# Desegregation Aff

### 1ac Desegregation Advantage

#### U.S. schools still face rampant segregation --- reviving federal intervention is critical to reverse the trend

Scott, 16 --- Ranking Member on the Committee on Education and the Workforce in the US House of Representatives (5/19/16, Bobby, “America's schools are still segregated by race and class. That has to end,” <https://www.theguardian.com/commentisfree/2016/may/19/america-schools-segregation-race-class-education-policy-bobby-scott>, accessed on 5/8/17, JMP)

This week marks the 62nd anniversary of the landmark supreme court ruling in Brown v Board of Education, which concluded that “separate educational facilities are inherently unequal”, and compelled states to provide for educational opportunity that is “available to all on equal terms”.

Thanks in large part to federal intervention in the decades following Brown, students experienced indisputable academic and social benefits inherent to racially and socioeconomically diverse learning environments. A recent report by the Century Foundation affirms that learning in diverse environments improves critical thinking and problem solving. But as time marched on, deliberate government action and meaningful federal oversight fell by the wayside in many communities.

Two years ago, on the occasion of the 60th anniversary of Brown, I joined two of my colleagues in formally asking the Government Accountability Office (GAO) to examine racial and socioeconomic isolation in K-12 public schools and the resulting impact on educational equity. I did this because research consistently shows that our nation’s public schools remain segregated by both race and class, producing inequitable access to educational opportunity that has robbed our nation’s most vulnerable students of learning gains and later life success. In the face of many skeptics who denied that segregation was occurring, we asked the GAO to confirm what researchers claimed.

The report resulting from this inquiry is staggering. The GAO has confirmed that our nation’s schools are, in fact, largely segregated by race and class. What’s more troubling in their findings is that segregation in public K-12 schools is not getting better, but it is rapidly getting worse. The report shows that more than 20 million students of color now attend racially and socioeconomically isolated public schools. That is up from under 14 million students in 2001.

The GAO also confirms that high-poverty, high-minority schools are under-resourced and over-disciplined. Students attending these schools are less likely to have access to advance coursework and more likely to be suspended or expelled. The GAO found that our nation’s public schools are separate, and they are unequal.

If our nation is going to close persistent achievement gaps and prepare all students for success in a 21st-century economy, we must seriously address racial and socioeconomic integration at every level in our public schools.

Our children cannot afford for us to sit idly by in the face of these facts. This report is a call to action, and we urge our colleagues – Democrats and Republicans – to heed that call.

December marked enactment of the Every Student Succeeds Act (ESSA), an overhaul of our nation’s K-12 policy and the replacement of the No Child Left Behind Act (NCLB). Working across the aisle, we successfully enacted a new K-12 law that both affords more flexibility to states and school districts and upholds the civil rights legacy of the Elementary and Secondary Education Act of 1965. The ESSA maintains strong federal protections for disadvantaged students.

As states and school districts work to implement the new law, Congress, the US Department of Education, and the US Department of Justice must bolster actions to reverse this alarming trend of resegregation in our nation’s public schools. And the federal government must respond when and where segregation and resulting racial disparities in education persists. The ESSA presents an opportunity to reinvigorate a national effort to integrate public K-12 education and advance opportunity for every child.

That’s why I have introduced HR 5260, the Equity and Inclusion Enforcement Act with my friend Representative John Conyers of Michigan to empower parents and communities to address – through robust enforcement – racial inequities in public education. This bill would amend Title VI of the Civil Rights Act of 1964, which bars any entity that receives federal dollars from discriminating on the basis of race, color, or national origin, by restoring the individual right of action in cases involving disparate impact.

The bill would also create an assistant secretary of education to proactively monitor and enforce compliance with Title VI, and support newly required school district Title VI monitors. I have also asked my Republican colleague, the education and the workforce committee chairman, John Kline, to convene a series of hearings on the GAO’s findings.

Despite congressional gridlock, Republicans and Democrats have worked together to tackle some big problems. We’ve replaced No Child Left Behind, updated workforce development laws and are currently tackling the nation’s opioid epidemic. We must also work together to eliminate the vestiges of the pre-Brown era of public education that remain to this day.

#### Segregation is decimating minority students opportunity to receive a quality education

Hertz, 14 --- masters student in public policy at the University of Chicago, has written about urban affairs for several publications, including Citylab (7/24/14, Daniel, “You’ve probably never heard of one of the worst Supreme Court decisions; But we're still dealing with its awful legacy,” <https://www.washingtonpost.com/posteverything/wp/2014/07/24/youve-probably-never-heard-of-one-of-the-worst-supreme-court-decisions/?utm_term=.8f851ada1429>, accessed on 5/14/17, JMP)

Forty years ago this month, the Supreme Court released one of its most villainous, yet under-appreciated, decisions. Its legacy hangs over nearly every major school system in the country, but its name means nothing to most people.

Milliken v. Bradley began in 1970, when the NAACP sued the state of Michigan to desegregate Detroit’s schools. In particular, they wanted a solution that would involve both the city and the suburbs since, by that point, the vast majority of Detroit’s residents were black, and meaningful de-segregation within city limits had become almost impossible.

After hours of testimony on redlining, exclusionary zoning, police-sanctioned violence, and other sordid tales of American housing discrimination, the federal judge on the case, Stephen Roth, agreed with the plaintiffs that government “at all levels” bore responsibility for residential segregation. As a result, Roth concluded, the government could not legitimately enforce the school boundaries that residential segregation was designed to exploit.

If the school districts’ boundary lines were drawn today, he wrote, they would be struck down as unconstitutional.

Roth’s proposal, instead of redrawing the Detroit area’s school districts, was simply to make them irrelevant: he ruled that some black students from Detroit would have to enroll in schools out in the suburbs, and lots of white kids in the suburbs would have to enroll in schools in Detroit.

The plan was not without its problems. But it was the first time a judge had recognized the crucial role city-suburb borders played in maintaining segregated schools, and ordered a major metropolitan area to do something about it.

Unfortunately, in July 1974, the Supreme Court voted 5-4 to overturn Roth. The majority found no evidence that governments had encouraged segregation in the Detroit metro area – despite, for example, the fact that the mayor of suburban Dearborn had been quoted just a few years before in the New York Times saying, “I favor segregation.” Before that, he told a newspaper: “Every time we hear of a Negro moving…in, we respond quicker than you do to a fire.”

Among Dearborn’s 90,000 residents, there were fewer than 100 black people.

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In other realms, Roth’s logic – that political boundaries must be subservient to larger questions of justice, including segregation – is taken for granted. Think, for example, about Congressional districts. To start with, they’re redrawn every ten years to adjust to shifting populations. Not only that, but there are lots of rules designed to make sure the new districts aren’t unfair in ways that violate anyone’s civil rights. If they are, they can be thrown out by a judge, and ordered to be redrawn.

We go through all of this because we understand that unfair Congressional districts can be devastating for minority communities, denying them political power and, along with it, the ability to fight for policies that improve their lives.

School districts, of course, play just as large a role in determining their residents’ life chances, but share basically none of these rules. In general, school districts don’t have to be redrawn at any regular interval, and many haven’t changed for decades, if not generations.

No one is reviewing the districts that already exist, to make sure that they’ve been drawn in ways that don’t unfairly disadvantage anyone. And they’re certainly not throwing out school districts, and ordering them to be redrawn to, say, reduce segregation.

In fact, more recently the Supreme Court has voted to curtail attempts to desegregate even within school districts, to the extent it’s possible.

Predictably, the result of all this is that many American school districts are moving towards pre-Civil Rights Movement levels of racial separation. In the last few years, reports from ProPublica and UCLA’s Civil Rights Project, among others, have found that school segregation has been getting worse for decades.

Sometimes, we’re tempted to justify our separate schools by arguing that they’re equal. Or, more accurately, that they could be equal: we tell the stories of racially and economically segregated schools that have “beaten the odds” by performing as well academically as their wealthier, more integrated peers. But entire school districts shouldn’t have to “beat the odds” to get a decent education. Moreover, as the phrase implies, the vast majority don’t. In his book Fives Miles Away, A World Apart, law professor James Ryan cites a study that found that high-poverty, high-minority schools have a one-in-300 chance of being “high-performing,” or scoring in the top third of schools on at least two subjects in two grades over two years. Mostly white, middle-class schools have a one-in-four shot.

Nor is more money enough, even where it’s needed. Studies have shown that low-income students learn more in economically integrated schools than they do in mostly poor ones – even when the poor schools have more funding.

Piercing school district borders – the walls that prevent enrollment or, in many cases, funds from being spread more evenly between white or relatively more affluent districts and ones populated by black, brown, or poorer families nearby – isn’t a simple task, politically or logistically.

But the five justices who wrote Milliken 40 years ago wanted us to believe something else: that it wasn’t a necessary task, morally.

They were wrong.

#### These problems will become more entrenched under Trump --- the DOE’s Office of Civil Rights will be restricted and greater “school choice” will fuel more segregation and strengthen the school-to-prison pipeline

Quinlan, 3/1/17 --- education reporter at ThinkProgress, CUNY Graduate School of Journalism (Casey, “Trump won’t protect students’ civil rights; Trump says he wants to help disadvantaged students, but his administration’s actions will do the opposite,” <https://thinkprogress.org/trump-calls-education-a-civil-rights-issue-after-endangering-the-education-department-s-civil-ed904adf27b3>, accessed on 5/8/17, JMP)

In his first speech before a joint session of Congress, President Donald Trump called education “the civil rights issue of our time,” even as his actions threaten to significantly weaken the U.S. Department of Education’s Office for Civil Rights.

Education Secretary Betsy DeVos’ statements over the past couple weeks call into question whether she will prioritize civil rights issues at the department — and the Trump administration’s reported choices to lead the Office for Civil Rights suggest its enforcement may be significantly weakened.

The office handles complaints about the violations of rights of students with disabilities, Title IX violations (including those related to women’s access to sports and campus rape investigations), and racially disparate student discipline.

In an interview earlier this month with Axios, DeVos was asked whether, in an ideal world, the federal government would have a role in education. She said she hadn’t reached a conclusion, and that although there was a “time when, you know, girls weren’t allowed to have the same kind of sports teams,” and “we had segregated schools,” she couldn’t think of other remaining issues where the federal government should intervene.

“I can’t think of any now,” DeVos said.

DeVos has also promised to audit the Education Department and told a Michigan radio show host earlier this month she guarantees “there are things the department has been doing that are probably not necessary or important for a federal agency to do.”

Civil rights groups are concerned about who the Trump administration would pick to lead the Office for Civil Rights. This week, more than 60 civil rights groups signed a letter to DeVos urging her to pick an OCR head who will do the following: collect and report data that shows where students don’t have access to equal opportunity in education; investigate system discrimination; and ensure justice for students who report discrimination through complaints to the office.

DeVos pledged that the office would keep investigating claims of discrimination against LGBTQ students, but that statement may ring hollow given that the Trump administration moved to roll back protections for transgender students last week. Although education secretaries have historically had a role to play in choosing the head of the OCR, it falls on Trump’s shoulders to make the pick.

And one of the people being considered to lead the OCR — University of San Diego law professor Gail Heriot — has a track record of criticizing the office’s approach to Title IX violations related to campus sexual assault, as well as its guidance on transgender students’ rights.

In an interview with The Washington Post, Derek Black, a law professor at the University of South Carolina School of Law, said of Heriot, “With these individuals in place, it is hard to imagine much good happening at the federal level. Even if they do not rescind other department positions on integration, school discipline, English language learners, and school resources, they are very unlikely to enforce existing regulations and policy guidance.”

In addition to concerns that the OCR will be weakened, Trump’s interest in expanding private school vouchers could create exacerbate civil rights violations. Trump said in his address before Congress:

I am calling upon Members of both parties to pass an education bill that funds school choice for disadvantaged youth, including millions of African-American and Latino children. These families should be free to choose the public, private, charter, magnet, religious or home school that is right for them.

But there isn’t evidence to show that vouchers actually improve the quality of education students receive or boost student achievement. Recent research shows that in many cases, vouchers hurt student learning.

Vouchers can also increase racial and economic school segregation. Many years of research have shown that choice programs tend to benefit advantaged students the most. In schools where the population is predominantly African American, black students are suspended at higher rates. And harsh student discipline against students of color fuels the school-to-prison pipeline, and reduces opportunities for the disadvantaged youth Trump refers to.

#### As a guiding principle, Trump and Devos are infatuated with “local control” that empirically fuels segregation --- only reigning them in can promote school equality

Needham, 5/10/17 --- adjunct law professor and attorney who has worked in the areas of First Amendment, education, and labor law (Lisa, “The Future Looks Grim for School Desegregation, as a Recent Alabama Case Shows,” <https://rewire.news/article/2017/05/10/future-looks-grim-school-desegregation-recent-alabama-case-shows/>, accessed on 6/13/17, JMP)

In 1965, 11 years after the U.S. Supreme Court’s landmark Brown v. Board of Education decision, Blevins Stout, a Black resident of Jefferson County, Alabama, filed a lawsuit seeking to enroll his daughter, Linda, in the all-white county school district. In doing so, Stout hoped to desegregate the county school system. Jefferson County has been under a desegregation court order ever since.

In the last five decades, desegregation efforts in the country have proceeded in fits and starts, with school systems dissolved, transfer plans rejected, and schools forcibly merged after districts refused to begin busing. Desegregation court orders vary in scope. In Jefferson County, the district initially had a good deal of discretion as to how to meet desegregation goals. However, it initially chose plans such as “freedom of choice,” in which Black students had to request transfers to predominantly white schools. Later courts disapproved of this sort of plan precisely because it shifted the burden to Black students.

Last month, the most recent battle in this long, long war of a case came to an end: An Alabama federal district court judge ruled that a mostly white suburb called Gardendale can partially separate from the surrounding Jefferson County schools and create its own school system, even though its desire to do so is motivated by racism.

Gardendale is a mostly white suburb that abuts mostly Black Birmingham, Alabama, both of which are in Jefferson County. It’s also much more affluent than Birmingham. Thanks to a quirk of Alabama law, it is totally permissible for individual municipalities to break off from county-level control and form their own school districts. Predominantly white towns in Jefferson County have tried to do so repeatedly, and sometimes they have succeeded.

Gardendale has been contemplating separation from the Jefferson County schools for decades, but the effort began in earnest back in 2012. Organizers of the effort explained their motivation for wanting to leave in vague terms like “general improvements in education” and “historically in many areas, including Alabama, a smaller system with individual local control … tend[s] to perform better academically than larger systems.” (Judge Madeline Haikala’s 190-page decision notes this is demonstrably not true, as different Alabama municipal systems consistently rank at both the top and the bottom, achievement-wise, regardless of their size.)

Other explanations from the organizers and other backers of the plan, however, engaged in exactly the sort of coded racism that pervades opposition to integrated schools. The court decision notes that parents complained of students being bused in from all over and invoked the specter of Gardendale becoming another Pinson or Huffman—nearby, predominantly Black towns. It also cites the fact that a flyer was circulated with a picture of a white student and the slogan “What path will Gardendale choose?” The flyer listed cities in Jefferson County that have integrated or those with mostly Black populations in order to invoke a contrast with predominantly white Gardendale.

The desire to separate also seemed motivated by greed. The judge pointed out that Jefferson County had recently built a $55 million dollar high school in Gardendale, and Gardendale believed that if it separated, it could take the high school with it for free.

The court found that Gardendale’s separation would indeed make Gardendale’s schools whiter. It also found that the City was motivated by “a desire to control the racial demographics of the four public schools in the City of Gardendale,” and to avoid enrolling the Black students that are currently being bused to Gardendale pursuant to the desegregation order.

And yet, the judge partially approved Gardendale’s desire to break off from the Jefferson County schools: The City now has the right to run some elementary schools at the municipal level, though the high school will remain part of Jefferson County schools.

In her ruling, the judge seemed to fall victim to the notion that many parents of Gardendale students may not be motivated by racism at all, but instead by a desire for their children to attend the best schools:

Each of the parties in this case—the parents who serve as the private plaintiffs, the United States, the Jefferson County Board of Education, and the Gardendale Board of Education—is trying to secure the best public education for the students whom the party serves.

The problem with this framing is that it implicitly agrees with the idea that wanting your children to be surrounded only by children that look like them is somehow the same as wanting to secure them a good education. In reality, this isn’t the case. Children who attend integrated schools, regardless of race, have higher average test scores, are more likely to enroll in college, and are less likely to drop out. Integrated schools also significantly decrease the achievement gap between white students and students of color.

The judge was also limited by U.S. Supreme Court jurisprudence: Over the years, the Court has prioritized “local control,” maintaining that letting smaller political subdivisions like municipalities control the education system is inherently better than letting county or federal-level officials do so. But “local control,” when applied, has often been synonymous with Southern states trying to get school systems out from under desegregation orders.

Though the judge seemed sincerely troubled by the racism that underpinned this entire effort and equally sincerely motivated to do the right thing, the decision has profound implications in the Trump era. First, there’s the depressing reality that we no longer have a U.S. Department of Justice (DOJ) that will fight for desegregation. In fact, the DOJ, under Obama, had opposed the Gardendale breakaway effort, but declined to even comment on this recent decision. Next, Trump has already issued an executive order strengthening local control and promising to stop the federal government from “imposing its will” on state and local governments. His secretary of education, Betsy DeVos, echoes this, saying “when it comes to education, decisions made at local levels and at state levels are the best ones.” This is, of course, nonsense, as decisions made at local levels are exactly what led to persistent and vicious racism-fueled segregation.

Over the past 60 years, litigation has been a critical tool in the fight against segregation, as has federal imposition of desegregation orders. With a Supreme Court that likely will look askance at litigation efforts—Chief Justice John Roberts already gutted the Voting Rights Act because he doesn’t believe discrimination is pervasive any longer—and an executive branch that won’t exert authority over schools who discriminate, the future looks grim for desegregation.

#### Making exceptions to desegregation, whether in the name of “educational quality” or “school choice” just lets racism win --- the constitution demands that public institutions comply with the law

Black, 6/6/17 --- Professor of Law, University of South Carolina (Derek, “Education in America Has Deep Flaws—and That's Why Racial Segregation Is on the Rise,”

https://theconversation.com/why-schools-still-cant-put-segregation-behind-them-78575, accessed on 6/13/17, JMP)

A federal district court judge has decided that Gardendale – a predominantly white city in the suburbs of Birmingham, Alabama – can move forward in its effort to secede from the school district that serves the larger county. The district Gardendale is leaving is 48 percent black and 44 percent white. The new district would be almost all white.

The idea that a judge could allow this is unfathomable to most, but the case demonstrates in the most stark terms that school segregation is still with us. While racial segregation in U.S. schools plummeted between the late 1960s and 1980, it has steadily increased ever since – to the the point that schools are about as segregated today as they were 50 years ago.

As a former school desegregation lawyer and now a scholar of educational inequality and law, I have both witnessed and researched an odd shift to a new kind of segregation that somehow seems socially acceptable. So long as it operates with some semblance of furthering educational quality or school choice, even a federal district court is willing to sanction it.

While proponents of the secession claim they just want the best education for their children and opponents decry the secession as old-school racism, the truth is more complex: Race, education and school quality are inextricably intertwined.

Rationalizing Gardendale’s segregation

In some respects, Gardendale is no different from many other communities.

Thirty-seven percent of our public schools are basically one-race schools – nearly all white or all minority. In New York, two out of three black students attend a school that is 90 to 100 percent minority.

In many areas, this racial isolation has occurred gradually over time, and is often written off as the result of demographic shifts and private preferences that are beyond a school district’s control.

The Gardendale parents argued their motivations were not about race at all, but just ensuring their kids had access to good schools. The evidence pointed in the other direction: In language rarely offered by modern courts, the judge found, at the heart of the secession, “a desire to control the racial demographics of [its] public schools” by “eliminat[ing]… black students [from] Gardendale schools.”

Still, these findings were not enough to stop the secession. As in many other cases over the past two decades, the judge conceded to resegregation, speculating that if she stopped the move, innocent parties would suffer: Black students who stayed in Gardendale would be made to feel unwelcome and those legitimately seeking educational improvements would be stymied.

Simply put, the judge could not find an upside to blocking secessionists whom she herself characterized as racially motivated.

As such, the court held that Gardendale’s secession could move forward. Two of its elementary schools can secede now, while the remaining elementary and upper-level schools must do so gradually.

The problem with conceding to segregation

Unfortunately, there’s no middle ground in segregation cases. No matter what spin a court puts on it, allowing secessions like Gardendale’s hands racism a win.

While it’s true that stopping the secession may come with a cost to members of that community who have done nothing wrong, our Constitution demands that public institutions comply with the law. That is the price of living in a democracy that prizes principles over outcomes.

In this case, the constitutional principles are clear. In Brown v. Board of Education, the Supreme Court held that there is no such thing as separate but equal schools: Segregated schools are “inherently unequal.”

Rather than stick to these principles, the judge in the Gardendale case seemingly tried to strike a bargain with segregation. As long as Gardendale appoints “at least one African-American resident” to its school board and does not do anything overtly racist moving forward, the court will allow the city to pursue its own agenda.

The sordid roots of school quality – and inequality

The ruling in Gardendale is a step toward reinforcing an unfortunate status quo in Alabama.

Alabama is one of a handful of states that amended its state constitution in an attempt to avoid desegregation in the 1950s. The amendment gave parents the right to avoid sending their kids to integrated schools and made clear that the state was no longer obligated to fund public education. Alabama preferred an underfunded and optional educational system to an integrated one. Courts quickly struck down the discriminatory parts of the new constitution, but the poor state education system remained.

Today, student achievement in Alabama ranks dead last – or near it – on every measure. Most communities don’t have the resources to do anything about it. Funding is relatively low – and unequal from district to district. Even after adjusting for variations in regional costs, a recent study shows that the overwhelming majority of schools in Alabama are funded at ten percent or more below the national average and another substantial chunk is thirty-three percent or more below the national average.

Parents trapped in under-resourced schools understandably feel like they need to take action. But rather than demanding an effective and well-supported statewide system of public schools, parents with the means often feel compelled to isolate their children from the larger system that surrounds them.

And while whites and blacks struggle over the future of Gardendale’s schools, the real culprits – the current state legislature and the segregationists who gutted public education in Alabama decades ago – go unchallenged.

The path forward leads through equal public education

The education system in Alabama, like in so many other states, is rigged against a large percentage of families and communities: Those with less money tend to get a worse education. Until these states reform their overall education funding systems, the inequalities and inadequacies that they produce will continue to fuel current racial motivations.

The lawsuit in Gardendale was a poor vehicle for fixing Alabama’s education system: The state’s overall education system was not on trial. The only issue before the court was a racially motivated district line in one small community.

But our small communities are connected to larger education systems.

In my view, we cannot fix those systems by way of more individual choice, charters, vouchers or school district secessions. The fact is, educational funding is down across the board, when compared to a decade ago. If we want all students to have a decent shot at better education, we need to recommit to statewide systems of public education. Only then will our base fears and racial biases begin to fade into the background.

#### Challenging institutional racism is a prior ethical question— it makes violence structurally inevitable and foundationally negates morality making defenses of utilitarianism incoherent

Memmi, 2k --- Professor Emeritus of Sociology @ U of Paris, Naiteire (Albert, Racism, Translated by Steve Martinot, p. 163-165)

The struggle against racism will be long, difficult, without intermission, without remission, probably never achieved. Yet, for this very reason, it is a struggle to be undertaken without surcease and without concessions. One cannot be indulgent toward racism; one must not even let the monster in the house, especially not in a mask. To give it merely a foothold means to augment the bestial part in us and in other people, which is to diminish what is human. To accept the racist universe to the slightest degree is to endorse fear, injustice, and violence. It is to accept the persistence of the dark history in which we still largely live. it is to agree that the outsider will always be a possible victim (and which man is not himself an outsider relative to someone else?. Racism illustrates, in sum, the inevitable negativity of the condition of the dominated that is, it illuminates in a certain sense the entire human condition. The anti-racist struggle, difficult though it is, and always in question, is nevertheless one of the prologues to the ultimate passage from animosity to humanity. In that sense, we cannot fail to rise to the racist challenge. However, it remains true that one’s moral conduit only emerges from a choice: one has to want it. It is a choice among other choices, and always debatable in its foundations and its consequences. Let us say, broadly speaking, that the choice to conduct oneself morally is the condition for the establishment of a human order, for which racism is the very negation. This is almost a redundancy. One cannot found a moral order, let alone a legislative order, on racism, because racism signifies the exclusion of the other, and his or her subjection to violence and domination. From an ethical point of view, if one can deploy a little religious language, racism is ‘the truly capital sin. It is not an accident that almost all of humanity’s spiritual traditions counsels respect for the weak, for orphans, widows, or strangers. It is not just a question of theoretical morality and disinterested commandments. Such unanimity in the safeguarding of the other suggests the real utility of such sentiments. All things considered, we have an interest in banishing injustice, because injustice engenders violence and death. Of course, this is debatable. There are those who think that if one is strong enough, the assault on and oppression of others is permissible. Bur no one is ever sure of remaining the strongest. One day, perhaps, the roles will be reversed. All unjust society contains within itself the seeds of its own death. It is probably smarter to treat others with respect so that they treat you with respect. “Recall.” says the Bible, “that you were once a stranger in Egypt,” which means both that you ought to respect the stranger because you were a stranger yourself and that you risk becoming one again someday. It is an ethical and a practical appeal—indeed, it is a contract, however implicit it might be. In short, the refusal of racism is the condition for all theoretical and practical morality because, in the end, the ethical choice commands the political choice, a just society must be a society accepted by all. If this contractual principle is not accepted, then only conflict, violence, and destruction will be our lot. If it is accepted, we can hope someday to live in peace. True, it is a wager, but the stakes are irresistible.

#### U.S. legal changes are modeled by other countries --- civil rights protections in education are critical to overall equality --- they help sustain social movements

Willie, 14 --- professor emeritus at the Harvard Ed School, served as a consultant, expert witness, and court-appointed master in major school desegregation cases in cities such as Boston, Hartford, Dallas, Denver, Houston, Kansas City, Little Rock, Milwaukee, San Jose, Seattle, and St. Louis (6/4/14, Charlies, “Brown at 60 and Milliken at 40,” <https://www.gse.harvard.edu/news/ed/14/06/brown-60-milliken-40>, accessed on 5/14/17, JMP)

Michelle Obama has reminded us to remember this: "Movements for real and lasting change are sustained by the relationships we build with one or others." The idea suggests that real success is based on a mutually collective relationship or a community. The quotation from our first lady reminds me of a statement made by former Morehouse College president Benjamin Mays, who told me and the other undergraduates, including Martin Luther King Jr., in the class of 1948 that "No [one] is wise enough or strong enough to go it alone." Brown v. Board of Education of 1954 and the Civil Rights Act of 1964 gave us the help we needed to stay on the right road to a nation-state of the people by the people and for the people that was created to establish justice, insure domestic tranquility, and promote general welfare. Also, our Declaration of Independence adopted in 1776 declared that "all are created equal."

We know that the United States has not always lived up to the democratic principles of community life. However, it is never too late to do the right thing. Sixty years after the Supreme Court Brown opinion and 50 years after the United States Congress law that required justice for all in public institutions is a good time to assess the effects of these historical events. We know that it is right and our bound duty to give thanks for the good that we have experienced with others in public or private relations in public or private spaces.

Many scholars have recognized that Brown was in part based upon the 14th Amendment of the United States Constitution, which declares that "No state shall make or enforce any law which shall abridge the privileges … of citizens … nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." My guess is that sooner or later, this amendment is going to be used against people who kill people in the theaters and streets and elsewhere simply because they do not like how one looks or where one may be going. The Brown v. Board of Education decision was in part based upon this amendment. It has been said that the 14th Amendment strengthened the Supreme Court opinion in Brown. And it could be used against many other contentious issues with reference to race and gender. In our technology society today, the words of the Brown opinion ring again: "Today, education is perhaps the most important function of state and local governments." Brown declared that education "is the very foundation of good citizenship," and I would add so is diversity. Diversity is in the air. Diversity is everywhere because no one is strong enough to go it alone, especially in education and public service. We know that the United States has not always lived up to the democratic principles of community life, including the value of diversity. A very important reason for examining closely the Brown v. Board of Education case is that it quickly addresses the question of whether racially segregated schools are inherently unequal.

Law professor Norman Vieira, in his 1978 book, Civil Rights in a Nutshell, wrote, "In its historical context, state enforced racial separation would almost certainly [have been] by whites who were politically and economically dominant." A famous historian, John Hope Franklin, wrote in his book From Slavery to Freedom, "No public question in the United States in the twentieth century arouses more interest at home and abroad than the debate about the constitutionality of segregated public schools." Franklin further said, "The decision of the court in Brown v. Board of Education, May 17, 1954, was unequivocal in outlawing segregated public schools." Another famous historian, Richard Kluger, also agreed with John Hope Franklin. In 1977, Kluger said, "Scholars have assigned the case known as Brown v. Board of Education … a highpoint in America's willingness to face the consequence of centuries of racial discrimination."

I will close this part of the Brown v. Board of Education story by sharing with you how one country, the Republic of South Africa, has reacted to the Brown case. I will share with you my observations while visiting South Africa to participate as one of the speakers in the conference on Equal Educational Opportunities Comparative Perspective in Education Law: Brown v. Board of Education at 50 years and Education Law at 10 years. Please note that the conference name included the United States and South Africa. Conference leaders said, "The year 2004 marked two momentous occasions: The 50th anniversary of the United States Supreme Court's ruling in Brown v. Board of Education and the first 10 years of democratic government in South Africa." The conference planners further said, "In Brown, the American Supreme Court struck down the notion of separate but equal education, and the dawn of democracy in South Africa was accompanied by legislation guaranteeing equality and the right to equal educational opportunities."

Judge Albie Sachs of the Constitutional Court of South Africa — similar to the U.S. Supreme Court — gave the first public speech on equal educational opportunities and the Constitutional Court. He began his speech with these words: "I, speaking now as a judge, have no hesitation in saying that as far as I am concerned, the greatest legal decision of the 20th century in the world was Brown. It set a marker in terms of creativity, in terms of resonance, in terms of integrity — philosophical and legal integrity — for the whole world. It also included what judges could do. The role and scope of a judiciary in a society that proclaimed itself as one based on fundamental value was demonstrated in it. The justices were saying that there are certain forms of conduct that are just not sustainable, that just cannot be tolerated in a society with pretentions to justice." The whole conference burst into a very loud and long clapping of hands. I, of course, was very happy to hear those remarks from a member of the Constitutional Court in South Africa.

Personally, I realized that what we do in the United States is watched carefully elsewhere. I know this to be true because my wife and I visited the Constitutional Court after the conference that I addressed; we were presented a small book of the Constitution of the Republic of South Africa prepared in 1996 that is similar in some ways to the Constitution of the United States.

#### Desegregation in education serves as bridge to link ongoing racial disparities with historic racial discrimination and challenge white supremacy --- advances equality in prisons, mental health facilities, housing authorities, and police departments

Holley-Walker, 12 --- Associate Professor of Law, University of South Carolina School of Law, J.D. from Harvard (Winter 2012, Danielle, Georgia State University Law Review, “A NEW ERA FOR DESEGREGATION,” 28 Ga. St. U.L. Rev. 423, Lexis-Nexis Academic, JMP)

[\*443] III. WHY WE NEED A NEW ERA OF DESEGREGATION

The goal of Part III is to make the normative case for a new era in traditional desegregation cases. Plaintiffs in pending traditional desegregation cases should re-examine those cases and, where appropriate, argue that the desegregation orders in those cases be enforced. The vigorous enforcement of desegregation orders is desirable in both practical and rhetorical ways. The practical benefits include providing an avenue for additional resources for minority and high-poverty schools, having a direct, race-conscious method of challenging resegregation and racial isolation, and providing an alternative method for equal educational opportunity beyond socioeconomic integration plans and school finance cases. The broader, rhetorical benefits of vigorous desegregation enforcement include the ability for plaintiffs and civil rights advocates to make positive arguments for the benefits of racial integration and highlight ongoing racial disparities in our public schools. The successful conclusion of desegregation cases is also a part of the broader landscape of structural reform litigation. If desegregation litigation is ultimately successful in various school districts, it will provide a valuable blueprint for other struggling structural reform litigation, such as prison reform litigation.

A. The Current Landscape of Education Reform

Desegregation is not a focal point of current public school reform in the United States. Instead, education reform efforts over the last quarter-century have focused on accountability, school choice, and school finance. n118

[\*444] 1. New Accountability

Many scholars trace the current era in education reform back to the 1983 report, A Nation at Risk: The Imperative for Educational Reform. n119 The report was authored by the National Commission on Excellence in Education, a panel formed at the request of then-Secretary of Education, Terrel Bell. n120 The report recommended "stronger high school graduation requirements; higher standards for academic performance and student conduct; more time devoted to instruction and homework; and higher standards for entry into the teaching profession and better salaries for teachers." n121 The findings from A Nation at Risk received significant public attention, and in its aftermath, almost every state formed a task force or a commission to study school reform. n122

By the early 1990s, the results and direction of these reform efforts were becoming clear. States began to focus on adopting performance standards for students, requiring standardized testing to assess whether these goals were being met, reporting the testing outcomes to the public, and implementing consequences for schools and school districts where students did not meet the performance standards. n123 These reforms have become known as "New Accountability." n124 The hallmark of New Accountability is that schools and school districts [\*445] are evaluated on their student educational outcomes, and those outcomes are measured almost exclusively by standardized tests. n125

At present, New Accountability is most closely associated with the 2002 federal education law, No Child Left Behind (NCLB). n126 Under NCLB, states are required to adopt reading and math standards, test students annually to assess the students' progress towards proficiency in math and reading, and finally to hold schools accountable if students are failing to make adequate yearly progress (AYP) towards proficiency. n127 The accountability designations under NCLB include "needs improvement," "corrective action," and "restructuring." n128 These designations call for escalating sanctions, including making supplemental education services available and allowing students to transfer schools. n129 Restructuring is the most drastic of the accountability measures, requiring that schools which fail to make AYP for more than four consecutive years be faced with a series of sanction options including: school closure, firing of teachers and administrators, conversion to a charter school, or any other major restructuring of school governance. n130 As of the 2007-2008 academic year, over 3,500 schools were in restructuring under NCLB. n131

[\*446] The Obama Administration has made accountability a central part of its education policy. Under the American Recovery and Reinvestment Act, the United States Department of Education has passed new regulations that require states to identify their persistently low-performing schools. n132 In the Obama Administration's proposed changes to NCLB, the administration removes the goal of proficiency in reading and math by 2014 but continues to include accountability measures such as allowing "failing" schools to be converted to charter schools. n133

2. School Choice

Another dominant strand in the school reform efforts of the last quarter-century has been school choice. The concept of school choice encompasses a broad number of different policy ideas, including the creation of magnet schools and charter schools, and the availability of school vouchers. n134 School choice "can be defined broadly as educational policies and practices that allow a student to attend a school other than his or her neighborhood school." n135

[\*447] a. Magnet Schools

Many school choice options, such as magnet schools, developed in the late 1960s as a method of promoting racial integration. n136 Magnet schools are schools that typically pick an academic focus, such as math and sciences or the performing arts, to attract students from across a city or even across school district lines. n137 Magnet schools played a key role in desegregation. For many years desegregation resources focused on the funding of magnet school programs. n138 "As reliance on other desegregation strategies has gradually diminished, magnet schools have emerged as the principal means upon which school systems--particularly larger, urban school systems--now rely to advance Brown's vision of equal, integrated public education." n139

Despite this reliance on magnet schools as a desegregation mechanism, the schools' effectiveness in promoting racial integration may be waning due to a lack of funding and other factors. n140 One study by the Department of Education concluded that magnet schools receiving federal grant money have "made only modest progress in reducing minority group isolation." n141

The current activity in pending desegregation cases reflects this increasingly muddled connection between magnet schools and desegregation. There are indications that some plaintiffs in desegregation cases may begin to view magnet schools as an obstacle to increasing racial integration and equality. In Tangipahoa Parish School Board, the plaintiffs opposed the concept of additional schools and magnet schools as the primary response to the school [\*448] district's ongoing constitutional violation. n142 The plaintiffs argued that, "[t]he plan submitted by the defendants is not a desegregation plan but a massive building plan devoid of any meaningful desegregation analysis. The school board's plan is a camouflage that seeks to maintain certain one-race schools into perpetuity." n143 Despite the plaintiffs' opposition, the district court accepted the school board's desegregation plan that relies on the construction of additional elementary schools and the creation of additional magnet programs. n144

Having magnet schools included as part of the desegregation plan does provide an opportunity for court and community oversight to insure that the magnet programs are being implemented with a desegregative purpose. Tangipahoa Parish School Board also provides a blueprint for other plaintiffs in similar desegregation cases to offer concrete alternatives to magnet schools. n145

b. Charter Schools

Charter schools are another example of how school choice and desegregation may collide. n146 Charter schools are publicly funded schools that have greater autonomy as to curriculum, staffing, and school policy. n147 Charter schools are based on the idea that this autonomy will create more opportunity for policy innovation and encourage additional commitment from parents, students, and [\*449] administrators. n148 Charter schools have been hailed as an important alternative to the traditional public school system. Every presidential administration since the early 1990s has made charter schools a central part of federal education policy. n149 States have also championed charter schools, with over forty states and the District of Columbia having a charter school law. n150 Charter schools are also central to the landscape of urban schools, with some urban school districts, such as New Orleans and Baltimore, having a large number of their overall public schools in the charter format. n151

Civil rights organizations continue to voice their concern about the racial isolation that exists in many of our nation's charter schools. n152 In a recent report, the UCLA Civil Rights Project/ProyectoDerechosCiviles concluded that "charter schools are more racially isolated than traditional public schools in virtually every state and large metropolitan area in the nation." n153 The study notes that charter schools have a higher percentage of African-American students than traditional public schools and that 70% of these students attend "intensely segregated minority charter schools (which enroll 90-100% of students from under-represented minority backgrounds)." n154 In ten states, mostly in the West, white students [\*450] make up a higher percentage of the students in charter schools than in the traditional public schools, and these states also have high percentages of nonwhite students. n155 "Charter schools in some of the most diverse states may be as [sic] a less diverse alternative for white students." n156 Just as importantly, the report notes that charter school proponents cite school improvement as the main justification for charter school expansion, but there is little discussion of the impact of charter schools on racial diversity. n157

These concerns about racial isolation in charter schools come at the same time that the federal government continues to promote charter schools as a centerpiece of school reform efforts. n158 For the last several decades, the federal government has promoted the expansion of charter schools. n159 Charter schools have been promoted as having the potential to offer poor students a high-quality alternative to the traditional public school system and to allow teachers and administrators the opportunity to utilize innovative curriculum and school policies. n160 Charter schools have also become a central part of accountability legislation, like NCLB, because charter schools are incorporated as an option for schools that fail to meet yearly standards. n161

One prominent civil rights scholar, John A. Powell, has identified this conflict as a struggle between "integrationists" and "reformists." n162 Integrationists support racial integration either as a means of producing greater educational outcomes or serving broader [\*451] values such as the promotion of tolerance and good citizenship. n163 Reformists also believe in educational equity and outcome improvement, but they advocate school reform without regard to issues of racial or economic disparity. n164

The concern over charter schools and their possible conflict with desegregation goals is being played out in the recent developments in the Little Rock desegregation case. n165 The district claims that charter schools are "draining non-black students and high performing students" from the traditional public schools. n166 The charter school movement has become increasingly identified with privatization, deregulation, and providing alternatives for failing traditional public schools. n167

c. School Vouchers

School voucher programs "provide vouchers that can be used at private schools, including religious schools . . . ." n168 These programs have been implemented in only a few cities and states including Milwaukee, Cleveland, and Florida. n169 Proponents of school vouchers, including some segments of the African-American community, argue that vouchers provide an alternative to failing schools and give parents the opportunity to choose effective schools for their children, similar to wealthy parents. n170 Opponents of school vouchers argue that pouring public money into private schools may drain the public schools of resources, and that public money being [\*452] transferred to parochial schools is a First Amendment concern. n171 Some suburban opponents also fear that vouchers will allow minority and poor children to enter their schools. n172 Due to their limited adoption and use, school vouchers will not likely promote increased racial integration of the public schools and will likely not be seen as a desegregative tool. n173

3. School Finance Reform

Beyond school choice, school finance reform has also been an important strand of recent education reform movements. After the U.S. Supreme Court's 1973 decision in San Antonio Independent School District v. Rodriguez, n174 in which the Court determined that education was not a fundamental right under the Federal Constitution, school reform advocates filed lawsuits under state constitutions to argue for more equality in school funding. n175 In states from New Jersey to South Carolina, these lawsuits have been successful in winning determinations that students have a right to education under the state constitution. n176 The intransient hurdles in [\*453] the state school finance litigations have proven to be crafting effective remedies.

