Substantive Due Process Challenges: Are They Creeping into Education under a New Standard of Review?

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Substantive Due Process Challenges: Are They Creeping into Education under a New Standard of Review?

Traditionally, courts have accorded educational institutions great deference in educational decisions made by the appropriate authorities. However, in recent years, challenges to educational practices have become more frequent and substantive due process attacks have been increasingly used in those challenges. Despite the great number of substantive due process attacks, the Supreme Court has yet to determine whether "courts can review academic decisions of public educational institutions under a substantive due process standard." Justice Stevens, writing for the Court in Regents of University of Michigan v. Ewing,


2. In the context of this article, the term "educational practices" is used to describe the decisions, practices and laws under which the daily activities of educational institutions operate. For the purposes of this article, only public educational institutions are considered, but included are primary, secondary, and higher educational institutions. Examples of educational practices include: the decision to expel a student; the decision not to graduate a student; the decision not to rehire a teacher; decisions about curriculum content; and general administrative decisions such as school boundaries; teacher assignments, etc.

3. Before Griswold v. Connecticut, 381 U.S. 479 (1964) (generally considered by most commentators to have been the watershed case in establishing the doctrine of substantive due process as a protection for fundamental rights), there were very few challenges to educational practices using explicit substantive due process attacks. Since Griswold, there have been 344 challenges to educational practices using substantive due process. These challenges have involved cases regarding student dismissals, student discipline, faculty dismissals, and curriculum decisions. (WESTLAW, MED-CS, ALLFEDS databases).

A typical substantive due process challenge to an educational practice usually involves a situation where a student or a teacher has a grievance with an administrative decision but has been given a chance to air those grievance in some sort of hearing. Because the plaintiff in these cases has been granted procedural guarantees, the plaintiff is left to argue that the underlying educational practice is fundamentally unfair. The argument is made that the educational practice was so fundamentally unfair that it rises to a deprivation of a constitutionally protected right under the due process clause. This challenge to the substance or content of the action is made under the doctrine of substantive due process. See infra notes 10-15 and accompanying text.

Education administrators are especially vehement in their concern over instances of judicial intervention in what they perceive as "their business." Educators often find that nowhere is "their business" more "their business" than in policies and decisions about grades, program completion, and diplomas. Substantive due process challenges pose an especially significant threat of judicial intrusion because substantive due process analysis goes to the substance of the educational decisions, not just the procedure of those decisions as procedural due process.


assumed that such a standard of review existed, but stated that the issue had not been decided. Justice Powell, in a concurring opinion, vehemently disagreed with this assumption and decried the idea of creating a different standard of review under substantive due process for education cases.

This article looks at the standard of review in recent substantive due process cases which evaluate educational practices. The article concludes that lower courts are developing a slightly different standard of review for substantive due process challenges to educational practices. This new standard of review is more demanding than the plausible rational basis requirement found in most substantive due process cases that deal with non-fundamental interests; however, this standard is much less stringent than strict judicial scrutiny under the compelling state interest test used in fundamental right analysis. This standard of review may be a "rational educational basis" standard, rather than a traditional "rational basis" standard. The difference between the standards is that the "rational educational basis" standard looks at the content of the educational practice, whereas the traditional "rational basis" standard looks at the relationship between the practice and a legitimate state interest.

Part I of this article briefly looks at the traditional standard of review under a substantive due process challenge as it relates to educational practices. Part II explores the standard of review which the

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6. Id. at 511-12.
7. In the context of liberty interests, this Court has been careful to examine each asserted interest to determine whether it 'merits' the protection of substantive due process. . . . I do not think the [education interest] entitles it to join those other, far more important interests that have heretofore been accorded the protection of substantive due process. Id. at 515-16 (Powell, J., concurring).
8. See infra text accompanying notes 16-19.
9. When the Supreme Court uses strict judicial scrutiny in fundamental rights cases they employ the "compelling state interest test." In other words, when strict scrutiny is used, the state must have a compelling interest (or reason) for infringing on a protected right, not just a legitimate interest. Sometimes, the terms "strict judicial scrutiny" and "compelling state interest" are used interchangeably. See infra text accompanying notes 18-22.
10. There is a subtle difference between the traditional rational basis test enunciated in such cases as Williamson v. Lee Optical Co., 348 U.S. 483 (1955), and the "rational educational basis" test which this article suggests exists. The main difference between the two standards is that the latter examines the rationality of the content of the educational practice, while the former does not. The main similarity between the two standards is that both standards are very deferential towards the legislative or administrative agencies which promulgate the practices. For a more complete discussion of "rational educational basis" see infra notes 89-77 and accompanying text. For a more complete discussion of the traditional rational basis test see infra notes 16-23 and accompanying text.
11. Education creates a unique backdrop for substantive due process challenges because of the unique nature of education. This helps explain why courts are developing new standards of
courts are presently using when examining substantive due process in education cases. Finally, part III looks at substantive due process challenges in the context of judicial intrusion into educational practices.

I. TRADITIONAL SUBSTANTIVE DUE PROCESS AND EDUCATION

Almost since the nation began, the Justices of the Supreme Court have suggested that the Court has an inherent right to review the substance of legislation and state action of Congress, state legislatures, or administrative agencies. The belief that the judiciary has a right to review the substance of legislation and administrative practices springs from the pre-revolutionary war philosophers who espoused the position that certain natural rights prevailed for all men and that a governmental body could not limit or impair those rights.

The constitutional provision most used to review the substance of legislation is the due process clause of the fourteenth amendment. However, judicial examination of the substantive aspects of legislation and administrative practices has often met with a storm of opposition. "In no part of constitutional law has the search for legitimate ingredients of constitutional interpretation been more difficult and more controversial than in the turbulent history of substantive due process."

A. Standard of Review for Substantive Due Process

After the Supreme Court decision in Nebbia v. New York, the use of substantive due process was discredited. In recent years, however, review for dealing with such challenges. For a more complete discussion of the unique nature of education see infra notes 24-27 and accompanying text.

