

COMING FULL CIRCLE: THE JOURNEY FROM SEPARATE BUT EQUAL TO SEPARATE AND UNEQUAL SCHOOLS

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In this article, Professor Garda explains how the “separate but equal” doctrine rejected in Brown became the guiding principle in modern education reform. He tracks the evolution of education reform from integration to finance reform to the standards based accountability and freedom of choice reforms embraced in the No Child Left Behind Act to explain why racially separate schools are no longer considered inherently unequal. The desegregation movement’s failure to remedy the de facto school segregation resulting from private residential choice dovetailed with school finance reform to make “separate” schools socially acceptable, so long as the schools were equitably funded and the racial isolation was not state sanctioned. The political and legal blunting of school finance equity claims then coincided with the rise of educational “adequacy” claims, standards based accountability, and school choice further encouraging racial separation by promising meaningful equality through educational outcome parity and the liberty inherent in school choice. Professor Garda explains why these reforms resulted in extreme racial and socioeconomic isolation of poor and minority students in the worst schools today, and why integration is not considered the solution despite its tested benefits. By aligning the evolution of past reforms

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with the current state of education and society's refusal to pursue racial and socioeconomic integration, he explains why the schools of our future will remain separate and unequal.

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I

INTRODUCTION

The United States public education system historically pursues equal educational opportunities for minorities through either resource equalization or integration. Following the rise of mandatory public schooling in the late 1800s, educational institutions followed the route of “separate but equal” education for

minorities endorsed by the Supreme Court in *Plessey v. Ferguson*.¹ Equality under state sponsored, or de jure, segregation was an illusion, and in 1954 the Supreme Court redirected education down the desegregation path to equality in *Brown v. Board of Education*.² For political, legal, and demographic reasons, the integration road appeared to be a dead end detour for minorities, and the education reform movement retreated back to seeking resource equalization through school finance litigation in the 1970s and 1980s. When equal educational inputs for poor and minority students proved nearly impossible to attain in the 1990s, education reform pursued revolutionary new routes to equal educational opportunities for minorities: educational outcome equality by way of standards based accountability and freedom of choice through voucher programs and charter schools. These new reform efforts entirely displaced integration as the primary means to attain educational equality and by the end of the century education is “going back to a kind of *Plessey* separate-but-equal world.”³

Education reformers and the American public no longer subscribe to *Brown*’s admonition that separate schools are inherently unequal because separation is now voluntary instead of state sanctioned, equality now encompasses both resource equality and

1. 163 U.S. 537 (1896). The separate but equal doctrine “apparently originated in *Roberts v. City of Boston*, 1850 . . . upholding school segregation against attack as being violative of a state constitutional guarantee of equality.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 n.6 (1954). The Supreme Court expressly endorsed the “separate but equal” doctrine in the education context in *Gong Lum v. Rice*, 275 U.S. 78, 85–86 (1927) (finding that a Chinese citizen is not denied equal protection of the laws when he is “classed among the colored races and furnished facilities for education equal to that offered to all . . .”).

2. 347 U.S. 483 (1954).

3. Gary Orfield, *quoted in Tresa Baldas, Saying Goodbye to Desegregation Plans*, NAT’L L.J., June 16, 2003, at 4. See also Gary Orfield, *Why Segregation is Inherently Unequal: The Abandonment of Brown and the Continuing Failure of Plessey*, 49 N.Y. L. SCH. L. REV. 1041, 1042 (2005) [hereinafter *Inherently Unequal*].

educational outcome equality, and the liberty resulting from school choice is accepted as a remedy for inequity. But these distinctions between the modern era's and *Plessey's* "separate but equal" paradigms make no educational difference for low income and minority students and our schools are, and will continue to be, separate and unequal.

The push begun in *Brown* for integration lacks momentum among academics, all branches of government, and most importantly, society. The racial and socioeconomic composition of a classroom no longer matters to parents selecting schools. Considering the collective disregard for integration, it is not surprising that schools are rapidly resegregating with no signs of slowing. The accountability, finance reform, and school choice movements contribute to the extreme racial and socioeconomic segregation in today's schools. These movements replaced integration as the best means to attain equality in the 1990s and the No Child Left Behind Act of 2001 ("NCLB")⁴ may mark the point of no return down the modified "separate but equal" path to equality. The Act's accountability methods and its resurrection of the segregationists' favorite tool—school choice—lead to "perverse incentives" for schools to segregate.⁵ The current reform movements displace integration in the American conscience as the best route to equality by creating a false belief that minority achievement gaps can be eliminated in separate schools.⁶ They also degrade the socializing

4. Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of Title 20 of the United States Code).

5. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004) [hereinafter *Perverse Incentives*].

6. Erica Frankenberg et al., The Civil Rights Project, Harvard University, *A Multicultural Society with Segregated Schools: Are We Losing the Dream?* 10, at <http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf>. (2003).

component of education by judging schools exclusively on financial inputs or academic achievement measured by standardized test scores, thus making integration even less necessary. In short, the current reform movements—financial adequacy claims, school choice, and accountability—make voluntary, or de facto, segregation morally and socially acceptable. The Supreme Court apparently stands alone in its belief that classroom diversity provides significant educational benefits, yet it no longer compels schools to diversify their student bodies to achieve racial balance.⁷ The separate schools of today and tomorrow no longer need a “but equal” justification; they are separate without excuse: they are separate *and* equal.

The promise of equal educational resources and outcomes and the liberty inherent in freedom of choice appears to make desegregation worth sacrificing, but true equality cannot be achieved without socioeconomic and racial integration. Even a separate but perfectly equal education system, which will not unfold, is not as sure a route to equality and racial accord as integration. The racially segregated schools of the future will inevitably be unequal. The input equalization sought through finance litigation and the output equalization sought through the standards based accountability movement will prove as illusory as *Plessey’s* guarantee of equality. The standards based accountability of the NCLB Act will ensure that no child is left behind by lowering academic standards rather than improving the performance of its worst students—the poor and minorities—to the level of its best students. Voucher programs and charter schools provide more hope for improved educational opportunities, though they have yet to live up to their promise and tend to further isolate poor and minority students. The segregated

7. *Grutter v. Bollinger*, 539 U.S. 306, 328–33 (2003).

schools of the future may be open to enrollment by any student, may attain equal resources and their students may all pass the same standardized tests, but the education received will by no means be equal.

In *Grutter v. Bollinger*, Justice O'Connor predicted that race-based admissions policies to higher education would be unnecessary in twenty-five years, because the achievement gap between nonwhites and whites would close.⁸ The opposite is likely to occur as education reform is leading us directly to a destination that the architects of *Brown* fought to avoid: racially segregated schools, which are inherently unequal. Part I of this paper discusses *Brown*, its various interpretations, and the goals that its advocates hoped to achieve. Part II explores the evolution of education reform law since *Brown*, tracking the ascent and fall of desegregation and the alternative legal avenues that opened for minorities to attain equality in education. The rise of the finance reform, accountability, and freedom of choice movements are chronicled, ending with the NCLB. Part III describes the current state of American education, the benefits of integration to both minorities and society, and why desegregation was abandoned before it could achieve these benefits. Part IV discusses the possible futures of each of the reform movements and what will be lost in our impending separate and unequal schools.

II

THE UNDERPINNINGS OF *BROWN*

For centuries prior to *Brown v. Board of Education*, American society and institutions were divided by race. The governmental

8. *Id.* at 343.

structure was designed to prevent contact between the races and our institutions; beliefs and practices perpetuated racial separation and unequal treatment. Educational institutions were no exception. In the Jim Crow era, schools for minorities were separate from white schools—in the South, due to state sponsored, or de jure, segregation, and in the North and West due to residential patterns—and unequal in terms of resources, facilities, and staffing.⁹

The brilliant advocates behind the fight for *Brown*—Marshall, Houston, White, and Margold—sought to end the “separate but equal” doctrine and not merely equalize separate schools.¹⁰ They rejected pursuing resource equalization for two reasons. First, they accepted that, so long as black schools and white schools co-existed, white schools would be favored.¹¹ Separate schools were an insurmountable barrier to true, equal educational opportunity. They recognized the need to tie the educational fates of blacks to whites, because “green follows white,” i.e. white schools get better teachers, resources, facilities, and higher standards.¹² Second, and more importantly, they believed in the intrinsic values and benefits of integration. They viewed education as inherently intertwined with society and hoped to engineer a society that learned and worked together, not one that co-existed in parallel worlds.¹³

9. CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* 13–22 (2004).

10. Dennis W. Archer, *Overcoming All Obstacles: The Lawyers in Brown v. Board*, in *BROWN at 50: THE UNFINISHED LEGACY* 7 (Deborah L. Rhode & Charles J. Ogletree, Jr. eds., 2004). See also Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest Convergence Dilemma*, in *BROWN at 50, supra*, at 82.

11. CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* 113–14 (2004).

12. James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L.REV. 432, 477–78 (1999) [hereinafter *The Influence of Race*].

13. MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at xi (1987); Robert L. Carter, *Reexamining Brown Twenty-Five Years Later: Looking*

To achieve the integration ideal, the National Association for the Advancement of Colored People (“NAACP”) laid the groundwork by fighting for integration in “separate but equal” graduate programs. In *Sweatt v. Painter*¹⁴ and *McLaurin v. Oklahoma State Regents*,¹⁵ the Supreme Court held that separate graduate schools that were objectively equal—i.e. equal in terms of facilities and resources—were not in fact equal. These holdings opened the door for the “separate but equal” paradigm to be overturned in primary and secondary public education.

In 1954, the Supreme Court held in *Brown v. Board of Education* that separate but equal educational facilities deprived minority children equal educational opportunities guaranteed by the Equal Protection clause of the Fourteenth Amendment.¹⁶ Relying on *Sweatt* and *McLaurin*, the Court reasoned that separate institutions are unequal for “intangible considerations” that are “incapable of objective measurement.”¹⁷ It found that such considerations “apply with added force” in grade schools and high schools because “[s]egregation with the sanction of law [denotes the inferiority of minority children and], therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly]

Backward into the Future, 14 HARV. C.R.-C.L. L. REV. 615, 617 (1979); RICHARD KLUGER, SIMPLE JUSTICE 543–81 (1977).

14. 339 U.S. 629 (1950) (mandating integration of University of Texas law school even though a separate law school for blacks in Texas existed).

15. 339 U.S. 637 (1950) (holding that Oklahoma’s disparate treatment of African Americans in graduate programs denied equal protection of the laws).

16. 347 U.S. 483, 493 (1954).

17. *Id.*

integrated school system.”¹⁸ For these reasons the Court held that “separate educational facilities are inherently unequal.”¹⁹

The intentionally brief and ambiguous reasoning of *Brown*—necessitated by the Justices’ desire for a unanimous decision on an explosive issue—subjects the decision to two different interpretations. It can be read broadly to mean that separate schools are inherently unequal because of “intangible considerations.” Therefore any segregation, whether state sponsored or not, is prohibited by the Fourteenth Amendment. The Court’s reliance on *Sweatt* and *McLaurin*—finding graduate programs with equal inputs to still be unequal—supports this interpretation. *Brown* can also be read more narrowly to prohibit only state sponsored segregation. Because the only educational harm identified by the Court—feelings of racial inferiority—derives exclusively from de jure segregation, *Brown* can mean that de facto segregation requires no remedy. These competing interpretations each found traction in the courts and the public conscience, which is discussed next.

III

THE EVOLUTION OF EDUCATION LAW SINCE *BROWN*

Brown was hailed as a landmark victory that would forever change the face of race relations, discrimination, and education. It achieved much of what its architects hoped, eliminating de jure segregation and engineering society by increasing contact among the races within schools. Yet *Brown* did not entrench the education system in the desegregation path as initially hoped. Instead,

18. *Id.* at 494. The Court cited numerous social science studies that found that state sponsored segregation caused significant harms to blacks even if their schools were equal, because it resulted in low self-esteem and a defeatist attitude among black students, and it perpetuated odious stereotypes. *Id.* at 494 n.11.

19. *Id.* at 495.

integration proved a mere detour from the resource equalization path of *Plessey*, altering the path to include educational outcome equality and liberty. By looking at the effects of *Brown* and the legal reform movements in its wake, it is apparent that education today seeks to achieve equality for minorities through minimum educational standards, equivalent financing and school choice without regard to integration.

A. 1954–1973: The Desegregation Movement

In *Brown v. Board of Education II*, decided one year after *Brown I*, the Supreme Court required schools to desegregate “with all deliberate speed” and encouraged “prompt and full compliance” with *Brown I*.²⁰ This mandate was met with “massive resistance.”²¹ The South initially rejected desegregation outright, denouncing *Brown* in the “Southern Manifesto” and interpreting it to forbid state sponsored segregation but not require integration.²² Between 1954 and 1964 there was little change in policies affecting interracial contact in schools apart from the technical elimination of de jure regimes and “virtually nothing happened” to desegregate schools in the South.²³ Segregationists fought both the letter and intent of

20. 349 U.S. 294, 300 (1955).

21. Judith A Hagley, *Massive Resistance: The Rhetoric and Reality*, 27 N.M. L. REV. 167 (1997).

22. See, e.g., *Holland v. Bd. of Pub. Instruction*, 258 F.2d 730, 732 (5th Cir. 1958) (“[T]he Fourteenth Amendment does not speak in positive terms to command integration, but negatively, to prohibit governmentally enforced segregation.”); *Briggs v. Elliot*, 132 F. Supp. 776, 778 (E.D.S.C. 1955). See also OGLETREE, *supra* note 11, at 125.

23. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 52 (1991). See also Dennis D. Parker, *Are Reports of Brown’s Demise Exaggerated? Perspectives of a School Desegregation Litigator*, 49 N.Y. L. SCH. L. REV. 1069, 1072 (2005); Orfield, *Inherently Unequal*, *supra* note 3; Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1337 (2004); Nick Lewin, *The No Child Left Behind Act of 2001: The Triumph of School Choice Over Racial Desegregation*, 12 GEO. J. ON POVERTY L. & POL’Y 95, 107–08 (2005).

Brown by inventing educational schemes to ensure the continued separation of the races.

The provision of school vouchers was a favorite tool of segregationists in this era.²⁴ A voucher is a payment the government makes to a parent, or to an institution on a parent's behalf, to be used for a child's educational expense.²⁵ Vouchers assist parents in sending their children to private schools, or public schools other than the neighborhood school, with tuition assistance from the government. Though vouchers were conceived by Milton Friedman in the 1950s as a free-market means to improve public schools through competition, they were implemented after *Brown* primarily to avoid integration.²⁶ For example, in 1959, Prince Edward County, Virginia, closed its public schools, and its residents created private schools for white students only, which were financially supported by state- and locally-funded tuition grants and tax credits.²⁷ The Supreme Court held in *Griffin v. County School Board of Prince Edward County* that these practices violated the Equal Protection Clause of the Fourteenth Amendment, because "the result is that Prince Edward County school children, if they go to school in their

24. Clint Alexander & Kern Alexander, *Vouchers and the Privatization of American Education: Justifying Racial Resegregation from Brown to Zelman*, 2004 U. ILL. L. REV. 1131, 1137–41.

25. *Id.* at 1132.

26. *Id.* at 1137–38. *See also id.* at 1133 (a "veiled crusade was launched under the pretext of private choice to resegregate the nation's schools through the use of tuition vouchers . . ."); James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L.J. 1287, 1288 (2005) (explaining that school choice was used in the south to avoid *Brown*, but that civil rights advocates in the North supported vouchers for minority students to escape poorly performing schools); Terry M. Moe, *The Future of School Vouchers*, in THE FUTURE OF SCHOOL CHOICE 147 (Paul E. Peterson ed., 2003); THE FUTURE OF SCHOOL CHOICE ix (Paul E. Peterson ed.) (2003) (the freedom of the school choice movement started with Milton Friedman); MILTON FRIEDMAN, THE ROLE OF GOVERNMENT IN EDUCATION, IN ECONOMICS AND THE PUBLIC INTEREST 127 (Robert A. Solow ed., 1955).

27. *Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218, 221–23 (1964).

own county, must go to racially segregated schools which, although designated as private, are beneficiaries of county and state support.”²⁸ The Court broadly interpreted *Brown* to prohibit segregation caused by private choice aided by public monies.

The *Griffin* ruling combined with the legislative and executive branches of the federal government placing their full weight behind desegregation changed the legal landscape in 1964. The passage of the Civil Rights Act of 1964 combined with the Elementary and Secondary Education Act (“ESEA”) provided the necessary carrot (significant federal funds) and stick (withholding of funds if schools failed to desegregate) to bring about meaningful change.²⁹ Faced with foregoing significant federal funds, schools began to grudgingly integrate.

In the South, “freedom-of-choice” plans were implemented to prevent integration while maintaining eligibility for federal ESEA funds.³⁰ In New Kent County, Virginia, for example, residents were permitted to choose between two public schools, one white and the

28. *Id.* at 230–31. See also *Hall v. St. Helena Parish Sch. Bd.*, 368 U.S. 515 (1962) (invalidating a Louisiana statute that provided a means for public schools to become private schools as a denial of equal protection, because the legislation was created to accomplish the perpetuation of racial segregation by closing public schools and operating only segregated schools supported directly or indirectly by state or county funds). Numerous district courts also held tuition assistance statutes unconstitutional. See, e.g., *Coffey v. State Educ. Fin. Comm’n.*, 296 F. Supp. 1389 (S.D. Miss. 1969); *Griffin v. State Bd. of Educ.*, 296 F. Supp. 1178 (E.D. Va. 1969); *Brown v. S.C. State Bd. of Educ.*, 296 F. Supp. 199 (D.S.C.), *aff’d per curiam*, 393 U.S. 222 (1968); *Poindexter v. La. Fin. Assistance Comm’n.*, 275 F. Supp. 833 (E.D. La. 1967), *aff’d*, 389 U.S. 571 (1968); *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967).

29. GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT* 46, 77 (1969).

30. AMY STUART WELLS, *TIME TO CHOOSE: AMERICA AT THE CROSSROADS OF SCHOOL CHOICE POLICY* 62 (1993); Betsy Levin, *Race and School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY* 266–68 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999) (school choice flourished during this time as means to avoid desegregation); Paul Gewirtz, *Choice in the Transition, School Choice and the Corrective Ideal*, 86 COLUM. L. REV. 728 (1986).

other black.³¹ No white children chose to attend the black school, and eight-five percent of the black students remained at the black school.³² The Supreme Court struck down the plan in *Green v. County School Board of New Kent County, Virginia*, because “‘freedom of choice’ . . . is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means . . . fail[] to undo segregation, other means must be used to achieve this end.”³³ The Court established an “affirmative duty to take whatever steps may be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”³⁴ By focusing on the racial composition of the schools resulting from a neutral choice policy, the *Green* Court interpreted *Brown* to eliminate the de jure “root” of segregation and its resulting de facto segregation “branch.”

The Supreme Court continued its vigorous pursuit of racial balancing in schools in *Swann v. Charlotte-Mecklenburg Board of Education*, by authorizing cross-town bussing and altering school attendance zones, because “[t]he objective today remains to eliminate from the public schools all vestiges of state imposed segregation.”³⁵ The Court emphasized that “school authorities should make every effort to achieve the greatest possible degree of actual desegregation”³⁶ Residential segregation within a district no

31. *Green v. County Sch. Bd. of New Kent County, Va.*, 391 U.S. 430, 431–32 (1968).

32. *Id.* at 441.

33. *Id.* at 440.

34. *Id.* at 437–38. See also Lewin, *supra* note 23, at 109–11 (The U.S. Commission on Civil Rights and the courts quickly recognized the segregative impact of freedom of choice plans and they were treated with suspicion, or banned outright, in many desegregation orders).

35. 402 U.S. 1, 15 (1971).

36. *Id.* at 26.

longer excused districts that practiced invidious discrimination from racially balancing their schools through student assignment policies.

By 1971, it was clear that private choice resulting in segregated schools—whether through vouchers, public school choice, or residential choice within a district—was constitutionally infirm. The Equal Protection Clause presented a barrier to neutral voucher and freedom of choice plans that yielded segregated schools.³⁷ Racial separation, whether state sponsored or voluntary, was unacceptable and “the Supreme Court made racial balance the *sin qua non* of successful compliance with *Brown*.”³⁸ Student assignment policies designed to racially balance schools were the most important remedial measures for courts to consider when deciding the unitary status of a district.³⁹ Because all governmental branches worked together to achieve racially blended schools, integration peaked in the late 1960s and early 1970s and there was a dramatic increase in the level of interracial contact within schools.⁴⁰

37. See also *Norwood v. D.L. Harrison*, 413 U.S. 455, 467 (1973) (striking a Mississippi plan that purchased school books and gave them to students at private segregated schools, because a state cannot provide aide to institutions that practice invidious discrimination). *Norwood* implied that the use of tuition vouchers violated the Equal Protection clause if they had tendency to reinforce and support private discrimination. Alexander & Alexander, *supra* note 24, at 1144.

