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Education's Elusive Future, Storied Past, and the Fundamental Inequities Between

Derek W. Black
Howard University School of Law

EDUCATION'S ELUSIVE FUTURE, STORIED PAST, AND THE FUNDAMENTAL INEQUITIES BETWEEN

*Derek W. Black**

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I. INTRODUCTION

During the past half-century, education experienced a rapid and broad expansion of student rights.[1] Where no rights previously existed, students now have the right to be free from discrimination based on race,[2] language status,[3] disability,[4] wealth,[5] gender,[6] and homelessness.[7] But the full development of these rights, along with substantive educational improvements for disadvantaged students, stalled more recently. For instance, mandatory school desegregation, which laid the political and theoretical foundations for the other movements, is nearly nonexistent today.[8] School finance litigation experienced

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[1] *See generally* Betsy Levin, *The Courts, Congress, and Educational Adequacy: The Equal Protection Predicament*, 39 MD. L. REV. 187, 205–24 (1979) (describing the creation and expansion of student rights in the areas of race, gender, disability, language status, and poverty); Derek W. Black, *Civil Rights, Charter Schools, and Lessons to be Learned*, 64 FLA. L. REV. (forthcoming 2012), *available at* http://www.works.bepress.com/Derek_black/6/ (describing the expansion of equal opportunities for students).

[2] *See, e.g.*, Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703 (2006) ("No State shall deny equal educational opportunity to an individual on account of his or her race . . . ."); Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 241, 252 (1964) ("No person . . . shall, on the ground of race, . . . be excluded from . . . any program or activity receiving Federal financial assistance.").

[3] *See, e.g.*, No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1001, 115 Stat. 1425, 1440 (2002) (covering "limited English proficient children").

[4] *See, e.g.*, The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 (2006) (mandating that "all children with disabilities have available to them a free appropriate public education").

[5] *See, e.g.*, Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976) (holding that education is a fundamental interest and subjecting school financing systems based on wealth and inequities to strict scrutiny).

[6] *See, e.g.*, 20 U.S.C. § 1681 (2006) ("No person . . . shall, on the basis of sex, be excluded from participation in . . . any education program or activity receiving Federal financial assistance . . . .").

[7] *See, e.g.*, McKinney–Vento Homeless Education Assistance Improvements Act of 2001, 42 U.S.C. § 11431 (2006) ("Each State Educational agency shall ensure that each child of a homeless individual and each homeless youth has equal access to the same free, appropriate public education . . . .").

[8] *See* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1615–19 (2003) (describing how the courts' cessation of remedies for desegregation caused resegregation to result); Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1159–60 (2000) [hereinafter Parker, *School Desegregation*] (arguing that although desegregation litigation was not dead in 2000, most surviving cases suffered from severe neglect). *But see* Dennis D. Parker, *Are Reports of* Brown's *Demise Exaggerated? Perspectives of a School Desegregation*

sustained success for almost two decades but now shows signs of faltering.[9] Effective litigation and legislation on behalf of language minorities and disabled students also stalled, as courts and legislatures erected evidentiary barriers to reform.[10] In some respects, courts appear disappointed about the results of past reform and are simply skeptical toward current claims.

For many, the practical limitations and shortcomings of desegregation and other reforms may raise serious questions about whether there is a promising future in rights-based education reform and whether educational opportunities for disadvantaged

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Litigator, 49 N.Y.L. SCH. L. REV. 1069, 1069 (2005) (concluding that the era of civil rights advances in the field of education is not dead).

[9] John Dinan, *School Finance Litigation: The Third Wave Recedes in* FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 96, 96 (Joshua M. Dunn & Martin R. West eds., 2009); William S. Koski, *Courthouses vs. Statehouses?*, 109 MICH. L. REV. 923 (2011) (reviewing ERIC A. HANUSHEK & ALFRED A. LINDSETH, SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA'S PUBLIC SCHOOLS (2009) and MICHAEL A. REBELL, COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS (2009)). In just the past few months, however, some lower courts have shown a renewed willingness to intervene in school finance or enforce existing orders. *See, e.g.*, Lobato v. State, No. 2005CV4794 (Colo. Dist. Ct. Dec. 9, 2011), *available at* http://childrens-voices.org/wp-content/uploads/2011/12/Decision1.pdf ("[T]he Colorado public school finance system is not rationally related to the mandate to establish and maintain a thorough and uniform system of free public schools. On the contrary, the public school finance system is irrational, arbitrary, and severely underfunded."); Hoke Cnty. Bd. of Educ. v. State, 95 CVS 1158 (N.C. Super. Ct. Sept. 2, 2011), *available at* http://www.ncforum.org/doclib/ManningOrder.pdf (reiterating North Carolina's obligation to provide pre-kindergarten services to at-risk students and refusing to modify prior orders). Of course, whether these courts are willing and able to compel legislative action in their respective states in another question.

[10] *See* Kristi L. Bowman, *Pursuing Educational Opportunities for Latino/a Students*, 88 N.C. L. REV. 911, 929 (2010) ("During the 1960s and 1970s, Latinos/as began to benefit from expanding educational equity rights via statutes, doctrine, and regulations. In the thirty years since, many progressive social changes have occurred, but in general the rights-based framework provided by law has contracted."); Eric Haas, *The Equal Educational Opportunity Act 30 Years Later: Time to Revisit "Appropriate Action" for Assisting English Language Learners*, 34 J.L. & EDUC. 361, 369 (2005) ("[T]he courts placed a burden of proof upon the plaintiffs that is virtually impossible to meet. It appears that the courts will uphold a school district's language support program for ELLs so long as the defendant school district can find *one* 'expert' who will testify that the program's underlying theory supports a 'successful' program somewhere in the world." (emphasis in original)); Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 102, 105 (2009) ("Some of the current problems with special education eligibility stem from judicial decisions that read the eligibility provisions extremely narrowly," including reading restrictive state standards into the federal definition of disability, without any "justification in the federal statute").

students can be systematically improved.[11] From their perspective, education reform has, at best, permanently plateaued and, at worst, begun what will become an increasingly steep decline.[12] A historical view of civil rights and education, however, suggests that this view is incorrect. Instead, *Brown v. Board of Education*[13] and the half-century of education reform that followed collectively represent not the whole story of educational and civil rights but only one part of what can be conceptualized as a multi-act play. In fact, *Brown* followed at least two important foundational periods: Reconstruction and Jim Crow.[14] Each period was a reaction to the events that preceded it, and while each involved its own climatic movements, those moments did not resolve the struggle for full educational opportunity.[15] If history serves as any guide, the modern era of educational civil rights and reform will be no different, but rather, it will be part of both an unending and uneven march forward that will be followed by a new era.[16]

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[11] *See, e.g.*, Robert A. Garda, Jr., *Coming Full Circle: The Journey from Separate but Equal to Separate and Unequal Schools*, 2 DUKE J. CONST. L. & PUB. POL'Y 1, 53 (2007) (arguing that the distinction between *Plessy v. Ferguson*'s enforced segregation and today's voluntary segregation "will not make a practical difference to our students . . . as our separate schools will continue to produce disparate educational opportunities for our poor and minority students" and concluding that school finance litigation, for instance, will not counteract the disparity); Daniel S. Greenspahn, *A Constitutional Right to Learn: The Uncertain Allure of Making a Federal Case out of Education*, 59 S.C. L. REV. 755, 775–79 (2008) (outlining the difficulties of pursuing a guarantee of a federal right to education); Denise C. Morgan, *Introduction:* Brown *Is Dead? Long Live* Brown*!*, 49 N.Y.L. SCH. L. REV. 1029, 1033–39 (2005) (posing the question of the viability of *Brown*'s future and discussing other symposium authors' thoughts on the subject).

[12] *See* Morgan, *supra* note 11, at 1033–39 (noting the varying degrees of optimism and pessimism toward *Brown*).

[13] 347 U.S. 483 (1954).

[14] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863–1877, at xxiv–xxv (1988) (conceptualizing Reconstruction not as a period of total racism and conservatism but as a period of evolution where blacks were "active agents" in a new social order and "interracial democracy"); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 5–9 (2d ed. 1966) (discussing the new "Jim Crow" phase in history "that began in 1877 [with] the withdrawal of federal troops from the South" and lasted into the middle of the following century).

[15] *See* WOODWARD, *supra* note 14, at 3–9 (discussing how the phases of slavery, war, Reconstruction, Jim Crow, and the Civil Rights Movement lead into and reacted to one another).

[16] *See* Mark A. Graber, *The Price of Fame:* Brown *as Celebrity*, 69 OHIO ST. L.J. 939, 1012 (2008) ("*Brown* demonstrates that history both progresses and cycles.").

Placing the entire weight and focus of educational and civil rights success on *Brown* and its progeny cuts this story short. It leads to the conclusion that *Brown* has failed to reform schools and that recent events are harbingers of the story's end. A broader view of educational civil rights suggests that we are in a transitional stage between *Brown* and the next act in the long-running play of educational and civil rights attainment. Because so many foundational accomplishments occurred previously, advocates in this next act should be in a position to vindicate the hopes of years past.

Yet, the failure to situate educational rights in this broader context can, itself, be a harbinger of the end that many have already forecast. While our past has been a forward march, the progress that accompanies it is neither inevitable nor uncontested.[17] To seize the opportunities that will follow in education's saga, advocates must first conceive a meaningful future. The failure to do so is the equivalent of abandoning the fight in advance. Of course, accepting the possibility of continuing education rights expansion is easy. Identifying the animating theme and strategy of this expansion is another matter altogether. Currently, it is far from clear that reformers are even thinking in terms of a thematic or paradigmatic next era. Leading reform agendas are either so marred in the past that they cannot construct a viable future or they attempt to entirely divorce themselves from the past and ignore the most important lessons already learned. Moreover, these divergent policy agendas, at times, work at cross purposes.[18]

The key to spurring a new era of educational rights expansion will be striking a balance that fully acknowledges the past but does not repeat it. Most importantly, history teaches us that there is no reason to believe that children who attend segregated, or unequal, schools will consistently obtain equal educational

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[17] PHILIP A. KLINKNER & ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA 8 (1999) ("[R]acial progress has not been either inevitable or irreversible in America.").

[18] *See generally* ERICA FRANKENBERG, GENEVIEVE SIEGEL-HAWLEY & JIA WANG, THE CIVIL RIGHTS PROJECT, CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS (2010) (criticizing charter schools and revealing the rift between charter advocates and civil rights advocates).

opportunities. But history also teaches us that our past strategies are insufficient to resolve the problems. Policies that ignore these stubborn facts of history face a steep uphill battle. Unfortunately, those on all sides of the issue seem to do exactly that.

Civil rights advocates too often cling to the symbolism of *Brown* and reiterate antiquated arguments, seemingly ignoring that they have lost a slow battle of attrition. Similarly, school finance advocates continue to press boilerplate funding claims even though the most aggressive and courageous court responses to these claims have still failed to secure substantive and lasting resource equity. Policy makers have moved in the opposite direction. Most pay scant attention to the need to stem racial and poverty isolation, and the rest forward policies that assume creative pedagogy can offset gross inequity. Though misguided in practice, the various motivations of these institutional players are not necessarily ill-intentioned. The key may be simply to redirect their motivations. For instance, if the fervor behind current reforms such as charter schools could coalesce around policies that account for segregation and inequality, a new era of educational expansion would be within reach. But this coalescing will only occur if integrative and equality policies also find ways to create outlets for modern reforms' expectations of creativity and educational renewal.

II. SITUATING THE RECENT RETRENCHMENT WITHIN A BROADER HISTORICAL FRAMEWORK

A. THE RECENT RETRENCHMENT

During the middle of the twentieth century, civil rights advocates secured a progressive series of victories before the Supreme Court that precipitated the momentous decision in *Brown*.[19] Following *Brown*, the Court issued another series of decisions that placed an affirmative obligation of integration on

[19] Brown v. Bd. of Educ., 347 U.S. 483 (1954). The cases leading up to *Brown* include *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Board of Regents of the University of Oklahoma*, 332 U.S. 631 (1948); and *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

public schools.[20] In the decades after *Brown*, the National Association for the Advancement of Colored People (NAACP) won every school desegregation and inequality case it brought to the Supreme Court.[21] As a result of these and other efforts, the face of American education changed. When *Brown* was decided in 1954, less than 0.1% of African-American students attended integrated schools in the South.[22] During the decade following *Brown*, very little changed, but during the 1980s, more than 40% of African-American students in the South attended integrated schools.[23] More importantly, by breaking down racial barriers to opportunity and reducing poverty isolation, African-American graduation and college enrollment rates soared during this same period.[24] The African-American high school dropout rate was cut in half, falling from almost 30% to less than 15%, and African-Americans' college enrollment nearly doubled, rising from around 18% to 30%.[25]

The past two decades, however, have appeared to roll back many of these gains. In the late 1980s and early 1990s, the

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[20] *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208 (1973) (holding "that a finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious"); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) ("In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system."); Green v. Cnty. Sch. Bd., 391 U.S. 430, 437–38 (1968) (stating that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch").

[21] John E. Lee, Note, *The Rise (and Fall?) of Race-Conscious Remedies and "Benign" Racial Discrimination in Public Education*, 30 SUFFOLK U. L. REV. 153, 171 n.112 (1996). *Milliken v. Bradley*, 418 U.S. 717 (1974), was the first case to limit a desegregation remedy. *Id.* From 1936 to 1961, Thurgood Marshall argued thirty-two cases on behalf of the NAACP before the Supreme Court and won twenty-nine, many of which were school desegregation cases. Mark Tushnet, *Lawyer Thurgood Marshall*, 44 STAN. L. REV. 1277, 1277 (1992).

[22] GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, *BROWN* AT 50: KING'S DREAM OR *PLESSY'S* NIGHTMARE? 19 tbl.7 (2004), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-50-king2019s-dream-or-plessy2019s-nightmare/orfield-brown-50-2004.pdf.

[23] *Id.*

[24] KIM M. LLOYD, MARTA TIENDA & ANNA ZAJACOVA, TRENDS IN EDUCATIONAL ACHIEVEMENT OF MINORITY STUDENTS SINCE *BROWN V. BOARD OF EDUCATION* 15 fig.15, 17 fig.17 (2001), *available at* http://theop.princeton.edu/reports/misc/trends_in_ed.pdf.

[25] *Id.* (providing high school dropout data from 1967 to 1999 and reporting college enrollment rates from 1972 to 1999).