12. See Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798). In Calder, the Court held that the Connecticut legislature had not violated the Constitution when it set aside a probate decree. However, Justice Chase believed that the drafters of the constitutions of the federal and state governments intended to create governments of limited powers, and that natural law, as well as the specific provisions of written constitutions, restricted and regulated governmental power. See id. at 386-388. Therefore Justice Chase decided that the proper role of the Supreme Court was to invalidate legislation if the justices believed that it interfered with rights vested in the people.


14. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend XIV, § 1.


17. See West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (sustaining the constitutionality of Washington state's minimum wage law for women over the plaintiff's allegation that the law violated substantive due process); United States v. Carolene Products Co., 304 U.S. 144 (1938) (upholding legislation which prohibited the interstate shipment of "filled milk" by stating that the statute must be sustained if any state of facts either known or which could reasonably be assumed supports the legislation); Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (stating that the
ever, the use of substantive due process has flourished as a haven for the protection of fundamental values.\(^{18}\) Because the Supreme Court has applied two different standards of review in substantive due process cases a dichotomy in analysis exists. Generally, the Court merely requires that there be a rational relation between the statute and a legitimate state objective.\(^{19}\) However, where the Court finds that a fundamental right is impaired by a statute or practice, the Court has applied a scrutiny that is stricter in two respects. First, the state's objective must be compelling, not merely legitimate, and second, the relation between that objective and the means must be very close, so that the means can be said to be necessary to achieve the end.\(^{20}\) These two standards of review are the two classic standards under substantive due process analysis. The Supreme Court has not clearly articulated any other standards for substantive due process cases.\(^{21}\)

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18. See, Griswold v. Connecticut, 381 U.S. 479 (1965) (finding that several general constitutional theories combined to create a zone of constitutionally protected privacy which required a compelling state interest and a closely tailored statute before the fundamental right of privacy could be regulated by the state); Roe v. Wade, 410 U.S. 113 (1973) (invalidating a Texas anti-abortion statute on the grounds that the statute violated the due process clause of the fourteenth amendment as an unjustified deprivation of liberty in that it unnecessarily infringed on a woman's right to privacy). See also Perry, Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process, 23 UCLA L. Rev. 689 (1976); Epstein, Substantive Due Process by Any Other Name: The Abortion Cases, 1973 Sup. Ct. Rev. 159.

19. See Nebbia v. New York, 291 U.S. 502, 537 (1934) ("[A] state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare.") (emphasis added); Carolene Products, 304 U.S. at 152 ("[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests on some rational basis. . . .") (emphasis added); Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963) ("[W]e refuse to sit as a 'superlegislature to weigh the wisdom of legislation' . . . .") (footnotes omitted).


21. The two standards of substantive due process analysis can be contrasted with the several standards which the Supreme Court uses in Equal Protection analysis. In analyzing economic
In short, the classic substantive due process analysis involves just two standards of review — strict judicial scrutiny under the compelling state interest test and minimal judicial scrutiny under rational basis analysis. In practice this means that absent a fundamental right, legislators and administrators enjoy great deference, but if a fundamental right is found, any infringement on that right is rarely justified.\textsuperscript{22}

In theory, if the classic substantive due process analysis were applied to an educational practice, the analysis would involve two steps. First, the court would determine whether the educational practice in question involved a fundamental right. Second, the court would apply the appropriate standard of review. If the practice in question were found to involve a fundamental right, the standard of review would be the compelling state interest test with strict judicial scrutiny. However, if the practice did not infringe on a fundamental right, the rational basis test would be used with minimal judicial scrutiny. Under a rational basis test, little analysis of the content of the educational practice would be necessary because the court would merely need to analyze whether the practice was rationally based on a legitimate state interest.

In reality, however, neither of these approaches are currently being used by most courts for decisions in educational cases.\textsuperscript{23} A partial reason for a different standard of review in cases involving substantive due process challenges to educational practices is found in the nature of education.

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regulation cases under equal protection analysis, the Supreme Court uses a rational basis standard. \textit{E.g.}, Railway Express Agency v. New York, 336 U.S. 106, 110 (1949) (As long as the classification scheme “has relation to the purpose for which it is made and does not contain the kind of discrimination against which the equal protection clause affords protection” the Court will sustain the regulation against arguments based on equal protection.). Where the classification scheme of the questioned regulation involves a suspect classification, the Court will use strict judicial scrutiny. \textit{See} Korematsu v. United States, 323 U.S. 214, 216 (1944). \textit{Korematsu} is a Japanese internment case where the Court first identified the different standard of review which applied to classifications according to “suspect categories.”

The rational basis and strict judicial scrutiny standards are not the only standards of review which the Court has used in equal protection analysis. In cases of gender based classifications, the Court has held that strict judicial scrutiny is not appropriate, but that an intermediate level of review is. \textit{See} Reed v. Reed, 404 U.S. 71 (1971). Classifications based on alienage and illegitimacy also have somewhat heightened review, although not rising to the level of strict judicial scrutiny. \textit{See}, Graham v. Richardson, 403 U.S. 365 (1971); Mathews v. Lucas, 427 U.S. 495 (1976).

The willingness of the Supreme Court to engage in intermediate levels of review in equal protection analysis may be part of the reason why lower courts are beginning to stretch substantive due process analysis from the two rigid categories.

22. \textit{See GUNThER, supra} note 15, at 454 (“It is only when the ‘liberty’ allegedly infringed is thought to be ‘fundamental’ deserving of special protection, and thus imposing on the state especially high burdens of justification for the infringement, that due process turns into an interventionist tool.”)

