt out for sex education but not evolution?
-parental vs. educational function
-is accommodation of one religion equal to establishment?

B. Nonsecretarian Socialization
-issues with library book selection
-governmental interest such as loyalty and patriotism issues
-who controls socialization?
-students vs. parental rights?
-Meyer-today-issues with due process of fourteenth amendment, common for exemptions from secular education courses

Ritual and Coercion of Beliefs
West Virginia State Board of Education v. Barnette- US SC, 1943
-salute to the flag which was regular part of program, and all students and teachers required to participate in saluting the flag.
-failure to do so=insubordination
-Jehovah's witnesses asked to be exempt from this, saying it violated their religious beliefs
-court: the saluting of the flag is an affirmation of belief and state of mind
-Compulsory saluting the flag invades First Amendment rights
-Dissent: no religion shall either receive the state's support or incur its hostility. Religion is outside the sphere of political government, but this does not mean that all matters on which religious organizations or beliefs may pronounce are outside sphere of government/an act promoting good citizenship and national allegiance is within the domain of governmental authority, parents can choose to send kids to different schools, etc.
Free exercise of religion or freedom of expression?
-coercion?
-what about national anthem? Patriotic exercises for memorial day? Patriotic holidays?

Control of Curricular Materials and Texts
Board of Education, Island Trees Union Free School District v. Pico, US SC, 1982
-School board decided to remove books from high school and junior high library (taking some of the recommendations of a committee and disregarding others)
-claim: § 1982, taken out of library because they offended personal moral tastes and not because the books lacked educational value/ and denied rights under First Amendment
-constitutional limits on power of state to control curriculum and classroom
1. Does the First Amendment impose any limitations upon discretion of petitioners to remove books from library? And 2. If so, do the affidavits and other evidence, raise a genuine issue of fact whether petitioners exceeded those limitations?
-Public schools vitally important for inculcating fundamental values, schools boards must apply curriculum in such a way as to transmit community values, but the discretion must be consistent with the First Amendment
-courts shouldn't intervene unless basic constitutional values are directly and sharply implicated in those conflicts
-right to receive ideas is necessary in order to have meaningful exercise of free speech, press, politics
-therefore, school boards don't have absolute discretion and there is a genuine issue of material facts so it must be remanded
-DISSENT: state and local school board responsibility
-Classroom: Marketplace of ideas vs. inculcation of values
-motivation
-dissent: court usurping proper role of school board
-Rehnquist- Board hasn't precluded discussion, just taken them out
-plurality draws line between removal decisions and what books to purchase

Multiculturalism, Discrimination, and the Public School Curriculum
Crosby v. Holsinger
Johnny Reb-former cartoon symbol mascot of high school, principal removed mascot after complaints from black students and parents, other students protested, censorship claim
-Did nothing to stop the protests of elimination of Johnny Reb
-There is a difference between tolerating speech and affirmatively promoting it
-school symbol or mascot bears the stamp of approval of the school itself, so school authorities can disassociate the school from it

-Is this consistent with Pico and Barnette?
-sanitized textbooks issues
-can schools bar confederate flag symbols on campus?
Hidden Curriculum-rules that prescribe certain behavior for teachers and students, hair and dress codes, mandatory uniforms, marriage, pregnancy, immorality-free speech or privacy?
Liberty in 14th Amendment?
READ THIS SECTION AGAIN
HIDDEN CIRRICULUM-role modeling, marriage, pregnancy, immorality, hair and dress codes, marketplace o f ideas v. inculcation of values

Newdow

II. OPENING SCHOOLS TO ALTERNATIVE IDEAS

-to what extent do public schools have obligation to tolerate ideas, often conflicting, from teachers, staff, and students
-governmental powers vs. assertion of individual rights
-freedom of speech and association

A. Students' Rights of Expression

-informally by discussions, wearing symbols, etc.
-tension between school values and personal values
-many free speech cases came in 1960s and 1970s when student activism peaked

1. Student Speech

Tinker v. Des Moines School District, US SC, 1969
-Tinker and Eckhardt- 15 and 16, high school, Tinker-13 middle school
-group met at Tinker's home, wanted to publicize their objections to Vietnam by wearing black armbands during holiday season and by fasting
-principals of school became aware and adopted policy that any student wearing armband to school would be asked to remove it and suspended if refused.
-Wore armbands to school, sent home until they would come back without wearing, didn't come back until after the holidays
-Claim: § 1983, injunction and nominal damages, dc refused-it is symbolic act within free speech clause of first amendment, close to pure speech.
-**Teachers don't shed their constitutional rights to freedom of speech or expression at the schoolhouse gates, but states and school officials also have authority to prescribe and control conduct in schools**

-problem when first amendment rights collide with rules of school authority

-"Pure Speech" (vs. clothes, hair style, deportment, etc.)
-silent, passive expression of opinion, no disorder or disturbance by petitioners (only a few students wore them, no work or class disrupted, a few hostile remarks made, but no threat of violence)
-Even though a fear of disturbance, that's not enough, because any variation from majority may cause fear, any word spoken, etc. and the constitution says we must take this risk
-state must show more than mere desire to avoid discomfort and unpleasantness

test-materially and substantially interfere with the requirements of appropriate discipline in the school

-all they did was wear armbands/no substantial interference
CONCUR: First Amendment right of children is not coextensive with adults (not full capacity for individual choice)
DISSENT: Student and teachers should not use the schools as a platform for free speech, symbolic or pure, and the courts should not decide this
-there were comments, warnings, etc., other evidence to show it brought much attention, armbands did take students minds off their work and diverted them to thoughts about the war
-under 21 or 18, can't even vote, etc.
-DISSENT: School officials should be allowed broad discretion; burden should be to show that a school measure was motivated by other than legitimate school concerns

-symbolic act, close to pure speech? (or non-speech?)
-Rights of children –less than adults?
-Rights of teachers (Tinker like claims by teachers)-if role models and communicators of values, should they receive less protection?
-equal protection case? Rights of students? Parents' rights to express through students? Intellectual inquiry in education? School is limited public forum (marketplace of ideas)?
-Substantial Disruption Standard
-Defining Disruption and Impairment
-Heckler's veto-must the disruption arise from the student speaker's conduct or can it result from others conduct to the speaker?

-class notes: purse speech-maximum first amendment protection
-majority-one of schools values is supposed to be inculcation and respect for American way of life (diversity of ideas, etc.)
-Black's dissent: idea of schools is to gain knowledge and learn
-Is this case consistent with Pico?
-Pico-if good faith reasonable decision and not politically motivated, then its fine

Bethel School District v. Frazier, US SC, 1986
-Does the First Amendment prevent a school district from disciplining a high school student who gives a lewd speech at a school assembly? NO
-gave a speech, many were fourteen, references to sexual things, teachers informed him beforehand that they were inappropriate, students reactions, etc.,
-school rule-prohibits use of obscene language (if materially and substantially interferes with the educational process)
-suspended for two days
-claim: violation of First Amendment freedom of speech and sought injunctive relief and monetary damages under § 1983
-DC-violation, vague, overbroad, violation of due process clause

-Court of Appeals agreed, Tinker applies to this case
-Supreme Court: Tinker is different because there it did not concern speech or action that intrudes on work of schools or other students rights
-fundamental values must include tolerance of diverse viewpoints, but also must be considerate of others
-**must balance the freedom to advocate unpopular and controversial views in schools with society's interest in teaching students the boundaries of appropriate behavior.**
-different with children and adults, this speech was plainly offensive to teachers and students, insulted teenage girls, could damage young children, etc.
-Pico case-school board has authority to remove books that are vulgar (in loco parentis), to protect children from exposure to sexually explicit speech
-DISSENT: failed to show disruptive behavior
-DISSENT: should have gotten fair notice

-Is Frasier consistent with Tinker?
-Difference because school assembly? Student officers? Speaking or wearing something?
-political speech vs. nonpolitical speech? Context vs. content? Vulgar vs. not?

2. Student Newspapers

Hazelwood School District v. Kuhlmeier, US SC, 1988
-paper, journalism class, gave funds from board, etc.
-principal objected to two articles about pregnancy and impact of divorce on students
-principal claimed that sexual activity references were inappropriate, may identify pregnant girls, parents of students divorced should be given opportunity, etc.
-said no time to make changes before press run, so he just eliminated the two pages on which these articles were printed
-Student's don't shed rights at schoolhouse gates, but schools also don't need to tolerate speech that is inconsistent with basic educational mission (Fraser, for example)
-Is the paper a public forum?
-court says no because
-public schools don't have same attributes as streets, parks, other traditional
-**School are only public forums if school authorities, by policy or practice, open facilities for indiscriminate use by the general public or by some segment of the public, such as student organizations**
-No public forum if facilities reserved for other intended purposes, then school can impose reasonable restrictions on speech of students and teachers
-policy in this case: control over newspaper, part of education, classroom activity, principal was final authority, school officials had ultimate control, purpose was to teach leadership responsibility
-therefore, school officials could regulate in any reasonable manner
-school would be affirmatively promoting a particular student speech, part of school curriculum, so educators have greater control, a school may disassociate itself from speech that would interfere or that is poorly written, profane, etc.
-nation's youth is responsibility of parents, teachers, and state and local school officials, not judges
-Principal acted reasonably because he could have concluded that the students had not sufficiently mastered the portions of the class that pertain to treatment of controversial issues and personal attacks, need to protect privacy, and restraints imposed on journalists within a school community
-DISSENT: Mere incompatibility with schools' message is not sufficient justification for suppressing student speech, no blanket censorship
Tinker standard should apply, no material disruption in this case, etc.

Distinction between personal and governmental expression-two ways students may attempt to counter socialization
-substantial disruption? Might the principal have foreseen this? If libelous, can schools delete it even if no substantial disruption?
-Standard of review of principals decision: reasonableness?
-Should it be the same as the Pico standard- (good faith educational decision)?
-Advice to school authorities planning to set up and sponsor a school newspaper?
-see Buss, 74 Iowa L. Rev. 505, 522, and 16 JL and Educ. 1 1987
Some state laws guarantee freedom of expression in school papers

B. Changing the School's Message

-Should teachers be able to convey only those ideas approved by the school board?

1. Academic Freedom

-for teachers, cases have not developed a body of constitutional doctrine
-Teachers are not free to transform their assigned courses into something other than what the school intended them to be
Cary v. Board of Education, 10th Cir. 1979
-five teachers claimed violation of rights under First and Fourteenth Amendments when ten books were banned from use in the language arts classes
-Tenured teachers, elective courses (contemporary literature, poetry, etc.)

-committee was set up to review books used in the courses, meeting, open discussion, public display, etc., and ten books that had previously been used were excluded from the approved list
-books not approved are not purchased, used, and no credit to individuals for reading
-teachers first amendment rights to conduct their classes as they see fit in exercise of their professional judgment, but this is not absolute broad latitude
-if board can decide not to offer a class and can select the major texts of the class, why can't it exclude books from being assigned?
-does not prohibit mentioning the book in class

-Freedom of inquiry and research, freedom of teaching, and freedom of extramural utterance and action (premised on idea that truth is discovered through research and this is subject to debate)
-education ought to liberate students and open minds to new ideas
-is academic freedom a constitutional right protected by 1A or is it an educational policy subsumed within more general concepts of First Amendment?
-If it is a right, who holds it, school districts and universities or teachers and professors?
-derived from students rights to learn and hear?