Supreme Court issued a series of decisions that made securing new desegregation orders and sustaining old orders increasingly difficult.[26] First, the Court emphasized the need to return control over educational decision making to local authorities.[27] This premise dominated the entire evaluation of cases, rendering continuing segregation and inequality irrelevant in various instances.[28] Second, the Court treated the mere passage of time and existence of demographic changes as presumptive evidence warranting the dismissal of a desegregation decree.[29] Of course,

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[26] *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 100 (1995) (holding that an "order requiring the State to continue to fund the quality education programs," which sought to reverse white flight, was beyond the authority of the district court); Freeman v. Pitts, 503 U.S. 467, 496 (1992) (finding that a school district is under no duty to remedy an imbalance caused by demographic factors in the absence of de jure discrimination); Bd. of Educ. v. Dowell, 498 U.S. 237, 247 (1991) (holding that the lower court's test for dissolving a desegregation decree was more stringent than was required).

[27] *Dowell*, 498 U.S. at 248 ("Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that 'necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.' " (quoting Spangler v. Pasadena City Bd. of Educ., 611 F.2d 1239, 1245 n.5 (9th Cir. 1979) (Kennedy, J., concurring)); *see also* Milliken v. Bradley, 433 U.S. 267, 280–81 (1977) ("[T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs . . . .").

[28] *See, e.g.*, *Freeman*, 503 U.S. at 489 ("[T]he court's end purpose must be to remedy the violation and, in addition, to restore state and local authorities to the control of a school system . . . ."); *Dowell*, 498 U.S. at 248 ("The legal justification for displacement of local authority by an injunctive decree in a school desegregation case is a violation of the Constitution by the local authorities."); *see also* Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. LOUIS U. L.J. 885, 890–91 (1993) (characterizing the Court's standards for dismissing desegregation orders as "lax"); Wendy Parker, *Limiting the Equal Protection Clause Roberts Style*, 63 U. MIAMI L. REV. 507, 533 (2009) ("Another prominent value in the Rehnquist Court's Equal Protection Clause jurisprudence was the importance of local control in the education setting."); Mark V. Tushnet, *The "We've Done Enough" Theory of School Desegregation*, 39 HOW. L.J. 767, 779 (1996) (concluding that the Court and public gave up on desegregation rather than addressing the facts and law).

[29] *Freeman*, 503 U.S. at 475–77 (recounting the demographic shifts that caused a predominantly white school district to become almost entirely minority). The Court's holding in *Freeman*, moreover, is inapposite to the Court's indication in *Keyes v. School District No. 1*, 413 U.S. 189 (1973), that, while the passage of time blurred the connection to past segregation, the passage of time alone was not controlling. *See Keyes*, 413 U.S. at 210–11 ("We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of

both the passage of time and demographic changes naturally and inevitably exist in most school districts.[30] Thus, with these holdings, segregation levels today have risen back to levels resembling those that existed four decades ago, when desegregation had finally begun in earnest.[31]

The federal government has even gone so far as to facilitate this resegregation.[32] While the Department of Justice still maintains an active docket of desegregation cases,[33] it aggressively litigates very few to expand integration.[34] In fact, during the Bush Presidency, the Department of Justice consistently moved for school districts to be declared unitary.[35] As a result, the Department's desegregation docket decreased nearly by half in just a few short years, falling from 430 in 2000 to 266 in 2007.[36] At best, courts permitted relatively meager orders to remain in various other cases.[37]

To add insult to injury, the Supreme Court more recently placed limits on the steps that districts can take to voluntarily desegregate their schools.[38] In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court treated the use of race to integrate schools as functionally equivalent to the use of

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remoteness in time certainly does not make those actions any less 'intentional.' ").

[30] *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436 (1976) (describing the pattern of human migration as "quite normal").

[31] *See* ORFIELD & LEE, *supra* note 22, at 18 (comparing 1970 segregation to 1999 levels).

[32] *See* Danielle Holley-Walker, *After Unitary Status: Examining Voluntary Integration Strategies for Southern School Districts*, 88 N.C. L. REV. 877, 887 (2010) (noting the "integral role of the DOJ" in the "racially homogenous" unitary status cases).

[33] U.S. COMM'N ON CIVIL RIGHTS, BECOMING LESS SEPARATE? SCHOOL DESEGREGATION, JUSTICE DEPARTMENT ENFORCEMENT, AND THE PURSUIT OF UNITARY STATUS 23 (2007) (indicating that the United States was a party to 266 cases in 2007).

[34] *See* Holley-Walker, *supra* note 32, at 889 (commenting that the George W. Bush Presidency was marked by hostility to desegregation litigation).

[35] *See id.* at 887–90 (describing the Department of Justice under the Bush Administration as "active and hostile . . . to continuing Southern desegregation cases").

[36] U.S. COMM'N ON CIVIL RIGHTS, *supra* note 33, at 22.

[37] *See* Chinh Q. Le, *Racially Integrated Education and the Role of the Federal Government*, 88 N.C. L. REV. 725, 759–60 (2010) ("To make matters worse, over the past forty years, under no administration, Democratic or Republican, has DOJ taken a thoughtful, transparent, comprehensive, and strategic approach to its school desegregation docket, which apparently includes something in the neighborhood of 250 cases at present.").

[38] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 735 (2007) (holding that voluntary desegregation plans relying on racial classification must meet strict scrutiny and requiring school districts to narrowly tailor such plans).

race to segregate them.[39] Thus, the Court demanded that schools justify their voluntary desegregation plans with a compelling interest.[40] Only by the narrowest margin did the Court accept the basic principle that preventing racial isolation and promoting diversity were compelling interests.[41] Four justices would have held that race-based desegregation is justified only as a remedy to intentional racial segregation.[42] The Court's majority struck down the desegregation plans before it, characterizing the districts' plans as racial balancing[43] and finding that the districts had failed to show that other race-neutral means were not available to achieve their ends.[44]

The Department of Justice, Solicitor General, and Department of Education also sided with the most extreme positions in the case.[45] The United States argued that strict scrutiny should apply to the plans and that, consistent with the minority of four on the Court, the districts lacked a compelling interest to voluntarily desegregate because their purpose was not to remedy past intentional discrimination.[46] It also would have applied the most rigorous narrow tailoring to the plans, finding that they amounted to quota systems, lacked sufficient stopping points, unfairly

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[39] *Id.* at 747–48 ("Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way 'to achieve a system of determining admission to the public schools on a nonracial basis,' . . . is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." (quoting Brown v. Bd. of Educ., 349 U.S. 294, 300–01 (1955))).

[40] *Id.* at 720.

[41] *Id.* at 797–98 (Kennedy, J., concurring).

[42] *Id.* at 720 (plurality opinion).

[43] *See id.* at 726 ("In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.").

[44] *Id.* at 735.

[45] Brief for the United States as Amicus Curiae Supporting Petitioner at 8, *Parents Involved*, 551 U.S. 701 (No. 05-908), 2006 WL 2415458, at *8 [hereinafter United States *Parents Involved* Amicus Brief] (noting that this was a case of race balancing rather than an attempt to "eliminate the lingering effects of any *de jure* segregation").

[46] *Compare id.* at 10 ("[T]he use of such race-based measures must be strictly limited to remedying past discrimination."), *with Parents Involved*, 551 U.S. at 720 (finding that "remedying the effects of past intentional discrimination" is a compelling interest).

burdened third parties, and failed to implement race-neutral plans.[47]

After the Court issued its decision, the Department of Education's Office for Civil Rights disregarded those portions of the Court's opinion that were favorable to school districts and treated its own more conservative position as controlling law. In an official letter and statement of policy to school districts, the Office for Civil Rights refused to even mention Justice Kennedy's controlling opinion.[48] Thus, the letter incorrectly stated that the Court has recognized that "a government interest is compelling [for equal protection purposes in the school context] in only two instances: to remedy the effects of intentional discrimination and to obtain a diverse student body in higher education."[49] One might argue that the letter intentionally misled school district officials as to the law by "strongly encourag[ing] the use of race-neutral methods for assigning students to elementary and secondary schools," when even Chief Justice Roberts's plurality opinion had not done so.[50] The result of this letter was to discourage the nation's public school educators from taking action that is, in fact, constitutional and would enhance educational opportunities for all

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[47] United States *Parents Involved* Amicus Brief, *supra* note 45, at 21–29, 2006 WL 2415458, at *21–29.

[48] STEPHANIE J. MONROE, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., THE USE OF RACE IN ASSIGNING STUDENTS TO ELEMENTARY AND SECONDARY SCHOOLS (2008) (withdrawn). *Marks v. United States*, 430 U.S. 188 (1977), established the prevailing legal test for analyzing Supreme Court precedent in divided opinions. *See* Ruth L. Friedman, Comment, *The Confrontation Clause in Search of a Paradigm: Has Public Policy Trumped the Constitution?*, 22 PACE L. REV. 455, 466 n.53 (2002) (noting the traditional use of the *Marks* "narrowest grounds" test to analyze the impact of plurality decisions). Under this analysis, Justice Kennedy's concurrence in *Parents Involved* is controlling. *See* United States v. Alamance-Burlington Bd. of Educ., 640 F. Supp. 2d 670, 683 (M.D.N.C. 2009) (stating in dicta that Justice Kennedy's concurrence established that racial diversity is a compelling interest in remedying de facto resegregation); Hart v. Cmty. Sch. Bd., 536 F. Supp. 2d 274, 283 (E.D.N.Y. 2008) (applying the *Marks* analysis and indicating that Justice Kennedy's concurrence was the controlling holding of *Parents Involved*); James E. Ryan, Comment, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 137 (2007) (explaining that Justice Kennedy's concurrence is controlling because he only concurs in part of the plurality's opinion and the four dissenters "would apply looser criteria to assess voluntary integration plans than would Justice Kennedy").

[49] MONROE, *supra* note 48.

[50] *Id.*

students, particularly for poor students of color.[51] The Obama Administration eventually rejected this position and issued a new guidance on the Court's opinion, but waited until the end of 2011 to make this correction.[52]

School finance, while fairing far better than desegregation, recently showed signs of slowing and potentially reversing course. During the late 1990s and the first several years of the new century, multiple state supreme court decisions each year ordered their respective legislatures to direct more financial resources toward property-poor districts or districts serving disproportionately large numbers of at-risk students.[53] Prior to the end of 1990, only fifteen high courts had ruled in favor of plaintiffs, but in the following five years, an additional twelve high courts ruled in favor of plaintiffs.[54] In all, between 1990 and 2005, forty-three high courts ruled in favor of plaintiffs.[55] More recently, the victories have been far less frequent and courts seem unwilling to even jump into the foray in some instances.[56] For instance, the Supreme Court of New Jersey, a long-time leader in school finance, rejected a challenge to the state's

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[51] *See The Integration Report–The Civil Rights Project at UCLA–Issue 23*, EDUCATION NEWS (Jan. 13, 2010), http://www.educationnews.org/ed_reports/education_organizations/29036.html (noting the actions taken by the Department of Education to discourage integration).

[52] U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION & U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (2011), *available at* http://www2.ed.gov/print/about/offices/list/ocr/docs/guidance-ese-201111.html (last modified Jan. 3, 2012).

[53] *See* Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1500–05 (2007) (discussing the results in state cases and the substantive meaning of the constitutional right to education in those cases).

[54] SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY app. at 345–58 (Martin R. West & Paul E. Peterson eds., 2007) [hereinafter SCHOOL MONEY TRIALS]; *see also* DAVID HURST ET AL., NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., OVERVIEW AND INVENTORY OF STATE EDUCATION REFORMS: 1990 TO 2000, at 41–43 tbl.3.3 (2003) (listing all plaintiff victories in school finance litigation by state), *available at* http://nces.ed.gov/pubs2003/2003020.pdf.

[55] SCHOOL MONEY TRIALS, *supra* note 54, app. at 345–58.

[56] *See* Dinan, *supra* note 9, at 96 ("Numerous state court rulings of the past several years indicate, however, that the school finance litigation movement may have peaked, in that many judges are now disinclined to undertake continuing supervision of school finance policies."); Koski, *supra* note 9, at 924 ("Recently, however, a few courts seem to be taking a more cautious approach, either declining to become embroiled in school-finance lawsuits or declaring the school-finance systems constitutional and relinquishing jurisdiction.").

finance system in 2009,[57] the court's first such decision in a series of twenty decisions stretching over thirty-six years.[58] The court's decision was limited and had relatively little precedential impact,[59] but other courts have taken stark steps. For instance, after issuing a strong decision in favor of the plaintiffs in 1993 and establishing the need for various reforms,[60] Massachusetts's highest court refused to enforce the principles of that holding in 2005 and rejected the plaintiffs' claim and the lower court's findings that the state was providing inadequate funding to needy students.[61] Ohio went further, withdrawing jurisdiction from lower courts to hear school finance claims in 2003,[62] after having issued several orders for school finance reforms in previous years.[63] Even the Supreme Court of the United States, which has traditionally extricated itself from all issues relating to school finance, has waded into school funding issues to overturn a longstanding set of finance remedies for Arizona's English Language Learners program.[64] In other less

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[57] Abbott *ex rel.* Abbott v. Burke, 971 A.2d 989, 992 (N.J. 2009).

[58] *See id.* at 991 (noting the decision is twentieth in the line of cases). The first case was *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973). *But see* Abbott *ex rel.* Abbott v. Burke, 20 A.3d 1018, 1045 (N.J. 2011) (ordering the state to fully fund the School Funding Reform Act of 2008 for the Abbott districts).

[59] *See, e.g.*, *Abbott*, 20 A.3d at 1024–25 (finding state distribution of funds improper).

[60] McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516, 552 (Mass. 1993) (finding that the state was depriving many students in poor communities of an adequate education).

[61] *See* Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1138 (Mass. 2005) (sharing the lower court's "concern that sharp disparities in the educational opportunities, and the performance, of some Massachusetts public school students persist," but finding that "[t]he public education system [the court] review[ed] was not the public education system reviewed in *McDuffy*" and that "[i]ts shortcomings, while significant in the focus districts, do not constitute the egregious, [s]tatewide abandonment of the constitutional duty identified in that case.").

[62] *See* State *ex rel.* State v. Lewis, 789 N.E.2d 195, 198, 202 (Ohio 2003) ("Therefore, our . . . mandate forbids . . . the common pleas court to exercise further jurisdiction in this matter. . . . The duty now lies with the General Assembly to remedy [the] educational system . . . .").

[63] *See, e.g.*, DeRolph v. State, 780 N.E.2d 529, 530 (Ohio 2002) (directing "the General Assembly to enact a school-funding scheme that is thorough and efficient"); DeRolph v. State, 754 N.E.2d 1184, 1201 (Ohio 2001), *vacated*, 780 N.E.2d 529 (urging the legislature to "consider alternative means of funding"); DeRolph v. State, 712 N.E.2d 125, 288 (Ohio Ct. C.P. 1999) (finding the state had failed to overhaul Ohio's school funding system); DeRolph v. State, 677 N.E.2d 733, 747 (Ohio 1997) (plurality opinion) ("Ohio's public school financing scheme must undergo a complete systematic overhaul.").