23. \textit{See supra} note 10 and accompanying text on the distinction of a “rational educational basis” test from traditional rational basis. \textit{See generally infra} Part II.
B. The Unique Nature of Education and Its Effect on Judicial Review

Under a classic substantive due process analysis, the nature of the challenged educational practice would be the key in determining which standard of review should be applied. However, the unique nature of education makes it ill-suited for either traditional standard of substantive due process analysis. While there is no provision in the U.S. Constitution for public or private education, education is almost universally thought of as a value fundamental to American society. This is evidenced by the fact that almost every state constitution recognizes educational institutions or educational rights. While the Supreme Court has held that public education is not a “right” granted to individuals by the Constitution, the Court has also stated:

[N]either is [education] merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. . . . [E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society.

In short, while there is no explicit mention in the Constitution of education as a fundamental right, the fundamental importance of education cannot be denied. Thus, courts have refused to grant education a fundamental right status, or to relegate it to a lower classification. As a result, an anomaly exists in substantive due process challenges to educational practices. Courts are pulled toward strict scrutiny by the esteemed value of education, but they are also pulled toward a deferential review because education has not been granted a fundamental right status by the Constitution or by the Supreme Court. The tension between the need for scrutiny and the need for deference has created a paradox in substantive due process review. This paradox is discussed in the next section.

24. The legal importance of education is revealed by the fact that forty-eight of the 50 states have state constitutional provisions requiring that the state legislature create a system of public education. On the other hand, only one state (New York) has a constitutional provision requiring that the state provide a service other than education (welfare).

A. Morris, The Constitution and American Education 59 (2nd ed. 1980). See also infra text accompanying notes 41-42.


27. For many of the issues involved in judicial intrusion into education see infra Part III.
II. FEDERAL SUBSTANTIVE DUE PROCESS IN ACADEMIA

Substantive due process challenges to laws and regulations often meet with great resistance and controversy. For example, educators, legislators, and police officers do not appreciate judges who “second-guess” their decisions, laws, and policies in the name of substantive due process. In the case of education, the Supreme Court has recognized these fears by endorsing a deferential approach to the decisions made by educational administrators.28

Recently, however, plaintiffs in education cases have asked the courts to give greater substantive due process protection to various rights inherent in education.29 Before 1965 when Griswold v. Connecticut30 was decided, there had been only three substantive due process challenges to educational practices.31 Pre-Griswold education cases involved more traditional constitutional rights such as first amendment rights.32 Since 1965, there has been an explosion of substantive due process cases challenging educational practices.33 These challenges are

28. See Ewing, 106 S. Ct. at 514.
29. See infra note 33.
30. 381 U.S. 479 (1965). Griswold is a watershed point in the development of the doctrine of substantive due process because it was one of the first cases in which the Court clearly identified a non-economic right, privacy, which was not in the Constitution, but deserved constitutional protection. Most commentators agree that Griswold opened up a new area of substantive due process. See Gunther, supra note 15, at 503-16.
31. Elbrandt v. Russell, 381 P.2d 554, 94 Ariz. 1 (1963) (challenging the validity of loyalty oaths which teachers were required to sign); Jones v. Board of Control, 131 So. 2d 713 (Fla. 1961) (alleging a breach of contract for terminating a teacher’s employment because the teacher filed as a candidate for a judgeship); Board of Public Educ. School Dist. v. Intelle, 163 A.2d 420, 401 Pa. I (1960) (challenging a teacher’s dismissal for incompetence).
33. For example, in Mermer v. Constantine, 131 A.D.2d 28, 520 N.Y.S.2d 264 (1987), following a classroom evaluation conducted by a school district consultant, a teacher was advised that he must visit a dentist to improve the appearance of his teeth. When he refused, he was terminated. The teacher brought an action based on a substantive due process claim. The court found that the complaint failed to establish that the defendant’s conduct infringed upon a protected interest and therefore, no denial of substantive due process existed. In Fiscus v. Board of School Trustees of Central School Dist., 509 N.E.2d 1137 (Ind.App. 1987), a teacher brought action against school board alleging a denial of substantive due process in her termination for uttering an “immoral” remark in a fifth-grade classroom. The court found no right it could protect. In Dean v. Tensas Parish School Board, 505 So.2d 908 (La.App. 1987), a former school supervisor brought
often accompanied by a storm of opposition because of the potential for judicial intrusion into education.

Education administrators are especially vehement in their concern over instances of judicial intervention in what they perceive as "their business." Educators often find that "nowhere is 'their business' more 'their business' than in policies and decisions about grades, program completion, and diplomas." Substantive due process challenges pose an especially significant threat of judicial intrusion because substantive due process analysis goes to the substance of the educational decisions, not just the procedure of those decisions as does procedural due process analysis.

A. Procedural Due Process in Education as Opposed to Substantive Due Process

For the most part, federal courts have left the "educator's business" to the educator by refusing to grant substantive due process challenges to educational decisions. However, the courts are still willing to review educational administrative decisions on procedural due process grounds. In Goss v. Lopez, the Supreme Court held that students had a property right in their continued enrollment in school. Therefore, according to the Court's logic, students have a constitutional right not to be suspended for misbehavior unless they are first afforded procedural due process rights — the right to be informed of the reason for the proposed suspension, and the right to a hearing.

Goss and similar cases are intended to protect students from procedural forms of abuse. These cases applied procedural due process standards to school disciplinary procedures, but at a level so minimal that these cases "stand primarily for the Court's unwillingness to con-
clude that due process has no application at all to schools." For example, in Goss the Court recognized the unusual character of the school environment by leaving discretion with school officials to define the level of procedural formality required. "In that sense, school personnel are not treated as other state agents, nor does procedural due process have the same meaning in school cases that it does elsewhere." Accordingly, the educational setting is sufficiently unique to justify a unique set of procedural requirements, although the educational setting alone does not confer independent fundamental rights or liberty interests.