Class Notes: Court-authority rests with school board
-who has greater academic freedom, students or teachers
-students-have to go to school, teachers can find other jobs
-teachers-need more freedom to allow students the freedom

Parduci v. Rutland, MD Ala
-absence of general policy
-teacher assigned Vonnegaut's "Welcome to the Monkey House"
-principal told her to stop, promotes killing elders, free sex
-teacher said she felt she had professional obligation to teach it
-dismissed from her job for assigning disruptive materials
-Teacher claimed first amendment right to academic freedom
-not absolute/must be balanced against interests of society
-not obscene
-∆ failed to show either that assignment was inappropriate for high school or it created a significant disruption

Boring v. Buncombe County Board of Education, 4th Cir.1998
-teacher chose the play Independence which had single parent family, lesbian, illegitimate child, notified principal about her choice
-play won awards, performed for a class, got permission slips
-principal told ⌈ they couldn't perform in state competition
-Ivey agreed later, with certain portions deleted
-request transfer of teacher for personal conflicts-failure to follow controversial materials policy in producing play
-⌈-controversial materials policy didn't include dramatic productions (this was later amended)
-claims violation of freedom of speech
-court-this is an ordinary employment dispute, not speech of a public concern, school, not teacher, fixes curriculum

What about a standard that said teachers may not introduce materials that frustrate the legitimate interest of the school authorities in regulating curriculum? Teachers have right to choose method and/or materials that serve a demonstrated educational purpose as established by weight of opinion of teaching profession? Broad range of factors?
-see problems on page 258
-Institutional academic freedom

-Academic freedom: teachers can switch jobs, but children are compelled to be in school
-Does academic freedom apply to: telling a professor he can't teach 1A in Con Law, grading outside curve, attendance requirements, grading exams, tenure decision, student group invitations, 911 lesson plans
-university setting-linked with tenure, teachers free to express even taking controversial positions, freedom of inquiry and research, freedom of teaching, etc.

-are we looking for good faith decisions of schools? If so, how should Hazelwood case have been decided?

2. Access to School Facilities

Board of Education v. Mergens, US SC, 1990
-Equal Access Act, 20 USC 4071-does it prohibit a school from denying a student religious group permission to meet on school premises during non-instructional time and if so, does it violate the establishment clause of the first amendment?
-students at high school, clubs-written policy concerning formation of student clubs (present request to official)
-request to form Christian Club with same privileges and terms as other groups except for no faculty sponsor was denied. School said you needed a faculty sponsor and having one would violate the establishment clause

-[] sued for violation of equal access and violation of first and fourteenth amendments
-trial court said no limited open forum, appeals court reversed and said many clubs, non-curriculum related
-equal access policy doesn't violate establishment clause (passes Lemon test)-secular purpose, no primary effect of advancing religion, no excessive entanglement
-limited open forum-whenever granted for one or more non-curriculum related student groups to meet on school premises
-meetings-voluntary, student initiated, but not school sponsored and not controlled or conducted by school persons)
-purpose of act is to protect from discrimination with speech
-DISSENT: Congress didn't intend to issue an order to every public high school stating that if you sponsor chess or scuba diving, etc., without having formal classes in those, you must let every religious, political, and social organization in (Congress intended much narrower forum)
-what is curriculum related? Athletics? Drama Club? School Play?

Widmar v. Vincent- US SC, 1981
-state university that makes its facilities generally available to registered student groups may not deny use of its facilities to a student religious group (Equal access policy does not violate Lemon)-open forum policy would have secular purpose and avoid entanglement with religion, primary effect of public forum (open to all forms of discourse) is not to advance religion even though religious groups would benefit from it (this benefit is incidental)
-denial of access of facilities was violation of free speech clause

-Public School District violated free speech when it denied a church access to school facilities after hours to show film that contained religious viewpoints when the school was open for social, civic, and recreational uses of its schools after hours (subject matter-child rearing-had not been placed off limits to other non religious groups)
-no danger of establishment of religion, not during school, not sponsored by school, and was open to the public (Lamb's Chapel v. Center Moriches Union)

-once a state has opened a limited public forum, it may not discriminate on the basis of viewpoint *(Rosenberger)*
-therefore a university could not deny funding to Christian newspaper if no other student organizations that produced newspapers were denied.
-different from Widmar and Mergens because it involves funding?
-does equal access act permit religious groups to meet during lunchtime? (non instructional)
-can it require student leaders to be Christian?
-Can school apply discrimination rules to a club?
-What about mandatory student fees? Constitutional if there is viewpoint neutrality
-minority views are treated same respect as majority views

Ambach v. Norwick-US SC, 1979
-Can a state, consistently with equal protection clause of fourteenth amendment, refuse to employ teachers who are aliens eligible for citizenship but who refuse to seek naturalization?
-NY law forbids certification if not a citizen unless manifested intent to apply for citizenship
-Two teachers met all educational requirements but refuse to seek citizenship and were denied certification
-general principle: **Some state functions are so bound up with the operation of the state as a governmental entity as to permit the exclusion of those functions of all persons who have not become part of the process of self government**
-example: governmental positions, police force (rational basis)
-oath of allegiance can't take place of legal bond of citizenship
-Is teaching in public schools a governmental function?
-look to role of public education and degree of teacher responsibility and discretion
-yes; teachers performing task that goes to the heart of representative government
-like police function, it serves a fundamental obligation of government to its constituency
-teachers play role in developing attitude towards society and government, role of citizenship, direct day to day contract, wide discretion over material, help fill broader function of public school system, including political and social subjects
therefore, **legitimate state interest, and rational relationship**
DISSENT: state classifications based on alienage are inherently suspect and subject to close judicial scrutiny, no showing that they are otherwise unqualified, have lived hear for many years, married to American, each willing to take an oath, pays taxes, lives in American community, etc.
-no different than attorneys (can't restrain aliens from taking bar exam)
-Class Notes: Strict Scrutiny doesn't apply to aliens as public employees
-therefore, uses rational basis test because teacher's functions are inculcating values

-Standard of review-stricter than rational basis if suspect class (such as race or religion)-because "when a class of people has been saddled to political and social disabilities and subjected to unequal treatment," subject to more judicial inquiry---
-Are aliens a suspect class? (Graham) but majority doesn't adhere to this
-Freedom of association-Shelton-statute requiring teachers to list organizations they belong to violates freedom of association

4. Teacher's Rights of Expression

-Pickering- teacher in IL, dismissed for sending a letter to newspaper related to tax increase which criticized board and superintendent, because it was detrimental to efficient operation…
-Balance between interest of teacher, as a citizen, in commenting upon matters of public concern, with the interest of the state, as an employer, in promoting the efficiency of the public services it performs through it's employees
-Statements were in no way directed toward anyone he would normally be in contact with, no question of discipline by immediate superiors or harmony among coworkers, not so much with board and superintendent
-no showing that statements were per se harmful to the school
-Teacher made erroneous public statements upon issues of public attention which are critical of his ultimate employer but which are not shown or presumed to impede his performance of daily duties in classroom or regular school operation.
-**Therefore, the interest of school in limiting teachers contributions to public debate is not significantly greater than its interest in limiting a similar contribution by a member of the general public**
-RULE: Absent showing of knowingly or recklessly making false statements, a teacher's exercise of right to free speech may not be basis for his dismissal from public employment

Pickering Standard-does the school employee have the kind of close working relationship, which requires personal loyalty and confidence for the employee to carry out his functions? *How is this different from Tinker test?*

Cox v. Dardanelle Public School District, 8th Cir. 1986
-Cox, old teacher, and new principal, Dillard, had many difficulties, and she became more active in DEA organization, Dillard implemented several changes in regulations under which teachers performed duties, teachers disagreed, dismissed because of her expression of disagreement over educational policies
-**Whether a public employee's expressions are constitutionally protected involves two step inquiry: 1. is the employee's speech a matter of public concern? If yes, 2.Pickering- balance the interest of the employee as a citizen and the state as an employer in promoting efficiency**
-public concern-considered in light of content, form, context of given statement-focus on the role the employee has assumed in advancing the particular expression: as a citizen or as an employee?
-in this case it touched on matters of public concerns and was more than criticisms of internal policies, so it was a matter of public concern entitled to protection
-balancing test- disruption with colleagues? Affected performance? Willful disobeying directives? Disrupting relationship with Dillard? (no-disruption with relationship was from his policies not her speech), relationship with principal is not such personal and intimate of superior and subordinate that criticism of superior by subordinate would seriously undermine effectiveness of working relationship.

Lacks v. Ferguson Reorganized School District-
-fired as teacher because she allowed her students to use profanity in poems and plays they wrote for her English class
-claims: violation of due process and First Amendment
-8th Cir-School board has right to establish and require enforcement of a rule which prohibits classroom profanity in any context and Lacks had enough notice (cites Bethel-public education must inculcate civility, Tinker-students don't shed rights at gates, but their rights are balanced against society's right to teach students boundaries of socially appropriate behavior-Fraser)

D. The Legalization of Dispute Resolution in Public Schools

-discipline processes for public school teachers and students and constraints that courts and legislatures impose on these processes
-what degree have courts, legislatures, and administrative bodies contributed to legalization of dispute resolution in public schools?
-**legalization**- tendency to discover, construct, and follow rules as a method for settling disputes and to adhere to prescribed procedures in their formulation and application

Governmental Regularity and School Rules

-must schools act on basis of preexisting rule before a student or teacher may be punished for violating an institutional norm? (does due process clause of 14th Amendment require the prior enactment of such rules in order to assure that those in schools have notice?)
-even if this was the case, may only be applicable to the most severe sanctions
-some courts have held that some behavior is so plainly disruptive of school life that those who engage in some behavior knew or should have known they would be subject to sanctions; school officials must have some flexibility to respond to unexpected
-School officials generally may discipline students for conduct disruptive of educational process or that endangers health and safety of students and school personnel without having adopted a prior rule forbidding behavior and specifying the penalties (Richards, Hasson, Fraser)
-can rules be void for vagueness? (**persons of common intelligence must necessarily guess at its meaning and differ as to its application)**
-largely limited to criminal, courts generally decline to extend to school rules
-over breadth doctrine**-is the rule applicable to some constitutionally protected conduct that may not be prohibited under any rule?**

Gathering the Evidence to Prove the Infraction

New Jersey v. TLO- SC, 1985
-teacher saw two students smoking in bathroom, were taken to office, principal went through purse, found cigarettes, rolling papers, marijuana, drug paraphernalia, evidence TLO was selling drugs. Turned over to police, charges in juvenile court
-Issue: Does the Fourth Amendment prohibition on unreasonable searches apply to school officials?
-yes but the search of TLOs purse did not violate the amendment because **what is reasonable depends upon the context within which each search takes place and you must balance need to search against the invasion -balance privacy of individuals with government need for effectively dealing with public order**
-interest of child in privacy set against the substantial interest of teachers and admin. In maintaining discipline in the school
-school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject
-standard stops short of probable cause and depends simply on reasonableness of all circumstances of search
Reasonableness Test: 1. was the action justified at its inception (will be justified if reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating law or school rules) 2. was the actual search reasonably related in scope to the circumstances which justified the interference in the first place (measures are reasonably related to objectives of search and not excessively intrusive)
-allows teachers to use common sense
In this case: validity of search for marijuana depends on reasonableness of initial search for cigarettes
-teacher report said she was, purse was obvious place to find them, common sense conclusion about human behavior
-nothing about the search was unreasonable
-CONCUR: Emphasis on school setting which is different even from juveniles in non-school setting
-teachers have familiarity, authority over students, not same subjective expectation of privacy in school setting as population generally, different between students and teachers than with cops as adversaries of criminal suspects (different attitudes)
CONCUR/DISSENT: shouldn't set aside the probable cause standard in the school setting. This is the only standard seen in the language of the fourth amendment,
DISSENT: preferable standard is if search would uncover evidence that student is violating the law or in conduct that is seriously disruptive of school order, or the educational process

-issues with lockers, does a student have reasonable expectation of privacy with them?
-usually found no reasonable expectation, other court says depends on circumstances, such as who has combinations, is it school property, etc.
-exclusionary rule (fruits of illegal search excluded) question with school searches left unanswered
-what about when police are involved? And administrators or teachers?