[64] *See* Horne v. Flores, 129 S. Ct. 2579, 2588, 2597 (2009) (overruling the Arizona Court of Appeals requirement for a state to show "a particular funding mechanism" as a

dramatic instances, school finance may simply die of neglect. As of April 2012, the South Carolina Supreme Court had not issued a decision in a case that went to trial in 2005 and was argued before the supreme court in 2008.[65] Although not as blatantly (and not before their state supreme courts), litigation in Georgia and Florida has also languished or stalled.[66] Of course, plaintiffs are still emerging with victories in some instances.[67] But the overall trend suggests that a retrenchment may be occurring—in part because of a faltering economy.[68] Cognizant of the serious financial reality and the cutbacks they have made to education, some state legislatures have acted to foreclose any possibility of school finance litigation, enacting prohibitions against districts expending funds to support litigation against the state.[69]

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misapprehension of the Equal Education Opportunities program). For prior decisions that imposed funding obligations on the state, see *Flores v. Arizona*, 480 F. Supp. 2d 1157, 1164 (D. Ariz. 2007) (requiring the state to provide sufficient funding to implement the state's chosen language instruction method), *aff'd*, 516 F.3d 1140 (9th Cir. 2008), *rev'd*, *sub nom.* Horne v. Flores 129 S. Ct. 2579 (2009); *Flores v. State*, 405 F. Supp. 2d 1112, 1118 (D. Ariz. 2005) (enjoining the administration of a graduation test until adequate funding for English Language Learner programs is established), *vacated sub nom.* Flores v. Rzeslawski, 204 F. App'x 580 (9th Cir. 2006); and *Flores v. State*, 172 F. Supp. 2d 1225, 1238–39 (D. Ariz. 2000) (finding the state's allocation of $150 per student with limited English proficiency to be inadequate).

[65] *Education Justice South Carolina*, EDUC. LAW CTR., http://www.educationjustice.org/states/southcarolina (last visited Apr. 16, 2012).

[66] New litigation was filed in Georgia in 2004 but withdrawn in 2008 after being transferred to a judge perceived to be hostile to the case. The plaintiffs have not refiled it. *Education Justice Georgia*, EDUC. LAW CTR., http://www.educationjustice.org/states/Georgia (last visited Apr. 11, 2012). Multiple cases have been filed in Florida over the past several years, some of which have been dismissed and none of which have reached the state supreme court. *Florida Litigation*, NAT'L ACCESS NETWORK, http://www.schoolfunding.info/states/fl/lit_fl.php3 (last updated Aug. 2010).

[67] *See, e.g.*, Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 271 (Conn. 2010) (en banc) (plurality opinion) (allowing the plaintiff to proceed with a claim brought under the state constitution for suitable education opportunity); Abbott *ex rel.* Abbott v. Burke, 20 A.3d 1018, 1041 (N.J. 2011) (requiring the state to comply with a state constitutional mandate to adequately fund school systems).

[68] *See* Michael A. Rebell, *Litigation Strategies for Hard Economic Times*, NAT'L ACCESS NETWORK, http://www.schoolfunding.info/news/litigation/12-2010Stateline.php3 (last visited Dec. 14, 2011) ("[I]t would be naïve not to recognize that some courts may be reluctant to assume jurisdiction of new cases or to enforce vigorously existing decisions when faced with arguments from state officials that severe revenue shortfalls and escalating entitlement obligations make it difficult to maintain educational funding levels, no matter how important they may be.").

[69] In March 2011, the New Hampshire House of Representatives passed, with a 252-to-

Although not as obvious or thoroughly analyzed, other reform movements on behalf of special education students, homeless students, and students who speak English as a second language have experienced analogous setbacks or limitations.[70] For instance, the Equal Educational Opportunities Act of 1974 obligates school districts "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs,"[71] but courts have required plaintiffs to establish that districts' programs are causing diminished achievement or failing to elevate student achievement to the appropriate level.[72] For a variety of practical reasons, this has simply been impossible to show, regardless of an English Language Learner (ELL) program's poor results or its questionable pedagogical basis.[73] Similarly, federal law obligates

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113 vote, a constitutional amendment intended to give the legislature full discretion on school aid, effectively removing judicial branch influences over school finance decisions. *See* Tom Fahey, *Senate Panel OKs Amendment to Ease Targeting School Aid,* NEW HAMPSHIRE UNION LEADER, Mar. 23, 2011, *available at* 2011 WLNR 5753258 (noting passage of the amendment). The bill was subsequently approved by the senate, with a vote of 16-to-8. The amendment is expected to be on the ballot in 2012, where voters must approve it by a two-thirds vote. Editorial, *No to Amendment on School Funding*, TELEGRAPH (Nashua, N.H.), Apr. 19, 2011, *available at* 2011 WLNR 7563936.

[70] *See generally* Black, *supra* note 1. Gender equality is arguably an exception to the general trend in that females consistently match or outperform males in elementary and secondary reading skills and are now the majority of students at many universities. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 2011 app. at 182 tbl.A-11-1, app. at 172 tbl.A-8-2 (2011), *available at* http://nces.ed.gov/pubs2011/2011033.pdf; Tamar Lewin, *At Colleges, Women Are Leaving Men in the Dust*, N.Y. TIMES, July 9, 2006, at A1. Yet, it would be a mistake to conclude gender inequity has been entirely eliminated. Sex discrimination, for instance, is still a serious problem in public schools. *See, e.g.*, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 171 (2005) (recognizing a course of action on behalf of girls' basketball coach who alleged retaliation for complaining of unequal treatment of the girls' basketball team); Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 632 (1999) (noting accusations of sexual harassment against fifth grader); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277–78 (1998) (discussing a teacher's sexual harassment of students).

[71] 20 U.S.C. § 1703(f) (2006).

[72] *See, e.g.*, Castaneda v. Pickard, 648 F.2d 989, 1010 (5th Cir. 1981) (stating that if the program should fail "to produce results indicating that the language barriers confronting students are actually being overcome" then "that program may . . . no longer constitute appropriate action").

[73] *See, e.g.*, Quiroz v. State Bd. of Educ., No. Civ. S-97-1600WBS/GGH, 1997 WL 661163, at *6 (E.D. Cal. Sept. 10, 1997) ("*Castaneda* provides no guidance in determining what standards a court should use in evaluating an educational plan. Because it 'is surely beyond the competence of this court to fashion its own measure of academic achievement'

states and districts to provide special services to homeless students and initially provided hope for substantive improvements in their education outcomes.[74] Yet, over time, students' legal rights have languished as neither courts nor federal agencies have enforced the right in any serious way.[75]

B. RETRENCHMENT AS ONE PART OF LARGER CYCLES

The retrenchment in school desegregation, the potential beginning of the same in school finance, and the serious limitations of other movements naturally leave many to wonder whether educational civil rights have peaked and offer any prospect for meaningful reform in the future. As compared to the second half of the twentieth century, the possibility for vindication of educational civil rights today appears meager. This comparison, however, is not the appropriate one and lends itself to an overly pessimistic and self-defeating approach. To look to the future of educational civil rights with any level of clarity, we must look further back than the near past. No doubt, the recent erosion or faltering of rights has been painful and real for communities,[76] but a longer historical approach to educational civil rights suggests that rather than being on a terminal dead-end slide, educational rights and reform are simply in a transitional stage. Unfortunately, this transition entails a realignment of rights and remedies that includes temporary regression. But from a historical perspective, this transitional, regressionary period is not new or unexpected. Moreover, the realignment of rights and

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the court approaches this prong with 'great trepidation.' " (quoting Teresa P. *ex rel.* T.P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698, 715 (N.D. Cal. 1989)).

[74] McKinney–Vento Homeless Assistance Act, 42 U.S.C. § 11431 (2006).

[75] *See* Jennifer A. Na, Comment, *For Better or For Worse?: A Closer Look at the Federal Government's Proposal to Provide Adequate Educational Opportunities for Homeless Children*, 51 HOW. L.J. 863, 885–88 (2008) (detailing the careless federal monitoring of the Education for Homeless Children and Youth program).

[76] The experience of Charlotte, North Carolina, during desegregation shows the positive effects of desegregation, which are contrasted with resegregation and its academic consequences. *See* Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513, 1546–48, 1556–59 (2003) (discussing the positive academic outcomes in Charlotte while under court order to desegregate and projecting the results of the decision to terminate that order).

remedies can set the stage for another period of educational opportunity expansion.

The movement toward full recognition and vindication of educational civil rights can be best understood as a multi-act play with rising and falling action in each act. The natural inclination of current generations is to understand and analyze their circumstances primarily from their own narrow vantage point. But this vantage point captures, at best, a single act in the play. As C. Vann Woodward warned in his seminal text, *The Strange Career of Jim Crow*, "[t]he twilight zone that lies between living memory and written history is one of the favorite breeding places of mythology."[77]

The saga of educational civil rights began well over a century ago during post-Civil War Reconstruction. The educational rights and opportunities during this period were a direct response to the total absence of educational opportunity that followed from the pre-war legal prohibition against African-Americans even learning to read—much less attend schools.[78] Three major legal developments during Reconstruction drastically expanded the educational opportunities of African-Americans (as well as many poor whites): the creation of the Freedmen's Bureau and the enactments of the Fourteenth and Fifteenth Amendments to the U.S. Constitution.

The Freedmen's Bureau was tasked with several responsibilities—education being among the foremost.[79] As General Oliver Howard, the Bureau's Commissioner, indicated: "[T]he most urgent want of the freedmen was a practical education; and from the first [he had] devoted more attention to this than to any other branch of [his] work."[80] The Bureau's expenditures were a testament to this fact, with more than two-thirds of its total budget spent on education during most years of its existence.[81] Under Howard's leadership, the Freedmen's

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[77] WOODWARD, *supra* note 14, at xii.

[78] *See* FONER, *supra* note 14, at 96 ("[E]very Southern state except Tennessee had prohibited the instruction of slaves.").

[79] *See id.* at 69, 144 (noting the Bureau's responsibilities and that "[e]ducation probably represented the agency's greatest success in the postwar South").

[80] 2 OLIVER OTIS HOWARD, AUTOBIOGRAPHY 368 (1907).

[81] Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth*

Bureau created Freedmen's schools and chartered universities.[82] It also assisted states in creating and funding a more universal system of public education.[83] During its height, the Bureau itself was educating approximately 100,000 students.[84] It also provided the funds necessary to establish several independent institutions of higher education, most notably Howard University.[85]

The expansion of educational rights and opportunities was so paradigmatic and the federal government's role so central that, unlike other aspects of the Freedmen's Bureau, this work did not simply come to an end with the natural expiration of the Bureau. Rather, a federal Department of Education was created in 1867 and initially worked concurrently with the Bureau.[86] Its purpose was to "stimulate recognition of education as a national concern beyond the moral duty owed to the new freedmen"[87] and "to enforce education, without regard to race or color, upon the population of all such States as shall fall below a standard to be established by Congress."[88] Moreover, this purpose was not conceived as a mere policy initiative, but rather came from the notion that

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Amendment, 71 VA. L. REV. 753, 780–81 (1985).

[82] *Id.* at 781.

[83] *See* FONER, *supra* note 14, at 144 (indicating that the Bureau helped "lay the foundation for Southern public education").

[84] Schnapper, *supra* note 81, at 781.

[85] HOWARD, *supra* note 80, at 394–95 (indicating that institutions of higher education were started in Hampton, Charleston, Atlanta, Macon, Savannah, Memphis, Louisville, Mobile, Talladega, Nashville, New Orleans, and other locations between 1866 and 1867 and that as Commissioner of the Freedmen's Bureau, General Howard, encouraged these institutions and "adhere[d] to [his] principle of Government aid in dealing with [them]"); *id.* at 395–401 (recounting the details of the founding of Howard University); *see also* JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 308 (3d ed. 1969) ("Among the schools founded in this period which received aid from the Bureau were Howard University, Hampton Institute, St. Augustine's College, Atlanta University, Fisk University, Storer College, and Biddle Memorial Institute (now John C. Smith University).").

[86] Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 372 (2006).

[87] *Id.* at 372–73.

[88] *Id.* at 373 (quoting CONG. GLOBE, 39TH CONG., 1ST SESS. 60 (1865) (resolution introduced by Rep. Donnelly)) (internal quotation marks omitted).

> every child of this land is, by natural right, entitled to an education at the hands of somebody, and . . . this ought not to be left to the caprice of individuals or of States so far as [Congress has] any power to regulate it. At least, every child in the land should receive a sufficient education to qualify him to discharge all the duties that may devolve upon him as an American citizen.[89]

Congress never gave the Department the power sufficient to achieve these grand ends. But the Department's work certainly facilitated the conversation and gradual movement toward those ends,[90] which at the time was momentous.

The Fourteenth and Fifteenth Amendments' express language[91] did not exert direct influence on educational rights in the way the Freedman's Bureau did, but the Amendments produced two significant indirect changes. First, Congress conditioned Southern states' readmission to the Union not only on adopting the Fourteenth and Fifteenth Amendments but also on making certain changes to their own state constitutions,[92] including some aspects of those clauses related to education. The result was an entire reshaping of the legal framework regarding education at the state level. For instance, prior to the war, Louisiana's constitution explicitly apportioned education funds based only on "the number of free white children"[93] and the Virginia constitution included no provision for education at all.[94] Overall, during the antebellum period, only a single state, Wisconsin, enacted a constitutional

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[89] *Id.* at 373–74 (quoting CONG. GLOBE, 39TH CONG., 1ST SESS. 3045 (1866) (statement of Rep. Moulton)).

[90] *See id.* at 374 (describing the continued effect of the Bureau's work despite the Bureau's demotion to an office within the Department of the Interior).

[91] U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. XV, § 1.

[92] *See, e.g.*, ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 90 (2009) ("A central feature of Radical Reconstruction was to require . . . the southern states to revise their constitutions . . . as a condition of *readmission* to the Union."); John C. Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education 1776–1900*, 42 AM. J. LEGAL HIST. 1, 26–27 (1998) (describing various developments in Confederate state constitutions following the Civil War).

[93] LA. CONST. of 1852, tit. VIII, art. 136.

[94] Eastman, *supra* note 92, at 13.

provision that mandated the education of all children in the state.[95] But, with the exception of Virginia, every state seeking readmission to the Union adopted constitutional language during the post-war period that required their legislature "to establish and maintain a uniform or thorough system of free schools, for the gratuitous instruction of all children in the State."[96]

Second, by extending citizenship and the right to vote to African-Americans,[97] the Amendments gave African-Americans the opportunity to exert political power during Reconstruction, which would prove important for education during the ensuing years. African-Americans made a concerted effort to use their own newfound political power and the progressive educational mandates in the amended state constitutions to expand public education further than ever before. As Professor Eric Foner writes: "[B]lacks embraced the activist, reforming state as a counterbalance to the forces of wealth and tradition arrayed against them. 'They took to legislation . . . because in the very nature of things, they can look nowhere else.' "[98] In particular, they "supported appropriations for schools."[99]

Neither standardized nor universal public education was available prior to or during Reconstruction, but with these and other efforts, it moved steadily in that direction and state responsibility for education became commonplace.[100] In effect, the Freedmen's Bureau and the changes the Fourteenth and Fifteenth Amendments wrought ultimately coalesced to produce what one might call an educational renaissance in the South.[101] Changes in African-American literacy may be the greatest testament. In 1870, 20% of African-Americans were literate, but within three decades, more than half were.[102]

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[95] *Id.* at 17.