One reason for the minimal level of procedural guarantees in education cases is the unique nature of education. Schools are to provide more than a service; their mandate is to educate their pupils. Nevertheless, it would be difficult for a court to mandate the level of education a school must provide because the effectiveness of education inevitably depends on willingness and cooperation from the student. For example, a court is more likely to review the procedure used in dismissing a child from a public school, than it is to review the quality of that child's education. "[W]hile children clearly have the right to be educated, their right is not susceptible of total enforcement, because enforcement depends so heavily upon the fulfillment of affirmative duties by schools that are beyond the capacity of courts to supervise in productive, specific ways."

1. Academic freedom of educational institutions

The Supreme Court has recognized that an educational institution has "essential freedoms" to "determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." This is known as the doctrine of academic freedom. In many ways academic freedom is a counter argument to

39. Id. at 694.
41. See, e.g., Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr 854 (1976) In Peter W., the plaintiff sued the school district for failing to educate him adequately. The plaintiff claimed that the school was negligent as evidenced by the fact that he couldn't read a level higher than the 6th grade. Id.
42. Hafen, supra note 38, at 711.
44. See Morris, supra note 24, at 238.
the substantive due process argument. Under academic freedom, the school feels that it has a right to teach and administer policies as it sees fit. On the other hand, under substantive due process, the plaintiffs in educational cases argue that they have a fundamental right to a certain type of education and school policies and that teachings must be consistent with that fundamental right.

In *Regents of University of Michigan v. Ewing*, a unanimous Supreme Court relied on the concept of academic freedom when it upheld the University of Michigan’s dismissal of a student for academic reasons. The action involved the judgment of a university faculty committee regarding the academic qualifications of a student. Rejecting the student’s claim that the University had misjudged his fitness for continued enrollment, the Court refused to override the “faculty’s professional judgment” unless “it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.” Noting that “considerations of profound importance counsel restrained judicial review of the substance of academic decisions,” Justice Stevens, writing for the majority, found the judiciary unsuitable to “evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions.” Justice Stevens went on to state: “Academic freedom thrives . . . somewhat inconsistently, on autonomous decision making by the academy itself.”

*Ewing* reaffirmed an earlier decision in *Board of Curators v. Horowitz*, where the Supreme Court showed a strong preference for deferring to the discretionary judgment of school leaders in the subjective evaluations of academic competence. Because the Court is reluctant to second-guess academic judgment calls of university faculty, educational institutions enjoy a certain degree of autonomy from judicial review.

46. The student had completed four years of a six-year program, but failed a national qualifying test after having barely completed his other requirements. *Id.* at 508-09. His suit alleged arbitrary and capricious action by the University in violation of his substantive due process right to continued enrollment, noting that he was the only student to fail the test who had not been permitted to retake it. *Id.*
47. *Id.* at 513. The board’s judgment was found “not beyond the pale of reasoned academic decision-making” in light of the student’s entire university career. *Id.* at 515.
48. *Id.* at 513.
50. See *e.g.* Board of Curators v. Horowitz, 435 U.S. 78, 92-93 (1978) (“Even assuming that the courts can review under such a [substantive due process] standard an academic decision of a public educational institution, we agree with the District Court that no showing of arbitrariness or capriciousness has been made in this case. Courts are particularly ill-equipped to evaluate academic performance.”) (emphasis added; footnotes omitted).
2. Restriction on autonomy of educational institutions

The concept of educational autonomy found in *Ewing* and *Horowitz* does not give educational institutions total autonomy. Discretionary core educational decisions, are likely to be upheld upon judicial review, but where non-academic decisions are involved, the discretion of educators meets with more scrutiny. The procedures used to implement those decisions, therefore, must meet minimum procedural due process standards and cannot offend other constitutional guarantees. For example, “student discipline for non-academic infractions may be sufficiently removed from core academic activity to call for greater due process protections than would be appropriate in evaluations of academic performance.” The distinction between discretion in core educational decisions and discretion in administrative non-academic procedures helps explain why the Supreme Court is less willing to sustain broad institutional autonomy in behavioral discipline cases than it is in decisions about academic curriculum.

B. Current Substantive Due Process of Educational Practices

Between *Horowitz* and *Ewing*, it is evident that the Court will give great deference to educational practices which involve core educational discretion. However, from examining the recent challenges to educational practices, it is these discretionary educational policy decisions which are most likely to be attacked on substantive due process grounds. Despite the fact the Supreme Court generally advocates deference to educational policy makers, the analysis which the Court has

51. In *Horowitz*, the Court rejected a challenge by a medical student that her termination as a student violated substantive due process. Prior to her termination, she had received several poor progress reports and failed a supervised test. However, she claimed that her dismissal was arbitrary and that the procedures followed were unfair. The Court held only a minimal hearing was required and that determinations regarding student status by educational administrators should be given great deference. *Id.* at 92.


53. Core educational decisions include curriculum matters, teacher evaluations, graduation requirements, academic performance, academic advancement, etc.


56. See *supra* note 33 for a listing of many cases involving discretionary decisions which were challenged under substantive due process. *See also infra* text accompanying notes 69-77.
used in its recent substantive due process decisions is slightly less deferential than the traditional rational basis test. 57

1. Supreme Court has not yet decided whether a different standard of review exists in education cases

As stated earlier, the majority of the Court has assumed, but not explicitly decided, that there is a right to review educational practices under substantive due process. 58 In Ewing, for example, the Court accepts at face value the student's contention that he has a property interest in his continued education that is protected by the due process clause in the fourteenth amendment. 59 The Court then proceeds to analyze this interest and finds that no unconstitutional infringement of his interest has occurred because the University's decision to terminate his affiliation with the school was not arbitrary. 60 It is evident from the decision that the Court used some form of substantive due process review in evaluating the student's interest; however, the standard of review used by the Court is unclear. The Court, most certainly did not use the same analysis as in a fundamental rights case, i.e. compelling state interest coupled with a closely tailored means. 61 However, the Court's language is also not consistent with traditional rational basis analysis 62 because the Court considered the substantive aspects of the

57. Compare Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (where the Court presumed the validity of a legislative enactment and even went so far as to hypothesize a rational basis for the enactment) with Ewing, 106 S.Ct. 507 (1985) (where the Court assumed that a substantive due process analysis into an education case involved an inquiry into the fundamental fairness of the practice and decided whether the policy was carried out in a manner that was arbitrary and capricious).