In many states and school districts, school finance litigation was the form of school equity litigation that followed traditional desegregation cases. n177 In the late 1960s and early 1970s, some civil rights advocates believed that traditional desegregation was no longer going to be effective, so they sought out new types of reform litigation. n178 In the most recent wave of school finance litigation, plaintiffs typically argue that a provision in the state constitution guarantees public school education, and that the state's school funding scheme violates that basic state constitutional guarantee. n179 Since 1970, courts in over half the states have found that the state's school funding system does not satisfy the state constitution, under either the equal protection clause or the education clause of the state constitution. n180

Despite the success for plaintiffs in these cases, many school equity advocates have expressed frustration with the ability of school finance cases to create equal educational opportunity. Similar to school desegregation cases, school finance reform cases are subject to politics, especially in the implementation of any remedies to address the state constitutional violations. For example, in the first [\*454] Connecticut school finance case, Horton v. Meskill (Horton I), n181 after the courts found that the state constitution violated the state education clause and state equal protection clause, they left it to the executive and legislative branches to craft a solution. n182 The lawsuit ultimately did not end the disparities in expenditures between "property-poor and property-rich districts." n183 This failure to achieve equalization has been attributed to "weak political will and extensive deal-making." n184 Another barrier to school finance litigation creating equal educational opportunity is the difficulty in crafting and implementing effective remedies. n185

School finance cases are also subject to significant racial politics. n186 James Ryan has said "the evidence offers further proof that one must understand the dynamics of race relations and school desegregation in order to understand fully the limits and dynamics of school finance reform." n187 Specifically, Ryan argues that school finance cases demonstrate that predominately minority school districts are more likely to face funding problems, whereas integrated school districts are likely to have better financial situations. n188 [\*455] Predominately minority districts are also less successful as plaintiffs in school finance litigation. n189 Civil rights advocates also claim that the school finance cases do little to decrease racial isolation, and may have been a barrier to effectively implementing desegregation orders because the finance cases focused state resources on equalization of funding instead of desegregation. n190 In Connecticut, a group of plaintiffs concluded that the Horton litigation did little to address the racial and economic isolation of urban districts, and so they filed a separate lawsuit, Sheff v. O'Neill, to specifically challenge persistent racial disparities in the state school system. n191

While some school finance litigation has been successful based on challenges to state constitutions, the U.S. Supreme Court found in San Antonio Independent School District v. Rodriguez n192 that there is no federal right to education. n193 That means the resources of the federal government, which have been such a powerful tool for desegregation cases, are not an important factor in the pursuit of school finance litigation. n194 Reliance on state constitutions also leaves a patchwork of rights for students across state lines. n195

4. Themes in Current Education Reform Efforts

What are the dominant themes that emerge from these education reform efforts? The accountability movement, which has become perhaps the most dominant aspect of education reform in the wake of NCLB, focuses almost exclusively on student learning outcomes and [\*456] student achievement, as measured by standardized testing. n196 In the accountability movement, racial integration is not a goal. Instead, emphasis is on closing the racial achievement gap and promoting the idea that all children can learn. n197 There is little discussion of why the racial achievement gap persists and how addressing historic racial inequality might help address the problem. n198 One of the underlying premises of the accountability movement is that the state will educate children where they are, meaning that children in poor, racially isolated schools will be provided a successful standards-based education--even in the face of significant social science evidence to the contrary. n199 "[P]erhaps the greatest flaw of standards-based reform schemes as currently designed and implemented is that they all lack a crucial ingredient: meaningful assurances that all schools--particularly poor and minority schools--possess the educational conditions and resources necessary to teach to--and achieve--the state's high standards." n200

Furthermore, the standards and accountability movement has not proven to set a high bar for academic achievement. The No Child Left Behind Act and state accountability statutes measure the basic skills students should possess in math and reading, instead of prescribing an aspirational curriculum. n201 This focus on adequacy has also emerged in the school finance cases since the late 1980s. n202 Most [\*457] school finance cases no longer pursue equal funding, but instead funding that will give each child a minimally adequate education. n203

The other theme that emerges from the current education reform landscape is the notion that education is simply the ability to acquire knowledge in reading, math, and science instead of a broader process of preparing students to become sophisticated and responsible citizens of our democracy. n204 The Supreme Court has said:

We have recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government," and as the primary vehicle for transmitting "the values on which our society rests." "[A]s . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." n205

The goals of public education narrow with the focus on adequacy and accountability.

B. A Role for Desegregation Cases in the Education Reform Landscape

My argument is not that all of the current education reform efforts, such as accountability, school choice, and school finance litigation, should be abandoned. Instead, education reformers should recognize that the remaining desegregation cases have a critical role to play in providing better educational opportunity for all students. Traditional [\*458] desegregation cases offer unique benefits that are currently lost in the education reform landscape. Specifically, traditional desegregation cases have the ability to connect the persistent racial achievement gap with the lingering effects of historic racial discrimination, allow for continuing efforts to use targeted race-conscious measures to improve education for poor students and racial minorities, and use litigation as a means to promote a public dialogue about the ongoing importance of racial integration to our democracy.

1. The Lingering Effects of Historic Discrimination

Despite all of the education reform efforts of the last several decades, there is a persistent racial achievement gap. As noted above, one of the goals of NCLB is to close the achievement gap. n206 The National Assessment of Educational Progress from July 2009 noted that math and scores were higher than in any year since 1990. n207 Despite this progress, white students' scores are on average twenty-six points higher on the assessments on a 0-500 scale. n208

There are also disturbingly high numbers of racial minorities dropping out of high school. Currently, only 54% of African-American, 51% of Native American, and 56% of Latino students graduate from high school. n209 A recent report, Yes We Can: The Schott 50 State Report on Public Education and Black Males 2010, noted that in the 2007-2008 school year, black males graduated from [\*459] high school at a 47% rate in comparison to 78% for white males. n210 In some urban areas, these numbers are even more dismal, with black males graduating from high school at a rate of 24% in Charleston, South Carolina, 25% in Buffalo, New York, and 21% in Pinellas County, Florida. n211

Why does the racial achievement gap continue to exist in American public schools? Experts often cite several factors, including poverty, lack of parental involvement, and cultural factors. n212 One factor that is sometimes overlooked is the impact of historic racial discrimination and ongoing racial discrimination in our schools.

As Wendy Parker has noted, one stubborn area of ongoing racial disparity is in school faculty composition. n213 Parker notes that in the 157 school districts she studied, racially "[m]atching the teaching staffs to the student body was a hallmark pattern of both de jure and de facto segregated schools . . . ." n214 Parker argues that where de facto segregation has become "acceptable both constitutionally and educationally, . . . integration of both students and teachers is a necessary first step to achieving equal opportunity; without it, the distribution of resources will be unequal." n215 The plaintiffs in the Tangipahoa Parish litigation saw teacher segregation as a lingering effect of prior de jure segregation, and they strongly argued that the desegregation plan should include the protection and promotion of African-American teachers. n216

[\*460] Another ongoing area of racially disparate treatment is in the assignment of students to special education classes and in the imposition of disciplinary actions. n217 There have also been instances of racially discriminatory treatment in extracurricular activities. In one Mississippi school, there was a policy of excluding African-American students from running for leadership positions in the student government. n218

In school districts that are still under a desegregation order, these cases provide an opportunity to meaningfully challenge ongoing instances of racial discrimination, such as teacher segregation, disproportionate student discipline, and inequality in school resources. This is especially important when other methods for private plaintiffs to challenge racial discrimination in education, such as aspects of Title VI of the Civil Rights Act of 1964, have been limited. n219

Traditional desegregation cases also provide a crucial opportunity to link ongoing racial disparities with historic racial discrimination. As demonstrated in Walthall County, Mississippi, there are also instances of racially biased student assignment. n220 There is a continuous narrative that can be told about the history of the school system that provides a structural explanation for racial inequality. For example, in the Pulaski County litigation discussed above, the plaintiff has used its Motion to Enforce to recount the racially discriminatory history of both housing and schools and to [\*461] demonstrate the way these past policies continue to impact the school district. n221

2. Employing Race-Conscious Remedies

The education reform efforts such as accountability, school choice, and school finance reform do not ignore race, but if they address race they rely primarily on race-neutral remedies. n222 If we want to improve educational opportunities for minority students, race-conscious efforts are important where they are available. n223 For example, in Connecticut, plaintiffs realized that school finance efforts alone would not be enough to improve opportunity for minority students in urban areas. n224

Many scholars have raised doubts about whether race-conscious efforts to racially integrate schools are important to the overall goal of greater educational opportunity and improved student outcomes. n225 Racial isolation sends a strong message to minority students that there is ongoing racial hierarchy and racial subordination. n226 Racial isolation can also reinforce racial stigma.

As Professor Michelle Adams argues in a recent article, the topic of school desegregation is central to the broader dialogue about the value of racial integration. n227 Professor Adams argues that the goal of racial integration is under attack. n228 For some conservatives, such as Chief Justice Roberts, promoting racial equality in K-12 schools [\*462] means preventing reverse racial discrimination. n229 For many progressives and African Americans, the issue of race and schools is tied to the question of black identity and black achievement. n230 These observers challenge the assertion that quality schools are equivalent to racially integrated schools and argue that we should begin to focus on creating high-quality schools regardless of their racial makeup. n231

Professor Adams then argues that there is a need to embrace "radical integration" as a "forward-looking, aspirational view of equality." n232 It is difficult to think of many examples where racial integration is being advocated for in this manner. Traditional desegregation cases provide an opportunity for plaintiffs to make these types of aspirational arguments for racial equality and to see court orders that both acknowledge the history of racial discrimination and provide a blueprint and resources for racially integrated education in the twenty-first century. In the Walthall County desegregation case, the federal government argued for a vision of equality that includes integrated schools and classrooms. n233

Professor Adams also advocates for the radical integration approach as a way to "highlight[] the deep interdependence between segregation and the maintenance of white supremacy. Within this paradigm, racial segregation is understood as a multifaceted and self-sustaining generator of inequality." n234 We see this theory at work in the Little Rock desegregation case. In the school district's Motion to Enforce the 1989 Settlement Agreement, the school district recounted [\*463] the recent history of both residential and inter-district school segregation in Pulaski County. n235 The school district is able to focus on the importance of ending racial isolation, not for the goal of diversity, but instead to address structural inequality.

Furthermore, there has not been significant empirical evidence that racially and socioeconomically isolated schools are able to provide high-quality education for students in those schools. n236 Although desegregation decrees remain in only a small number of school districts, plaintiffs may use these cases as an opportunity to highlight racial isolation and the importance of racial integration as a value.

3. Litigation as a Dialogic Tool

Why is litigation a useful method for public debate on whether racial integration is an important value in our public schools? Litigation provides a unique opportunity to have a public dialogue on the issue of racial integration. Litigation also provides an opportunity to marshal and debate empirical evidence on the role of race in public education.

PICS is an example of litigation providing an opportunity for a broad public dialogue on race in public schools. The party briefs and amicus briefs provided ample empirical evidence about whether avoiding racial isolation may be a compelling government reason for employing race-conscious remedies. n237

In the Supreme Court opinion, the Justices engage in a debate about the meaning and legacy of Brown. n238 This became a key point of disagreement for the Justices in PICS. n239 For Chief Justice [\*464] Roberts, the desegregation cases, beginning with Brown, represent the importance of colorblindness: n240

Before Brown, schoolchildren were told where they could and could not go to school based on the color of their skin. . . . 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. n241

Justice Stevens wrote a separate dissent focusing on the legacy of Brown. Justice Stevens argued that Chief Justice Roberts' interpretation of Brown was devoid of context and history:

There is a cruel irony in THE CHIEF JUSTICE's reliance on our decision in Brown . . . . THE CHIEF JUSTICE fails to note that it was only black schoolchildren who were so ordered [that they could not go to school with white children]; indeed, the history books do not tell stories of white children struggling to attend black schools . . . . THE CHIEF JUSTICE rejects the conclusion that the racial classifications at issue here should be viewed differently than others, because they do not impose burdens on one race alone and do not stigmatize or exclude. n242

The remaining desegregation cases and their outcome will provide an important opportunity to recapture the legacy of Brown and to engage in a public discourse about the continuing racial inequality in our public schools.

[\*465] There are also significant limits to litigation, and many of these challenges have been demonstrated in the history of the desegregation cases. Traditional school desegregation cases occupy a special place in the history of American litigation. n243 Scholars have identified desegregation cases as the paradigmatic example of structural reform litigation and public law litigation. According to Professor Owen Fiss:

Adjudication is the social process that enables judges to give meaning to public values. Structural reform . . . is one type of adjudication, distinguished by the constitutional character of the public values and, even more important, by the fact that it involves an encounter between the judiciary and the state bureaucracies. The judge tries to give meaning to our constitutional values in the operation of these organizations . . . . As a genre of constitutional litigation, structural reform has its roots in the Warren Court era of the 1950s and 1960s and the extraordinary effort to translate the rule of Brown v. Board of Education into practice. n244

As structural reform litigation, the school desegregation cases led the way for other types of lawsuits to reform social institutions, such as prisons, mental health facilities, housing authorities, and police departments. n245

The role of desegregation cases as a paradigm of structural reform litigation means that the legacy of these cases has broader implications. n246 Is the desegregation docket in the federal district courts seen as a failure? Some have argued that the litigation strategy [\*466] failed. n247 Others have argued that court-supervised desegregation was successful for a short time from the late 1960s to mid-1970s and then began to suffer a series of setbacks that have led to the current climate of resegregation. n248

A new era of desegregation may redefine the landscape of structural reform litigation by demonstrating the resilience of this form of adjudication. These cases lay dormant for decades, but because of the process of adjudication, specifically the remedy of the injunction, the cases remain a powerful tool for social transformation and racial justice.

The school desegregation cases were a blueprint for many of the other major structural reform litigation movements, including prison reform and reform of mental health institutions.

IV. CONCLUSION

The final chapter of the desegregation cases is now being written. This final chapter is an important moment for both education reform and racial justice. The remaining desegregation cases are a means to help address the lingering effects of past discrimination and to refocus our education reform on equality as a core value.

#### Government based education reforms can transform society --- defeatist attitudes ensure the world stays the same

Glaude 16—Professor of African American Studies and Religion at Princeton and a PhD in Religion from Princeton [Eddie S., Jr., *Democracy in Black: How Race Still Enslaves*, p. 185-197]

But Goldwater failed to realize that governmental indifference can harden hearts, and government action can create conditions that soften them. People's attitudes aren't static or untouchable. They are molded by the quality of interactions with others, and one of the great powers of government involves shaping those interactions-not determining them in any concrete sense, but defining the parameters within which people come to know each other and live together. Today, for example, most Americans don't believe women should be confined to the home raising children, or subjected to crude advances and sexist remarks by men. The women's-rights movement put pressure on the government, which in turn passed laws that helped change some of our beliefs about women. Similarly, the relative progress of the 1960s did not happen merely by using the blunt instruments of the law. Change emerged from the ways those laws, with grassroots pressure, created new patterns of interactions, and ultimately new habits. Neither Obama's election to the presidency nor my appointment as a Princeton professor would have happened were it not for these new patterns and habits.

None of this happens overnight. It takes time and increasing vigilance to protect and secure change. I was talking with a dose friend and he mentioned a basic fact: that we were only fifteen years removed from the passage of the Voting Rights Act of 1965 when Ronald Reagan was elected president and Republicans began to dismantle the gains of the black freedom struggle. Civil rights legislation and the policies of the Great Society had just started to reshape our interactions when they started to be rolled back. We barely had a chance to imagine America anew-to pursue what full employment might look like, to let the abolition of the death penalty settle in, to question seriously the morality of putting people in prison cells, and to enact policies that would undo what the 1968 Kerner Commission described as "two Americas"­ before the attack on "big government" or, more precisely, the attack on racial equality was launched. The objective was to shrink the size of government ("to starve the beast") and to limit its domestic responsibilities to ensuring economic efficiency and national defense. Democrats eventually buckled, and this is the view of government, no matter who is in office, that we have today. It has become a kind of touchstone of faith among most Americans that government is wasteful and should be limited in its role-that it shouldn't intrude on our lives. Politicians aren't the only ones who hold this view. Many Americans do, too. Now we can't even imagine serious talk of things like full employment or the abolition of prisons.

We have to change our view of government, especially when it comes to racial matters. Government policy ensured the vote for African Americans and dismantled legal segregation. Policy established a social safety net for the poor and elderly; it put in place the conditions for the growth of our cities. All of this didn't happen simply because of individual will or thanks to some abstract idea of America. It was tied up with our demands and expectations. Goldwater was wrong. So was Reagan. And, in many ways, so is Obama. Our racial habits are shaped by the kind of society in which we live, and our government plays a big role in shaping that society. As young children, our community offers us a way of seeing the world; it lets us know what is valuable and sacred, and what stands as virtuous behavior and what does not. When Michael Brown's body was left in the street for more than four hours, it sent a dear message about the value of black lives. When everything in our society says that we should be less concerned about black folk, that they are dangerous, that no specific policies can address their misery, we say to our children and to everyone else that these people are "less than"-that they fall outside of our moral concern. We say, without using the word, that they are niggers.

One way to change that view is to enact policies that suggest otherwise. Or, to put it another way, to change our view of government, we must change our demands of government. For example, for the past fifty years African American unemployment has been twice that of white unemployment. The 2013 unemployment rate for African Americans stood at 13.1 percent, the highest annual black unemployment rate in more than seventy years. Social scientists do not generally agree on the causes of this trend. Some attribute it to the fact that African Americans are typically the "last hired and first fired." Others point to changes in the nature of the economy; still others point to overt racial discrimination in the labor market. No matter how we account for the numbers, the fact remains that most Americans see double-digit black unemployment as "normal." However, a large-scale, comprehensive jobs agenda with a living wage designed to put Americans, and explicitly African Americans, to work would go a long way toward uprooting the racial habits that inform such a view. It would counter the nonsense that currently stands as a reason for long-term black unemployment in public debate: black folk are lazy and don't want to work.

If we hold the view that government plays a crucial role in ensuring the public good-if we believe that all Americans, no matter their race or class, can be vital contributors to our beloved community-then we reject the idea that some populations are disposable, that some people can languish in the shadows while the rest of us dance in the light. The question ''Am I my brother's or my sister's keeper?" is not just a question for the individual or a mantra to motivate the private sector. It is a question answered in the social arrangements that aim to secure the goods and values we most cherish as a community. In other words, we need an idea of government that reflects the value of all Americans, not just white Americans or a few people with a lot of money.

We need government seriously committed to racial justice. As a nation, we can never pat ourselves on the back about racial matters. We have too much blood on our hands. Remembering that fact-our inheritance, as Wendell Berry said-does not amount to beating ourselves over the head, or wallowing in guilt, or trading in race cards. Remembering our national sins serves as a check and balance against national hubris. We're reminded of what we are capable of, and our eyes are trained to see that ugliness when it rears its head. But when we disremember-when we forget about the horrors of lynching, lose sight of how African Americans were locked into a dual labor market because of explicit racism, or ignore how we exported our racism around the world-we free ourselves from any sense of accountability. Concern for others and a sense of responsibility for the whole no longer matter. Cruelty and indifference become our calling cards.

We have to isolate those areas in which long-standing trends of racial inequality short-circuit the life chances of African Americans. In addition to a jobs agenda, we need a comprehensive government response to the problems of public education and mass incarceration. And I do mean a government response. Private interests have overrun both areas, as privatization drives school reform (and the education of our children is lost in the boisterous battles between teachers' unions and private interests) and as big business makes enormous profits from the warehousing of black and brown people in prisons. Let's be clear: private interests or market-based strategies will not solve the problems we face as a country or bring about the kind of society we need. We have to push for massive government investment in early childhood education and in shifting the center of gravity of our society from punishment to restorative justice. We can begin to enact the latter reform by putting an end to the practice of jailing children. Full stop. We didn't jail children in the past. We don't need to now.

In sum, government can help us go a long way toward uprooting racial habits with policies that support jobs with a living wage, which would help wipe out the historic double-digit gap between white and black unemployment; take an expansive approach to early childhood education, which social science research consistently says profoundly affects the life chances of black children; and dismantle the prison-industrial complex. We can no longer believe that disproportionately locking up black men and women constitutes an answer to social ills.

#### Political nihilism spreads beyond the classroom – it empowers violent conservatives like Trump – forsaking compromise is a dangerous, academic luxury

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On the surface, it would seem that intellectuals have nothing to do with the rise of global illiberalism. The movements powering Brexit, Donald Trump and Third-World strongmen like Philippine president Rodrigo Duterte all gleefully reject books, history and higher education in favor of railing against common enemies like outsiders and globalization. And you’ll find few Trump supporters among the largely left-wing American professoriate.

Yet **intellectuals are accountable** for the rise of these movements—albeit indirectly. Professors have offered stringent criticisms of neoliberal society. But they have failed to offer the public viable **alt**ernative**s**. In this way, they have promoted a **political nihilism** that has set the stage for new movements that reject liberal democratic principles of tolerance and institutional reform.

Intellectuals have a long history of critiquing liberalism, which relies on a “philosophy of individual rights and (relatively) free markets.” Beginning in the 19th century, according to historian Francois Furet, left-wing thinkers began to arrive at a consensus “that modern liberal democracy was threatening society with dissolution because it atomized individuals, made them indifferent to public interest, weakened authority, and encouraged class hatred.”

For most of the 20th century, anti-liberal intellectuals were able to come up with alternatives. Jean-Paul Sartre famously defended the Soviet Union even when it became clear that Joseph Stalin was a mass murderer. French, American, Indian, and Filipino university radicals were hopelessly enamored of Mao Zedong’s Cultural Revolution in the 1970s.

The collapse of Communism changed all this. Some leftist intellectuals began to find hope in small revolutionary guerrillas in the Third World, like Mexico’s Subcomandante Marcos. Others fell back on pure critique.

Academics are now mostly gadflies who rarely offer strategies for political change. Those who do forward alternatives propose ones so vague or divorced from reality that they might as well be proposing nothing. (The Duke University professor of romance studies Michael Hardt, for example, thinks the evils of modern globalization are so pernicious that only worldwide love is the answer.)

Such thinking promotes political hopelessness. It rejects gradual change as cosmetic, while patronizing those who think otherwise. This nihilism **easily spreads from the classroom** and academic journals to op-ed pages to Zuccotti Park, and eventually to the public at large.

For academic nihilists, the shorthand for the world’s evils is “neoliberalism.” The term is used to refer to a free market ideology that forced globalization on people by reducing the power of governments. The more the term is used, however, the more it becomes a vague designation for all global drudgery.

Democratic politics in the age of neoliberalism, according to Harvard anthropologists Jean and John Comaroff, is “something of a pyramid scheme: the more it is indulged, the more it is required.” They argue that our belief that we can use laws and constitutional processes to defend our rights is a form of “fetishism” that is ultimately “chimerical.”

For the University of Chicago literary theorist Lauren Berlant, the democratic pursuit of happiness amid neoliberalism is nothing but “cruel optimism.” The materialist things that people desire are “actually an obstacle to your flourishing,” she writes.

According to this logic, we are trapped by our own ideologies. It is this logic that allows left-wing thinkers to implicitly side with British nativists in their condemnation of the EU. The radical website Counterpunch, for example, describes the EU as a “neoliberal prison.” It also views liberals seeking to reform the EU as “coopted by the right wing and its goals—from the subversion of progressive economic ideals to neoliberalism, to the enthusiastic embrace of neoconservative doctrine.”

Across the Atlantic, Trump supporters are singing a similar tune. Speaking to a black, gay, college-educated Trump supporter, Samantha Bee was told: “We’ve had these disasters in neoconservatism and neoliberalism and I think that he [Trump] is an alternative to both those paths.”

The academic nihilists and the Trumpists are in agreement about a key issue: The system is fundamentally broken, and liberals who believe in working patiently toward change are weak. For the Portuguese sociologist Boaventura de Sousa Santos, “indifference” is the “the hallmark of political liberalism.” Since liberals balance different interests and rights, Santos writes, they have no permanent friends or foes. He proposes that the world needs to “revive the friend/foe dichotomy.” And in a profane way, it has: modern political movements pit Americans against Muslims, Britain against Europe, a dictatorial government against criminals.

Unfortunately, academic anti-liberalism is not confined to the West. The Cornell political scientist Benedict Anderson once described liberal democracy in the Philippines as a “Cacique Democracy,” dominated by feudal landlords and capitalist families. In this system, meaningful reform is difficult, since the country’s political system is like a “well-run casino,” where tables are rigged in favor of oligarch bosses. Having a nihilist streak myself, I once echoed Anderson when I chastised Filipino nationalists for projecting “hope onto spaces within an elite democracy.” Like Anderson, I offered no alternative.

The alternative arrived recently in the guise of the Duterte, the new president of the Philippines. Like Anderson and me, Duterte complained about the impossibility of real change in a democracy dominated by elites and oligarchs. But unlike us, he proposed a way out: a strong political leader who was willing to kill to save the country from criminals and corrupt politicians.

The spread of global illiberalism is unlikely to end soon. As this crisis unfolds, we will need intellectuals who use their intellects for more than simple negation—professors like the late New York University historian Tony Judt, who argued that European-style social democracy could save global democracy. Failing that, we need academics who acknowledge that liberal democracy, though slow and imperfect, enables a bare minimum of tolerance in a world beset by xenophobia and hatred. For although **academics have the luxury of imagining a completely different world, the rest of us have to figure out what to do with the one we have**.

### 1ac Plan + Solvency – Section 5 of 14th Amendment

#### The United States federal government, via Section 5 of the Fourteenth Amendment, should regulate K-12 schools that receive public funding by implementing a law that:

#### Requires states to affirmatively further racially integrated education

#### Explicitly includes a private right of action for parties to sue for equitable relief if states fail to take measures to affirmatively reduce racial isolation in schools

#### Creates clear statutory language that confers rulemaking and regulatory authority to the Department of Education’s Office for Civil Rights or an independent agency directed by a career employee, rather than a political appointee, to provide federal oversight and enforcement

#### Authorizes and requires action by the Department of Justice for states that refuse compliance

#### Funds deliberations that both document the current racial inequities in educational opportunity and provide useful data that may assist states and localities in fostering racially inclusive educational opportunities

#### Funds research, development, and policy replication to preserve and strengthen federal, state, and local efforts to protect equal access to educational opportunities

#### Includes the provision of transportation and construction funding to suburban schools, while also increasing school funding for inner-city schools

#### The plan is a comprehensive mechanism to address racial segregation in public education --- congressional action is critical

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III. CURRENT JUDICIAL CONSTRAINTS AND LEGISLATIVE IMPERATIVES

In its examination of Section 5 power to protect fundamental rights and suspect classes, the Court has continued to underscore Congress's substantial authority. Hibbs and Lane suggest that to survive Boerne's congruence and proportionality requirements, such legislation need not directly target adjudicated constitutional violations. The FMLA at issue in Hibbs, for example, provided remedies beyond existing civil rights legislation. n109 In Lane, the Court found support for Title II of the ADA outside the legislative record provided and in instances without evidence of a discriminatory motive. n110 It is worth noting, however, that the wide latitude the majority afforded in Hibbs and Lane may not be easily replicated given the changing composition of the Court. Since 2004, Chief Justice Roberts and Justices Samuel Alito, Sonia Sotomayor, and Elena Kagan have replaced Justices Rehnquist, O'Connor, Souter, and Stevens, respectively; the former Justices all voted to uphold the policies at issue in those cases. n111 While the replacement of Justices Souter and Stevens with Justices Sotomayor and Kagan may not portend a jurisprudential shift, the addition of Chief Justice Roberts and Justice Alito may augur more considerable changes. Roberts replaced Rehnquist, the author of the majority opinion in Hibbs, and Alito replaced O'Connor, the author of the majority opinion in Lane. In addition, while Justice Kennedy offered hopeful language in his Parents Involved concurrence, he joined the dissent in Lane and Hibbs. One could argue, however, that some [\*104] of Kennedy's more recent jurisprudence suggests an evolving understanding of issues of fundamental racial inequality and access to opportunity. n112 His opinion in Parents Involved and his recent voting rights jurisprudence evince a more nuanced awareness of structural racial inequities and the relevance of racial identity and dynamics than in previous decisions. n113 Kennedy, with the implicit endorsement of the four dissenting Justices, has clearly found a compelling government interest in avoiding racial isolation in schools, regardless of whether such isolation is the result of a discriminatory motive or more complex structural inequities. n114 Moreover, he has called on the legislative and executive branches to go forth and craft remedial policies. n115 As such, it is certainly possible that he could uphold Congress's authority to craft carefully tailored legislation to address de facto racial segregation in schools. n116

Since Boerne, the Court has not addressed the scope of congressional enforcement power in areas that touch on fundamental racial inequality. In 2009, the Court considered congressional enforcement power under the Fifteenth Amendment to enact the Voting Rights Act of 1965, n117 but unanimously applied the principle of constitutional avoidance to refrain from deciding whether the preclearance requirements of Section 5 of the Voting Rights Act exceeded Congress's powers. n118 In dicta, the Court referenced the need identified in post-Boerne cases for legislation that is designed to address recent patterns or practices of discrimination. n119 The Court suggested that the Voting Rights Act raises serious constitutional concerns in that it "imposes current burdens and must be justified by current needs." n120 The ruling is instructive insofar as it hints at the level of evidence of contemporary [\*105] discrimination the Roberts Court may require to uphold congressional enforcement legislation intruding upon state sovereignty. n121

The aforementioned adjudicatory considerations of the reach of equal protection indicate that carefully tailored race-conscious legislation to eliminate racially isolated schools and address broad-based racial inequality in educational opportunity may be well within the Supreme Court's construction of congressional enforcement power under Section 5. Proposed legislation may be designed as a constitutional response to address the educational inequality facing racial minorities, which falls into the type of remedial legislation for the protection of traditionally excluded groups that the Court is more likely to uphold. Moreover, as discussed above, the nature of the legislative branch is that it does not suffer from the same constraints as the judiciary. As an institution, it is designed to gather facts from a broad range of constituents across the nation, the very data that would be necessary to develop appropriate remedial and prophylactic legislation addressing the compelling interest in alleviating persistent racial isolation in education.

IV. STATUTORY DESIGN CONSIDERATIONS

In the wake of narrowed judicial avenues to remedy the structural racial inequality in education, Congress may be better situated to create a meaningful response. First, Congress has a clear responsibility under Section 5 of the Fourteenth Amendment to enforce racial equality. In addition, such responsibility is especially critical in the domain of education. n122 Given the text, history, and structure of congressional enforcement power under Section [\*106] 5 of the Fourteenth Amendment, Congress should have broad power to establish national standards to protect basic educational rights and solve persistent racial inequality. From a practical perspective, however, such policies might be strongest if designed with a keen awareness of judicially defined limits on congressional enforcement power. Statutory design helps determine the probability of such legislation withstanding judicial scrutiny. The principles of flexibility and fostering local choice in creating remedies should guide the creation of statutory language to ameliorate racial inequality and promote racial inclusion in public education.

To stand on the strongest footing, proposed legislation at the intersection of racial equality and education should be designed with an understanding of the Supreme Court's narrower "congruence and proportionality" test set forth in Boerne. n123 To craft legislation that comports with the Boerne requirement of congruence and proportionality, legislators may need to clearly define the remedial and/or prophylactic purpose of the statute. If the statute's purpose is to remedy existing racial isolation and avoid continuing isolation, the legislation will be well within the definition of constitutionally authorized remedial or prophylactic legislation. n124 Yet, the question of how far such legislation should go in reaching this goal raises more complicated statutory questions. For example, such legislation may provide constitutional protection for ongoing voluntary integration efforts by school districts like Jefferson County, Kentucky, a district committed to creatively working to eliminate racial isolation even in the wake of the Supreme Court's decision striking down its previous policy. In addition, legislation might go further and articulate a broad directive to prod recalcitrant, less informed, or less aware districts to follow suit and begin to craft measures to foster racial integration.

This article does not purport to answer all of the questions raised by suggesting that Section 5 serve as the vehicle for federal legislation addressing de facto racial segregation in education. Rather, I offer some broad suggestions for ways in which lawmakers might conceive of maximizing the potential of a federal legislative structure aimed at ameliorating racial isolation and inequality in education. Such suggestions focus on three substantive areas: (1) the use of statutory language mirroring integration language in the fair housing context; (2) data collection to support legislation and to [\*107] provide information on successful models of racially integrated education; and (3) implementing such legislation through a principle of shared burden.