Board of Education v. Earls
-Board policy-all students In extracurricular activities must have drug test
-Earls-choir, band, NHS, James-academic team
-Is this policy constitutional? Yes
-Reasonably serves school interest in preventing drug use among students
-⌐ say-§ 1983-violates the fourth amendment because the school did not identify need special to those who participate in extracurricular activities, and it doesn't address the drug problem
-DC-sum judgment for school, special needs exist, legitimate concern, large number of students involved in extracurricular
-Appeals Ct-reversed, violates 4th Amendment, must show an identifiable problem among a significant number of those testing and that testing will reduce the problem
-must look at policy and reasonableness/don't need probably cause
-reasonable if special needs make and warrant probable cause requirement impracticable
-special needs in public schools-balancing test
-schools custodial responsibility and authority
-activities have their own rules that don't apply to all schools which diminish expectation of privacy for students, degree of privacy depends on manner of production of urine sample
-small consequences (suspension only after three violations)
-nationwide drug epidemic
CONCUR: Emphasis-drug problem in schools is serious, supply side hasn't helped, public schools have to have safe environment, this policy seeks to combat with peer pressure, community should develop how to test, conscientious objector (can choose not to participate), individualizing
DISSENT: Vernonia (athletics drug testing okay) is wrong and so is this case
DISSENT: Veronina only applies to athletes and this case is different
-no drug problem that is major
-athletes communal undress, safety risk that schools must mitigate
-information handled carelessly, left unsealed, etc.
Why extracurricular?
-voluntary
-more limited privacy expectations

PROCEDURAL DUE PROCESS

A. The Allure of Due Process

-even where substantive standard is clearly fixed, rights also depend on assurance that state won't act arbitrarily (procedural protections)
-some sort of hearing by neutral fact finder, which is increasingly regarded as instrument for vindicating substantive rights
-important in and of itself and for the outcomes it generates
-due process implications: 1. affects process of student socialization (views of citizenship rights and relationships) 2. Influence the internal governance structure of school (teachers due process rights supplement collective bargaining rights), legalizes dispute resolution in the school

B. The Development of Constitutional Doctrine

Board of Regents v. Roth, US, 1972
-Roth-hired as professor for one year, wasn't rehired, no tenure rights (only after four years)
-procedural protection from non-renewal corresponds to job security (tenure-must have written charges, certain procedures), non-tenured teacher-only during his one year term (if dismissed before end of the year)
-Roth sued claiming violation of 14th amendment: a. true reason was to punish him for criticizing administration and it violated free speech and b. failure to give notice and opportunity for hearing violated his right to procedural due process of law
-ISSUE: Did Roth have right to a statement of reasons and hearing?
-Procedural Due Process 14th Amendment: protects liberty and property

liberty-freedom from bodily restraint, right to contract, engage in occupations of life, acquire useful knowledge, marry, establish a home, bring up children, worship God, enjoy privileges as essential to pursuit of happiness

-not the case here (no charge against him that might damage his standings and association in the community, did not base non-renewal of his contract on charge that he was guilty of immorality, dishonesty, etc.

-not his good name, honor, or integrity at stake **(if good name, honor, integrity were at stake, then notice and oppty to be heard are essential)**

-no stigma or other disability that prevented him from future employment oppty

property-security of interests that a person has already acquired in specific benefits (legitimate claim of entitlement to something)

-example-welfare recipients property interest in welfare payments which are created by statute

-in this case-defined by statutory terms, but contract itself said it would terminate, no claim of entitlement to reemployment

-DC-balances interests and says Roth's outweighs universities, so subject to a hearing
-SC-liberty or property interest? Liberty-stigma plus tangible detriment
Property-state law (employment law)
-what process is due?
-SEE PROBLEMS ON P. 336

Goss, US SC, 1975
-high school students suspended for up to ten days without a hearing, filed § 1983 claim against school board, seeking to find the statute allowing suspension for up to ten days without hearing unconstitutional because it permitted schools to deprive students of rights to education without a hearing of any kind (procedural due process component of fourteenth amendment)
-Appelles had legitimate claim of entitlement to public education under statue that directs authorities to provide free education to all residents between certain age and compulsory attendance laws-**legitimate claims of entitlement---property interests (Roth)-created and defined usually by existing rules or understandings that stem from an independent source, such as state law**
-liberty interests-good name, reputation, honor, etc.-this would occur, very detrimental, nature of interest at stake is serious event for child
1. does due process apply (liberty or property)
2. what process is due?

-minimum-some kind of notice and some kind of hearing

-need some communication by disciplinarian with the student to inform him and let him tell his side; informal allegation may be enough, no delay between notice and hearing are required

-longer suspensions may require more formal procedures

-DISSENT: opens avenues for judicial intervention in public schools that may harm quality of education, the Ohio statute that creates the right to a free education also authorizes the principal to suspend for ten days, so the legislation which defines dimension of entitlement, does not establish this right free of discipline imposed in accord with Ohio law; there is a serious damage requirement (Roth case)
liberty interest or property interest?
-court says property interest in educational benefits
-does statue trump or limit property interests?
-liberty of reputation-different here than in Roth case?
-compulsory here vs. Roth-contract
-purpose of "process"-student-oppty to clear his name, avoid unfair or mistaken exclusion
-what process is due? Court says informal, conversation between student and disciplinarian may be enough

Ingraham v. Wright, US SC, 1977
-corporal punishment in schools:
-is paddling students cruel and unusual punishment under 8th Amendment?
-If it is permissible, to what extent does the 14th Amendment require due process notice and opportunity to be heard?
-Eighth Amendment does not apply to paddling children to maintain discipline (history of amendment)
-Due process: liberty or property interest? What process is due?
-liberty interest (nature of interest at stake)-inflict appreciable physical pain-implicates liberty interests
-what process is due? If not for common law, case for requiring procedural safeguards would be strong, but here it is within tradition, rooted in history, so child's liberty interest is subject to historical limitations
-FL law has some safeguards: reasonably necessary to discipline? Must exercise prudence and restraint, judicial proceedings may determine if unjustified or excessive
-costs vs benefit
-due process clause does not require notice and a hearing prior to corporal punishment because the practice of it is authorized and limited by common law
-DISSENT: traditional common law remedies do nothing to protect against good faith mistake in disciplining and even if student could sue, it occurs after the punishment, physical pain is final and irreparable

Board of Curators of University of Missouri v. Horowitz, US SC, 1978
-medical student, faculty concerned about he poor clinical performance (attendance, low performance, lack of hygiene) in first year, advanced to second year on probation (council on evaluation) Second year-again poor performance, council said no graduation in June and without radical improvement she would be dropped from school. She appealed, allowed to take exams with several physicians who could recommend graduation. 2 said graduate on time, 2 said immediate dismissal, 3 said continued probation and council reaffirmed position. Council later decided after another low rating that she would not be re-enrolled. Committee and Dean approved and notified student, who appealed to provost, who sustained university actions.
-Issue: Did the student's dismissal deprive her of her liberty by impairing medical opportunities? Did dismissal violate due process? NO
-Even if she had a liberty interest, the school gave her due process and made a fully informed, careful, deliberate decision
Goss-only requires informal give and take, student given oppty to characterize conduct, etc.
-need for flexibility
-academic review is much different than judicial and administrative findings of fact
-requirement of hearing is to prevent erroneous decisions, whereas academic decisions are more subjective and evaluative (not factual), expert evaluation is not adequate for hearing
-academic vs. disciplinary

Class Notes: Liberty interest? Stigma plus tangible detriment? Yes in this case? Deprived of liberty interest? Court doesn't need to decide/assumes she was but says due process was given, went through a number of steps, what if she didn't get those steps? (only received grades and was then dismissed)
Horowitz v. Goss-line between disciplinary and academic decisions

FERPA-parents have right to access to school records and a right to request that it be amended or altered if they believe they are false or misleading or violate other rights, requires a full and fair hearing, including notice, right to present evidence, right to have an attorney, etc.
-how does this supplement or supplant judicially imposed due process procedures?

Owasso v. Falvo
FERPA-rule that sensitive information about students may not be released without parental consent
-education records-records, files, documents, other materials with information directly related to students
-teachers used peer grading, call out or show teacher scores
-mother of three children claimed peer grading embarrassed, asked district to ban it, district wouldn't, class action suit against district, superintendent, principal
-claim: violation of FERPA
-DC-sum judgment for school district, grades on paper are not records maintained by educational agency because they're not records, Appeals court-grades are educational records as protected by statute so very act of grading is impermissible, SC reversed, they are not records
-definition only includes materials in permanent file, not student work or homework
-Parents argue-exception for records of instructional personnel in sole possession of maker. If grade books are not educational records then the exception is unnecessary. Grade books are maintained by the teacher. If Congress forbids disclosure once in the grade book, should do the same before it gets there
-Court-federalism, not "maintained" according to its ordinary meaning
-each student grader is not acting for educational institution
-educational techniques
-Other sections of the statute-every teacher would have an obligation to keep separate record of access for each assignment
-with the education records-would be kept in one place with a single record of access
-elaborate procedural machinery to challenge (wouldn't include accuracy of grade of each test, etc.)
-would place substantial burdens on teacher that Congress didn't intend

Gonzaga v. John Doe
-John Doe undergrad of Gonzaga, was going to teach at Washington school which required affidavit of good moral character from dean
-teacher certification specialist overheard student conversation about John Doe and sexual misconduct, launched an investigation, notified state agency
-John Doe didn't know until he was notified that they would not give affidavit
-sued in state court, jury found for him, Washington court of appeals reverse in part (FERPA doesn't create individual rights), Washington SC reversed, FERPA reinstated
-Issue: Does FERPA provide a student with the right to sue private university for violations? NO
-Spending legislation, no right unless Congress speaks with clear voice, unambiguous intent
-Did Congress intend to create federal right? Must be phrased in terms of persons benefited, FERPA-institutional policy and practice, not individuals, administrative procedures provided
CONCUR: look to Congress' intent (don't presume right only if unambiguous)
DISSENT: personal right-right of parents to withhold consent, overall context of FERPA ("no person shall"); administrative avenues fall short of rebutting presumption

C. Implementing Due Process Protections

The Threat of Damage Suits as a Goad to Implementation
42 USC § 1983-used to prod officials into enforcing constitutional rights
-authorizes damages suits against anyone who, acting under color of state law, deprives an individual of federal constitutional or statutory rights
-theory of pocketbook loss might make prompt effectuation of substantive rights a reality
-test- used to be good faith (Wood) and only violations that are of the basic, unquestioned rights of an official's charges would lead to liability, but this was refined in Harlow-**if officials conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known (objective test)**
-What are clearly established constitutional rights?
Implementation and Due Process: Goss Revisited
-Since Goss, courts have had to determine what process is required for longer term suspensions or expulsions and generally have held that school officials need not follow all of the procedures required in a judicial proceeding

Jain v. State Iowa SC, 2000
Father of university student who committed suicide in his dormitory room brought wrongful death action against university, claiming that it had negligently failed to exercise reasonable care and caution for student's safety. The District Court, Johnson County, Lynne E. Brady, J., entered judgment in favor of university, and father appealed. The Supreme Court, Neuman, J., held that university owed no duty to inform student's parents of student's previous suicide attempt. Affirmed. Even though university had policy to notify parents, this did not create an assumption of a duty. No duty under FERPA (Exception to release of information under emergencies)
FERPA-right to access records and can't release to anyone else, University may provide access to parents (undergrads), Jains parents-saying under health and safety exception, you have a duty to tell parents
Court says this language is permissive, not mandatory and it doesn't assume a duty to tell parents

In loco parentis-demise of it, discussion with Lori Fox
Elizabeth Shin-**Elizabeth Shin** also told MIT counselors she'd discussed her chronic
depression with her mother, the university says in its court filing made Friday. Shin's parents sued MIT in January for negligence and wrongful death, saying their daughter would still be alive if school officials had told them of the seriousness of her mental illness. The
sophomore biology major was treated by MIT's counselors for more than a year before she set herself on fire in her dormitory room in April 2000.
Other issues-hazing, alcohol, etc.
Does presence of supervisors give rise to duty? (Coughlin-yes)
Knoll-hazing-premises liability

II. EQUAL EDUCATIONAL OPPORTUNITY

Race

I. The Judicial Response to School Segregation: The Brown Decision

A. Brown I: Legal and Policy Implications
Brown v. Board of Education, US SC, 1954
-attempt to desegregate public schools
-claim: segregation violates equal protection clause under the Fourteenth Amendment
-segregated schools are not and never will be equal, so they are being deprived of equal protection of laws