58. See supra note 6 and accompanying text.

59. Ewing, 106 S.Ct. at 512.

60. Id. at 511-13.

61. This is quite evident from the sort of relief the student in Ewing was seeking. In Ewing, the student was merely seeking the right to retake a standardized test which he failed the first time. Id. at 509. The University had usually allowed students to retake that test, but had denied Ewing this opportunity. Ewing claimed this denial was arbitrary. Id. If the Court had found that Ewing had a fundamental right to continued enrollment, it is most probable that the Court would not have found the state's interest in regulating it's program sufficient enough to deny Ewing the opportunity to retake the test, especially in light of the fact that the University had allowed several other students the right to retake the test. See id. at 512.

62. The Court assumed a protected property right in the education. Ewing, 106 S.Ct. at 512. Then the Court examined whether or not the procedures employed by the University in denying Ewing a chance to retake the test were fair. Id. at 513. Finally, the Court considered the substantive aspects of the University's policy. Id. at 513-14.

Under traditional rational basis, the Court would have looked to find a legitimate state interest and whether the procedure used was rationally related to that interest. By examining the fairness of the University's action and the substantive aspects of the University's policy, the Court is giving much closer scrutiny to the challenged practice than a mere rational basis analysis would require.
University's actions for fairness, not just whether the actions were rationally related to a legitimate state interest.

Justice Powell felt that this increased scrutiny was alarming and wrote a concurring opinion merely to decry any form of substantive due process analysis which expands the standard of review. He noted that no substantive due process protection should be asserted until the Court has been "careful to examine each asserted interest to determine whether it 'merits' the protection of substantive due process." Even though he agreed with the result reached by the Court, Justice Powell feared that the analysis used by the Court gave Ewing significant substantive due process protection without examining the nature of the interest asserted by Ewing. This fear prompted Powell to write separately to deny that educational interests deserved any greater substantive due process protection than other non-fundamental interests.

In Horowitz, the Supreme Court made the assumption that a slightly different standard of review exists for substantive due process in education cases. Justice Rehnquist writing for the majority, noted that "a number of lower courts have implied in dictum that academic dismissals from state institutions can be enjoined if 'shown to be clearly arbitrary or capricious.'" Justice Rehnquist then analyzed the rights involved assuming that a standard of review based on a showing of arbitrariness or capriciousness existed. He found that the action involved was not arbitrary or capricious.

The Horowitz opinion does not make it clear whether a standard which looks at arbitrariness or capriciousness is different from the rational basis test used in other substantive due process cases. It is arguable that the arbitrary or capricious standard is a higher standard than the rational basis test. To determine whether an action is arbitrary or capricious, the court looks to the substance of the action, not just to the rational relation to a legitimate goal. Such an inquiry becomes very fact sensitive because fundamental fairness could mean different things in different situations or even to different interested parties. Additionally,
an action may be found to be rationally related to a legitimate state goal but still be arbitrary or capricious.

2. Lower courts are adopting a "rational educational basis" test which is more searching than rational basis

As stated in the introduction, this article argues that the lower courts are using a standard of review which examines the nature of the challenged educational practice and not just its rational relationship to a legitimate state interest. This standard may be termed a "rational educational basis" standard because the courts are still very deferential to educational policy-makers and only require a rational educational goal. This new standard looks at questions of fundamental fairness, arbitrariness, and capriciousness. However, even under this new standard, the presumption is that the questioned educational practice does have a rational educational basis and is therefore constitutional.

Justice Rehnquist seemed to support this notion when he noted in Horowitz that lower courts are beginning to adopt different standards of review in education cases where a substantive due process challenge exists.69 Even though the vast majority of substantive due process challenges to educational practices have not succeeded because the courts defer to the educational practice, the lower courts are increasingly willing to examine the substantive nature of the academic and daily decisions made by educational institutions.

An example of a more intense judicial scrutiny of the substance of an educational administrative decision can be seen in Pace v. Hymas.70 In this case, a junior college terminated an entire program, including a faculty position in the program.71 The teacher who was terminated with the program, sued the college claiming she had a constitutionally protected interest in her job under the doctrine of substantive due pro-

69. See Mahavongsanan, 529 F.2d at 449; Gaspar, 513 F.2d at 850. See also supra note 33 and accompanying text; infra text accompanying notes 70-77.

The arbitrary and capricious standard is also being considered in other areas of constitutional law which are analogous to education cases. In "taking" jurisprudence, for example, many courts have looked at whether a finding of arbitrary or capricious conduct in the denial of a building permit is sufficient grounds to support a due process challenge. See Littlefield v. City of Afton, 785 F.2d 596, 604 (8th Cir. 1986) ("This circuit has not previously considered whether an arbitrary, capricious or illegal denial of a building permit states a substantive due process claim under § 1983. A number of other circuits have considered this question and all but the First Circuit generally recognize such claims.").

70. 111 Idaho 381, 726 P.2d 693 (1986).

71. The plaintiff in this case was the only teacher terminated when the program was terminated even though she had tenure and she was the most experienced teacher in the program. The plaintiff was 54 years old and could have retired with full benefits with only one more year of service. Id. at 582, 726 P.2d 693, 94 (1986).
cess. The court examined more than the manner in which the teacher was terminated; the court examined the reason behind the termination of the program.\textsuperscript{72} It was alleged that the program was terminated because of severe budgetary reductions. The court found that a sufficient "financial exigency" was not proven, thus the school was not justified in terminating the teacher's job. Moreover, it is not clear whether the school could have terminated the program for reasons other than financial exigencies without also violating the teacher's substantive due process protection in her job. Because the court went into such detailed analysis of the substance of the school's action, it is doubtful that the court would accept many of the possible state reasons for depriving this teacher of her job. It is evident that the standard of review employed by the court was higher than a mere rational basis test.