A. Coupling the Fair Housing Analogy With Clear Enforcement Mechanisms

The aforementioned concerns regarding statutory language suggest that congressional efforts to further racial inclusion may be on stronger footing when such legislation does not require students to be individually classified by race or ethnicity. The context of fair housing provides an interesting model. The Fair Housing Act of 1968 n125 requires federal government agencies and the programs and activities they fund to be operated in a manner that affirmatively furthers fair housing. n126 Federal courts have repeatedly held that § 3608 reflects a congressional "desire to have [the U.S. Department of Housing and Urban Development (HUD)] use its grant programs to assist in ending discrimination and segregation . . . . " n127 Section 3608 imposes an affirmative obligation on HUD and its grantees to ensure that federal housing and community development funds are used to reduce rather than perpetuate racial segregation. n128 In fact, courts have held that in determining site selection of new schools or attendance zone lines, "[HUD cannot] remain blind to the very real effect that racial concentration has had in the development of urban blight . . . [and] must utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts." n129 Interestingly, congressional language affirmatively furthering fair housing has been one of the few race-conscious policies to remain relatively unscathed in the more recent proliferation of "reverse discrimination" lawsuits in the domains of education, public contracting, employment, and voting rights. n130 Rather, in recent litigation, section 3608 has provided a mechanism to address entrenched residential segregation and provide a legal hook for promoting racially inclusive housing opportunities. n131

Language in the education context might read as follows: Within the limitations set forth by the Constitution, this Act shall require states to affirmatively [\*108] further the compelling government interest in alleviating racial isolation in the provision of public education. While requiring states to "affirmatively further" racially integrated education is a worthy goal, it will need strong enforcement language to work effectively. In addition, clear statutory language conferring rulemaking and regulatory authority to an administrative agency may help insulate legislation from judicial attack. n132 Such enforcement, I suggest, should go beyond requiring integrative efforts as a precondition of the receipt of federal funds by states. Rather, such legislation should explicitly include a private right of action for parties to sue for equitable relief if states fail to take measures to affirmatively reduce racial isolation in schools. n133 Corrective legislation addressing the ability of private parties to bring claims offers an important means of ensuring those [\*109] who have been harmed by persistent racial isolation have meaningful constitutional protection. n134 Such a statutory scheme should work in conjunction with existing civil rights legislation under Titles IV and VI of the 1964 Civil Rights Act. As Title VI has done, the proposed scheme could empower an administrative body such as the Office for Civil Rights in the Department of Education or an independent agency directed by a career employee, rather than a political appointee, to provide federal oversight and enforcement. This body could investigate and resolve complaints. Moreover, legislation could authorize action by the Department of Justice for those states that refuse compliance. Language might also allow for liability on the part of the Department of Education if the Department knows of states' failure to comply and has made no effort to require compliance.

B. Data Collection: Creating a Legislative Record and a National Repository

Any proposed legislation to address structural racial inequality in education should include deliberations that both document the current racial inequities in educational opportunity and provide useful data that may assist states and localities in fostering racially inclusive educational opportunities. The post-Boerne decisions striking down congressional enforcement legislation stressed the critical role of congressional fact-finding in safeguarding legislation from judicial scrutiny. n135 In Garrett, for example, the Rehnquist Court struck down the application of a provision of the ADA to state actors in part due to insufficient legislative findings. n136 Rather than assuming the existence of state discrimination against disabled persons, the Court held that Congress must first "identif[y] a history and pattern of unconstitutional state transgressions." n137 Similarly, in Kimel, the Court stressed the importance [\*110] of a strong evidentiary record supporting the legislation. n138 The Court found a constitutional right to enact enforcement legislation prohibiting age discrimination only if Congress can identify "any pattern of age discrimination by the States" that reaches "the level of a constitutional violation." n139 According to dicta in Lane, such findings need not be limited to state discrimination and may include evidence of private party conduct. n140

When congressional enforcement legislation protects suspect classes or a fundamental right, however, the Court has held that such deliberations need not take the form of formal congressional hearings from which findings are officially compiled. Rather, Congress may create a task force that is charged with receiving and compiling evidence on racial isolation and inequality in education. The Supreme Court has accepted such evidence as valid congressional findings when reviewing and upholding congressional enforcement legislation in the wake of Boerne. n141

Ultimately, Congress may serve a key function by creating and housing a national repository of critical data on the pervasiveness and permutations of racial and socioeconomic segregation in public education. By providing examples of successful integration policies that have been used in school districts throughout the country, such a repository may turn out to be one of the most helpful and least controversial aspects of fostering racial inclusion in public education. An interesting analogy may be the use of racial disparity studies in the public contracting context. In the wake of the 1989 Supreme Court decision in Richmond v. Croson, n142 striking down Richmond, Virginia's affirmative action policy in public contracting, various state and local governments as well as the United States Commission for Civil Rights have commissioned studies to document continued racial disparities in public employment and contracting. n143 Such studies help to satisfy the Court's requirement that existing race-conscious policies in public employment and contracting remedy the present effects of past, particularized discrimination in specific geographic regions and industries. n144

In this vein, one could also look to the fair housing context for a model to address some of the evidentiary considerations. The components of "affirmatively furthering" fair housing legislation that may be replicated in the education context include (1) conducting analysis to identify the impediments to racially integrated education within jurisdictions; (2) taking appropriate actions to overcome the effects of the impediments identified through [\*111] analysis; and (3) maintaining records reflecting analysis and actions taken in this regard. n145 Such a model led to the settlement of litigation in Westchester County, New York, where HUD alleged that the County failed to affirmatively further fair housing by concentrating government-funded housing developments in low-income and minority communities. n146 Under the settlement negotiation, the County must build affordable housing in more affluent areas. n147

Moreover, such data collection serves the key function of elucidating the benefits of racially integrated education. Social science evidence supporting racial integration in education has detailed the democracy-reinforcing benefits of racially integrated educational environments. n148 This evidence can be helpful in researching and documenting effective integration policies at the federal level. Data collection should include evidence of creative racially inclusive policies that have been successfully used by districts. A number of school districts throughout the country have created or maintained policies aimed at fostering racial and socioeconomic diversity in schools. n149 Jefferson County, Kentucky, which encompasses the city of Louisville, still considers income, place of residence, and race and ethnicity when assigning students to schools; however, its consideration of race is "global," in that it eschews individual classification in favor of census tract data. n150 In northern California, the Berkeley Unified School District considers several variables in granting school choice, including race, socioeconomic status, geography, and linguistics. n151 Again, the Berkeley example uses global policies that do not allocate benefits and burdens on the basis of individual racial classification. n152 Such examples show that there are communities [\*112] who desire the ability to implement integration plans, so it is imperative to find avenues of support for such efforts.

Congressional legislation should also fund research, development, and policy replication to preserve and strengthen federal, state, and local efforts to protect equal access to educational opportunities. Such funding would include providing technical assistance to localities devising programs to alleviate racial disparities, which would allow flexibility in fashioning the best remedies for a particular locale. Recently, Congress began funding demonstration projects in a number of school districts. n153 Funding for research and replication grants could further be utilized to assist those districts with the most persistent racial isolation and largest disparity issues. In addition, grants might fund research that will show best practices in reducing racial isolation and disparities. Such funding for research and development could help fuel improvement by facilitating the replication of successful programs. Indeed, a critical role of federal legislative involvement in this arena is to educate the public and facilitate flexible, holistic, and varied race-conscious and race-neutral measures. The benefit of proposed replication grants is that such grants may encourage school diversity by helping those districts that voluntarily adopt carefully tailored race-conscious measures to promote the educational, social, and democratic benefits of racially and ethnically diverse classrooms. The aim would be to allow local discretion in collaborating to determine optimal ways to increase racial inclusion in local school districts. As such, legislation should give jurisdictions the flexibility to choose one mode of inclusion over another. This would allow for more nuanced and holistic ways of operating effectively.

In addition, such legislation should take account of the increased political feasibility of "global" policies designed to foster racial inclusion while refraining from classifying or assigning individual students on the basis of their race. For example, in his pivotal concurrence in Parents Involved, Justice Kennedy talked about the necessity of race-conscious measures to alleviate racial isolation and proffered generalized race-conscious policy options that do not categorize individual students based on race. n154 Significantly, Kennedy eschewed individualized racial classifications, even though they have been the mainstay remedy for de jure segregation. n155 Kennedy championed policies that may be neutral on their face, though developed out of a desire to increase racial inclusion. n156 These included strategic site selection of new schools, targeted student and faculty recruitment, and drawing attendance zone lines to maximize racial integration. n157 Kennedy reasoned that such facially neutral, racially motivated plans may not even trigger strict [\*113] scrutiny. n158 Legislation that calls for "race-conscious," "race-neutral," or "facially neutral yet racially motivated" measures or uses race on a "global" level, while refraining from individualized racial classifications, has tremendous import for purposes of constitutional endurance. n159 Moreover, Congress may cull evidence to support the use of additional race-conscious measures over measures that are facially neutral.

C. Furthering a Principle of Shared Burden

Such proposed legislation should also further the principle of "shared burden"--combining flexibility and choice to maximize benefits and decrease burdens for all. For example, models that foster increased racial and economic integration between city and suburban districts may include structures to minimize inner-city fiscal burdens and potential overcrowding in suburban schools. Policies might include the provision of transportation and construction funding to suburban schools, while also increasing magnet school funding for inner-city schools. n160 Such programs work best when implemented in the earliest years of education. The flexibility of these programs might include increased funding for transportation and creation of experimental districts. Obviously, there are myriad considerations regarding the scope of legislation of this kind. For instance, placing a premium on choice and flexibility in this context may raise concerns regarding the effectiveness of the proposed requirements. In addition, specific attention to racial, socioeconomic and spatial characteristics of school districts and regions is critical to facilitating truly effective reform. The key factor in such policy considerations is grounding them in the tenets of structural disparities rather than focusing on intentional racial discrimination. In this vein, one might look to examples of existing measures used to identify sources of intractable racial inequality and lack of opportunity. Such examples include "racial impact statements" conducted by some state governments prior to engaging in new construction projects or social initiatives. Similar to fiscal and environmental impact statements, such assessments are viewed as responsible measures to minimize the burden of new initiatives. n161

[\*114] CONCLUSION

Given its unique position in our national landscape, it is no wonder that scholars have long argued about the essential role of Congress in constitutional interpretations of civil rights norms. The complicated tapestry of systemic racial, economic, and demographic factors that have contributed to sustained racial isolation in education necessitate effective and nuanced solutions that emanate from policy reform rather than court-ordered redress. Congressional enforcement power is, at its core, a mechanism for ensuring that the promise of equality is realized for all. One of the more hopeful and substantive paths for addressing racial segregation and isolation in American schools and their attendant inequities may be in capitalizing on Congress's significant enforcement power under Section 5 of the Fourteenth Amendment to consciously create a remedy for twenty-first century structural ills.

#### Citing Section 5 of the 14th Amendment is best --- guarantees educational equality is prioritized

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I. CONGRESSIONAL AUTHORITY TO ENACT LEGISLATION TO FOSTER RACIALLY INCLUSIVE PUBLIC EDUCATION

Congress's constitutional authority to enact legislation fostering racially inclusive public education can take many forms. Theoretically, such congressional power can be found in a number of constitutional provisions, including the Thirteenth Amendment and the Spending n10 and Commerce Clauses of Article I. In 1964, Congress famously used its power under the Commerce Clause to enact the Civil Rights Act. n11 Rather than cloaking the [\*93] legislation in equality and dignity language, an emphasis on congressional commerce power grounded the legislation in such concerns as whether African Americans would be inconvenienced if they traveled across state lines. n12 Thus, to ensure a constitutional remedy for private discrimination, the Civil Rights Act of 1964 sacrificed its grounding in notions of equality. Yet, as Justice Goldberg stated in his concurrence in Heart of Atlanta Motel v. United States, n13 the "primary purpose" of the 1964 Civil Rights Act "is the vindication of human dignity and not mere economics." n14

Section 5 of the Fourteenth Amendment, conversely, is the legislative power that is precisely designed to vindicate human dignity and equality. As such, I argue that Section 5 provides the best means for enacting legislation aimed at reducing racial isolation in education. While practical expediency may have necessitated the use of congressional commerce power in the case of the 1964 Civil Rights Act, n15 congressional action to enforce race-conscious legislation in the domain of schools should not, and need not, take that path. n16 Such legislation should be grounded in the language of equality rather than masking the essence of the constitutional entitlement it seeks to protect. Section 5 of the Fourteenth Amendment serves as the best democratic tool to carry out the judicial expression of equality.

In addition, such proposed legislation would address the intersection of fundamental racial inequality and educational opportunity. While the Court has not found an explicit fundamental right to education under the Equal Protection Clause, education holds a special place of importance in Supreme Court jurisprudence. n17 The Court has held that education is the "very foundation of good citizenship" n18 and is critical to sustaining "our political and cultural heritage." n19 Indeed, education is integral "in maintaining our basic [\*94] institutions" and leaves a "lasting impact of its deprivation on the life of the child." n20 Consequently, courts have long upheld significant federal regulation of public schools. n21 Moreover, the Court has held that Congress may exercise its authority under Section 5 to protect myriad rights that do not find explicit protection in the text of the Constitution. n22 Given that such legislation would touch upon equality and substantive rights that the Court has held to be of extraordinary significance, Congress should have expansive constitutional authority to legislate in this realm. In fact, Congress's Section 5 power should be at its apex when passing legislation to root out the persistent, pervasive malady of racial isolation and segregation and its attendant educational inequities.

#### DeVos concedes schools receiving public funds must follow federal laws and she defers to Congress and Courts

Green, 6/17/17 (Erica L., The New York Times, “Education Dept. Plans to Scale Back Its Civil Rights Investigations,” Factiva, JMP) **\*\*\*Note --- Candice E. Jackson, the acting head of the DOE’s office for civil rights**

Since her appointment as the education secretary, Ms. DeVos has come under fire from lawmakers and civil rights advocates for her remarks about the department's role in enforcing civil rights laws in the public school system.

The office is charged with enforcing legal prohibitions against discrimination by race, color, national origin, sex and disability.

Ms. DeVos has denounced discrimination in any form and has said schools that receive federal funds must follow federal laws. But she also believes in a limited federal role in education. She has signaled that her office is ''not going to be issuing any decrees'' on civil rights and that those should come from Congress or the courts.

In the memo issued last week, Ms. Jackson wrote that the department would ''robustly enforce the civil rights laws under our jurisdiction, and we will do so in a neutral, impartial manner and as efficiently as possible.''

## Solvency

### Solvency – Congress Necessary

#### Congress necessary to craft enforcement legislation to facilitate racial inclusion in public education

Epperson, 12 --- Associate Professor of Law, American University Washington College of Law (Winter 2012, Lia, Harvard Law & Policy Review, “SYMPOSIUM: EDUCATION: EQUALITY OF OPPORTUNITY: Legislating Inclusion,” 6 Harv. L. & Pol'y Rev. 91, Lexis-Nexis Academic, JMP)

[\*91] INTRODUCTION

This article seeks to situate recent jurisprudence on the Constitution's commitment to ending racial segregation in public education in the framework of congressional power to enact enforcement legislation. In previous work, I have examined jurisprudential shifts in recognizing the right to racially integrated education. n1 In recent jurisprudence, a majority of the Supreme Court identified a substantive equality right to eliminate persistent racial isolation and inequality in public education. Specifically, in his sharply worded concurrence in Parents Involved in Community Schools v. Seattle School District, n2 Justice Anthony Kennedy found that a "compelling government interest exists in avoiding racial isolation" and that school districts may choose to pursue this interest. n3 Kennedy, with the implicit endorsement of the four dissenting Justices, focused on the broader constitutional ideal of fostering racial inclusion in our nation's schools and highlighted the continued relevance of integration to the promise articulated in Brown v. Board of Education. n4

Existing jurisprudential avenues to address current constitutional violations, however, are limited by the modern anti-classification framework used in adjudicating equal protection claims. n5 I suggest that political branches may have more institutional strength, expertise, flexibility, and enforcement [\*92] power to pursue racial inclusion in public education. n6 Specifically, I propose that Congress, via Section 5 of the Fourteenth Amendment, should delineate equal protection remedies to address the unique and enduring dilemma of twenty-first century racial isolation and resulting inequality in public education. n7 Though the Supreme Court has issued a series of opinions narrowing congressional power to enact enforcement legislation in recent years, n8 no decisions have addressed congressional enforcement power to legislate at the distinctive intersection of racial equality and educational opportunity.

This article proceeds in four parts. Part I posits Congress has the authority to enact enforcement legislation to alleviate racial isolation in public education. Part II closely examines the scope and contours of congressional enforcement power under Section 5 of the Fourteenth Amendment by analyzing constitutional text and recent Court interpretations of equality and enforcement power. Such analysis highlights Congress's unique power to craft legislation alleviating de facto racial segregation n9 and isolation in public schools, institutions integral to shaping our democracy and preparing students to be effective citizens. Part III acknowledges potential judicial constraints posed by the current Court, which underscore the importance of legislative imperatives. Finally, Part IV draws from these doctrinal arguments to offer preliminary considerations on optimal statutory design. I offer some suggestions that may help bridge the divide between our constitutional ideals and the practice of facilitating racial inclusion in public education.

### Solvency – Section 5 14th Amendment

#### \*\*\*note when prepping file --- the paragraph that begins with “In Nevada Department…” could be useful to defend the “private right of action” as an enforcement mechanism.

#### Congress has the authority to enforce desegregation in public education through Section 5 of the 14th Amendment

Epperson, 12 --- Associate Professor of Law, American University Washington College of Law (Winter 2012, Lia, Harvard Law & Policy Review, “SYMPOSIUM: EDUCATION: EQUALITY OF OPPORTUNITY: Legislating Inclusion,” 6 Harv. L. & Pol'y Rev. 91, Lexis-Nexis Academic, JMP)

II. THE SCOPE OF ENFORCEMENT POWER

The Reconstruction Amendments n23 represent the nation's commitment to the protection of individual rights in the wake of the Civil War. In prohibiting state infringement of equal protection, the Fourteenth Amendment provided a constitutional mandate that facilitated the inclusion of African Americans in the national community. Section 5 of the Fourteenth Amendment provides Congress with "the power to enforce, by appropriate legislation," the provisions of the Fourteenth Amendment. n24 This Section gave Congress significant authority to define those individual rights and create the legislative structure necessary to enforce them. As congressional debates show, n25 congressional enforcement power was subject to the test outlined in McCulloch v. Maryland: n26 "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the [\*95] letter and spirit of the constitution, are constitutional." n27 Much of this legislative structure focused on the provision and protection of rights to African Americans. n28 The goal of such enforcement legislation was to ensure that Congress, rather than the judiciary, be tasked with remedying Reconstruction Amendment violations. n29

While the Supreme Court restricted the scope of congressional enforcement power in the nineteenth century, citing principles of federalism, n30 it continued to articulate the McCulloch test for congressional enforcement power. n31 In Katzenbach v. Morgan, n32 one of the first key Supreme Court decisions of the twentieth century to examine Congress's Section 5 power, the Court again voiced an expansive reading of congressional power to protect fundamental rights and the rights of traditionally excluded groups. n33 The Warren Court found that Section 5 gave Congress the power to legislate for the "perfect equality of civil rights and equal protection of the laws." n34 The Court explicitly rejected the notion that "an exercise of congressional power under § 5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce." n35 Such a reading would run counter to "congressional resourcefulness and responsibility" for implementing the Fourteenth Amendment. n36 This constitutional enforcement power, particularly in the safeguarding of rights for minorities, means that Congress can exercise its discretion in determining necessary legislation to secure the guarantees of the Fourteenth [\*96] Amendment. n37 Courts continued to reiterate this expansive understanding of congressional enforcement power through the 1980s. n38

A. The Sea Change of Boerne?

In 1997, however, the Supreme Court decided City of Boerne v. Flores? n39 which many perceived to signal a constitutional sea change in the interpretation of the Section 5 power. n40 The Court held that the 1993 Religious Freedom and Restoration Act (RFRA) n41 exceeded Congress's Section 5 power. n42 Congress enacted RFRA in response to Employment Division v. Smith, n43 a 1990 Supreme Court opinion that significantly limited the religious freedom protections historically afforded individuals under the First Amendment. n44 RFRA provided a different interpretation of First Amendment protection for religious freedom, one that comported with the prevailing standard prior to Smith.

In holding RFRA unconstitutional, the Court retreated from its position in Katzenbach v. Morgan that Congress has independent interpretive authority. [\*97] Instead, the Court distinguished congressional enforcement and interpretive power:

The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power to "enforce," not the power to determine, what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]." n45

To protect the "vital principles necessary to maintain separation of powers and the federal balance," n46 the Court set forth a new test for determining the constitutionality of Section 5 legislation: "There must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." n47 Absent such a connection, "legislation may become substantive in operation and effect." n48

One could interpret the scope and breadth of the Boerne decision less as a constitutional sea change in the protection of fundamental rights and more as a response to Congress's explicit reversal of prior judicial constitutional interpretation. n49 In addition, Boerne may also be distinguished from Katzenbach v. Morgan in that, unlike the Voting Rights Act that was at issue in Morgan, no facts in the passage of RFRA or its historical background indicated a present pattern of discrimination. n50 In highlighting the distinction between "measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law," n51 the Court in Boerne recognized that Congress "must have wide latitude" with respect to measures that are remedial or prophylactic in nature. n52 Indeed, one reading of Boerne suggests its limiting language does not apply to legislation to enforce voting rights, nor does it apply more broadly to legislation directly [\*98] enforcing civil rights for racial minorities. As one federal district court noted, "the basic concerns animating . . . Boerne . . . do not apply to legislation designed to prevent . . . racial discrimination--the precise evil addressed by the Civil War Amendments . . . . " n53 Consequently, congressional authority to implement a remedial and prophylactic measure for the reduction and avoidance of racial isolation in public education should be broad.

Interestingly, the Boerne Court made clear that Congress may go beyond the judicial articulation of constitutional rights when enacting legislation pursuant to Section 5: "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" n54 On its face, this language suggests Congress may have expansive authority to enact remedial legislation to reduce racial isolation in schools. The Court, however, tempered such language by requiring "congruence and proportionality" between the prevention or remedying of an injury and the means adopted. n55 The RFRA, the Court held, provided no such congruity.

In the five years following Boerne, the Supreme Court continued to diminish congressional enforcement power under Section 5 in a series of cases. In Kimel v. Florida Board of Regents, n56 United States v. Morrison, n57 and Board of Trustees of University of Alabama v. Garrett, n58 the Court struck down legislation as beyond the scope of congressional enforcement power under Section 5 of the Fourteenth Amendment. These cases prompted questions about Section 5's continued viability as a mechanism for practical implementation of constitutional remedies to protect individual rights. n59 Interestingly, none of these cases concerned the scope of enforcement legislation aimed at state conduct that affected a suspect class or, like in Boerne, protected a fundamental value. n60

In Kimel v. Florida Board of Regents, n61 the Court held that the Age Discrimination in Employment Act, which allowed individuals to seek monetary relief from states for age discrimination, n62 exceeded the scope of Congress's [\*99] enforcement power under Section 5. The Court struck down the Act because it went beyond the scope of congressional enforcement power by offering heightened protection for age discrimination. Under the equal protection clause, age is not a suspect classification. n63

In United States v. Morrison, n64 the Court held that the federal Violence Against Women Act n65 exceeded Congress's Section 5 power on the ground that it regulated private conduct. n66 While the legislation at issue targeted violence motivated by gender, n67 a quasi-suspect classification, the Court found Congress had exceeded its Section 5 authority in passing legislation that targeted private conduct. n68 Similar to the legislation in The Civil Rights Cases, n69 such action is beyond the scope of the Fourteenth Amendment. While Congress amassed a substantial legislative record documenting "gender-based disparate treatment by state authorities," the Court held that the legislation failed the Boerne congruence and proportionality test because the remedy held private individuals, rather than the "culpable state official," liable. n70

One year later, the Court in Board of Trustees of the University of Alabama v. Garrett n71 held that Title I of the Americans with Disabilities Act (ADA), n72 which allowed disabled individuals to sue states for money damages for violation of equal protection rights, exceeded Congress's Section 5 power. n73 The legislation at issue in Garrett suffered a similar fate to the Act in Kimel. The Court held that Congress could not impose a heightened level of scrutiny for disability discrimination, which has not been recognized as a suspect classification. By rendering illegal a broad swath of state conduct n74 [\*100] that exceeded what is constitutionally required under rational basis review, n75 the Court held that provisions of the ADA overstepped Congress's Section 5 authority.

B. Enforcing the Heart of Equal Protection

These recent changes in legal doctrine affecting congressional authority have not limited Section 5 power to legislate in the important context of fundamentally protected rights and the protection of suspect classifications. Even in striking down the provision at issue in Kimel, the Court noted that Congress retains broad authority under Section 5 "both to remedy and to deter violation of rights guaranteed" under the Fourteenth Amendment "by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." n76 In a more recent series of cases that touched upon constitutional protections of fundamental rights and suspect classifications, the Supreme Court upheld congressional enforcement power. n77

In Nevada Department of Human Resources v. Hibbs, n78 the Court found the Family and Medical Leave Act (FMLA) n79 involved an appropriate use of congressional enforcement power pursuant to the Equal Protection Clause. n80 The FMLA created a private right of action for equitable and monetary relief against state agencies and other employers who denied or interfered with those rights guaranteed under the legislation. n81 In applying the Boerne congruence and proportionality test, the Court identified the constitutional right at issue as the right "to be free from gender-based discrimination in the workplace." n82 The Court noted that gender-based classifications receive heightened scrutiny under well-established Fourteenth Amendment jurisprudence. n83 It also likened the "difficult and intractable proble[m]" addressed by the FMLA to the voting rights issues of Katzenbach v. Morgan. n84 Ultimately, the Court held the FMLA constituted sufficiently proportional prophylactic [\*101] legislation. It is worth noting that the remedies available under the FMLA exceed those available under existing civil rights legislation. n85

One year after Hibbs, the Court in Tennessee v. Lane n86 upheld a requirement in Title II of the ADA that protected the fundamental right of access to the courts. n87 The Court's analysis in Lane is particularly enlightening as to the question of congressional power. Like Garrett, the case examined the constitutionality of provisions of the ADA. Yet, the Lane Court defined the protected constitutional right at issue differently, and in doing so found Title II of the ADA to be a valid exercise of congressional enforcement power. n88 Unlike Title I, Title II "seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review" than disability discrimination. n89 In defining the right at issue as one that courts have repeatedly afforded greater judicial protection, the Court appeared to give Congress wider berth to enact prophylactic legislation. n90

In referencing such historical treatment, n91 the Court noted that the congressional record reflected "a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." n92 The Court, in recognizing the importance of the right of access to the courts, found instances of discrimination across a spectrum of activities beyond judicial administration. n93 In addition, the Court looked outside the four corners of the legislative record to find support for the Act. n94 In dicta, the Court also remarked that evidence of discrimination [\*102] need not be limited to state actors and may include actions by lower level government entities n95 and private actors. n96 Finally, the Court noted that Congress has authority to ban conduct that has a discriminatory impact, even in the absence of evidence of a discriminatory motive. n97

In a powerful dissent in Lane, Justice Scalia stated that he believed the Section 5 power should be confined to statutes that provided causes of action for judicially articulated constitutional rules or that would directly facilitate judicial enforcement. n98 With respect to legislation remedying racial discrimination, however, Scalia announced he would apply a version of the relaxed standard set forth in Katzenbach v. Morgan. n99 Scalia attributed this reasoning to the Fourteenth Amendment's original concern for racial equality n100 and emphasized that any such legislation could not "violate other provisions" of the Constitution. n101

Of course, one may question what constitutes current evidence of racial discrimination per Scalia's analysis. Race-conscious policies designed to ameliorate persistent structural racial and social inequities in education may not easily fit into Scalia's conception of valid Section 5 legislation in Lane. n102 In his more recent concurrence in the employment case Ricci v. DeStefano, n103 Scalia suggested that some measures to reduce racial disparities may not survive constitutional muster. n104 In Ricci, the Court held that the city of New Haven, Connecticut violated Title VII of the 1964 Civil Rights Act's ban on intentional discrimination by refusing to certify results of a firefighter promotion examination after discovering that the process had a severely adverse statistical impact on African-American firefighters. n105 Scalia noted the seeming incongruity between the Equal Protection Clause, which prohibits the federal government "from discriminating on the basis of race," and disparate [\*103] impact laws like Title VII that "mandat[e] that third parties--e.g., employers, whether private, State, or municipal--discriminate on the basis of race." n106 Some have argued that Scalia's opinion in Ricci portends the Court's dismantling of voluntary employer measures to remedy disparate impact violations. n107 Even if this were the case, broad voluntary measures to foster racial inclusion in education may be distinguished. As Chief Justice Roberts stated in the Ricci oral argument, the Parents Involved plurality and concurrence agreed that some actions aimed at eliciting racial integration, such as drawing attendance zone lines and strategic site selection, may not trigger strict scrutiny, because they do not classify individual students on the basis of race. n108

### AT: Don’t Solve / Alt Causes

#### Desegregation can’t address all equity concerns but it is the best way to equalize education

Orfield & Frankenberg, 14 --- \*professor of education, law, political science and urban planning at the UCLA Graduate School of Education and Information Studies, AND \*\*assistant professor in the department of education policy studies in the College of Education at the Pennsylvania State University (5/15/14, Gary Orfield and Erica Frankenberg with Jongyeon Ee and John Kuscera, “Brown at 60: Great Progress, a Long Retreat and an Uncertain Future,” https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf, accessed on 6/15/17, JMP)

Conclusion

Desegregation is not a panacea, and it is simply not feasible in some situations. Within diverse schools, there can be classroom segregation and unequal treatment, so those issues must be addressed by teachers and administrators. There are many consequential impacts of family and community poverty that can be addressed only by social and economic policy and by civil rights changes in housing and other areas. There are, of course, important things other than desegregation, such as building high quality preschools and developing policies to assign and hold highly qualified and experienced teachers in segregated schools. Nothing in this study is meant to disparage those efforts. They are needed whether or not desegregation is possible. Where it is possible, however-- and it still is possible in many areas-- desegregation properly implemented can make a very real contribution to equalizing educational opportunities and preparing young Americans for the extremely diverse society in which they will live and work and govern together. It is the only major tool our society has for this goal.

It is good to celebrate Brown by revisiting historic sites and remembering the many struggles that led to the decision and the changes in the South. It was a major accomplishment of which we should rightfully be proud. But a real celebration should also involve thinking seriously about why the country has turned away from the goal of Brown and accepted deepening polarization and inequality in our schools. It is time to stop celebrating a version of history that ignores our last quarter century of retreat and to begin make new history by finding ways to apply the vision of Brown in a transformed, multiracial society in another century.

### AT: DeVos Circumvents / No Enforcement

#### \*\*\*Note when prepping file --- a strong defense of fiat and the scope of the affirmative plan is the best angle to take against arguments of this genre.

#### Plan solves --- DeVos is committed to enforcing any federal antidiscrimination laws

Wilkins, 6/7/17 (Emily, Roll Call, “Senate Republicans Reject DeVos' Proposed Education Cuts,” Factiva, JMP)

Senate appropriators told Education Secretary Betsy DeVos on Tuesday that the Education Department's budget request was dead on arrival in Congress, with Republicans and Democrats alike defending programs the department proposes to slash or eliminate in fiscal 2018.

At the Labor-HHS-Education Appropriations Subcommittee, DeVos also clarified remarks she made in the House last month. She pledged Tuesday to ensure that federal school choice programs would require schools to follow laws for students with disabilities. She didn't commit to any protections not in federal law.

DeVos declined to say whether the federal government would intervene if states sent vouchers to schools that discriminated against LGBT or minority students.

The department's budget request proposed a $9.2 billion cut in fiscal 2018, to $59 billion from $68.2 billion in the annualized spending levels from the fiscal 2017 continuing resolution enacted in December. Several school choice programs, including vouchers and charter schools, would receive an additional $1.4 billion.

Sen. Roy Blunt, the subcommittee chairman, said students would be hurt if programs that promoted career and technical education and helped disadvantaged students attend college were cut. The Missouri Republican said that when it came to ending federal assistance to before- and after-school programs, it would "be all but impossible to get those kinds of cuts through this committee."

"The kinds of cuts that are proposed in this budget will not occur," he said.

The programs on the chopping block in the budget request include 21st Century Community Learning Centers, which received about $1.2 billion in fiscal 2017 to provide educational before- and after-school programs as well as summer learning; comprehensive literacy development grants, which received $190 million this fiscal year to help states increase literacy in primary education; and the federal supplemental education opportunity grants, which received $732 million in fiscal 2017 to provide grants to college students to help "reduce financial barriers to postsecondary education."

Senate Appropriations Chairman Thad Cochran raised concerns about cuts to grant programs to provide professional development grants to teachers.

"We need to train teachers and support the training of teachers," the Mississippi Republican said. "There are federal programs that are legitimate and need to be on the front burner for the support and strengthening of our federal programs that help us teach our children."

DeVos defended the proposed cuts, telling committee members the 22 programs cut in the budget were "duplicative, ineffective, or are better supported through state, local, or private efforts."

When questioned about 21st Century Community Learning Centers, DeVos said the program did not focus on the school day, and therefore wasn't a part of the department's core mission.

"We made some tough choices and tough decisions around this," she said. "But this one was deemed to be one that was not effective."

Sen. Patty Murray of Washington, the subcommittee's ranking Democrat, picked up on a line of questioning from a House hearing last month on whether DeVos would ensure students in a proposed $250 million voucher program would not be discriminated against by private schools they chose to attend.

DeVos committed to ensuring students in the voucher program would be protected under a law for student with disabilities. She declined to make that commitment last month before the House panel.

But DeVos did not commit to ensuring those students in the programs would be covered under a wider array of civil rights laws. Murray pushed back on her rhetoric that such choices should be left to states and localities.

"You are seeking authority for a new federal program," Murray said. "It is paid by my taxpayers, so it can't just be left to states."

"Let me be clear," DeVos said. "Schools that receive federal funds must follow federal law. Period."

Sen. Jeff Merkley, D-Ore., also quizzed DeVos about discrimination in her proposed school choice programs, noting that federal law is not always clear on issues such as LGBT students.

But despite a heated exchange, DeVos did not elaborate beyond stating that schools receiving federal dollars must follow the federal law.

"On areas where the law is unsettled, this department isn't going to be issuing decrees," she said.

#### Government agencies are already investigating Trump administration to ensure that civil rights laws will be enforced

Green, 6/17/17 (Miranda, CNN Wire, “Commission on Civil Rights to probe Trump administration enforcement,” Factiva, JMP)

WASHINGTON (CNN) -- The US Commission on Civil Rights announced Friday that it will investigate the Trump administration's enforcement of civil rights, saying it has concerns about the impact of proposed budget and staff cuts across the federal government.

The independent government agency, which is tasked with monitoring federal civil rights enforcement, unanimously approved a two-year probe into whether the cuts will allow federal civil rights offices to perform their duties under the law.

"Along with changing programmatic priorities, these proposed cuts would result in a dangerous reduction of civil rights enforcement across the country, leaving communities of color, LGBT people, older people, people with disabilities, and other marginalized groups exposed to greater risk of discrimination," the commission wrote in a statement announcing the investigation.

The commission cited proposed staff decreases in several departments and agencies as well as the actions of the Justice Department and the Education secretary in its reasons for taking the assessment. The administration's budget would reduce money for civil rights-related offices in several agencies, making cuts of 15% and 23% in some cases, and would eliminate the EPA's Environmental Justice program and the nonprofit Legal Services Corp., which supports civil legal aid for low-income Americans, the commission said.

The Justice, Education and Labor departments and the Environmental Protection Agency were among seven agencies and departments that the commission listed as of special concern.

The commission also criticized the Just Department's decision to place Immigrations and Customs Enforcement officers at courthouses, saying it was a "dangerous impediment to access to justice for all Americans."

The agency also said the revised priorities of the department's civil rights division "do not mention the need for constitutional policing or to combat discrimination against the LGBT community or people with disabilities," adding that the budget request calls for cutting 121 positions, including 14 attorneys.

The commission also called out Education Secretary Betsy DeVos by name, citing her "repeated refusal" in congressional testimony to promise that the department would enforce federal civil rights laws. Further, the administration's proposed budget would cut 46 staff positions at the department's civil rights office, which investigates sex, race disability and age based complaints, the statement said.

Committee Chair Catherine E. Lhamon said in the statement on the investigation: "For 60 years, Congress has charged the commission to monitor federal civil rights enforcement and recommend necessary change. We take this charge seriously, and we look forward to reporting our findings to Congress, the President, and the American people."

The White House did not immediately respond to a request for comment on the commission's announcement.

#### Congress will reject cuts in new DeVos education budget

Wilkins, 6/7/17 (Emily, Roll Call, “Senate Republicans Reject DeVos' Proposed Education Cuts,” Factiva, JMP)

Senate appropriators told Education Secretary Betsy DeVos on Tuesday that the Education Department's budget request was dead on arrival in Congress, with Republicans and Democrats alike defending programs the department proposes to slash or eliminate in fiscal 2018.

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"The kinds of cuts that are proposed in this budget will not occur," he said.