38. Rachel F. Moran, *Brown’s Legacy: The Evolution of Educational Equity*, 66 U. PITT. L. REV. 155, 159 (2004). See also Dan J. Nichols, *Brown v. Board of Education and the No Child Left Behind Act: Competing Ideologies*, 2005 B.Y.U. EDUC. L.J. 151, 168 (2005).

39. *Green*, 391 U.S. at 435; *Swann*, 402 U.S. at 28; *Keyes*, 413 U.S. at 202–03. See also United States Office of Education, Department of Health, Education and Welfare, GENERAL STATEMENT OF POLICIES UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 RESPECTING DESEGREGATION OF ELEMENTARY AND SECONDARY SCHOOLS (1965).

40. Clotfelter, *supra* note 9, at 26–27; Frankenberg et al., *supra* note 6, at 17.

B. 1973–1983: The Erosion of Integration and Resurrection of Resource Equality

Despite the success in integrating schools, the government began “dismantling desegregation” in the 1970s.⁴¹ Richard Nixon campaigned against desegregation orders as part of his “Southern strategy” in the 1968 presidential election and, once elected, he attempted to end enforcement of the 1964 Civil Rights Act in schools.⁴² President Nixon set the tone for the next two decades of education reform by declaring that he would prohibit bussing to achieve racial balance in schools and instead direct additional funds to poor and inner city schools.⁴³ Nixon’s separate but equal message was adopted by Congress—primarily because of the stiff opposition to bussing from the politically powerful middle-class suburbs—and legislation began concentrating on increasing funding to urban school districts rather than integration.⁴⁴ Racially separate schools would be acceptable if they were meaningfully equal.

The Supreme Court, reshaped by Nixon appointees, also retreated from integration. In 1973, the Supreme Court pushed the integration tide to its legal high-water mark while at the same time laying the groundwork for its eventual ebb. In *Keyes v. Denver School District No. 1*, the Court held that de facto segregation in a majority of the Denver school system could be remedied by the courts because

41. GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION, THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION I (1996).

42. Frankenberg et al., *supra* note 6, at 8.

43. *Transcript of Nixon’s Statement on School Busing*, N.Y. TIMES, Mar. 17, 1972, at 22 (“It is time for us to make a national commitment to see that the schools in the central cities are upgraded so that the children who go there will have just as good a chance to get quality education as do the children who go to school in the suburbs.”).

44. James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2055 (2001–2002). See also *id.* at 8, 14, 67 (Congress drastically cut back on desegregation enforcement and 1972 saw the last legislation supporting integration).

of de jure segregation in limited areas of the school district.⁴⁵ By finding that desegregation orders could reach voluntary segregation caused by residential patterns, even in limited circumstances, the Court extended desegregation efforts to the North and West which had significant racial isolation but no statutorily mandated dual school systems. But by refusing to eliminate the legal distinction between de facto and de jure segregation, and remedying the latter only if it was the result of invidious discrimination, the Court began the narrowing of *Brown*. Schools segregated by private choice, not influenced by state sponsored discrimination, were now beyond the reach of the courts.

The Supreme Court's shift away from racial balancing became complete in 1974, as it started interpreting *Brown* as merely "a formalistic rule of non-discrimination."⁴⁶ The critical blow came in *Milliken v. Bradley (Milliken I)*, in which the Supreme Court prohibited interdistrict, or between district, bussing to achieve integration in urban Detroit schools.⁴⁷ Building on *Keyes*, the Court held that the affirmative duty to integrate extended only to school districts that had shown clear de jure discrimination in the past.⁴⁸ Because the suburban Detroit schools did not have a history of state sponsored discrimination, their students could not be used to remedy the invidious discrimination in the urban Detroit schools.

45. 413 U.S. 189 (1973).

46. Moran, *supra* note 38, at 161.

47. 418 U.S. 717 (1974). See Michael Heise, *Litigated Learning and the Limits of the Law*, 57 VAND. L. REV. 2417, 2430–31 (2004) ("the *Milliken* decision effectively brought [desegregation] to a close.") [hereinafter *Litigated Learning*]; Mark C. Rahdert, *Obstacles and Wrong Turns on the Road from Brown: Milliken v. Bradley and the Quest for Racial Diversity in Education*, 13 TEMPLE POL. & CIV. RTS. L. REV. 785, 786 (Spring 2004) ("If there is one single case that marks the point where the Court started to abandon its quest to integrate American public education, in my view that case is *Milliken v. Bradley*.").

48. 418 U.S. at 745.

Whereas *Swann* remediated intradistrict residential choice yielding racially isolated schools, *Milliken I* insulated interdistrict residential choice despite its segregative impact, thus rendering *Brown* obsolete in fighting interdistrict residential segregation.

The impact of *Milliken I* on integration was devastating. By 1974, the earnest enforcement of *Brown* led directly to “white flight” from urban school districts to the suburbs and private schools.⁴⁹ Urban school districts had become minority hubs that could not racially balance their schools without drawing from the white suburban spokes. *Milliken I* ensured separate schools for urban blacks and suburban whites by limiting the interracial composition of schools to the racial composition of the school district. As Justice Marshall predicted in his dissent, *Milliken I* ensured the continual separation of races for years to come.⁵⁰

Just as dramatic was *Milliken I*'s long-term influence on society's view of segregated schools. The *Griffin* and *Green* decisions holding that private choice resulting in segregated schools was constitutionally infirm led to an underlying view that separation of any type was socially and morally unacceptable. Racial isolation, whether state sponsored or not, was improper. *Milliken I* drove a

49. John Charles Boger, *Education's "Perfect Storm"? Racial Resegregation, High Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375, 1392 (2002–2003) (desegregation led whites to enroll children at predominantly white private schools); Clotfelter, *supra* note 9, at 8, 82–83, 109–110, 113–14, 121 (desegregation led directly to white flight from urban schools); Alison Barnes, *The Conundrum of Segregation's Ending: The Education Choices*, 89 MARQ. L. REV. 33, 35 (2005) (whites fled urban centers for many reasons, including better jobs, safer communities, and the advent of improved transportation, but desegregation also led directly to white loss apart from these other demographic factors). *But see* James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 282 (1999–2000) (citing conflicting studies as to whether desegregation led to white flight).

50. 418 U.S. at 814–15 (Marshall, J., dissenting). *See also* Clotfelter, *supra* note 9, at 78–81 (residential segregation increased in the 1970s following *Milliken*); Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1470 (2002–2003) (*Milliken I* encouraged white flight).

wedge in this ethos by finding that one type of private choice that led to racial separation—the choice to live in a segregated school district—was constitutionally permissible. Over time, the populace embraced this constitutional interpretation as a social and moral principle, making segregated schools tolerable so long as the segregation was not state sponsored.⁵¹

While the three branches of government were dismantling desegregation, civil rights leaders began questioning the efficacy of integration as a means to improve minority educational opportunity. The integrative principles of *Brown* were viewed by civil rights leaders as based on the demeaning proposition that minorities could not learn unless seated next to whites. Malcolm X forcefully argued that “what integrationists . . . are saying, when they say that whites and blacks must go to school together, is that the whites are so much superior that just their presence in the black classroom balances it out. I can’t go along with that.”⁵² This view of integration, combined with the white hostility to integration, led minorities to believe that their best route to equality was to improve their own schools.⁵³ The *Milliken I* defeat further pushed minorities to seek alternatives to integration.

The government’s retreat from integration mixed with the perception that integration was not helping minorities to the extent initially envisioned, led to the birth of the school finance reform

51. Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353, 1399–1402 (2005). See also *id.* at 1358 (“We have come to think of de facto segregation not simply as the absence of judicially cognizable constitutional injury, but as the absence of any injury at all.”).

52. MALCOLM X: BY ANY MEANS NECESSARY: SPEECHES, INTERVIEWS AND A LETTER 16–17 (George Breitman ed., 1970), cited in Forman, *supra* note 26, at 1307.

53. *Id.* at 1306.

movement in the early 1970s.⁵⁴ School finance litigation challenged state school finance schemes that inequitably funded school districts. Nearly all school finance systems employ a mixture of state and local revenue, with local governments providing the bulk of the funding through property and sales taxes.⁵⁵ Inequalities are inherent in such a system due to disparate property wealth: wealthy school districts with high land value are well funded with a low tax rate while poor school districts with depressed land values are poorly funded despite high property tax rates. Finance litigation sought to remove financial disparities by requiring all districts to be funded equally. It initially complemented integration by ensuring that all integrated schools, whether in the suburbs or the cities, would be equitably funded thus leveling educational opportunities. But over time, school finance reform undermined integration by creating the hope of meaningful equity in racially divided schools—that separate did not have to be inherently unequal.

The first “wave” of finance litigation challenged state financing schemes based on the federal Equal Protection Clause.⁵⁶ It began in 1971 with the successful challenge to California’s financing scheme in *Serrano v. Priest*,⁵⁷ and ended two years later with *San Antonio Independent School District v. Rodriguez*, where the Supreme Court

54. John Dayton & Anne Dupre, *School Funding Litigation: Who’s Winning the War?*, 57 VAND. L. REV. 2351, 2358 (2004); James E. Ryan, *Sheff, Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 532 n.12 (1999) [hereinafter *Sheff*]; Ryan, *Schools, Race, and Money*, *supra* note 49, at 259 (civil rights activists sought equal educational opportunity through finance litigation).

55. For a general discussion of school financing schemes, see Allen R. Odden, *School Finance and Education Reform*, in RETHINKING SCHOOL FINANCE 1 (Allen R. Odden ed., 1992).

56. William Thro’s “wave” metaphor is pervasive in discussions of education finance reform. William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990).

57. 487 P.2d 1241 (Cal. 1971) (striking down property based funding scheme on state and federal equal protection grounds because wealth is a suspect classification and education is a fundamental right).

declared that school funding inequities do not violate the United States Constitution.⁵⁸ At the end of 1974, the hope for education reform in the courts was bleak, as the Supreme Court had denied both interdistrict bussing to achieve integration and a constitutional guarantee of equivalent financing for all schools. The divide between middle-class, white, suburban schools and poor, urban, minority schools appeared unbreakable.

But developments in the mid-1970s provided hope for at least closing the financial gap between suburban and urban schools. The second wave of school finance litigation relied on state constitutional provisions. Every state constitution contains some form of equal protection guarantee and an education clause mandating the provision of a free and public education. The education clauses guarantee a certain level of education to state residents, such as an “adequate” or “thorough and efficient” or “general and uniform” education.⁵⁹ Successful challenges to state finance systems during this second “wave” of finance litigation combined the state constitutional education clauses with the state equal protection clauses to seek equalized funding per pupil.⁶⁰

The fight for financial equity received a significant boost from the desegregation cases of 1977. In *Milliken v. Bradley (Milliken II)*, the Supreme Court required states to fund remedial and compensatory

58. 411 U.S. 1 (1973).

59. See generally DAVID C. THOMPSON ET AL., FISCAL LEADERSHIP FOR SCHOOLS: CONCEPTS AND PRACTICES 282–86 (1994) (cataloguing the education articles found in all fifty state constitutions); R. CRAIG WOOD & DAVID C THOMPSON, EDUCATION FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AIDE PLANS—AN ANALYSIS OF STRATEGIES app. (2d ed. 2006) (cataloguing provisions for equal treatment in forty-nine state constitutions).

60. See, e.g., *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980).

educational programs in segregated districts.⁶¹ Almost as a “consolation prize” to the defeat in *Milliken I*, which made desegregation virtually impossible, the Court ordered that extra money be provided to segregated schools to make up for past discrimination.⁶² The racially isolated schools created by *Milliken I* would at least be well-funded under *Milliken II*. After *Milliken II*, courts increasingly ordered states and local school boards to infuse money into segregated schools, rather than order desegregation, to overcome the vestiges of prior discrimination. Remedial funding soon began displacing integration as the primary focus of desegregation cases.⁶³

In the late 1970s and early 1980s, minority leaders and academics further abandoned integration and firmly latched onto school finance reform as the best means to improve educational opportunities for minorities. In 1980, Derrick Bell’s groundbreaking *Interest-Convergence* article argued that *Brown* mandated integration only because the interests of powerful whites converged with the interests of African Americans, and that integration harmed black students.⁶⁴ Bell concluded that equal opportunity for disadvantaged students was best achieved by equal school financing.⁶⁵ Three years later, the classic book, *Strategies for Effective Desegregation*, identified four widely held myths about desegregation: it increased racial separation through white flight; it lowered educational quality and increased racial prejudice by creating racial strife; it created discord

61. 433 U.S. 267 (1977).

62. Rahdert, *supra* note 47, at 801.

63. McUsic, *supra* note 23, at 1343; Ryan, *Schools, Race, and Money*, *supra* note 49, at 264.

64. Derrick A. Bell Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L.REV. 518, 524–25, 531–32 (1980). See also MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* (1990).

65. Bell, *supra* note 64, at 532–33.

in terms of race relations and support for community schools; and mandatory integration plans such as bussing were not necessary for desegregation.⁶⁶ Despite the fact that “the new mythology [did] not jibe with available evidence from education and social science research,”⁶⁷ desegregation was viewed as a failure. Charles Clotfelter summarized the mood at the time: “Frustrated by white resistance to desegregation and disappointed by the perception that blacks had borne the bulk of desegregation’s costs—including longer bus rides, inferior teaching assignments, and the closing of black schools—[black] leaders increasingly stressed school quality over desegregation.”⁶⁸

C. 1983–2000: The Accountability and School Choice Movements

While the debate over desegregation, mandatory bussing, and adequate financing was grabbing both the headlines and the public conscience, a movement began in the 1980s which was concerned with the educational plight of all students, not just minorities. In 1983 the Department of Education published *A Nation at Risk*, which criticized public schools for setting their sights too low and pointed to a “rising tide of [educational] mediocrity that threatens our very future as a Nation and a people.”⁶⁹ The report showed that American students ranked last in comparison to students in other industrialized countries in seven of nineteen achievement tests and that student achievement in the United States declined precipitously from 1963 to 1980.⁷⁰ Not since the launching of Sputnik had the

66. WILLIS D. HAWLEY ET. AL., STRATEGIES FOR EFFECTIVE DESEGREGATION 1–2 (1983).

67. *Id.* at 2. See also Ogletree, *supra* note 22, at 250, 302.

68. Clotfelter, *supra* note 9, at 184.

69. NAT’L COMM’N ON EXCELLENCE IN EDUC., U.S. DEP’T OF EDUC., *A NATION AT RISK* 5 (1983).

70. *Id.* at 8–9.

education system come under such rigorous attack. The report galvanized educators, activists, politicians, and business leaders to search for alternative education reforms that raised the level of education for all students. The primary focus became subjecting schools that were immune from market forces to incentives to improve, either through competitive pressure or internal accountability.⁷¹

By the end of 1984, the standards-based accountability reform movement was born, as school reformers began an ambitious agenda to raise educational standards nationwide.⁷² Standards-based accountability entails high educational goals for every student, carefully designed curricula to move students toward those goals, regular assessment of student progress through uniform tests to determine if goals are being achieved, and rewards or punishments for students, teachers, and administrators to create incentives for reaching the prescribed goals. Within a few years after publication of *A Nation at Risk*, nearly all fifty states had adopted some form of minimum competency standards for students.⁷³ In its infant years, the accountability movement focused almost exclusively on students—requiring them to pass “high stakes” tests to advance to the next grade or graduate—while schools themselves were not assessed or held accountable.

71. Aaron J. Saiger, *Legislating Accountability: Standards, Sanctions and School District Reform*, 46 WM. & MARY L. REV. 1655, 1673, 1706–07 (2005).

72. Boger, *supra* note 49, at 1425.

73. James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 208 (2003); Diane Ravitch, *The Search for Order and the Rejection of Conformity: Standards in American Education*, in LEARNING FROM THE PAST: WHAT HISTORY TEACHES US ABOUT SCHOOL REFORM 167, 179 (Diane Ravitch & Maris A. Vinovskis eds., 1995) (by the 1987–1988 school year, forty-five states and District of Columbia applied some form of statewide test, with twenty-five states using nationally normed exams).

A Nation at Risk also led reformers to resuscitate school choice. Public schools would improve, it was thought, if they had to compete for students (and the state funds that accompany them) with public charter schools and private schools through voucher programs. The Court's erosion of the Equal Protection barrier that previously hindered freedom of choice plans, combined with the social and political will generated by *A Nation at Risk*, raised school choice plans to the forefront of education reform.

The influence of *A Nation at Risk* on the education reform movement cannot be understated. It is considered by many observers as the primary impetus for the standards-based accountability and school choice movements, both radical departures from past reforms and both of which dominate education reform today.⁷⁴ Its influence on society's views of finance reform and integration—the primary reform tools of the time—was dramatic. As Gail Sunderman notes, “[A] *Nation at Risk* shifted the debate from a focus on educational access and equity to a concern with educational quality”⁷⁵ and also “promoted the application of market principles to education and school choice as remedies for educational problems.”⁷⁶ The standards-based accountability movement redirected the nation's focus from educational inputs—money,

74. Martin R. West & Paul E. Peterson, *The Politics and Practice of Accountability*, in NO CHILD LEFT BEHIND? THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY 6 (Paul E. Peterson & Martin R. West eds., 2003) [hereinafter NO CHILD LEFT BEHIND?]; Andrew Rudalevige, *No Child Left Behind: Forging a Congressional Compromise*, in NO CHILD LEFT BEHIND? 23, 29; Suhrid S. Gajendragadkar, Note, *The Constitutionality of Racial Balancing in Charter Schools*, 106 COLUM. L. REV. 144, 148 (2006).

75. Gail L. Sunderman, The Civil Rights Project, Harvard University, *The Unraveling of No Child Left Behind: How Negotiated Changes Transform the Law* 14 (2006), available at http://www.civilrightsproject.harvard.edu/research/esea/nclb_unraveling.php; see also Stephen A. Rosenbaum, *Aligning or Maligning? Getting Inside a New Idea, Getting Behind No Child Left Behind and Getting Outside of it All*, 15 HASTINGS WOMEN'S L.J. 1, 26 (2004); West & Peterson, *supra* note 74, at 16.

76. Sunderman, *supra* note 75, at n.6.

teachers, facilities, racial composition—to educational outputs, in the form of student academic achievement as measured by standardized test scores.

Civil rights activists and minority leaders latched on to the accountability movement as a tool to promote equity in public education.⁷⁷ Standards-based reform promoted both excellence and equity by requiring all students, not just privileged whites, to meet the same high standards. More importantly, standards based reform appeared to be the only means to help minority students, because integration was further dismantled—the Reagan administration took a strong stance against desegregation and sought an end to desegregation orders⁷⁸—and finance equity litigation began to fizzle.

The equity challenges to state financing schemes enjoyed only moderate success in the 1980s. State courts began applying a rational basis standard to plaintiffs' equal protection claims, often finding that the state's interest in promoting local control was a sufficient interest to justify funding disparities.⁷⁹ As of 1988, finance equity lawsuits had succeeded in only seven states and failed in fifteen.⁸⁰ Strict financial equality between school districts required that either the highest spending districts cap their spending or that the state

77. Boger, *supra* note 49, at 1426; William L. Taylor, *Assessment as a Means to a Quality Education*, 8 GEO. J. ON POVERTY L. & POL'Y 311, 312–13 (2001); West & Peterson, *supra* note 74, at 6–7 (the promise of accountability to improve all schools through higher educational standards appeased both middle-class whites and poor minorities). In 1987 the NAACP Legal Defense Fund recognized that the standards movement created “an affirmative opportunity to define a right to a *minimally adequate education*.” Julius Chambers, *Adequate Education for All: A Right, An Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55, 61 (1987).

78. Frankenberg et al., *supra* note 6, at 18.

79. See, e.g., Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 364–65 (N.Y. 1982); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 790 (Md. 1983); Fair Sch. Fin. Council of Okla., Inc. v. State, 746 P.2d 1135, 1146–47 (Okla. 1987); Richland County v. Campbell, 364 S.E.2d 470, 472 (S.C. 1988); Kukor v. Grover, 436 N.W.2d 568, 579–80 (Wis. 1989).

80. Michael A. Rebell, *Adequacy Litigation: A New Path to Equity*, 141 PLI/NY 211, 221 (2004).

recapture wealthy district tax money and redistribute it to poorer districts. Neither of these options was palatable to the politically powerful suburban majority who wanted to maintain excellent schools, and the resulting high property values, through disparately high spending.⁸¹ Suburban resistance to finance reform resulted in few court victories for reformers and spotty implementation of court orders by state legislatures.⁸² Education reform was poised for radical change on several fronts, which occurred in the late 1980s and early 1990s.