Another example of a court carefully analyzing the substance of an educational decision is \textit{Mermer v. Constantine}.\textsuperscript{73} In \textit{Mermer}, a teacher was dismissed because he refused to comply with a direction to visit a dentist to have his disfigured teeth fixed. The \textit{Mermer} court went into great detail in analyzing the substance of the school agency's action to determine whether it was fundamentally fair. While the \textit{Mermer} court found that the school's action was not violative of substantive due process, as in \textit{Pace}, the reasons given were very fact specific. The court carefully examined many different aspects of the school board's action to determine the fundamental fairness of that action. This sort of fact specific review is a higher level of scrutiny than that which normally applies to substantive due process cases, but this level of review is quite prevalent in educational substantive due process cases.

Substantive due process challenges to educational practices do not always fail. \textit{Evans v. West Virginia Board of Regents}\textsuperscript{74} is an example of a standard of review, different from the rational basis standard, used to uphold a challenge to an educational decision. In \textit{Evans}, the plaintiff was a student at the West Virginia School of Osteopathic Medicine (WVSOM). After he completed two-and-a-half years of school with a B average, he contracted a serious infection which required him to withdraw from school. He sought and obtained a year leave from school, but he remained absent from school for a year and two months. When he returned to school, he was informed that he would have to reapply for admission. After he reapplied, WVSOM rejected his application without giving any indication why. After review, the West Vir-

\textsuperscript{72} Id.
\textsuperscript{73} 131 A.D.2d 28, 520 N.Y.S.2d 264 (1987).
\textsuperscript{74} 271 S.E.2d 778 (W.Va. 1980).
Virginia Board of Regents dismissed his case. He then sued in state court claiming a denial of substantive due process rights.76

The West Virginia Court agreed that Mr. Evans was denied substantive due process and reinstated Evans in school. Significantly, the court did not just require a hearing by the educational institution, but instead, the court reinstated the student. In so doing, the court found that Evans had a protected interest in continued enrollment at WV-SOM and that interest could not be taken away by what it found to be an arbitrary action. This intrusive review by the state court sharply contrasts the mandates in Horowitz and Ewing. In those cases, as explained above,76 the Supreme Court held that only minimal procedural guarantees were needed to dismiss a student, clearly giving great deference to school administrators. In Evans, however, the state court gave only limited deference to school administrators and ordered the reinstatement of Mr. Evans contrary to the decision of the educational authorities.

If the Evans court had applied a mere rational basis test, it is most likely that the challenged school action would have been upheld. The school arguably has an interest in maintaining an orderly program which includes regulating the beginning and ending dates of the program. Furthermore, the school has an interest in ensuring that classes will not be disrupted by students entering in the middle of the year. These interests give the school sufficient justification for controlling a leave of absence from the school and enforcing deadlines for returning from a leave of absence. If a rational basis test truly had been followed, the court should have found that the decision not to readmit Evans to school, after missing a deadline for returning, was rationally related to maintaining the academic integrity of the school’s programs. However, the court focused more on the arbitrary nature of the school’s decision not to readmit Evans, rather than deferring to the school’s administrative decision.

From the decisions in Evans, Mermer, Pace, and numerous other lower court decisions in education cases,77 it seems apparent that a

\[75. \text{Id. at 780. See also Strope, supra note 34, at 986.}\]

\[76. \text{See supra text accompanying notes 58-68.}\]

\[77. \text{See cases cited supra note 33. Another example of a slightly higher standard used by a court is in the recent case Honore v. Douglas, 833 F.2d 565 (5th Cir. 1987). In Honore, a law school professor brought a substantive due process challenge against the law school because he was refused tenure. The trial court granted a summary judgment against the professor because it found that Honore's arguments did not create a genuine issue of material fact. The 5th Circuit reversed because it concluded that a showing of arbitrary or capricious action on the part of the school's administration would be sufficient to support a substantive due process challenge, and that there existed issues of fact of whether there was arbitrary or capricious conduct. Id. at 568-69. Significantly, the Honore opinion cites Justice Stevens opinion in Ewing for the authority that a showing...}\]
standard of review exists which is different from the traditional rational basis test. This new standard is not nearly as strict as the standard involved in fundamental right cases, but it is less deferential than the traditional rational basis test because it looks at the nature or fairness of educational practice in question. The new standard, however, still gives deference to educational administrators because most courts, including the Supreme Court, are still careful to give educators great deference when a rational educational policy is found.

This great deference given to school administrators is why this new standard of review may be termed a "rational educational basis" test. While the Supreme Court has acknowledged that lower courts are using alternate standards of review, the Court has expressly withheld deciding the validity of these standards. It is unclear just how strict this standard is, or what the appropriate test under this standard should be. Most lower courts accept a notion that educational practices should be checked against a standard of arbitrariness and capriciousness. However, such a review is inherently fact sensitive and no clear guidelines have been established defining arbitrariness. The reason for concern over the standard of review can be traced to the argument over judicial intrusion into educational practices, the higher the standard of review — the more the judicial intrusion into education.

III. Judicial Intrusion into Education

When considering the question of substantive due process challenges to educational practices, the general topic of judicial intrusion is very important. Many commentators argue that courts should "presume the constitutional validity of rational decisions" of public education administrators, whether those activities are in curricular or extracurricular areas.78 Traditionally, courts have made this presumption and assumed that daily actions of school administrators are constitutional. However, this deference has not been absolute. Often, courts have stepped in to protect the individual rights of students. In Tinker v. Des Moines Independent Community School District,79 the Court held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."80 Pierce v. Society of Sis-

of arbitrary or capricious conduct is sufficient to sustain a substantive due process challenge to an educational practice. Id. Thus, the Honoroë court required more than a mere showing of a rational relationship to a legitimate state interest before it would dismiss a substantive due process challenge to an educational practice.