### AT: Brown Was Failure

#### Brown was not a failure --- boosted support for civil rights movements and changed the national mindset

Strauss citing Rothstein 5/16/17 – Richard is a research associate of the Economic Policy Institute and a Fellow at the Thurgood Marshall Institute

(Valerie citing Richard, 5/16/17, “Brown v. Board is 63 years old. Was the Supreme Court’s school desegregation ruling a failure?” <https://www.washingtonpost.com/news/answer-sheet/wp/2017/05/16/the-supreme-courts-historic-brown-v-board-ruling-is-63-years-old-was-it-a-failure/?utm_term=.003455b3ba6c>, MW)

Sixty-three years ago on Wednesday, the Supreme Court prohibited school segregation. In the South, Brown v. Board of Education was enforced slowly and fitfully for two decades; then progress ground to a halt. Nationwide, black students are now less likely to attend schools with whites than they were half a century ago. Was Brown a failure?

Not if we consider the boost it gave to a percolating civil rights movement. The progeny of Brown include desegregation of public accommodations and the mostly unhindered right of African Americans to compete for jobs, to vote, and to purchase or rent homes. Brown’s greatest accomplishment was its enduring imprint on the national ethos: the idea of second-class citizenship for African Americans, indeed for any minority group, is now universally condemned as a violation of the Constitution and of American values. None of these transformations came easily, and none are complete, but none would have happened were it not for Brown.

### AT: Congress Already Acted

#### Congress has not passed legislation to remedy segregation in public education

Epperson, 12 --- Associate Professor of Law, American University Washington College of Law (Winter 2012, Lia, Harvard Law & Policy Review, “SYMPOSIUM: EDUCATION: EQUALITY OF OPPORTUNITY: Legislating Inclusion,” 6 Harv. L. & Pol'y Rev. 91, Lexis-Nexis Academic, JMP) **\*\*\*note --- this is footnote number 122**

n122 It should be noted that Congress has passed a number of statutes that address the provision of education, which civil rights practitioners have used to advocate for racial equality in education. For a discussion of the role of Title VI of the 1964 Civil Rights Act in furthering school integration, see Lia Epperson, Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence, 10 BERKELEY J. AFR.-AM. L. & POL'Y 146 (2008). See also Epperson, Equality Dissonance, supra note 1 (discussing No Child Left Behind; General Education Provision Act; Magnet Schools Assistance Program; and Emergency School Aid Act of 1972, which offered funding to help "eliminate[] racial segregation and discrimination" in elementary and secondary schools, but ended with the passage of the 1981 Omnibus Budget Reconciliation Act under President Ronald Reagan). For a discussion of the Emergency School Aid Act of 1972, see GARY ORFIELD, Desegregation and the Politics of Polarization, in CONGRESSIONAL POWER: CONGRESS AND SOCIAL CHANGE 173 (1975). The fact remains, however, that Congress has not passed broad-based legislation to effectuate the constitutional ideal of remedying de facto racial isolation and segregation as outlined by Justice Kennedy in Parents Involved.

## Advantage

### OCR Enforcement Will Be Cut

#### \*\*\*note when prepping file --- consider using these cards for the basis of an aff that just enforces existing desegregation initiatives.

#### OCR will shrink enforcement of civil rights under Trump --- gutting their effectiveness

Murphy, 3/13/17 (James S., “The Office for Civil Rights's Volatile Power; The influence of the office has waxed and waned with each administration. How will it fare under Betsy DeVos?” <https://www.theatlantic.com/education/archive/2017/03/the-office-for-civil-rights-volatile-power/519072/>, accessed on 5/10/17, JMP)

In another interview, DeVos talked about “when we had segregated schools and when we had a time when, you know, girls weren't allowed to have the same kind of sports teams—I mean, there have been important inflection points for the federal government to get involved.” There is strong evidence that school segregation is worse now than it has been for more than 30 years. The Obama administration tackled desegregation; campus sexual violence; harassment against transgender students; and disparities in discipline that made African American students and students with disabilities much more likely to be restrained, secluded, arrested, suspended, or expelled. There was a sense of urgency in the OCR during the Obama years. DeVos sees things differently. Asked if there any remaining issues where the federal government should intervene, DeVos said “I can't think of any now.”

Given this milquetoast response, it was surprising to learn that DeVos raised an objection to Attorney General Jeff Sessions and President Trump’s decision to rescind the Department of Education’s protections of transgender students’ rights. DeVos’s push-back was overridden, and though she could have refused to go along with the administration, in the end, she capitulated, and the acting assistant secretary of civil rights in the Department of Education signed off on the the new guidance. Speaking to an audience at the Conservative Political Action Conference a day later, she called the Title IX guidance “a very huge example of the Obama administration’s overreach.” None of this was unexpected—at least, not to anyone familiar with the history of the OCR.

Michael Petrilli, the president of the Thomas B. Fordham Institute, a conservative education-policy research center, suggested that the OCR under Trump would be “more humble in its goals.” He said it would likely return to the “traditional role of responding to complaints,” as previous Republican administrations have, rather than using the power of the office “more proactively to launch complaints.” President Obama and his two secretaries of education, King and Arne Duncan, certainly put much more emphasis on students’ civil rights than their predecessors did, likely because school seems to play such a large role in their visions of both citizenship and progress. Education appears to play a smaller role in Trump’s worldview, however. During his campaign and his inauguration speech, education served as just another example of American decline (“an education system flush with cash, but which leaves our young and beautiful students deprived of all knowledge”). What follows from such a view, or from DeVos’s remark that traditional public schools are a “dead-end,” is not nearly so clear.

Because the OCR has long been subject to pendulum swings between Republican and Democratic administrations, history provides the best guide to what is likely to happen to the office in the next four years.

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The OCR bears the primary responsibility to enforce laws that “prohibit discrimination … on the basis of race, color, national origin, sex, disability, or age.” Although the office has always worked with institutions to resolve complaints filed against them, its ultimate enforcement tools are to withhold federal funds or to refer a complaint to the Department of Justice for prosecution. In an interview, Catherine Lhamon, the second assistant secretary of Civil Rights for the Department of Education under Obama, said, “Happily, we almost never need to initiate [either] process.” Lhamon was appointed to a six-year term as chair of the U.S. Civil Rights Commission in the last weeks of the Obama presidency. People who work in schools, she pointed out, are there because they want to help students, so they typically work with the OCR to satisfy the law.

Republican critics of the OCR do not see things in such a warm light. They have accused the office of overreach, overregulation, and intimidation during President Obama’s administration and have promised change. Representative Virginia Foxx, a Republican from North Carolina and the new chair of the House Committee on Education and the Workforce, wants “to see the [entire] department scaled back.” At a recent post-election event, David Cleary, the chief of staff for Senator Lamar Alexander—a former secretary of education himself and the current chairman of the Senate Health, Education, Labor, and Pensions Committee—predicted a weaker role for the office: “Certainly we think that the Office [for] Civil Rights has overreached ... and, there will be a very natural shrinking of the expansive interpretations of Title IX and civil-rights laws.”

What some see as a “natural” correction to an office that has come under a great deal of criticism (and not just from conservatives) other see as a profound threat. When the Department of Education hosted an event this past December intended to mark all that the Office for Civil Rights had accomplished during the Obama administration, it felt equal parts funeral and rally. Liz King, a senior policy analyst and the director of education policy at The Leadership Conference on Civil and Human Rights, told me after the event, “People are actually worried that historic civil-rights laws may not be enforced.”

The OCR is unlikely to be abolished in the next four years. That would require legislative cooperation across the aisle. It will, however, almost certainly be diminished in scale and ambition, which some might argue is tantamount to its elimination. Curt Decker, the executive director of the National Disability Rights Network, said “There has to be a very robust enforcement system to make sure any federal legislation has the impact it is intended to have.” A law without enforcement amounts to little more than theater. Civil-rights laws cannot be easily reversed, but they can go unenforced.

#### Devos could cut the funding and enforcement powers of the OCR

Murphy, 3/13/17 (James S., “The Office for Civil Rights's Volatile Power; The influence of the office has waxed and waned with each administration. How will it fare under Betsy DeVos?” <https://www.theatlantic.com/education/archive/2017/03/the-office-for-civil-rights-volatile-power/519072/>, accessed on 5/10/17, JMP)

Carter’s main accomplishment with respect to education and the Office for Civil Rights was the creation of the Department of Education in 1979. Shirley Mount Hufstedler served as the department’s first secretary. One of the justifications for the department was the need to ensure equal access for all Americans to educational opportunities of a high quality. The department was given its own Office for Civil Rights, headed by an assistant secretary, clearly indicating the prominence of the position, the office, and its mission.

The shine wore off quickly, however, with the election of Ronald Reagan, who ran on a promise to eliminate the Department of Education because he believed it represented a federal intrusion into state and local matters. Reagan appointed Terrel H. Bell as secretary of education, with the hope that he would shutter the department. In less than one year, Bell “reduced the number of [department] employees to less than 4,300 from 5,666, in part by attrition and in part by eliminating more than 250 jobs.” This attrition has continued in the Office for Civil Rights across Republican and Democratic administrations: from 1981 to 2016, the full-time staff shrank from 1,099 to 563, even as civil-rights complaints grew from 2,887 to 16,720.

Bell is remembered best today as the architect of the 1983 report A Nation at Risk, which ignited the modern education-reform movement. It declared the federal government’s responsibility to protect “constitutional and civil rights for students and school personnel.” But Bell’s record and remarks on civil rights hardly lived up to that declaration.

In 1982, he told a reporter, “We’ve tried to eliminate a lot of hassling of schools and colleges.” An official at Boston University confirmed that they did not “have people from the Office [for] Civil Rights hanging around as much” because “their staffs have been cut, and they can't do it. They are also much more willing to accept your answers.” Bell did not get to kill the department off, thanks to Congressional opposition, but he and Reagan did restrain the power of the Office for Civil Rights by cutting back its funding, reducing investigations and reviews, and rescinding guidance. These are the strategies DeVos might well follow.

### DeVos Will Withdraw Past Guidance

#### DeVos likely to withdraw OCR guidance on a number of civil rights issues

Murphy, 3/13/17 (James S., “The Office for Civil Rights's Volatile Power; The influence of the office has waxed and waned with each administration. How will it fare under Betsy DeVos?” <https://www.theatlantic.com/education/archive/2017/03/the-office-for-civil-rights-volatile-power/519072/>, accessed on 5/10/17, JMP)

Under DeVos, the guidance on sexual violence will almost certainly be modified, if not withdrawn, as will the transgender guidance. So, too, might the guidance on discipline, seclusion, and restraint, in particular. Seclusion (removing a student from a classroom and putting her in isolation) and restraint (restricting a student’s movement, often by pinning him to the floor) have been used disproportionately against students with disabilities and African American students. President Trump’s rhetoric about “American carnage” and “bad dudes” suggests he is more likely to embrace the “zero-tolerance” policies.

### Framing – Only Responsible for the Plan

#### We are only responsible for whether the plan itself is a moral action – the decisions of other agents are outside your power to determine and focusing on them perpetuates inaction and sanctions atrocity

Harris, 8 (Alex, J.D. Stanford University, Harvard University Bachelors (magna cum laude), Practicing Appellate and Constitutional Law at Gibson, Dunn & Crutcher LLP, former Adjunct Analyst at The Competitive Enterprise Institute, “Philosopher's Corner: The Principle of Intervening Action”, <https://cei.org/blog/philosophers-corner-principle-intervening-action>, August 15, 2008, ak.) **\*\*\*Note --- PIA = Principle of Intervening Action**

Gewirth takes the position that we are solely responsible for the morality of our own actions in two senses. First, only we are responsible for the acts we commit, even if someone else's action caused us to act as we did. (For example, if a woman's husband cheated on her and she, upon finding out, grew enraged and killed his lover, she - not he - would bear sole responsibility.) Second, we are only responsible for our own actions, even if they lead to other actions. Thus, we have a preeminent duty to never act immorally, even if doing so would preclude others from taking even more immoral actions. Gewirth contends that never violating the negative rights of another "is an obligation so fundamental that it cannot be overridden even to prevent evil consequences from befalling some persons." He clarifies with an example. Imagine that a group of terrorists kidnaps a woman and offers her son a choice: he must torture his mother or they will blow up a city with a nuclear weapon. Gewirth argues that the son has a primary duty to not violate the rights of his mother, whereas he is not the actor who is blowing up the city - the terrorists are the moral agents responsible for that action, not the son. If the son had the choice, he would pick neither. His duty is to never violate rights; the only way to fulfill this is to not torture his mother. Gewirth argues: "It would be unjustified to violate the mother's right to life in order to protect the rights to life of the many other residents of the city. For rights cannot be justifiably protected by violating another right." PIA is the only consistent, justifiable moral theory of consequences. First, one should note that only PIA sets a non-arbitrary limit on the string of effects that can factor into the moral calculation. PIA says that no consequences of other actions can count; the only other non-arbitrary standard says that all consequences in the chain must count. One cannot claim that I am responsible for only, say, the first four other actions resulting from my action. One must either consider only my actions or all resulting actions. Thus, if the destruction of the city by terrorists actually ended up preventing more rights violations by, say, staving off a Malthusian population crunch that would result in mass starvation and world war, then the consequentialist position has to endorse the terrorists' action. Consequentialists have to count every effect in the chain, even in the absurdly far-off future, to determine whether an action is moral. This fact, of course, does not by itself constitute a reason to reject consequentialism in favor of PIA, but it does suggest that PIA is the only reasonable interpretation of the requirement of non-consequentialism. It also suggests an implausible feature of consequentialism. I went on to demonstrate how the libertarian principle of self-ownership supports PIA and why people cannot be responsible for all effects of their actions: Since we are born owning ourselves and nothing else, controlling our mind and body and no one else's, it makes perfect sense that we should be responsible for only the actions that we ourselves commit. Some could argue that we should be responsible for the results of these actions. PIA states that we are. If a person gets a wrecking ball and knocks over a building, which then falls and crushes twenty people, the person is to some degree responsible for those results. But this is not the case if someone else's action intervenes, because another moral agent is the more proximate cause of the effects; she has stepped into the line of causation to take the moral responsibility. When you act upon a rock that you hurl at an enemy's face, you are responsible for the effects of the rock for two reasons: first, you are using force upon the rock; secondly, the rock has no agency over the effects it causes. The rock, by the fact that it has no agency of its own, is merely your tool, an extension of your agency. But neither of these reasons holds for using non-coercive measures that result in a person's action. As long as one does not use coercion to compel another to commit a rights-violating action, one has not reduced that other person's agency. Possessing full agency, the person is morally responsible for the totality of her actions; thus no one else can assume any portion of that responsibility. You are not responsible for anyone else's free actions and no one else is responsible for yours. If the son were somehow partially responsible for the terrorists blowing up the city, that would necessarily diminish, by whatever fraction of responsibility the son assumed, the terrorists' responsibility for that action. They would not be wholly responsible, because the son had caused their action. But this must not be the case; the terrorists must be held totally responsible for the destruction of the city. Consequentialists ask, "Which set of rights-violations do you endorse: the torture of the mother, or the deaths of the millions?" Gewirth responds that PIA endorses neither. PIA gives the terrorists complete responsibility for their actions, and emphatically condemns them, in a way that no other position is capable of. Only PIA is capable of giving rights their supreme status by proclaiming that they may never be violated for any reason, including preventing future rights-violations.

## Disadvantage / Kritik Answers

### AT: DA Federalism – No Link

#### Federal government has the constitutional authority to regulate public schools

Takhar, 15 --- J.D. Candidate, 2015, University of California Hastings College of the Law (Summer 2015, Neelam, Hastings Women's Law Journal, “No Freedom in a Ship of Fools: A Democratic Justification for the Common Core State Standards and Federal Involvement in K-12 Education,” 26 Hastings Women's L.J. 355, Lexis-Nexis Academic, JMP)

C. On the Rise: Federal Authority Over Public Schools

Article I of the United States Constitution establishes Congress' enumerated powers, including the power to levy taxes, regulate commerce, declare war, and create laws that are necessary and proper. n121 It does not refer to public education directly. The Tenth Amendment reserves power not given explicitly to the federal government to the states. n122 Thus, the power to directly regulate public education is reserved to the states. n123 Despite this limitation Congress does possess the power to spend for the general welfare, and it is under this indirect authority that it regulates public education. n124 Congress uses its spending power in two ways: first, to incentivize states and local governments to adopt programs by offering funding and grants; and second, to require states and local districts that receive federal funding to comply with conditions that serve federal policy goals, such as public safety or civil rights protections. n125 States or districts that act in opposition to federal policy goals lose federal funding. n126

The federal government also adopts administrative rules and regulations affecting education. n127 The U.S. Department of Education was [\*369] created in 1867, with the modest mission of "collecting information on schools and teaching that would help the States establish effective school systems." n128 In 1980, the Department of Education became a Cabinet level agency, n129 and today, it is the primary federal agency that issues regulations to implement federal education statutes, and monitors districts for compliance. n130 Its ultimate power is the authority to withhold federal funds from schools found to be in non-compliance with federal statutes. n131 The U.S. Department of Education's actual control over school operations and policy decisions is somewhat limited, because federal dollars typically account for less than ten percent of the average district budget. n132 Although courts grant broad discretion to administrative agencies like the Department of Education, n133 "critical federal institutions - including the courts - [have] reinforced the prevailing ethos that education in the United States was the principal dominion of state and local authority." n134

In light of the constitutional framework and sources of school funding, federal involvement in K-12 education has traditionally been marginal. The federal government's involvement in elementary and secondary schools began by focusing on groups with narrowly defined needs, such as students with disabilities, low socio-economic status, and other "insular and discrete subpopulations." n135 Most prominent of these programs is Title I of the Elementary and Secondary Education Act which concentrates on the nation's most disadvantaged students. n136 This important piece of federal legislation, as well as the No Child Left Behind Act, The Race To The Top, [\*370] and most recently The Common Core State Standards Initiative are all discussed in detail later in this article. n137

Critics of federal education legislation perceive it as federal interference in a matter that constitutionally has been reserved to the states. n138 However, the Supreme Court has held that although the federal government has limited enumerated powers under Article I, Congress may exercise its Spending Clause n139 power to attach conditions to federal funds, requiring state and local governments to comply with federal statutory and administrative directives. n140 This broad interpretation of the Spending Clause has been applied to federal education legislation as well. n141

#### Civil rights protection is an area of federal control

Murphy, 3/13/17 (James S., “The Office for Civil Rights's Volatile Power; The influence of the office has waxed and waned with each administration. How will it fare under Betsy DeVos?” <https://www.theatlantic.com/education/archive/2017/03/the-office-for-civil-rights-volatile-power/519072/>, accessed on 5/10/17, JMP)

Here is a question nobody asked Betsy DeVos at her confirmation hearing to become the eleventh secretary of education: Is the U.S. Department of Education a civil-rights agency?

The last secretary, John King, thinks so. Over 600 education scholars who protested the nomination of DeVos think so, too. In a letter to the Senate, they recalled that the Elementary and Secondary Education Act of 1965, which created the federal role in American schools, is “at its heart a civil-rights law.”

While much of the controversy over the new secretary has focused on school choice and the privatization of public education, the reality is that DeVos will have little power to enact major changes on those fronts because control lies with the state. When it comes to civil rights, however, DeVos and the Department of Education’s Office for Civil Rights (OCR) still possess immense power and responsibility. During her hearing, DeVos was evasive about how she would wield both, promising only to review OCR’s policies should she be confirmed. In a recent interview, she acknowledged that “anti-discrimination issues” require “a federal role,” but, she went on, “I also think there is an opportunity to streamline and simplify a lot of the engagement and involvement the department has had around some of these issues.”

#### Ensuring equal access and limiting discrimination are federal roles

Gregory & Kaufman, 10 (Spring 2010, Erin R. and Dean, Education Law & Policy, “EDUCATION AND FEDERALISM: THE ROLE FOR THE FEDERAL GOVERNMENT IN EDUCATION REFORM,” <https://pdfs.semanticscholar.org/290b/cdfdb2cc2cdab7c352063eaad7d9216d372e.pdf>, accessed on 6/6/17, JMP)

Perhaps the most significant and far reaching attempt was The No Child Left Behind Act (NCLB). The NCLB was an aggressive and ambitious attempt by the federal government to improve American education. However, it was not the first time the federal government inserted itself into the realm of education. These initial attempts by the federal government were largely a response to concerns about considerable racial disparities in education, precipitated by the Supreme Court’s holding in Brown v. Board of Education in 1954.8 The role of the federal government in ensuring access to education for disadvantaged groups should not be underestimated9, particularly when the remnants of discrimination still plague American schools, and the federal government should continue to promote accessible education for these groups. But while racial and gender-based discrimination are problems of national magnitude requiring a decisive national response, other problems facing the United States’ educational system today are quite different.

#### This is a limited area where federal action is justified

Gregory & Kaufman, 10 (Spring 2010, Erin R. and Dean, Education Law & Policy, “EDUCATION AND FEDERALISM: THE ROLE FOR THE FEDERAL GOVERNMENT IN EDUCATION REFORM,” <https://pdfs.semanticscholar.org/290b/cdfdb2cc2cdab7c352063eaad7d9216d372e.pdf>, accessed on 6/6/17, JMP)

V. CONCLUSION

The role of the federal government in education should be limited to setting national goals, incentivizing creative approaches to meeting those goals by individual states and local communities, and ensuring accessible education by investigating civil rights violations. Education is an area best left to state and local governments because those closest to the students are in the best position to determine their academic needs. States and local communities also provide most of the funding for local schools and thus, are more invested in the success of these schools. Moreover, schools should be able to respond to the wishes of parents regarding their children’s education without undue federal regulation. Even as the federal role in education has increased in the last several decades, the federal government has been unable to successfully improve schools.

### AT: DA Federalism – USFG Key to New Education Federalism Model

#### Expanded federal role is critical to new model of education federalism that establishes a floor of minimal equality

Bowman, 17--- Vice Dean of Academic Affairs and Professor of Law, Michigan State University (last revised 4/27/17, originally published 11/28/16, Kristi L., University of Michigan Journal of Law Reform, Forthcoming, “The Failure of Education Federalism,” <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2876889>, JMP)

V. CONCLUSION

Unlike many countries around the world, in the United States there is no positive right to education in federal law.233 Such a right exists only at the state level and it varies from one state to another. Part of this variation occurs because similar language in state constitutions has been interpreted as creating moderate to robust education rights in one state and weak to nonexistent education rights in another.234 The blame is not entirely at the feet of state courts though—in a state with a failing level of educational quality, all three branches of government are complicit. Michigan shows us precisely what it looks like when the proverbial floor rots and children fall through: in one small district, a native English speaker without a learning disability matriculates to seventh grade while reading only at first grade level and sometimes misspelling his or her own name, and in a neighboring major district, the percentage of eighth graders proficient in reading is in the single digits.235

Under the current model of education federalism, these glaring gaps in educational quality are not the federal government’s problem, and in some ways the federal government’s hands are tied when it comes to being part of the solution. This must change. The current model of dual federalism does not reflect the current reality of many federal-state-local relationships, and it is sorely outdated in the context of public education. The interest of having a population across the country with at least a minimal level of education—indeed, the interest in avoiding creating an permanent underclass through our own public schools—is an interest all citizens and all levels of government share. It is grounded in both liberty and equality, and especially since the Great Recession it is threatened. The present reality of public education in Michigan shows us what is likely to occur in a growing number of states unless at least one branch of the federal government intervenes. Adopting a model of cooperative federalism in education would enable us to avoid a dystopic future by establishing a federal floor of minimal educational quality. The children of this country deserve no less.

### AT: K Antiblackness

#### Significant Black progress has been made --- maintaining optimism is vital to further gains. Prioritizing the learning of factual knowledge is necessary to give students critical intellectual capital.

Thernstrom & Thernstrom, 98 --- \*Senior Fellow, Manhattan Institute, AND \*\*Winthrop Research Professor of History at Harvard University (3/1/1998, Abigail & Stephan, “Black Progress: How far we’ve come, and how far we have to go,” <https://www.brookings.edu/articles/black-progress-how-far-weve-come-and-how-far-we-have-to-go/>, accessed on 6/16/17, JMP)

Let’s start with a few contrasting numbers.

60 and 2.2.

In 1940, 60 percent of employed black women worked as domestic servants; today the number is down to 2.2 percent, while 60 percent hold white- collar jobs.

44 and 1. In 1958, 44 percent of whites said they would move if a black family became their next door neighbor; today the figure is 1 percent.

18 and 86. In 1964, the year the great Civil Rights Act was passed, only 18 percent of whites claimed to have a friend who was black; today 86 percent say they do, while 87 percent of blacks assert they have white friends.

Progress is the largely suppressed story of race and race relations over the past half-century. And thus it’s news that more than 40 percent of African Americans now consider themselves members of the middle class. Forty-two percent own their own homes, a figure that rises to 75 percent if we look just at black married couples. Black two-parent families earn only 13 percent less than those who are white. Almost a third of the black population lives in suburbia.

Because these are facts the media seldom report, the black underclass continues to define black America in the view of much of the public. Many assume blacks live in ghettos, often in high-rise public housing projects. Crime and the welfare check are seen as their main source of income. The stereotype crosses racial lines. Blacks are even more prone than whites to exaggerate the extent to which African Americans are trapped in inner-city poverty. In a 1991 Gallup poll, about one-fifth of all whites, but almost half of black respondents, said that at least three out of four African Americans were impoverished urban residents. And yet, in reality, blacks who consider themselves to be middle class outnumber those with incomes below the poverty line by a wide margin.

A Fifty-Year March out of Poverty

Fifty years ago most blacks were indeed trapped in poverty, although they did not reside in inner cities. When Gunnar Myrdal published An American Dilemma in 1944, most blacks lived in the South and on the land as laborers and sharecroppers. (Only one in eight owned the land on which he worked.) A trivial 5 percent of black men nationally were engaged in nonmanual, white-collar work of any kind; the vast majority held ill-paid, insecure, manual jobs—jobs that few whites would take. As already noted, six out of ten African-American women were household servants who, driven by economic desperation, often worked 12-hour days for pathetically low wages. Segregation in the South and discrimination in the North did create a sheltered market for some black businesses (funeral homes, beauty parlors, and the like) that served a black community barred from patronizing “white” establishments. But the number was minuscule.

Beginning in the 1940s, however, deep demographic and economic change, accompanied by a marked shift in white racial attitudes, started blacks down the road to much greater equality. New Deal legislation, which set minimum wages and hours and eliminated the incentive of southern employers to hire low-wage black workers, put a damper on further industrial development in the region. In addition, the trend toward mechanized agriculture and a diminished demand for American cotton in the face of international competition combined to displace blacks from the land.

As a consequence, with the shortage of workers in northern manufacturing plants following the outbreak of World War II, southern blacks in search of jobs boarded trains and buses in a Great Migration that lasted through the mid-1960s. They found what they were looking for: wages so strikingly high that in 1953 the average income for a black family in the North was almost twice that of those who remained in the South. And through much of the 1950s wages rose steadily and unemployment was low.

Thus by 1960 only one out of seven black men still labored on the land, and almost a quarter were in white-collar or skilled manual occupations. Another 24 percent had semiskilled factory jobs that meant membership in the stable working class, while the proportion of black women working as servants had been cut in half. Even those who did not move up into higher-ranking jobs were doing much better.

A decade later, the gains were even more striking. From 1940 to 1970, black men cut the income gap by about a third, and by 1970 they were earning (on average) roughly 60 percent of what white men took in. The advancement of black women was even more impressive. Black life expectancy went up dramatically, as did black homeownership rates. Black college enrollment also rose—by 1970 to about 10 percent of the total, three times the prewar figure.

In subsequent years these trends continued, although at a more leisurely pace. For instance, today more than 30 percent of black men and nearly 60 percent of black women hold white-collar jobs. Whereas in 1970 only 2.2 percent of American physicians were black, the figure is now 4.5 percent. But while the fraction of black families with middle-class incomes rose almost 40 percentage points between 1940 and 1970, it has inched up only another 10 points since then.

Affirmative Action Doesn’t Work

Rapid change in the status of blacks for several decades followed by a definite slowdown that begins just when affirmative action policies get their start: that story certainly seems to suggest that racial preferences have enjoyed an inflated reputation. “There’s one simple reason to support affirmative action,” an op-ed writer in the New York Times argued in 1995. “It works.” That is the voice of conventional wisdom.

In fact, not only did significant advances pre-date the affirmative action era, but the benefits of race-conscious politics are not clear. Important differences (a slower overall rate of economic growth, most notably) separate the pre-1970 and post-1970 periods, making comparison difficult.

We know only this: some gains are probably attributable to race-conscious educational and employment policies. The number of black college and university professors more than doubled between 1970 and 1990; the number of physicians tripled; the number of engineers almost quadrupled; and the number of attorneys increased more than sixfold. Those numbers undoubtedly do reflect the fact that the nation’s professional schools changed their admissions criteria for black applicants, accepting and often providing financial aid to African-American students whose academic records were much weaker than those of many white and Asian-American applicants whom these schools were turning down. Preferences “worked” for these beneficiaries, in that they were given seats in the classroom that they would not have won in the absence of racial double standards.

On the other hand, these professionals make up a small fraction of the total black middle class. And their numbers would have grown without preferences, the historical record strongly suggests. In addition, the greatest economic gains for African Americans since the early 1960s were in the years 1965 to 1975 and occurred mainly in the South, as economists John J. Donahue III and James Heckman have found. In fact, Donahue and Heckman discovered “virtually no improvement” in the wages of black men relative to those of white men outside of the South over the entire period from 1963 to 1987, and southern gains, they concluded, were mainly due to the powerful antidiscrimination provisions in the 1964 Civil Rights Act.

With respect to federal, state, and municipal set-asides, as well, the jury is still out. In 1994 the state of Maryland decided that at least 10 percent of the contracts it awarded would go to minority- and female-owned firms. It more than met its goal. The program therefore “worked” if the goal was merely the narrow one of dispensing cash to a particular, designated group. But how well do these sheltered businesses survive long-term without extraordinary protection from free-market competition? And with almost 30 percent of black families still living in poverty, what is their trickle-down effect? On neither score is the picture reassuring. Programs are often fraudulent, with white contractors offering minority firms 15 percent of the profit with no obligation to do any of the work. Alternatively, set-asides enrich those with the right connections. In Richmond, Virginia, for instance, the main effect of the ordinance was a marriage of political convenience—a working alliance between the economically privileged of both races. The white business elite signed on to a piece-of-the-pie for blacks in order to polish its image as socially conscious and secure support for the downtown revitalization it wanted. Black politicians used the bargain to suggest their own importance to low-income constituents for whom the set-asides actually did little. Neither cared whether the policy in fact provided real economic benefits—which it didn’t.

Why Has the Engine of Progress Stalled?

In the decades since affirmative action policies were first instituted, the poverty rate has remained basically unchanged. Despite black gains by numerous other measures, close to 30 percent of black families still live below the poverty line. “There are those who say, my fellow Americans, that even good affirmative action programs are no longer needed,” President Clinton said in July 1995. But “let us consider,” he went on, that “the unemployment rate for African Americans remains about twice that of whites.” Racial preferences are the president’s answer to persistent inequality, although a quarter-century of affirmative action has done nothing whatever to close the unemployment gap.

Persistent inequality is obviously serious, and if discrimination were the primary problem, then race-conscious remedies might be appropriate. But while white racism was central to the story in 1964, today the picture is much more complicated. Thus while blacks and whites now graduate at the same rate from high school today and are almost equally likely to attend college, on average they are not equally educated. That is, looking at years of schooling in assessing the racial gap in family income tells us little about the cognitive skills whites and blacks bring to the job market. And cognitive skills obviously affect earnings.

The National Assessment of Educational Progress (NAEP) is the nation’s report card on what American students attending elementary and secondary schools know. Those tests show that African-American students, on average, are alarmingly far behind whites in math, science, reading, and writing. For instance, black students at the end of their high school career are almost four years behind white students in reading; the gap is comparable in other subjects. A study of 26- to 33-year-old men who held full-time jobs in 1991 thus found that when education was measured by years of school completed, blacks earned 19 percent less than comparably educated whites. But when word knowledge, paragraph comprehension, arithmetical reasoning, and mathematical knowledge became the yardstick, the results were reversed. Black men earned 9 percent more than white men with the same education—that is, the same performance on basic tests.

Other research suggests much the same point. For instance, the work of economists Richard J. Murnane and Frank Levy has demonstrated the increasing importance of cognitive skills in our changing economy. Employers in firms like Honda now require employees who can read and do math problems at the ninth-grade level at a minimum. And yet the 1992 NAEP math tests, for example, revealed that only 22 percent of African-American high school seniors but 58 percent of their white classmates were numerate enough for such firms to consider hiring them. And in reading, 47 percent of whites in 1992 but just 18 percent of African Americans could handle the printed word well enough to be employable in a modern automobile plant. Murnane and Levy found a clear impact on income. Not years spent in school but strong skills made for high long-term earnings.

The Widening Skills Gap

Why is there such a glaring racial gap in levels of educational attainment? It is not easy to say. The gap, in itself, is very bad news, but even more alarming is the fact that it has been widening in recent years. In 1971, the average African-American 17-year-old could read no better than the typical white child who was six years younger. The racial gap in math in 1973 was 4.3 years; in science it was 4.7 years in 1970. By the late 1980s, however, the picture was notably brighter. Black students in their final year of high school were only 2.5 years behind whites in both reading and math and 2.1 years behind on tests of writing skills.

Had the trends of those years continued, by today black pupils would be performing about as well as their white classmates. Instead, black progress came to a halt, and serious backsliding began. Between 1988 and 1994, the racial gap in reading grew from 2.5 to 3.9 years; between 1990 and 1994, the racial gap in math increased from 2.5 to 3.4 years. In both science and writing, the racial gap has widened by a full year.

There is no obvious explanation for this alarming turnaround. The early gains doubtless had much to do with the growth of the black middle class, but the black middle class did not suddenly begin to shrink in the late 1980s. The poverty rate was not dropping significantly when educational progress was occurring, nor was it on the increase when the racial gap began once again to widen. The huge rise in out-of-wedlock births and the steep and steady decline in the proportion of black children growing up with two parents do not explain the fluctuating educational performance of African-American children. It is well established that children raised in single-parent families do less well in school than others, even when all other variables, including income, are controlled. But the disintegration of the black nuclear family—presciently noted by Daniel Patrick Moynihan as early as 1965—was occurring rapidly in the period in which black scores were rising, so it cannot be invoked as the main explanation as to why scores began to fall many years later.

Some would argue that the initial educational gains were the result of increased racial integration and the growth of such federal compensatory education programs as Head Start. But neither desegregation nor compensatory education seems to have increased the cognitive skills of the black children exposed to them. In any case, the racial mix in the typical school has not changed in recent years, and the number of students in compensatory programs and the dollars spent on them have kept going up.

What about changes in the curriculum and patterns of course selection by students? The educational reform movement that began in the late 1970s did succeed in pushing students into a “New Basics” core curriculum that included more English, science, math, and social studies courses. And there is good reason to believe that taking tougher courses contributed to the temporary rise in black test scores. But this explanation, too, nicely fits the facts for the period before the late 1980s but not the very different picture thereafter. The number of black students going through “New Basics” courses did not decline after 1988, pulling down their NAEP scores.

We are left with three tentative suggestions. First, the increased violence and disorder of inner-city lives that came with the introduction of crack cocaine and the drug-related gang wars in the mid-1980s most likely had something to do with the reversal of black educational progress. Chaos in the streets and within schools affects learning inside and outside the classroom.

In addition, an educational culture that has increasingly turned teachers into guides who help children explore whatever interests them may have affected black academic performance as well. As educational critic E. D. Hirsch, Jr., has pointed out, the “deep aversion to and contempt for factual knowledge that pervade the thinking of American educators” means that students fail to build the “intellectual capital” that is the foundation of all further learning. That will be particularly true of those students who come to school most academically disadvantaged—those whose homes are not, in effect, an additional school. The deficiencies of American education hit hardest those most in need of education.

And yet in the name of racial sensitivity, advocates for minority students too often dismiss both common academic standards and standardized tests as culturally biased and judgmental. Such advocates have plenty of company. Christopher Edley, Jr., professor of law at Harvard and President Clinton’s point man on affirmative action, for instance, has allied himself with testing critics, labeling preferences the tool colleges are forced to use “to correct the problems we”ve inflicted on ourselves with our testing standards.” Such tests can be abolished—or standards lowered—but once the disparity in cognitive skills becomes less evident, it is harder to correct.

Closing that skills gap is obviously the first task if black advancement is to continue at its once-fast pace. On the map of racial progress, education is the name of almost every road. Raise the level of black educational performance, and the gap in college graduation rates, in attendance at selective professional schools, and in earnings is likely to close as well. Moreover, with educational parity, the whole issue of racial preferences disappears.