First, school finance litigation evolved into its third wave, influenced heavily by standards-based accountability.⁸³ The underlying claim in the third wave of finance litigation was not that all school districts are entitled to strict funding equality, but rather that all students are entitled to funding sufficient to provide them with the “adequate” or “efficient” education guaranteed under the state constitution.⁸⁴ Finance adequacy litigation did not risk decreasing expenditures at high performing middle-class schools—the primary roadblock thwarting finance equity lawsuits—because wealthier districts could exceed the expenditures necessary to

81. McUsic, *supra* note 23, at 1348–49 (2004); Saiger, *supra* note 71, at 1693–94 (wealthy districts oppose finance reform); Ryan & Heise, *supra* note 44, at 2058–63 (explaining how suburban resistance blunted the effect of finance reform).

82. Saiger, *supra* note 71; Dayton & Dupre, *supra* note 54.

83. James E. Ryan & Thomas Saunders, *Foreword to Symposium on School Finance Litigation: Emerging Trends or New Dead Ends*, 22 YALE L. & POL’Y REV. 463, 473 (2004) (adequacy lawsuits arose at same time that standard based reforms were gaining momentum); Dayton & Dupre, *supra* note 54, at 2391–92 (explaining that the goal of finance litigation moved from equal finances to sufficient finances to produce an “adequate” education). Adequacy litigation did not displace equity litigation, as many school finance plaintiffs continue to claim that finance schemes violate state equal protection clauses. *Id.* at 2351, 2382, 2389 n.219.

84. *See, e.g.*, *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 206, 213 (Ky. 1989); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 689–90 (Mont. 1989); *Abbot v. Burke*, 575 A.2d 359, 363 (N.J. 1990) (funding of poor urban schools must be adequate to address their special disadvantages).

produce an “adequate” education. In short, adequacy suits presented more “modest and achievable goals” than equity lawsuits.⁸⁵ Not surprisingly, plaintiffs were more successful in adequacy lawsuits than in equity lawsuits, prevailing in eighteen of the twenty-nine major decisions of the states’ highest courts since 1989.⁸⁶

The rise of finance adequacy reform coincided with the final nails being driven into the coffin of desegregation. In 1991, the Supreme Court ruled in *Board of Education of Oklahoma City v. Dowell* that once unitary status is achieved in a school district a desegregation order should end even if it will inevitably result in the resegregation of the schools.⁸⁷ The Court went one step further in 1992, when it ruled in *Freeman v. Pitts* that school districts were no longer obligated to undo intradistrict de facto segregation resulting from residential patterns, despite a history of invidious discrimination in the district.⁸⁸ Finally, in 1995 the Supreme Court decided *Missouri v. Jenkins*, wherein it struck down a desegregation order that required Kansas City to use state money to create magnet schools in the hopes of luring suburban whites back into the urban school district.⁸⁹ In *Jenkins*, the Court held that achievement disparities between whites and nonwhites did not prevent a finding of unitary status, because the ultimate inquiry for finding unitary status was whether the district complied in good faith with the desegregation decree and

85. Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 182 (1995).

86. Rebell, *supra* note 80, at 216–17, 221–22 (sixteen of the eighteen victories involved substantial or partial adequacy considerations). See also Dayton & Dupre, *supra* note 54, at 2351, 2382, 2389 n.219.

87. 498 U.S. 237, 248 (1991).

88. 503 U.S. 467, 490 (1992). The plaintiff was now required to prove that the segregated schools were a vestige of a dual school system and not merely the product of demographic forces. *Id.* at 495–96.

89. 515 U.S. 70, 100–01 (1995).

whether vestiges of past discrimination were eliminated to the extent practicable. In other words, districts fulfilled their obligation under *Brown*, despite having segregated schools with unequal resources, so long as they had made a good faith effort to integrate. As a result, desegregation orders were rapidly ended through declarations that schools were achieving unitary status or were being entirely ignored.⁹⁰ The *Dowell*, *Pitts*, and *Jenkins* decisions further entrenched the social acceptability of racially divided schools in the public conscience: resegregated and unequal schools which were not the direct result of invidious discrimination were acceptable—only state sponsored segregation was a social malady worth remedying.

Because *Dowell*, *Pitts*, and *Jenkins* relaxed the standards for finding unitary status, the emphasis of desegregation cases necessarily became paying reparations for segregation instead of ensuring racially balanced schools. Unitary status was often achieved in the 1990s through one-time payments from the state to school districts in settlement of desegregation cases.⁹¹ By the end of the 1990s, desegregation cases completed their merge with finance litigation, as they both resulted in more funding for minority schools, but not integration.

By finding that the Fourteenth Amendment no longer circumscribed the private choices that resulted in segregation, the Supreme Court opened the door for the third important development during this time period—the implementation of freedom of choice plans through voucher programs and charter schools. While revival of the school choice movement in the 1990s

90. Nancy Levit, *Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, 2005 U. ILL. L. REV. 455, 465 (2005); Ogletree, *supra* note 22, at 71, 260; Clotfelter, *supra* note 9, at 4.

91. Ryan, *Schools, Race, and Money*, *supra* note 49, at 260, 271.

was not a surprise, the source was: poor urban African Americans.⁹² In Milwaukee the urban poor were fed up with the ineffectiveness of desegregation and teamed with the traditional conservative supporters of vouchers to create the nation's first pilot voucher program in 1992.⁹³ African American leaders pushed for vouchers despite their racist pedigree because it was their children's only escape from dysfunctional schools. By leading the charge, Milwaukee's African Americans transformed vouchers from a free market issue to a social equity issue. Vouchers moved in three short decades from being a civil rights anathema to a method preferable over integration to assist minorities in achieving equal educational opportunity.⁹⁴ Despite the perceived advantages of voucher programs, they experienced limited growth in the 1990s in part because of fears that the provision of state funded vouchers for use at sectarian schools violated the Establishment Clause.⁹⁵

Charter schools also began their rapid ascent in the early 1990s. Minnesota passed the first state law authorizing the creation of charter schools and the nation's first charter school opened in 1992.⁹⁶

92. Ronald Reagan had pushed throughout the 1980s to allow students to use Title I funds as they saw fit, but the choice movement did not gain traction until the 1990s. Rudalevige, *supra* note 74, at 30–31. The push for vouchers from civil rights groups may not be as surprising as it appears, considering that many civil rights activists in the North pursued vouchers and freedom of choice plans in the 1960s in order for minority students to escape poor schools. For a discussion of the political history of school choice, see Forman, *supra* note 26; Goodwin Liu & William Taylor, *School Choice to Achieve Desegregation*, 74 *FORDHAM L. REV.* 791, 812–13 (2005).

93. Moe, *supra* note 26, at 148.

94. *Id.*; see also Paul E. Peterson, *Introduction: After Zelman v. Simmons-Harris, What Next?*, in *THE FUTURE OF SCHOOL CHOICE*, *supra* note 26, at 2, 6, 7, 10.

95. Clint Bolick, *Sunshine Replaces the Cloud*, in *THE FUTURE OF SCHOOL CHOICE*, *supra* note 26, at 57 (the school choice movement was initially dogged by the Equal Protection clause and later by the Establishment Clause). Indeed, every freedom of choice plan until 2002 was met with legal challenges contesting their constitutionality, pressed mainly by teachers' unions. *Id.*; Peter Berkowitz, *Liberalism and School Choice*, in *THE FUTURE OF SCHOOL CHOICE*, *supra* note 26, at 108.

96. Peterson, *supra* note 94, at 10.

Charter schools are self-governing public schools, often run by private companies, which operate outside the authority of the local school boards and enjoy greater flexibility than traditional public schools in the areas of policy, curriculum, hiring, and teaching techniques. They operate under a charter, or contract, with the state or its subdivision, and are publicly funded, tuition-free, nonsectarian schools.⁹⁷ Charter schools are popular because they provide competition to traditional public schools, creating incentives to improve, but they remain public schools, subject to state accountability measures and limited control. Charter schools flourished in the 1990s society that highly valued public schooling, accountability, and notions of free choice.⁹⁸ The federal government legitimized the charter school movement in 1995 by allocating six million dollars in start-up capital to charter schools and funding charter school studies and conferences in the Public Charter School Program.⁹⁹

The final major development to occur in the 1990s was the rapid growth of the accountability movement. Due to broad-based support from whites, minorities, the middle class, and the poor, comprehensive accountability models began to emerge in many states such as Texas.¹⁰⁰ The federal government also increasingly

97. See generally Brunno V. Manno et al., *Beyond the Schoolhouse Door: How Charter Schools are Transforming U.S. Public Education*, 81 PHI DELTA KAPPAN 736 (2000) (explaining structure of charter schools).

98. Tom Loveless, *Charter School Achievement and Accountability*, in NO CHILD LEFT BEHIND?, *supra* note 74, at 177; Steven K. Green, *Seminal or Symbolic?*, in THE FUTURE OF SCHOOL CHOICE, *supra* note 26, at 54.

99. This Act was part of the Improving America's Schools Act, Pub. L. No. 103-382, 108 Stat. 3518 (1994) (originally codified at 20 U.S.C. § 8061 (1994) (repealed in 2002)). For a discussion of federal involvement in the charter school movement in the 1990s, see Gajendragadkar, *supra* note 74, at 149.

100. Frederick M. Hess, *Refining or Retreating? High Stakes Accountability in the States*, in NO CHILD LEFT BEHIND?, *supra* note 74, at 55.

threw its weight behind accountability reforms leading to unprecedented growth.¹⁰¹ In 1996 only ten states had active accountability systems, but by 2000 that figure had increased to thirty-seven.¹⁰² Accountability regimes also began to hold schools, as well as students, accountable for student achievement.

Finally, in 2002, the Supreme Court eliminated the Establishment Clause barrier to vouchers by upholding Cleveland's voucher program in *Zelman v. Simmons-Harris*.¹⁰³ *Zelman* completed the transformation of vouchers from segregationists' tool to a civil rights initiative to assist poor and minority students. President Bush and his cabinet proclaimed *Zelman* a historic civil rights victory second only to *Brown* because it endorsed voucher programs for inner city children to escape poor and underperforming schools.¹⁰⁴ While *Brown* opened school doors previously closed by race, it was expected that *Zelman* would open school doors previously closed by class.¹⁰⁵

101. In 1991, President George H.W. Bush proclaimed "America 2000: An Educational Strategy" as his plan for attaining excellence in public schools, which reflected standards based reforms. U.S. DEP'T OF EDUC., AMERICA 2000: AN EDUCATION STRATEGY (1991). In 1994, Title I was re-authorized as the Improving America's Schools Act (IASA) to include many accountability reforms. 20 U.S.C. §§ 6311(a)(1), 8062 (1994). In the same year, President Clinton signed into law the "Goals 2000: Educate America Act," a three hundred and ninety-four million dollar comprehensive education reform bill which created financial incentives for states to develop standards and assessment procedures. Pub. L. No. 103-227, 108 Stat. 125 (1994) (codified as amended in scattered sections of 20 U.S.C.).

102. Jennifer Hochschild, *Rethinking Accountability Politics*, in NO CHILD LEFT BEHIND?, *supra* note 74, at 108 (citing Eric A. Hanushek & Margaret E. Raymond, *Improving Educational Quality: How Best to Evaluate Our Schools?* (Federal Reserve Bank of Boston, 2002), available at <http://edpro.stanford.edu/eah/papers/accountability.BostonFedfinal%20publication.pdf>). See also *id.* at 109 (many states adopted high stakes accountability measures in the mid- to late 1990s and state takeover provisions of failing schools expanded, states actually took over schools more often, and many states created mechanisms for creating charter schools to replace failing schools); Moe, *supra* note 26, at 80 (the accountability movement exploded in the late 1990s).

103. 536 U.S. 639 (2002).

104. Forman, *supra* note 26, at 1314–15. See also Peterson, *supra* note 94, at 1 (President Bush declared that *Zelman* represents a turning point in how Americans think about education).

105. Peterson, *supra* note 94, at 2; Bolick, *supra* note 95, at 55.

By the end of the century, school finance reform, accountability, and freedom of choice completely displaced desegregation as the primary means to achieve equal educational opportunity for minorities. Desegregation cases were being resolved as though they were finance cases, and finance cases began pursuing the modest goal of obtaining financing sufficient for an adequate education. With desegregation no longer a primary or even secondary goal, and with equal funding claims transforming into funding adequacy claims, the stage was set for the accountability and freedom of choice movements to predominate educational reform efforts.

D. The No Child Left Behind Act of 2001

The No Child Left Behind Act of 2001 (“NCLB”)¹⁰⁶ is the most important piece of education legislation in the last thirty-five years. The NCLB’s express goals are to boost academic achievement across the board and to eliminate the academic achievement gap between races.¹⁰⁷ It seeks to accomplish these goals by incorporating the standards-based accountability and freedom of choice reforms which were created after publication of *A Nation at Risk*, and modified throughout the 1990s.¹⁰⁸ While *Brown* gave privilege of access to

106. Pub. Law 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.) [hereinafter cited to 20 U.S.C. in Supp. II 2002].

107. 20 U.S.C.S. § 6301 (Supp. II 2002). See also Edward Blum, *Two Hundred Ninety-Four Months and Counting*, 8 TEX. REV. L. POL. 213, 226 (2003) (book review) (with NCLB, “the federal government threw its full weight behind closing the racial learning gap”). President Bush hailed the NCLB as an attack on the “soft bigotry of low expectations” and a commitment “to eliminating the achievement gap, not hiding it within school or statewide averages.” James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1746 (2002–2003) (citing *Reaching Out . . . Raising African American Achievement*, No Child Left Behind Fact Sheet, available at http://www.nclb.gov/start/facts_pdf/achievementgap_aa.pdf).

108. 20 U.S.C.S. § 6301 (Supp. II 2002) (“An act to close the achievement gap with accountability, flexibility and choice, so that no child is left behind.”); Rudalevige, *supra* note 74, at 24 (President Bush identified accountability as “the first principle” of the law and stated that “accountability is the cornerstone of reform”); see also *id.* at 44 (NCLB embraced accountability

education on equal terms through desegregation, the NCLB gives the privilege of adequate education on equal terms without regard to integration.¹⁰⁹

To achieve its objectives, the NCLB requires states to establish “challenging” academic standards in reading, math, and science and test all students regularly to ensure they are meeting those standards.¹¹⁰ States are free to determine their own “challenging” academic standards and the test scores that students must achieve to establish the requisite proficiency.¹¹¹ Test scores are tabulated for schools in the aggregate and are also disaggregated by subgroups, including migrant students, disabled students, English-language learners, and students from all major racial, ethnic, and income groups.¹¹²

The test scores and other school indicators, such as attendance and graduation rates, are then used to determine if a school is making “adequate yearly progress” (AYP) towards the Act’s goal of one hundred percent student proficiency by the year 2014.¹¹³ All students must score at proficient levels by 2014, and in the interim states must establish intermediate goals that require an ever-increasing percentage of students to demonstrate proficiency.¹¹⁴ To

more than any previous federal law); Liebman and Sabel, *supra* note 107, at 1709–11 (2002–2003) (the accountability movement’s shift in the 1990s from punitive measures against students to a diagnostic tool for reform and school assessment laid the foundation for the NCLB).

109. Liebman & Sabel, *supra* note 107, at 1705–06.

110. 20 U.S.C. § 6311(b)(1), (b)(3)(C)(ii) (Supp. II 2002).

111. 20 U.S.C. § 6311(b)(1)–(2) (Supp II 2002). *See also* Rudalevige, *supra* note 74, at 46–47 (states are given significant flexibility in plans).

112. 20 U.S.C. § 6311(b)(3)(C)(xiii), (b)(3)(C)(v)(II)(aa)–(dd).

113. 20 U.S.C. § 6311(b)(2).

114. *Id.* at § 6311(b)(2)(F) (Supp. II 2002). All schools in a state must make AYP and each district must disseminate information about each school’s AYP status. *Id.* at § 6311(b)(2)(C)(v), (G)(iii), (I). States and local educational agencies (LEAs) are required to issue report cards which include state-wide, district-wide and school-by-school student achievement data broken down by

make AYP, the student population as a whole as well as each subgroup must meet the proficiency goal, i.e. a sufficient percentage of students must perform proficiently on state tests.¹¹⁵ If any subgroup fails to make AYP, then the entire school fails to make AYP.

Schools that receive Title I funding—over half of all public schools¹¹⁶—and fail to make AYP are deemed “in need of improvement” and face increasingly harsh sanctions for every year they fail.¹¹⁷ Schools that fail to make AYP for two consecutive years are subject to “corrective action,” including but not limited to, allowing students to transfer to a non-failing school within the district and providing them transportation.¹¹⁸ All non-failing public schools within the same district as a failing school must accept transfers despite lacking capacity. If the district does not have sufficient capacity in non-failing schools, it must create additional capacity or provide choices of other schools.¹¹⁹

subgroup and information on the performance of school districts in making AYP. *Id.* at § 6311(h).

115. *Id.* at § 6311(b)(2)(C), (b)(1)(E); §6316(b)(1)(A). If a subgroup does not meet proficiency goals a school can still make AYP under the “safe harbor” provision. GOV’T ACCOUNTABILITY OFFICE, REPORT TO THE SECRETARY OF EDUCATION, *NO CHILD LEFT BEHIND ACT: EDUCATION NEEDS TO PROVIDE ADDITIONAL TECHNICAL ASSISTANCE AND CONDUCT IMPLEMENTATION FOR SCHOOL CHOICE PROVISION* 6, n.6 (2004), available at <http://www.gao.gov/new.items/d057.pdf>. To qualify for “safe harbor” a school must have reduced the percentage of students in the failing subgroup by at least 10% in the previous year and the subgroup must show progress on other academic indicators such as graduation and drop-out rates. *Id.*

116. DEP’T OF EDUC., FACT SHEET ON TITLE I, PART A, available at <http://www.ed.gov/rschstat/eval/disadv/title1-factsheet.pdf> (2002) (reporting that 58% of public schools receive Title I funding).

117. 20 U.S.C. § 6316.

118. 20 U.S.C. § 6316(b)(1)(E)–(F)(i), (9) (2000 & Supp. II 2002); 34 C.F.R. § 200.44. Schools must also create an improvement plan and are entitled to technical assistance from the state. 20 U.S.C. § 6316(b)(1) (Supp. II 2002). “Corrective action” may also include decreasing the management authority at the school level and restructuring a school’s internal organization. *Id.* § 6316(b)(7)(C)(iv).

119. 34 C.F.R. § 200.44(d).

After three consecutive years of failure, schools must offer supplemental education services, such as tutoring, to low income students who did not transfer.¹²⁰ After a fourth year of failure schools enter the “corrective” phase, which includes such measures as instituting new curriculum, replacing staff, and appointing educational expert advisors.¹²¹ A fifth consecutive year of failure triggers the “alternative governance” or “restructuring” sanctions, which require either conversion to a charter school, reconstitution, private management, or state takeover.¹²² On the other hand, schools that continually increase test scores and reach benchmark levels receive increased federal budgets.¹²³

The NCLB marries standards based accountability to freedom of choice remedies. It federalizes the standards based accountability movement and holds schools, rather than students, accountable for student failure. The high stakes testing of students in the 1980s and 1990s is now high stakes testing for schools and districts, where test scores determine whether teachers, administrators and schools avoid sanctions. The NCLB places education reform squarely on the emerging path of accountability and choice to create equal opportunity for poor and minority students.

IV

THE PRESENT STATE OF EDUCATION REFORM

The trajectory of past education reforms aimed at equalizing opportunity for minorities illuminates certain predictable trends.

120. 20 U.S.C. § 6316(b)(8) (Supp. II 2002).

121. *Id.* § 6316(b)(7)(C).

122. *Id.* § 6316(b)(7)–(8).

123. Helen A. Moore, *Testing Whiteness: No Child or No School Left Behind?*, 18 WASH. U. J. L. & POL'Y 173, 176 (2005).

Each reform met with initial resistance. Desegregation floundered for ten years, equity finance litigation achieved only limited success for its first two decades, while voucher programs, charter schools, and accountability, though pushed after *A Nation at Risk*, did not gain traction until the 1990s. The initial opposition to these movements was followed by significant support, as the government, courts and public warmed to the new reforms. Desegregation reform peaked from 1964–1973 with strong support from the three branches of government, adequacy claims in finance litigation enjoyed success throughout the 1990s, and accountability and freedom of choice flourished in the 1990s culminating in the No Child Left Behind Act. The question now is whether these new reforms will repeat the history of desegregation. After only seven years of serious enforcement the courts and government abandoned integration and, frustrated with its failure to achieve equality, society soon followed. Alternative avenues to educational equity appeared in the reform landscape and integration was deserted. The finance reform, choice and accountability movements will likely meet this same fate. This Part will discuss the current status of integration, school finance litigation, standards based accountability, voucher programs, and charter schools. It will then examine why these reforms cannot achieve the same level of equality that is derived from integration, and why desegregation was discarded despite its advantages over other educational reforms.