78. Hafen, supra note 38, at 664.
80. Id. at 506.
ters,\textsuperscript{81} and \textit{Wisconsin v. Yoder}\textsuperscript{82} exemplify the U.S. Supreme Court’s willingness to overturn state laws or policies which govern the conduct of education if those laws or practices infringe on protected constitutional rights. In \textit{Pierce} and \textit{Yoder}, the Court found the individual rights at stake outweighed the state’s interests. In these cases, the Supreme Court found an independent fundamental right that counter-balanced the state interest in education.\textsuperscript{83} The Court predicated its intrusion into educational practices on traditional constitutional rights such as the rights protected by the first amendment.\textsuperscript{84}

Despite the judicial activity in the area of individual rights,\textsuperscript{85} courts still give great deference to educational administrators.\textsuperscript{86} This is

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\item \textsuperscript{81} 268 U.S. 510 (1925) (holding that a compulsory attendance law which required children to attend only public schools violated the due process clause of the U.S. Constitution).
\item \textsuperscript{82} 406 U.S. 205 (1972). In \textit{Yoder}, the Court held that a compulsory education law which required Amish children to attend schools after the 8th grade was unconstitutional. The Amish religion believed in avoiding worldly influences and in remaining on farms. The Court found that the Amish children received a sufficiently equivalent education by the 8th grade and that the state’s interest in requiring further education was not outweighed by the burden placed on the Amish religion. \textit{See} id. at 234-36.
\item \textsuperscript{83} In \textit{Pierce}, the Court found that the right to direct the upbringing of children by the parents was a check against the state’s right to control education. \textit{See} \textit{Pierce}, 268 U.S. at 532. Therefore, the state could not require that students only attend public schools, but the state did have the authority to set minimum guidelines for the academic content of private schools. \textit{Id.} at 534. In \textit{Yoder}, the same notion of the rights of parents to direct the upbringing of their children also was justification for striking down compulsory education laws when equivalent or adequate education had been attained by the students. \textit{See} \textit{Yoder}, 406 U.S. at 233-34.
\item Significantly, the Court in both cases recognized the importance of education to American society and balanced the needs of the educational administrators against other fundamental rights. Implicit in both decisions is the Court’s recognition that the state has a right to demand and regulate basic education to all citizens and only if equivalent or otherwise adequate education can be provided elsewhere, can the parents right in upbringing their children override the state’s educational system.
\item \textsuperscript{84} \textit{See} Justice Douglas’s characterization of the rights in Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925), in \textit{supra} note 32. \textit{Meyer} and \textit{Pierce} have been cited for the proposition that parents have a fundamental right to direct the upbringing of their children, \textit{see} Roe v. Wade, 410 U.S. 113 (1973), but these cases have not been interpreted by the Supreme Court to include a fundamental right of education. \textit{See} San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).
\item \textsuperscript{85} \textit{See}, e.g., Brown v. Board of Educ., 347 U.S. 483 (1954), is an example of the Supreme Court’s intrusion on the daily activities of school to protect individual rights. The Court ruled that legislated segregation in the school district violated the fourteenth amendment. \textit{Id.} Through this decision, the Court began using the schools as a vehicle to affect social change.
\item \textsuperscript{86} The courts are far less suited "to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions." Regents of Univ. of Mich. v. Ewing, 106 S. Ct. 507, 514 (1985). \textit{See also} Board of Curators v. Harowitz, 433 U.S. 78, 92 (1978), Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (reaffirming the Court’s deference to educational institutions by stating that “public education in our Nation is committed to the control of state and local authority,” and that federal courts should not ordinarily “intervene in the resolution of conflicts which arise in the daily operation of school systems.”); Tinker v. Des Moines School Dist., 393 U.S. 503, 507 (1969) (noting that the Court has repeatedly emphasized
especially true in areas of curriculum, teacher and student discipline, academic performance, and testing procedures. Traditionally, the courts have applied only a minimal level of scrutiny to school administrative decisions unless a fundamental right was involved.87

In recent years,88 however, there has been what some school administrators consider an explosion of educational law litigation.89 Students, parents, special interest groups, and governmental agencies are seeking to have the courts impose certain standards on schools. In essence, these groups want the courts to give stricter scrutiny to educational practices. They want educational interests to be examined as a liberty interest or a fundamental right, as are privacy issues.90

Several reasons have been given for the increase in educational law litigation. One reason is that schools have become more influenced by governmental control. Another reason is the fight over local control of school administrations as opposed to state or federal control. A final reason for increased litigation is the increased role schools play in social reform. Because of increased governmental control, local control, and social reform movements, litigants want the courts to more carefully scrutinize the educational practices.91

A. Governmental Control in Schools

In the last few years, educational reform groups have increasingly called for education to return to higher academic standards.92 As a result, education is moving toward a reassertion of authority. As education becomes more institutional, it is carrying with it "increasingly heavy social and political policies in addition to its more traditional burden of teaching."93 During the past two centuries, public education

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87. See Hafen, supra note 38, at 688-93.
88. The years since Griswold v. Connecticut, 381 U.S. 479 (1964). See supra note 3; notes 29-33 and accompanying text.
90. The right to privacy is a fundamental right deserving strict scrutiny. See Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 348 U.S. 483 (1973).
91. In Ewing, the student brought a suit challenging the administration of and policies surrounding a standardized test imposed on medical students at a state university. In San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), the plaintiff asked the Court to scrutinize local educational funding schemes. In University of Cal. Regents v. Bakke, 438 U.S. 265 (1975), the plaintiff challenged racial quotas in admissions to medical schools. These three cases represent examples in each of the categories: Governmental control — standardized tests, local control — local funding, and social reform — racial quotas.
in the United States, "despite occasional pauses and diversions, has moved in the direction of greater emphasis on governmental control."94

With the greater emphasis on governmental control, the courts have become increasingly sensitive to the protection of individual rights against governmental abuse. However, the courts are still reluctant to extend strict scrutiny to educational cases unless they also involve fundamental rights. If the increased governmental regulation of education impinges on a right which the court has previously decided was fundamental, then the court will protect that right.