The Road to True Equality

Black progress over the past half-century has been impressive, conventional wisdom to the contrary notwithstanding. And yet the nation has many miles to go on the road to true racial equality. “I wish I could say that racism and prejudice were only distant memories, but as I look around I see that even educated whites and African American…have lost hope in equality,” Thurgood Marshall said in 1992. A year earlier The Economist magazine had reported the problem of race as one of “shattered dreams.” In fact, all hope has not been “lost,” and “shattered” was much too strong a word, but certainly in the 1960s the civil rights community failed to anticipate just how tough the voyage would be. (Thurgood Marshall had envisioned an end to all school segregation within five years of the Supreme Court s decision in Brown v. Board of Education.) Many blacks, particularly, are now discouraged. A 1997 Gallup poll found a sharp decline in optimism since 1980; only 33 percent of blacks (versus 58 percent of whites) thought both the quality of life for blacks and race relations had gotten better.

Thus, progress—by many measures seemingly so clear—is viewed as an illusion, the sort of fantasy to which intellectuals are particularly prone. But the ahistorical sense of nothing gained is in itself bad news. Pessimism is a self-fulfilling prophecy. If all our efforts as a nation to resolve the “American dilemma” have been in vain—if we’ve been spinning our wheels in the rut of ubiquitous and permanent racism, as Derrick Bell, Andrew Hacker, and others argue—then racial equality is a hopeless task, an unattainable ideal. If both blacks and whites understand and celebrate the gains of the past, however, we will move forward with the optimism, insight, and energy that further progress surely demands.

#### Undeniable racial progress has occurred—envisioning blueprints for positive futures builds upon this—their nihilism is de-politicizing

Desmond & Emirbayer 12, (John L. Loeb Associate Professor of the Social Sciences, professor of sociology at University of Wisconsin-Madison, To imagine and pursue racial justice, scholar.harvard.edu/files/mdesmond/files/imaginepursue.pdf)

The ends Many of America’s whites believe that racial equality already has been achieved, while many of its non-whites hold that little has changed since the Civil Rights Movement and that things may be getting worse (Brown et al. 2003, 224–5). One side declares, ‘Racial harmony has arrived.’ The other side replies, ‘Racial harmony will never come.’ But the truth lies somewhere in the middle. Two things are undeniable: that racial progress in America has been nothing short of astounding and that racial domination in America has yet to be dismantled. As one sociologist has put it, ‘It can be said, unconditionally, that the changes that have taken place in the United States over the past fifty years are unparalleled in the history of minority–majority relations... .There does not exist a single case in modern or early history that comes anywhere near the record of America in changing majority attitudes, in guaranteeing legal and political rights, and in expanding socioeconomic opportunities for its disadvantaged minorities’ (Patterson 1998, 16). If we refuse to recognize this fact, we foster an angry spirit of cynicism and nihilism, a spirit of hopelessness that causes whites and non-whites to throw up their hands and conclude, ‘If racial equality is hopeless, then why should we do anything to fight it?’ Change has come to America. Indeed, some ethnic conflicts viewed as intractable and eternal a mere 100 years ago hardly exist today. One thinks, for example, of the conflict between Protestants and Catholics, or between Irish and Italians. The historical record demonstrates that what one generation found unrealistic and impossible – idealistic – the succeeding generation made into reality (Du Bois 1996 [1899], 386). ‘What is considered impossible today may be possible tomorrow,’ observe the authors of White-Washing Race. ‘It is well to remember that in the 1950s few Americans believed that a revolution in civil rights was just around the corner. Jim Crow seemed to be deeply entrenched, racial prejudice too formidable a presence in the minds of white Americans. Yet many people of all races vigorously opposed segregation anyway, not because they knew they would prevail, but because they believed that doing so was morally necessary. And in the end they did prevail’ (Brown et al. 2003, 248). We cannot deny the progress of the past, just as we cannot turn a blind eye to the problems of the present – or the pregnant promise of the future. Researchers and social commentators rightly have documented the (racial) troubles of today, but what does the future hold? What do we want it to hold? Social science is able to provide a much-needed picture of alternative realities. It can, in a phrase, present us with real utopias. Creative and radical alternatives for society ‘grounded in the real potentials of humanity’ as well as in social-scientific and historical research, real utopias are intellectually rigorous, carefully designed blueprints for a better tomorrow (Wright 2003, vii–viii; see also Bourdieu 2003, 17–25). They are the end products of social change; they are realistic renderings of a society more just, equal, and moral than the one we currently inhabit. Real utopias are hopeful but not naïve; realistic but not cynical. They are what America’s founding fathers envisioned when they longed for ‘a more perfect union’; what Karl Marx had in mind when he spoke of real or ‘human emancipation’ of the working class; of what Martin Luther King, Jr. dreamt when he referred to ‘the promised land.’ (For an extended discussion of realized real utopias in the political and economic spheres, see Cohen and Rogers 1993; Wright 2010.) To work toward racial justice, we must know precisely what we are working toward. Accordingly, in what follows, we sketch three goals, three real utopias, connected to the dismantling of racial domination. This discussion is not a venture in prediction, the stuff of social forecasting; rather, it is an exercise of the imagination. Nor do we paint a complete picture of what a racially just society might look like, a project too rich and expansive for our purposes here. We simply sketch what we believe are three ends essential to the ascension of racial justice, inviting you to fill in the details and, with us, to imagine further possibilities.

#### Their defeatism perpetuates racial domination—material solutions are crucial

Desmond & Emirbayer 12, (John L. Loeb Associate Professor of the Social Sciences, professor of sociology at University of Wisconsin-Madison, To imagine and pursue racial justice, scholar.harvard.edu/files/mdesmond/files/imaginepursue.pdf)

Justice The second end we propose is: a society that embraces racial justice. Because racial domination has been such a central feature of American society since its inception, it might be difficult to imagine an America where racial justice finally has come to replace injustice. Some people have given up trying (Bell 1987). But there is no surer way to guarantee racial domination’s continued reign than to conceive of it as intractable and eternal. Imagining alternatives to how we should live is itself a small act of resistance, one that refuses to settle for the world we have inherited and that firmly rejects the defeatist claim, ‘This is how it is, and how it has always been, so get used to it.’ Since the collapse of the Civil Rights Movement, most activists in America simply have not known where to march next (Winant 2001). During Jim Crow, racial domination was obvious and legal; there was a clear enemy (segregation) and a clear goal (desegregation). But today, racial domination can be more elusive and complicated; it can be ghostlike and difficult to confront. There is a good deal of truth to this, but numerous studies (Western 2006; Brown et al. 2003; Feagin, Vera, and Batur 2001; Bonilla-Silva 2003; Gotanda 2000) have shown that today racial domination influences all of society’s fields of life; its consequences are devastating and, in many cases, its presence undeniable. There are tangible problems in need of tangible solutions. A revitalized Civil Rights Movement – uncompromisingly egalitarian, intersectional, and multicultural – is needed. In the paragraphs below, we offer some direction to that movement, ends it can pursue and, in some cases, is pursing today. What might a racially just America look like? It would take several books, in reality, to answer this question thoroughly. But, in what follows, we imagine some real utopias for several major areas or fields of social life (proceeding from the macro to the micro), in an exercise intended to pry open our imaginations and to stretch the limits of what we believe to be possible.

#### Latin America demonstrates that even gratuitous violence is not permanent—solutions demand more, not less, policy

Winant 12, (Prof @ UCSB, A New Hemispheric Blackness, [www.soc.ucsb.edu/faculty/winant/Race\_articles/Dixon-Burdick\_HWforeword\_final.htm](http://www.soc.ucsb.edu/faculty/winant/Race_articles/Dixon-Burdick_HWforeword_final.htm))

When George W. Bush asked Fernando Henrique Cardoso, then President of Brazil, "Do you have blacks too?" (Pedreira 2002),[1] he was reflecting more than his own provincialism. He was expressing the ignorance of the vast majority of the US population about Afro-Latin America. How many North Americans know that Brazil has the second-highest black population of any country in the world? How many know that of the c. 15 million Africans who survived the tortures of the Atlantic slave trade, roughly 85% were transported to Latin America and the Caribbean (Curtin 1972), and only about 15% arrived alive in the North American colonies and early United States? How many North Americans know of the vast contributions made by Afro-Latin Americans to the development of the modern world, economically, politically, and culturally? Let’s look at that last point. Economically, Afro-Latinos were the world's first industrial workers, toiling in the engenhos (sugar factories) of the Brazilian Recôncavo, the Haitian moulins (James 1989 [1963]), and the Cuban ingenios (Moreno Fraginals 1976) to establish sugar as the world's most extensively traded international commodity (Mintz 1985). Afro-Latinos were the gold-miners, coffee-pickers, and plantation workers who made possible the circuits of capital of the 16th-19th centuries. Indeed as the age of import-substitution industrialization dawned in 1930s Latin America, Afro-Latino workers also played a major role, especially in São Paulo but in other Latin American metropoles as well (Andrews 1991; see also Andrews 2004). How many are aware of the political centrality of Afro-Latin slave revolutions in shaping not only black freedom movements around the world, but also inventing modern anticolonialism and indeed modern democracy and popular sovereignty?[2] The first modern anti-imperial movements occurred throughout the western hemisphere, and depended in large measure on the armed struggles of emancipated (and self-emancipated) slaves of African descent.[3] Indeed whole regions of Latin America and the Caribbean were early liberated territory, occupied by cimarrones, maroons, or quilombo communities, quasi-nation/states that emancipated themselves from colonial slavery and defended themselves by force of arms (Price ed, 1996). Many were crushed of course, but some survived into the era of emancipation. Some continue even today. And how many recognize the importance of Afro-Latin culture, notably of the treasure-house of African music that shapes blues, reggae, salsa, merengue, samba and cumbia? Without Afro-Latinidad, would we even have jazz, hip-hop, or rock and roll? Would we have the "primitivism" of Picasso, Stravinsky's "The Rite of Spring," or the sculpture of Giacometti? These all-too-brief points suggest, if nothing else, the tremendous importance of Politics Cultures Identities: Comparative Perspectives on Afro-Latin America, which is more than a title for the vital book that you now hold in your hands. For the themes addressed in that title contribute in a very central way to the new understanding of race and racism that is developing today. This text takes its place in a growing literature, a new racial studies. Theoretically informed and empirically grounded, the work collected here signals a shift in race scholarship that is long overdue: from the world's North to its South, from the limited focus of American Studies to something not just hemispheric but global, from the disciplinary confinement of various social sciences and humanities fields to a fully multidisciplinary and historically attuned cultural studies and (once again) a new racial studies. Perhaps most important, the work collected here honors the vast legacy of freedom struggles that African-descended people continue to present to the world. \*\*\* The Atlantic slavery system, it may be said, produced a contradictory legacy. In the main it was a bottomless abyss of human horror, a taker of numberless souls, a shoah or naqba all its own. But it was also the antithesis of that sort of genocidal disaster. The predation of Africa and the framework of “blackness” that were the outcomes of European imperialism and the Atlantic slavery system also gave rise to modernity (Gilroy 1994), to revolutionary self-activity, and to the demand for a universal popular sovereignty that is shared in a broad sense by all the wretched of the earth. So blackness in the western hemisphere has a contradictory valence, both in the historical past and in the present-day: the Africanizing of the western hemisphere was both deracinating (that is, it dug up African peoples from their roots) and radicalizing (that is, it permitted or forced them to dig deep new roots elsewhere). The mass transport (and mass murder) of African people that founded the modern world also produced new peoples: peoples both more authentic and more marginalized than any other Americans. It generated sociopolitical regimes that were both more western and white supremacist than had ever existed before, and that were simultaneously more unstable and illegitimate, more despotic and prone to permanent revolt, than any others in the modern world. While it has not yet achieved the scholarly attention that North American blackness has received, the new hemispheric blackness embodied in Afro-Latin America has nevertheless been the subject of continuous study. This volume both continues and alters a long tradition of social sciences- and humanities-based attention to Africans in the Americas (Thornton 1998, Thompson 1983). The case-specific ethnographic and theoretical studies assembled here are the latest iterations of that tradition. They succeed earlier generations of research on colonial rule and abolition, on modernization and revolution, dictatorship, and abertura. They build upon long-standing politically- and culturally-oriented analyses of the black experience in the Americas. They also alter that legacy in numerous ways, notably through a deepened commitment to blackness at the grass-roots level, through a greater attentiveness to women’s praxis, and through a heightened ability to hear and understand the voices of everyday Afro-Latinos. So, while these essays flow from the work of earlier periods, they also challenge and transform the tradition. By validating the experiences and insights -- the self-activity -- of contemporary black people in Latin America, these works also update the great work that has come before: the sociology of Florestan Fernandes, for example (1978), the anthropology of Melville Herskovits (1966), and the many other giants in the field who must be recognized. \*\*\* World War II, I have argued, began to establish a new global racial system, one characterized by new contradictions: on the one hand it generated a higher degree of inclusion of black people (as well as other racially-identified groups) than had existed earlier; on the other hand it gave rise to mendacious claims that race had now been transcended and democratic inclusion at long last extended to peoples of color around the world. From the contradictory racial outcomes of the War derive our various contemporary “commensense” notes of race: ideas of “colorblindness,” “racial democracy,” nonracialism,” and the like (Winant 2001). Thus in our time we are required to account for racial conditions that are largely (if not totally) unprecedented: recognizable "progress" from despotism to racial justice, combined with reinforced and newly ratified patterns of “structural racism.”[4] Needless to say, these transformations did not occur as a result of the benevolence of ruling groups. Instead they were an uneven response to the achievement of greater political power on the part of colonized and racially oppressed nations and communities around the world. The mobilizations of these peoples during and after WWII, and the enormous demographic transformations that occurred over the same period, allowed black people to achieve higher levels of cultural awareness and political autonomy than had generally been available to them before. Inspired by parallel anticolonial and antiracist struggles around the world, and drawing more deeply on their own legacies of resistance, rebellion, and revolution, Afro-Latin peoples too began to assert their own identities in new ways, both culturally and politically. This process of course drew on many earlier precedents and “rehearsals”: on slave revolts, marronage, abolitionism, fitful and partial democratizations from across the whole historical sweep of Afro-diaporic history and Afro-modernity (Hanchard 1999; see also Hanchard 2006). Afro-Latin movements were subject to many painful and sometimes brutal setbacks, but – I would like to argue here – by the time of the demise of the most recent (and hopefully the last) wave of rightwing dictatorships in Latin America in the 1980s and 1990s, the black communities of meso-America were poised to make a giant step forward politically. They were striving everywhere to achieve greater collective self-awareness and greater political power qua black communities. Black power: the term might have a familiar ring.... Indeed Latin American blacks have achieved parallel – and sometimes greater political gains than their North American sisters and brothers: notably the development of quota-based affirmative action and land redistribution in Brazil, the emergence of black political formations and parties, and the enactment of reforms variously characterized as racial or ethnic reforms in many countries. Culturally, politically, and in state-based institutions as well, these processes continue to advance, not without inspiring significant reaction of course, but still quite inexorably. Their core energy, as every author present here makes abundantly clear, is popular and “bottom-up”: the continuing vitality of black struggles to assert and legitimate identity, both personal and collective. These efforts make use of a wide variety of cultural forms, most notably music (as has been true historically as well), but also a vast range of other expressions: it’s going on, friends, in all the arts, scholarly work, mass media, and cultural politics. Black movement organizations are active everywhere in Latin America and the Caribbean, linked not only to these culturally-oriented activities, but actively challenging the racial state and white supremacy at all levels, from the local to the national to the diasporic.[5] Of course there are numerous currents, wide disagreements and differences among different movement groups – often rooted in class and gender tensions -- but the underlying recognition of the depth of the black presence throughout the continent is not generally in question. What a significant change from generations past! A certain amount of state-based support of racial justice can also be discerned – for example affirmative action policies, land title transfers to traditional quilombo- and mocambo-based communities, and efforts to spur access to education and other social and political resources. These achievements remain uneven, however; they are often more symbolic than substantive. Huge racial disparities continue: in literacy and incarceration rates, in access to health care, and in “life chances” in general – economic opportunity, income distribution, and life expectancy.[6] Reformist racial policy, where it exists, is driven in large measure by the social movement activity and cultural ferment discussed in these pages. There is still a long way to go. It is tempting to end these brief remarks with the standard disavowal: plus ça change, plus c'est la même chose. But in my view – and as this book makes clear, Afro-Latin conditions do not merit that cynical judgment. Despite the tremendous journey that still lies ahead, great strides have already been taken: the movement towards respect for racial difference and for the enormous achievements of black people in Latin America proceeds. Complete citizenship, full democracy, and racial equality, still lie ahead. We norteños have a lot to learn from our sisters and brothers across the hemisphere.

#### Don’t write off interim gains—there’s no time for ideology when people are dying

**Balko 15**, (writer @ Washington Post, The Black Lives Matter policy agenda is practical, thoughtful — and urgent, https://www.washingtonpost.com/news/the-watch/wp/2015/08/25/the-black-lives-matter-policy-agenda-is-practical-thoughtful-and-urgent/)

Last week, the leaders of Black Lives Matter\* released a series of policy solutions to address police killings, excessive force, profiling and racial discrimination, and other problems in law enforcement, called “Campaign Zero.” Critics and police organizations have portrayed Black Lives Matter as radical, anti-police, and anti-white. But the policies Campaign Zero is pushing are none of those things. Instead, they’re practical, well-thought out, and in most cases, achievable. Most will also directly benefit everyone — not just black people. In most cases, the policies Campaign Zero is suggesting are already in place in one or more police departments across the country, and Campaign Zero points this out. That’s smart, and I suspect that it will prove to be effective. It makes it more difficult for police groups to portray those proposals as “anti-cop.” But it also makes it easier to pitch those ideas to policymakers and the public. They’ve already been field-tested. As a set, these policies are more a list of “best practices” than revolutionary reform. A few of the proposals will be a tougher sell, but even those are far short of world-shaking. There are no calls to disarm the police. No calls to abolish law enforcement agencies. No demands that police unions be prohibited. This isn’t a fervid manifesto. It’s a serious effort to solve a problem. (Its practicality is undoubtedly born of urgency. ***There’s no time for*** wild-eyed ***ideology when people are dying***.) This isn’t criticism, but praise. These are proposals that will almost certainly have an impact, even if only some of them are implemented. The ideas here are well-researched, supported with real-world evidence and ought to be seriously considered by policymakers at all levels of government.

#### Calling for acknowledgement are meaningless and entrench the power of violent institutions—specific, concrete policies are the only way to meaningfully improve conditions

**Robinson 15**, (Editor of Current Affairs, Social Policy PhD student at Harvard University, as well as an attorney, <https://www.currentaffairs.org/2015/12/the-limitations-of-black-lives-matter-as-slogan-and-movement>)

As a slogan/hashtag/rallying cry, Black Lives Matter has been extraordinarily successful in unifying people and putting a lot of focus on the crimes of the police. Even though the pace of murders by police does not appear to have slowed, it’s at least encouraging that names are finally being named, and there are some prosecutions occurring that would not have occurred in the absence of the movement. The “Black Lives Matter” phrase itself has a lot of rhetorical force, and its spread has generally been tremendous. But it seems as if the movement is spinning its wheels a bit, uncertain of how to proceed in order to reach its goals, which also remain undefined. It has turned to somewhat bizarre tactics, like regularly protesting Bernie Sanders rallies. And it has produced a powerful public rememberance and grieving process for victims of police, but so far we don’t know how to actually reduce the number of victims. I don’t want to trivialize the movement’s gains or tell it how to run itself, but I want to observe a couple of core weaknesses that limit the likelihood of its success. First, if we analyze what it means to protest that “Black Lives Matter,” I think it ironically concedes too much power to white people. Black lives obviously matter to people with black lives, and obviously do not matter much to the police. The demand here is that the police recognize the fact that black people are correct in insisting that their lives matter, and for the police to begin to behave as if this is so. The difference between multiple meanings of “matter” makes this a bit confusing, since “matter” can refer to both personal dignity and empirical social significance. Dignity is self-created and cannot be taken or given. Significance measures my worth according to the opinions of others. “I matter” and “I matter” can have two different connotations, one true and one false, even given the same set of facts. I do not matter (because I am insignificant and powerless in my society) but I matter (because I nevertheless have dignity.) The Black Lives Matter slogan attempts to imply both the dignity meaning (Black people have dignity no matter what) and the significance meaning (Black people ought to be treated as having significance), one being descriptive and one being aspirational. Yet in both these respects, the Black Lives Matter slogan itself becomes a demand for recognition from white people. Dignity should be measured personally and not by the opinions of others. And significance should not be asked for, but built, since asking for an increase in significance reaffirms and legitimizes the power of those who claim the right to determine social significance. But a Black Lives Matter protest requests these things. “I matter, and I demand you acknowledge that I matter, which you currently do not do.” That kind if demand requires the demander to have strong interest in the opinion of the demandee. The Black Lives Matter slogan isn’t being directed at black people, who already know that fact. It’s a demand that someone else affirm the dignity and worth of black people. It seems to be begging the state/white people/the police. A protest demanding recognition of dignity is somewhat odd. If I am, say, abused and demeaned by someone, who treats me as if I have no worth, is the best way to assert my worth to stand outside of his house with a sign saying “I have worth”? Most would probably admit that this implies the abuser is the one with the power to determine my worth, when my worth exists independent of what my abuser thinks. Of course, it will be replied that “Black Lives Matter” intends precisely to insist that worth exists independent of the opinions of power; it is saying that “black lives matter whether you like it or not.” But if that is the case, who are the signs and hashtags directed at convincing? (By the way, I feel the same about the wearing of Sunday clothing and the holding of “I Am A Man” signs during the first civil rights movement. The natty suits were supposed to persuade white people that black people were clean, dignified Americans. I don’t want to say the tactic shouldn’t have been used, since the struggle was an urgent one and effectiveness was important. But there was something to Malcolm X’s critique of the civil rights struggle, that it was asking instead of taking.) Instead of a humble request for white people to admit black dignity, then, it might be better to orient a movement around exactly what its real demands are. In the case of Black Lives Matter, I take that to be more along the lines of “End Racist Police Violence.” That doesn’t demand any kind of recognition, because recognition is (1) merely symbolic and (2) not even a desirable symbolic concession. Ending racist police violence is very specific. Success cannot be faked. With Black Lives Matter, those in power can say “I hereby declare that black lives now matter.” Have you therefore won? If we all sing a song together about how much we believe one another matters, will we have changed the situation that first brought this all about? Absolutely not. Among liberal and left-wing activists, there’s sometimes a suspicion of creating demands. This tendency seems to have solidified during the “demandless” Occupy movement, but it has its roots in the 1960’s, like the “Demand the Impossible” graffiti of the French May ’68 student movement. The suspicion comes from the same impulse Malcolm X had: if you demand something, you’re acknowledging that someone else is the one who has the power to give it to you. You are, to use a fashionable meaningless academic verb, “reifying” their power. As I’ve indicated, there’s something valuable in this impulse. Practically speaking, however, it can be suicide, especially when you’re not actually building something instead. If you want to reject the ability of the “power structure” to decide whether you win, then you have to be building some alternative form of power, or else you will simply be resigning yourself to being crushed. This was the civil rights movement’s response to Malcolm: Okay then, how are you going to build black political power? And it was Malcolm’s weakness that he didn’t have a good answer. His own political organizations foundered; rhetoric about self-defense will only carry you so far. That’s not completely fair, since if Malcolm had lived, he might have managed to create something meaningful. And in fact, the Black Panthers can be seen to have embodied what Malcolm advocated: a self-defense organization that provides aid to communities (medical and childcare), keeps people safe by resisting the police, and terrifies the establishment. But the Black Panthers were destroyed, in large part due to government infiltration and suppression, though also partly because of inherent weaknesses in their philosophy, poor organization, and self-defeating acts. You have to be very good at what you’re doing in order to shun the entire process of making demands. In the case of Black Lives Matter, though, a “no demands” defense of their current direction does not really work. As I pointed out, they’ve already indicated their willingness to make demands. The whole movement is built on a demand, a demand for black lives to matter. So it might as well make its demands concrete, and insisting on meaningful differences in the real world. Thinking of things that can be asked for is not difficult. Halve the prison population within five years. Drastic changes to the sentencing structure to reduce future sentences for all crimes. Decriminalize all drugs, massive new funding for diversion and treatment programs.The end of law enforcement officers’ qualified immunity from lawsuits. A nationwide ban on criminal record questions on job applications. The extensive redistribution of wealth by race, so that white households no longer have an average net worth 13 times that of black households. Nationwide debt forgiveness for poor people. A basic income. Guaranteed parity of school funding. Citizen oversight committees for every local police force, with the power to fire officers. “If BLM is about black people, it needs to expand beyond policing, and if it’s about policing, it needs to expand beyond black people.” In fact, just end the police. Break up police forces into their component functions, so that they are no longer an enormous violent Leviathan. Give the investigative functions to courts, have a traffic agency handle traffic offenses, let trained professionals deal with the mentally ill so that the police don’t end up putting bullets in them. The cops with the badges and the guns should be a tiny group, used only in true violent emergencies. Stop having cops show up where medics or social workers are what’s necessary. Demand some of these. None of them. Any of them. But if the movement reorients itself around pushes for some actual goals, it will at least have the chance of accomplishing something, and won’t lose steam. Demanding that a long-shot socialist Democrat start tweeting the slogan might be achievable, and might also even be helpful. (I understand why the left should demand that the left-wing candidate have a good race platform, though excessive disproportionate, hostile attention to Bernie seems like it will do nobody any good.) But even assuming the maximum level of possible impact for that tactic, it is still many steps removed from any actual underlying improvement in the society.

#### The neg defines THE world as anti-black. This fait accompli and fatalism is politically immature and sacrifices others for the sake of purity. The originator of the term argues we must treat our world as AN anti-black world capable of revision.

Lewis **GORDON** Philosophy & African American Studies @ UConn ‘**15** (the leading scholar of Fanon in the US, PhD from Yale, Professor of Philosophy and African American Studies at UConn)

(Lewis, Lewis Gordon presents "What Fanon Said", Speech at Red Emma’s hosted by former Towson debater Ben Morgan, 6/10/2015 <https://www.youtube.com/watch?v=UABksVE5BTQ&feature=youtu.be>, transcribed)

Nowhere is there ever a human being who is ever one identity. People know about race; **you ever really see a race walking**? You see a, you see a racialized man or woman. Or trans-man or trans-woman. Or hermaphro… you see what I’m getting at? You ever see a class walking? Class is embodied in **flesh and blood people**. And we could go on and on. A man, a woman, a color, so forth. So, if we **enrich our philosophical anthropology**, we will begin to notice certain other things and **one of the other things we begin to realize is that we commit a serious problem when we do political work**. And the problem is this. The question about **Wilderson, for instance**. There is this discussion going on, and a lot of people build it on my **early books**. I have a category that I call, as a metaphor, an ‘anti-Black world’ – you notice the indefinite article: AN anti-Black world. The reason I say that is because THE world is different from an anti-Black world. The project of racism is to create a world that would be anti-Black, anti-woman. Although that’s a project, it’s not a fait accompli. People don’t seem to understand how recent, how recent this phenomenon we’re talking about is. A lot of people talk about race… they say they know the history of how race is connected into fear naturalism, how for instance, in Andalusia and pushing out the moors, the history of how race connected to Christianity was formed. A lot of people don’t understand that from the standpoint of a species that’s 220,000 years old, what the hell is 500 years? But the one thing that we don’t understand too is that we create a false model of how we study those 500 years. We study the 500 years as if the people who have been dominated have not been fighting and resisting. Had they not been fighting and resisting, we wouldn’t be here. And then we come into this next point, because you see, the problem in the formulation of pessimism and optimism is there both based in forecasted knowledge, a prior knowledge. But human beings don’t have prior knowledge. And in fact, what, what in the world are we if we **need to have guarantees** for us **to act?** You know what you call such people? **Cowards**. The fact of the matter is, our ancestors – think about, let’s just start with enslaved ancestors. The enslaved ancestors who were burning down the plantations, who were finding clever ways to poison the masters, who were organizing meetings for rebellions – **none of them had any clue about what the future would be** 100 years later, in fact, some had good reason to believe it may have even taken 1,000 years. But you know why they fought? Because they knew it wasn’t for them. One of the problems we have in the way we think about political issues is we commit what Fanon and others who were taught in the existential condition would call a form of **political immaturity**. Political immaturity is, it’s not worth it unless I, me, individually get the pay off. When you’re thinking about what it is to relate to **other generations**, remember Fanon said the problem with the people in the transition – the pseudo post-colonial bourgeoisie – is that they miss the point **to fight for liberation for other generations**. And that’s why **Fanon said other generations, they must have their mission**. But you see, some people fought, and they said now I want my piece of the pie. And **that means the biggest enemy becomes the other generations**. And that is why the postcolonial pseudo bourgeoisie – there not a bourgeoisie proper because they do not link to the infrastructural development of the future. **It’s about themselves and that’s why**, for instance, as they live higher up the hog, as they get their mediating service oriented racial mediation wealth, **the rest of the populations are in misery**. The very fact that in many African countries there are people whose futures have been mortgaged, the fact that in this country that very **example of mortgaging the future** of all of you is there, what happens to people when they have no future? **It now collapses the concept of maturation** and places people into perpetual childhood. So one of the political things, and this is where a psychiatrist-philosopher is crucial, is to ask ourselves what does it mean to take on adult **responsibility**. And that means to understand in all political action, **it’s not about you**. It’s what you are doing for a world you may not be able to even understand. Now that becomes tricky because, how do we know this? **People have done it before**. There were people, for instance, who fought anti-colonial struggles. There are people – and I’m not talking about like 30 or 40 years ago, I’m talking about people from day 1, from the 17th century, the 18th century, all the way through and we right now – we have no idea what we are doing for the 22nd century. And this is where becoming, **developing political insight comes in**. Because we commit the **error** of forgetting that the systems, the systems were talking about, **are human systems**. There not systems in the way that we can talk about, for instance, the law of physics. **A human system can only exist by human actions maintaining them**. Which means every human system is like the model of, of reason evaluating completeness. **Every human system is incomplete. A human being is by definition incomplete, which means you can go this way or you can go another way**. And it’s that fundamental incompleteness that raises the question. **The system isn’t actually closed**. How do we know it? The reason we’re seeing all of this brutality in the world today is because the systems are breaking down. If the systems were working, they wouldn’t have to worry. You know how you have an effective system? You make people mentally **be their own prisoners**. If the system were really working, you wouldn’t have to have the police, because you all would do it for them. It is the very fact that the system is breaking down that we are seeing heightened brutality.

### --- AT: Cruel Optimism Link

#### Cruel pessimism is a greater problem than cruel optimism. The possibility of a decolonized world is worth our efforts. Even as spectators and critics, we can shape the discourse of anticolonial activity.

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Optimism: Duty or Cruelty?¶ More recently, further objections have been made within queer and affect theory in particular to the normativizing tendencies inherent in politics in general: perhaps political optimism or revolutionary hope are simply ways of interpellating queer subjects into compulsory affective circuits in which "negative" feelings and emotions must be renounced in the name of "positive" ones, or into certain hetero- or homonormative visions of the "good life" that is to be sought in revolutionary movements. Such a process, according to some queer theorists, thus installs a form of affective normativity into politics, which demands certain investments and obscures the distribution of "positive" and "negative" feelings across gender, sexual, racial, class, and national axes (see Duggan and Munoz 2009 and Berlant 2011). As such, much recent queer theory has drawn on certain forms of psychoanalysis to advocate the political use-value of precisely these "negative" and "non-normative" affects and feelings including hopelessness, melancholia, shame, unhappiness-in the name of queer resistance (see Eng and Kazanjian 2002, Duggan and Munoz 2009, Ahmed 2010, Halperin and Traub 2010). In its most extreme form (which we take up extensively in Chapter 3 ), queer theorist Lee Edelman (2004) has argued that any politics whatsoever is always already both heteronormative and conservative insofar as it imagines "the Child" as the horizon and beneficiary of any political action. The focus on the future inherent to any political agenda, according to Edelman,jnvolves a compulsory renunciation of the present in the name of the children who will inherit that "better" future. Queers are, according to Edelman, those not fighting for the children and are thus figured as the death drive of the social order-a status Edelman forcefully exhorts queers to actively take up in the "insist[ence] that the future stop here" (2004: 31).¶ So does all of this mean that we are, to use Lauren Berlant's (2011) term, "cruel optimists" ?3 We would answer this simply: there is surely nothing crueler than to say that there is no way out of the horrific and brutal exploitation of advanced capitalism that leaves the majority of the world's population in conditions of dire poverty and targeted for extinction. Embracing the death drive, or what amounts to the same thing, abandoning oneself to the impending doom of the species and the planet when you have no possibility of life is not such a big deal, and is certainly not an act of "queer" or "posthumanist" resistance. Centuries ago, Immanuel Kant argued that we have a duty to be optimistic, not because things are necessarily going to get better, but because they might. For Kant, we are not obligated to believe in any particular vision of the future or its possibility, but the fact that ideals such as perpetual peace (and we would add: the end of capitalism) cannot be proven impossible obliges us to live as if (not necessarily believe) they were. To quote Kant:¶ for there can be no obligation ... to believe something [i.e., a specific end]. What is incumbent upon us as a duty is to act in conformity with the idea of that end, even if there is not the slightest theoretical likelihood that it can be realized, as long as its impossibility cannot be demonstrated either. Now morally practical reason pronounces in us its irresistible veto: there is to be no war ... So the question is no longer whether perpetual peace is something real or a fiction, and whether we are not deceiving ourselves in our theoretical judgment when we assume that it is real. Instead we must act as if it is something real, though perhaps it is not ... and even if the complete realization of this objective always remains a pious wish, still we are certainly not deceiving ourselves in adopting the maxim of working incessantly toward it. For this is our duty .. . (1996: 490-1, emphasis added)¶ And, moreover, as spectators (if not participants) in revolutionary struggle, we actually shape the way those struggles will be read. So for Kant, the spectators who cheered on the French Revolution played a role in history in that the significance they gave to that revolution became part of the new reality that that revolution constituted. And cannot the same be said for those who cheered on the "Arab Spring," as well as those who heroically participated in it? Can it not be said of those who stayed up all night watching the votes be counted in recent elections in Greece, Spain, and South Africa to see if new socialist parties would be voted in? The deep irony of much recent feminist and queer theory is that it effectively tells us that, in the name of "queerness" and "posthumanism," everything must ultimately remain exactly as it is, given that the hope for a different future is heteronormative and any idea of transforming the world is humanist delirium; that we should instead embrace ephemerality, extinction, and the death drive (all of which capitalism has conveniently made readily available); and that anyone who writes or claims otherwise is nothing but a nostalgic, humanist fool providing deluded idiots with cruel optimism. How do these thinkers know that we are fated to fragility, death, extinction, poverty, war, capitalism, depression, melancholia, and unbearable sex?¶ In this book, we want to show that the "truth" they tell us about the ultimate impossibility of a more just future can, and should, be deconstructed in the name of a queer-feminist future beyond Man, a future that by the very appropriation of the word "queer" tells us that nothing is ever what it seems and that the psychic and bodily prisons that we live in are always in the process of being undone by collective revolutionary processes. Indeed, as the late queer theorist Jose Esteban Munoz insisted in his disagreements with much recent queer theory, queerness is itself a form of utopianism or "revolutionary consciousness." As he put it: It is difficult to hold onto a phrase like "revolutionary consciousness." It seems stark, out-moded, universalizing, and prescriptive. Yet I nonetheless deploy it because I want to link it specifically to the world of affect and feeling ... It is not about announcing the way things ought to be, but, instead, imagining what things could be. (Duggan and Muiioz 2009: 278) We do not wish to rehearse here the hope versus hopelessness, future versus anti-future debates that have dominated queer theory over the past decade. We do, however, want to point out the resonances of Munoz's contention that "queerness is an ideality" (2009: 1) with the Kantian duty of optimism, explicitly putting queer politics on the side of revolution: that we can imagine beyond what we can know both enables and obligates us to live according to ideals of freedom as we also struggle to bring such a world into existence. Certainly, Kant's point is that as we put ourselves into the story, we are part of it and thus pessimism becomes just as much a part of that story as optimism. And moreover, as we will discuss in Chapter 4, these stories have a profound power to materialize and rematerialize the world that we live in together. Thus, if what many contemporary theorists tell us is not truth, then it is just their own conviction-itself a form of political faith. And why have the faith that we are thoroughly fucked if there is any way for us to queer ourselves out of it? It would thus seem that many theorists have their .own form of cruel attachment-a cruel pessimism?-to the idea that revolution is something we (can) no longer desire. Perhaps this is a form of immunity to the inevitable disappointments of political struggle: we can no longer be disappointed if we no longer hope for a more just future or believe it is possible. And yet, as political theorist Jane Anna Gordon eloquently said at a recent event in New York City, "Political theory is incoherent if we accept that we are in a post-revolutionary time. All we can do then is poetically discuss resignation and impossibility. " 4 The philosophy of the limit means that the very limit to any idea of "the impossible," that is, to any metanarrative of postrevolutionary doom, leaves us with the responsibility to fight for a politics that is both revolutionary and that is constantly challenging the reign of Man in the form of colonialism, capitalism, racism, phallocentrism, and heterosexism (see Cornell 1992). As we have suggested, and will argue throughout this book, thinkers in the global South have been engaged in precisely this project for centuries. These thinkers, however, have been too involved in revolutionary struggles themselves to spend too much time hand-wringing about the humanistic arrogance of politics and the failures of feminism and socialism, or debating the value of hope versus pessimism, because there is simply too much work to be done in the struggle for total decolonization. They, in a deep and profound sense, are on the side of life, understood not as abstract "life itself," but as part of political spirituality: the struggle for different ways of living individually, collectively, and with the other beings with which we share the planet. And perhaps it is precisely to these thinkers that we must now look for the spirit of revolution and for a new practice of the human beyond Man. We close this introduction and open our book with the words of Gilles Deleuze castigating the so-called "New Philosophers" of the 1970s who critiqued Marxism and socialism for manipulating the supposedly ignorant masses:¶ What I find really disgusting is that the New Philosophers are writing a martyrology: the Gulag and the victims of history. They live off corpses ... But there never would have been any victims if the victims had thought or spoken like our New Philosophers. The victims had to live and think in a totally different way to provide the material that so moves the New Philosophers, who weep in their name, think in their name, and give us moral lessons in their name. Those who risk their life most often think in terms of life, not death, not bitterness, and not morbid vanity. Resistance fighters are usually in love with life. No one was ever put in prison for powerlessness and pessimism-on the contrary! From the perspective of the New Philosophers, the victims were duped, because they didn't yet grasp what the New Philosophers have grasped. If I belonged to an association, I would bring a complaint against the New Philosophers: they show just a little too much contempt for the inmates of the Gulag. (2007: 144-5) With very little adjustment, could these same words not be said of our new prophets of queer hopelessness, posthumanist renunciation, and postrevolutionary pessimism?