A. Accountability, Finance Reform, Choice and Integration.

Due to the NCLB, every state education system operates under a standards based accountability regime and their Title I schools are becoming increasingly subject to sanction. As of the 2005–2006

school year, roughly sixteen percent of all schools and twenty-four percent of all districts are failing to make AYP.¹²⁴ Ten percent of schools nationwide are subject to the choice sanctions of the NCLB while three percent are subject to the corrective and restructuring sanctions.¹²⁵ Most of the schools sanctioned for failing to make AYP are poor, urban minority schools. Roughly eighty-eight percent of African Americans and Latinos are in schools that fall below their state mandated minimum proficiency rating.¹²⁶

While accountability is just beginning to kick-in, finance reform continues to evolve. As of 2006, the finance schemes of forty-five states have been challenged, yielding twenty-six victories.¹²⁷ Several new trends are apparent in the changing nature of the finance reform movement. First, some courts are beginning to accept that vertical equity finance systems—formulas which provide more resources to students with greater needs—are necessary for states to provide a constitutionally adequate education.¹²⁸ Students from poor families are more expensive to educate than middle-class students, because

124. Ctr. on Educ. Pol'y, *From the Capital to the Classroom: Year 4 of the No Child Left Behind Act* (2006), <http://www.cep-dc.org/nclb/Year4/CEP-NCLB-Report-4.pdf> (last visited Feb. 7, 2007).

125. *Id.*

126. Thomas J. Kane & Douglas O. Staiger, *Unintended Consequences of Racial Subgroup Rules*, in *NO CHILD LEFT BEHIND?*, *supra* note 74, at 152, 157.

127. Access, "Equity" and "Adequacy" School Funding Decisions, <http://www.schoolfunding.info/litigation/equityandadequacytable.pdf> (last visited Feb. 7, 2007) (identifying states in which plaintiffs prevailed); Access, Litigations Challenging Constitutionality of K-12 Funding in the 50 States, <http://www.schoolfunding.info/litigation/In-Process%20Litigations.pdf> (last visited Feb. 7, 2007) (noting that only Delaware, Hawaii, Mississippi and Utah have not had their school finance schemes challenged); *see also* Martha Minow, *Surprising Legacies of Brown v. Board*, 16 WASH. U. J.L. & POL'Y 11, 17 n.29 (2004) (providing information on lawsuits as of 2002). In the past twenty-five years, thirty-four states have implemented some reform, by judicial order or legislative initiative, to satisfy states' constitutional obligations to provide equal or adequate funding for schools. John C. Brittain, *A Look at Brown v. Board of Education*, in 2054, 3 SEATTLE J. FOR SOC. JUST. 29, 35 (Fall/Winter 2004).

128. Ryan & Saunders, *supra* note 83, at 465, 468–72.

they experience biological and social deficits which require more educational resources to overcome.¹²⁹ Horizontal equity finance schemes which provide equal finances across all districts do not take into account the disparate costs to provide an adequate education between poor and middle class students. Instead of asking how much it costs to provide an average student with an adequate education, some courts are beginning to ask how much it costs to adequately educate different types of students in the state. It is for this reason that costing out studies—studies establishing the cost of an adequate education for particularized students—are gaining prominence in finance litigation.¹³⁰

Courts are also adopting accountability principles in adequacy finance litigation. The debate over whether an adequate education should be defined by educational inputs (resources, facilities, teacher qualifications, teacher to student ratios, etc.), educational outputs (student performance), or a combination of both, is longstanding. One significant advantage of adequacy litigation over equity litigation is that it permits courts to consider more than just educational inputs.¹³¹ The issue recently arose in the New York finance litigation, where the court held that inputs are the primary measure of adequacy but allowed the state to use outputs—student performance on standardized tests—as evidence of adequacy.¹³²

129. Robert Garda, *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071, 1086 (2004) (identifying social and biological factors negatively impacting students from low income families).

130. Ryan & Saunders, *supra* note 83, at 475–77; see Access, Costing Out, <http://www.schoolfunding.info/policy/CostingOut/overview.php3> (last visited Feb. 7, 2007) (“[S]tates and education advocacy organizations have increasingly turned to ‘costing-out studies’ to obtain rationally based, objective information . . .”).

131. See, e.g., *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989) (requiring state of Kentucky to improve seven educational outputs). See generally Liebman & Sabel, *supra* note 73, at 205.

132. *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 345–47 (N.Y. 2003).

Courts that define adequacy through student performance are increasingly finding that accountability is a constitutional requirement of an adequate education.¹³³ In *Claremont School District v. Governor*, for example, the court held that “accountability is an essential component of the State’s [constitutional] duty” to ensure that the court’s definition of an adequate education is “subject to meaningful application.”¹³⁴ Courts in finance litigation, in short, are beginning to borrow heavily from standards-based accountability by incorporating legislatively-created educational standards into the definition of an adequate education and requiring monitoring of whether those standards are achieved.

As the finance and accountability reforms merge, much like integration and finance reform merged in the 1970s, the freedom of choice movement continues to grow. Currently thirty-six thousand students are being served by public voucher programs in Ohio, Florida, Wisconsin and Washington, D.C., and seventy-thousand students are served by private voucher programs.¹³⁵ This represents only a fraction of a percentage of all students in the United States, but voucher programs did not begin their growth spurt until the late

133. Dayton & Dupre, *supra* note 54, at 2396–97 (2004); Ryan & Saunders, *supra* note 83, at 474 (“[S]tandards will continue to play a prominent role in adequacy lawsuits.”); Michael Heise, *Educational Jujitsu*, EDUC. NEXT, Fall 2002, at 31–32. For a critique of courts’ use of legislative standards to define adequacy, see Josh Kagan, Note, *A Civics Action: Interpreting “Adequacy” in State Constitutions’ Education Clauses*, 78 N.Y.U. L. REV. 2241 (2003).

134. 794 A.2d 744, 745, 751 (N.H. 2002); *see also* Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 511 (Ark. 2002) (stating that the court is willing to review the adequacy and equality of the state’s school-funding system).

135. Moe, *supra* note 26, at 149; Sam Dillon, *For Parents Seeking Choice, Charter Schools Prove More Popular than Vouchers*, N.Y. TIMES, July 13, 2005, at B8. Maine and Vermont have long-standing voucher programs for children in rural areas that do not have a public school. Educ. Comm’n of the States, Policy Brief: Vouchers 1, 7, <http://www/ecs/org/clearinghouse/58/76/5876.htm> (last visited Feb. 7, 2007); *see also* Alexander & Alexander, *supra* note 26, at 1149–50 (noting that six states have voucher programs).

1990s.¹³⁶ A handful of Republicans recently proposed a nationwide one hundred million dollar voucher program for twenty-eight thousand low income and minority students, but this still would affect only a fraction of public school students.¹³⁷

Charter schools experienced significantly more growth than vouchers through the 1990s. There were virtually no charter schools in 1992 but the numbers today are staggering. Currently forty states and the District of Columbia have enacted charter school enabling statutes and more than thirty-six hundred charter schools are operating across the United States serving more than one million children.¹³⁸ Four hundred and twenty-four new charter schools opened in the 2005-2006 school year, an increase in thirteen percent over the previous year, and charter schools now account for four percent of the nation's public schools.¹³⁹

Finally, integration appears completely lifeless. The government and public believe that "reform efforts should be directed solely at improving the education that minority students receive, regardless of

136. In 1999, Florida became the first state to enact a statewide voucher program, which awards opportunity scholarships to students in failing schools and students with disabilities. Moe, *supra* note 26, at 149-50; John Tierney, *A Chance to Escape*, N.Y. TIMES, June 7, 2005, at A23; Educ. Comm'n of the States, *supra* note 135. In 2003, Colorado created a voucher program for low income students in eleven school districts. *Id.* In 2004, the federal government created vouchers for students in the District of Columbia public schools with priority to low income families. *Id.* In 2005, Ohio expanded its Cleveland voucher program and implemented the largest voucher program in the nation, creating fourteen-thousand publicly financed scholarships to allow students in failing schools to attend private schools. Dillon, *supra* note 135, at 8. The Utah legislature also recently created vouchers for use by students with disabilities. *Id.*

137. Diane Jean Schemo, *Republicans Propose National School Voucher Program*, N.Y. TIMES, July 19, 2006, at A17.

138. Ctr. for Educ. Reform, <http://www.edreform.com/index.cfm?fuseAction=stateStats&pSectionID=15&cSectionID=44> (last visited Feb. 7, 2007); see also Loveless, *supra* note 98, at 177-78 (chronicling the rise of charter schools in the 1990s).

139. Ctr. for Educ. Reform, *Charter Schools by the Numbers*, http://www.edreform.com/_upload/charters-by-number.pdf (last visited Feb. 7, 2007). The previous school year saw a 15% increase in the number of charter schools. *Id.*

whether those students are in integrated or segregated schools.”¹⁴⁰ National consensus shows that integrated schools are an accepted goal but “we should not do anything promote them.”¹⁴¹ In fact, the public resists desegregation far more than it resists equalized funding, though both entail significant sacrifices.¹⁴² The current educational reforms winnow any remaining support for integration by promising to improve educational outcomes in segregated schools.

B. The Benefits of Integration and the Reasons it was Abandoned.

The retreat from desegregation comes despite the significant achievements of *Brown* and the immense benefits of racial and socioeconomic integration, which cannot be reproduced in segregated schools, recognized in social science research. In thirty short years, *Brown* changed the centuries-old structure of de jure segregation and transformed schools in the South from the most segregated to the least segregated in the country.¹⁴³ The Supreme Court’s unprecedented reliance on social science evidence in *Brown* to justify its holding resulted in a virtual cottage industry researching the advantages of desegregation. The research since *Brown* focuses

140. Ryan, *The Influence of Race*, *supra* note 12, at 479. A recent argument made by an African American school board member opposing the creation of diverse magnet schools in New Orleans exemplifies America’s current state of mind: “[i]t’s not about diversity any more. It’s about whether or not schools have the same resources It’s about equity.” Brian Thevenot, *Drawn Apart*, TIMES PICAYUNE, May 18, 2004, at 1.

141. RICHARD KALLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 42 (2001). Nancy Levit argues that there is a national impulse to resegregate our schools based on identity characteristics such as race, sex and sexual preference. Levit, *supra* note 90, at 459.

142. Ryan & Heise, *supra* note 44, at 2057–58 (opposition to mandatory racial integration still exists); Ryan, *Sheff*, *supra* note 54, at 566.

143. CLOTFELTER, *supra* note 9, at 6; OGLETREE, *supra* note 22, at 59–60; Boger, *supra* note 49, at 1387.

on essentially four benefits: the self-esteem of minorities, the academic achievement of minorities, the long-term effects on education and employment for minorities, and the effects on intergroup relations.

Modern findings call into doubt the Supreme Court's rationale that segregation harms the self-esteem of minority students. Research since *Brown* fails to establish a clear link between desegregation and black self-esteem. In fact, integration may have negatively impacted the self-esteem of black students by subjecting them to overt discrimination and more demanding academic curriculums.¹⁴⁴

A more compelling justification for integration, not expressed in *Brown*, is its positive effect on minority academic achievement. This rationale invites controversy, as finding that minorities learn better only when seated next to whites is repugnant to minorities and the product of an arrogant subordination mentality of whites. Similar to Malcolm X's discontent with desegregation in the 1970s, Justice Thomas and critical race theorists bristle at calls for integration, because it is founded on the idea "that blacks cannot succeed without the benefit of the company of whites."¹⁴⁵ The controversy began with the Coleman Report of 1966, which suggested that increasing contact among black and white students would raise achievement levels of black children without harming the performance of whites.¹⁴⁶ Research since the Coleman Report yields mixed results, and the debate is ongoing as to whether minorities perform better in

144. CLOTFELTER, *supra* note 9, at 187; Guinier, *supra* note 10, at 90–91.

145. *Missouri v. Jenkins*, 515 U.S. 70, 119 (1995) (Thomas, J., concurring); *see also* Ryan, *Sheff*, *supra* note 54, at 552 n.74 (identifying critical race theorists opposing desegregation because it rests on the grounds that nonwhites can only perform well when educated with whites).

146. JAMES S. COLEMAN ET AL., U.S. DEP'T OF HEALTH, EDUC., & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966).

integrated schools.¹⁴⁷ There is at least general consensus that desegregation led to moderate gains for black students without negatively impacting white students.¹⁴⁸

While the connection between racial diversity and minority achievement is controversial, there is virtually unanimous agreement that there is a direct link between a student's socioeconomic status and educational performance. The Coleman Report found that a student's socioeconomic status is the greatest determinant of school success, and that the socioeconomic status of a student's peers significantly influences academic performance.¹⁴⁹ The poorer the

147. Compare JUDITH BLAU, RACE IN THE SCHOOLS: PERPETUATING WHITE DOMINANCE? 203 (2003) (arguing that segregation, whether de facto or de jure, disadvantages minority schoolchildren), and Derek Black, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923, 943–45 (2002) (citing studies concluding that racial diversity in schools results in better teaching and learning and higher achievement for minorities), and Boger, *supra* note 49, at 1437–40 (finding that students in segregated schools consistently perform worse on high stakes tests than do students in diverse schools), and Kevin Brown, *The Road Not Taken in Brown: Recognizing the Dual Harm of Segregation*, 90 VA. L. REV. 1579, 1590 (2004), and Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 741–42 (1998) (citing studies concluding that African Americans attain greater academic success in majority white schools than in majority black schools), and Liu and Taylor, *supra* note 92, at 792, 796–97 (2005) (arguing that desegregation enhances academic achievement of blacks), and McUsic, *supra* note 23, at 1354–55 (concluding that integration leads to improved African American academic performance), and Frankenberg et al., *supra* note 6, at 12 (noting that students in integrated schools perform better on standardized tests); Gary Orfield & Chungmei Lee, Harvard Univ. Civil Rights Project, *Brown at 50: King's Dream or Plessy's Nightmare?* 22–26 (2004), available at <http://www.civilrightsproject.harvard.edu/research/reseg04/resegregation04.php> (finding that minorities perform better in integrated schools), with CLOTFELTER, *supra* note 9, at 187 (finding little evidence supporting the idea that blacks achieve better in integrated settings); Ryan, *Sheff*, *supra* note 54, at 555 (citing conflicting studies).

148. CLOTFELTER, *supra* note 9, at 38; Ryan, *Sheff*, *supra* note 54, at 555 (stating that minority achievement improved during integration era) (stating that in 1954 the percent of nonwhites attending college for four or more years was 2.1% which was one-third the rate for whites of 6.3%. By 2000, 16.5% of nonwhites attended college for four or more years compared to 26.1% of whites); Frankenberg et al., *supra* note 6, at 67 (noting that desegregation improved minority graduation rates and reduced test score gaps until the 1990s); Richard Rothstein, *Must Schools Fail*, N.Y. REV. OF BOOKS, Dec. 2, 2004, available at <http://nybooks.com/articles/17598>. Achievement gap between whites and nonwhites also decreased during desegregation but began increasing in the 1990s as desegregation ended. Frankenberg et al., *supra* note 6, at 10.

149. COLEMAN ET AL., *supra* note 146, at 304 (arguing that “student body characteristics” account for “an impressive percent of variance” in student achievement, and the influence is greatest on students from disadvantaged backgrounds). A more recent government study, the

child, and the poorer the child's classmates, the less likely the child will succeed academically. Many studies since the Coleman Report conclude that the socioeconomic status of the student body is the most important, school-related factor for academic success, even more important than an individual student's wealth.¹⁵⁰ The reasons for this conclusion are varied, but it is clear that when poor students are integrated into middle-class schools, their academic achievement improves without affecting the achievement of their advantaged peers. In short, socioeconomic integration—the indirect result of racial integration—leads to higher academic achievement for minorities.

The third advantage of integration, also not mentioned in *Brown*, is that it improves minorities' long term life chances. Black students from integrated schools are more likely to attend college, receive higher grades while in college, graduate from college, find white collar and professional jobs, and earn higher wages than black students from segregated schools.¹⁵¹ These outcomes are partially explained by the socioeconomic diversity of integrated schools. Another explanation is that networks and information previously closed to minorities in segregated schools become opened in integrated schools. The social networks minority students create in integrated schools allow access to information and modes of

Prospects report, found that economically disadvantaged children scored lower on tests when they attended schools with high concentrations of poverty than when they were in mixed-income schools. U.S. DEPT. OF EDUC., NATIONAL ASSESSMENT OF THE CHAPTER 1 PROGRAM: THE INTERIM REPORT 27–31 (1992).

150. Boger, *supra* note 49, at 1412–23 (discussing research regarding link between socioeconomic status and educational performance); McUsic, *supra* note 23, at 1355–58 (finding that the socioeconomic status of a student's classmates is a critical variable in determining a student's academic performance).

151. Black, *supra* note 147, at 943–45 (citing studies concluding that racial diversity in schools results in better teaching and learning, increased employment opportunities, improved civic values, and higher achievement and educational opportunities); Liu & Taylor, *supra* note 92, at 797 (examining studies finding that desegregation enhances later life chances).

behavior that are helpful in gaining college admission, scholarships, and jobs.¹⁵² While the short-term academic effects of racial integration are controversial, the beneficial long-term effects are well accepted.

The fourth advantage of integration—the improvement of racial attitudes and intergroup relations—is the most accepted justification for desegregation. The social benefits of integration were the primary reason the architects of *Brown* elected to pursue integration rather than equalize separate schools. They believed that by altering the racial composition of schools they could re-engineer society along nonracial fault lines. Gordon Allport's classic 1954 study laid the foundation for the universally accepted "contact theory." Allport concluded that members of a racial group typically hold members of the minority in low-esteem and that no contact, or casual contact, between these groups serves only to reinforce negative stereotypes.¹⁵³ Prejudice declines substantially, however, when casual contact gives way to closer acquaintance and especially when individuals of different races are engaged as equals in pursuit of a common goal.¹⁵⁴ Racially diverse classrooms create this contact and reduce cultural ignorance and the resulting fear of the unknown.

Because of contact theory, the benefit to intergroup relations is the most accepted of all integration rationales. There is a consensus among experts and the public "that integration is a desirable policy goal, mainly for the social benefit of increased information and understanding about cultural and social differences among various

152. CLOTFELTER, *supra* note 9, at 192.

153. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 263–64 (1954).

154. *Id.* at 264 ("In contrast to casual contacts, most studies show that true acquaintance lessens prejudice."); *id.* at 281 ("Prejudice . . . may be reduced by equal status contact between majority and minority groups in the pursuit of common goals.").

racial and ethnic groups.”¹⁵⁵ The Supreme Court has consistently recognized the benefit of diverse educational settings. Justice Marshall, dissenting in *Milliken I*, recognized that “unless our children begin to learn together, there is little hope that our people will ever learn to live together.”¹⁵⁶ Justice Powell, in *Regents of Univ. of Cal. v. Bakke*, noted that nothing less than the “nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.”¹⁵⁷ Most recently in *Grutter v. Bollinger*, the Supreme Court found that diversity yields substantial educational benefits such as promoting cross-racial understanding, breaking racial stereotypes, and enabling students to better understand persons of different races.¹⁵⁸

Experience proves the Court correct. The desegregation of the last fifty years expanded the extent of interracial acquaintances and friendships. Interracial contact increased markedly after *Brown* in public schools, private schools, and universities.¹⁵⁹ As predicted by contact theory, these expanded friendships and acquaintances led to more tolerant racial attitudes as students in diverse schools understood racial and ethnic cultural differences. The benefits of this contact are now realized with a dramatic increase in racial tolerance over the last fifty years.¹⁶⁰

Contact theory underscores the importance of school integration, because segregation is self-perpetuating. Products of integrated

155. David J. Armor, *Facts and Fictions About Education in the Sheff Decision*, 29 CONN. L. REV. 981, 982 (1997).

156. *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

157. 438 U.S. 265, 313 (1978). He concluded that both “tradition and experience lend support to the view that the contribution of diversity is substantial.” *Id.*

158. 539 U.S. 306, 330 (2003).