B. Local Control of Schools

Another area of tension in educational law is the fight over local control of educational decision-making. Local control played a major role in the Supreme Court's 1973 decision in San Antonio Independent School District v. Rodriguez.96 In Rodriguez, the Court held that seemingly inequitable funding levels among local school districts within a state does not violate the equal protection clause. The plaintiffs in the case wanted stricter scrutiny applied to education funding programs. The Supreme Court, however, held that a system of local control which assured basic education for every child only needed to bear a rational relationship to a legitimate state purpose.96

The Court also had to wrestle with the concept of local control in Board of Education, Island Trees Union Free School District No. 26 v. Pico.97 In Pico, the Supreme Court recognized that local school boards have broad discretion in the management of school affairs.98

The Court, nevertheless, determined that a school board cannot remove books from a school library for the purpose of prescribing what is "or-

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94. Hafen, supra note 38, at 671-72.
96. In addition to acknowledging that local financial control allows each district the choice of devoting "more money to the education of one's children," the Court also noted "the opportunity [local control] offers for participation in the decision-making process that determines how these local tax dollars will be spent." Moreover, "[p]luralism [which local control encourages] also affords some opportunity for experimentation, innovation, and a healthy competition for education excellence." Id. at 50.

This case actually involved an equal protection argument. However, the Court's refusal to give strict scrutiny to an educational funding practice also applies to substantive due process.
thodox in politics, nationalism, religion, or other matters of opinion."99 The Court recognized that discretion given to school authorities "must be exercised in a manner that comports with the transcendent imperatives of the First Amendment."100 From reading the Court's opinion in *Rodriguez, Pico* and *Barnette*, it is evident that the Court is struggling to preserve the local control of school administrative bodies while protecting individual rights.

C. *Schools as Vehicles of Social Reform*

A final element in the increased tension between individual rights and deference to school administrative bodies is the expansive role of schools in creating social change. Traditionally, schools were seen as substitutes for parents in educating their children. This doctrine, known as In-loco-parentis, presupposes a voluntary delegation of authority from parents to school officials.101 However, in recent years schools have become an important vehicle for social and political change, and the changes which have been instituted by the schools have often been antithetical to the expressed wishes of the parents.102 Therefore, the fiction that the schools have authority to conduct its business because the parents consent to such actions is less viable.

Because some of the traditional justifications for school action have been eroded, courts have been placed in the position to define the roles of schools. The expansion of social and welfare services has created incentives for challenges to governmental actions that affect the availability of educational benefits.103 Social reformers have pressed the courts to expand both procedural and substantive due process guarantees to curb "governmental arbitrariness in decision-making" and to erect "sufficient procedural hurdles . . . [so] that the costs of governmental action would be so high that the government would refrain from taking away some benefit it had granted."104

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100. *Pico*, 457 U.S. at 864. See also, West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637-38 (1943) (Education is the "reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.").


102. Examples of school actions which were conducted in direct opposition to the wishes of many parents include desegregation, busing, and boundary changes in school districts.

103. See *Hafen*, supra note 38, at 672-82.

In summary, the topic of substantive due process challenges to educational practices should be viewed in the context of judicial review and the reasons for judicial intervention. Even though courts generally give deference to daily educational decisions, the judiciary is increasingly being asked to hear educational cases. As schools become greater vehicles for government control and social reform, courts are more willing to give closer scrutiny to educational actions. The pressure towards increased judicial activism in education and the trend to heightened scrutiny into the substantive aspects of educational decisions seems to coincide. The trend to heightened scrutiny in educational cases, however, is in direct conflict with the Supreme Court’s directive that deference be given to rational educational decisions. This tension is most likely responsible for the uncertainty in the standard of review which should be employed in education cases.

CONCLUSION

In conclusion, as a general rule, substantive due process challenges to educational practices do not succeed. However, the standard of review which the courts are presently using to evaluate those substantive due process challenges is higher than the traditional rational basis test. It is unclear at this point, the degree of scrutiny lower courts will use in deciding educational cases. This will be especially true if the Supreme Court remains silent on what standard of review should be employed in substantive due process challenges to educational practices. For now, at least, there appears to be a standard which may be termed as a “rational educational basis” standard. Under this standard the courts are examining the substantive aspects of educational practices, but only to the extent of determining whether there is a rational educational basis for the practice. This standard allows courts to look at the fundamental fairness of educational practices in specific instances as well as whether the practice is arbitrary or capricious.

The failure of substantive due process challenges in most educational cases may be explained by the deference which the judiciary traditionally gives to educators. Even under a slightly heightened scrutiny of the educational practices, courts still are very hesitant to intrude upon education except in specific areas and in specific ways. Most courts, especially the Supreme Court, are willing to give educators the benefit of the doubt if a rational educational practice can be found.

Presently, procedural due process, academic freedom, and educational autonomy are the most successful arguments available to plaintiffs who challenge educational decision-making. However, because the Supreme Court has not clearly enunciated a standard of review for sub-
stantive due process challenges to educational practices, and because lower courts are using a "rational educational basis" standard of review, substantive due process challenges in educational cases will continue to have uncertain outcomes. If the courts continue to show deference to educational practices, then not many substantive due process challenges will succeed. However, if the courts scrutinize educational practices more closely, or if they continue to scrutinize in detail the specific facts of the case, it is likely that deference to educational administrators will decrease and more substantive due process challenges will succeed.

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