[96] *Id.* at 27.

[97] U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. XV, § 1.

[98] FONER, *supra* note 14, at 365 (quoting an Alabama newspaper).

[99] *Id.*

[100] *See id.* at 366 (describing the rise of public schools in the Reconstruction South).

[101] *See generally* Marjorie H. Parker, *Some Educational Activities of the Freedmen's Bureau*, 23 J. NEGRO EDUC. 9 (1954).

[102] NAT'L CENTER FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT 9 (1993).

The great promise of Reconstruction, however, was ultimately cut short by the political compromise of 1877, in which the Republican nominee for President, Rutherford B. Hayes, agreed to withdraw federal troops from the South in exchange for an end to a dispute over election results.[103] With no protection from violence or enforcement of newfound rights, the rise of Jim Crow ensued.[104] As Reconstruction ended, so did education's first act, which was overwhelmingly comprised of progressively expanding educational opportunities. But rather than continued unfettered expansion, the first act immediately led into a second act characterized by segregation and discrimination, which the Supreme Court infamously constitutionalized in 1896 in *Plessy v. Ferguson*.[105]

Those educational institutions that had not already adopted the so-called "separate but equal" principle quickly followed suit. From the late-nineteenth to the mid-twentieth centuries, African-Americans were consistently denied opportunities altogether at the higher education level and offered only segregated opportunities at the elementary and secondary level.[106] Moreover, segregated education was separate but equal in name alone. In reality, school districts devoted far more resources to the education of whites than African-Americans. For example, "[i]n 1915, the average amount spent in [thirteen] Southern States for basic education of a black student was $4.01 compared with $10.82 for a

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[103] *See* FONER, *supra* note 14, at 575–81 (describing the electoral crisis and compromise of 1877); WOODWARD, *supra* note 14, at 6 (characterizing the withdrawal of federal troops from the South as "the abandonment of the Negro as a ward of the nation").

[104] *See* FONER, *supra* note 14, at 593–96 (detailing laws in the post-war South meant to restore white supremacy). *But see id.* at 587 (noting the end of Reconstruction did not immediately end progress).

[105] 163 U.S. 537, 550–51 (1896) ("[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.").

[106] *See* TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 63–65 (1947) (detailing discrimination and education disparities during the mid-1940s); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 256–57 (1975) (discussing the unequal funding of elementary and secondary education for blacks in the South and that, as of 1947, there was nothing even approaching a first-class university opportunity for blacks in segregated states and not a single southern institution where blacks could pursue a doctorate).

white student."[107] In many districts, the disparity was much worse and remained so over time.[108] For instance, in the 1949–1950 school year, Clarendon County, South Carolina, spent $179 per white pupil and $43 per black pupil.[109] The district even denied African-Americans bus transportation altogether while offering it to whites.[110] And at one point, the U.S. Supreme Court went so far as to sanction the closing of African-American schools while the white school remained open in Richmond County, Georgia, because the district claimed it could not afford both.[111]

As brutally unjust as Jim Crow was, the period did not cede all the gains that had preceded it, nor did it fail to carve out certain bases for later progress. Viewed in isolation, the Jim Crow era is easily cast as an educational dark age. But from a broader historical perspective, two significant positive points arise.

First, while educational opportunities for minorities do not continue unabated from the first act into the second act, educational opportunities for minorities do not retreat back toward pre-war circumstances. In fact, educational opportunities—albeit segregated and unequal—continued to grow in some instances for African-Americans. At the highest level, historical black colleges and universities grew in number and enrollment. In the first federal survey of black colleges in 1915, thirty institutions serving

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[107] NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE TRADITIONALLY BLACK INSTITUTIONS OF HIGHER EDUCATION: 1860 TO 1982, at 2 (1985). Richard Kluger indicated that "[i]n 1910, eleven Southern states spent an average of $9.45 on each white child enrolled in their public schools and $2.90 on each black child" and that by 1916 the disparity grew with spending on whites rising to $10.32 per child while dropping to $2.89 for blacks. KLUGER, *supra* note 106, at 88.

[108] *See, e.g.*, Kamina A. Pinder & Evan R. Hanson, *De Jure, De Facto, & Déjà Vu All Over Again: A Historical Perspective of Georgia's Segregation-Era School Equalization Program*, 3 J. MARSHALL L.J. 165, 175 (2010) (discussing funding during segregation in Atlanta, Georgia, and noting that "[t]he per capita expenditure for black schools was $1.71 compared to $15 for white schools.").

[109] KLUGER, *supra* note 106, at 8.

[110] *See id.* at 13–21 (providing a narrative of the litigation over discriminatory bus service for students). It was not until the 1940s that African-American students in the Summerton community of Clarendon County went to a school with electricity and running water. PETER IRONS, JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE *BROWN* DECISION 45–46 (2002). White students at the time already had a cafeteria and science lab. *Id.* at 46.

[111] Cumming v. Richmond Cnty. Bd. of Educ., 175 U.S. 528, 530, 545 (1899) (refusing to intervene when Richmond County closed the high school for blacks but kept open the school for whites).

943 students were identified as offering college-level courses.[112] Another survey in 1927 showed that the number of black colleges had risen to seventy-seven and the number of students to almost 14,000.[113] By 1953, the number of undergraduate students enrolled in black colleges grew to 75,000, with an additional 3,200 graduate students.[114] Similarly, the number of African-Americans enrolled in public high schools was just below 10,000 in 1906 but grew to almost 100,000 in just two decades.[115] On the basic measure of educational attainment, literacy, African-Americans likewise continued to make gains during each of the first four decades of the twentieth century, with African-American illiteracy rates falling from 44.5% in 1900 to 11.5% in 1940.[116] While segregation degraded and brutalized minorities in many respects, these numbers further suggest that the period is part of a larger continuum of rising and falling action. African-American opportunities were grossly unequal to those of whites, but the extension of basic educational rights and policies during Reconstruction had created a foundation upon which African-Americans continued to build throughout the Jim Crow era. In short, previously earned gains were readjusted and realigned but not vanquished.

Second, the Jim Cow era included positive steps that set up the dramatic expansion that occurred in the third act. During the second half of the Jim Crow era, the NAACP pursued a litigation strategy that accepted the principle of separate but equal and sought to enforce it for the maximum benefit of minorities.[117]

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[112] NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 107, at 5 tbl.1.3.

[113] *Id.* at 7 tbl.1.4.

[114] *Id.* at xiii. Another 44,000 summer school students took courses at these black colleges. *Id.*

[115] *Id.* at 7 fig.1.1.

[116] NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 102, at 21 tbl.6.

[117] *See* McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 638–39 (1950) (discussing an African-American graduate student's contention that the school's denial of his admission due solely to his race "deprived him of the equal protection of the laws"); Sweatt v. Painter, 339 U.S. 629, 635–36 (1950) (holding that a separate law school for minorities should afford equal educational opportunities as those that admit whites); Sipuel v. Bd. of Regents of the Univ. of Okla., 332 U.S. 631, 632–33 (1948) (stating that the black "petitioner is entitled to secure legal education afforded by a state institution [to white applicants] in conformity with the equal protection clause of the Fourteenth Amendment"); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 351 (1938) (holding that "the State was

While segregated schools were constitutional, the NAACP argued unequal schools and opportunities were not. The NAACP further used this principle to establish that the absence of opportunity was also unconstitutional.[118] Thus, if a state did not offer African-Americans segregated higher education opportunities within the state, the only remaining remedy was for the state to admit African-Americans to white schools.[119] Later, the NAACP argued that under some circumstances even segregated education would be insufficient.[120] For instance, separate could not be equal when the opportunities available at a state's flagship law school are so unique and integral to the subsequent practice of law in the state that they cannot be replicated in an African-American-only school.[121] All of these arguments were ultimately successful before the Supreme Court and expanded African-Americans' educational opportunities, but left the principle of separate but equal intact.

III. THE MODERN ERA: THE SYSTEMATIC EXPANSION OF EDUCATIONAL RIGHTS

The rising action during the latter half of education's second act laid the foundation for the third act, or the modern era, which began with *Brown*. Few, if any, other legal decisions rival the drama and significance of *Brown*. By declaring that separate was inherently unequal, the Court rendered unconstitutional what had been the dominant paradigm of American education for more than

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bound to furnish [for an African-American law student] within its borders facilities for legal education substantially equal to those" afforded to whites).

[118] *Gaines*, 305 U.S. at 349–50 (finding unconstitutional the practice of operating a white-only law school within the state and sending African-Americans out of state for legal education opportunities).

[119] *See id.* at 351 (binding a state to furnish within its borders facilities to provide equal education to all)

[120] *See Sweatt*, 339 U.S. at 633–34 (describing the disproportionate opportunities available to students at the University of Texas School of Law compared to the Texas State University for Negroes).

[121] *See id.* at 634 ("[T]he University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.").

a half-century. This momentous decision opened the door to an avalanche of litigation, structural reform, and rights expansion.[122]

Admittedly, school desegregation did not immediately come to fruition during the decade following *Brown*, as schools refused to act on their own volition.[123] But with the passage of the Civil Rights Act of 1964[124] and aggressive Supreme Court decisions shortly thereafter, school desegregation took off.[125] The Court held that the Constitution imposed affirmative obligations on schools to eliminate the vestiges of segregation "root and branch,"[126] which necessitated aggressive steps such as busing and redrawing attendance zones.[127] The Court also indicated that racial imbalances in various aspects of education beyond just student assignments were constitutionally suspect.[128] By prohibiting discrimination in federally funded programs[129] and expanding its funding of public education, the Civil Rights Act also created fiscal

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[122] *See* MARTHA MINOW, IN *BROWN*'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK 1–4 (2010) (drawing connections between *Brown* and the expansion of other rights and movements).

[123] *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 14–15 (1958) (noting the resistance of public officials from Arkansas to desegregate); JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 513 (8th ed. 2000) (describing the resistance of White Citizens' Councils to desegregation).

[124] Pub. L. No. 88-352, 78 Stat. 241.

[125] *See* GARY ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT 1–5, 15, 22–23 (1969) (discussing the shift toward serious efforts to desegregate schools).

[126] Green v. Cnty. Sch. Bd., 391 U.S. 430, 437–38 (1968) (finding that school authorities were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.").

[127] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 27–30 (1971) ("The remedy for [past] segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.").

[128] *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 196, 213–14 (1973) (identifying factors beyond student assignments as points of inquiry and applying a presumption to racial imbalances in student assignment); *Green*, 391 U.S. at 435 (identifying imbalances in staff, faculty, transportation, student assignment, extracurricular activities, and facilities as ways in which schools are racially identifiable).

[129] *See, e.g.*, 42 U.S.C. § 2000d (2006) (prohibiting recipients of federal financial aid from discriminating on the grounds of race, color, or national origin).

incentives for integration and disincentives for segregation.[130] In effect, Congress dangled the carrot and the Court held the stick.

The impacts of *Brown*, its progeny, and the Civil Rights Act were also significant in expanding equality to issues beyond race. The concept of equal educational opportunity naturally extended to other disadvantaged groups beyond racial minorities.[131] And once the concept gained traction in regard to race, analogous movements followed in other educational paradigms.[132] The federal courts themselves recognized that the constitutional guarantee of equal protection prohibited gender and disability discrimination in education in addition to race[133] and that statutory prohibitions against racial discrimination also extended to ethnicity and language barriers that can accompany race.[134] Congress also passed significant legislation to further equality of educational opportunity for poor students in 1965,[135] women in

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[130] *See* ORFIELD, *supra* note 125, at 24–25, 47, 76–77 (discussing agencies' use of funding as leverage to enforce the Civil Rights Act).

[131] *See, e.g.*, MINOW, *supra* note 122, at 5–6 ("Although *Brown* focused on racial equality, it also inspired social movements to pursue equal schooling beyond racial differences, and it yielded successful legal and policy changes addressing the treatment of students' language, gender, disability, immigration status, socioeconomic status, religion, and sexual orientation."); Elizabeth Davenport, Brown *and Gender Discrimination, in* BROWN V. BOARD OF EDUCATION: ITS IMPACT ON PUBLIC EDUCATION 77, 77 (Dara N. Byrne ed., 2005) ("*Brown* and its progeny became the mechanism by which women could work to change sexual misconceptions and achieve equal rights. *Brown* opened the discussion for inequalities experienced by female students."); John Dayton, Commentary, *Special Education Discipline Law*, 163 EDUC. L. REP. 17, 17 n.5 (2002) (noting the expansion of credit to Civil Rights Act for civil rights victories of disabled students).

[132] *See, e.g.*, Levin, *supra* note 1, at 206, 209, 212 (describing how *Brown*'s concepts of equality were extended to or argued in other paradigms).

[133] *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729–30 (1982) (finding that equal protection prohibits excluding men from a nursing school based on gender); Mills v. Bd. of Educ., 348 F. Supp. 866, 878 (D.D.C. 1972) (holding that denying disabled students publicly supported education violates equal protection and due process); Pa. Ass'n for Retarded Children v. Commonwealth, 334 F. Supp. 1257, 1259 (E.D. Pa. 1971) ("Having undertaken to provide a free public education to all of its children, including its exceptional children, the [state] may not deny any mentally retarded child access to a free public program of education and training.").

[134] *See* Lau v. Nichols, 414 U.S. 563, 566–67 (1974) (relying on a federal statute to disallow a requirement of basic English language skills to participate in educational programs), *overruled on other grounds by* Alexander v. Sandoval, 532 U.S. 275 (2001).

[135] Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

1972,[136] language minorities in 1974,[137] students with disabilities in 1975,[138] and homeless students in 1987.[139]

Building on these federal movements, state courts eventually became involved in educational equality. Starting in the mid-1970s, a few state courts declared education to be a fundamental right under their respective constitutions and ordered reforms in school finance structures that would direct more resources toward poor students and districts.[140] When desegregation slowed in the late 1980s, the state movement gained even more momentum, as numerous courts declared that students had a constitutional right to some qualitative level of education, whether it be an adequate, a sound basic, a thorough, or a high quality education.[141] In the span of just three decades, public education went from a system that was free to treat children as it saw fit, including entirely excluding some students from opportunities without any legitimate reason, to one constitutionally and statutorily ordered to expand opportunity and treat students fairly.