-effect of separation on educational opportunities impacts colored children because it usually implies inferiority of the Negro group, which affects the motivation of children to learn and retards the educational development of black children and deprives them of the benefits they would get under integrated system
-**separate educational facilities are inherently unequal-violate equal protection of laws guaranteed by 14th amendment**
-(overrules *Plessy v. Ferguson,* separate but equal doctrine)
-debate about original meaning of fourteenth amendment,
-Is Brown about education or race? Both?
B. Brown II: The Scope of Relief
Brown v. Board of Education, US SC, 1955
-question of relief because cases arose under different local conditions and local problems
-remand cases to those courts
-equitable principals, may need to eliminate obstacles in making the transition
-courts will require that defendants make a prompt and reasonable start towards full compliance
-Standard: "All Deliberate Speed"
-Court had not developed adequate guidelines for lower federal court so much time was wasted

II. Desegregation: Evolution of a Constitutional Standard
-what standard should be used to determine whether the constitution has been violated?
-once it has been determined that the equal protection clause has been violated, what is the scope of the remedy that should be imposed on school boards by the courts? Race-neutral student assignment?
Green v. County School Board, US SC, 1968
-freedom of choice plan allows pupil to choose his own public school
-children automatically reassigned to previous school unless the school board assigned to another school upon application, no Negro pupil had applied to white school, no whites to black school
-then later adopted a freedom of choice plan in which students could annually choose between the schools
-pattern of separate schools same pattern as in Brown
-dual systems unconstitutional and must be abolished and had to effectuate a transition to a racially nondiscriminatory school system
-must have transition to a unitary nonracial system of public education
-must measure the freedom of choice plan to achieve that end
-Has the board taken appropriate steps to abolish its dual system?
-plan must promise to realistically work now
-must show meaningful and immediate progress toward disestablishing state imposed segregation
-plan must be shown to have real possibility of dismantling dual system at the earliest practicable date and board must be acting in good faith
-freedom of choice plan is not an end of itself because it has been shown to be ineffective in achieving desegregation
-in three years, no single white child chose the Negro school, 85% Negroes still attend that school
-burdens children and parents with responsibility the court place on school board
-Green factors: composition of student bodies, faculty, staff, transportation, extracurricular activities, and physical facilities- makes a school racially identifiable

Sann v. Charlotte Mecklenburg Board of Education, US SC, 1971
-states-long history of two sets of schools in single system deliberately operated to separate pupils in schools solely on the basis of race
-what is the scope of duty of schools and court sin implementing Brown I and the mandate to eliminate dual systems and establish unitary systems at once?
-School system-desegregation plan based on zoning with a free transfer provision, fell short of achieving unitary school system
-district court ordered new plan, satellite zones for jr high schools, Negroes assigned by attendance zones to predominately white jr high schools, thereby substantially desegregating all jr high schools in the system, elementary schools-zoning and pairing and grouping techniques with the result hat student bodies would range from 9-38 percent Negro
-district court presented with the board plan and the finger plan, finger plan approved
-objective-**eliminate from the public schools all vestiges of state-imposed segregation**
-if school authorities fail to do so, judicial authority may be invoked
-nature of violation determines the scope of the remedy
if school doesn't offer valid ones, courts can fashion a remedy that will assure a unitary school system
-**if it is possible to identify a white school or a black school simply by reference to the racial composition of the six Green factors, a prima facie case of violation of equal protection clause is shown**
-when dual, schools must eliminate individual racial distinctions
Issue: student assignment: four problem areas-
1. May racial balances or quotas be used?
Starting point in process of shaping a remedy and that is a useful starting point
2. One Race Schools-

small number of these schools within a district is not in and of itself the mark of a system that segregates, no per se rule, but if proposed plan contemplates the continued existence of some schools that are one race, they have burden to show school assignments are nondiscriminatory (scrutinize the schools)

3. Remedial Altering of Attendance Zones
   -informed judgment of district courts, pairing and grouping of noncontiguous school zones is permissible tool and considered in light of objectives
4. Transportation of Students
   -no rigid guidelines, but transportation is integral part of school system
   -time and limits of travel differ with age, etc., but bussing is a valid tool for desegregation

III. Desegregation: An Emerging National Standard

Keyes v. School District No. 1, US SC 1973
-Denver, Colorado school system, claim against them that board alone created or maintained racially segregated schools throughout school district (even though no statute that mandated or permitted racial segregation)
-voluntary student transfer program (boar opposed resolutions designed to desegregate the schools)
-dc found that construction of new small elementary school in Negro community and by gerrymandering student attendance zones, use of option zones, use of mobile classroom units, racial segregation, and ordered board to desegregate in Park Hill area
-Petitioners asked DC to order desegregation over all Denver schools, but court said that they must make fresh showing of *de jure* segregation in each area of the city for which they seek relief
-but also found that school board must at a minimum offer equal educational opportunity and although all out desegregation could not be decreed, the only program that achieves equality is desegregation. School Board appealed, 10th Cir. Affirmed with Park Hill, reversed with other core city schools
Issue: Did the District court and court of appeals apply an incorrect legal standard in addressing the deliberate segregation in the core city schools? YES
If no statutory dual system ever existed, must show:
1. segregation exists and
2. it was brought about or maintained by intentional state action
-when plaintiffs show that school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is likely that a dual system exists
-**A finding of intentional segregation board actions in a meaningful portion of a school system creates a presumption that other segregated schooling within the system is not adventitious and establishes a prima facie case of unlawful segregation design and shifts burden on the me to prove that other schools within the system are not result of intentional actions (must show that segregative intent was not a motivating factor)**
de jure segregation-intent or purpose to segregate
de facto-unintentional
****REMOTENESS IN TIME HAS NO RELEVANCE TO ISSUE OF INTENT**
   -but at some point in time, the relationship between past segregative acts and present segregation may be so attenuated as to find no support for de jure segregation warranting judicial intervention
   -close examination of past acts and present segregation
-DISSENT: abandon the de jure/de facto distinction

Can we meaningfully distinguish de jure (intentional) and de facto (unintentional)?
   -many decisions made to maintain segregation by those other than schools
National standard that treats them the same (Powell concur/dissent opinion in Keyes)
   -every thing is a vestige of slavery, regardless of intent
What is relevance of passage of time?
   -when does de jure turn into de facto?
   -Keys-time doesn't matter but past acts and present segregation may be so attenuated as to be unable to find de jure

School District Boundaries: Does the Bus Stop Here?

Milliken v. Bradley, US SC, 1974
-may a federal court impose a multi-district area wide remedy to a single district *de jure* segregation problem absent any finding that the other school districts have failed to operate unitary systems within their district, absent any finding that the included districts committed acts which effected segregation within the other districts, and absent a meaningful opportunity for the included districts to be heard?
-action for all children in Detroit, finding de jure segregation
-ordered board of education to submission of desegregation plans, ordered state to submit desegregation plans for three county area despite the fact that 85 districts were not part of the action
-court said that any less plan would result in all black school system surrounded by almost all white, and this would be appropriate because of state violations and authority to control each district
-court reasoned that district lines are arbitrary and may be bridged when inter-district relief
   -SC rejects this argument, says lines and local authority essential to schools
-scope of remedy determined by nature of violations

-Before an inter-district remedy can be ordered, it must be shown that a constitutional violation within one district produces a significant segregative effect in another (state actions have caused inter-district segregation)

-this was not the case here, and the remedy was inappropriate

DISSENT: violations committed by governmental entities for which the state is responsible and a Detroit only remedy would not accomplish the task of eliminating segregation

Interdistrict remedies can't be ordered for solely intradistrict violations
What is the difference between placement of highways (which we can change) and school district boundaries? Local control

Liddell v. Board of Education-Court of Appeals approved settlement that called for interdistrict remedy despite the fact that there was no inter-district violation because state was a primary wrongdoer and it could be required to take all actions that will further desegregation of city schools even if actions occur outside city boundaries

What about white flight? Can courts take this into account?

IV. End of an Era?

Dowell-US SC, 1991-
-desegregation is not intended to operate in perpetuity
Two part test to determine unitariness
1. whether the board complied in good faith with desegregation decree since it was entered
2. whether the vestiges of past discrimination had been eliminated to the extent practicable (look at every facet of school operations, Green factors)
-court has no authority if unintentional and caused by outside powers

-Circuits split on issue of whether plaintiff must show discriminatory intent or segregative effects to challenge school board actions that may lead to resegregation

The Legal Significance of Achieving Partial Unitary Status

Freeman v. Pitts, US SC, 1992
-court ordered desegregation for Atlanta school, 1969 ordered to dismantle dual system
-district court said had achieved unitary status with attendance and three other categories, relinquished control to those aspects which it was unitary and supervisory for those not in full compliance. Court of Appeals reversed, stating that district court should have full remedial authority until it achieves unitary status in six categories for several years. Reversed
-District court can withdraw judicial supervision with respect to discrete categories, which the school district has complied
-remedy only justifiable insofar as it advances objective of alleviating initial violation, judicial control is only a temporary measure with the objective for local authorities to gain control, less link between current conditions and prior violations
CONCUR: should resolve issue with other courts that faced with the same issue (too fact centered); demographic changes itself cause by past school segregation; dual nature of DCCS, makes little sense for court to only control some aspects/can't rely on school board

Partial unitary status-permissive or mandatory? Timing-if not a product of state action but of private choices, not a constitutional issue
How would Green be decided today?
Does this end Green's command that racial discrimination end so that schools no longer racially identifiable?
-quality of education is a factor courts may consider in determining unitary
-how does a district determine if segregation is vestige of prior dual system, due to actions of other officials regarding housing, former dual systems contribution to racial segregation, or attributable to private decisions?

Limits on Court Ordered Remedies Other Than Pupil Reassignment

Missouri v. Jenkins, US SC, 1995
-state challenged district court's order of salary increases for all staff within Kansas City school district and the order requiring state to fund remedial quality education programs because student achievement levels were low
-KCMSD nominal defendant cross claim against state for failure to eliminate vestiges of prior dual system, DC dismissed case against federal defendants and suburban school districts but held state and KCMSD liable for violating intradistrict operation segregates school and failed to eliminate vestiges of dual system, remedial order to eliminate
-ordered quality education programs, expanding educational programs, cash grants
-No interdistrict violation so can't order desegregation within suburban districts
-1986-magent school, capital improvements, liable for funding, DC ordered salary assistance, massive expenditures
-state claims mandatory salary assistance is beyond power of the court and challenges order requiring it to continue to fund (claims Freeman-partial unitary status)
-Issue: do orders rest as a means to an end of restoring past discriminatory conduct?
Freeman analysis: 1. good faith compliance 2. vestiges of past discrimination eliminated
-magnet schools approved as intradistrict desegregation remedies, but the district court's plan is to attract students from outside the district, which is beyond violation
(goal of plan was to attract non minority students to magnet schools) is beyond the intradistrict violation)

-Insistence on academic goals unrelated to effects of legal segregation, so no remedial power
-CONCUR: remedy only available if directly caused by violation
-district court should have focused to harm to black kids, issues with social science and federalism, education is local concern and remedy didn't target specific harm
-DISSENT: failure to provide parties adequate notice of the issues to be decided

Issues-salary increases for teachers, funding of quality education programs

End of an era: different rules or different facts?
Has majority shifted burden to ⌈ to show need for continued discrimination? (burden used to be whether the vestiges of past discrimination has been eliminated and state demonstrates a good faith effort of commitment)
How might desegregation or segregation cause white flight?