159. CLOTFELTER, *supra* note 9, at 179–81.

160. *Id.* at 38–39, 181, 188–91, 195; Frankenberg et al., *supra* note 6, at 10.

schools, because they are more tolerant and understanding of other races, are more likely to work and live in integrated environments, which in turn leads to more school integration.¹⁶¹ It is imperative that interracial contact exist in schools for all races to live and work together.¹⁶²

Despite the immense benefits of integration that cannot be replicated in separate but equal schools, it was deserted because *Brown* did not meet lofty expectations and integration was improperly viewed as a failure. *Brown* fell far short of creating permanently desegregated schools and significantly increasing contact among racial groups for several reasons. First, as noted above, the courts retreated from racially balancing schools only twenty short years after *Brown*. They quickly tired of micromanaging school district policies ranging from student and teacher assignment plans to extracurricular offerings and teacher pay scales. They conveniently ignored the significant social science evidence supporting racially diverse schools in order to return local control to school boards. Indeed, the benefits of integration are formally irrelevant to modern courts deciding whether to dismantle a desegregation order.¹⁶³ Disregarding the benefits of integration permits courts to return control to local school boards without remorse, thus hastening the demise of integration.

161. Note, *Lessons in Humanity: Diversity as Compelling State Interest in Public Education*, 40 B.C. L. REV. 995, 1023 (1999) (citing studies establishing that students attending desegregated schools were more likely to work in racially mixed environments); Frankenberg et al., *supra* note 6, at 12–13 (examining studies showing that an integrated education helps students work with members of other races and ethnic groups).

162. Boger, *supra* note 49, at 1411; Orfield, *Inherently Unequal*, *supra* note 3 ("Segregation is a fundamental structure of society, and it is profoundly self-perpetuating, even in the absence of overt discrimination."); Frankenberg et al., *supra* note 6, at 12–13 ("[I]nterracial exposure in K-12 education can help break the perpetual cycles of educational and occupational segregation . . .").

163. Levit, *supra* note 90, at 460, 478–82; James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659, 1673 (2003).

The second factor blunting the effect of *Brown* was white aversion to integration and avoidance of racially mixed schools.¹⁶⁴ The “white flight” to suburbs and private schools prevented meaningful and universal integration. The residential segregation resulting from white flight has declined since its post-*Milliken I* plateau, but it is still greater today than it was in the pre-*Brown* era and is worsening.¹⁶⁵ Because districts typically assign students to neighborhood schools, the current residential segregation is the most significant factor preventing school integration.¹⁶⁶

Whites avoided integrated schools not only through white flight, but also by opposing efforts to desegregate their racially insulated suburban schools. Once white suburban schools were threatened with integration, the courts and legislatures lost their resolve to racially balance the schools.¹⁶⁷ As Charles Clotfelter aptly notes,

[t]he social world of the public schools, especially the public high school, could have been turned on its head by desegregation. Through various means, whites, the more powerful group in

164. CLOTFELTER, *supra* note 9, at 8, 91, 96, 181. White aversion continues today, as whites residing in successful integrated school districts that are celebrated for academic achievement continue to send their children elsewhere and their schools are resegregating. Amy Stuart Wells & Jennifer Jelison Holme, *No Accountability for Diversity: Standardized Tests and the Demise of Racially Mixed Schools*, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK 187 (John Charles Boger et al. eds., 2005).

165. CLOTFELTER, *supra* note 9, at 78–81, 184 (noting that the racial disparity between districts is widening, and Latinos are currently the most residentially segregated race); Boger, *supra* note 49, at 1401–03 (“[O]verall levels of residential segregation remain very high for African Americans in most metropolitan areas.”); Heise, *supra* note 47, at 2432 (“African Americans are more [residentially] segregated today than they were in 1940.”); Ryan & Heise, *supra* note 44, at 2094 (“Hispanics have experienced similar, though less dramatic, residential segregation.”). See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993) (arguing that American residential segregation is intense and worsening).

166. Chemerinsky, *supra* note 50, at 1462; Liu & Taylor, *supra* note 92, at 792 (finding that neighborhood school attendance policies are the primary obstacle to desegregation because of high levels of residential segregation); James E. Ryan, Brown, *School Choice, and the Suburban Veto*, 90 VA. L. REV. 1635, 1644 (2004) [hereinafter *Suburban Veto*].

167. See generally Ryan & Heise, *supra* note 44, at 2051–52.

most schools, were able to preserve some of the elements of the previous social order, thus moderating the extent of change in social relations.¹⁶⁸

The third factor minimizing the effect of *Brown* was the desertion of integrative principals by minorities in favor of resource and outcome equalization. Integration is not merely ignored today, but maligned. Modern anti-subordination theory endorses voluntary racial separation in the schools. It posits that equal educational opportunity is not achieved by desegregating the schools and treating all students equally, but rather that equality can be achieved only by treating disparately situated people differently.¹⁶⁹ Anti-subordinationists argue that separate education is sometimes necessary in order to achieve equal educational opportunity, because minorities do not achieve in white schools due to bias, therefore, separate schools for minorities will free them from this discrimination and allow them to flourish.¹⁷⁰ Anti-subordinationists believe that segregation, when voluntary, is the best way to achieve equality in education, and often embrace the de facto segregation of today's schools, so long as they are equal.

Finally, the promise of *Brown* was blunted by the rise of alternative legal avenues for minorities to attain an equal education. Integration was no longer viewed as necessary to attain a high quality

168. CLOTFELTER, *supra* note 9, at 182; *see also* Minow, *supra* note 127, at 15 (“The continuing failure to realize the vision of *Brown* seems persistently linked to the white resistance that fault line represents.”).

169. Minow, *supra* note 127, at 29 (“[I]ntegration is not the exclusive way to achieve equal opportunity; treating people the same who are different is not equal treatment.”).

170. *See, e.g.*, W.E. Burghardt DuBois, *Does the Negro Need Separate Schools?*, 4 J. OF NEGRO EDUC. 328, 333–35 (1935); Amy H. Nemko, *Single-Sex Public Education after VMI: The Case for Women's Schools*, 21 HARV. WOMEN'S L.J. 19, 76–77 (1998); Pamela J. Smith, *All-Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2003, 2014–15 (1992); Kristina Britten, Comment, *Equal Protection Theory and the Harvey Milk High School: Why Anti-Subordination Alone is Not Enough*, 45 B.C. L. REV. 869, 878–79 (2004).

education for minority students once finance reform, freedom of choice and accountability promised to create truly equal but segregated schools. Integration yielded to finance reform, which is now yielding to school choice and accountability. It is uncertain what new reform movements loom on the horizon that will displace choice and accountability, but replacement will certainly be sought because the equality guaranteed by these new education reform movements is as illusory as equality during the *Plessey* “separate but equal” era and will continue to be impossible to attain in the future.

C. Minorities in Today’s Schools

White-aversion, residential segregation, the desertion of integration principals by civil rights leaders and the judiciary, and the rise of alternative legal reform avenues curbed the effect of *Brown* and decreased the amount of interracial contact hoped for by its architects. These factors reduced the pace of desegregation since the 1970s and led to the rapid resegregation of our nation’s schools today.¹⁷¹ Incredibly, schools are more segregated today than they were in 1954 and the rate of resegregation is rapidly increasing.¹⁷² Furthermore, all types of American school districts are resegregating. Every major urban school district is majority, nonwhite, and segregated, and suburban schools are getting whiter.¹⁷³

171. Ogletree, *supra* note 22, at 235, 256, 259. See generally McUsic, *supra* note 23.

172. Frankenberg et al., *supra* note 6, at 5, 37, 42, 67; Erica Frankenberg & Chungmei Lee, Harvard Univ. Civil Rights Project, Charter Schools and Race: A Lost Opportunity for Integrated Education 2 (2003), available at <http://www.civilrightsproject.harvard.edu/research/deseg/CharterSchools.php> (“[B]lack and Latino students are more isolated than they have been for three decades.”); Gary Orfield & Susan E. Eaton, Harvard Univ. Civil Rights Project, Back to Segregation (2004); available at <http://www.civilrightsproject.harvard.edu/research/articles/reseg.php>. There are less black students in majority white schools than in any period since 1968. Frankenberg et al., *supra* note 6, at 37. Black students’ exposure to white students has been steadily falling since 1980. *Id.* at 41.

173. *Id.* at 5, 53–62. Only 14% of the 14,952 schools in the nation’s 100 largest districts have enrollments that match the nation’s profile. Sandra Clark, *Finding a New Route to Equal*

All racial groups currently attend schools in which a majority of the student body is composed of students of their own race.¹⁷⁴ Seventy percent of black students attend schools in which racial minorities are a majority and one-third of black students are in schools that are ninety to one hundred percent minority.¹⁷⁵ Latinos are even more racially segregated, not only by race and ethnicity but also poverty.¹⁷⁶ Whites continue to be the most isolated group. White students have little contact with minorities despite the fact that minority enrollment in schools is increasing while white enrollment is decreasing.¹⁷⁷

Extreme socioeconomic isolation accompanies today's racial and ethnic concentrations. Indeed, poverty concentration in today's schools is greater than racial and ethnic concentration. Urban school districts contain high concentrations of minority students and students from poor families.¹⁷⁸ Over half of the students in schools attended by African Americans and Latinos are poor or near poor

Achievement, CATALYST FOR CLEVELAND SCHOOLS, <http://catalyst-cleveland.org/04-00/equalach.htm>. The minority enrollment in 11,399 of these schools is more than 41%. *Id.*

174. OGLETREE, *supra* note 22, at 261; Rahdert, *supra* note 47, at 786, 800; Frankenberg et al., *supra* note 6, at 27.

175. Adam Cohen, *The Supreme Struggle*, N.Y. TIMES, Jan. 18, 2004, at A4. One sixth of all black students attend apartheid schools, which are entirely nonwhite and have high concentrations of poverty. Frankenberg et al., *supra* note 6, at 5. Five percent of all students attend apartheid schools. *Id.* at 28.

176. Chemerinsky, *supra* note 50, at 1463; Frankenberg et al., *supra* note 6, at 4, 32, 33.

177. Frankenberg et al., *supra* note 6, at 4, 27, 47; Orfield and Lee, *supra* note 147 (“[Although] American public schools are now only sixty percent white nationwide and nearly one-fourth of U.S. students are in states with a majority of nonwhite students . . . except in the South and Southwest, most white students have little contact with minority students.”); *see also* CLOTFELTER, *supra* note 9, at 35 (tracking changes in racial compositions in schools since 1954).

178. Heise, *supra* note 47, at 2427 (“Indeed, the correlation between race and poverty, at least in the education context, is startling.”); Ryan, *supra* note 15, at 272–75; Frankenberg & Lee, *supra* note 172, at 2 (“The increasing isolation is not just isolation by race but also by poverty . . .”).

compared to only twenty percent of the students in schools attended by whites.¹⁷⁹

The combination of extreme racial and poverty concentrations exacerbates the current academic achievement gap between white and nonwhite students.¹⁸⁰ Because racial isolation accompanies socioeconomic isolation, minorities today suffer disastrous educational results. Minorities are concentrated in poorly performing, high poverty schools that experience lower achievement scores, graduation rates, and college matriculation rates and higher dropout rates than their suburban counterparts.¹⁸¹ Socioeconomic isolation, rather than racial segregation, is the predominant factor causing disparities between races in academic achievement.¹⁸²

Federal and state legislatures, courts, and the public will not revive integration to combat these disparities. America's retreat from the integration path to equality is complete, displaced by the promises of choice, equal resources and improved educational

179. Boger, *supra* note 49, at 1419 (“[M]inority children comprise 77% of the student bodies in high-poverty schools”); Frankenberg et al., *supra* note 6, at 35; Frankenberg & Lee, *supra* note 172, at 2 (“[N]early nine-tenths of intensely segregated black and Latino schools have student bodies with concentrated poverty.”).

180. Roland G. Fryer, Jr. & Steven D. Levitt, *Understanding the Black-White Test Score Gap In the First Two Years of School*, 86 REV. ECON. & STAT. 447, 461 (May 2004) (concluding that the achievement gap can be attributed to the generally lower quality schools that black children attend); *see also* Kane & Staiger, *supra* note 126, at 154–55, 172 (identifying current academic achievement gap between minorities and whites); Peterson & West, *supra* note 74, at 4 (“[T]he long-standing difference in average math scores of black and white students in American schools . . . is approximately 1.0 standard deviation, as is the performance difference between typical fourth and eighth graders.”); Nat’l Assessment of Educ. Progress, *The Nation’s Report Card*, <http://www.nces.ed.gov/nationsreportcard> (identifying current academic achievement gap between minorities and whites).

181. Boger, *supra* note 49, at 1419; Brittain, *supra* note 127, at 32; Chemerinsky, *supra* note 50, at 1468; Levit, *supra* note 90, at 497–98; Ryan, *supra* note 49, at 272–75.

182. *See* Brittain, *supra* note 127, at 33; Lewin, *supra* note 23, at 125–26 (concluding that because school performance is more associated with class than race, minorities in segregated schools perform poorly because of the high concentrations of children from poor families, not because of racial concentrations).

outcomes. Charles Boger locates the American education system in a “perfect storm”—where the end of desegregation combined with the standards based movement and financial disparity among school districts creates segregated and unequal schools.¹⁸³ Yet, the current situation is not a fleeting weather pattern, but instead a permanent climatic shift in education reform, and our schools will remain separate and unequal into the foreseeable future.

V

THE FUTURE OF EDUCATION: SEPARATE BUT UNEQUAL

By lining up the historical path of education reform with the current state of education, the future trajectory of education becomes apparent: Schools will return to the past path of “separate but equal” in name, but separate and unequal in practice. The new “separate and equal” paradigm is expected to succeed where *Plessey* failed, because racial separation is now voluntary instead of state mandated, equality requires both resource *and* outcome equity, and school choice will remedy inequality. These distinctions will not make a practical difference to our students, however, as our separate schools will continue to produce disparate educational opportunities for our poor and minority students.

A. Finance Litigation

The school finance reform movement will not reverse the growing racial and socioeconomic isolation in schools. Quite the opposite will occur as the false promise that finance litigation will yield equal funding, and an adequate education obviates the need to pursue racial and socioeconomic integration. It has already proven

183. See generally Boger, *supra* note 49.

to be a “costly distraction” that “unwittingly” legitimizes de facto segregation.¹⁸⁴ With the hope that all schools will be sufficiently funded to yield adequate educational outcomes, parents have little reason to demand integration. In a 1994 Gallup poll, sixty-four percent of African Americans considered increased funding to be the best way to help minorities, compared to only twenty-five percent who selected integration. Furthermore, sixty-four percent said they would choose local schools over integrated schools outside of their community.¹⁸⁵ School finance reform also leads away from integration by submerging the important socializing component of education. By defining schools as merely a combination of inputs that lead to measurable academic outcomes, finance reform degrades education’s role in shaping social attitudes and leads away from, not towards, integration.¹⁸⁶

Finance litigation *could* be used to integrate schools. In *Sheff v. O’Neill*, the Connecticut Supreme Court combined the state segregation clause with the education clause to find that even when resources are divided evenly, “the existence of extreme racial and ethnic isolation in the public school system deprives schoolchildren of substantially equal educational opportunity.”¹⁸⁷ Because the court ordered that students be divided evenly by race and ethnicity, and not merely that money be divided evenly, *Sheff* was hailed as a landmark decision at the time.¹⁸⁸ Scholars strongly advocated for other courts to consider the racial composition of a classroom a

184. Ryan, *Schools, Race and Money*, *supra* note 49, at 315–16.

185. Ryan & Saunders, *supra* note 83, at 480.

186. Brittain, *supra* note 127, at 35.

187. 678 A.2d 1267, 1281 (Conn. 1996).

188. See, e.g., John C. Brittain, *Why Sheff v. O’Neill Is a Landmark Decision*, 30 CONN. L. REV. 211 (1997).

critical educational input for an adequate education.¹⁸⁹ But *Sheff* is more anomaly than signpost. A similar claim was rejected in *Paynter v. State, No. 75*, wherein the plaintiffs conceded that New York had sufficiently funded the Rochester school district but faulted the state for policies that resulted in high concentrations of minority and low income students which denied them their state constitutional right to an adequate education.¹⁹⁰ The court held that the plaintiff's claim connecting racial isolation to inadequate education "has no relation to the discernible objectives of the Education Article."¹⁹¹

Paynter's holding that racial and socioeconomic integration are not integral components of an adequate education is likely more indicative than *Sheff* of the future of school finance litigation. Most state constitutions do not include Connecticut's unique segregation clause making it analytically challenging for other courts to apply the *Sheff* rationale. More importantly, the last decade of integration decisions created reluctance, even antipathy, by courts to interfere in local control over student assignment policies. This disinclination, combined with the modern era reforms, create a judicial mindset to focus on input and output equality without regard to racial or socioeconomic diversity. This single-minded focus will lead future courts, like *Paynter*, to divorce the racial and socioeconomic composition of the classroom from the definition of an adequate education, despite its proven effectiveness as an educational input.

Finance litigation could also integrate schools if the remedies awarded included permitting aggrieved plaintiffs to attend magnet schools or awarding successful plaintiffs vouchers for use at private

189. Ryan, *Sheff*, *supra* note 54 at 530–31.

190. 765 N.Y.S.2d 819, 824 (N.Y. 2003).

191. *Id.*

or out of district schools.¹⁹² These alternative remedies face the same opposition as integration and will likely never reach beyond school district boundaries. The judicial, political, and social opposition to integrating suburban middle-class schools means finance litigation will not be redirected toward integrative remedies.

The separate schools resulting from school finance reform will not be equal for several reasons. First, the poor minority districts that most need additional funding are the least likely to obtain it through finance litigation. Only twenty-five percent of school districts composed of minorities were victorious in finance litigation, compared to a seventy-five percent victory rate when the plaintiff was a predominantly white school district.¹⁹³ The schools most in need of additional resources—urban minority districts—won only 12.5% of their cases.¹⁹⁴ There is no reason to believe that minority victory rates will rise in the future.

Even when minority districts are victorious, state legislatures resist court orders redistributing educational resources. Akin to the South's "massive resistance" to desegregation, many state legislatures evade court orders compelling them to either increase or equalize educational spending, often rendering finance litigation ineffective.¹⁹⁵ The middle-class suburban voters in well financed school districts effectively block educational wealth redistribution. The twenty-five year fights waged by minority school districts in Texas and New

192. School voucher advocates recently filed a lawsuit in New Jersey demanding that the state and districts provide families of 60,000 children in 96 "failing schools" the right—and the money—to attend other schools of their choice, public or private. Kristen A. Graham, *Suit to Ask N.J. to Ease Transfers for Pupils*, PHILADELPHIA ENQUIRER, July 13, 2006. In a similar, non-class action lawsuit, a mother sought tuition vouchers as a remedy for the state's failure to provide her children an adequate education. David J. Hoff, *Education Week*, January 25, 2006.

193. Ryan, *The Influence of Race*, *supra* note 12, at 455.

194. *Id.*

195. Boger, *supra* note 49, at 1383–84, 1454, 1458–59.

Jersey establish that finance “reform will be particularly difficult when legislatures are forced by court order to devote more resources primarily to minority districts.”¹⁹⁶ The political opposition to wealth redistribution will likely continue unabated and prevent finance litigation from creating schools with equivalent financing.

Even in states where finance litigation is successful in both the courts and legislature, complete equality does not result. Not one single state has adopted a plan that completely equalizes spending through wealth redistribution.¹⁹⁷ There is simply not enough money to ensure that all districts increase their spending to match the highest spending districts, and there is insurmountable opposition to capping expenditures by the wealthiest districts.¹⁹⁸ The current finance reform wave—adequacy litigation—does not even address this inequality. Wealthy districts can, and will, continue to outspend poor districts in a system that requires only sufficient funding to attain an adequate education.¹⁹⁹ The adequacy wave which dominates finance litigation today will lead to further financial disparity between wealthy and poor districts.

The recently emergent trend in finance litigation to demand vertical equity will not change this outcome for several reasons. First, it is unlikely that state legislatures will implement vertical equity schemes even if the theory materializes into the fourth wave of finance reform. Considering the significant resistance to horizontal equity it is unlikely that state legislatures and the voting populace will

196. Ryan, *The Influence of Race*, *supra* note 12, at 472; *see also id.* at 458, 471–76.

197. McUsic, *supra* note 23, at 1349; Ryan & Heise, *supra* note 44, at 2059, 2062 (“No school finance case has led to equalized funding among school districts in any state.”); Heise, *Litigated Learning*, *supra* note 47, at 2438 (finding that no finance scheme creates true equitable spending).

198. McUsic, *supra* note 23, at 1349–50 (explaining that states do a poor job of utilizing supplemental state funds to equalize spending); Ryan and Heise, *supra* note 44, at 2060–61.