Yet, just like education's first two acts, this modern era of educational civil rights was not entirely linear. While desegregation and various other movements were broadly expanding rights, the courts and Congress were imposing doctrinal limits along the way. As early as 1973, the Court took steps to limit desegregation, holding that school districts were obligated to

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136 Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2000).

137 Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703 (2000).

138 Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1450 (2006).

139 McKinney–Vento Homeless Assistance Act of 1987, Pub. L. 100-77, 101 Stat. 482 (currently codified at 42 U.S.C. §§ 11301–11374 (2006)).

140 *See, e.g.*, Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976) (holding that education is a fundamental interest and subjecting classifications based on district wealth to strict scrutiny); Robinson v. Cahill, 303 A.2d 273, 295 (N.J. 1973) (finding that an equal education opportunity was a state constitutional mandate best measured by a discrepancy in dollar input per pupil).

141 *See, e.g.*, Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 733 (Idaho 1993) (construing the Idaho constitution to impose a duty on the legislature to provide a "general, uniform and thorough" system of education); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 200 (Ky. 1989) (finding a state constitutional duty to provide an "efficient" system of education); McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516, 552–54 (Mass. 1993) (finding that the state was violating its state constitutional duty by depriving many students in poor communities of an adequate education); Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 664 (N.Y. 1995) (interpreting New York's constitutional right to a "sound basic education").

remedy only the segregation that they intentionally created or maintained.[142] One year later, the Court held that remedies for intentional discrimination must be limited to the confines of the individual school districts that caused the segregation.[143] The effect of these holdings was to exempt many school districts from desegregating at all, particularly many northern and suburban districts.[144] Nearly two decades later, the Court treated the inevitable demographic shifts that occur over time as severing the tie between current segregation and prior acts of intentional segregation.[145] This approach offered most districts a basis for terminating their desegregation efforts and the rest an excuse for failing to desegregate in the first instance.[146]

Disability, English Language Learner, and school finance cases likewise experienced setbacks shortly after or concurrent with rights expansion. For instance, while delivering individualized special education programs is now standard practice in most modern schools and while courts routinely vindicate the violation of requisite procedural protections, structural aspects of education continue to produce systemic special education failures,[147] particularly those relating to the intersection of disability with race, discipline, and poverty.[148] Congress has made some attempt

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[142] Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 213–14 (1973).

[143] Milliken v. Bradley, 418 U.S. 717, 744–45 (1974) ("[I]t must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. . . . [W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.").

[144] *See* GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 10–16 (1996) (comparing *Brown*'s effect in the South to the limiting effects of *Milliken* on the North).

[145] Freeman v. Pitts, 503 U.S. 467, 494–95 (1992).

[146] *See* Parker, *School Desegregation*, *supra* note 8, at 1209 (indicating that demographic changes provide larger schools with "plausible excuses" for segregation).

[147] *See generally* Samuel R. Bagenstos, *The Judiciary's Now-Limited Role in Special Education*, *in* FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 121 (Joshua M. Dunn & Martin R. West eds., 2009) (discussing the successes and shortcomings of the Individuals with Disabilities Education Act (IDEA) as applied to education).

[148] *See, e.g.*, Robert A. Garda, Jr., *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071, 1072 (2005) (discussing the issues of racial discrimination in special education and indicating that African-American students are so disproportionately identified as disabled under the IDEA "that the Department of Education considers it a 'national problem' and experts proclaim it a

to address certain systemic failures, such as racial bias in disability identification, but has yet to produce a solution. Moreover, these attempts are counterbalanced by congressional efforts to afford administrators more flexibility in providing special education services[149] and to alleviate the perceived undue burdens that special education purportedly places on schools.[150]

The nonlinear progress for English Language Learners and school finance claims is even more obvious. For English Language Learners, the principle that students have affirmative rights to language services has expanded and is now firmly in place.[151] Likewise, school finance litigation has resulted in the explicit recognition of constitutional rights to equal and/or quality educational opportunities for all students.[152] But, in both movements, the implementation of these established rights has been uneven and sometimes halted by courts' inquiries into evidentiary questions of whether educational programs and policies or external factors are the cause of students' low achievement.[153] In the absence of conclusive evidence attributing

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'crisis' "); Katherine Twomey, Note, *The Right to Education in Juvenile Detention Under State Constitutions*, 94 VA. L. REV. 765, 776–77 (2008) (discussing the limits of class action special education litigation to address problems with juvenile delinquents). *But see* Larry P. v. Riles, 793 F.2d 969, 981 (9th Cir. 1984) (finding that federal special education law was violated where the district relied primarily on an intelligence quotient (IQ) test that disproportionately disadvantaged minority students rather than using the statutorily mandated evaluation tools).

[149] Congress has attempted to curtail the procedural requirements of the Act, particularly those related to paperwork. 20 U.S.C. § 1408 (2006) (permitting the Secretary of Education to grant waivers to reduce the paperwork and procedural obligations of schools).

[150] *See, e.g.*, Cynthia Godsoe, *Caught Between Two Systems: How Exceptional Children in Out-of-Home Care Are Denied Equality in Education*, 19 YALE L. & POL'Y REV. 81, 93 (2000) ("[C]ompliance with special education mandates is often focused on meeting procedural requirements as opposed to outcome goals."); Ashley Oliver, Survey, *Should Special Education Have a Price Tag? A New Reasonableness Standard for Cost*, 83 DENV. U. L. REV. 763, 763 (2006) (discussing the high cost of special education).

[151] *See, e.g.*, 20 U.S.C. § 1703 (2006) (obligating school districts "to take *appropriate action* to overcome language barriers that impede *equal participation* by its students in its instructional programs." (emphasis added)).

[152] *See* Rebell, *supra* note 53, at 1500–05 (discussing victories in adequacy and equity litigation).

[153] *See, e.g.*, Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1021 (N.D. Cal. 1998), *aff'd*, 307 F.3d 1036 (9th Cir. 2002) (indicating that plaintiffs could not establish that an English-only educational program was ineffective until after it was implemented and results were available to evaluate); Teresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698, 714–15

responsibility to the state, courts have refused to afford disadvantaged students remedies.[154]

In summary, the overall story of education's third act is one of exponentially expanding educational rights. This expansion, however, was not uncompromising, but rather was tempered early in most movements. More recently, this tempering has taken the shape of what appears to be a practical repudiation of rights, particularly in regard to race. The current inability to press various educational rights might lead many to despair that educational rights are on the terminal wane. And with this despair comes the inability to conceptualize a future that entails racially and socioeconomically integrated schools, fully and adequately funded schools, and schools where all children are achieving at high levels or, at least, have the opportunity to do so. In this respect, the recent past can serve to define the entire future.

Yet a fuller appreciation of the two acts that preceded the modern era, as well as the nuance of the modern era, suggests the recent past is but the falling action in education's third act that, while not an overwhelming success, moved education dramatically forward. Just as political events and *Plessy* cut short the gains of Reconstruction and the NAACP cut deep into the underpinning of separate but equal prior to *Brown*, recent retractions in educational rights are an unfortunate part of what may be a natural cycle. The important point is that the overall cycle is one of continual improvement of education that arises out of a natural tug of war.

(N.D. Cal. 1989) (refusing to attribute student failure to school-level policies and practices); Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1018 (Colo. 1982) (noting that courts are ill-suited to determine whether a causal connection exists between funding and student outcomes and refusing to "venture into the realm of social policy"); McDaniel v. Thomas, 285 S.E.2d 156, 160 (Ga. 1981) (finding insufficient evidence to support a causal connection between state funding and student achievement); Haas, *supra* note 10, at 361–62 (stating that courts have "placed a burden upon plaintiff [English Language Learners] to show that an English language assistance program was 'inappropriate' by demonstrating that a school district's language program was completely unsupportable under all circumstances.").

[154] *See supra* note 153.

IV. THE CATALYST FOR A NEW ERA?

Unfortunately, although a contextualization of the past may be sufficient to dissuade the notion that the end is near or has already come, it cannot tell us what to expect in the future.[155] At most, it offers a perspective with which to view current circumstances and a guide to the realm of possibilities as we move forward. With that caveat firmly in mind, this Essay contends that our educational system is currently in a transitional phase. Both the expansion and retraction of rights are largely complete. The past decade has shown neither a sign of a new rights paradigm,[156] nor any indication that a further serious retraction of existing rights is necessary to placate oppositional forces. In effect, the rights movement of the modern era has stabilized.[157] What comes next is not certain, but this stabilization, while discouraging for advocates, is not equivalent to reaching a low point or a sign of the end. To the contrary, the stabilization of rights makes transition to a fourth era of expansion possible.[158] Moreover, with the past era having created a vast foundation of rights and norms,[159] the next era could move us close to the meaningful and lasting equal educational opportunity that others have struggled so long to achieve.

This optimism, to some, might seem wishful and based on little more than intuition. Yet, one could say the same, or even worse, of the concession of defeat or acceptance of stagnation. Just one year after the Court decided *Brown* and long before any schools were

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[155] Although social scientists and historians are making strides in the systematic analysis of the past as a predictor of the future, this Essay obviously comes nowhere near their sophisticated analysis. Moreover, even as to that analysis, comparative historians acknowledge its limitations and problems. *See, e.g.*, James Mahoney & Dietrich Rueschemeyer, *Comparative Historical Analysis: Achievements and Agendas*, *in* COMPARATIVE HISTORICAL ANALYSIS IN THE SOCIAL SCIENCES 3, 5 (James Mahoney & Dietrich Rueschemeyer eds., 2003) (questioning the scope of issues for which this is relevant).

[156] The most recent rights paradigm appears to be that of the right to a quality education. For a general discussion of the paradigm, see Rebell, *supra* note 53, at 1500–05.

[157] *See supra* notes 53–68 and accompanying text (demonstrating that even the school finance reform paradigm has shown signs of retraction).

[158] *See* Rebell, *supra* note 53, at 1500 (describing how education finance challenges did not begin to accelerate until the "Supreme Court's active involvement with desegregation remedies [began] to lag").

[159] *See supra* notes 122–41 and accompanying text.

actually desegregated or the civil rights movement had gained serious traction, Woodward wrote:

> The new Southern system [of Jim Crow] was regarded as the 'final settlement,' the 'return to sanity,' the 'permanent system.' Few stopped to reflect that previous systems had also been regarded as final, sane, and permanent by their supporters. The illusion of permanency was encouraged by the complacency of a long-critical North, the propaganda of reconciliation, and the resigned compliance of the Negro. The illusion was strengthened further by the passage of several decades during which change was averted or minimized. Year after year spokesmen of the region assured themselves and the world at large that the South had taken its stand, that its position was immovable, that alteration was unthinkable, come what might.[160]

Although he could not forecast the details of what would follow, Woodward was historically astute enough to write that the current system of Jim Crow was "now crumbling before our eyes."[161] Of course, as discussed above, an enormous expansion of rights would follow just a few years after he wrote these passages.[162]

This comparison, however, is not to suggest that a bright fourth era in education's saga is inevitable.[163] The key to the fourth era is to substantively conceive it. Without a conceptual framework capable of animating the next era, a period of transition somewhat susceptible to regression (at least as a matter of perspective) is likely to persist. And unfortunately, the current policies vying for the future of education offer no signs of capitalizing on current circumstances and reopening the expansion of educational rights and opportunities. On the one hand, the robust history behind us

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[160] WOODWARD, *supra* note 14, at 7–8.

[161] *Id.* at 5.

[162] *See supra* notes 122–41 and accompanying text.

[163] *See* KLINKNER & SMITH, *supra* note 17, at 8 ("[A]lthough racial progress has not been either inevitable or irreversible in America, it has been in significant ways cumulative.").

offers a solid foundation to build upon.[164] On the other, the current set of leading policies are either failing to move that history forward or appear deadset on abandoning that history to pursue an uncharted course.[165]

The most forgiving appraisal of current policies is that they are collectively floundering and their proponents lack the perspective to recognize their likely futility. Among the competing reform ideologies are a continuation of traditional civil rights remedies, high stakes testing, increased funding, and school choice—whether it be through charter schools, vouchers, or privatization.[166]

A. TRADITIONAL CIVIL RIGHTS REMEDIES

Regardless of the intrinsic merit or value, traditional civil rights remedies and claims such as desegregation are, in most instances, nonstarters in the policy and legal world.[167] New mandatory desegregation remedies have been largely unrealistic for some time given current doctrine,[168] and voluntary desegregation efforts, while important, are too random and meek to produce widespread progress.[169] Likewise, as a practical matter, federal policy has long since abandoned the financial incentives and legal mandates it could have adopted to give diversity and desegregation a viable chance.[170]

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164 *See supra* notes 19–24 and accompanying text.

165 *See supra* notes 53–75 and accompanying text.

166 *See, e.g.*, Garda, *supra* note 11, at 22–41 (describing various reform movements, including standards-based accountability, school choice, and finance litigation).

167 *See id.* at 47 (stating that integration has been deserted because "integration was improperly viewed as a failure").

168 *See* NAACP v. City of Thomasville Sch. Dist., 299 F. Supp. 2d 1340, 1342 n.2, 1367 (M.D. Ga. 2004) (indicating that the case before the court "may be the only pending school desegregation case in the country in which an initial determination of liability has not yet been made" and subsequently rejecting the claim).

169 *See* Derek W. Black, *The Uncertain Future of School Desegregation and the Importance of Goodwill, Good Sense, and a Misguided Decision*, 57 CATH. U. L. REV. 947, 953–56 (2008) (discussing "meek" efforts at desegregation).

170 For a discussion of policies that could invigorate integration and that the federal government has yet to undertake, see Le, *supra* note 37, at 768–85 ("[T]he current administration should actively seek to develop regulations, legislative revisions, and policy positions that create positive, integration-encouraging activities, within the limits of the law.").

The fact that these trends could theoretically reverse with the mere change in composition of the Supreme Court or a renewal commitment from the Executive Branch is tantalizing for civil rights groups.[171] In addition, these groups have long histories devoted to protecting these past paradigms.[172] Yet, the sad truth is that conventional wisdom—albeit flawed—has long since concluded that desegregation was a failed experiment.[173] As such, more of the same in terms of civil rights advocacy only serves to doom the arguments to irrelevancy and potential extinction. In all fairness, the concept of diversity as a positive educational benefit for all presents a new paradigm. But, thus far, advocates have failed to develop a systematic framework through which to implement it,[174] and opponents have cast it as a guise to justify otherwise constitutionally prohibited action.[175]

For a time, school finance appeared ready to replace or continue the spirit of *Brown* and serve as a major driver of equal opportunity. During the 1990s and the first part of this century, school finance advocates were routinely successful in securing

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[171] *Cf.* Rebell, *supra* note 53, at 1539–42 (calling for a "colloquy" of "sustained commitment" among the three branches of government to achieve "equal educational opportunity").