Limits on Voluntary Actions by School Boards to Reduce Segregation

1. Constitutionality of State Limits on Voluntary Actions by Boards

Washington v. Seattle School District No.1, US SC, 1982
-School district, steps to alleviate isolation of minority children and permitted students to transfer to schools outside of their neighborhood (segregation caused by housing patterns)
-Resolution defined racial imbalance and resolved to eliminate it, concluded that mandatory reassignment of students was necessary, adopted the Seattle plan for desegregation-busing, mandatory reassignments, pairing and trading, to reassign roughly equal numbers of blacks and whites and allows most students to spend half of their careers near their home, and it was shown to be effective.
-initiative, statewide, that said that no school board should require any student to attend a school other than the school ;which is geographically nearest or next nearest to place of residence with a number of broad exceptions. Passed by a substantial majority. District initiated suit against state challenging the constitutionality of the initiative under the Equal protection clause of 14th Amendment
-court: fails because it does not attempt to allocate governmental power on the basis of any general principle and imposes substantial burdens or minorities
-school boards have wide authority and so the initiative would work a major reordering of the states educational decision making., board has power to determine what programs fill a district needs
-DISSENT: people of state adopted policy that is binding on local school districts but does not affect authority of courts to order school transportation to remedy violations or disallow voluntary transfer programs, no constitutional violation
-state doesn't have to treat people differently based on race absent a constitutional violation, decision not to assign students does not offend the Fourteenth Amendment (no affirmative duty to integrate absent unconstitutional segregation)

Crawford v. Board of Education of LA, US SC, 1982-decided on same day as *Seattle*
-state constitutional amendment approved by voters in a referendum that prevented state courts from using mandatory pupil assignments and busing except where violation of EP clause was shown. Upheld the amendment
Why this distinction?

Wessman v. Gittens-1st Cir. 1998
-Boston-examination schools, including BLS, admissions policy required 35 percent of those admitted to maintain 35% set aside until finding that system was unitary, so no longer mandated, but school continued the policy, until challenged, then they discontinued
-began searching alternative policies
-standardized test, combine scores with others, QAP, half of seats allocated in strict accordance with rank order, then fill up seats, racial/ethnic distribution of second group must mirror that of the pool of qualified applicants
-Wessmen challenged, would have gotten in if composite scores alone
-Standard of review: race: strict scrutiny- 1. compelling governmental interest; and 2. narrowly tailored to serve that interest
what is a compelling state interest with regard to race? One is to undo legacy of past discrimination, diversity may also be a compelling state interest (Bakke)
-neither occur here (no compelling state interest is shown), the policy is not to achieve constitutionally relevant diversity but rather to racial balance

-Remedying the present effects of past discrimination is a compelling state interest only if government shows that it has a strong basis in evidence for its conclusion that remedial action is necessary

Gratz v. Bollinger-ED Mich, 2001
In action challenging constitutionality of state university's admissions programs for its college of literature, science, and the arts, the District Court held that college's race-conscious admissions policies were not a narrowly tailored means of achieving compelling governmental interest of remedying the present effects of past discrimination and therefore violated equal protection clause. Plaintiff's motion for summary judgment was granted
To rise to the level of "compelling," so as to justify racial classifications under equal protection clause, an interest must meet two conditions: (1) the discrimination must be "identified" discrimination, and (2) the institution that

makes the racial distinction must have had a strong basis in evidence' to conclude that remedial action was necessary, before it embarks on an affirmative-action program

Grutter v. Bolinger, 6th Cir. 2001
Regents of state university and its law school appealed from a decision of the United States District Court for the Eastern District of Michigan, Bernard A. Friedman, J., 137 F.Supp.2d 821, which determined that the law school's consideration of race and ethnicity in its admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act. The Court of Appeals, held that law school's admissions policy admissions policy was narrowly tailored to serve its compelling interest in achieving a diverse student body, and therefore its policy was valid.
Diversity is a compelling state interest, looked at many different factors, no quotas, similar to Harvard plan (plus factors, one is race, includes other factors)
-this is what we discussed in class in small groups with judges, etc.
-lots of concurrences and dissents
Is diversity a compelling state interest? SC hasn't decided, but this court says yes

-Involvement of Other Political Branches-Attorney general, federal assistance, administrative regulations, etc.
-no individual suits can be brought without showing intent

Racial Discrimination and Ability Grouping
-sorting has alleged benefits for students and teachers, but it has significant racial consequences and tends to concentrate minority children in less advanced school programs
Lemon v. Bossier Parish School Board-5th Cir., 1971
-district court approved school board plan that assigns students to one of two schools on basis of scores on achievement tests
-not in compliance with previous orders of school desegregation orders, testing cannot be employed in any way until unitary school systems have been established, rejected testing as a basis for student assignments
-only unitary for one semester

-What if intra school grouping and not inter?

Hobson v. Hansen, DC CIR. 1969
-District of Columbia-tracking system that places students in tracks according to ability to learn
-as practiced, this system denies equal educational opportunity to the poor and a majority of the Negroes in violation of the Fifth Amendment and the premise of the track system itself
-purposes-allow different types to achieve maximum potential, track system-separate self contained curriculum, emphasis on ability of the student
-flexibility (not all students fit neatly or permanently into a track), students may show ability that calls for different track
-flexibility between tracks is not a kept promise, movement between tracks is limited, lack of kindergartens and honors programs in black school, testing process, etc.
-high proportion of disadvantaged children in school system, tracking translates ability into educational opportunity, track shapes his progress in school and society
-standardized test is used, psychological factors, empirical confirmation of disadvantaged child's handicaps on aptitude tests, teacher expectation, self fulfilling prophecy, etc.
-**tracking system in this case deprives Negro students their right to equal education under equal protection and due process**
Tracking system must be abolished

-cases since this, unless clearly shown to be a vestige of past discrimination, tracking has been upheld with courts deferring to local authorities
-tracking used as a way to segregate?
-school decision making: who should decide best way to deliver educational services?
-something in between? Procedural protection on assignments?
-stigma issues
-what should be standard to determine whether a previously segregated school system when data shows tests have racially disproportionate impact
intent to discriminate
curricular validity (what is the test testing?)
notice
segregated students are out of school
due process
liberty or property interest?
Goal of Testing: Address vestiges of segregation

Larry P. v. Riles-9th Cir. 1984

-IQ tests used by California school system to place children into special classes (EMR) were held to violate the equal protection clauses of US and CAL constitution, use was enjoined, state had to develop plans to eliminate disproportionate enrollment of blacks in EMR class. Affirmed with statute but reversed on constitutional issues
-EMR seen as dead end classes, only teach social adjustment and economic usefulness, black children significantly over represented, IQ tests were used to determine who was placed in these classes, parental consent required but it is rarely withheld
-Equal Education For All Handicapped Children Act requires that tests and evaluation procedures be free of racial and cultural biases
-would have to show that tests are a proven tool to determine which students have EMR characteristics
    -this was not established
-Title VI-recipients of federal funding may not use criteria or methods that result in discrimination because of race, color, or national origin, or have the effect of impairing accomplishment of objectives…
    -Title VI requires proof of discriminatory intent but proof of discriminatory effect may be enough if suit brought to enforce regulations rather than statute itself
    -clearly in this case, discriminatory effects, violation of Title VI
-no equal protection violation because have to show intentional discrimination under the fourteenth amendment
Equal Protection vs. Disparate Impact-equal protection requires showing of intent to discriminate, disparate impact under Title VI-if disparate impact of subjecting individuals to discrimination, then violation (disparate impact claim)
Disparate Impact Claim: 1. preponderance of evidence that some policy or practice has disproportionate adverse impact on a protected group 2. if 1 is shown, burden shifts to educator to show educational necessity (standard of justification of policy) (tests-test meets professional standards that apply given the purpose for which the test is being used) 3. if educational necessity, plaintiffs can show an equally effective alternative that would result in less disproprotinality

Exclusionary Disciplinary Measures
-zero tolerance policies result in harsher discipline for minorities for similar offenses
-courts disagree as to the standard for a successful challenge to racial disparities in discipline
Fuller v. Decatur Public School- CD Ill. 2000
-students expelled for two years
    -argue it was because of zero tolerance policy which punished them as a group, was unconstitutional, and racially motivated, say shouldn't have been expelled because fight was short, no drugs, no guns, no knives
-fight at football game, investigation, evidence gathered to show each student involved in fight, principals recommended expulsion for two years
-court is reluctant to enter into school discipline
-right to education is not a fundamental right and school disciplinary policy is not unconstitutional unless it is wholly arbitrary (substantive due process claim requires extraordinary departure from established norms)
-abuse of power that shocks the conscience
-not shown here, not attempted to show white students not subject to same discipline

Is notice and hearing adequate for the problem in this case? (Goss)

E. Impact of School Choice on Racial and Ethnic Minorities
-issues about school choice on race and if it would increase racial and economic isolation
-school choice: vouchers, magnet schools, charter schools, interdistrict transferred, controlled choice districts
    -mixed evidence about whether these choices will increase racial and econ. Isolation
    -Milwaukee's voucher program-even among poor, those seeking to get into program are more involved and have higher expectations than the average parent, smaller families, more volunteer work, etc.
State action and charter schools-charter schools are somewhere in between public and private, state laws vary as to whether charters granted by district, agency, or independent board, much more independence from state and local regulation, publicly funded, privately managed, same expenditures but more flexibility to raise funds privately? Enough public to characterize them as state actors for equal protection clause?

School choice-vouchers-race makes a difference; how should demographics influence our analysis?
How to classify schools that participate-are private schools not public schools?

Gender
Symmetrical vs. asymmetrical models of sexual equality-
    a. Symmetrical- deny that there are any significant natural differences between women and men and consider the two symmetrically located with regard to any issue, norm, or rule
    b. Asymmetrical-differences between men and women should not be ignored, society must deal with the difference (accommodation, such as pregnancy, etc.)
Constitutional Standard-**must serve important governmental objectives and must be substantially related to achievement of those objectives in order to classify by gender**
        -more demanding than equal protection but less than race cases

Mississippi University for Women v. Hogan, US SC, 1982

-is a state statute that excludes males from enrolling in a state nursing school a violation of the equal protection clause of the fourteenth amendment? YES
-was otherwise qualified, denied admission because of his sex, filed action for violation of 14th amendment
test-party seeking to uphold a statute that classifies individuals based on gender have burden to show that there is an exceedingly persuasive justification for the classification (classification serves important governmental objectives and the discriminatory means employed are substantially related to those objectives)
-states justification is that it compensates for discrimination against women, but this is not persuasive because no showing that women lacked opportunities to attain positions in nursing school when it was opened (women in labor force-predominance of nursing positions were women), this practice actually perpetuated the stereotyped view of nursing
-state also has made no showing that substantially and directly related to objective of compensating for the past
-DISSENT: courts holding is limited to nursing school and since women have dominated it, state may be able to maintain all women business school or liberal arts program
-DISSENT: inevitable spillover with any state supported educational institution that confines its student body in any area to members of one sex
-equal protection clause "liberating spirit" does not demand needless conformity
DISSENT: conformity, only harm to Hogan is that he has to travel to attend state nursing school available to him
-MUW as a whole, not just nursing school
-should have used rational basis test and this would pass and even under the standard applied by the court, it should have passed