## Counterplan Answers

### AT: CP States

#### Permutation – do both --- net better strategy by uniting the Federal and State governments in opposition to racist segregation policies. If we win our framing arguments the permutation is an independent reason to vote affirmative.

#### ( ) Permutation doesn’t restrict state flexibility --- the plan essentially creates a floor, not a ceiling for state leads desegregation efforts --- it ensures a critical enforcement backbone in case states provide sufficient protections.

#### Federal stance alone plays a critical role in advancing desegregation

Le, 10 --- Practitioner in Residence at Seton Hall University School of Law's Center for Social Justice (March 2010, Chinh Q. Le, North Carolina Law Review, “LOOKING TO THE FUTURE: LEGAL AND POLICY OPTIONS FOR RACIALLY INTEGRATED EDUCATION IN THE SOUTH AND THE NATION: ARTICLE: RACIALLY INTEGRATED EDUCATION AND THE ROLE OF THE FEDERAL GOVERNMENT,” 88 N.C.L. Rev. 725, Lexis-Nexis Academic, JMP)

Introduction

As with most issues implicating public policy on a grand scale, when it comes to racial and ethnic integration in our nation's public schools, it matters significantly whether the federal government is friend or foe. This has always been the case, but it is particularly so [\*727] now. More than three decades have passed since the last major federal initiative to promote school integration. n1 Meanwhile, courts in recent years have applied increasingly narrow interpretations to laws that once allowed private litigants and other entities to supplement federal government enforcement of civil rights. n2 Indeed, in light of Alexander v. Sandoval, n3 private litigants may no longer bring disparate impact actions under the implementing regulations of Title VI of the Civil Rights Act of 1964, n4 a substantial shift in the law that has thrown into question long presumed private rights of action for such claims under various other federal statutes, too. n5

Specifically with regard to the provision of equal, integrated, quality public education, here, in a nutshell, is where the nation stands: the Federal Constitution does not guarantee a fundamental right to education, n6 let alone an equal or desegregated education. n7 [\*728] School districts or states once subject to court-ordered desegregation may emerge from their long history of de jure acts after just a few years of reasonable compliance with formal orders, even if the compliance resulted in only nominal desegregation. n8 And even voluntary efforts to provide some modicum of racial and ethnic integration, once encouraged by the courts, are now constitutionally suspect. n9 In other words, at least for the time being, the courts are at best only loosely enforcing (and hardly expanding) education rights, so executive and congressional leadership is sorely needed if we as a nation are going to realize the ideals articulated in Brown v. Board of Education n10 more than a half century ago.

And these times demand leadership. In the most recent of a series of reports by the Civil Rights Project/Proyecto Derechos Civiles on the subject, the organization's co-director, Gary Orfield, tells us American public schools have witnessed two consecutive decades of resegregation and are more segregated today than they have been in over forty years. n11 Even though public school enrollment overall is more racially and ethnically diverse than ever, this diversity has failed to translate into diverse schools. Instead, severe racial isolation remains commonplace. In the academic year spanning 2006-2007, forty percent of Latino students and nearly that same percentage of [\*729] Black students attended "intensely segregated schools," where ninety to one hundred percent of the population is non-White. n12 These patterns of segregation, once perceived as a largely urban phenomenon - with almost two out of every three Black and Latino students in the nation's major cities attending these intensely segregated schools - have been replicating themselves in the suburbs as well. n13 And, the relationship between race and poverty continues to run deep n14: forty percent of Black and Latino students also attend schools of concentrated poverty, where seventy to one hundred percent of the children are poor. n15 By contrast, only about one in thirty White students attend such schools. n16

For eight years, the civil rights community did not shy away from criticizing George W. Bush for the failure of his administration to place much if any of a priority on promoting racial integration in public schools. n17 The election of Barack Obama, a former community organizer and constitutional law professor, not to mention the nation's first biracial/African American President, has renewed hope in some that civil rights generally - and issues of educational equity and integration in particular - will receive greater attention from the top. One should be only cautiously optimistic, however. If his experience in office to date is any indication, President Obama's attention is spread thin across many fronts, with the financial and credit crisis on the one hand, and the continuing conflicts in Iraq and Afghanistan on the other, not to mention his ambitious intentions to expand and improve health care, stimulate job growth, and "green" [\*730] the nation's energy infrastructure, while at the same time reducing the federal deficit. It will be incumbent upon civil rights advocates, therefore, to keep the Obama administration focused on educational equity. In any event, high expectations are often followed by great disappointment, so prudence demands tempered expectations, even in this age of hope.

With that caveat, this Article takes a look back at the role that the federal government has played with regard to issues of school integration (or, for most of the past, school desegregation) to see how history can inform what a new administration in Washington could do to reinvigorate the cause and advance the goal of racially integrated education. The school desegregation story that many of us - especially the lawyers and law students among us - know best is the one that follows the federal courts' role in implementing the powerful but all-too vague mandate of Brown. n18 But there is a parallel and interwoven tale that involves the political branches of government too, n19 and the purpose of revisiting that tale is threefold. First, it helps to explain where the nation currently stands and how it got there. Second, it serves as a reminder that, as important as the federal judiciary has been in shaping the opportunities for meaningful racial and ethnic integration in the nation's public schools, leadership from the President and Congress has had as much if not more of an impact on those opportunities than the court decisions. Third, it highlights the legal and policy tools available and the federal agencies that once were and may once again become allies to the cause under an administration that is willing to make integration a priority.

#### Federal action provides necessary visibility and essential oversight to ensure enforcement of civil rights laws

King & Lhamon, 3/16/17 --- \*served as Education Secretary in the Obama Administration and is president and CEO of Education Trust, \*\*AND served as Assistant Secretary for Civil Rights in the U.S. Department of Education and chairs the U.S. Commission on Civil Rights (John B. King Jr. and Catherine E. Lhamon, “Opinion: Kids’ civil rights need federal protection, not just local,” <http://www.mercurynews.com/2017/03/16/opinion-kids-civil-rights-need-federal-protection-not-just-local/>, accessed on 4/30/17, JMP)

In his first joint address to Congress last month, President Trump declared education to be “the civil rights issue of our time.”

We strongly agree that ensuring every American child has equal access to quality education is essential to our nation’s future. Sadly, today, far too many children do not have that equal access.

That’s why Congress has repeatedly passed education and civil rights laws that require the U.S. Department of Education to protect vulnerable students and monitor the progress of states and districts in providing a quality education to every child.

We wish such oversight were no longer necessary. But too many states and districts either continue outright discriminatory practices or remain passive while hostile environments flourish on their campuses. A few examples from this 2016 report show why the job of protecting young people in this country is by no means done.

■ In 2013, the Department of Education’s Office for Civil Rights (OCR) investigated a gang rape at a high school in Richmond, California. That review found pervasive sexual harassment of girls, beginning in elementary schools and increasing in middle and high schools, with adults in the district paying far too little attention.

■ Meanwhile, in Oakland, a 9-year-old student with autism was restrained on 92 separate occasions by staff in the private school to which the district had assigned him. The investigation showed that the child had been held face down on the floor for a total of 2,200 minutes over the course of 10 months. The agreement required the district to cease contracting with schools that condone prone restraint.

These are not isolated cases. These are real issues affecting real students across the country.

And it’s not just about investigations; it’s about shining a spotlight on ongoing problems.

For example, thanks to data from the Department of Education’s Civil Rights Data Collection, Americans learned that high schools enrolling concentrations of black and Latino students are less likely to offer courses in calculus, physics and chemistry than those whose students are predominantly white.

We also learned that black students are almost four times as likely as white students to receive one or more out-of-school suspensions. Students with disabilities are more than twice as likely to be suspended as those without.

Publishing data has spurred action on both these fronts and helped lead the way to a 20 percent reduction in school suspensions nationwide.

Our civil rights laws reflect American values of fairness, equality and justice. But those laws must be enforced.

The Trump administration has repeatedly implied that Office of Civil Rights has overstepped its boundaries. At various times, President Trump, Attorney General Jeff Sessions and Education Secretary Betsy DeVos have signaled that enforcing federal civil rights laws is “best left to states.”

We disagree. Leaving enforcement of civil rights laws to states will breed chaos and undermine the education of millions of children. What’s more, it will subject students of every age to abuse, neglect, indifference and outright racism, sexism and anti-immigrant hostility, among other harms.

The federal government defers to states and school districts when it comes to issues like standards and curriculum—and rightly so. But when it comes to the civil rights of students, we cannot simply hope that states and districts will do the right thing.

More than 200 civil rights organizations have called for Congress, the Trump administration and Americans everywhere to defend our civil rights and urge strong, uncompromising enforcement of our laws. This is not a political choice. This is a matter of basic American freedoms and core American values.

#### Federal data collection and dissemination is essential to positively influence state and local educational policies --- sends unique signal

Murphy, 3/13/17 (James S., “The Office for Civil Rights's Volatile Power; The influence of the office has waxed and waned with each administration. How will it fare under Betsy DeVos?” <https://www.theatlantic.com/education/archive/2017/03/the-office-for-civil-rights-volatile-power/519072/>, accessed on 5/10/17, JMP)

The time and effort it takes to resolve many of the thousands of complaints the OCR receives each year help explain why the office pursued a more assertive (or, depending on the perspective, aggressive) policy on guidance in the past eight years. The fastest way to resolve a complaint is to prevent its ever having been made, which is why the department said it placed so much emphasis on making its guidance and data more usable, available, and visible.

Justice is slow, childhood is fleeting, and the task of the Department of Education’s Office for Civil Rights is to make those schedules match. Information and transparency are key to attaining that goal. In addition to making its resolutions part of the public record so other school leaders could learn from them and increasing its outreach to schools through technical assistance (through, for example, workshops, flyers, and community meetings), the OCR under Obama made the data it is required to collect about civil rights in primary and secondary schools more easily accessible, comprehensive, and public-facing. Now, state and local governments, schools, community organizations, journalists, and citizens could use them. The OCR has used it biennial CRDC reports to highlight disparities in such areas as discipline, college and career readiness, and absenteeism.

Repeatedly in interviews, civil-rights stakeholders expressed their support of the OCR’s decision to make the CRDC more public-facing and to use it as a tool for shining a light on civil-rights issues. Liz King of the Leadership Conference points to this change as evidence that “leadership matters. From Arne Duncan, we saw a huge premium on data transparency” and a “strong emphasis on CRDC.” They also expressed concern that this could change in the Trump administration. Monique Dixon, the deputy director of policy and senior counsel at the NAACP Legal Defense Fund, praised the Obama administration’s transformation of the CRDC into a mechanism for confirming the scale of civil-rights abuse, but she worries that the new administration could mean a “return to inactivity.”

The staff that created the reports will remain in place at the OCR, but it will be up to Secretary DeVos and her assistant secretary for civil rights whether they will carry out that task. It is easy to imagine the argument from the incoming administration: that the extent of the data collection places an unreasonable burden on schools, and so it needs to be scaled back. When I asked Gerard Robinson, an adviser to Trump's education-policy team, about this possibility, he suggested that the changes made to the CRDC were part of Secretary Duncan’s “data-driven vision,” which he attributed to his having been a superintendent. Robinson asserted that Trump “is also a data guy. Betsy DeVos is also a data person.” No data were provided to back up these claims.

#### Federal government is a uniquely critical tool for social movements

Dawson 14 – PHD in pol sci and director of the Center for the Study of Race, Politics and Culture at UChicago

(Michael, 10-22-2014, "Washington Must Redress State Injustice", https://www.nytimes.com/roomfordebate/2013/07/16/state-politics-vs-the-federal-government/washington-must-redress-state-injustice, MW)

Since the nation’s founding, “states rights” has been the rallying cry and mechanism of authority for those who wished to systematically disenfranchise and exploit large segments of their population. That this continues to be the case is profoundly demonstrated by politics of North Carolina and other states.

States are actively trying to weaken and undermine minorities and the disadvantaged.

States are still the most active political arenas for trying to maintain an ever weakening, but still potent, system of white control, as is shown by the wave of new legislation limiting voting rights that state legislatures are pushing through in the wake of the Supreme Court voting decisions.

State legislation has injured communities of color, whether it is North Carolina’s repeal of the Racial Justice Act, which was designed to combat racial discrimination in death penalty cases, Arizona’s draconian restrictions on immigrant rights or Florida’s Stand-Your-Ground travesty.

Racial minorities are not the only groups under attack by politicians in North Carolina, Texas and elsewhere. In North Carolina, unemployed workers and public school students have been subjected to draconian cuts that expand extreme inequality and put the economic future of those states at risk. In Texas and other states, legislatures have drastically rolled back the reproductive rights of women. The volume and inhumanity of the attacks in North Carolina have led to a series of protests involving the N.A.A.C.P. and others. These “Moral Monday” protests have led to the arrest of more than 700 citizens who took to the streets, as people did a generation ago, to focus a bright light on political processes that are fundamentally unjust.

We need to remember, however, whether we examine the history of Reconstruction after the Civil War, or the victories of the civil rights movement a generation ago, that the federal government is the place of last resort to protect citizen rights when states trample on the rights and lives of the groups that local politicians disdain. Whether we are considering racial justice, reproductive rights or worker rights, local movements focusing on local injustices have often been most successful when they have been able to bring the power of the national government to bear in the name of decency, dignity and justice.

#### \*\*\*note when prepping file --- this evidence could be useful to answer the argument that federal policies are not implemented / followed by local school districts.

#### Federal action is critical ensure a minimum floor for educational equality --- encourages states to meaningfully assist local school districts

Bowman, 17--- Vice Dean of Academic Affairs and Professor of Law, Michigan State University (last revised 4/27/17, originally published 11/28/16, Kristi L., University of Michigan Journal of Law Reform, Forthcoming, “The Failure of Education Federalism,” <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2876889>, JMP)

Additionally, although Michigan is only one state, its experience operates as an outsized caution against the specific policy of unfettered school choice and the more general model of education federalism (dual federalism) that involves great deference to state and local authorities.161 Regarding the federalism model, if the ability to define a “right to education” remains exclusively with the states, then state courts—the backstop for education rights—can interpret these rights so minimally that they effectively refuse to consider the question of educational quality at all. Moving forward, the form of federalism in education must shift to a cooperative one, and reforms must be grounded in both liberty and equality. In September 2016, some of the attorneys who brought the “right to read” case in state court filed a complaint in federal court with just this approach.162 As of March 2017, the complaint awaits the federal district court’s ruling on the state’s motion to dismiss.

IV. COOPERATIVE FEDERALISM

Fortunately for the children of this country, education federalism does not fail all states—some states have robust school finance systems and related policies that produce education of an acceptable level of quality (or higher), and do so more or less uniformly. In other states, judicial intervention has remedied constitutionally and functionally inadequate systems. However, as the previous section demonstrated, not all states are willing and able to address structural problems in public education. Especially given the likely growing federal support for school choice under the Trump Administration, it is important to consider a range of federal legal protections that could create and maintain a meaningful federal floor of educational quality.

This Section first discusses action that Congress and the U.S. Department of Education could take, with the idea that legislative and agency-driven reforms are theoretically easier to enact and also have the long-term potential to be more effective in some ways than judicial reforms. That said, this Article also acknowledges that the reforms proposed here are unlikely to be supported by the Trump Administration or the current Congress and thus may be more viable in the long-term than in the short-term. Because judicial reforms sometimes occur when legislative and executive reforms cannot, and because judicial reforms are more difficult to un-do, this Section then turns to the courts. Specifically, by coupling the concepts of liberty and equality, this Section ultimately proposes a de facto federal constitutional amendment through interpretation that engages both the Equal Protection Clause and Substantive Due Process.163 At the heart of each of the approaches considered in this section is, as law professor Kimberly Jenkins Robinson has argued, a shift in our approach to public education from dual federalism to cooperative federalism.

A. Federal Legislation and Agency Action

Congress has legislated about public education regularly since the 1960s, and for good reason. As then-law professor, now California Supreme Court Justice Goodwin Liu articulated in 2006, the Citizenship Clause is one source of authority for Congress’s involvement in education policy, and of course the Fourteenth Amendment is connected to this.164 For various reasons, Congress seems quite willing to continue legislating about public education. Additionally as law professor Kimberly Jenkins Robinson convincingly argues, even after the Court’s 2012 decision limiting Spending Clause authority in National Federation of Independent Business v. Sebelius,165 Congress retains substantial authority to legislate about education—and the legislative and executive branch are in some ways better suited to education reform than the judiciary.166

Congressional Acts often go hand-in-hand with federal agency enforcement, and thus the U.S. Department of Education has substantial experience by this point in time interpreting and enforcing statutory and constitutional law. This role is nothing new either in the specific context of education or in the general context of the federal government,167 and in fact federal agencies are especially important today in what law professor Karen Tani calls the “age of cooperative federalism.”168 Accordingly, the combination of Congressional action and agency enforcement can be a powerful tool in the pursuit of educational quality. Examples of that partnership include:

• Title IV and VI of the Civil Rights Act of 1964, which address race discrimination169;

• The Bilingual Education Act of 1968170 (repealed in 2002) and the Equal Educational Opportunities Act of 1974, which establish rights for non-native English speaking students171;

• The Education for All Handicapped Children Act of 1965,172 which was superseded by the Individuals with Disabilities in Education Act of 1990173; Section 504 of the Rehabilitation Act of 1973174; and Title II of the Americans with Disabilities Act of 1990,175 which all serve to make schools accessible to students with disabilities;

• Title IX of the Education Amendments of 1972, which provide for sex and gender equity in schools; and

• The McKinney Vento Homeless Assistance Act of 1987,176 which ensures educational access for homeless children.

In short, the Department of Education is involved in enforcing a wide range of statutes, and has been for quite some time.

Of course, the federal government’s broadest regulation of education remains the 1965 Elementary and Secondary Education Act (ESEA).177 Since its enactment, ESEA has been reauthorized and amended roughly every five years.178 Although ESEA began as part of President Johnson’s war on poverty, and thus provided supplemental funds for the education of students in poverty, it has grown substantially since then. The most well known rendition of the law may be the 2001 variation, the No Child Left Behind Act (NCLB).179 NCLB was notable because it required states to develop proficiency standards, test students’ proficiency on a regular basis, and make regular progress towards uniform proficiency.180 The goal was noble, and the Act sought to incorporate the current model of education federalism, dual federalism, deferring significantly to state and local authorities.181 However, many problems emerged, not the least of which was schools’ inability to make sufficient progress toward the goal of uniform proficiency even though the states themselves determined what was proficient.182

Had the Act been reauthorized on the usual timeline, lawmakers could have revised the statute to include more realistic goals, but by the time the Act was reauthorized as the Every Student Succeeds Act in December 2015,183 nearly all states seemed to need waivers to comply with NCLB so that they could continue to receive the federal funding that makes up roughly 10% of an average school district’s budget.184 As law professor Derek Black chronicles, under Secretary of Education Arne Duncan’s direction, the Department took the unprecedented step of conditioning its granting of waivers on states adopting certain policies.185 This approach is only permissible if the authorizing statute provides sufficient notice—which NCLB did not, but future iterations of ESEA could.186 Interestingly, at the same time that NCLB unfolded nationwide, states’ standards became increasingly uniform: as of 2016, 42 states and the District of Columbia had adopted the Common Core State Standards.187

Theoretically, this may open a political window for federal involvement in establishing a minimum quality level via the next (post-ESSA) iteration of ESEA. Before continuing this conversation, however, it is important to note that neither the new Congress nor the new Administration seem likely to want to pursue this course of action. But, for a Congress or an Administration so inclined, this option would be attractive because although the ESEA regulations are conditions on the receipt of funding rather than mandates, no state has yet been able to opt out of receiving this funding and thus opt out of abiding by these conditions.188 Even more significantly, imposing a uniform floor of educational quality in part through national standards (opportunity-to-learn189 or otherwise) still could allow states some options, but limit the choice to the two or three sets of standards widely-adopted nationally, assuming those are at a sufficient level. Additionally, the enforcement would not be via lawsuit but would be through the executive branch (the Department of Education) via the potential loss of the funds to which the policy strings were attached.190 Funding cutoff is a tool that has given the federal government significant and effective persuasive authority throughout history, including during the very difficult process of school desegregation beginning in the 1960s.191 Furthermore, such enforcement would provide political cover to state legislatures who need to raise taxes, repurpose funding streams, or enact other understandably unpopular policies in order to comply with the conditions of receiving ESEA funding.

There are disadvantages to Congressional action and Executive enforcement, of course. If actually enforced, funding cutoffs are not particularly helpful in a situation of constrained resources.192 A legislative policy is much easier to overturn than a judicial one, thus education would remain politicized, albeit at a different level. Perhaps even more significantly, though, the perception that the federal government should have an incredibly limited role in social welfare services such as education is deeply held,193 even though the U.S. is an outlier in this regard on the global stage. Indeed, the 2015 version of ESEA (ESSA) pulled back from NCLB’s highly regulatory approach, deferring more to the states.194 Relatedly, it is not unusual to hear a politician propose eliminating the U.S. Department of Education altogether, and in fact a member of Congress introduced such a bill in February 2017.195 Thus, while ease of statutory repeal is one disadvantage, inability to enact a statutory reform in the first place may be an even more significant one, especially in today’s political climate. Finally, the more directive federal education legislation becomes, the closer it gets to the trigger the Court established in NFIB v. Sebilus196 when it struck down legislation as having “cross[ed] the line from coercion to compulsion.” It appears highly likely that current federal education legislation remains compliant with Spending Clause requirements, but future legislation must be mindful of this decision.197

The impact this approach could have for local districts is uncertain because the contours of Congressional action and executive enforcement could vary so widely. However, if any real federal quality floor for public education is created, it would seem that states would be compelled to assist local districts in a meaningful manner so that every school offers students an education at a certain basic level of quality. Many schools across Michigan, and indeed across the entire country, would benefit.

#### Civil rights protection requires a federal role --- OCR data gathering is key to uncover and fight discrimination

Filler, 3/16/17 (Lane – member of the Newsday editorial board, “The federal role in defending students,” <http://www.newsday.com/opinion/columnists/lane-filler/the-federal-role-in-defending-students-1.13270148>, accessed on 5/15/17, JMP)

In her speech to the National Lieutenant Governors Association yesterday, Secretary of Education Betsy DeVos again reminded everyone why she’s the perfect ultra-conservative choice to head a federal agency: She doesn’t really believe in the federal government.

“Federalism isn’t an antiquated idea,” DeVos told the group. “Our founders reserved most powers, including education, for states to exercise because they knew all too well that a distant central government cannot adequately express the needs of the people.”

She said it even better to Axios, the news and media website, last month: “It would be fine with me to have worked myself out of a job.”

In some ways, DeVos is right. The Constitution does not allow much federal control of schools, one reason her post has only been a Cabinet position since 1979. Having Washington dictate rules to make schools in New York City and Nashua, New Hampshire, operate identically would be a disaster.

But because states and districts often fall short, one area of education in which the federal government must have a strong presence and the final word is civil rights. And thus far, DeVos seems aggressively unwilling to prioritize her department’s Office for Civil Rights and its mission. In her confirmation hearing, asked whether schools receiving federal funding should have to comply with the federal Individuals with Disabilities Education Act, she said, “I think that is a matter that’s best left to the states.”

Asked in that interview with Axios whether the federal government has a role in education, she said, “I mean, when we had segregated schools and when we had a time when, you know, girls weren’t allowed to have the same kinds of sports teams — I mean, there have been important inflection points for the federal government to get involved.” But DeVos said, “I can’t think of any now” when asked whether there are such problems today.

That’s scary. There are inescapable civil rights issues implicit in education policy, and local districts and states are often terrible at dealing with them. That’s why state after state, including New York, ends up with court orders telling it to stop underfunding the education of poor people and minorities and people with disabilities, court orders that are too often ignored. That’s why states end up with federal decrees telling them to reorganize funding and districts and access more fairly, and to make sure students with special needs get the resources they require. Dollars are too often driven in the direction desired by local taxpayers whose clout is defined by the wealth of their communities, a problem it falls to Washington to fix.

Often, states’ rights, federalism and local control are defenses to justify discrimination. Nowhere has this been more true than in education. And the Department of Education’s Office for Civil Rights doesn’t just fight this, it uncovers it by gathering and analyzing data from the nation’s public schools.

“A group of us are trying to draw attention to where the education department and Secretary DeVos are headed,” John B. King Jr., DeVos’ predecessor, said in an interview last week. He and Arne Duncan, who preceded King, and the two most recent heads of the Office for Civil Rights, Russlynn Ali and Catherine Lhamon, are speaking up to put a spotlight on the important work of the office and to push DeVos to prioritize it.

DeVos can’t destroy public schools, as critics fear, or start huge voucher programs to divert public money to private schools. That’s mostly beyond her role. But she can seriously diminish the Office for Civil Rights, and with it, the educations of a lot of vulnerable children.

#### Federal leadership empirically key to set equity agenda

Orfield & Frankenberg, 14 --- \*professor of education, law, political science and urban planning at the UCLA Graduate School of Education and Information Studies, AND \*\*assistant professor in the department of education policy studies in the College of Education at the Pennsylvania State University (5/15/14, Gary Orfield and Erica Frankenberg with Jongyeon Ee and John Kuscera, “Brown at 60: Great Progress, a Long Retreat and an Uncertain Future,” https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf, accessed on 6/15/17, JMP)

Though education policy authority in the U.S. is fundamentally vested in state governments, and despite the fact that local districts hire and supervise the vast majority of educators and operate with considerable discretion, federal leadership has been very important in setting the equity agenda. With the passage of the Elementary and Secondary Education Act in 1965 and the l964 Civil Rights Act, the federal role, including federal aid, expanded very rapidly with a central focus on equalizing educational opportunity for poor and minority students. Education policy shifted dramatically following the Reagan Administration’s A Nation at Risk report in l983 and the adoption by almost all states of the report’s agenda of increased testing and accountability. The policies followed since--and reaching an extreme form in the No Child Left Behind legislation of 2002--have assumed that segregation and poverty are not important. Instead these policies are based on the premise that setting demanding standards, coupled with harsh sanctions, can equalize schooling. Related to this has been a great enthusiasm for unregulated charter schools and choice. The Obama Administration’s Race to the Top and waiver policies from NCLB standards, which no state was meeting, emphasized even more accountability pressures in evaluating teachers and led to the rapid expansion of charters. Within this policy framework, issues of segregation have been virtually ignored in education policy.

In a period in which Congress has been unable to enact a major federal education law since 2002, and in which federal education policies are being framed by administrative rule making, there need to be funds set aside for helping school districts deal successfully with integration at the school and classroom levels and the stabilization of integrated communities. More could be done to promote diversity through building preferences into existing and new federal policy and to provide support to local districts, including through a renewed focus on desegregation at the regional Equity Assistance Centers. The one new federal program to support district diversity efforts since the 1970s was Technical Assistance for Student Assignment Policies (TASAP) in 2009, designed to support districts by helping with diversity plans. Despite its short turnaround and low amount of funding, TASAP had more than twice as many applicants as available funds in its very brief existence.

#### Federal action is critical to protect civil rights --- only locking in DOE support can solve

Lhamon, 2/27/17 --- former Assistant Secretary of Education in charge of the Office for Civil Rights at the U.S. Department of Education from 2013 to 2017 (Catherine E., “Betsy DeVos May Need a Civil Rights Reality Check; Former civil rights chief of the Education Department on why the agency is indispensable,” <http://washingtonmonthly.com/2017/02/27/betsy-devos-may-need-a-civil-rights-reality-check/>, accessed on 5/8/17, JMP)

“When we had segregated schools and when we had a time when, you know, girls weren’t allowed to have the same kind of sports teams [these were] important inflection points for the federal government to get involved,” the new Secretary of Education, Betsy DeVos, said recently.

But when asked whether any such need for federal involvement exists today, Secretary DeVos responded that she “can’t think of any right now.”

Our nation’s students need her to know better.

Secretary DeVos holds the purse strings for billions of federal dollars and leads federal involvement in schools, making it critically important that she know what students in too many schools today know all too well, and what Congress has mandated for close to 60 years: The federal government must actively ensure that our nation’s schools keep core civil rights promises.

I led the U.S. Department of Education’s Office for Civil Rights, so I can offer Secretary DeVos a dose of reality about just how far we have to go as a nation to fulfill the law.

In Lee County Schools system in rural Alabama, for example, which had years earlier convinced a federal court that it had eliminated the effects of segregation, one of the four public high schools served more than 90 percent black students – even though the district student population was only 23 percent black.

Related: In a city still struggling with segregation, a popular charter school fights to remain diverse

The majority-black high school had never offered an Advanced Placement course to its students until three years before the civil rights office investigated, while the other three high schools offered a broad range of A.P. courses. Investigators from the Office of Civil Rights asked the principal of the overwhelmingly black school why he didn’t offer high-rigor courses. He said his students needed remedial education, not A.P. It took federal intervention in 2013, almost 60 years after Brown v. Board of Education, to ensure that all students in Lee County – not just the white students and the few black students attending majority-white schools – had access to an education that would prepare them to fulfill their dreams.

In a district in the Southwest, teachers required a boy with autism to stand in front of his class and listen to his peers tell him what they didn’t like about him, as a way to discipline the child. When his mother complained, administrators defended the decision, saying the school needed to be able to innovate. It took federal intervention to ensure that this child, and his peers, did not suffer further discrimination at school.

In a Northeastern district, a middle school boy’s self-portrait was defaced with a gender slur, and he endured regular taunts from his peers — in front of school administrators – telling him he was too effeminate. His school refused to investigate many of the harassment incidents. With federal intervention, the school finally met its obligation to ensure that this student, and all students, could participate in school without ridicule for who they are.

In West Contra Costa Unified School District in California, where there were highly publicized rapes of middle school and high school students, administrators told the civil rights office staff that they were aware students were sexually harassing each other at school, but they hadn’t taken action because such behavior was expected of Latino students in an “urban culture.” After federal intervention, students in the district can now attend school without being subjected to a hostile environment of harassment and discrimination.

At Shaw University in North Carolina, a student with cerebral palsy arrived on campus for orientation only to be told his admission had been rescinded because of his disability. University officials told the civil rights office that they routinely denied admission to students with disabilities if the school couldn’t readily accommodate the student. It took federal intervention to ensure that the Americans with Disabilities Act, which had become law some 25 years earlier, would apply for students wanting to attend Shaw.

Related: New Orleans schools still struggle with integration

During President George W. Bush’s Administration, the civil rights office investigated racial harassmentthat had occurred on the way to a high school basketball game. White students attacked a black student, threatening to lynch him and other students of color. Only with federal intervention did the district finally address such racial harassment. At an elementary school, district administrators admitted to segregating Latino students. Without federal intervention, the segregation would have persisted.

These are only a handful of examples of the injustices that students face every day in this country’s schools and colleges. While millions of educators strive to – and do – provide rich and meaningful opportunities to all their students on an equal basis, some students still suffer unspeakable harm in school. Congress committed in 1964 – and every year thereafter – that the federal government would help ensure that our nation’s highest ideals of fairness and equality are reality for not just some, but for all students. We need the federal government’s intervention when that is not happening, and we need the Secretary of Education to lead that work.

### AT: CP States – Devolution Fails

#### Devolution will fail --- federal government key to uniformity and justice

Guneratne, 16 --- lecturer at Santa Clara University’s School of Education & Counseling, master’s degree in education from the University of San Francisco (5/19/16, Elizabeth, “No: Federal government must play major role in teaching America’s students,” <http://www.gazettextra.com/20160519/no_federal_government_must_play_major_role_in_teaching_america8217s_students>, accessed on 5/8/17, JMP)

The federal government should not leave elementary and high school education to the whims of local school boards.

Such boards lack the capacity to address the funding, curricular and justice gaps that students experience throughout our nation.

Take California, for example. It is one of the wealthiest states in our nation, but you would never know it from its schools.

The state has the highest poverty rate for children in the country. Effectively half of California’s 6 million public school children are poor or living just barely above the poverty line.

More than half a million of these children are homeless. Eighty-one percent come from families in which the parents are working but still can’t make ends meet.

Nearly one in four of California’s students is a non-native English learner. One in 10 has an identified learning disability. Many suffer from trauma. Many show up just to eat hot meals.

These kids need a lot of support, and the state simply won’t foot the whole bill. Per-pupil spending in California is among the lowest in the country. Last year, the federal government contributed $7 billion to education in California. While this is only a fraction of the state’s education budget, it literally cannot operate schools without this money.

But financial support is not all that federal authorities provide. There is value in uniformity.

The federal government has established a common vision for our schools. If we want our students to excel in college and compete with an international workforce, we must have uniform curricular expectations that apply to all students.

There is no reason for one local board to decide that its students won’t be taught that global warming exists, while another teaches that it does. If we want to produce informed, productive citizens, we can’t allow local boards to lower the national expectations for student learning.

Even more important than a common vision is advancing justice. Through civil rights legislation and monitoring, federal authorities have consistently butted in to protect the rights of students with disabilities, young women, poor students and students of color.

But the battle is not over. Our schools today are almost as segregated as they were in the days before the civil rights movement. Almost every district in the country has an achievement gap related to race.

It is the federal authorities, and not local school boards, who make sure that children have equal access to education regardless of whether they live in Bakersfield, Calif., Appalachia or New York City. It is the federal authorities who are now protecting the rights of transgender students to use the restroom.

Separate is not equal. It has never been. But today, separate is also weak.

Research shows that countries with greater equity in education have better schools. Despite its fall from grace, this was the premise of President George W. Bush’s No Child Left Behind Act and the accountability movement.

And his idea makes good sense: If we want to improve education, we should hold schools responsible for the success of each and every student. We need a central authority to help us maintain this focus.

This is not to diminish the role of local government in public education. I am a lifelong educator. I have taught in California schools for years. While federal involvement is imperative, local governments can lead the way with school improvement.

I hope California Gov. Jerry Brown’s local control of funding will better serve our students, but holding the purse only matters if it is not empty.

I hope we can work together at a national and local level to cultivate excellent schools that provide equal opportunities for all our students.

Ultimately, education is about our kids. And if the federal government butts out entirely, our kids are the ones who will suffer.

### AT: CP States – No Federal Follow On

#### Federal modelling is laughable --- DeVos has been explicit the DOE will ONLY comply with FEDERAL law and will only initiate discrimination charges when schools are in violation of federal law. At best the CP will be ignored by the DOE and, most likely, will be actively circumvented by DeVos and Trump. That’s Quinlan and Needham.

#### \*\*\*Note when prepping file --- this next card isn’t critical because the 1ac evidence makes very similar claims but wanted to include here in case you wanted additional insurance against the “federal will model” claim.