199. Ryan and Heise, *supra* note 44, at 2062.

support allocating resources disproportionately to poor urban schools. The political trend points in exactly the opposite direction, as the NCLB and society demand that poorly performing schools be penalized rather than provided additional funds. The era of throwing additional money at underperforming schools has been replaced by strict accountability and sanctions for underperformance.

The second reason vertical equity will fail to equalize educational opportunities for low income and minority students is that such funding schemes assume that increased funding leads to improved educational outcomes—a link that is tenuous at best. School finance cases are premised on the supposition that increased funding and resources to poor schools will lead to better student performance. The courts and scholars disagree on this assumption. The Supreme Court, in *San Antonio v. Rodriguez*, found the question of “whether the quality of education may be determined by the amount of money expended for it” to be “unsettled and disputed.”²⁰⁰ Four state supreme courts also reject the correlation while seventeen state courts find a direct link between expenditures and educational opportunity.²⁰¹ Scholars also disagree. As early as 1966, the Coleman Report found that increased funding has a negligible effect on student achievement.²⁰² Numerous researchers since that time reach the same conclusion while others find a positive correlation between resources and student performance.²⁰³

200. 411 U.S. 1, 23–24 (1973).

201. For a discussion of the states which have accepted the correlation and those that have rejected it, see Dayton & Dupre, *supra* note 54, at 2379–80.

202. JAMES S. COLEMAN ET AL., *supra* note 146.

203. See, e.g., Orfield, *Inherently Unequal*, *supra* note 3, at 1048 (increased money does not improve the education of minorities); ABIGAIL THERNSTROM & STEPHAN THERNSTROM, NO EXCUSES: CLOSING THE RACIAL GAP IN LEARNING at 153 (2004) (money does not improve

The perception is certainly that money matters, as wealthy districts adamantly oppose wealth redistribution or spending caps and poor districts adamantly fight for increased funding. But practical experience in schools since the inception of the finance reform movement indicates that money does not matter. Overall student performance in the 1990s did not improve despite per pupil expenditures increasing fifteen percent.²⁰⁴ The performance of students in states where finance litigation was successful, even when victories yielded vertical equity finance schemes, does not support the correlation between expenditures and improved educational outcomes.²⁰⁵

Most importantly, increased funds do not lead to better academic results in racially isolated, high poverty schools.²⁰⁶ The pessimistic view of why this occurs is that high poverty urban schools are often “employment-regimes,” animated more by preserving jobs in the school system than by spending money efficiently.²⁰⁷ On the other hand, no educators are certain exactly which educational inputs lead to improved educational outcomes. It is unknown if student

achievement); McUsic, *supra* note 23, at 1353–54 (citing numerous studies finding that increased funding does not lead to better educational outcomes); Ryan & Saunders, *supra* note 83, at 475; Peterson & West, *supra* note 74, at 12 (studies show that resources and performance are not linked). *But see* PETER SCHRAG, FINAL TEST: THE BATTLE FOR ADEQUACY IN AMERICA’S SCHOOLS (2004) (the unequal distribution of money among schools accounts for much of the achievement gap). *See also* Dayton & Dupre, *supra* note 54, at 2379–80 (citing studies disagreeing on the link between expenses and student performance).

204. Peterson & West, *supra* note 74, at 11–12.

205. Saiger, *supra* note 71, at 1714 (explaining that finance victories have not improved schools); Liebman and Sabel, *supra* note 73, at 204 (victories that led to increased funding have led to little or no educational improvement); Ryan, *Sheff*, *supra* note 54, at 540 (student performance has not improved in states with vertical finance schemes).

206. Ryan, *Sheff*, *supra* note 54 at 532, 538, 541; Ryan, *Schools, Race and Money*, *supra* note 49, at 284–93.

207. Saiger, *supra* note 71, at 1666–68, 1705 (explaining the “employment regime” of local school districts and its deleterious effects on educational policy); Ryan, *Schools, Race and Money*, *supra* note 49, at 284, 294–95 (finding that schools in poor neighborhoods are often treated as job programs and patronage, not merit, dictates employment decisions).

performance improves with new books, higher teacher salaries, more security, improved transportation to school, improved facilities, new computers or any combination of resource inputs. Throwing money at a bad school will not yield positive results unless the elusive question of what money should be spent on can be answered. While no school system can pinpoint expenditures which improve student performance, high poverty schools are particularly susceptible to spending money unwisely.²⁰⁸ Whatever the underlying cause, increasing funds does not appear to improve student achievement and school finance litigation will not improve student performance in poor and racially isolated schools.

The past failure of finance reform to narrow the achievement gap does not guarantee its future failure, but the next “wave” of finance litigation reform is not promising. The current trend in finance litigation, to include educational outcomes as measured by legislatively created educational standards in the definition of an adequate education, provides little hope of attaining true equality. The NCLB makes it easy for courts in finance litigation to incorporate accountability principles. Because the NCLB requires each state to create educational standards and a means to determine if such standards are met, it allows future finance litigants to argue that schools failing to make AYP deny children their state constitutional right to an adequate education and to demand additional funding or other changes. Courts have every incentive to pursue this route particularly as they begin to tire (as they did in the integration cases) of micromanaging state education policy by constantly revisiting fiscal and curricular issues. Courts will likely take the easy route and refer to legislatively created educational

208. Ryan, *Schools, Race and Money*, *supra* note 49, at 294.

standards when defining what constitutes an adequate education under the state constitution.

The merger of finance reform and standards-based accountability, much as integration fused with finance reform in the 1970s, will not result in equal schools. By tying the constitutional meaning of adequacy to legislatively created state educational standards, the accountability movement will envelop finance reform and liability will hinge solely on whether a school is meeting minimum state standards. As discussed in the next Section, states are lowering and will continue to lower their educational standards to avoid being labeled as failing under the NCLB. Equality cannot be attained by defining an adequate education with reference to legislatively created educational standards because these low standards will easily be surpassed by wealthier suburban school districts, while students at poor school districts will barely clear the low hurdle.

Rather than expanding judicial remedies and the reach of courts into the educational system, finance litigation will likely follow the path of all previous judicial reforms in the education field; initial resistance, followed by adoption then frustration at inadequate results, followed by abandonment.²⁰⁹ There is no reason to believe finance reform will deviate from this trend. The resistance to finance reform occurred in the first two decades of the movement while the adoption phase has been underway for the last decade and continues to evolve. If history repeats itself, courts will soon tire of tinkering in school policy, and the public will become frustrated by the unfulfilled promises of finance reform. On the other hand, finance reform has

209. Liebman & Sabel, *supra* note 73, at 207 (explaining that courts in finance litigation may follow old trend of courageous effort to reform schools followed by disheartening recognition of the failure of its interventions followed by a retreat to caution).

proven more resilient than integration, already lasting over a decade longer due to its strategic shift from equity to adequacy and now to accountability. But the reforms required to create truly equal schools will be blocked by the same powerful constituency that blocked meaningful integration—the middle class suburbs. In the end, “[t]he drive for ‘adequacy’ is bound to be seen, when someday it has played itself out, as only another failed education crusade.”²¹⁰ At least in the short run, the school finance movement shows no signs of abating and its combined effect with the NCLB further lures education reform away from integration.

B. The NCLB

The standards based accountability movement culminating in the NCLB will create separate and unequal schools. Like finance litigation, the NCLB makes integration appear unnecessary for minority academic success because of its guarantee that no child will be left behind. The NCLB itself expressly rejects the goal of desegregation in favor of school choice and standards based accountability.²¹¹ It mandates that students in failing schools be allowed to transfer, and goes one step further by subjugating existing desegregation orders to the school choice remedy.²¹² In other words, districts operating under desegregation plans that prohibit freedom of choice plans must alter the plan to allow the school choice remedy under the NCLB. By trumping desegregation orders, the NCLB explicitly rejects integration as the best route to equality.

210. Rothstein, *supra* note 148; Saiger, *supra* note 71, at 1711–18 (finding that courts will be ineffective at reforming schools through finance litigation).

211. CENTURY FOUNDATION TASK FORCE ON THE COMMON SCHOOL, DIVIDED WE FAIL: COMING TOGETHER THROUGH PUBLIC SCHOOL CHOICE 17 (2002).

212. 30 C.F.R. § 200.44(c). For a thorough discussion of the school choice provisions of the NCLB and their interaction with desegregation orders, see Lewin, *supra* note 23, at 116–23.

NCLB proponents contend that school choice will increase racial and socioeconomic diversity because poor and minority students at failing Title I schools will choose to transfer to white and middle class schools that are achieving AYP.²¹³ This is not occurring because parents are not exercising their school choice options under the NCLB. A 2004 report by the General Accounting Office found that more than three million schoolchildren—overwhelmingly low-income and minority children—were entitled to transfer, but only one percent of those eligible actually transferred.²¹⁴ Parents may be unwilling to transfer their children because there are no acceptable schools to which to transfer. The NCLB limits transfer to only

213. See, e.g., William Taylor, *Title I as an Instrument for Achieving Desegregation and Equal Educational Opportunity*, 81 N.C. L. REV. 1751, 1755 (2003)

214. Alliance for School Choice, *National Test Cases Filed Against Los Angeles and Compton School Districts Demanding Public School Transfer Options Under No Child Left Behind Act*, March 23, 2006 (reporting that recent complaints filed by education advocacy groups allege that no child in Compton Unified School District transferred schools, despite less than a quarter of the students being proficient in English, because the district failed to notify students of their transfer rights); see also CENTER FOR EDUCATIONAL STUDIES, FROM THE CAPITAL TO THE CLASSROOM: YEAR 4 OF THE NO CHILD LEFT BEHIND ACT vii (March 2006), available at <http://www.cepdc.org/nclb/Year4/CEP-NCLB-Report-4.pdf> (reporting that only 1.6% of students permitted to transfer exercised the choice option); CYNTHIA G. BROWN, CITIZEN'S COMMISSION ON CIVIL RIGHTS, CHOOSING BETTER SCHOOLS: A REPORT ON STUDENT TRANSFERS UNDER THE NO CHILD LEFT BEHIND ACT 37 (Dianne M. Piche and William L. Taylor eds., 2004), available at <http://www.cccr.org/choosingbetterschools.pdf> (finding that in the 2003–2004 school year, only 5.6% of transfer eligible students sought to transfer schools and only 1.7% actually transferred); JIMMY KIM & GAIL L. SUNDERMAN, THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, DOES NCLB PROVIDE GOOD CHOICES FOR STUDENTS IN LOW PERFORMING SCHOOLS? (2004) available at http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/30/b8/29.pdf (finding that the NCLB transfer provision is not widely used, does provide low-income students with better educational choices, and is unworkable in urban districts with many low-performing schools). Parents may be unable to exercise the school choice remedy because districts are making it difficult by failing to send statutorily-required transfer notifications, sending them late, making them incomplete, or discouraging transfers in the notice. Abigail Aikens, Note, *Being Choosy: An Analysis of Public School Choice under No Child Left Behind*, 108 W. VA. L. REV. 233, 249 (2005) (“[S]chool choice under NCLB . . . has been unenthusiastically supported, ignored, and even actively discouraged.”); Ronald Brownstein, *Implementing No Child Left Behind*, in THE FUTURE OF SCHOOL CHOICE, *supra* note 26, at 220–23 (school districts fail to notify parents of transfer rights); Peterson & West, *supra* note 74, at 9; Gootman, *infra* note 235, at 3; Juliet Williams, *Education Advocates Sue LAUSD: Petition: Students at failing schools blocked from opting out*, LA DAILY NEWS, March 24, 2006. Despite these problems no states or districts have been sanctioned for failing to properly notify districts.

schools within the same district as the failing school. Because failing schools are often concentrated in poor, urban areas, there may not be a more acceptable choice than the failing school.²¹⁵ The NCLB choice sanctions will not result in integrated schools so long as poor families are unable or unwilling to exercise school choice.

Even if choice is exercised, it will not result in integrated schools, because interdistrict choices are not mandated. Because segregation today occurs between rather than within districts, intradistrict school choice alone cannot lead to more integrated schools.²¹⁶ The NCLB directs districts, “to the extent practicable,” to establish a cooperative transfer agreement with higher performing neighborhood districts when no schools of choice are available within a student’s district.²¹⁷ While many interdistrict transfer requests have been made under this provision, only two districts in the entire country have transferred students across district lines.²¹⁸

Assuming the remote best-case scenario—that students at failing schools elect to transfer to an integrated and successful school within the district—it is unlikely the integrated school will accept the transfers. Space constraints will limit the amount of movement within a district. The number of children in failing schools vastly

215. Liu and Taylor, *supra* note 92, at 801; Aikens, *supra* note 214, at 249; Brownstein, *supra* note 214, at 218–19; Phillip T.K. Daniel, *No Child Left Behind: The Balm of Gilead has Arrived in American Education*, 206 EDUC. L. REP. 791, 812 (2006) (finding that children who want to transfer under NCLB will have few acceptable alternatives).

216. Goodwin Liu, *Real Options for School Choice*, N.Y. TIMES, Dec. 4, 2002, at A31; Orfield, *Inherently Unequal*, *supra* note 3, at 1042 (segregation today exists between, not within, school districts).

217. 20 U.S.C. § 6316(b)(11) (Supp. II 2002).

218. Brown, *supra* note 214, at 67–69; Brownstein, *supra* note 214, at 213–17 (finding that suburban schools have not been accepting transfers from children in urban schools); Liu and Taylor, *supra* note 92, at 804–05 (explaining that suburban schools will not accept transfers from urban schools).

exceeds the number of available slots in better performing schools.²¹⁹ Though the NCLB prohibits space constraint as a reason to reject transfer students, the regulation may be ignored as simply too impractical in running a school district. Many school districts, including Long Beach, Los Angeles, Chicago, Atlantic City and Providence have already denied transfers based on lack of capacity.²²⁰

The school choice remedy will not integrate schools, and the other NCLB sanctions promote segregation in several ways. First, the NCLB's sanctions create strong incentives for white, middle class schools to avoid integration in order to maintain AYP.²²¹ Because low income and minority students perform worse than middle class whites on standardized tests, and because failure of a subgroup means the entire school fails, diverse schools are less likely than segregated white schools to make AYP. White, middle class schools will exclude nonwhite and poor students and avoid integration because it brings a higher risk of sanction.²²² This is already occurring in Connecticut, where the state education commissioner noted the "reluctance on the part of school districts to accept youngsters who come with deficiencies because they're concerned

219. Alliance for School Choice, *National Test Cases Filed Against Los Angeles and Compton School Districts Demanding Public School Transfer Options Under No Child Left Behind Act*, *supra* note 214.

220. Brown, *supra* note 214, at 62–63.

221. AP, *Law Raises Fears of More Segregation*, April 19, 2006 (stating that the NCLB "is—unexpectedly—encouraging school segregation"); Ryan, *Perverse Incentives*, *supra* note 5, at 963–64.

222. Kane & Staiger, *supra* note 126, at 152–53, 158, 160–68, 174; Aikens, *supra* note 214, at 238; Ryan, *Perverse Incentives*, *supra* note 5, at 961–62; AP, *supra* note 221 (a solution for schools to avoid the failing label "is for schools to become less diverse"); *see also* Daniel, *supra* note 215, at 803–05 (discussing reasons why diverse schools are less likely to make AYP than predominantly white suburban schools).

that if they get enough of them . . . they'll become labeled as failing schools."²²³

Second, parents will reject diverse schools because they are less likely to make AYP. Parents become skeptical of the value of integration once test scores begin to decline, creating an incentive to forego diversity in order to attend a school making AYP.²²⁴ Middle class parents will shun diverse schools because they are more likely to score lower on standardized tests. Prestigious integrated schools are already losing white students for this reason.²²⁵

Most importantly, though, the NCLB will lead to segregated schools because it diverts the nation's attention from integration as a means to achieve equal educational opportunity. The NCLB "redirects educational thinking along new channels"—away from diversity and into academic accountability.²²⁶ School reputation was previously based on an array of factors, including the diversity of the student body, but the NCLB hinges school reputation exclusively on standardized test scores, cutting integration out of the equation.²²⁷ The standards-based movement undercuts integration by acting in concert with the economic model of schools from finance reform to transform our vision of schools from institutions that convey a broad

223. AP, *supra* note 221.

224. Wells & Holme, *supra* note 164.

225. *Id.* at 1, 7, 13.

226. Peterson & West, *supra* note 74, at 1–2; *see also* Wells & Holme, *supra* note 164, at 1 (“[T]he accountability movement . . . has significantly narrowed the definition of school quality in a way that works against racial diversity.”); Daniel, *supra* note 215, at 813 (describing the NCLB as a “balm of comfort” and a “healing salve of federal spending [that] will help mend the gap between the performance of all students”).

227. Eric A. Hanushek and Margaret E. Raymond, *Lessons about the Design of State Accountability Systems* in NO CHILD LEFT BEHIND?, *supra* note 102, at 138 (“[A]ccountability systems focus attention on some details of performance and leave others as irrelevant.”); Ryan, *Perverse Incentives*, *supra* note 5, at 966 (“[The NCLB’s] emphasis on standardized test scores has undeniably worked to narrow perceptions of what constitutes a ‘good’ school.”).

spectrum of learning—from social to cultural to the three “R”s—to institutions that convey merely academic material. The intergroup benefits of integration to all races are meaningless in a system that judges schools exclusively on objective measurable outcomes and financial inputs.

The segregated schools created by the NCLB will inevitably be unequal. The politics of school accountability virtually guarantee that states will reduce educational standards to ensure their schools make AYP. High educational standards and accountability to ensure those standards are reached are appealing in the abstract and enjoy broad-based but dispersed political support. But the existence of standards necessarily means that certain students, teachers, schools, and districts will not meet these standards and will consequently oppose the system. As the opposition to standards-based accountability coalesces, the scattered support will wane. Legislatures will bow to these special interest groups because there is no concentrated pro-accountability constituency. Frederick Hess concludes that all conflicts over accountability standards turn out the same: “Proponents . . . must marshal diffuse support in response to challenges from passionate, coherent constituencies. The American political system is notoriously bad at pursuing collective goods when it requires imposing concentrated costs on select groups.”²²⁸

The concentrated political forces opposing standards-based accountability are formidable. Teachers unions pose one of the most powerful opponents to the NCLB, because the NCLB threatens teachers’ classroom autonomy, job security, and pay.²²⁹ States and

228. Hess, *supra* note 100, at 65; *see also id.* at 56 (accountability is appealing in the abstract but its costs are more politically salient than the diffuse long-term educational benefits).

229. The National Education Association, the largest teachers union, has spent over \$8 million in an effort to derail the NCLB. Gregg Topo, *Report: NEA Pays Opponents of NCLB*, USA

school districts oppose the sweeping reforms of the NCLB, because they intrude on state and local control over education and increase education costs. States, school districts, and teachers' unions have taken their opposition to court and are seeking declaratory relief from the NCLB in federal courts on the grounds it is an unfunded mandate.²³⁰ The racial and economic communities that are disproportionately affected by standards-based reform will also mount opposition. Poor and minority school districts will likely oppose the NCLB because their schools are the most likely to be found failing and subject to the school choice and reconstitution sanctions. In the 2004–2005 school year, high-poverty schools that failed to make AYP jumped fifty percent, from six thousand to nine thousand.²³¹ The opposition of poor and minority districts will be further galvanized by the recent DOE changes to the NCLB, which make it “harder for some districts, primarily those serving minorities, to make AYP.”²³²

In short, the politics of accountability give “every reason to believe that tough, coercive accountability will gradually evolve into

TODAY, July 10, 2006, available at http://www.usatoday.com/news/education/2006-07-10-nea-no-child_x.htm; see also Peterson & West, *supra* note 74, at 10–11 (opposition from the powerful teachers' unions threatens the accountability movement); Hochschild, *supra* note 97, at 112–14 (teachers unions are opposed to standards based reforms and are one of the most powerful forces in American politics); Moe, *supra* note 23, at 90–93 (teachers' unions oppose accountability reforms); Hess, *supra* note 100, at 61–62 (unions historically oppose any reduction in teacher autonomy); Nichols, *supra* note 38, at 175 (teachers' unions oppose accountability because it introduces incentives, both positive and negative, which educational institutions were previously insulated from).

230. See, e.g., *Connecticut v. Spellings*, No. 3:05cv1330(MRK), 2007 U.S. Dist. LEXIS 7638 (D. Conn. Aug. 22, 2005); *School District of the City of Pontiac v. Spellings*, No. 05-71535-DT (E.D. Mich. Nov. 23, 2005). For a general discussion of state and local school district opposition to the NCLB, see Daniel, *supra* note 207, at 797–801.