[172] The NAACP Legal Defense Fund, for instance, attained its prominence through its efforts to desegregate schools. *See* KLUGER, *supra* note 106, at 253–84 (discussing the NAACP's pre-*Brown* legal strategy to improve the quality of black education and its attacks on segregated schooling and the NAACP's strategy in *Brown* to frontally attack the principle of separate but equal in education). Over half a century later, its public image is tied to those successes and it is the first one expected to speak to and defend issues relating to school segregation. *See, e.g.*, Brief of the NAACP Legal Def. & Educ. Fund, Inc. as *Amicus Curiae* in Support of Respondents at 1, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (Nos. 05-908 & 05-915), 2006 WL 2927075 at *1 (describing the NAACP's role in educational desegregation and diversity).

[173] *Compare* JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 273 (2010) (stating that desegregation is no longer fashionable), *with* Bradley W. Joondeph, *Skepticism and School Desegregation*, 76 WASH. U. L.Q. 161, 162–64 (1998) (responding to the skepticism of desegregation, noting that "[i]n many respects, school desegregation has been a remarkable policy success").

[174] Current defenses of diversity are predicated on voluntary rather than mandatory or systemic programs. *See generally* Lisa J. Holmes, Comment, *After* Grutter*: Ensuring Diversity in K–12 Schools*, 52 UCLA L. REV. 563 (2004) (arguing for a framework that upholds voluntary race-conscious student assignment policies in public schools).

[175] *See, e.g.*, Ward Connerly, *It Is Time to End Race-Based "Affirmative Action,"* 1 U. ST. THOMAS J.L. & PUB. POL'Y 56, 58 (2007) (asserting that the diversity rationale is an excuse to discriminate).

positive decisions from the courts.[176] Those decisions held the promise of finally securing the resources necessary to ensure that disadvantaged students and districts receive the basic components of a quality education. Over time, however, that promise has begun to prove false. First, as noted above, courts have more recently grown reluctant to issue sweeping orders or enforce them, and the current financial crisis appears to have encouraged courts to further withdraw.[177] Second, while this litigation has made some difference in some states, recent studies suggest extensive inequities and inadequacies persist in most states.[178] In fact, notwithstanding court orders to the contrary, many states' finance systems slip back, within a few years, into funding patterns similar to those that existed prior to any litigation.[179] Third, federal courts and policy makers have paid little, if any, attention to school finance. Federal courts bowed out decades ago,[180] and federal policy makers have intentionally shied away from addressing the underlying problems for the past several decades.[181] In short, school finance reform currently offers no signs of catalyzing a new era.

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[176] *See* Rebell, *supra* note 53, at 1500 (noting that inequities in school funding have been challenged in more than forty states in the last few decades and plaintiffs have won in more than 60% of them).

[177] John Dayton, Anne Proffitt Dupre & Eric Houck, Commentary, *Brother, Can You Spare a Dime? Contemplating the Future of School Funding Litigation in Tough Economic Times*, 258 ED. LAW REP. 937, 954 (2010) ("[C]ourts will face very difficult challenges in attempting to bridge the growing gap between constitutional ideals and fiscal realities if the General Assembly lacks public support and sufficient resources to fund remedies for school funding inequities and inadequacies."); *cf.* Rebell, *supra* note 68 (positing that courts are unlikely to grant jurisdiction or enforce existing claims in times of economic downturn).

[178] *See* Marguerite Roza, *How Districts Shortchange Low-Income and Minority Students*, *in* FUNDING GAPS 2006, at 9, 9–12 (Educ. Trust ed., 2006), http://www.edtrust.org/sites/edtrust.org/files/publications/files/FundingGap2006.pdf (showing that districts direct money to schools with less need); Ross Wiener & Eli Pristoop, *How States Shortchange the Districts That Need the Most Help*, *in* FUNDING GAPS 2006, *supra*, at 5, 5–6 (determining that high-minority districts receive less state and local money).

[179] *See generally* Christopher Berry, *The Impact of School Finance Judgments on State Fiscal Policy*, *in* SCHOOL MONEY TRIALS, *supra* note 54, at 213 (discussing the results of adequacy cases).

[180] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 58 (1973) (noting that it is the role of state legislatures, not courts, to reform the systems of state taxation and education).

[181] *See* Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U. L. REV. 313, 314–15 (2010) (discussing the

School finance may, in some respects, have simply fallen victim to a continual re-waging of old battles. Definite battle lines in school finance were originally set as a war over money and the inequity between school districts.[182] Money alone, however, fails to captivate or transform student experiences of its own accord.[183] Rather, money requires some pedagogical or policy end through which to be funneled. While some important school finance cases have focused on access to pre-kindergarten opportunities and other programmatic services,[184] much of it has not. To capture education's fourth act, school finance would have to become a battle over something other than just money, such as teachers, pre-kindergarten, reading programs, or longer school years. In fact, school finance litigation need not be "finance" litigation at all but, rather, litigation over constitutional equity and adequacy and the issues that money cannot remedy, such as socio-economic and racial isolation.[185]

Thus far, the great disappointment of school finance litigation has been its failure to seriously challenge the social and racial structures within which schools operate.[186] On its current course,

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minimal role that federal law plays in ensuring resource equity between schools). The recent creation of a commission to study inequity offers a glimmer of hope that the federal government's position might change in the future. *See* Press Release, U.S. Dep't of Educ., U.S. Secretary of Education Appoints Members of Equity and Excellence Commission (Feb. 17, 2011), *available at* http://www.ed.gov/news/press-releases/us-secretary-education-appoints-members-equity-and-excellence-commission (announcing a new commission established to assess the impact of school finance on opportunities and to give recommendations for improving school finance to maximize equity).

[182] *See Rodriguez*, 411 U.S. at 15–16 ("Despite these recent increases, substantial interdistrict disparities in school expenditures . . . in San Antonio and in varying degrees throughout the State still exist. And it was these disparities, largely attributable to differences in the amounts of money collected through local property taxation, that led the District Court to conclude that Texas'[s] dual system of public school financing violated the Equal Protection Clause." (footnote omitted)).

[183] *See, e.g.*, Abbott v. Burke, 575 A.2d 359, 404 (N.J. 1990) (noting that research is clear "that money alone has not worked").

[184] *See, e.g.*, Hoke Cnty. Bd. of Educ. v. State, 599 S.E.2d 365, 391–95 (N.C. 2004) (reviewing a lower court's order of pre-kindergarten services).

[185] James E. Ryan, Sheff, *Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 533–35 (1999) (writing that "school 'finance' litigation need not be limited to funding" and that the affirmative right to education embodied in such litigation could be used to foster integration remedies).

[186] *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996), is the only state court opinion to marry the issues of school finance with segregation.

the task of school finance has too often devolved to making separate schools equal—a premise that proved false during the *Plessy* era.[187] Of course, schools are no longer segregated by law and high minority schools are in desperate need of resources to mitigate the circumstances in which they find themselves. But neither money alone nor educational policy that ignores segregation is well-positioned to produce equal opportunity in the future.

B. NEW REFORM MOVEMENTS

The two leading national policies of the day—testing and charter schools—may suffer from the opposite problems of desegregation and school finance: they are not sufficiently grounded in lessons from the past. This approach can make for drama and popular appeal. But if one accepts that the past offers important lessons, ungrounded policy does not make for good policy. Thus, neither testing nor charter school policy is likely to prompt a new progressive era.

Testing and accountability rose to national prominence in 2002 when the No Child Left Behind Act (NCLB)[188] was enacted with bipartisan support.[189] Although the notion of standardized testing was not new,[190] the sanctions attached to low test scores largely were, as was the role of the federal government as a dominant driver of local educational policy.[191] The popular narrative

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[187] *See* Garda, *supra* note 11, at 88–89 ("It is believed that true equality can be achieved under a 'separate but equal' route that failed before, because outcome 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 *Plessy*.").

[188] No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

[189] *See* Lizette Alvarez, *House Votes for New Testing to Hold Schools Accountable*, N.Y. TIMES, May 24, 2001, at A1 (discussing the significant bipartisan support for NCLB in the House).

[190] *See* William Celis, *Administration Offers Plan for Better Schools*, N.Y. TIMES, Apr. 22, 1993, at A20 (reporting a plan of the first Clinton Administration to improve public schools using, among other methods, national tests); *cf.* Bill Zlatos, *Testing: Scores That Don't Add Up*, N.Y. TIMES, Nov. 6, 1994, at 28 (questioning the effectiveness of standardized testing when poor results are so easy to avoid).

[191] *See, e.g.*, Jacques Steinberg, *Edgy About Exams, Schools Cut the Summer Short*, N.Y. TIMES, Aug. 18, 2002, at 1 (noting that many Florida districts shortened the summer break due to worry about federal sanctions for low test scores).

surrounding NCLB was that testing and accountability for educational standards, in and of themselves, would lead to educational improvement and close achievement gaps.[192] The testing was not promoted as achieving any particular substantive end. Rather, schools were free to adopt whatever policies, curricula, pedagogy, and tests they wanted[193]—so long as they did, in fact, test students and hold schools accountable for the results.[194] In fact, so much was left to states' discretion that they were essentially free to manipulate tests and cut-off scores to produce the statistical outcomes that NCLB sought, without doing anything to improve the substance of what students learned.[195]

Regardless, by most accounts, NCLB has been a failure.[196] It has not produced a noticeable gain in student achievement,[197] and

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[192] *See Excerpt from Bush Statement Announcing Start of His Education Initiative*, N.Y. TIMES, Jan. 24, 2001, at A14 (stating overall goals of NCLB); Nicholas Lemann, Letter From Washington, *Testing Limits: Can the President's Education Crusade Survive Beltway Politics?*, NEW YORKER, July 2, 2001, at 28–34 (detailing the crusades-like feel of President Bush's education plan and how it conflicted with political realities).

[193] *See* James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1247–48 (2008) (pointing out that this lack of standards allows states to adopt lower standards to remain in compliance).

[194] *See* 20 U.S.C. § 6311 (2006) (requiring states to set standards, test students on them, and hold schools accountable).

[195] *See* Ryan, *supra* note 193, at 1248–49 (offering evidence that at least twelve states lowered the score needed to be proficient on state tests and noting discrepancies of state results when compared to National Assessment of Educational Progress (NAEP) results).

[196] *See, e.g.*, Philip T.K. Daniel & Maurice R. Dyson, *Bringing Every Child Forward: Lessons Learned Under No Child Left Behind & a Roadmap for Obama's Educational Reform*, 19 TEMP. POL. & CIV. RTS. L. REV. 63, 66–67 (2009) (arguing that negative shifts in curriculum and continued racial inequalities are attributable to NCLB); Regina Ramsey James, *How to Mend a Broken Act: Recapturing Those Left Behind by No Child Left Behind*, 45 GONZ. L. REV. 683, 683–84 (2010) (indicating NCLB has failed); Craig Livermore & Michael Lewchuk, *Centralized Standards and Decentralized Competition: Suggested Revisions for No Child Left Behind to Create Greater Educational Responsiveness Toward Disempowered Minority Groups*, 33 SETON HALL LEGIS. J. 433, 435 (2009) ("[S]tudies suggest that few failing schools are actually engaged in meaningful restructuring despite the mandate. State assessment standards are significantly politically contingent on inputs from various special interests which are not necessarily aligned with the interests of student performance, and the NCLB restructuring provisions are flexible to the point of complete malleability.").

[197] *See* ANNA HABASH ROWAN, DARIA HALL & KATI HAYCOCK, EDUC. TRUST, GAUGING THE GAPS: A DEEPER LOOK AT STUDENT ACHIEVEMENT 2–3 (2010) (discussing trends on NAEP test results). *But see* CTR. ON EDUC. POLICY, STATE TEST SCORE TRENDS THROUGH 2007–08, PART 1: IS THE EMPHASIS ON "PROFICIENCY" SHORTCHANGING HIGHER- AND LOWER-ACHIEVING STUDENTS? 1–2 (2009), http://www.cep-dc.org/cfcontent_file.cfm?Attachment=C

thus, its system of sanctions is set to kick in.[198] In fact, in the spring of 2011, the Secretary of Education projected that, in the fall of 2011, NCLB would label 80% of the nation's schools as failing.[199] This posed two serious problems. First, the mandatory sanctions and corrective action that these labels demand would be so widespread and disruptive that any benefits one might hope to make by sanctioning schools would most likely be offset by the chaos sanctions would bring.[200] Second, many of the schools that NCLB would label as failing are not "bad" schools.[201] In fact, only a small percentage would fairly reflect that characterization.

Recognizing as much, Secretary of Education Arne Duncan and President Obama have agreed to waive noncompliance with NCLB.[202] They would, however, only grant waivers based on an interesting set of policy-based conditions. In exchange for waiving the required proficiency levels on the tests, states must agree to adopt a standardized curriculum called "Common Core Standards,"[203] which states themselves have been developing as an attempt to systemize and nationalize what is taught across the nation.[204] Further, in exchange for waiving teacher quality

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hudowsky2Kober%5FSTST07%2D08%5FP1%2DGeneralAchievementTrends%5F061709%2Epdf (finding gains in all areas studied as a result of NCLB).

[198] *See* 20 U.S.C. § 6311(b)(2)(A) (2006) (requiring states to establish accountability systems that sanction schools for failing to meet NCLB's goals); Sam Dillon, *Most Public Schools May Miss Targets, Education Secretary Says*, N.Y. TIMES, Mar. 10, 2011, at A16 (stating that the Secretary of Education believed 80,000 of the nation's 100,000 public schools could be labeled failing under NCLB).

[199] Dillon, *supra* note 198.

[200] *See id.* at A22 (noting that escalating sanctions for missing targets include layoffs and shutdowns).

[201] *See id.* at A16 ("Even many of the nation's best-run schools are likely to fall short of the law's rapidly rising standardized testing targets . . . .").

[202] *See* Sam Dillon, *Overriding a Key Education Law: Waivers Offered to Sidestep a 100 Percent Proficiency Rule*, N.Y. TIMES, Aug. 8, 2011, at A12 (detailing the decision to waive compliance with the 100% proficiency deadline).

[203] *See* Michele McNeil & Alyson Klein, *States Cautious on Duncan's NCLB-Flexibility Offer*, EDUC. WK. (June 20, 2011), http://edweek.org (noting that the waiver and exchange package was not yet finalized, but adoption of the common core standards was likely).

[204] *See About the Standards*, COMMON CORE STANDARDS INITIATIVE, http://www.corestandards.org/about-the-standards (last visited Dec. 14, 2011) (providing an overview of the initiative).

targets, states must agree to adopt measures of teacher performance, which will presumably be based on test scores.[205]

In effect, the Obama Administration is attempting to symbolically break from NCLB by waiving its specific requirements while, at the same time, retaining NCLB's focus on curricular standards and tests through conditional waivers that slightly modify schools' federal obligations. The primary difference between NCLB's original mandates and the current waivers is that the waivers shift accountability for the test results from schools and students to teachers. This shift, however, is unlikely to alleviate the problems and concerns that drove us to this point. Rather, it may ultimately be "damage control" that pushes failed policies further down the road.