U.S. v. Virginia, US SC, 1996
-VMI-citizen soldiers, physical and mental discipline, strong moral code, huge alumni endowment, financially supported by the state, enrolls only men to prepare for military and civilian life, dissects young student, similar to boot camp, wouldn't allow women in (say won't benefit)
-Woman seeking admission sued, claiming violation of 14th Amendment Equal Protection Clause
-court found that women did want to attend, could achieve a critical mass that would make female experience positive, would train others to deal with mixed gender army
-district court ruled for VMI saying it brought diversity to otherwise coeducational system, court of appeals said that policy of diversity must do more than favor one gender, even though aspects of program would be affected (privacy, physical training, adversative approach)
-Three remedial options: admit women, establish parallel programs or become private
-Virginia posed a parallel program for women VWIL, that would be open to students, share VMIs mission, but would differ from VMI in academic offerings, educational methods, and financial resources, not a military format, no uniforms, community meals, etc.; district court approved, divided appeals court affirmed
-ISSUE: Does the exclusion of women from the educational opportunities provided by VMI deny women capable of all the activities the equal protection clause of the fourteenth amendment?
If so, what is the remedial requirement?
-If differential treatment or denial of opportunity, the court must determine if justification is exceedingly persuasive (**burden on state to show at least that the classification serves an important governmental objective and the means employed are substantially related to the achievement of those objectives**)
-heightened standard of review but sex is not a proscribed classification, physical differences are enduring
-VA showed no exceedingly persuasive justification for excluding all women and the remedy of other program does not cure the violation by providing equal opportunity
-claims for exclusions: single sex education offers benefits to some students-may be true but VA has not shown that VMI was established or maintained with a view to diversifying educational opportunities (compares Hogan case-no close resemblance between alleged objective-educational affirmative action-and the actual purpose underlying the action)
-VA also claims that the adversative method of training provides benefits that cannot be made available, unmodified, to women, but the court shouldn't generalize and look at tendencies, not a one size fits all, women who have will and capacity shouldn't be excluded
-women have been shown successful in military academies and forces
-Remedy: should place the persons in the position they would have been without the discrimination (proper remedy for exclusion is to eliminate as far as possible the effects of the past discrimination)
-VWIL is not equal to VMI
-CONCUR: IF equal facility for women, it would be fine, and the sole remedy is not just to admit women
-DISSENT: when a practice not expressly prohibited by the bill of rights bears endorsement of long tradition unchallenged in history, we shouldn't' strike it down, single sex instruction is an approach substantially relate to interest of providing effective college education
-court is really applying strict scrutiny

death knell for single sex education? Vs. school districts could provide as long as they offered a sufficiently compelling justification
-are schools separated by sex inherently unequal?
(race vs. gender)
-symmetrical view or asymmetrical? Majority-symmetrical

-Does equal protection require assimilation?
-Benefit to diversity with single sex education-sufficient to pass scrutiny?
Standard-exceedingly persuasive justification

Title IX
-no person shall be excluded from participation, be denied benefits of, or be subjected to discrimination under any education program or activity receiving financial assistance on the basis of sex except:
-vocational, professional, graduate higher education, and public undergraduate
-not apply to religious schools if against religious tenets
-primary purpose is military then doesn't apply
-doesn't apply to undergrad that traditionally and continually only admits one sex
-Don't need proportions (same ratio as community)
-can still maintain separate living facilities
REGULATIONS: Admissions-can't give preference by ranking separately, apply numerical limitations, or treat differently because of sex, can't operate test criteria that has disproportionate adverse effect on basis of sex unless shown to predict validly success in that program; no rules concerning actual or potential family status, no discrimination because of pregnancy or childbirth, etc.; treat disabilities related to pregnancy same as other physical conditions; no pre admission inquiry as to marital status of applicant
Activities-can't deny academic, extracurricular, research, occupational training, or other activity on basis of sex (except for certain religious organizations, military, social fraternities, single sex youth organizations, etc.)
Access to Course Offerings-including PE except for contact sports, sex education classes
Counseling and Materials
Concerning a student's actual or potential marital status or family (pregnancy)
Athletics-may have separate teams if based on skill or contact sport but if a sport only offered to one sex, then excluded sex must be allowed to try out for team unless contact sport-equal opportunities-look to interests and abilities, equipment and supplies, scheduling, travel, opportunity for coaching, tutoring, locker rooms, facilities, medical and training facilities, publicity, housing, etc.
-asymmetrical model (acceptance model)
-are regulations a plausible interpretation of the statue?
-Congress enacted on basis of spending power/ability to implement fourteenth amendment
-Pregnancy-some separate treatment okay as long as voluntary, treated same as other medical problems
-asymmetrical
-different from Title VI because there is an intent requirement for title Vi (or disparate impact?)
a. athletics
Force v. Pierce City R-VI School District, WD MO., 1983
Force-middle school, wanted injunction that would allow her to compete for place on 8th grade football team (claims it violated right to equal protection under 14A and § 1983
-Board voted to deny request to allow her to try out, even though they all agreed she would be a good player, but didn't want to have to make same allowance for all girls
-This is a gender based classification (only males allowed to participate), test as set forth in Hogan, is that it serves an important governmental objective and means substantially related to achieving that objective
-School says objectives: maximize oppty for all students, maintain safe programs, comply with Title IX, and comply with MSHSAA
-nothing in Title IC that mandates actions (each school free to choose whether coed participation is allowed)
-MSHSSA rules don't validate
-School says that males outperform females, so best way to get females to participate is to provide them separate teams (volleyball for females, football fro males)
-but there is no factual indication that males would want to play volleyball, she is the only female who wanted to play football, situation would be self regulating
-volleyball and football are very different and so you can't designate separate sports as only male or female
-Should be given a chance
b. pregnancy and marriage
-most schools excluded pregnant students from classes at some time during pregnancy, but Title IX prohibits discrimination on basis of pregnancy but may voluntarily participate in separate programs as long as comparable to what school offers
-courts split on whether unwed pregnant students could be barred from NHS

Pfeiffer v. Marion Center Area School District, 3rd Cir. 1990
-Pfeiffer-good student, earned high grades, student council, NHS, pregnant, wanted to finish high school, handbook said students selected based on scholarship, service, leadership, character, dismissed from NHS because she failed to show leadership and character, now works in a hotel
-sought injunction and damages under Title IX and its regulations, gender discrimination under § 1983 and 1985 and state law claims
-testimony presented that school district keeps no records of NHS, pregnant female student had resigned earlier (given choice to dismissed or resigned), excluded
-dc found ⌐ not dismissed because of pregnancy but rather because she failed to uphold standards by having premarital sex
-she wasn't dismissed because of her condition of pregnancy, but rather because her character

-even though evidence that a male who had gotten a girl pregnant was not dismissed, but nothing indicating if members of council knew
-intent to discriminate?
-why dismissed? Immoral behavior, double standard? Absences?

Chipman v. Grant County School District
-disparate impact analysis
-significant adverse affect on young women who have become visibly pregnant from premarital sex
-no men who had premarital sex or women who did but not pregnant are denied admission
-They say that they would be denied if they knew about it
-But even if unintentional disparate impact, intention is not required

C. Scholarships and School Admission Standards
Sharif by Salahuddin v. NY State Education Department, SDNY, 1989
-Does NY state deny females equal opportunity to receive state merit college scholarships by its sole reliance on SAT scores? No
-Also, can Title IX discrimination be established solely by disparate impact or must there be an intent to discriminate? Yes
-SAT developed to serve as predictor of performance in college and not academic high school achievement, which the scholarships were designed for
-disparate impact enough (Title IX similar to Title VI and under Title VI, if suit brought for violation of regulations, disparate impact is enough even though under Title VI itself, intent must be shown)
-for educational testing, must show **educational necessity**
-failed to show reasonable relationship between practice and purpose, only two of high school classes on there, combination of GPA and SAT is preferable
Title IX explicitly confers a benefit on persons discriminated against and authorizes a private right of action
Title IX applies to discrimination in employment not just students

Davis v. Monroe County Board of Education US SC, 1999
-sexual harassment by fifth grade classmate, vulgar stamens, tried to touch, teacher told principal, no acts were taken against him, continued for many months, still did nothing
-grades dropped, suicide note, other girls also were victims, wanted to talk to principal, teacher denied their request, no disciplinary action was taken
-no effort made to separate them,
-district court dismissed, said no cause of action for student on student harassment
-ISSUE: Can a recipient of federal funds be held liable in a private damages action arising form student on student sexual harassment? Yes
-private right of action under Title IX, but only available when recipients had adequate notice that they could be liable
-board says holding liable for conduct of others, but that is not the case; it was the boards decision to remain idle in the face of known sexual harassment
-degree of control over the harasser and the environment in which it occurs
    -school hours and school grounds=”under” an “operation” of the recipient
-recipients may be liable for their deliberate indifference to known acts of peer sexual harassment
-must show that misconduct was clearly unreasonable in light of circumstances
-DISSENT: only cause of action under Title IX is judicially implied
    -speculation, congress hasn’t specifically spoken, no clear notice

Nabozny v. Podlensy, 7th Cir. 1999
-student subjected to harassment because he was gay, performed mock rape, said boys will be boys, should expect such behavior if openly gay
-parents met with principal and perpetrators, boys denied, no action taken, principal said should expect it
-attempted suicide, in hospital, finished at catholic school
-same thing occurred in public high school, assaulted, etc., referred him to guidance counselor, who was supposed to change schedule to minimize exposure to perpetrators, eventually placed in special ed class in which the perpetrators were also enrolled, again attempted suicide, sent to live with relatives, social services ordered him to return to school, parents moved, had to ride bus, school officials didn’t do anything
-again assaulted, wanted to press charges, police liaison discouraged it and he promise to speak to boys, reported incident to school official in charge of disciplining, who said he deserved it
-diagnosed with post traumatic stress disorder, filed suit under § 1983 and equal protection of 14th Amendment
-must show intention or deliberate indifference
-gender discrimination: heightened scrutiny
-more aggressively punished male on female violence , can’t decide this for summary judgment

Beyond Race and Gender
-ethnicity, origin, gender, disability
-dilemma of difference-similar treatment or special treatment? Integration or separation? Neutrality or accommodation?
Brown v. Board-nonwhite population was almost all black, but Latino and Asians grew dramatically

-concern with language difference, Bilingual Education Act-grant in aid program designed to promote research and experimentation on how best to meet needs of NEP and LEP students

1. The Rise of a Statutory Entitlement

Lau v. Nichols-US SC, 1974
-class action brought by non English speaking Chinese students against school officials alleging unequal educational opportunities in violation of 14th Amendment
-don't reach equal protection issue but rather rely on Civil Rights Act § 601 to reverse Ct of appeals and hold that relief should be granted
-§ 601 bans discrimination on basis of race, color, national origin in any program or activity receiving federal financial assistance (Title VI)
-discrimination is barred that has the effect even though no purposeful design under regulations
-clearly Chinese speaking minorities receive less benefits from English speaking
-school district must take affirmative steps to rectify language deficiency

2. The Scope of the Entitlement

Martin Luther King, Jr. Elementary School Children v. Michigan Board of Education, ED Mich 1978
-15 black preschool children attending or will attend MLK, Jr. elementary school, allege that defendants have failed to determine whether plaintiff's learning difficulties stem from cultural, social and economic deprivation and to establish a program that would enable them to overcome these things
-claim violation of equal educational opportunity under equal educational opportunities act statute that says that no state shall deny equal educational opportunity on account of race…etc. by failure o f agency to take appropriate action to overcome language barrier (black English is language barrier)
-must show two things under section (f)-
1. denial of educational opportunity is on account of race, color, sex, origin and 2. educational agency fails to take action to overcome language barriers that are sufficiently severe so as to impede a student's equal participation in instructional programs; no limits on character or source of barrier except that it be sufficiently serious
-motion to dismiss is not proper because it could be sufficiently serious

Castanada v. Pickard, 5th Cir. 1981
-Mexican American children and their parents institute action that the district engaged in policies which deprive them of fourteenth amendment and § 1983 rights, Title VI of Civil Rights Act (42 USC 2000d) and Equal Educational Opportunities Act of 1974 (20 USC 1701)
-allege that unlawful discrimination from ability grouping that used racially discriminatory criteria, impermissible segregation, discriminatory hiring practices, and failing to implement bilingual education
-highly Mexican American area, very poor, very low expenditures on pupils
-bilingual education program for all students k-3, Spanish and English
-only half of teachers are native Mexican American and Spanish speakers, others certified to teach after a course in which they have limited Spanish vocabulary
-no bilingual program after third grade, but Spanish speaking aids are used to assist, learning center at schools, also has ESL classes, tutoring in English available
-apply Lau but questions the validity of opinion in Lau, which was written before Washington, which held that discriminatory purpose an don't just disparate impact was required for equal protection clause and Bakke, which held Title VI to be coextensive with Equal protection clause
-Title VI is violated only by an intent to discriminate and not disparate impact
-no intent to discriminate in this case
EEOA-unlawful for educational agency to fail to take action to impede-term "appropriate education" does not mean bilingual education and state and local authorities have latitude in determining programs they want to use
Court must look at soundness of educational theory or principles upon which program is based, then whether the practices are reasonably calculated to implement that theory, finally whether the program is sound for alleviating language barriers

Arguments for saying children who have language barrier should be in separate classes-different needs requires to provide equal educational opportunity requires different steps
Against-warehousing
Title VI-intent to discriminate required
Meyer v. Nebraska-didn't allow German in classroom, court found parental right to choose instruction
Do English only state laws violate academic freedom?