231. Diana Jean Schemo, *20 States Ask for Flexibility in School Law*, N.Y. TIMES, Feb 22, 2006.

232. Sunderman, *supra* note 75, at 10.

something softer, nicer, more acceptable to those directly affected.”²³³ This has proven true in the past and under current NCLB practice. States historically “dumb down” their standards when faced with too many failing students.²³⁴ For example, in the 1970s thirty-six states adopted Minimum Competency Testing (MCT) to assess students’ basic skills, and eighteen states conditioned graduation on passing exams.²³⁵ The legislation passed with ease, but met stringent opposition when students began to fail.²³⁶ In response to the political pressure from concentrated interests with significant stakes, passing rates were boosted by making exams easier, setting the bar low for passage, giving multiple chances to pass exams, and exempting categories of low performing students.²³⁷ Rather than actually improving educational institutions, the system was “gamed” to create the appearance of improvement. States that adopted accountability measures in the 1990s went through the same progression: high standards at first followed by lower standards to mollify the coalesced opposition. By 2000, one-third of all states adopting high stakes testing for students slowed or scaled back their original efforts in the face of political opposition.²³⁸

History is repeating itself under the NCLB. Because the NCLB leaves states significant discretion in setting their “challenging” academic standards, designing tests, and defining what constitutes a passing score, there is significant opportunity to game the system.

233. Peterson and West, *supra* note 74, at 12; *see also id.* at 19 (“If the past is any guide to what will happen in the next few years, softer forms of accountability are likely to be the norm.”).

234. *Id.* at 8–10; Moran, *supra* note 38, at 167.

235. Thomas S. Dee, *The “First Wave” of Accountability*, in *NO CHILD LEFT BEHIND? THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY* 217 (Paul E. Peterson and Martin R. West eds.) (2003).

236. Hess, *supra* note 100, at 70.

237. Dee, *supra* note 235, at 217, 234; Hess, *supra* note 100, at 69–70.

238. Hess, *supra* note 100, at 55–56, 60.

States are already diluting their minimum competency standards to avoid having their schools labeled as failing.²³⁹ Gail Sunderman's recent survey of amendments made by states to their NCLB implementation plans concludes that "[m]any of the changes simply reduced the number of schools and districts identified for improvement, but without requiring any educational improvement."²⁴⁰ For example, Michigan reduced its AYP cutoff from a seventy-five percent passage rate to a forty-two percent passage rate thereby reducing its number of failing schools from one thousand five hundred thirteen to two hundred sixteen in one fell swoop.²⁴¹ In 2006, twenty states requested that they be allowed to alter the means by which they measure student progress, i.e. to count students as proficient even though they are not.²⁴² The Department of Education has approved many state amendments "to respond to the growing state opposition to the law by providing relief from some of the law's provisions and reducing, at least temporarily, the number of schools and districts identified for improvement."²⁴³

States are also avoiding the failure label by not reporting the test scores of students in subgroups that are unlikely to score well on standardized tests. Schools need only report subgroup test scores if

239. Moore, *supra* note 123, at 198; Lance D. Fusarelli, *The Potential Impact of the No Child Left Behind Act on Equity and Diversity in American Education*, 18 EDUC. POL'Y 71, 82 (2004) (Ohio, Louisiana, Michigan, Texas and Arizona have already reduced test score standards); Lynn Olson, *Requests Win More Leeway Under NCLB*, EDUC. WEEK, July 13, 2005 (identifying states requesting changes to accountability plans).

240. Sunderman, *supra* note 75, at 10, 11. See also *id.* at 7 ("[T]he federal government is "permitting a wide variety of changes that lower the failure rate.").

241. Fusarelli, *supra* note 239, at 82.

242. Schemo, *supra* note 137.

243. Sunderman, *supra* note 75, at 9. *Id.* at 52 (finding that the DOE loosened accountability requirements in response to state and local opposition to NCLB); see also Liebman and Sabel, *supra* note 73, at 286-87 (the DOE has relaxed, not stiffened, the monitoring and enforcement mechanisms of the NCLB, which follows the DOE's tradition of lax enforcement of federal education requirements).

there are sufficient numbers of students in the subgroup to yield “statistically reliable information.”²⁴⁴ States retain great latitude in determining the magic number of students that comprises a subgroup. Because failure in any subgroup means the entire school fails, there are strong incentives for schools to reduce the number of subgroups. Nearly two dozen states have petitioned the federal government for exemptions to exclude larger numbers of students in racial subgroups, allowing them to avoid racial subgroup breakdowns even when they have up to fifty students of a given race in a testing population.²⁴⁵ A recent AP study found that nearly two million students’ test scores are not being counted under racial subgroups and that minorities are seven times more likely to have their scores excluded than whites.²⁴⁶

In summary, states and schools are “gaming” the system by changing their standards and assessment methods to ensure that they make AYP instead of making meaningful institutional changes to improve the education of all students.²⁴⁷ This ensures that the

244. 20 U.S.C. § 6311(b)(2)(C)(v)(II), (b)(3)(C)(xiii) (2006).

245. AP, *No Child Loophole Misses Millions of Scores*, April 18, 2006, available at <http://www.cnn.com/2006/EDUCATION/04/18/no.child.loophole.ap/index.html>. In Oklahoma, for example, schools may exclude the test scores from any racial subgroup with 52 or fewer members in the testing population, meaning 1 in 5 children in the state do not have scores broken out by race. *Id.*

246. *Id.* While less than 2% of white children’s scores aren’t being counted as a separate category, Hispanics and blacks have roughly 10% of their scores excluded. *Id.* See also Sunderman, *supra* note 75, at 7.

247. Sunderman, *supra* note 75, at 7 (“safe harbor” provisions have been expanded and statistics establishing progress have become increasingly complex, all of which lower the number of apparent failures). See also *id.* at 52 (“The combination of statistical techniques that can now be used to calculate AYP add complexity to the states’ accountability systems and complicates understanding of what AYP accountability means.”); AP, *supra* note 245 (schools are “asking the question, not how to we generate statistically reliable results, but how do we generate politically palatable results.”); Moore, *supra* note 123, at 197–98 (identifying methods by which states, schools and teachers are gaming the system); Daniel, *supra* note 215, at 808–10 (discussing “nefarious” means by which states and districts avoid NCLB sanctions without improving schools); Joyce Howard Price, *Student Pool Manipulated for Tests, Report Finds*, THE

schools make AYP, but the wealthy and middle-class white suburban schools will be far surpassing the low academic requirements while poor and minority urban schools will barely achieve minimum proficiency. This is the epitome of separate and unequal schools and a haunting reminder of de Tocqueville's prediction that the price of equality in a democratic society can be mediocrity.²⁴⁸

The NCLB schools of the future, while guaranteeing that no child will be left behind, do not guarantee that all children will receive equal educational opportunity. The Act virtually ensures that white, middle-class, suburban schools will remain racially isolated and will continue to provide superior teachers and educations to their students in comparison to poor urban minority schools.²⁴⁹ Rather than narrow the achievement gap, the NCLB will "exacerbate inequalities among communities and their schools and students" by redistributing rewards to schools that test well.²⁵⁰

While the short term trends of the accountability movement yield separate and unequal schools, changes could be made to avoid this long-term outcome. Congress could amend the NCLB to remove state discretion over setting educational standards. Currently, there is no objective check on state accountability measures and educational standards, making it difficult to ascertain if state

WASHINGTON TIMES, June 26, 2006, *available at* <http://www.washtimes.com/national/20060613-110558-2154r.html> (reporting that in Florida schools disproportionately suspended the weakest performing students just before scheduled standardized testing to ensure fewer of those students would take the tests and lower the schools score).

248. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 628–32 (J.P. Mayer ed., George Lawrence Trans., Anchor Books 1969) (1835).

249. The NCLB will lead the best teachers to go to the best schools where they are least needed. Boger, *supra* note 49, at 1445, 1448. This phenomenon occurred in California where the accountability movement widened the gap in teacher education, experience, and credentials between passing and failing schools. Julian R. Betts and Anne Danenberg, *The Effects of Accountability in California*, in *NO CHILD LEFT BEHIND?*, *supra* note 74, at 198–99, 209–10.

250. Moore, *supra* note 123, at 201. *See also id.* at 181 ("[The NCLB] is the free market model of education and school choice at its financial meanest.").

standards are meaningful. President Bush initially pushed for states to participate in the National Assessment of Educational Progress (NAEP), a national standardized assessment tool, and to judge schools based on their students' NAEP performance.²⁵¹ This idea was compromised to allow states to biennially participate in NAEP testing in fourth and eighth grade but without any penalty for schools failing to show improvement. There are currently no consequences if schools fail to improve performance on the NAEP.²⁵² If accountability was tied to the nationally standardized NAEP, states could not decrease their number of failing schools by merely reducing state educational standards. This future appears unlikely, as enforcement of the NCLB by the DOE shows a willingness to defer more to the states rather than push nationalized standards. The political pressures that push states to lower standards in the first place will prevent application of national standards.

The accountability reform trend will likely follow the path of previous legal education reforms. The initial resistance to accountability in the 1980s and 1990s is now yielding to significant effort to push these reforms through the NCLB. Frustration will soon set in unless accountability quickly achieves its promised results. Because the NCLB will not reduce the minority achievement gap, abandonment rather than retrenchment will follow. On the other hand, accountability has the potential to evolve differently than integration and finance reform, because it is not as vehemently opposed by the middle class suburbs. The NCLB reforms appear virtually cost free to the suburban middle-class, because the Act does not require them to open their doors or redistribute their property

251. Goodwin Liu, *Interstate Equality in Educational Opportunity*, 81 N.Y.U. L. Rev. 2044, 2107-08 (Dec. 2006)

252. Rudalevige, *supra* note 74, at 41-42.

wealth to poor and minority students, which were insurmountable obstacles in the finance and integration movements. It allows the middle class to feel that something is being done to help the poor and minorities, but not at the expense of their schools. The NCLB focuses sanctions directly at failing schools (typically poor, urban, minority schools), which is where the middle class believe the problem resides and where sole responsibility should lie. But as long as suburban schools are absolved of responsibility for urban schools and exempted from the school choice, and as long as concentrated political interests oppose high standards, the NCLB will lead to separate and unequal schools.

C. School Choice

Because school choice is still in its formative years, it lacks a cohesive identity and direction, making its evolution difficult to predict. Certain choice initiatives such as magnet schools and open enrollment have existed for decades, but the infusion of vouchers and charter schools changed the purpose of school choice from integration to improving underperforming schools through competition. The short history of choice as a civil rights initiative is difficult to extrapolate into an accurate prediction of its prospects. The critical question for the choice movement is whether the liberty inherent in school selection will provide an adequate remedy for inequality.

Because school choice is based on market driven competition, its effectiveness can be judged on supply and demand principles. Competition will improve public schools only if there is a broad supply, or market, of schools from which parents can choose, and there is a demand for such schools; i.e., parents actually exercise choice. If the scope of school choice is narrow, there will be little

competitive pressure on public schools to improve.²⁵³ Likewise, limited demand for school choice by parents means public schools do not need to improve to retain students. The potential of school choice to improve the plight of minority students has not, and will not, come close to being achieved because both the supply and demand for school choice are and will be circumscribed.

The supply of school choice alternatives is limited, because strong and unusual political alliances have aligned to prevent a large school choice market from developing. Conservatives, particularly religious conservatives, support expanding choice through vouchers despite its significant departure from the status quo. Poor and minorities also support choice despite its racist heritage. On the other hand, teachers' unions, civil liberty groups, and liberals oppose school choice measures in favor of the status quo system.²⁵⁴ Most importantly, middle class families seek to narrow choice to avoid threatening their community schools. Middle class parents see no need to increase educational options when they are satisfied with their schools and worry that choice may lead to an infusion of poor or minority students into their schools. The political opposition to this point has effectively limited most choice plans—whether through vouchers, charter schools, open enrollment, or magnet schools—to allow only intradistrict choice for low income and minority students.²⁵⁵

253. Ryan & Heise, *supra* note 44, at 2103, 2108, 2112–15; Forman, *supra* note 26, at 1318–19.

254. Berkowitz, *supra* note 95, at 108 (discussing the political proponents and opponents of school choice); Moe, *supra* note 26, at 149 (same); Peterson, *supra* note 96, at 19 (blacks support vouchers more than whites: 72% compared to 59%).

255. Ryan & Heise, *supra* note 44, at 2045, 2063, 2087. *See also* Liu & Taylor, *supra* note 92, at 803 (“[S]uburbanites have exercised ‘local control’ to insulate their neighborhood schools racially and socioeconomically.”); *id.* at 804 (“suburban taxpayers are wary of spending their local tax dollars on the education of nonresidents.”); *id.* at 814–15 (middle-class voters generally oppose vouchers).

If choice continues to be limited to schools within a district and not across district lines, racial and socioeconomic isolation will persist into the future.²⁵⁶ This will likely occur, considering the staying power and past victory rates of the opposition and that proponents do not support choice because of its integrative potential. Low income and minority students simply want an escape hatch from dismal schools, the religious right wants nonsectarian choices, and conservatives want only limited market pressure to bear on underperforming schools. No effort has been made by proponents or opponents to mold choice to advance integration and none should be expected.²⁵⁷

The narrow demand for school choice also limits its effectiveness. Less than two percent of students eligible for choice under the NCLB exercised their transfer right. Charter schools serve less than five percent of the overall student population, and voucher programs serve only a fraction of a percentage of American students.²⁵⁸ The limited demand may be a product of limited choice. If parents' choice is narrowed to only intradistrict public schools or inexpensive private schools, there is little reason for parents and students to undergo the effort of leaving the neighborhood school. But the limited demand for choice may also be a product of non-educational factors. Parents may not exercise school choice even when better schools are offered because of the strong ties to the neighborhood school, the convenience of the neighborhood school, the unwillingness to send their children on long bus rides, the unwillingness of the child to leave friends and transfer to a new environment, or any number of non-academic related factors. In

256. Ryan & Heise, *supra* note 44, at 2048, 2100.

257. *Id.* at 2089.

258. Moe, *supra* note 26, at 149.

short, broadening school choices may not lead to a concomitant rise in demand for such choices and limited demand may inhibit the effectiveness of school choice.

Assuming the school choice market can be expanded and the demand for choice increases markedly, many scholars conclude that school choice will result in further stratification of schools by class and race.²⁵⁹ The preferences of the American people drive segregation at this point, not state sponsored separation, and choice will only lead to further segregation. As Erika Frankenberg and Chungmei Lee explain, “normal outcomes of markets when applied to a racially stratified society is a perpetuation of racial stratification.”²⁶⁰ This certainly occurred in the post-*Brown* freedom of choice era and may likely be the fate of charter schools and voucher programs.

1. Vouchers

Vouchers are the most controversial freedom of choice reform because of their potential to change the face of education from publicly provided to only publicly funded. Whether vouchers can remedy the inequality between white and nonwhite students hinges

259. See, e.g., Robert Wrinkle et al., *Public School Quality, Private Schools and Race*, 43 AM. J. POL. SCI. 1248, 1248–53 (1999) (school choice will have segregative effects); Joseph R. McKinney, *Public School Choice and Desegregation: A Reality Check*, 25 J.L. & EDUC. 649, 657 (1996) (school choice and desegregation will continue to prove mutually exclusive into the future); MICHAEL WALZER, SPHERES OF JUSTICE 218 (1983) (parental choice leads to less diversity); National Working Commission on Choice in K-12 Education, *School Choice: Doing it the Right Way makes a Difference*, 16–17 (The Brown Center on Education Policy, The Brookings Institution ed., 2003), available at <http://www.brookings.edu/gs/brown/20031116schoolchoicereport.pdf> (noting the adverse effect increased competition can have on the poorest families); Helen Hershkoff & Adam S. Cohen, *School Choice and the Lessons of Choctaw County*, 10 YALE L. & POL'Y REV. 1, 28 (1992) (the ability of schools to maintain a majority white student body shows discrimination continues). But see Ryan, *Schools, Race and Money*, *supra* note 49, at 311–12 (suggesting school choice done properly could lead to integration in the future) and Ryan, *Suburban Veto*, *supra* note 166, at 1644 (arguing that school choice, if limited by racial considerations, may be one of the only means left for integration).

260. Frankenberg & Lee, *supra* note 172, at 5.

on whether the use of vouchers will grow in the future and, if so, whether they will improve educational opportunity for minorities.

Voucher programs cannot remedy educational inequality unless they experience tremendous growth. The small percentage of students currently served by voucher programs cannot exert sufficient market pressures for schools to improve and provides few escape opportunities for poor and minority students. But the privatization of education through the use of vouchers has not exploded as expected.²⁶¹ Vouchers remain unpopular with the American public, and voucher proposals almost always lose at the polls, usually by wide margins.²⁶² Americans simply may not be willing to abandon a public school system they have trusted for decades. Legal, political, and market factors will likely prevent the rapid growth of voucher programs necessary to make them an effective competitor to public schools.

Powerful political interest groups will continue to blunt the growth of vouchers. By introducing competition for students and the state funds that accompany them, vouchers threaten teacher and administrator job security and pay and are necessarily opposed by teachers' unions and public schools.²⁶³ The education establishment, with vested interests in maintaining the status quo, will exert its considerable political clout to protect its turf.²⁶⁴ In the short run,

261. Saiger, *supra* note 71, at 1673.

262. *Id.* at 1672; Ryan & Heise, *supra* note 44, at 2079–82. *See also* Moe, *supra* note 26, at 145 (vouchers lose at the polls because of a lack of familiarity amongst voters and the highly complex issues involved).

263. Dillon, *supra* note 135, at 8 (teachers unions strongly oppose vouchers because they introduce competition into the previously insulated public school system and they divert public funds into private schools which have little to no accountability to the state); Moe, *supra* note 26, at 138 (vouchers take students and money with them to private schools, thus hurting the union by removing money that would otherwise go toward job security and teacher salary).

264. Moe, *supra* note 26, at 141–42; Dillon, *supra* note 135, at 8.

therefore, vouchers do not appear poised to explode onto the scene and achieve universality. Overcoming the political clout of the education establishment and quelling Americans' trepidation of abandoning public education will likely not occur, if ever, for at least twenty to thirty years.²⁶⁵

Even if vouchers find favor in state legislatures, they may be blocked by the judiciary. While *Zelman* removed the Establishment Clause cloud that inhibited the growth of vouchers for three decades, state constitutions still present a significant legal hurdle to the expansion of vouchers. Forty-seven state constitutions contain religious establishment provisions that are more explicit than the Establishment Clause of the First Amendment.²⁶⁶ Blaine amendments, which specifically prohibit government aide to sectarian schools, and compelled support provisions, which prohibit states from compelling their citizens to support religion, may render broad voucher programs infirm under state constitutions.²⁶⁷

The education articles of state constitutions also present an obstacle to voucher programs. In 2004, the Colorado Supreme Court held that the state voucher program violated the local control provisions of the state constitution, because the state voucher law usurped district discretion over how to spend educational monies.²⁶⁸ While only six other states have similar local control provisions, the case exemplifies how vouchers may run afoul of a myriad of state

265. Moe, *supra* note 26, at 151–52, 154–55; Liu & Taylor, *supra* note 92, at 817.

266. Bolick, *supra* note 95, at 57, 80–81; Green, *supra* note 98, at 50–51; Louis R. Cohen & C. Boyden Gray, *The Need for Secular Choice*, in *THE FUTURE OF SCHOOL CHOICE*, *supra* note 26, at 96.

267. For a discussion of Blaine amendment decisions, see Cohen & Gray, *supra* note 266, at 101–04 (tracing history of Blaine amendment decisions). See also Saiger, *supra* note 71, at 1672 (discussing state constitution barriers to voucher programs).

268. *Owens v. Colo. Cong. of Parents, Teachers and Students*, 92 P.3d 933 (Colo. 2004).

constitutional provisions.²⁶⁹ Vouchers may even violate educational adequacy clauses, which are present in most state constitutions. For example, in 2006 the Florida Supreme Court held that Florida's opportunity scholarship program—the first statewide program in the nation—violated the state constitutional guarantee of a uniform system of free public schools.²⁷⁰ Whether the Florida high court decision is trend-setting or an anomaly is yet unknown, it still casts a cloud over efforts to institute vouchers on a widespread basis.

Market forces may also inhibit the growth of vouchers. The private school choice movement can only occur if there are in fact private schools to accept voucher students. As Brian Hassel explains, existing private schools are wary of accepting voucher students because they arrive with too many state-regulated strings attached, such as accountability measures and altered admission standards.²⁷¹ As a result, many new private schools will have to be formed to meet any future voucher demand, but forming a new private school is costly and difficult. If vouchers ever do take off, their effectiveness will be blunted by a dearth of private schools willing to accept voucher students.²⁷² Because of these legal, political, and market obstacles, it is unlikely vouchers will expand to produce sufficient market pressure for public schools to improve or to provide a significant number of students a means to escape underperforming schools.²⁷³

269. *Id.* at 939.