The most significant recent trend in educational policy, however, may have nothing to do with NCLB. Educational programs that are largely exempt from the purportedly onerous aspects of state, local, and federal bureaucracies are consistently at the center of policy reforms. Charter schools, in particular, have gained unparalleled political traction in the past few years.[206] The idea of charter schools has captivated the public's imagination through the highly publicized Harlem Children's Zone[207] and films such as *Waiting for Superman*[208] and *The Lottery*,[209] which paint a dreary picture of public schools and a fanciful one of charters.[210] The Obama Administration is no exception, placing charter schools at the center of its policy agenda from the outset. President Obama appointed an avid proponent of charters, Arne Duncan, as the Secretary of Education.[211] And in March 2010, the U.S.

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[205] *See* McNeil & Klein, *supra* note 203 (quoting Indiana Superintendent of Public Instruction as a fan of these measures).

[206] *See* Genevieve Siegel-Hawley & Erica Frankenberg, *Does Law Influence Charter School Diversity? An Analysis of Federal and State Legislation*, 16 MICH. J. RACE & L. 321, 323 (2011) (describing growth of charter schools and federal financial incentives for increasing the number of charter schools).

[207] *See, e.g.*, David Brooks, Op-Ed, *The Harlem Miracle*, N.Y. TIMES, May 8, 2009, at A31 (touting the positive results of the Harlem Children's Zone schools).

[208] WAITING FOR SUPERMAN (Electric Kinney Films 2010).

[209] THE LOTTERY (Great Curve Films 2010).

[210] *Cf.* Ross Douthat, Op-Ed., *Grading School Choice*, N.Y. TIMES, Oct. 11, 2010, at A23 (describing public school bureaucracy as "manipulative" and "simplistic").

[211] *See, e.g.*, Editorial, *Promises and Facts on Charter Schools*, N.Y. TIMES, Jan. 11, 2010,

Department of Education released *A Blueprint for Reform: The Reauthorization of the Elementary and Secondary Education Act*, which included charter schools as a central component.[212]

Even more telling is the fact that reauthorizing the Elementary and Secondary Education Act has been on standstill for the past two years,[213] relegating the once dominant federal policy to an afterthought, while the President's commitment to charter schools moved forward on an independent legislative track. Through competitive grant programs that give advantages and special consideration to states that enact, among other policies, pro-charter legislation, the Obama Administration has greatly expanded the possibilities for charter schools.[214] North Carolina, for instance, had maintained a strict cap on the number of charter schools in the state, but in response to competitive grants, the state lifted that cap and is now confronting a potential explosion of charters.[215] Other states have made analogous changes.[216]

Now that Republicans control the U.S. House of Representatives,[217] charter schools are poised to receive more support. Some within the Democratic Party have expressed

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at A16 (indicating Secretary Duncan's desire to turn failing schools into charters).

[212] *See* U.S. DEP'T OF EDUC., A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 6 (2010), *available at* http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf (supporting expansion of school choice).

[213] *See* Press Release, U.S. Dep't of Educ., Obama Administration Proceeds with Reform of No Child Left Behind Following Congressional Inaction (Aug. 8, 2011), *available at* http://www.ed.gov/news/press-releases/obama-administration-proceeds-reform-no-child-left-behind-following-congressiona (explaining that the proposal had been in the House for sixteen months as of August 2011).

[214] *See* Siegel-Hawley & Frankenberg, *supra* note 206, at 338–40 (noting that Obama's "Race to the Top" program provides billions of dollars to expand charter schools); Sam Dillon, *Dangling $4.3 Billion, Obama Pushes States to Shift on Education*, N.Y. TIMES, Aug. 17, 2009, at A1 (citing Secretary Duncan's statement that states without charter schools are unlikely to receive an award from Race to the Top).

[215] *See* Rob Christensen, *Perdue Signs Law Lifting Cap on Charter Schools*, NEWS & OBSERVER N.C., June 17, 2011, http://www.newsobserver.com/2011/06/17/1281607/perdue-signs-law-lifting-cap-on.html (noting near unanimous passage of bill).

[216] *See, e.g.*, Lori Higgins, *Group Ups Michigan to 10th in Charter School Law Rankings*, DETROIT FREE PRESS, Jan. 18, 2012, *available at* http://www.freep.com/article/20120118/NEWS06/120118030/Group-ups-Michigan-10th-charter-school-law-rankings (indicating that Michigan's governor is progressively easing the cap on the charter schools that the state's public universities can authorize).

[217] Jeff Zeleny, *Reid Is Re-Elected and Keeps Leader's Job*, N.Y. TIMES, Nov. 3, 2010, at A1.

reservations or hostility toward charter schools,[218] but they appear too small in number to impede charter school policy. Charter schools seem to be a primary point of agreement between the President and Republicans.[219] The President's position on charter schools has been clear and, upon taking control of the U.S. House of Representatives in the 112th Congress, Republicans quickly moved a bill through committee that would significantly expand federal funding and support for charters.[220]

Both charter schools and high-stakes testing policy suffer from the fatal flaw of ahistorical positions. In particular, they largely ignore the problems that the two dominant movements prior to them have devoted their entire existence to addressing: segregation and resource inequality. For instance, NCLB—to the delight of some civil rights advocates—has provided further evidence of the perversity of racial and socio-economic segregation and inequality. The data results produced under the Act show that those schools enrolling the highest percentages of poor and minority students have consistently performed far lower than other schools on standardized tests and secured far fewer highly qualified teachers.[221] In this respect, NCLB highlights the

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[218] *See, e.g.*, Richard Pérez-Peña, *Christie Calls for More Cuts and Big Changes to Schools*, N.Y. TIMES, Jan. 12, 2011, at A19 (indicating charter school expansion in New Jersey "will be a tough sell in a Legislature controlled by Democrats"). It is worth noting that while many Democrats have raised questions about charter schools and have political allegiances opposed to charter schools, the overall tenor of the party and its leadership is predisposed toward charter schools. *See, e.g.*, *Building on What Works at Charter Schools: Hearing Before the H. Comm. on Educ. and Labor*, 111th Cong. 2–3 (2009) (statement of Rep. George Miller, Chairman) (lauding the successes of certain charter schools); David Brooks, Op-Ed., *An Innovation Agenda*, N.Y. TIMES, Dec. 8, 2009, at A37 (indicating that President Obama, Republicans, and Democrats agree on the need to encourage charter school innovation).

[219] *See* Julie Pace, *Obama, in Florida, Makes Nice with Republicans*, WASH. TIMES, Mar. 4, 2011, http://www.washingtontimes.com/news/2011/mar/4/obama-jeb-bush-teaming-florida-school/?page=all (reporting that former Republican Governor of Florida Jeb Bush and President Obama agree on education policies, including increasing charter schools).

[220] Empowering Parents Through Quality Charter Schools Act, H.R. 2218, 112th Congress (2011) (including goals of the bill and an allocation of funds to support charters); *see also* Kate Andersen Brower, *Obama Headed for Fight Over School Spending and Laws*, BLOOMBERG (Jan. 24, 2011), http://Bloomberg.com/news/2011-01-24/duncan-obama-headed-for-fight-in-congress-on-education-policy-funding.html (noting that President Obama has "adopted such traditionally Republican principles as charter schools").

[221] *See* Renee v. Duncan, 623 F.3d 787, 797 (9th Cir. 2010) (citing statistics showing greater percentages of intern faculty (i.e., teachers lacking "full state certification") at schools attended by predominately low-income and minority students); SARAH ALMY &

problem of segregation: The compounding negative effects of concentrated poverty depress academic achievement and make securing one of education's most vital resources—good teachers—a staggering feat.[222] Yet, inexplicably, NCLB does almost nothing to address the problem it reveals.[223] Rather, it condemns the existence of achievement and teacher quality gaps while sanctioning the segregation and funding inequities that create the gaps.[224]

To its credit, NCLB currently includes a measure whereby students assigned to failing schools have the option to transfer to another school.[225] The measure, however, has proven more symbolic than practically meaningful. First, evidence shows systemic failures on the part of school districts to notify and afford parents these rights.[226] Second, and more importantly, the transfer option exists as a matter of right only within school districts—not between them.[227] Because low-performing schools are typically situated within low-performing districts, the right of transfer would typically be pointless to exercise—as it would only land a student in another low-performing school.[228] The obvious

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CHRISTINA THEOKAS, EDUC. TRUST, NOT PREPARED FOR CLASS: HIGH POVERTY SCHOOLS CONTINUE TO HAVE FEWER IN-FIELD TEACHERS 2 (2010) (reporting that high-poverty schools have a disproportionate number of inexperienced and out-of-field teachers); EDUC. TRUST–WEST, ACCESS DENIED: 2009 API RANKINGS REVEAL UNEQUAL ACCESS TO CALIFORNIA'S BEST SCHOOLS 1–2 (2010) (presenting analysis and graphical depiction of low performance on high-stakes tests from high-need and minority-concentrated schools).

[222] *See* Derek W. Black, *In Defense of Voluntary Desegregation: All Things Are Not Equal*, 44 WAKE FOREST L. REV. 107, 116 (2009) (commenting that quality teachers will not consistently teach in "black schools").

[223] *See* Black, *supra* note 181, at 314–15, 370–71 (discussing the minimal role that federal law plays in ensuring resource equity between schools and proposing ways it could address segregation).

[224] *Id.* at 314–15.

[225] 20 U.S.C. § 6316(b)(1)(E)(i) (2006).

[226] *See* U.S. DEP'T OF EDUC., OFFICE OF PLANNING, EVALUATION & POLICY DEV., POLICY AND PROGRAM STUDIES SERV., STATE AND LOCAL IMPLEMENTATION OF THE NO CHILD LEFT BEHIND ACT: VOLUME IV—TITLE I SCHOOL CHOICE AND SUPPLEMENTAL EDUCATIONAL SERVICES: INTERIM REPORT, at xxiii (2008) ("[O]nly a small proportion of eligible students actually participated in the choice options available to them.").

[227] 20 U.S.C. § 6316(b)(1)(E)(i) (2002) ("[T]he local educational agency shall . . . provide all students enrolled in the [failing] school with the option to transfer to another public school served by the *local educational agency* . . . ." (emphasis added)).

[228] *See* Craig R. Heeren, *"Together at the Table of Brotherhood": Voluntary Student Assignment Plans and the Supreme Court*, 24 HARV. BLACKLETTER L.J. 133, 184–85 (2008)

solution is to extend the right of transfer to neighboring districts.[229] But recent reauthorization discussions have signaled that the right of transfer might be eliminated altogether.[230] In short, the trajectory of federal policy is to further distance itself from its already willfully negligent approach to segregation.

Given that NCLB accepts the existence of segregation, one might expect that it would attempt to make separate equal, but surprisingly, it did very little on that score as well. In the 1960s and 1970s, the Elementary and Secondary Education Act (the formal title of NCLB) placed relatively strict equity requirements on schools and districts receiving federal funds.[231] During the Reagan Administration, those requirements were eroded to the point of practical irrelevance.[232] And although recent research

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(noting that the transfer plan is ineffective in racially isolated failing districts).

[229] *See generally* William L. Taylor, *Title I as an Instrument for Achieving Desegregation and Equal Educational Opportunity*, 81 N.C. L. REV. 1751, 1755–62 (2003) (discussing transfer rights and states' uses of them under NCLB). Interdistrict transfers, without question, entail administrative and school finance complexities. Nonetheless, voluntary interdistrict programs have proven successful in several jurisdictions, and they have done so without federal support. *See id.* at 1760–61 (describing the experience of St. Louis, Missouri, with interdistrict transfers); *see also* AMY STUART WELLS ET AL., CHARLES HAMILTON INST. FOR RACE & JUSTICE, BOUNDARY CROSSING FOR DIVERSITY, EQUITY AND ACHIEVEMENT: INTER-DISTRICT SCHOOL DESEGREGATION AND EDUCATIONAL OPPORTUNITY 2–3 (2009), *available at* http://www.charleshamiltonhouston.org/assets/documents/publications/Wells_BoundaryCrossing.pdf (identifying eight different interdistrict programs). Given that over 90% of school districts receive Elementary and Secondary Education Title I funds, the federal government is in a position to mandate the transfers as a condition of the Act. C. Joy Farmer, Note, *The No Child Left Behind Act: Will It Produce a New Breed of School Financing Litigation?*, 38 COLUM. J.L. & SOC. PROBS. 443, 456 (2005) ("[N]ine out of ten districts receive Title I funds."). Given the investiture of Title I in poor students, funds are at the government's disposal to make these transfers not only mandatory but also attractive.

[230] *See* MEREDITH P. RICHARDS, KORI J. STROUB & JENNIFER JELLISON HOLME, CENTURY FOUND., CAN NCLB CHOICE WORK? MODELING THE EFFECTS OF INTERDISTRICT CHOICE ON STUDENT ACCESS TO HIGHER-PERFORMING SCHOOLS 3–5 (2011) (responding to suggestions to jettison the transfer provision).

[231] *See* 45 C.F.R. § 116.26 (1975) (requiring comparability at a 5% variance between Title I and non-Title I schools); 45 C.F.R. § 116a.26 (1979) (requiring the same 5% comparability between Title I and non-Title I schools).

[232] *See* Phyllis McClure, *The History of Educational Comparability in Title I of the Elementary and Secondary Education Act of 1965*, *in* ENSURING EQUAL OPPORTUNITY IN PUBLIC EDUCATION: HOW LOCAL SCHOOL DISTRICT FUNDING PRACTICES HURT DISADVANTAGED STUDENTS AND WHAT FEDERAL POLICY CAN DO ABOUT IT 9, 21 (Ctr. for Am. Progress ed., 2008), *available at* http://www.americanprogress.org/issues/2008/06/pdf/comparability.pdf.

highlighted the problem, NCLB did nothing directly to address it.[233] Rather than increasing and concentrating the investment in poorer schools, Congress's investment through NCLB has been relatively modest and spread far too thin.[234] In addition, NCLB contains no effective mechanism to assure that states and school districts do not just offset the federal investment by reducing their own.[235] By ignoring these problems, NCLB's sanctions for low-performing schools amount to the practical equivalent of punishing schools for being poor and segregated—the very things that they have no means to change.[236] In this respect, NCLB's approach is ahistorical and will collapse on itself rather than offer a segway to a new era.