#### No spill up --- DOJ and Trump administration moving to limit federal civil rights enforcement --- only the plan can solve

Huseman & Waldman, 6/15/17 (Jessica & Annie, ProPublica Investigative Reporting, “Trump Administration Quietly Rolls Back Civil Rights Efforts Across Federal Government,” Factiva, JMP)

For decades, the Department of Justice has used court-enforced agreements to protect civil rights, successfully desegregating school systems, reforming police departments, ensuring access for the disabled and defending the religious.

Now, under Attorney General Jeff Sessions, the DOJ appears to be turning away from this storied tool, called consent decrees. Top officials in the DOJ civil rights division have issued verbal instructions through the ranks to seek settlements without consent decrees — which would result in no continuing court oversight.

The move is just one part of a move by the Trump administration to limit federal civil rights enforcement. Other departments have scaled back the power of their internal divisions that monitor such abuses. In a previously unreported development, the Education Department last week reversed an Obama-era reform that broadened the agency’s approach to protecting rights of students. The Labor Department and the Environmental Protection Agency have also announced sweeping cuts to their enforcement.

“At best, this administration believes that civil rights enforcement is superfluous and can be easily cut. At worst, it really is part of a systematic agenda to roll back civil rights,” said Vanita Gupta, the former acting head of the DOJ’s civil rights division under President Barack Obama.

Consent decrees have not been abandoned entirely by the DOJ, a person with knowledge of the instructions said. Instead, there is a presumption against their use — attorneys should default to using settlements without court oversight unless there is an unavoidable reason for a consent decree. The instructions came from the civil rights division’s office of acting Assistant Attorney General Tom Wheeler and Deputy Assistant Attorney General John Gore. There is no written policy guidance.

Devin O’Malley, a spokesperson for the DOJ, declined to comment for this story.

Consent decrees can be a powerful tool, and spell out specific steps that must be taken to remedy the harm. These are agreed to by both parties and signed off on by a judge, whom the parties can appear before again if the terms are not being met. Though critics say the DOJ sometimes does not enforce consent decrees well enough, they are more powerful than settlements that aren’t overseen by a judge and have no built-in enforcement mechanism.

Such settlements have “far fewer teeth to ensure adequate enforcement,” Gupta said.

Consent decrees often require agencies or municipalities to take expensive steps toward reform. Local leaders and agency heads then can point to the binding court authority when requesting budget increases to ensure reforms. Without consent decrees, many localities or government departments would simply never make such comprehensive changes, said William Yeomans, who spent 26 years at the DOJ, mostly in the civil rights division.

“They are key to civil rights enforcement,” he said. “That’s why Sessions and his ilk don’t like them.”

Some, however, believe the Obama administration relied on consent decrees too often and sometimes took advantage of vulnerable cities unable to effectively defend themselves against a well-resourced DOJ.

“I think a recalibration would be welcome,” said Richard Epstein, a professor at New York University School of Law and a fellow at the Hoover Institution at Stanford, adding that consent decrees should be used in cases where clear, systemic issues of discrimination exist.

Though it’s too early to see how widespread the effect of the changes will be, the Justice Department appears to be adhering to the directive already.

On May 30, the DOJ announced Bernards Township in New Jersey had agreed to pay $3.25 million to settle an accusation it denied zoning approval for a local Islamic group to build a mosque. Staff attorneys at the U.S. attorney’s office in New Jersey initially sought to resolve the case with a consent decree, according to a spokesperson for Bernards Township. But because of the DOJ’s new stance, the terms were changed after the township protested, according to a person familiar with the matter. A spokesperson for the New Jersey U.S. attorney’s office declined comment.

Sessions has long been a public critic of consent decrees. As a senator, he wrote they “constitute an end run around the democratic process.” He lambasted local agencies that seek them out as a way to inflate their budgets, a “particularly offensive” use of consent decrees that took decision-making power from legislatures.

On March 31, Sessions ordered a sweeping review of all consent decrees with troubled police departments nationwide to ensure they were in line with the Trump administration’s law-and-order goals. Days before, the DOJ had asked a judge to postpone a hearing on a consent decree with the Baltimore Police Department that had been arranged during the last days of the Obama administration. The judge denied that request, and the consent decree has moved forward.

The DOJ has already come under fire from critics for altering its approach to voting rights cases. After nearly six years of litigation over Texas’ voter ID law — which Obama DOJ attorneys said was written to intentionally discriminate against minority voters and had such a discriminatory effect — the Trump DOJ abruptly withdrew its intent claims in late February.

Efforts to implement the nation’s strictest voter ID requirements — a solution in search of a problem, according to one critic — foundered amid court defeats, confusion and at least one giant oversight. Read the story.

Attorneys who worked on the case for years were barely consulted about the change — many weren’t consulted at all, according to two former DOJ officials with knowledge of the matter. Gore wrote the filing changing the DOJ’s position largely by himself and asked the attorneys who’d been involved in the case for years to sign it to show continuity. Not all of the attorneys fell in line. Avner Shapiro — who has been a prosecutor in the civil rights division for more than 20 years — left his name off the filings written by Gore. Shapiro was particularly involved in developing the DOJ’s argument that Texas had intentionally discriminated against minorities in crafting its voter ID legislation.

“That’s the ultimate act of rebellion,” Yeomans, the former civil rights division prosecutor, said. A rare act, removing one’s name from a legal filing is one of the few ways career attorneys can express public disagreement with an administration.

Gore has no history of bringing civil rights cases. A former partner at the law firm Jones Day, he has instead defended states against claims of racial gerrymandering and represented North Carolina when the state was sued over its controversial “bathroom bill,” which requires transgender people to use the facility that matched their birth gender.

All of the internal changes at the DOJ have left attorneys and staff with “a great deal of fear and uncertainty,” said Yeomans. While he says the lawyers there would like to stay at the department, they fear Sessions’ priorities will have devastating impact on their work.

The DOJ’s civil rights office is not alone in fearing rollbacks in enforcement. Across federal departments, the Trump administration has made moves to diminish the power of civil rights divisions.

The Department of Education has laid out plans to loosen requirements on investigations into civil rights complaints, according to an internal memo sent to staff on June 8 and obtained by ProPublica.

Under the Obama administration, the department’s office for civil rights applied an expansive approach to investigations. Individual complaints related to complex issues such as school discipline, sexual violence and harassment, equal access to educational resources, or racism at a single school might have prompted broader probes to determine whether the allegations were part of a pattern of discrimination or harassment.

The new memo, sent by Candice Jackson, the acting assistant secretary for civil rights, to regional directors at the department’s civil rights office, trims this approach. Jackson was appointed deputy assistant secretary for the office in April and will remain as the acting head of the office until the Senate confirms a full-time assistant secretary. Trump has not publicly nominated anyone for the role yet.

The office will apply the broader approach “only” if the original allegations raise systemic concerns or the investigative team argues for it, Jackson wrote in the memo.

Candice Jackson’s intellectual journey raises questions about how actively she will investigate allegations of unfair treatment of minorities and women. Read the story.

As part of the new approach, the Education Department will no longer require civil rights investigators to obtain three years of complaint data from a specific school or district to assess compliance with civil rights law.

Critics contend the Obama administration’s probes were onerous. The office “did such a thorough review of everything that the investigations were demanding and very expensive” for schools, said Boston College American politics professor R. Shep Melnick, adding that the new approach could take some regulatory pressure off schools and districts.

But some civil rights leaders believe the change could undermine the office’s mission. This narrowing of the department’s investigations “is stunning to me and dangerous,” said Catherine Lhamon, who led the Education Department’s civil rights office from August 2013 until January 2017 and currently chairs the United States Commission on Civil Rights. “It’s important to take an expansive view of the potential for harm because if you look only at the most recent year, you won’t necessarily see the pattern,” said Lhamon.

The department’s new directive also gives more autonomy to regional offices, no longer requiring oversight or review of some cases by department headquarters, according to the memo.

The Education Department did not respond to ProPublica’s request for comment.

Education Secretary Betsy DeVos has also proposed cutting over 40 positions from the civil rights office. With reduced staff, the office will have to “make difficult choices, including cutting back on initiating proactive investigations,” according to the department’s proposed budget.

### AT: CP Housing Reform

#### CP solvency too slow --- perms solves better

Landsberg, 16 --- Professor Emeritus, Pacific McGeorge School of Law (Brian K., Fall 2016, Duke Journal of Constitutional Law & Public Policy, “LEE V. MACON COUNTY BOARD OF EDUCATION: THE POSSIBILITIES OF FEDERAL ENFORCEMENT OF EQUAL EDUCATIONAL OPPORTUNITY,” 12 Duke J. Const. Law & Pub. Pol'y 1, Lexis-Nexis Academic, JMP)

1. Racially neutral approaches

While the federal government could provide funding, accompanied by performance standards, to improve schools, that effort thus far has failed to erase racial disparities. n232 School systems could take steps on their own to end isolation of students in poor socio-economic status. Congress could use its spending power to encourage school systems to minimize isolation of students from lower economic strata, but will most likely continue to defer to the other branches. Advocates of eliminating racial isolation could wait for changing housing patterns to bring about desegregation. This could sentence children to racial [\*42] isolation for years to come, because "even if school segregation declines at the same rate as residential segregation from this point forward (by no means a certainty), the resulting progress will be frustratingly slow." n233

2. Race-based approaches; attacks on racial discrimination

As Justice Blackmun pointed out in his separate opinion in Regents of the University of California v. Bakke, "In order to get beyond racism, we must first take account of race. There is no other way." n234 School systems could make limited use of race, as outlined by Justice Kennedy's concurrence in Seattle. Whether such efforts would be upheld will depend on a closely divided Supreme Court taking an expansive view of permissible measures. As discussed below, a more promising approach would be for the federal government to apply disparate impact regulations of DOE to student assignment. n235 Just as the Supreme Court in Brown liberated courts from Plessy, the executive branch could liberate the courts to confront school board practices that result in racial isolation.

Going a step further, the federal government could apply the disparate impact regulations to challenge a state's maintenance of virtually one-race school districts. n236 It may be possible in some instances to desegregate schools by bringing housing discrimination cases. In the Carter Administration the DOJ Civil Rights Division merged the section responsible for enforcing the fair housing act with the section responsible for school desegregation enforcement, because of the inter-relationship of housing and schools. The merged section brought one case that joined housing and education. n237 It may sometimes be possible for plaintiffs to rely on state rather than federal law. The Lawyers Committee for Civil Rights Under Law has recently [\*43] filed a case in North Carolina state court "to challenge the maintenance of three racially identifiable and inequitably resourced school districts in Halifax County, North Carolina," based on the right to education under the state constitution. n238 An adverse decision is on appeal. n239

#### Desegregated education makes students more likely to seek out diverse neighborhoods later in life

Hilbert, 17 --- Associate Professor of Law at Mitchell Hamline School of Law, one of the plaintiffs' attorneys for the Minneapolis NAACP in the 1995 desegregation case (Winter 2017, Jim, Journal of Law & Education, “Restoring the Promise of Brown: Using State Constitutional Law to Challenge School Segregation,” 46 J.L. & Educ. 1, Lexis-Nexis Academic, JMP)

B. Inclusion and Diversity -- Why (Proper) Desegregation Can Still Matter

In a joint policy paper on diversity, the United States Departments of Education and Justice acknowledged the importance of diversity and "inclusive educational opportunities" to "achieving the nation's educational and civic goals." n135 As they explained, "[r]acially diverse schools provide incalculable educational and civic benefits by promoting cross-racial understanding, breaking down racial and other stereotypes, and eliminating bias and prejudice." n136 Integrated schools [\*26] help promote "social cohesion." n137 Indeed, the transformative potential of desegregation was the initial motivation for Brown. n138

Social science supports this idea as well. Study after study shows that interracial prejudice diminishes with intergroup racial contact. n139

Desegregated schools are specifically linked to a reduction in students' willingness to accept stereotypes. n140 Diverse classrooms also diminish bias and promotion of racial hierarchy by white students. n141

Desegregation may also be an effective tool for addressing the "achievement gap." n142 Test scores in particular for students of color improve significantly in desegregated settings. n143 Because of the link between race and poverty, racial desegregation will likely reduce socioeconomic segregation and improve the academic achievement of [\*27] otherwise "disadvantaged students." n144 Further, "research findings show, immigrant students who attend integrated schools are more likely to have higher test scores and better grades compared to those who attend racially and socioeconomically isolated schools." n145

Even more, school desegregation has lasting impacts on life outcomes beyond graduation. n146 For example, in one study students who attended desegregated schools for at least five years earned 25% more than their counterparts from segregated settings." n147 By middle age, the same group was also in far better health, too. n148 Students of all races who attended desegregated schools are more likely to seek out desegregated colleges, workplaces, and neighborhoods later in life, which may in turn provide desegregated educational opportunities for their own children. n149

### AT: CP Educational Equality

#### \*\*\*Note when prepping file --- evidence from the next two sections contain most of the useful evidence to answer this cp (as well as many cards in the 1ac)

#### The plan embodies a workable permutation --- addresses both racial isolation and inequality in education

Epperson, 12 --- Associate Professor of Law, American University Washington College of Law (Winter 2012, Lia, Harvard Law & Policy Review, “SYMPOSIUM: EDUCATION: EQUALITY OF OPPORTUNITY: Legislating Inclusion,” 6 Harv. L. & Pol'y Rev. 91, Lexis-Nexis Academic, JMP)

[\*91] INTRODUCTION

This article seeks to situate recent jurisprudence on the Constitution's commitment to ending racial segregation in public education in the framework of congressional power to enact enforcement legislation. In previous work, I have examined jurisprudential shifts in recognizing the right to racially integrated education. n1 In recent jurisprudence, a majority of the Supreme Court identified a substantive equality right to eliminate persistent racial isolation and inequality in public education. Specifically, in his sharply worded concurrence in Parents Involved in Community Schools v. Seattle School District, n2 Justice Anthony Kennedy found that a "compelling government interest exists in avoiding racial isolation" and that school districts may choose to pursue this interest. n3 Kennedy, with the implicit endorsement of the four dissenting Justices, focused on the broader constitutional ideal of fostering racial inclusion in our nation's schools and highlighted the continued relevance of integration to the promise articulated in Brown v. Board of Education. n4

Existing jurisprudential avenues to address current constitutional violations, however, are limited by the modern anti-classification framework used in adjudicating equal protection claims. n5 I suggest that political branches may have more institutional strength, expertise, flexibility, and enforcement [\*92] power to pursue racial inclusion in public education. n6 Specifically, I propose that Congress, via Section 5 of the Fourteenth Amendment, should delineate equal protection remedies to address the unique and enduring dilemma of twenty-first century racial isolation and resulting inequality in public education. n7 Though the Supreme Court has issued a series of opinions narrowing congressional power to enact enforcement legislation in recent years, n8 no decisions have addressed congressional enforcement power to legislate at the distinctive intersection of racial equality and educational opportunity.

This article proceeds in four parts. Part I posits Congress has the authority to enact enforcement legislation to alleviate racial isolation in public education. Part II closely examines the scope and contours of congressional enforcement power under Section 5 of the Fourteenth Amendment by analyzing constitutional text and recent Court interpretations of equality and enforcement power. Such analysis highlights Congress's unique power to craft legislation alleviating de facto racial segregation n9 and isolation in public schools, institutions integral to shaping our democracy and preparing students to be effective citizens. Part III acknowledges potential judicial constraints posed by the current Court, which underscore the importance of legislative imperatives. Finally, Part IV draws from these doctrinal arguments to offer preliminary considerations on optimal statutory design. I offer some suggestions that may help bridge the divide between our constitutional ideals and the practice of facilitating racial inclusion in public education.

### --- AT: Backlash Net Benefit

#### This argument is morally bankrupt --- not acting out of fear of backlash ensures that progress is never made. Voting negative kowtows to angry white bigots.

#### Backlash isn’t inevitable AND governmental policies is what sustains de facto segregation --- fiat solves by removing the legal means that opponents used to justify their actions

Delmont, 16 --- professor of history at Arizona State University (3/29/16, Matthew, “The Lasting Legacy of the Boston Busing Crisis; Desegregating schools by shuttling kids across town failed. That doesn’t mean the achievability or significance of the original goal must fail, too,” <https://www.theatlantic.com/politics/archive/2016/03/the-boston-busing-crisis-was-never-intended-to-work/474264/>, accessed on 6/22/17, JMP)

“When we would go to white schools, we’d see these lovely classrooms, with a small number of children in each class,” Ruth Batson recalled. As a Boston civil-rights activist and the mother of three, Batson gained personal knowledge of how the city’s public schools shortchanged black youth in the 1950s and 1960s. “The teachers were permanent. We’d see wonderful materials. When we’d go to our schools, we would see overcrowded classrooms, children sitting out in the corridors, and so forth. And so, then we decided that where there were a large number of white students, that’s where the care went. That’s where the books went. That’s where the money went.”

Batson was one of the millions of black parents and citizens in cities like Boston, Chicago, Detroit, Los Angeles, and New York who saw firsthand how school segregation and inferior educational opportunities harmed black students in the decades after Brown v. Board of Education (1954). Like black parents across the country Batson cared deeply about education and fought on behalf of her children and her community. Batson’s three-decade-long struggle for education equality in Boston illuminates both the long history of black civil-rights activism in the North and the resistance from white politicians and parents that thwarted school desegregation. The battles Batson fought are still ongoing and are being discussed today with renewed urgency. Thanks to work by Nikole Hannah-Jones, Richard Kahlenberg, and many others, school integration is being debated publicly in a way not seen in nearly 40 years. The popular understanding of school desegregation, however, is sketchy, and terms like “busing,” “de facto segregation,” and “neighborhood schools” are commonly used but poorly understood. There is a gap between what scholars like Jeanne Theoharis and Ansley Erickson have established about the history of school segregation and how the popular conversation proceeds. In order to think about how school integration can work in 2016 and beyond, it is crucial to reckon with the history of school-desegregation efforts in cities like Boston and to appreciate how people like Batson dedicated their lives to improving educational opportunities for black children.

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Batson was on the front lines of the school-desegregation battles in Boston. Born and raised in Roxbury, Batson recalled being exposed to politics at an early age by her Jamaican parents, who supported Marcus Garvey. “We heard racial issues constantly being discussed” at regular Sunday community meetings at Toussaint L’Ouverture Hall, Batson remembered. “I knew that there were flaws in the cradle of liberty.” As a former Boston public-schools student herself and the mother of three school-age daughters, Batson knew Boston’s schools were resolutely segregated, with vast differentials in funding, school resources, and teacher quality. Batson ran for the Boston School Committee in 1951, and her campaign fliers urged voters, “For your children’s sake, elect a mother.” Though she lost the election, Batson nonetheless dedicated herself to showing people how Boston school officials used subtle techniques to maintain school segregation. She was dismayed to see Boston’s schools grow more segregated in the decades after Brown, as the district bused white children to white schools with more resources and more experienced teachers.

“What black parents wanted was to get their children to schools where there were the best resources for educational growth—smaller class sizes, up-to-date-books,” Batson recalled. “They wanted their children in a good school building, where there was an allocation of funds which exceeded those in the black schools; where there were sufficient books and equipment for all students.” In short, Batson understood that school integration was about more than having black students sit next to white students. As she knew, more than 80 percent of Boston’s black elementary-school students attended majority-black schools, most of which were overcrowded. Across Boston’s public schools in the 1950s, per-pupil spending averaged $340 for white students compared with only $240 for blacks students. Over the years, data of this sort failed to persuade the Boston School Committee, which steadfastly denied the charge that school segregation even existed in Boston.

In the 1960s, Boston School Committee chairwoman Louise Day Hicks, who became a local and national symbol of the “white backlash” to school desegregation, consistently resisted the demands of civil-rights advocates. Describing a particularly contentious meeting in August 1963, The Boston Globe reported, “Hicks gaveled the last meeting with Negro leaders to a close in something short of three minutes when the speaker mentioned the words, de facto segregation—just mentioned the words.” For Hicks, acknowledging segregation at all might lead to having to do something about it. “We’re not quibbling about a word,” Batson told the Globe. “It is not the word. It is the fact that it exists. Our whole quarrel is with their refusing to admit that the situation exists.”

Batson and other civil-rights activists, parents, and students in Boston were organized and creative in their protests against school segregation. In June 1963, for example, Batson and other NAACP members met with the Boston School Committee while 300 black Bostonians demonstrated outside of City Hall. “We make this charge: that there is segregation in fact in our Boston public-school system,” Batson told the School Committee. “The injustices present in our school system hurt our pride, rob us of our dignity, and produce results which are injurious not only to our future but to those of the city, state, and nation.” In a hearing room crowded with press, the School Committee did not respond positively to these charges. “We made our presentation and everything broke loose,” Batson recalled. “We were insulted. We were told … our kids were stupid, and this was why they didn’t learn. We were completely rejected that night.” A week later, Batson and other civil-rights advocates organized a “Stay Out for Freedom” protest, with nearly 3,000 black junior and senior high-school students staying away from public school. Organizers preferred “stay out” to “boycott” because students were staying away from public school to attend community-organized “Freedom Schools.” “I feel that the Stay Out for Freedom Day was a success,” Batson told the Globe. “It demonstrated to the Boston community that the Negro community is concerned and that they want action.”

In September 1963, a month after the March on Washington, Batson led more than 6,000 black and white protesters on a march through Boston’s Roxbury neighborhood to protest school segregation. The march concluded at Sherwin School, built in 1870, five years after the end of the Civil War. Pointing to the dilapidated 93-year-old building, NAACP Boston executive secretary Thomas Atkins told the crowd: “This is where Negro kids go to school in Boston! What are you going to do about it?” After observing a moment of silence for the four young girls killed a week earlier in the bombing at the 16th Street Baptist Burch in Birmingham, Alabama, the crowd joined Susan Batson, Ruth Batson’s teenage daughter, in a chant that clearly outlined the marchers’ demands. Susan Batson shouted, “Jim Crow—” The crowd replied, “Must go!” “The School Committee”—“Must go!” “De Facto”—“Must go!” “Mrs. Hicks”—“Must go!”

As civil-rights pressure continued through the fall of 1963, Hicks and the Boston School Committee only grew stronger in their opposition to school desegregation. When Hicks received the most votes in the November 1963 School Committee election, she saw the victory as a referendum on school desegregation. “The people of Boston have given their answer to the de facto segregation question,” Hicks argued. Having failed to oust Hicks or elect someone to the School Committee who would support school desegregation, the black community organized a second “Stay Out For Freedom” on February 26, 1964. The “stay out” kept more than 20,000 students (more than 20 percent of the city’s public-school students) out of school and connected Boston to similar school boycotts that took place earlier in the month in New York and Chicago. Like her peers in other cities, Batson encountered school officials and politicians who refused to believe that unconstitutional school segregation could exist outside of the South.

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It wasn’t until the mid-1970s that Boston’s “busing crisis” finally garnered national attention. It was easy to forget that this wasn’t a new phenomenon, that black people in Boston and other cities had been fighting for years to secure equal education, and that powerful local officials and national politicians underwrote school segregation in the North. School desegregation was about the constitutional rights of black students, but in Boston and other Northern cities, the story has been told and retold as a story about the feelings and opinions of white people. The mass protests and violent resistance that greeted school desegregation in mid-1970s Boston engraved that city’s “busing crisis” into school textbooks and cemented the failure of busing and school desegregation in the popular imagination. Contemporary news coverage and historical accounts of Boston’s school desegregation have emphasized the anger that white people in South Boston felt and have rendered Batson and other black Bostonians as bit players in their own civil-rights struggle.

One reason Boston’s “busing crisis” continues to resonate for so many people is that it serves as a convenient end point for the history of civil rights, where it is juxtaposed with Brown v. Board of Education (1954) or the Little Rock school-integration crisis (1957). In this telling, the civil-rights movement, with the support of federal officials and judges, took a wrong turn in the North and encountered “white backlash.” The trouble with the “backlash” story is that the perspectives of white parents who opposed school desegregation figured prominently in the very civil-rights legislation against which they would later rebel. In drafting the 1964 Civil Rights Act, for example, the bill’s Northern sponsors drew a sharp distinction between segregation by law in the South and so-called “racial imbalance” in the North, amending the Act to read:

“Desegregation” means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but “desegregation” shall not mean the assignment of students to public schools in order to overcome racial imbalance.

This language was directly designed to keep federal civil-rights enforcement of school desegregation focused away from the North. White politicians and parents in cities like Boston, Chicago, and New York regularly pointed to the 1964 Civil Rights Act to justify the maintenance of white schools. This landmark legislation therefore actually allowed school segregation to expand in Northern cities.

Most people today associate busing with Boston in the 1970s, but as Batson knew, organized resistance to school desegregation in the North started in the mid-1950s. As early as 1957, white parents in New York rallied against a proposed plan to transfer 400 black and Puerto Rican students from Brooklyn to schools in Queens. In Detroit in 1960, thousands of white parents organized a school boycott to protest the busing of 300 black students from an overcrowded school to a school in a white neighborhood. In Boston in 1965, Hicks made opposition to busing a centerpiece of her political campaigns. “It was Mrs. Hicks who kept talking against busing children when the NAACP hadn’t even proposed busing,” the Globe noted.

With busing, Northerners had found a palatable way to oppose desegregation without appealing to the explicitly racist sentiments they preferred to associate with Southerners. “I have probably talked before 500 or 600 groups over the last years about busing,” Los Angeles Assemblyman Floyd Wakefield said in 1970. “Almost every time, someone has gotten up and called me a ‘racist’ or a ‘bigot.’ But now, all of the sudden, I am no longer a ‘bigot.’ Now I am called ‘the leader of the antibusing effort.’” White parents and politicians framed their resistance to school desegregation in terms like “busing” and “neighborhood schools,” and this rhetorical shift allowed them to support white schools and neighborhoods without using explicitly racist language.

Describing opposition to busing as something other than resistance to school desegregation was a move that obscured the histories of racial discrimination and legal contexts for desegregation orders. In covering school desegregation in Boston and other Northern cities, contemporary news media took up the busing frame, and most histories of the era have followed suit. Americans’ understanding of school desegregation in the North is skewed as a result, emphasizing innocent or unintended “de facto segregation” over the housing covenants, federal mortgage redlining, public-housing segregation, white homeowners associations, and discriminatory real-estate practices that produced and maintained segregated neighborhoods, as well as the policies regarding school siting, districting, and student transfers that produced and maintained segregated schools.

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Understanding the history of school desegregation in Boston and other Northern cities makes it clear that so-called “de facto” residential and school segregation in the North were anything but innocent. While civil-rights advocates initially promoted this distinction between “Southern-style” and “Northern-style” segregation to build a political consensus against Jim Crow laws in the South, the de jure/de facto dichotomy ultimately made it possible for public officials, judges, and citizens in the North and South to deny legal responsibility for the visible realities of racial segregation. As black writer James Baldwin observed in 1965, “‘De facto segregation’ means Negroes are segregated, but nobody did it.”

Over the past two decades, scholars like Thomas Sugrue, Beryl Satter, and David Freund have revealed the vast web of governmental policies that produced and maintained racially segregated neighborhoods and schools in the North, as well as the civil-rights activists who fought against these structures of racial discrimination. These studies provide overwhelming evidence that, in every region of the country, neighborhood and school segregation flowed from intentional public policies, not from innocent private actions or free-market forces. Among the most important aspects of this body of scholarship is that it shows that the distinction between de jure segregation and de facto segregation is a false one.

The crisis in Boston and in other cities that faced court-ordered school desegregation was about unconstitutional racial discrimination in the public schools, not about busing. Judge W. Arthur Garrity’s decision in Morgan v. Hennigan (1974) made it clear that the Boston School Committee and superintendent “took many actions in their official capacities with the purpose and intent to segregate the Boston public schools and that such actions caused current conditions of segregation in the Boston public schools.” Judges issued busing orders to school districts—such as Denver, Detroit, Kansas City, Las Vegas, Los Angeles, and Pontiac—that were found guilty of intentional de jure segregation in violation of Brown and the Fourteenth Amendment. U.S. Department of Health, Education, and Welfare chief Leon Panetta—who was fired from President Richard Nixon’s administration for advocating for investigations into school segregation in the North—said in late 1969:

It has become clear to me that the old bugaboo of keeping federal hands off Northern school systems because they are only de facto segregated, instead of de jure segregation as the result of some official act, is a fraud … There are few if any pure de facto situations. Lift the rock of de facto, and something ugly and discriminatory crawls out from under it.

The challenge for civil-rights lawyers and activists like Batson was that it was extraordinarily difficult to lift all of the rocks of “de facto” to expose the illegal discrimination underneath.

For over half a century, parents, school officials, politicians, and writers from across the political spectrum have described busing as unrealistic, unnecessary, and unfair, most often citing Boston as evidence that busing and school desegregation failed. The problem is that busing is so routinely described as having failed that Americans have lost sight of what this equation—“busing failed”—asks them to believe about the history of civil rights in the United States. Agreeing that busing and school desegregation failed makes it possible to dismiss the educational goals that were a pillar of the civil-rights movement and to dismiss the constitutional promise of equality endorsed by Brown, though it was never fully realized. This busing narrative is comforting because it authorizes people to accept the continuing racial and socioeconomic segregation of schools in the United States as inevitable and unchangeable. The national resistance to school desegregation was immense but not inevitable. If Americans are indeed ready to think seriously again about school integration, we must start by reckoning with the history of school segregation in the North and remembering the stories of people like Ruth Batson.

#### ( ) Permutation solves a majority of the backlash

Gebelhoff, 16 (6/10/16, Robert, Washington Post.com, “Should desegregation be the top priority for school reform?” Factiva, JMP)

After the Supreme Court handed down its decision on de jure segregation in the landmark Brown v. Board of Education case, activists began fighting for proactive solutions to end de facto segregation. In the '70s and '80s, courts ordered the forced integration of schools through controversial busing programs. Those litigation-heavy efforts lost much of their legal backing, however, after the Supreme Court decided in Milliken v. Bradley that segregation was permissible only if it wasn't an explicit policy of school systems.

Since then, the primary tools for school desegregation have been through school choice programs that allow minority students access to schools outside of their district. That includes charter school programs, which allow public schools to operate independently from the school district under more experimental administrations; voucher schools, which give families from failing schools a public voucher to use at a school of their choosing; and open-enrollment policies, which give families the chance to enroll in districts in which they don't reside.

Each of these strategies has shown mixed results in terms of effectiveness. But while academics often squabble over the data, it's clear that motivated kids often do well when they're given the chance to go to good schools with more resources. Meanwhile, the poorest schools remain just as segregated and the students left behind still lack resources.

As a result, some of the biggest opponents to school choice policies have historically been teacher unions and school boards from poorer schools. They often oppose desegregation policies that pull away resources from low-performing schools without plans to also improve the lowest-performing institutions -- including integration programs such as busing. They argue that the root problem is a lack of support from the community and that greater investment in poor schools would result in reduced educational disparities.

A fascinating, more recent case that illustrates a poor school's' resistance to desegregation policies is the story of the Normandy School District in Missouri. After losing its accreditation status in 2013, a court order inadvertently integrated the district with a busing program to bring Normandy students to a whiter neighborhood. In addition to massive backlash from parents in the white neighborhood, administrators at the failing school derided the program as unfair, arguing that it was only making a bad situation worse at the low-performing schools. Normandy fought the integration measures in court and eventually reversed the policy despite the fact that many of its students strongly supported the busing program.

### AT: CP That Doesn’t Advocate Desegregation / AT: Assimilation Bad

#### \*\*\*Note when prepping the file --- the 1ac is obviously loaded with evidence that explicitly defends the importance of racial desegregation. Reading more cards is fine but it should not come at the expense of effectively utilizing that longer, better evidence.

#### Desegregation is best way to narrow achievement gap --- just making separate schools better isn’t sufficient

Theoharis 15 – PHD and a chair in the School of Education at Syracuse

(George, 10/23/15, “‘Forced busing’ didn’t fail. Desegregation is the best way to improve our schools.”, <https://www.washingtonpost.com/posteverything/wp/2015/10/23/forced-busing-didnt-fail-desegregation-is-the-best-way-to-improve-our-schools/?utm_term=.99e5c334fa60>, MW)

Since the Reagan administration’s “A Nation at Risk” report pronounced that schools across the country were failing, every president has touted a new plan to close the racial academic achievement gap: President Obama installed Race to the Top; George W. Bush had No Child Left Behind; and Clinton pushed Goals 2000. The nation has commissioned studies, held conferences and engaged in endless public lamentation over how to get poor students and children of color to achieve at the level of wealthy white students — as if how to close this opportunity gap was a mystery. But we forget that we’ve done it before. Racial achievement gaps were narrowest at the height of school integration.

U.S. schools have become more segregated since 1990, and students in major metropolitan areas have been most severely divided by race and income, according to the University of California at Los Angeles’s Civil Rights Project. Racially homogenous neighborhoods that resulted from historic housing practices such as red-lining have driven school segregation. The problem is worst in the Northeast — the region that, in many ways, never desegregated — where students face some of the largest academic achievement gaps: in Connecticut, Maryland, Massachusetts and the District of Columbia.

More than 60 years after Brown v. Board of Education, federal education policies still implicitly accept the myth of “separate but equal,” by attempting to improve student outcomes without integrating schools. Policymakers have tried creating national standards, encouraging charter schools, implementing high-stakes teacher evaluations and tying testing to school sanctions and funding. These efforts sought to make separate schools better but not less segregated. Ending achievement and opportunity gaps requires implementing a variety of desegregation methods – busing, magnet schools, or merging school districts, for instance – to create a more just public education system that successfully educates all children.

Public radio’s “This American Life” reminded us of this reality in a two-part report this summer, called “The Problem We All Live With.” The program noted that, despite declarations that busing to desegregate schools failed in the 1970s and 1980s, that era actually saw significant improvement in educational equity. When the National Assessment of Educational Progress began in the early 1970s, there was a 53-point gap in reading scores between black and white 17-year-olds. That chasm narrowed to 20 points by 1988. During that time, every region of the country except the Northeast saw steady gains in school integration. In the South in 1968, 78 percent of black children attended schools with almost exclusively minority students; by 1988, only 24 percent did. In the West during that period, the figure declined from 51 percent to 29 percent.

But since 1988, when education policy shifted away from desegregation efforts, the reading test score gap has grown — to 26 points in 2012 — with segregated schooling increasing in every region of the country.

Research has shown that integration is a critical factor in narrowing the achievement gap. In a 2010 research review, Harvard University’s Susan Eaton noted that racial segregation in schools has such a severe impact on the test score-gap that it outweighs the positive effects of a higher family income for minority students. Further, a 2010 study of students’ improvements in math found that the level of integration was the only school characteristic (vs. safety and community commitment to math) that significantly affected students’ learning growth.

In an analysis of the landmark 1966 “Coleman Report,” researchers Geoffrey Borman and Maritza Dowling determined that both the racial and socioeconomic makeups of a school are 1¾-times more important in determining a student’s educational outcomes than the student’s own race, ethnicity or social class.

But we continue to think about segregation as a problem of the past, ignoring its growing presence in schools today. Desegregating schools has become a political third rail, even though it is an essential solution to one of our nation’s most persistent problems.

This month, Education Secretary Arne Duncan announced he would step down in December and his deputy, John King, would replace him. King, during his tenure as New York state’s education commissioner, visited both school districts mentioned above to advance the national Race to the Top agenda, but he never acknowledged the increasing school segregation apparent in the region. In 1989, Syracuse city schools were about 60 percent white, and just 20 percent of black and Latino students attended predominately minority schools. Today, the district is 28 percent white, while 55 percent of Latino students and 75 percent of black students attend predominately minority schools.

Racial and economic segregation affects schools in various ways. Federal and state policies that impose sanctions on poor-performing schools — state takeovers and forced replacement of school leaders, for example — often make matters worse. For example, Westside Academy , the Syracuse middle school where no students passed the state eighth-grade math assessment, has has had multiple principals and saw 44-percent teacher turnover in the 2012-2013 school year.

About a decade ago, the elementary schools that feed into Westside Academy and Wellwood Middle School adopted the same math curriculum program, touted as one of the best standards-based elementary programs available. As is typical, both districts struggled to implement the new curriculum initially. But a decade later, the schools in Wellwood’s district are still using it, with teachers becoming more skilled and comfortable with the new way to teach math. The schools in Westside’s district, however, changed their math program at least two more times, leaving teachers, students, and families in a constant state of churn and undoubtedly affecting student learning and test scores. In this era of accountability, this instability is not forced upon white, upper-middle class families.

While much has been said about the failure of busing, it’s time to move beyond this myth. In one of the most famous examples of court-ordered desegregation, Boston began busing students between white and black neighborhoods in 1974, sparking violent white protests and boycotts by white students. White families fled to the suburbs. Supporting neighborhood schools and opposing school bus rides became rhetoric to fight desegregation without overtly racist language. But as black activists in Boston noted at the time, “It’s not the bus, it’s us.” Before the court order, nearly 90 percent of high school students rode a bus to school without protest. Today, most children get on a school bus to attend a segregated school. Busing ended because of a combination of white protest, media that overemphasized resistance, and the lack of systematic collection to judge the impact of desegregation. So we need to be sober about our history: Busing didn’t fail; the nation’s resolve and commitment to equal and excellent desegregated schools did.