270. *Bush v. Holmes*, 919 So.2d 392, 405–12 (Fla. 2006).

271. Bryan Hassel, *The Future of Charter Schools* in *THE FUTURE OF SCHOOL CHOICE*, *supra* note 26, at 187.

272. *Id.*

273. Liu & Taylor, *supra* note 92, at 814–17.

If voucher programs traverse the political, legal, and market roadblocks, it is difficult to forecast whether their widespread use would yield integrated schools or improved educational opportunities for minorities. Properly constituted voucher programs can be used to further integration. Considering that all current voucher programs target poor and minority students, most of which attend highly segregated schools, it is logical to assume that voucher students will choose to move to more integrated schools. So long as vouchers remain available only for the poor and minorities, modest desegregative effects can be expected.²⁷⁴ But modern voucher programs are not designed to integrate students by making poor urban minorities attractive to middle class white schools because the amount of the vouchers are too low. “[I]nstead, [modern voucher programs] assume that inner-city students will continue to go to school with others of their same race and class background. The only change is the type of school, not the composition of the student body.”²⁷⁵ It is for these reasons that vouchers have had little to no effect on integration and may in fact lead to the resegregation of urban schools, as occurred in Milwaukee.²⁷⁶ Unless interdistrict

274. See, e.g., *id.* at 807 (arguing that voucher programs targeted at poor and minorities have led to modest integration in urban centers); *id.* at 813 (all voucher programs are currently targeted at educationally disadvantaged youth); John Tierney, *Black Students Lose Again*, N.Y. TIMES, Jan. 7, 2006, at A11 (citing studies showing that vouchers lead to integration); Ryan & Heise, *supra* note 44, at 2097 (vouchers lead to minimal improvement in integration because students from segregated urban schools go to more fully integrated private schools).

275. Forman, *supra* note 26, at 1315. See also Ryan & Heise, *supra* note 44, at 2085 (much of the support for vouchers is not intended to achieve racial balancing or integrated schools); Liu & Taylor, *supra* note 92, at 807–08 (modest voucher payments are preventing integration).

276. See, e.g., Alexander & Alexander, *supra* note 26, at 1135 (vouchers will lead to “the proliferation of private segregated academies, and the balkanization and racial resegregation of American education with the government’s help”); *id.* at 1152 (predicting an “exodus of students from integrated public schools to segregated private schools as tuition voucher programs and similar incentives are enacted at the state and federal levels”). Several studies conclude that voucher programs resegregate schools. See, e.g., Frank R. Kemerer, *The Legal Status of Privatization and Vouchers in Education*, in *PRIVATIZING EDUCATION: CAN THE MARKETPLACE*

limitations are eliminated and vouchers are valuable enough to encourage suburban schools to accept voucher students, voucher programs represent merely another attempt to make separate but equal schools.²⁷⁷

The racially separate voucher schools of the future, if they materialize, at least hold promise for equality (or at least the “most” equality that can be achieved in separate schools). There is great disagreement as to whether voucher students perform better in private schools.²⁷⁸ Studies of the Milwaukee program have reached varied conclusions.²⁷⁹ The most comprehensive study, conducted by Paul Peterson and William Howell, showed that black voucher students performed better in private schools.²⁸⁰ Analyzing the

DELIVER CHOICE, EFFICIENCY, EQUITY, AND SOCIAL COHESION? 55–59 (Henry M. Levin ed., 2001) (privatization may make racial isolation of schools even worse); Evan Thomas & Lynette Clemetson, *A New War Over Vouchers: Poor Parents Want Them But Civil Rights Leaders Are Split*, NEWSWEEK, Nov. 22, 1999, at 46 (arguing that vouchers can have an adverse effect on the racial integration of schools); Forman, *supra* note 26, at 1316–17 (claiming vouchers create de facto segregation). Contrastingly, other scholars conclude that vouchers will have little to no impact on integration. See, e.g., Robert K. Vischer, *Racial Segregation in American Churches and its Implications for School Vouchers*, 53 FLA. L. REV. 193, 228–29 (2001) (“[T]he relevance of geographical preferences to a voucher program in a city with highly segregated neighborhoods, rather, is that they appear to effectively negate any integrative tendencies arising from increased student mobility which vouchers are said to facilitate.”); BRIAN GILL, ET AL., RHETORIC V. REALITY: WHAT WE KNOW AND WHAT WE NEED TO KNOW ABOUT VOUCHERS AND CHARTER SCHOOLS 164–68 (2001) (available evidence suggests that students under voucher programs move to schools which are only slightly more integrated).

277. Forman, *supra* note 26, at 1316.

278. See, e.g., Sam Dillon, *Report Defends Vouchers but Fails to Quell Debate*, N.Y. TIMES, June 13, 2003, at A29 (describing disputes in methodologies of studies used to measure the success of voucher programs); Ryan & Heise, *supra* note 44, at 2110–11 (citing conflicting results in numerous studies).

279. Compare John F. Witte, *The Milwaukee Voucher Experiment*, 20 EDUCATIONAL EVALUATION AND POLICY ANALYSIS 229–51 (Winter 1998); with Jay P. Green et al., *Effectiveness of School Choice: The Milwaukee Experiment*, 31 EDUCATION AND URBAN SOCIETY 190–213 (Feb. 1999); and CECILIA ROUSE, PRIVATE SCHOOL VOUCHERS AND STUDENT ACHIEVEMENT: AN EVALUATION OF THE MILWAUKEE PARENTAL CHOICE PROGRAMS (1997).

280. Dillon, *supra* note 278, at 29. See also Peterson, *supra* note 95, at 12–13 (African-American students perform better in private schools); Ryan & Heise, *supra* note 44, at 2111 (most research shows modest improvement for African-Americans in private schools); Dillon, *supra*

identical data, however, other researchers concluded that African Americans in private schools showed minimal or no gain.²⁸¹ The United States Department of Education recently completed a comprehensive study concluding that when students of like economic, racial, and family backgrounds were compared, public school students did as well as or better than those in private school in fourth grade reading and math and in eighth grade math. The private school students performed better only on eighth grade reading tests.²⁸²

Because voucher programs are in their formative years, it is difficult to determine if they will increase racial and socioeconomic isolation or improve minority educational performance. Without knowing the answers to these questions it is not prudent to rely on vouchers to remedy the current educational inequity. They hold promise, but their extremely limited implementation to date makes them a poor reform on which to pin the hopes of minority and low income students.

2. *Charter Schools*

Charter schools are more likely than voucher programs to dominate the choice movement of the future. They enjoy strong public support, because they represent the middle ground between complete privatization and maintaining the status quo.²⁸³ Charter schools achieve the competitive benefits of choice without sacrificing the egalitarianism of public education, making it a popular reform.

note 135, at 8 (African-American voucher students in Cleveland improved their academic performance).

281. Michael Winerip, *On Education: What Some Much-Needed Data Really Showed About Vouchers*, N.Y. TIMES, May 7, 2003, at B12.

282. Diane Jean Schemo, *Public Schools Close to Private in U.S. Study*, N.Y. TIMES, July 15, 2006, at A1.

283. Dillon, *supra* note 135, at 8.

Middle-class suburbanites are ambivalent to charter schools, because their neighborhood schools typically serve them well and they favor initiatives that promise to improve urban educational opportunities without affecting their schools or wallets.²⁸⁴ The meteoric rise of charter schools in the 1990s established their resistance to even institutional opposition from public schools and teachers' unions. While the double digit growth of charter schools in the 1990s recently plateaued, the restructuring sanctions of the NCLB will soon kick-in and the number of charter schools should again rise.²⁸⁵ Charter schools appear poised to predominate academic reform for the next decade.

But charter schools do not provide an adequate remedy for the inequality resulting from racial and socioeconomic isolation. While the charter school movement is just over a decade old, the early returns indicate that it will produce separate and unequal schools. Scholars have long worried that charter schools will increase racial and socioeconomic isolation in schools.²⁸⁶ A 2003 study by the Harvard Civil Rights Project concluded that charter schools are more

284. Ryan & Heise, *supra* note 44, at 2077.

285. Hassel, *supra* note 271, at 190–98 (the growth in charter schools is plateauing because statutory caps prohibit their creation and the supply of willing organizers is shrinking)

286. Amy Stuart Wells et al., *Charter Schools and Racial and Social Class Segregation: Yet Another Sorting Machine?*, in A NOTION AT RISK: PRESERVING PUBLIC EDUCATION AS AN ENGINE FOR SOCIAL MOBILITY 169, 215 (Richard D. Kahlenberg ed., 2000) (charter schools may serve as refuges for white flight); Lawrence, *supra* note 51, at 1388; GERALD W. BRACEY, THE WAR AGAINST AMERICAS PUBLIC SCHOOLS: PRIVATIZING SCHOOLS, COMMERCIALIZING EDUCATION 76–79 (2002) (charter schools will lead to resegregation); KEVIN B. SMITH & KENNETH J. MEIER, THE CASE AGAINST SCHOOL CHOICE: POLITICS, MARKETS AND FOOLS 67 (school choice and charter schools may increase segregation); Martha Minnow, Lecture, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 283 (1999) (arguing that charter school movement and vouchers will increase racial and ethnic segregation in schools); Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563, 600–07 (2001) (charter schools will lead to further segregation).

racially isolated than public schools.²⁸⁷ Over seventy percent of black charter school students attend intensely segregated minority schools compared to only thirty-four percent of black public school students.²⁸⁸ The study concluded that “[t]he charter school law was a movement backward to the unregulated choice policies common 40 years ago across the South and in many big cities. Those did not work to produce integration and charter school policies do not either.”²⁸⁹ The segregative impact of charter schools is so acute that eleven states include racial balancing requirements in their charter school enabling legislation.²⁹⁰

Charter schools are racially and socioeconomically isolated, because they typically enroll only students from their home districts. The charter movement is principally aimed at serving disadvantaged students, hence most charter schools exist in urban school districts where minorities are highly concentrated by race and class.²⁹¹ And, like most public schools, charter schools usually do not allow students from other school districts to enroll, thus limiting interdistrict choice for students.²⁹² Charter schools cannot lead to

287. Frankenberg & Lee, *supra* note 172, at 2, 7–8, 25, 47. See also *id.* at 6 (too many charter schools are separate and unequal); Wells, *supra* note 286, at 191–99 (charter schools are typically less racially integrated than neighboring public schools).

288. Frankenberg & Lee, *supra* note 172, at 7.

289. *Id.* at 5. See also Wells, *supra* note 286, at 202 (“[C]harter schools are more extreme in terms of racial and social class isolation and segregation than the districts in which they are located.”). But see Berkowitz, *supra* note 95, at 118 (generally charter schools provide more diversity than public schools in the same area).

290. Gajendragadkar, *supra* note 74, at 145.

291. Press Release, The Center for Education Reform, *Charter Schools Succeed Where Others Fail: Serve More At-Risk and Minority Students, and Boost Achievement* (March 16, 2006), available at <http://www.edreform.com/index.cfm?fuseAction=document&documentID=2355§ionID=5&NEWSYEAR=2006> (charter schools have a 60 percent median minority population and a median 63 percent qualifying for free/reduced lunch); Liu & Taylor, *supra* note 92, at 801; Ryan & Heise, *supra* note 44, at 2076.

292. Liu & Taylor, *supra* note 92, at 802–03; Ryan & Heise, *supra* note 44, at 2075–78.

integration so long as there are few charter schools outside of urban areas and enrollment is limited to intradistrict students. While the first hurdle may dissolve, the second is likely permanent.

The charter school movement may very well sweep into the suburbs. Some suburban schools will be subject to the restructuring sanctions of the NCLB, even under watered-down state standards, and elect to charter their schools. Many more might voluntarily create charter schools after the NCLB firmly endorsed them as a means to improve education. But suburban charter schools are unlikely to open their doors to the urban poor and minorities. Suburban public schools were insulated from integration and there is no reason to believe suburban charter schools will follow a different path. Successful constitutional challenges have already been mounted against statutes requiring racial balancing in charter schools because they are not narrowly tailored under *Grutter*'s strict scrutiny analysis.²⁹³ Political opposition alone, even without court assistance, may be sufficient to close the backdoor to charter school integration that *Grutter* left open by holding that diversity is a compelling governmental interest.

The racially isolated charter schools of the future are unlikely to provide minorities an equal educational opportunity. Researchers are divided as to whether charter schools outperform traditional public schools.²⁹⁴ It is difficult to compare charter schools to public schools because they have varied educational approaches and draw

293. Gajendragadkar, *supra* note 74, at 145, 157–60 (discussing constitutionality of eleven state charter balancing statutes).

294. *Compare* The Center for Education Reform, *Charter Schools Get High Marks*, available at http://edreform.com/_upload/charter_achievement.pdf (concluding that charter schools outperform public schools) *with* Jennifer Mrozowski, *High Promises, Lagging Results*, CINCINNATI ENQUIRER, June 29, 2005, at A1 (citing studies showing that public schools outperform charter schools).

their enrollment in different ways. Considering that charter schools typically enroll at-risk minority and poor students and that scores tend to dip when a child attends a new school, comparison of charter school student performance to public school student performance is a comparison of oranges to apples.²⁹⁵ This admittedly unfair comparison shows that public schools outperformed charter schools on the 2003 NAEP. Charter schools performed even worse when the data was broken down by race, ethnicity and socioeconomic status.²⁹⁶ Charter schools also disproportionately fail to make AYP under the NCLB.²⁹⁷ In 2004, eighty charter schools were closed by states because of poor performance or questionable financial dealings.²⁹⁸ On the other hand, charter schools are only now coming of age, and they at least hold promise for improving educational outcomes for disadvantaged students. But as long as charter schools remain racially divided, they too cannot remedy educational inequality.

VI

CONCLUSION

Education reform has come full circle, from “separate but equal” to “separate and unequal” schools. The desegregation path to equal educational opportunity for minorities promulgated by *Brown* was but a short detour from the separate but equal path of *Plessey*. The new separate but equal route eliminates de jure discrimination and includes outcome equality and school choice, but these new

295. Loveless, *supra* note 98, at 184–89.

296. Diana Jean Schemo, *Charter Schools Trail in Results, U.S. Data Reveals*, N.Y. TIMES, Aug 17, 2004, at A1; Ryan & Heise, *supra* note 44, at 2109–10.

297. Loveless, *supra* note 98, at 181–83, 189–90. In Ohio alone, more than one-half of the 112 charter schools rated by the state received the lowest rating. Mrozowski, *supra* note 294, at 1. However, it is important to note that Ohio charter legislation permits charter schools to open only in the lowest performing districts.

298. Schemo, *supra* note 296, at 1.

innovations make little difference to low income and minority students, and separate schools will again prove to be inherently unequal into the future.

The segregated schools of today are accepted, and often embraced, for several reasons. Because *Brown* eliminated de jure segregation and its accompanying badge of inferiority for minorities, school segregation slowly shed its moral and social repugnance. The racial separation resulting from residential choice protected in *Milliken* became socially and morally acceptable soon thereafter. Minority leaders soon embraced separation as the best means to reclaim control over their schools and improve opportunity for their children, further excusing society from seeking integration.²⁹⁹ Current belief is that if racial groups choose separation then segregated schools need not be inherently unequal. Yet, society fails to recognize that segregation is not entirely the result of private, voluntary and free choice. The de facto segregation of today is simply the “branch” that grew from the “root” of de jure segregation.³⁰⁰

Racial and socioeconomic isolation in schools is also accepted because equality now appears to be real instead of *Plessey*'s feigned equality. It is believed that true equality can be achieved under a “separate but equal” route that failed before, because outcome

299. Levit, *supra* note 90, at 500. For example, the recent split in the Omaha school district along racial lines was supported by Nebraska's only black senator, who said that black students “would receive a better education if they had more control over their district.” AP, *Omaha School District to Split Along Racial Lines*, April 13, 2006, available at <http://www.msnbc.com/id/12307173/>.

300. Orfield, *Inherently Unequal*, *supra* note 3, at 1041–42 (discussing how housing segregation prevents meaningful residential choice by minorities); McUsic, *supra* note 23, at 1365–66 (concluding that schools are not segregated because of private choice but instead because of segregation in housing caused in part by zoning and other institutionalized causes of segregation).

equality and school choice now supplement input equality. But equality in separate schools will prove as illusory both today and in the future as it did under *Plessey*.

School segregation is also socially acceptable, because modern reform efforts have transformed schools from providers of a broad-based education in all facets of life to merely academic factories producing students with adequate test scores. The current reform movements wholly ignore the value schools have

not only for [their] impact on student academic learning but also for [their] central role in building the nation, socializing children, preparing citizens, communicating the basic values of our Constitution and democratic system, and helping immigrants from every part of the globe work and live together peacefully and successfully in a single democracy.³⁰¹

In short, the separate schools of today no longer need the “but equal” excuse. They are separate without justification. Today’s schools are separate *and* equal, often proudly so, rather than separate *but* equal.

What the courts, legislatures, and society refuse to accept is that socioeconomically and therefore racially isolated schools are inherently inferior, even when not state sanctioned. Only the path of integration, which was traveled for only a short distance, leads to equal educational opportunity and societal benefits unattainable in school finance cases, school choice or under the NCLB. Integration, and not resource and outcome equalization, is the best means to achieve equal educational opportunities.³⁰² Indeed, not one single

301. Frankenberg et al., *supra* note 6, at 11. *See also id.* at 12 (American schools “have always been seen as ways to educate the coming generation to be good citizens, successful workers, and able to function more successfully in the diverse society America has become”).

302. McUsic, *supra* note 23, at 1355 (“[I]ntegration is the best, and perhaps only, way to provide an equal educational opportunity.”); Ryan, *Schools, Race and Money*, *supra* note 49, at 289, 297, 315 (integration creates academic and social benefits that cannot be duplicated in modern era reforms); Richard Hunter & RoSusan Bartee, *The Achievement Gap*, 35 EDUC. & URB. SOC’Y 151, 158 (2003) (the last time there were systematic reductions in test score gaps was during

school district has created resegregated schools that are equal.³⁰³ The separate but equal path we now tread is a downhill route, and our momentum will increase the longer we stay on it.

Many avenues exist to derail American education from its current segregation track, but who will pursue them? With federally mandated desegregation ending and the public's focus concentrated on choice, funding and outcome equality, there is no reason to believe that race-based initiatives will take root.³⁰⁴ The Supreme Court forcefully explained why integrated schools are important:

[S]tudent body diversity promotes learning outcomes, and 'better prepares students for and increasingly diverse workforce and society, and better prepares them as professionals . . . American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints.'³⁰⁵

Despite the importance of a diverse education, school rankings for public consumption under the NCLB for K–12 schools, as well as U.S News & World Report for higher education, do not even consider racial composition. The public either believes that minimum academic standards and adequate funding will secure their

the integration era); Ryan, *The Influence of Race*, *supra* note 12, at 481 ("Not only does integration carry with it educational benefits that school finance reform fails to provide, it also appears to carry with it financial benefits and financial stability that school finance litigation has been unable to deliver to predominantly minority districts.").

303. Frankenberg et al., *supra* note 6, at 10.

304. See, e.g., Levit, *supra* note 90, at 456–57 (arguing that separation by race is accepted by society today); Rahdert, *supra* note 47, at 806 ("[C]hanges seem unlikely simply as a matter of political will."). Professor Rahdert believes that nothing will change with respect to race-based initiatives within the next fifty years. *Id.* at 805, 809. See also Chemerinsky, *supra* note 50, at 1472 ("[T]here seems neither the political nor judicial will to deal with the growing segregation and inequalities in American schools."); Frankenberg et al., *supra* note 6, at 67 (there is no leadership pushing for integration); Ryan, *Suburban Veto*, *supra* note 166, at 1644 (districts and states are not adopting voluntary desegregation plans); Ryan and Heise, *supra* note 44, at 2057 (there is no organized support for mandatory integration).

305. *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003).

place in the global economy or that education's role is not to impart social values, as these interests have yet to convince the middle class to integrate increasingly segregated schools. The NCLB, school choice, and finance reform feed these beliefs into the future.

Justice Ginsburg predicted that race-based admissions policies to higher education would be unnecessary in twenty-five years because minority achievement will approach white achievement.³⁰⁶ Unless an unlikely push for integration emerges, the twenty-five year window will close with further disparity in the achievement gap. Separate but equal schools will remain the default method to achieve minority equality so long as integration is not forced upon us, and inherent inequality will persist in our schools.

306. *Id.* at 346 (Ginsburg, J., concurring).