Plyler v. Doe, US SC, 1982
-Can Texas deny undocumented school-age children the free public education that it provides to citizens or legal aliens under the Equal Protection Clause?
-DC-used intermediate scrutiny, saying that unnecessary to determine under strict scrutiny because no rational basis, Court of appeals reversed under Texas statute but no equal protection because didn't matter if rational basis or more stringent, it wasn't protected under EP clause
-illegal aliens are entitled to Fourteenth Amendment protection because they are "within the jurisdiction of the US"
-children can't control their situation, it is parents decision

-public education is not a right but it is very important so different from other benefits
-no suspect class because in country for violation federal law; education is not a fundamental right
-rational basis test-must further some substantial goal of the state
-none here; child may never be deported, should get basic education
-no showing that it burdens states economy
-no rational basis for excluding illegal aliens
-CONCUR: education is fundamental interest
-CONCUR: nature of interest at stake is crucial to resolution
-CONCUR: unique character of cases
-DISSENT: theory was custom fit to facts, quasi suspect class, quasi fundamental right, level of scrutiny only applies to these facts (result oriented approach)
    -state doesn't deny based on statutes of birth
    -importance of education doesn't make it a fundamental right
    -no suspect class, so rational relationship test and it is not irrational for a state to conclude that it doesn't have same responsibility for illegal aliens
-choice of legislature, etc.
Equal protection challenge
Standard of review-rational basis (strict scrutiny only triggered by fundamental right, SC already said in Rodriguez, no fundamental right, no suspect class)
-Are children entitled to equal protection? Yes-"persons"
-state says more kids, more classes, more teachers or bigger size of class
-court weighs cost of two choices
-dissent-court is not applying rational basis but rather some form of heightened scrutiny
-court analogizes illegitimate child laws to discourage premarital sex
    -court used intermediate scrutiny because children had no control over status
-another approach court might use-instead of three tests, have a sliding scale

Proposition 187
-no public school shall admit illegal aliens, verify legal status, etc.

LULAC v. Wilson, CD Cal, 1995
-this impermissibly preempted federal law (because it regulated immigration which is exclusively a federal power) but state could bar access to public higher education

Excerpt on Deaf: used to show the tension between mainstream/overcoming disabilities and separation (integrate or separate students with disabilities?)
-*what is equality for the disabled? What is the role of schools?*

-Judicial decisions in 1970s asserted that disabled children enjoyed constitutional entitlements to an "appropriate education" that differed with each disability but never passed upon by supreme court
    -Congress-EAHCA, later renamed IDEA, has specified a broad set of rights, substantive and procedural for disabled students
-problems with education of the handicapped-misclassification, deemed uneducable, differential vulnerability (more boys than girls, more minorities), efficacy questioned, permanent assignments

Mills v. Board of Education, DDC, 1972
-seven children of school age seek declaration of rights and injunction to defendants from excluding them from DC public schools or denying them publicly supported education and compel them to provide with adequate education and facilities or alternative placement at public expense
-tagged as behavioral problems, mentally retarded, emotionally disturbed or hyperactive and denied admission to public schools or excluded with no alternative
-court: this violates the Columbia code, which is compulsory education with only exception if unable mentally or physically to profit from school but shall attend specialized instruction if it would benefit him and failure to do this is criminal offense
    -this statute presupposes that an educational opportunity will be given to them
-Due process: Hobson v. Hansen-Fourteenth Amendment embraces 1,4, 5, 6, 8 and the doctrine of equal educational opportunity (equal protection clause) is applicable to public school education and is a component of due process under the Fifth Amendment (so it applies to DC)
-Like Hobson, that denied poor children equal opportunities, the school here is denying all public supported education which violates due process
-Board and Schools claim defense of money, but court says constitutional rights must be afforded to citizens despite the expense and a lack of funds should not bear more heavily on the exceptional child
-summary judgment for plaintiffs, can't be excluded unless adequate alternative, hearing before placed in special class, and notice if action is going to be taken

Revolution in the legal treatment of education for disabled children
-can go to court to get a change

-excluded all disabled children from all public schools-due process clause, DC compulsory education statute
same arguments as Plyler-socialization, out of children control, financial burdens now or later?
-what is an equal educational opportunity?
-notice and hearing required (similar to Goss) why? Arbitrary vs. reasonable, avoid mistake

PARC v. Commonwealth, ED PA, 1972
-required PA to provide a free public program of education and training appropriate to the child's capacity with preference to placement in a regular class
-generally regarded as the first right to education class regarding the disabled

Does the money that goes toward suitable education for handicapped take away from suitable education for regulars?
Substantive entitlement in Mills-right to education/suitable instruction
Procedural Entitlement: Due process is to ensure not arbitrary action, how is hearing officer to determine what is suitable, etc.

The Federal Statutory Framework
-these two cases spawned litigation in many states to show entitlement to appropriate education and equality for disabled
-Congress-IDEA, 20 USC 1400-1490 and Rehabilitation Act-codifies Mills and Parc and is more detailed in specifying rights
learning disability-disorder in one or more of basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do math. Don't include learning problems resulting form visual, hearing, motor disabilities, mental retardation, emotional disturbance, or economic, cultural disadvantage
    -many argue against this, saying too broad, negative and exclusionary and not affirmative, diagnostic techniques are poor, misclassification
HIV-question about whether a disability but courts have found so long as it doesn't limit ability to learn, they should be admitted to the classroom, protect against discrimination under Rehabilitation Act, but no special accommodations under IDEA
Rehabilitation Act, Section 504
-nondiscrimination based on disability
Southeastern Community College v. Davis, US SC, 1979
-Does § 504, which prohibits discrimination against an otherwise qualified handicapped individual in federal funded programs solely by reason of his handicap, forbid professional schools from imposing physical qualifications for admissions to clinical programs? NO
-serious hearing disability seeks to be trained as a registered nurse, difficulty understanding questions asked hearing aid, hard to understand normal spoken speech, not admitted because it made her unsafe as a nurse and would make it hard to participate safely in clinic without modifications that would prevent her from benefiting
-filed suit under § 504
-**Section 504 doesn't compel educational institutions to disregard disabilities or make substantial modifications in their program (mere possession of handicap is not permissible ground for assuming an inability to function)**
An "otherwise qualified person" is one who can meet all of a programs requirements in spite of their handicap
    -were the physical qualifications necessary for participation? Yes- ability to understand speech is necessary for patient safety,
    -even though regulations say that they need to make adjustments by allowing devices or service, they would need close, individual attention by an instructor would be sufficient for patient safety, and the regulation does not encompass that kind of curricular change in programs
-distinction between evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome

"appropriate education"-CFR-designed to meet individual education needs of handicapped persons as adequately as the needs of non-handicapped

-see problems on p. 703
a. partial tuition reimbursement and no appropriate public education provided-
Burlington School Committee-Where court determines that a private placement desired by the parents was proper under the Education of the Handicapped Act, and that an individualized education plan calling for placement in a public school was inappropriate, appropriate relief would include a prospective injunction directing school officials to develop and implement at public expense an individualized education plan placing child in private school.
b. vision in only one eye wants to play contact sports
Kampmeier-the exclusion of handicapped children from a school activity is not improper if there exists a substantial justification for the school's policy, and (2) the students and their parents were not entitled to a preliminary injunction, as defendant school officials were relying on medical opinion that children with sight in only one eye are not qualified to play in contact sports because of the high risk of eye injury, as plaintiffs presented little evidence medical, statistical, or otherwise which would cast ("otherwise qualified" language)
c. psychiatric care, deep hostilities, lives at grandmas and wants to play football but state regulations intended to eliminate recruiting, bars unmarried students not living with parents from playing for one year
Doe v. Marshall-held that the student was entitled to a preliminary injunction restraining the regulatory body from barring him from interscholastic competition on the basis of a rule prohibiting a student from competing in interscholastic athletics for a

school district other than that in which his parents reside where the student was a "handicapped" individual within the meaning of the Rehabilitation Act of 1973, he had a legitimate, compelling necessity for living with his grandparents rather than his parents, and, because of his severe psychiatric difficulties, the student had a genuine, compelling need to participate in interscholastic football, and denying him that right might mean the difference between his growing up as a normal, productive adult, as distinguished from the possibility of his being institutionalized for the rest of his life.
d. black student-EMR program disproportionately black-achievement grouping of students remedied consequences of prior segregation through better educational opportunities and, thus, did not violate equal protection; (2) achievement grouping and placement of black students in special education programs did not violate Title VI of Civil Rights Act of 1964; (3) schoolchildren could not maintain disparate impact cause of action authorized by Rehabilitation Act regulations; but (4) schoolchildren, who failed to first exhaust their state administrative remedies, nevertheless could seek relief under Rehabilitation Act for school districts' alleged violations of federal regulations in operating their special education assignment programs.

IDEA
-codifies Mills and PARC and moves beyond those cases
-civil rights combined with entitlement approach
-outlaws discrimination and guarantees educational service
-**standards: full educational opportunity, free appropriate public education**
-requires an IEP plan, preference for mainstreaming in regular classrooms
-parental participation, due process hearing, appeal right to sue

a. The substantive requirement
-free, appropriate public education-what is appropriate?

Board of Education v. Rowley US SC, 1982
-deaf, lip reader, placed in regular kindergarten class, school-teachers attending ASL class and teletype machine to communicate with parents, at the end of the trial year they said she could stay in class but use hearing aid, parents wanted an interpreter, who was in class for two weeks and said it was not necessary, IEP just said hearing aid, tutor, speech therapist.
-district court said disparity between potential and achievement, so she is not receiving free appropriate public education, Ct of appeals divided
-SC-free appropriate education requires special education and related services, definition- designed to meet unique needs "to benefit" from instruction
-says nothing about level of education, no requirement of maximizing potential
-standard-meaningful education/**educational benefit standard**
-equal opportunities differ from student to student
-passing marks-IEP should be goal for this
-procedural compliance usually equal substantive as well
TEST: 1. have proper procedures been followed? 2. Is the IEP reasonably calculated to enable educational benefits?
Dissent: test-must eliminate effects of handicapped

Substantive Standard-is free appropriate education a phrase to complex to be read as equal? Is educational benefit standard consistent with Congress intent?
Procedural Standard-courts lack knowledge and experience to resolve questions of educational policy, so decision emphasizes procedural regularity over substantive standards
a. parents vs. school district decisions-Gonzalez-School district is required by Individuals with Disabilities Education Act (IDEA) and regulations to provide appropriate education, not best possible education or placement preferred by parents.
b. without summer school, handicapped child will lose and regress-courts may say they need to go to summer school
c. more than twelve years of publicly supported education-courts split, one says if graduated don't need, another says, if a handicapped children could be held back and get more than twelve years, then he should be able to
d. physician says he would be helped by physical therapy, etc. another says no educational potential-Timothy W. case-Education for All Handicapped Children Act required that school districts provide education for all handicapped children, regardless of the severity of their handicap; it did not exclude severely handicapped children from the Act. (no need to show that he could benefit)..words of statute "all handicapped"
-what about medical services? (if necessary to educational benefit and could be performed by school nurse, ex: catheterization)
-if school refuses and suit says improper, parents may be reimbursed do long as the private school provides an education that is otherwise proper under the Act
-students have rights under both IDEA and Rehabilitation Act § 504

b. Mainstreaming
Roncker v. Walter-6th Cir. 1983
-Severely mentally retarded (trainable mentally retarded), needed constant supervision, school recommended he be placed in special school, parents challenged and wanted him in special education class in regular school
-school said mainstreaming would bring no benefit
DC affirmed school districts decision, Appeals Ct reversed, saying mainstream is required in this case
-mainstreaming must be provided to maximum extent provided (strong Congressional preference for it)
-**inquiry-is a proposed placement appropriate under the act?**