The charter school movement fairs only slightly better. The movement seems to acknowledge that poverty and segregation create serious problems.[237] Its response is to create a new vehicle for delivering education in impoverished and segregated neighborhoods. The problem is that the vehicle, albeit new, continues to drive on the same road. Rather than attempting to destroy the walls of poverty and segregation structures, charter schools largely accept and work within them. While a precious few exceptions exist,[238] integration has not been among the goals of

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[233] *See* Helen F. Ladd & Edward B. Fiske, Op-Ed., *Class Matters. Why Won't We Admit It?*, N.Y. TIMES, Dec. 12, 2011, at A23 ("No Child Left Behind required all schools to bring all students to high levels of achievement but took no note of the challenges that disadvantaged students face.").

[234] *See* Black, *supra* note 181, at 340–43 (explaining that "over ninety percent of school districts receive Title I funds" because the eligibility threshold is a "mere two percent" poverty level in the district).

[235] *See id.* at 352–53 (noting that the U.S. Department of Education, as a practical matter, abandoned enforcement because enforcing a prohibition on supplanting funds was too speculative and required detailed tracking of spending).

[236] Ladd & Fiske, *supra* note 233.

[237] *See, e.g.*, *History*, HARLEM CHILDREN'S ZONE, http://www.hcz.org/about-us/history (last visited Dec. 15, 2011) (proclaiming that the purpose of the Harlem Children's Zone is "to offer innovative, efficiently run programs that are aimed at doing nothing less than breaking the cycle of generational poverty for the thousands of children and families it serves"); Halley Potter, *Equity and Diversity: The Next Challenge for Charter Schools*, TAKING NOTE: A CENTURY FOUND. GRP. BLOG (Jan. 31, 2011), http://takingnote.tcf.org/2011/01/equity-and-diversity-the-next-challenge-for-charter-schools.html (describing the goals of charter schools).

[238] *See, e.g.*, Dana Goldstein, *Integration and the 'No Excuses' Charter School Movement*, WASH. POST: EZRA KLEIN'S WONKBLOG (June 2, 2011, 2:49 PM), http://www.washingtonpost.

charter schools.[239] For that matter, neither has funding equalization—as part of the point of charters is to neutralize inequality through efficiency.[240] As a general matter, many charter schools locate themselves in the heart of concentrated poverty and racial isolation and struggle against the overwhelming odds.[241] Those that succeed appear to do so by asking faculty, staff, and students to work harder and longer than anyone else, and to do more with less.[242]

Unfortunately, expecting schools to uniformly and consistently do more with less may be fanciful thinking and begs the question of whether the charter school ethic can be replicated on a large scale. Even amongst the small cohort of existing charters, success is not widespread.[243] At best, a few well-publicized ones are achieving at high levels.[244] A recent study indicates that, notwithstanding sometimes extraordinary efforts, most charter schools are performing the same or worse than public schools.[245] Thus, the charter school model seems more apt to replicate a

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com/blogs/ezra-klein/post/integration-and-the-no-excuses-charter-school-movement/2011/06/02/AGmKLRHH_blog.html (discussing a charter school board member's support of diversity and the diverse Rhode Island charter school Blackstone Valley Prep).

[239] *See* Siegel-Hawley & Frankenberg, *supra* note 206, at 323 ("Charter schools were not developed with specific goals for mitigating ongoing patterns of public school segregation, though some voices in the movement suggested that their ability to transcend school boundary lines might encourage diversity.").

[240] *See, e.g.*, O.C.G.A. § 20-2-2080(a) (2009) (finding that charter schools can provide high-quality education with efficiency).

[241] *See* Frankenberg, Siegel-Hawley & Wang, *supra* note 18, at 4 ("Charter schools . . . tend to be located in urban areas. As a result, charter school enrollment patterns display high levels of minority segregation, trends that are particularly severe for black students.").

[242] *See, e.g.*, *Why Charter Schools?*, N.Y. CITY CHARTER SCH. CTR., http://www.nyccharterschools.org/learn/about-charter-schools/why-charter-schools (last visited Dec. 15, 2011) (asserting that New York charter schools "do more with less"); *supra* note 240.

[243] CENTURY FOUND., CHARTER SCHOOLS THAT WORK: ECONOMICALLY INTEGRATED SCHOOLS WITH TEACHER VOICE 4 (Oct. 2010) ("[C]laims of widespread charter school success do not hold up to scrutiny, and, indeed, the general performance of charter schools nationally has been largely disappointing.").

[244] Recent studies even question the success and inferences to be drawn in the successful charters. *See, e.g.*, *id.* at 4–8.

[245] *Id.*; *see also* RYAN, *supra* note 173, at 221 (finding no real evidence that charter schools produce consistent academic gains); Diane Ravitch, *A New Agenda for School Reform*, WASH. POST, Apr. 2, 2010, at A17 ("Charter schools have been compared to regular public schools on the [NAEP] in 2003, 2005, 2007 and 2009, and have never outperformed them.").

system of winners and losers, with most students simply consigned to low-performing charter schools instead of public schools, than it is to resolve the problems of segregated and unequal educational opportunities. Charter schools, through sheer will, might be able to "save" more students than the current system, but the number will still be proportionally small.

The limited success of charter schools strongly suggests that acknowledging, without attacking, the problems of segregation and inequality is not enough to transform well-intentioned policy into the engine of equality. In fact, nothing in our history supports the notion that poverty and segregation can be resolved by accepting them. The most significant educational gains in our history came when we attacked segregation.[246] This is not to say that charters are per se bad or incapable of integrating or equalizing schools. Rather, what the foregoing implicitly highlights, but policy makers so rarely notice, is that charter schools are, in essence, content-neutral.

Charter schools do not mandate or require that schools do anything in particular.[247] If flexibility is academic policy, then charter schools are in that respect policy; but beyond that, they are merely a vehicle for other open-ended policies. Charter schools could be used to integrate schools just as easily as they could be used to segregate them or make them more unequal. Likewise, they can be—and are—used to offer longer school days, longer school years, and stronger curricula. But they can also offer poor curricula, staffs, or faculties. Worst of all, charter schools can be used to intentionally subvert good policies. For instance, now that North Carolina has capitulated to federal incentives for more charter schools, one of the greatest fears is that white and middle-income parents who do not want to be subject to voluntary desegregation plans will simply open their own racially isolated

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[246] *See generally* Roslyn Arlin Mickelson & Martha Bottia, *Integrated Education and Mathematics Outcomes: A Synthesis of Social Science Research*, 88 N.C. L. REV. 993, 1026–42 (2010) (synthesizing the literature on the academic gains of integration and finding that "[o]f the fifty-nine studies, forty-four reported statistically significant effects of racial composition on outcomes").

[247] *See* Siegel-Hawley & Frankenberg, *supra* note 206, at 323 ("[Charter schools] are not subject to traditional regulations.").

charter schools.[248] In short, charter schools are a faceless vehicle, not a panacea or prescription. It is possible that they could be part of the solution in a new era of educational civil rights,[249] but they will not be an independent solution unless they respond more directly to the underlying structural problems that inspire their existence.

V. CONCLUSION

The final pages of educational civil rights are far from written. At this point, some fail to recognize that there are pages, not just *one* page, to be written. And some fail to imagine that those final pages will mark progress. Progress, of course, will not come without a realistic strategy for achieving it and an unrelenting commitment to it. But progress is more surely doomed by disbelief than it is by less than perfect plans. As Professors Phillip Klinkner and Rogers Smith emphasized in their comprehensive analysis of the historical evolution of racial equity in the United States, "[i]n the end, our . . . fate is something that we have significant powers to choose and determine."[250] In this respect, the immediate task for the future of educational civil rights is simply to recognize that we stand at the brink of a new era and must develop its theoretical and emotional catalysts. Unfortunately, those catalysts are unlikely to be found in current policy and advocacy.

The challenge that all current reform policies seem ill-equipped to overcome is appreciating and responding to historical context without falling victim to it. As much as one might like to start afresh, it is both too easy and too simple to conclude that the rights revolution of the past half century was a failure and, thus, justifies an entirely new path. In particular, the articulated rights

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[248] A recent study revealed this may have already been occurring on a smaller scale prior to the lifting of the cap. Robert Bifulco & Helen F. Ladd, *School Choice, Racial Segregation, and Test-Score Gaps: Evidence from North Carolina's Charter School Program*, 26 J. POL'Y ANALYSIS & MGMT. 31, 34, 39–40 (2006).

[249] *See* CENTURY FOUND., *supra* note 243, at 12 ("[I]t seems quite possible to reinvent charter schools . . . ."); RYAN, *supra* note 173, at 288–90 (discussing how charter schools and choice plans could be tools for integration).

[250] KLINKNER & SMITH, *supra* note 17, at 9.

of integration and equality were never implemented without abandon.[251] Courts, legislatures, and local authorities grew despondent far too quickly and lost their nerve to stay the course.[252] Knowing whether these movements could have achieved their ultimate goals is impossible. But we do know that the rights revolution made real gains. Desegregation improved the academic achievement of minority students in elementary and secondary schools and drastically expanded higher education opportunities.[253] Special education laws created an entirely new reality in which public schools now enroll and provide some form of individualized services to special needs students who would otherwise be denied opportunity altogether.[254] The Equal Educational Opportunities Act of 1974 brought an end to the unadulterated neglect of language minorities and resulted in language programs that are now consistently available for students who do not speak and read English fluently.[255] And since the mid-1960s, Title I of the Elementary and Secondary Education Act has delivered supplemental funding each year to schools serving disadvantaged students.[256] These gains make denying and underestimating the impact of the modern rights movement a mistake. Yet, harping on these gains as a basis for doing more of the same is a mistake as well. As a matter of perspective, policy makers and the public have largely lost their taste for integration and substantially increasing funding.[257] Once written, flawed

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[251] *See* RYAN, *supra* note 173, at 60 (noting lack of will to change the situation).

[252] *See id.* (indicating that post-*Brown* courts were merely acquiescing to middle-class whites' desires).

[253] *See* LLOYD, TIENDA & ZAJACOVA, *supra* note 24, at 2–3 (finding a doubling of the minority enrollment across public education over the past fifty years).

[254] *See, e.g.*, McKinney–Vento Homeless Education Assistance Improvements Act of 2001, 42 U.S.C. §§ 11431–11432 (2006).

[255] *See* U.S. DEP'T OF EDUC., THE BIENNIAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE TITLE III STATE FORMULA GRANT PROGRAM: SCHOOL YEARS 2004–06, at vii (2008) (indicating that in recent years "[c]lose to 85 percent of identified LEP students are participating in Title III-funded programs").

[256] *See, e.g.*, 20 U.S.C. § 6333 (2006) (providing Title I funding for schools serving economically disadvantaged students based on states' per-pupil expenditures); § 6334 (guaranteeing small states a fixed amount of Title I funds regardless of need); § 6335(c)(1)(B) (providing Title I funds based on poverty concentration levels); § 6335(c)(1)(C) (weighting Title I funds based on the total number of children in a school district).

[257] *Cf.* Rebell, *supra* note 68 (noting reduced education spending due to budget cuts).

views of history tend to be unflappable in the public domain. And attempting to rewind the clock is a waste of time.

Nonetheless, the fact remains that we are not operating on a blank slate. Efforts that abandon the frameworks and previously hard-earned gains for something entirely new will flounder against structural barriers, sometimes without even recognizing it. Segregation and resource inequality are simply too fundamental to educational outcomes to ignore or underplay. The crucial question not yet addressed by this Essay, however, is what potential policy might actually respond to segregation and inequality and appear reasonable in light of modern realities. The goal of this Essay was to diagnose the problem rather than prescribe the remedy. If the diagnosis is correct, serious analysis of the remedy it demands is worthy of its own symposium. But rather than conveniently end on that note, I would emphasize that nascent ideas consistent with this thesis are already circulating. Leading scholars and advocates have hypothesized how charter schools and other school choice mechanisms could achieve integration in contexts that previously would have been impossible,[258] how diversity and other forms of racial equity could be incorporated into the basic fabric of state constitutional rights to education,[259] how federal funding formulas could incentivize both funding equality and socio-economic integration,[260] how current federal statutes could

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[258] *See* RYAN, *supra* note 173, at 287–90 (proposing fixes with charters and vouchers); James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L.J. 1287, 1311 (2005) (discussing the equity-oriented voucher system of the Johnson Administration); Goodwin Liu & William L. Taylor, *School Choice To Achieve Desegregation*, 74 FORDHAM L. REV. 791, 795 (2006) (noting that NCLB's transfer provision may aid desegregation).

[259] Molly S. McUsic, *The Future of* Brown v. Board of Education*: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1359–65 (2004) (noting that "theories of unequal or inadequate schools could . . . just as readily justify a remedy of an altered school structure that would more completely improve the education of the plaintiff children" and proposing that plaintiffs "bypass the usual focus on reallocating money in favor of presenting evidence that economic integration was needed to guarantee that the education of students in plaintiff districts met the state constitutional standard").

[260] *See* Black, *supra* note 181, at 370–71 ("To encourage poverty deconcentration at the school level, Title I [funding formulas should account for] the poverty concentration between schools within a school district, applying the same principles that it does at the district level. Title I should provide incentives for districts that deconcentrate poor students among their schools and penalize those districts that take actions to concentrate poor students in particular schools."); *see also* NAT'L COAL. ON SCH. DIVERSITY, ISSUE BRIEF 1: KEY

incorporate affirmative rights of educational opportunities rather than just prohibitions on intentional discrimination,[261] and how we might build the movement to amend the Constitution.[262] None of these ideas have yet gained traction and maybe none should. Yet, "because . . . Americans *can* and *should* choose to commit themselves anew to overcoming our deepest and most enduring national [failures], not because . . . they *cannot* or *will not* do so,"[263] there is ever the more reason to continue and redouble our reform efforts. And given the history of educational civil rights, it is safe to say that the vindication of efforts of this sort will be part of the future, not just our past, if we can find the resolve to believe.

PRINCIPLES FOR ESEA REAUTHORIZATION 2 (2011), *available at* http://www.prrac.org/pdf/DiversityIssueBriefNo1.pdf (positing benefits of Title I funds for underperforming schools).

[261] *See* LAWYER COMM. FOR CIVIL RIGHTS UNDER LAW ET AL., FRAMEWORK FOR PROVIDING ALL STUDENTS AN OPPORTUNITY TO LEARN THROUGH REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 2 (2010) (urging federal policy to treat the "opportunity to learn as a civil right" and defining that opportunity to include "early education for all students in all states; policies that will provide access to highly effective teachers for all students . . . ; and community schools that offer wraparound services and strong, engaging instruction with adequate supports.").

[262] *See* Liu, *supra* note 86, at 334–35 (concluding, based on historical analysis, that a minimum level of education is a right of national citizenship and that Congress is obligated to enforce it); Jeannie Oakes et al., *Grassroots Organizing, Social Movements, and the Right to High-Quality Education*, 4 STAN. J. C.R. & C.L. 339, 355–57 (2008) (proposing that a social movement is needed to secure a fundamental right to a high-quality education).

[263] KLINKNER & SMITH, *supra* note 17, at 9 (emphasis added).