-cost is a factor but not a defense if a school district has failed to use funds to provide a proper continuum of alternative placements for handicapped
-do his educational, physical or emotional needs require service not feasibly provided in regular school?
-can't look solely at academic achievement

but some cases look more at academic achievement

Hartmann v. Loudon County Board of Education, 4th Cir. 1997
-Hartman- 11 years old, autistic, can't speak, motor skills, can't write, only type a few words, greatest need is communication skills
-regular classroom, teacher and aide, training, five hours week speech therapy, special education teacher, IEP team-many consultants, curriculum modified
-loud screeching, disruptive in class, kick, bite, pinch, hit, remove clothes
-shown no academic progress
-IEP team-autistic class in regular school, can join for art, music, PE, recess, etc., but parents refused to approved, claiming that it failed to comply with mainstreaming of IDEA, due process and hearing officer upheld IEP, found that despite efforts of county, he had no academic benefit
-dc reversed the decision and said he could receive significant benefit in a regular classroom
-4th Cir reverses, saying that federal courts can't run local schools, should regard the hearing officers finding and the overwhelming evidence, work would be at much lower level, would only be monitoring classes,
-mainstreaming is a presumption but not a mandate
-not required if no educational benefit, significantly greater benefits from separation or disruptive force in classroom
-social benefits are not enough, school made plenty of efforts, he was disruptive,
-academic benefits vs. social
-deference to educators

c. Mainstreaming, Segregation, and Equality
-belief that mainstreaming can safeguard children from harms of misclassification and segregation in dead end classes
-some scholars argue that inclusion is rooted in false analogy to race, they are not the same
-inclusion is the simple answer and it is wrong
-many children have learning problems that won't' just disappear when included in regular classrooms, difference become apparent, unable to learn in regular class
-on the other side, some say that truly common schooling is tantamount to effective education, which is a legal right, inclusion is an advance

d. The Procedural Entitlement
-IDEA weak on substance, strong on procedure, guarantees parents certain procedures with only general guidelines for substantive
-doesn't speak to authority of school officials to discipline disabled students

Honig v. Doe, US SC, 1988
"stay-put" provision in IDEA that directs that a disabled child shall remain in current educational placement pending completion of review proceedings unless parents and agency agree on something different
-ISSUE: does this apply when dangerous or disruptive conduct growing out of their disabilities?
IEP-vehicle for implementing goals of enforceable substantive right to public education, meetings between school representative, teacher, parents, and maybe children, sets out present performance, established goals, described specially designed instruction and services to meet those goals
-must be reviewed at least once a year, centerpiece of education system
-parental participation is essential, procedural safeguards (right to examine all records, prior written notice when changing child's placement or program, opportunity to present complaints, opportunity for impartial due process hearing
-may seek further administrative review and may file suit
-SF School sought to expel two emotionally disturbed children from school indefinitely for violence and disruptions related to their disabilities (choked another student, kicked out a school window, etc.) (stealing, extorting, sexual comments, etc.)
-there is no dangerousness exception in the language of the stay put provision and the language is unequivocal.
-state says: exception was too obvious or Congress inadvertently left it out
-court says it means what it says, no emergency exception for dangerous students, school can still use normal procedures for dealing with students, including study carrels, timeouts, detentions, and if immediately threatened-suspension for up to ten days, which ensures schools can protect safety and provide a cooling down period in which officials can IEP review and seek to persuade interim placement
-if parents still refuse and dangerous child-can seek aid of courts under judicial relief
Gun Free School Zones Act-can expel child for at least one year for bringing a gun to school
Disabled student-amendment-interim alternative educational setting for up to 45 days

IDEA Reauthorization Act-can suspend for up to ten days, place in interim alternative educational setting for up to 45 days if conduct substantially likely to cause injury, and a hearing officer can extend the placement for forty five days beyond initial period

E. Implementing the Right to an "Appropriate Education"
-Questions being raised about appropriateness of legalization in the school setting
-diverse variations in implementing the law
-is it better to have less formal procedures and more on professional judgment?

Equal Educational Opportunity and School Finance
-historically defined in resource (input) terms-universally available and free education, common curriculum, equality of resources within a given school district, but in the last theory years, increasing sensitivity to spending variations across and among school districts
Serrano v. Priest I- quality of education may not be a function of the wealth other than the wealth of the state as a whole
Class Notes: Emerging Philosophy-educational opportunity shouldn't depend on facts beyond educational control
Example-race, illegal aliens in Plyler, bilingual education, disability, gender, etc)
-Possible models for saying all children should have equal opportunity with finance
1.equal resources across state (equal input)
2. local control
3. degree of effort of school district (rate of taxation regardless of property values and bases)
4. vouchers
Fiscal Neutrality in the Courts
Equal Protection
Serrano v. Priest, Cal SC, 1971
-Cal system of finance relied heavily on local property taxes, claimed substantial disparities among districts in amount of money spent per pupil and violation of equal protection clauses because it discriminated on basis of wealth
-two level test for equal protection
economic regulation-presumption of constitutionality, must only show rational relationship to a conceivable legitimate state purpose
suspect class or fundamental interests-strict scrutiny, must show compelling state interests and distinctions drawn by law are necessary to further its purpose
-wealth is a suspect class, education is a fundamental right (essential for democracy, universally relevant, long period of time, molds personality of youth of society, compulsory)
-therefore, test is strict scrutiny: Is the CAL financing system necessary to achieve a compelling state interest?
CAL says-local control is compelling state interest
Court-even a assuming this, the present system is not necessary because it can still leave decision making to local authorities
-so long as assessed valuation within a district's boundaries is a major determinant of how much it can spend for its schools, only a district with a large tax base will truly be able to decide how much it cares about education
quality of a child's education cannot be a function of the wealth of his parents and neighbors (fiscal neutrality)
San Antonio School District v. Rodriguez, US SC, 1973
-TX system of financing-guaranteed minimum or basic educational offering by placing burden on school districts most capable of paying; each district contributes to fund; dual system of finance
-Mexican American students attending the poorest school, huge disparities in expenditures per pupil
-ISSUE: is the Texas system of finance a violation of the equal protection clause?
-suspect class or fundamental right? If so-invalid
-if not-does it have rational relationship?
-Wealth discrimination in this case is not a suspect class because disadvantaged class cannot be identified in traditional terms
-Education is not a fundamental right because even though it is important, it doesn't mean it is fundamental explicitly or implicitly guaranteed in the Constitution
-not purposeful discrimination
-under rational basis test-local control of education and fiscal flexibility, just because some inequality, not a reason to strike it
-DISSENT: local control and decision making is not a compelling state interest
-fails rational basis test because some communities are so low that there is little opportunity for local initiative and choice
DISSENT: shouldn't just have two tests for determining equal protection, local control would still be allowed

-poverty, standing alone, is not a compelling suspect classification
-Is education a fundamental right? Still questionable

Brigham v. State, VT, 1997
-Vermont system of funding for education –substantial reliance on local property taxes, results in wide disparities in revenues and deprives children of equal educational opportunity under Vermont constitution
-fundamental right to education and current funding disparities must be strictly scrutinized and state must show a compelling state interest that is narrowly tailored to serve that interest

-system: Funds through property assessments and funds under Foundation plan that enables each school district to spend an amount per pupil that is a minimum
-purpose of plan is to equalize capacity to produce a minimally adequate education
-court says fundamental right: compulsory education is mentioned in Constitution and was only government service mentioned
-equal protection clause-strict scrutiny- no legitimate governmental purpose to justify gross inequities in educational opportunities
-claim local control but the system is not necessary to foster local control
-also claim common benefits clause-government has to treat everyone evenhandedly
-must have substantially equal access to similar revenues per pupil
-legislative response: equalized fiscal capacity rather than equalized spending, education is funded by statewide property tax, and school districts may levy additional taxes, but property rich districts will have some of funds recaptured and placed into property poor districts

equity approach vs. adequacy approach

Robinson v. Cahill-NJ SC, 1973
-are education clauses violated (adequate education, etc) by the funding schemes
-what is thorough and efficient?
-constitutional demand for equal education has not been met
-doesn't guarantee that all pupils in state will receive the level of educational oppty as mandated in the constitution
-won't be thorough and efficient
-political fallout from this case-forced branches of government to move an issue already in public realm higher on their political agenda, disadvantaged districts with large numbers of poor families
-deference or activities judicial stance?

Rose v. Council for Better Education, Inc., KY, 1989
-Did KY legislature comply with providing an efficient system of common schools? NO
-must be created and maintained with premise that education is vital, tax proceeds are very important for this, must be adequately funded to achieve its goals
-every child must have equal oppty to adequate education regardless of where they live
-efficient system: free to all, available to all KY children, substantially uniform throughout state, equal educational oppty, no waste, duplication, political influence, sufficient funding, constitutional right to education, develops capacities
-not efficient in this case, must provide uniform tax rate so they all make comparable effort in common schools

court ordered reform can be stymied by the political process
-shift to adequacy relinquished normative power of vision of equal education for all

Abott v. Burke, NJ, 1990
-held that the Public School Education Act was unconstitutional as applied to poorer urban school districts and had to be amended to assure funding of education in poorer districts at the level of property-rich districts, that funding could not be allowed to depend on the ability of local school districts to tax, but had to be guaranteed and mandated by the state, and that the level of funding had to also be adequate to provide for the special educational needs of the poor urban districts in order to redress their extreme disadvantages.
Failure to provide "thorough and efficient" education, expenditures had to be substantially equivalent
Issues with municipal overburden
-far more prescriptive than other decisions?

Intradistrict Inequalities
-most have dealt with differences among districts, but even within districts, there may be different expenditures in different schools
-source of interdistrict: heavy reliance on local property tax

Hobson v. Hansen- (also tracking case, DDC, 1971)
-expenditures per pupil had financial disparities, with differences between black and white schools
-pattern of spending is so discriminatory on its face, large differentials cannot be condoned, can't require equalization of total expenditures per pupil (too broad) but court does find that equalization based on teacher's salaries per pupil and benefits that directly bear on quality of education is a good remedy
- *only one intradistrict disparity since Hobson, Brown v. Board of Education of Chicago-* wealth discrimination, but failed to establish poverty or adequate education, so the difference in expenditures had to be assessed in rational basis standard, school board had convince court that series of programs to correct funding disparities
what about private donations to public schools?

The right to a free public education
-student fees, original sources, hands on, computers, etc.

-what about transportation fees, fees for textbooks, lab equipment, lockers, etc.
School Fees
Older cases invalidated on basis of state constitutions providing free education for schools
Now: textbook fees-more than half say its valid as long as indigent children were able to get for free, but some invalidate
Materials, courses, extracurricular- three different views: 1. reasonable fees upheld, 2. if required or necessary items barred but extracurricular upheld, 3. even fees for extracurricular violate free public education guarantee

Kadrmas v. Dickinson Public Schools, US SC 1988
-bus fee for those schools not reorganized, unable to pay fee, wouldn't sign contract, no longer picked her up, family arranged to take her, ND SC said fees rationally related to legitimate governmental objective of allocating limited resources and the statute does not discriminate on basis of wealth
-say it deprives minimum access to education or equal protection clause requires government to provide free transportation to school for those who can't do it
-statutes having different effects on rich and poor are not on that basis alone subject to strict scrutiny and education is not a fundamental right that triggers strict scrutiny
-plyler- heightened scrutiny but in this case not penalized for illegal conduct by her parents, so not similar to plyler
test-**rational relation to a legitimate government objective**
    -this is allowable here, no suspect class, not fundamental right, not arbitrary or unreasonable, no violation of Equal Protection
DISSENT: burdens poor persons interest in education, denies equal opportunity

Title VI Disparate Impact and Resource Equity
-states under funding of minority districts has disparate impact on minorities in violation of Title VI

Powell v. Ridge, 3d Cir. 1999
-Title VI regulation prohibits using criteria or methods of administration which subject individuals to discrimination on basis of race, color or origin
-plaintiff plead that facially neutral practice adverse effects on group protected by Title Vi, and it did here so dismissal is improper
Does Title VI provide a private right of action? SC recently held that Title VI regulations don't give rise to private right of action