Busing is not the only way to desegregate our schools. We can unify school districts so they encompass racially and economically diverse neighborhoods. The countywide district centered in Raleigh, for instance, has been successful in integrating schools and achieving academic success, in contrast to the 18 schools districts across the metropolitan Syracuse area. Shaping districts like pie pieces, so they cut across urban, suburban and even rural spaces, could have the same effect.

Creating more open-enrollment magnet schools would also bring families of various races and incomes into well-funded and themed schools. For existing public schools, we could merge two neighborhood campuses in segregated communities, so they attend one neighborhood school together from kindergarten through second grade and the other from third through fifth grades. Or we can incentivize school districts to take action, imposing segregation and providing financial resources to districts with aggressive desegregation plans.

Certainly, none of these approaches is easy or perfect, and desegregation alone is not a magic bullet to end the achievement and opportunity gaps. Even integrated schools face racial gaps. Many black and Latino kids end up in lower academic tracks and white parents protect exclusive opportunities for their kids. Still, knowing the benefits of integrated learning environments, we can’t continue to ignore the growing hold segregation has on our schools.

We’ve heard soaring words from Duncan and Obama touting education as the route to a better life, saying it is a moral imperative that we work tirelessly to improve the education of our most vulnerable children. But rhetoric is no match for our failure of will to change the disparate realities of our separate educational systems. It is no match for our failure of courage to call out the persistent segregation of our schools.

Some scholars have argued that King will be good for school integration. Time will tell if we are entering a moment that moves beyond rhetoric toward substantial desegregation.

In this time of transition for the Education Department — in the last year of the Obama administration — are we going to continue ignoring the moral implications of separate schools? Our history shows that policy cannot focus on improving “failing” schools; it needs to also emphasize desegregating them. No matter how much we seek to improve the back of the education bus, it will always be the back.

#### Desegregation can’t address all equity concerns but it is the best way to equalize education

Orfield & Frankenberg, 14 --- \*professor of education, law, political science and urban planning at the UCLA Graduate School of Education and Information Studies, AND \*\*assistant professor in the department of education policy studies in the College of Education at the Pennsylvania State University (5/15/14, Gary Orfield and Erica Frankenberg with Jongyeon Ee and John Kuscera, “Brown at 60: Great Progress, a Long Retreat and an Uncertain Future,” https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf, accessed on 6/15/17, JMP)

Conclusion

Desegregation is not a panacea, and it is simply not feasible in some situations. Within diverse schools, there can be classroom segregation and unequal treatment, so those issues must be addressed by teachers and administrators. There are many consequential impacts of family and community poverty that can be addressed only by social and economic policy and by civil rights changes in housing and other areas. There are, of course, important things other than desegregation, such as building high quality preschools and developing policies to assign and hold highly qualified and experienced teachers in segregated schools. Nothing in this study is meant to disparage those efforts. They are needed whether or not desegregation is possible. Where it is possible, however-- and it still is possible in many areas-- desegregation properly implemented can make a very real contribution to equalizing educational opportunities and preparing young Americans for the extremely diverse society in which they will live and work and govern together. It is the only major tool our society has for this goal.

It is good to celebrate Brown by revisiting historic sites and remembering the many struggles that led to the decision and the changes in the South. It was a major accomplishment of which we should rightfully be proud. But a real celebration should also involve thinking seriously about why the country has turned away from the goal of Brown and accepted deepening polarization and inequality in our schools. It is time to stop celebrating a version of history that ignores our last quarter century of retreat and to begin make new history by finding ways to apply the vision of Brown in a transformed, multiracial society in another century.

#### Desegregation is critical --- helps promote cross-racial understanding that breaks down stereotypes

Hilbert, 17 --- Associate Professor of Law at Mitchell Hamline School of Law, one of the plaintiffs' attorneys for the Minneapolis NAACP in the 1995 desegregation case (Winter 2017, Jim, Journal of Law & Education, “Restoring the Promise of Brown: Using State Constitutional Law to Challenge School Segregation,” 46 J.L. & Educ. 1, Lexis-Nexis Academic, JMP)

B. Inclusion and Diversity -- Why (Proper) Desegregation Can Still Matter

In a joint policy paper on diversity, the United States Departments of Education and Justice acknowledged the importance of diversity and "inclusive educational opportunities" to "achieving the nation's educational and civic goals." n135 As they explained, "[r]acially diverse schools provide incalculable educational and civic benefits by promoting cross-racial understanding, breaking down racial and other stereotypes, and eliminating bias and prejudice." n136 Integrated schools [\*26] help promote "social cohesion." n137 Indeed, the transformative potential of desegregation was the initial motivation for Brown. n138

Social science supports this idea as well. Study after study shows that interracial prejudice diminishes with intergroup racial contact. n139

Desegregated schools are specifically linked to a reduction in students' willingness to accept stereotypes. n140 Diverse classrooms also diminish bias and promotion of racial hierarchy by white students. n141

Desegregation may also be an effective tool for addressing the "achievement gap." n142 Test scores in particular for students of color improve significantly in desegregated settings. n143 Because of the link between race and poverty, racial desegregation will likely reduce socioeconomic segregation and improve the academic achievement of [\*27] otherwise "disadvantaged students." n144 Further, "research findings show, immigrant students who attend integrated schools are more likely to have higher test scores and better grades compared to those who attend racially and socioeconomically isolated schools." n145

Even more, school desegregation has lasting impacts on life outcomes beyond graduation. n146 For example, in one study students who attended desegregated schools for at least five years earned 25% more than their counterparts from segregated settings." n147 By middle age, the same group was also in far better health, too. n148 Students of all races who attended desegregated schools are more likely to seek out desegregated colleges, workplaces, and neighborhoods later in life, which may in turn provide desegregated educational opportunities for their own children. n149

#### Integration benefits all students --- fosters important critical thinking skills and challenges stereotypes

Orfield & Frankenberg, 14 --- \*professor of education, law, political science and urban planning at the UCLA Graduate School of Education and Information Studies, AND \*\*assistant professor in the department of education policy studies in the College of Education at the Pennsylvania State University (5/15/14, Gary Orfield and Erica Frankenberg with Jongyeon Ee and John Kuscera, “Brown at 60: Great Progress, a Long Retreat and an Uncertain Future,” https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf, accessed on 6/15/17, JMP)

On the other hand, there is also a mounting body of evidence indicating that desegregated schools are linked to profound benefits for all children. In terms of social outcomes, racially integrated educational contexts provide students of all races with the opportunity to learn and work with children from a range of backgrounds. These settings foster critical thinking skills that are increasingly important in our multiracial society—skills that help students understand a variety of different perspectives.37 Relatedly, integrated schools are linked to reduction in students’ willingness to accept stereotypes.38 Students attending integrated schools also report a heightened ability to communicate and make friends across racial lines.39

Studies have shown that desegregated settings are associated with heightened academic achievement for minority students,40 with no corresponding detrimental impact for white students.41 These trends later translate into loftier educational and career expectations,42 and high levels of civic and communal responsibility.43 Black students who attended desegregated schools are substantially more likely to graduate from high school and college, in part because they are more connected to challenging curriculum and social networks that support such goals.44 Earnings and physical well-being are also positively impacted: a recent study by a Berkeley economist found that black students who attended desegregated schools for at least five years earned 25% more than their counterparts from segregated settings. By middle age, the same group was also in far better health.45 Perhaps most important of all, evidence indicates that school desegregation can have perpetuating effects across generations. Students of all races who attended integrated schools are more likely to seek out integrated colleges, workplaces, and neighborhoods later in life, which may in turn provide integrated educational opportunities for their own children.46

In the aftermath of Brown, we learned a great deal about how to structure diverse schools to make them work for students of all races. In 1954, a prominent Harvard social psychologist, Gordon Allport, suggested that four key elements are necessary for positive contact across different groups.47 Allport theorized that all group members needed to be given equal status, that guidelines needed to be established for working cooperatively, that group members needed to work toward common goals, and that strong leadership visibly supportive of intergroup relationship building was necessary. Over the past 60-odd years, Allport’s conditions have held up in hundreds of studies of diverse institutions across the world.48 In schools, those crucial elements can play out in multiple ways, including efforts to detrack students and integrate them at the classroom level, ensuring cooperative, heterogonous groupings in classrooms and highly visible, positive modeling from teachers and school leaders around issues of diversity.49

### --- XT: Segregation => Achievement Gap

#### Segregation is becoming more prevalent --- helps drive the achievement gap that further stacks the deck against minority students

Hilbert, 17 --- Associate Professor of Law at Mitchell Hamline School of Law, one of the plaintiffs' attorneys for the Minneapolis NAACP in the 1995 desegregation case (Winter 2017, Jim, Journal of Law & Education, “Restoring the Promise of Brown: Using State Constitutional Law to Challenge School Segregation,” 46 J.L. & Educ. 1, Lexis-Nexis Academic, JMP)

[\*20] III. WHY SEGREGATION n102 STILL MATTERS

As the Supreme Court effectively abandons federal enforcement of Brown, more and more students of color are attending highly segregated schools. n103 Since the "high point" of desegregation in 1988, the percentage of "intensely segregated" schools has more than tripled. n104 A recent study by the Government Accounting Office found the number of schools segregated by both race and income increased 143% between 2000-01 and 2013-14. n105 According to the federal government study, "there has been a large increase in schools that are the most isolated by poverty and race" and "the [number of] students attending these schools grew significantly." n106

[\*21] While most white students attend schools with at least a small percentage of students of color, n107 the majority of white students still attend predominantly white schools. n108 For students of color, particularly African American and Latinx students, the rate of segregation has increased dramatically. n109 As Professor Frankenberg reports, "Nearly 40% of black students and more than 43% of Latino students attended intensely segregated minority schools or schools where students of color comprised 90% or more of the enrollment." n110

Not surprisingly, just as segregation has been increasing, so too have racial disparities in academic outcomes. The so-called "achievement gap" n111 between African American and Latinx students on the one hand, and their white and Asian American counterparts on the other, is both substantial and increasing. n112 While there has certainly been significant discussion on the presence of the "achievement gap," few commentators have made the connection between its growth and greater segregation. n113 The recent GAO study found specifically that such disparities along [\*22] racial lines "are particularly acute among schools with the highest concentrations" of students of color and low-income students. n114

A. The Harm of Segregation Found in Brown

Segregation matters both in terms of educational outcomes and overall life achievement. n115 Racially segregated schools are far more likely to have fewer and lower quality educational resources than desegregated schools. By way of example, segregated schools tend to have larger class sizes, fewer classroom materials, and deficient technology and facilities. n116 Segregated schools are more likely to provide less challenging curricula and offer fewer advanced curricular offerings. n117 The schools are more likely to be staffed with less qualified teachers and suffer higher degree of teacher turnover. n118 Students in segregated schools are subjected to significantly higher rates of discipline, including both suspensions and expulsions. n119

[\*23] Segregated schools also limit students' exposure to outside peer groups and important networks. n120 This racial isolation often carries significant social consequences. n121 It can also perpetuate stereotypes and deny students the opportunity to learn different viewpoints and perspectives. n122 Segregation undermines the important idea of a shared future and a joint society. n123 As Professor john powell explains, "Mack of experience of the racial 'other,' in turn, contributes to the mystification of racial differences, and the perpetuation of stereotypes, fears, and ignorance." n124 Segregation can also interfere with language development for English Language Learners. n125

[\*24] Segregated schools can have a profoundly negative impact on the academic achievement of students of color at every level. Students of color who attend segregated schools score lower on achievement tests and other learning assessments. n126 High school graduation rates are lower in segregated schools. n127 Further, studies show that students of color attending segregated schools are less likely to attend college. n128 Of those who do gain college entry, obtaining a four-year degree is more difficult compared to students who graduated from a desegregated high school. n129

Another reason that segregation is so harmful is the strong connection between racially segregated schools and schools segregated by socioeconomic status. n130 Half of all students attending highly segregated schools are in schools that are also impacted by concentrated poverty. n131 Even independent of racial segregation, concentrated [\*25] poverty on its own negatively impacts educational achievement. n132 While a student's individual poverty status may impact achievement, the overall level of poverty in the school is a more powerful factor. n133 The combination of both racial and economic segregation creates unique problems for students of color trapped in "double segregation." n134

#### Segregated education maintains a self-defeating cycle of inequality

Strauss citing Rothstein 5/16/17 – Richard is a research associate of the Economic Policy Institute and a Fellow at the Thurgood Marshall Institute

(Valerie citing Richard, 5/16/17, “Brown v. Board is 63 years old. Was the Supreme Court’s school desegregation ruling a failure?” <https://www.washingtonpost.com/news/answer-sheet/wp/2017/05/16/the-supreme-courts-historic-brown-v-board-ruling-is-63-years-old-was-it-a-failure/?utm_term=.003455b3ba6c>, MW)

Because schools remain segregated, we have little chance to substantially boost the achievement of black children, especially those from low-income families. Of course, some children will always surmount their disadvantages and excel. But when separate schools concentrate students who are in poorer health and more frequently absent, who may be homeless or in unstable housing, and whose parents are less-educated, achievement lags when teachers are overwhelmed by non-academic challenges.

If more than a few pupils in a single classroom act-out from the stresses of economic insecurity, neighborhood violence, or parental incarceration, behavioral issues steal time from instruction. Added social, psychological, and academic services for these children can reduce (but not eliminate) their challenges, but funding for such services is inadequate everywhere.

### AT: CP Increase Funding for Segregated Schools

#### Increasing funding doesn’t resolve problems of desegregation

Hilbert, 17 --- Associate Professor of Law at Mitchell Hamline School of Law, one of the plaintiffs' attorneys for the Minneapolis NAACP in the 1995 desegregation case (Winter 2017, Jim, Journal of Law & Education, “Restoring the Promise of Brown: Using State Constitutional Law to Challenge School Segregation,” 46 J.L. & Educ. 1, Lexis-Nexis Academic, JMP)

[\*37] 2. Funding alone does not work.

School districts with large percentages of students of color face another challenge with school finance litigation. Even in the small number of cases where districts with large populations of students of color win, or even looking to the future of such cases, if they are victorious for plaintiffs, the injection of money into segregated schools does not guarantee improved educational performance. n202 On the contrary, funding may not improve performance at all in heavily segregated schools. As Professor Molly McUsic has found, "[i]n school district after school district, large funding increases have proved inadequate to overcome the educational disadvantages faced by poor, underachieving students." n203 Simply put, segregated schools do not provide better educational performance if they receive more money. n204

#### Permutation solves best

Farrie, 6/10/16 --- research director at the Education Law Center (Danielle, Washington Post.com, “How unfair funding makes it harder to desegregate schools,” Factiva, JMP)

Each week, In Theory takes on a big idea in the news and explores it from a range of perspectives. This week, we're talking about school desegregation. Need a primer? Catch up here.

Danielle Farrie is research director at the Education Law Center and co-author of "Is School Funding Fair? A National Report Card," an annual report on the condition of states' school finance systems.

While Brown v. Board of Education eliminated de jure segregation in schools in 1954, in 1973 the San Antonio Independent School District v. Rodriguez decision all but guaranteed that de facto segregation would continue.

That decision was about school funding. In Rodriguez, the Supreme Court ruled that a system of relying on local property taxes for supplemental educational revenue was nondiscriminatory, even though it meant that schools in poorer districts without a high property tax base would inevitably receive less funding.

By limiting any federal oversight of states' school funding systems, the Rodriguez decision maintained a status quo in which states, not the federal government, were responsible for making sure school funding systems meet constitutional standards. This has not been a success: Despite dozens of state-level legal challenges about equitable school funding since the 1973 case, the condition of state school finance in most states remains unfair and inequitable, depriving millions of poor and minority students of the opportunity for school success.

It is well established that a fair funding system progressively distributes resources so that additional funding is targeted to schools with high concentrations of student poverty. Poor students need additional supports -- such as early childhood education, tutoring, small class sizes and social workers -- to help them achieve state academic standards. High-poverty schools, which are often also heavily minority schools, falter without these essential resources. The glaring inequity between racially segregated, economically disadvantaged schools and their more affluent neighbors intensifies the challenge of eradicating school segregation because wealthier families are unlikely to support or participate in desegregation plans that involve sending their children to under-resourced and under-performing schools. Any viable plans to reduce segregation will require a significant investment to make the long-neglected, segregated schools attractive to new families.

One need only look to Texas, where the Rodriguez case originated, to see how school segregation and school finance interact to severely disadvantage poor students and students of color. In the latest edition of "Is School Funding Fair? A National Report Card" from the Education Law Center, Texas received the unenviable distinction of failing or below-median grades on all four measures of funding fairness: It is a low-funded, low-effort (in terms of education spending relative to economic output) state, where high-poverty districts do not receive the additional resources they require and where wealthier families leave the public school system in large numbers.

Researchers at the University of Texas analyzed school-level data from the Texas Education Agency and found persistently high levels of segregation by race/ethnicity, socioeconomic status and language. The majority of schools experiencing "triple segregation" are rated as low-performing, employ the lowest-skilled teachers and have high teacher and principal turnover. In absence of a funding system that directs greater resources to such struggling schools, it is not surprising that racial and economic achievement gaps on state assessments are persistent and even growing.

While the intense levels of segregation and unfair funding in Texas might be extreme, such disparities are a common condition across the country. The National Report Card shows that disparities in per-pupil funding levels between states are vast, from a low of $5,746 in Idaho, to a high of $17,331 in Alaska. Many of the lowest-funded states allocate a very small percentage of their economic capacity to fund public education. Most states have "flat" or "regressive" school funding systems, where students in districts with concentrated poverty receive the same or even less funding than their wealthy peers. Only a handful of states have comparatively high funding levels that are "progressively" distributed, in other words, where districts with high poverty concentrations receive more funding.

States that rank poorly on funding fairness have limited access to early childhood education, are unable to provide competitive wages for teachers and have higher teacher-to-pupil ratios, depriving students of the educational supports they need to succeed. Unsurprisingly, some of the largest and most segregated metropolitan areas, such as Philadelphia and Chicago, also have the most fiscally disadvantaged public school systems, where higher-than-average poverty levels and lower-than-average resources compared with surrounding areas leave these urban districts severely disadvantaged in their ability to attract and retain teachers and staff.

While equitable funding alone will not remedy the entrenched segregation seen in so many of the nation's schools, it could begin to improve conditions so that poor and minority students are not inextricably linked to substandard schools. Strategies to reduce segregation, such as inter-district choice programs or regional consolidation, would be far more palatable if state school funding systems were organized to meet the needs of all students. If the goal is to provide all students with the opportunity to succeed in school, then funding and desegregation need to be on the table, together.

# Desegregation Neg

## States Counterplan

### 1nc Solvency

#### CP is germane, predictable and solves the case --- federal action undermines effective state action

Lawson, 13 --- J.D. 2013, University of Michigan Law School (Aaron, Brigham Young University Education and Law Journal, “EDUCATIONAL FEDERALISM: A NEW CASE FOR REDUCED FEDERAL INVOLVEMENT IN K-12 EDUCATION,” 2013 BYU Educ. & L. J. 281, Lexis-Nexis Academic, JMP)

V. Conclusion

When we, as a nation, consider how best to provide adequate educational opportunity to as many students as possible, one critical question that must be answered is at what level these decisions are best made. This means developing an awareness of both where students may most effectively vindicate their own interests and where these decisions may be made most efficiently. NCLB and RTTT represent a belief that education policy may be usefully directed, if not dictated, at the federal level. As this Comment argues, these decisions [\*317] are best made on the state level. Substantive constitutional guarantees of education can be found in every state, entitling students to an adequate level of educational opportunity. These guarantees provide a role for both state courts and state legislatures in vindicating the national educational interest in ensuring educational opportunity for all.

The very nature of the educational right - positive in character - requires active government involvement. As Feldman recognizes, legislative inertia and not judicial overreach is the primary barrier to adequate vindication of positive rights. n172 Part of this active government involvement must come from the judicial branches, which are in a position to prod the legislature to act where educational quality falls below some minimally adequate level.

The judiciary is the ultimate defense against the legislative inertia that threatens the ability of poor and minority students to obtain an adequate education. Educational adequacy litigation began to open new doors and expand beyond funding precisely at the moment that federal involvement, through NCLB and RTTT, began to grow to such a level as to threaten to interfere with judicial intervention in education. n173 This potential pitfall is precisely the reason why the federal government should not take such an active role in education.

Courts are important players in education reform not by articulating the content of educational policy but by setting the rules governing how education reform can proceed. Educational reform involves an important give and take as interested parties advance their own solutions, but there are constitutional limits on this give and take that should be defined by state courts. The experience of educational adequacy lawsuits indicates that there is an important political dynamic at play here, which involves courts and ultimately inures to the benefit of students, as all education reform should.

To the extent that the federal government is involved, through programs like NCLB and RTTT, that involvement has the potential to diminish the effectiveness of state legislative [\*318] response to state courts by binding the legislature to the requirements of federal funding programs. Thus, through NCLB and RTTT, the federal government threatens this valuable political dynamic in which courts play an important role in vindicating the substantive educational entitlements enjoyed by students. Although state legislatures may be able to respond to both the federal government and to state courts simultaneously, the very real possibility that state legislatures may, in some instances, be placed in an untenable position between federal requirements and state court dictates should counsel against extensive federal involvement in education.

An adequacy framework for educational policy requires more than that a state legislature commit to a certain level of education funding. It requires also that a legislature be sensitive to the ways in which educational policies, especially those that go beyond the funding context, affect student performance and achievement. NCLB and RTTT focus legislatures in ways that may not actually be helpful. These policies may have any number of constitutionally relevant consequences, particularly for poor and minority students.

There is a role for courts to play in educational policy, and that role is to make sure that legislatures remain sensitive to the ways educational policies affect students and especially that they remain sensitive to the unique challenges posed to racially and socioeconomically isolated students within our educational systems and society. State constitutional text demands that closing the achievement gap cannot merely be a legislative priority. State courts cannot effectively play that role in a system riddled with federal commands. There are reasons for federal involvement in local educational policy, but protection of student interests counsels in favor of more restrained involvement, rather than the ever-expanding role the federal government has given itself in the last decade.

### 2nc Solvency – State Courts

#### State courts solve better --- their protections extend beyond the Supreme Court

Hilbert, 17 --- Associate Professor of Law at Mitchell Hamline School of Law, one of the plaintiffs' attorneys for the Minneapolis NAACP in the 1995 desegregation case (Winter 2017, Jim, Journal of Law & Education, “Restoring the Promise of Brown: Using State Constitutional Law to Challenge School Segregation,” 46 J.L. & Educ. 1, Lexis-Nexis Academic, JMP)

IV. STATE CONSTITUTIONAL CASES: EDUCATIONAL REFORM OF A DIFFERENT TYPE

As efforts in federal court became more and more difficult because of Supreme Court limitations on desegregation, a new focus emerged on unequal funding as a mechanism to improve the conditions of [\*28] America's struggling schools. n150 This "school finance" litigation movement developed largely out of dissatisfaction and concern about a lack of progress in desegregation during the 1960s, shifting the focus from the demographics of schools to the disparities in funding between schools. n151 From the beginning, school desegregation and school finance movements were driven by similar goals: securing educational opportunity for children, often low-income students of color, to whom access to quality education was largely denied. n152

A. The First "Wave" of Educational Reform through School Finance Litigation: Federal Court

Initially, school finance litigation advocates argued that funding disparities between school districts violated the Federal Equal Protection Clause. This "first wave" of school finance cases began in 1971 with Serrano v. Priest, in which the California Supreme Court held that the state's school finance system violated the guarantees of Equal Protection in both the California and United States Constitutions. n153 The success of Serrano inspired similar lawsuits mostly based on the federal constitution in more than thirty other states. n154

[\*29] Reliance on the federal constitution for school finance, however, did not last long. Two years after Serrano, the Supreme Court definitively addressed school finance litigation in federal courts. In San Antonio Independent School District v. Rodriquez, the Court reviewed the Texas education financing system under the federal Equal Protection Clause. n155 In a 5 to 4 decision, the Court concluded that education is not a fundamental right because the U.S. Constitution does not mention a right to education. n156 The Court concluded that the Texas school-financing scheme was rationally related to the legitimate state interest of local school control. n157 Rodriquez essentially foreclosed the federal courts from addressing the wide funding disparities between wealthy and low-income districts. n158

State constitutions, on the other hand, provided a new window for advocates. Shortly after Rodriquez, Justice William Brennan suggested that "because a conservative U.S. Supreme Court had given a cramped reading to equal protection guarantees, state courts should take up the slack." n159 In Justice Brennan's words, "state constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." n160 [\*30] Justice Brennan specifically mentioned the Court's then-recent desegregation decision in Milliken, n161 which was decided the year after Rodriquez, as evidence that state courts may be a more promising venue for advocates of education reform. n162 School finance plaintiffs were already there.

B. The Second Wave: A Focus on Equity, but this Time in State Courts

After the failure in Rodriquez and the first wave of school finance litigation, which was in federal court, n163 school finance advocates shifted to state constitutional provisions, something explicitly suggested by Justice Marshall in his dissent in Rodriquez. n164 Unlike the federal constitution, every state constitution contains specific language imposing a duty on states to provide at least some level of public education to schoolchildren. n165 Using these "education clauses" and state constitutional principles, the initial focus of school finance claims was on unequal spending between districts: n166 This "second wave" of [\*31] school finance litigation argued that state constitutional provisions required equal resources for all school districts. n167

The New Jersey Supreme Court ushered in the second wave almost immediately after Rodriguez was handed down. In Robinson v. Cahill, the New Jersey Supreme Court held that the state's educational funding scheme violated the state constitution's guarantee of a "thorough and efficient" education. n168 The court defined a "thorough and efficient" education as one that provides equal educational opportunities for all children such that each child is equipped both as a citizen and as a competitor upon entering the working world. n169 In striking down the state-funding scheme, the court specifically acknowledged that state constitutional reviews can be broader than afforded under the federal constitution. n170

Despite the court victory in New Jersey, second wave cases had more losses than wins. Of the twenty-two meaningful opinions in school finance cases issued between 1973 and 1989, less than one-third were victories for plaintiffs. n171 In addition, even the few victories had rather mixed results, often resulting in vague remedies that were overly deferential to noncompliant legislatures. n172 In Robinson, for example, [\*32] the case went before the New Jersey Supreme Court six times, because the legislature failed to comply with the court's order to address the disparities caused by the state's finance system. n173 Only after the court closed the New Jersey public schools for eight days did the legislature pass a statewide income tax to fund a more equitable school finance program. n174 In light of the poor track record, school finance cases began to wane in the 1980s as concerns with remedies and compliance from state legislatures left advocates looking for different solutions. n175

C. The Third Wave: Educational Adequacy and Ensuring a Sufficient Level of Education

Momentum for state-based educational cases swung back in favor of the plaintiffs in a big way following a revolutionary case in Kentucky in 1989. In Rose v. Council for Better Education, Inc., n176 the Kentucky Supreme Court declared the state school system unconstitutional under the Kentucky constitution. n177 Unlike previous cases that had merely struck down state financing systems, the court in Rose held the state's entire system of public schools unconstitutional, n178 one of the largest interventions by a state court in education. n179

[\*33] Importantly, the court detailed the overwhelming evidence not only about the deep disparities between wealthier and low-income districts, but also the overall inadequate conditions of Kentucky schools throughout the state. n180 According to the court, Kentucky's educational effort was "inadequate and well below the national effort." n181 Perhaps most troubling to the court, less than 7 out of 10 Kentucky ninth graders were remaining in school long enough to earn a diploma. n182

The court based its ruling on the Kentucky Constitution's requirement that the state provide an "efficient system of common schools" n183 and directed the state legislature to re-create and re-establish a system of common schools.' n184 As sweeping as its order striking down the entire system of education was, the court went even further. It also provided the legislature with specific criteria on what would constitute an "efficient" system of common schools, including what competencies students should receive and what characteristics a constitutional school system should exhibit. n185

[\*34] The court's now legendary ruling in Rose had an immediate impact both in Kentucky and in other states. n186 The remedy in Rose essentially transformed the education system in Kentucky overnight n187 and brought national attention to the remarkable commitment to fixing the problem that the court decision promoted. n188 The impact outside of Kentucky brought about a new wave of education-reform litigation n189 Soon after the Rose decision, three state cases specifically relied on the Kentucky court's definition of "adequacy" and sent the matter back to their legislatures to craft a remedial plan in accordance with the criteria set forth in Rose. n190 This "third wave" and new focus on "adequacy" rather than "equity" shifted state court litigation from ensuring an equitable balance of resources to securing sufficient resources to provide every student an adequate education. n191 Rose revolutionized the approach in state courts. n192

[\*35] D. Where State Constitutional Actions Failed: Students of Color in Segregated Schools

1. Most low-income school districts, particularly those that are predominantly students of color, lose these cases.

Compared to federal desegregation jurisprudence, state-finance litigation has developed a relatively successful track record. Since Rose, plaintiffs have won about two-thirds of finance and adequacy cases. n193 These court victories, however, have been far fewer and less impactful for school districts comprised predominantly of students of color. A study by Professor James Ryan, comparing the outcomes of school finance litigation along racial lines, made two key findings: (1) school districts comprised primarily of students of color did not do as well in school finance litigation as mostly white districts, and (2) when districts of mostly students of color were successful in courts, the [\*36] legislative resistance to reform far exceeded the resistance the predominantly white districts faced. n194

Of the 36 cases analyzed, 18 upheld the state school finance scheme at issue and 18 struck down the scheme at issue. n195 Yet only 25% of school districts that consisted predominantly of students of color were victorious in finance litigation, compared to more than double that rate when the plaintiff was a predominantly white school district. n196 Such districts of color were even less likely to prevail if they were in urban areas. The schools "most in need of additional resources," n197 namely urban districts that were predominantly students of color, won only 12.5% of their cases. n198

Even when districts that are predominantly students of color do prevail, state legislatures have been particularly resistant to complying with court orders to provide sufficient funds. n199 The resistance is "more intense and longer-lasting" than what is faced by predominantly white districts. n200 The examples in New Jersey and Texas are instructive. Both states had court victories by districts that are predominantly students of color but experienced decades of resistance by the legislature and multiple rounds in court trying to enforce court orders. n201

[\*37] 2. Funding alone does not work.

School districts with large percentages of students of color face another challenge with school finance litigation. Even in the small number of cases where districts with large populations of students of color win, or even looking to the future of such cases, if they are victorious for plaintiffs, the injection of money into segregated schools does not guarantee improved educational performance. n202 On the contrary, funding may not improve performance at all in heavily segregated schools. As Professor Molly McUsic has found, "[i]n school district after school district, large funding increases have proved inadequate to overcome the educational disadvantages faced by poor, underachieving students." n203 Simply put, segregated schools do not provide better educational performance if they receive more money. n204

E. Sheff v. O'Neill -- The Rose of Desegregation?

In 1989, two months before the Kentucky Supreme Court sent ripples through the school finance world with its decision in Rose, n205 another school finance case was filed in Connecticut that would make waves of its own and may have more impact in the long run. Sheff v. O'Neill was different than all other school finance cases. n206 Instead of seeking more equitable funding or more resources to improve education, the Sheff plaintiffs sought desegregation. Sheff, of course, was also very different [\*38] from federal desegregation cases. Sheff was filed in state court, relying on the Connecticut state constitution. The first of its kind, Sheff combined the underlying principles of state adequacy litigation with the original message of Brown. n207

The conditions in the Hartford schools that led to the filing of Sheff illustrate the limits to traditional school finance cases. Connecticut had previously experienced a successful school finance case twelve years earlier in 1977. In Horton v. Meskill, n208 the Connecticut Supreme Court struck down the state's school funding structure under the state constitution. n209 The court concluded that large differences in local revenue-raising capacity have "given rise to a consequent significant disparity in the quality of education available to the youth of the state." n210 In the years that followed the ruling in Horton, the Connecticut legislature made a number of important changes in its funding structure to provide the most state aid to the Hartford schools, which were predominantly low-income and students of color. n211 Despite additional funding, however, students in Hartford's segregated schools did significantly worse than their suburban counterparts. n212

[\*39] In this respect, Sheff is very much unlike previous school finance cases. Plaintiffs filed their complaint in Sheff not because of disparities in funding or to enforce previous court rulings resisted by state legislatures. n213 Horton and subsequent legislation had already resulted in a school funding structure that provided more resources to the low-income students of color in Hartford than their suburban counterparts. Plaintiffs filed Sheff because funding was not enough. n214

In Sheff, the plaintiffs alleged that "students in the Hartford public schools are burdened by severe educational disadvantages arising out of their racial and ethnic isolation and their socioeconomic deprivation." n215 Rejecting the state's argument that adequacy cases must be limited to only issues of funding, n216 the Connecticut Supreme Court held that "the existence of extreme racial and ethnic isolation in the public school system" violated the state constitution. n217 Importantly, unlike the federal cases in the Brown progeny, the issue of intent and the de jure/de facto [\*40] distinction were not relevant, n218 thus permitting the remedy to extend beyond boundaries of the school district. n219

The Connecticut Supreme Court issued what some thought might be the Rose of its day, providing a sweeping rebuke of segregation under the state constitution. n220 Using a combination of both state constitutional law and the framework of Brown, the plaintiffs in Sheff brought a hybrid state constitutional case directly challenging the segregated schools of Hartford using the underlying legal principles of state-based educational adequacy litigation. n221 Like Rose before it, Sheff had demonstrated that "the underlying right recognized in school finance cases--the right to an adequate or equal education--need not be defined solely in monetary terms . . . ." n222 Under Sheff, educational adequacy required remedying segregated schools. n223

F. Limits to Applying Sheff Beyond Connecticut

Sheff s impact on potential similar suits in different states is limited, however, by two important features: 1) a unique provision in its state constitution and 2) challenges in the remedy phase. First, the court in Sheff relied, in part, on Connecticut's unique anti-segregation clause, n224 [\*41] which provides that no person shall "be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil rights because of . . . race [or] ancestry." n225 The court explicitly relied on the clause. n226 Commentators have suggested that the presence of the anti-segregation clause limits the Sheff holding to Connecticut. n227

An at least equally impressive collection of commentators, however, support the view that the court's use of the segregation clause in Sheff may have been more for convenience than necessity. n228 Despite the use of the segregation clause, the "logic of Sheff rests primarily on the equal educational opportunity principle first used by the state supreme court [in Horton] in finding a constitutional right to more equitable spending." n229 The court made clear that prior state case law "imposes an affirmative constitutional obligation on the legislature to provide a substantially equal educational opportunity for all public [\*42] schoolchildren." n230 If schoolchildren are denied their right to the "equal educational opportunity" because of segregated schools, the legislature has an "affirmative obligation" to provide an effective remedy. n231 As the court reasoned, "[t]he failure adequately to address the racial and ethnic disparities that exist among the state's public school districts is not different in kind from the legislature's failure adequately to address the 'great disparity in the ability of local communities to finance local education' that made the statutory scheme at issue in Horton unconstitutional in its application." n232 As others have concluded, the court's use of the segregation clause may have largely been merely a "political attempt to avoid the appearance of relying on social science evidence about the effects of segregation." n233

Second, the remedy in Sheff also raises potential concerns as a model for future lawsuits. After pronouncing that de facto segregation violated the state constitution, the court limited its relief to a declaratory judgment that the school districting and boundary-drawing system was unconstitutional. n234 In "staying [its] hand," the court issued only an admonishment to "the legislature and the executive branch to put the search for appropriate remedial measures at the top of their respective agendas." n235 As the lengthy dissent argued, the court's mandate would be "extraordinarily difficult or perhaps even impossible" to follow "because the majority articulates no principle upon which to structure such a remedy." n236

The dissent's concerns were prescient. Five years after the decision, "only six percent of Hartford schoolchildren had access to desegregated schools, prompting the plaintiffs to return to court again in December [\*43] 2000." n237 The parties reached a settlement in 2003 that ultimately resulted in a $ 245 million voluntary desegregation plan requiring the construction of eight new magnet schools to attract suburban white children to the urban center and increased opportunities for students of color to attend the suburban public schools. n238 While the Sheff ruling has certainly led to important reforms, many of the conditions the case sought to remedy remain just as bad as before. n239

G. Post-Sheff: Other Cases

Unlike Rose, Sheff did not herald a new wave of similar cases. Until very recently, only two cases had utilized Sheff's adequacy-based attack on segregation. In Minneapolis Branch of the NAACP v. State of Minnesota, filed shortly before the Sheff decision but very much based on the Sheff complaint, n240 the plaintiffs argued that racial and socioeconomic segregation in the Minneapolis schools violated the Minnesota Constitution's education and equal protection clauses. n241 Similar to the situation in Sheff and the law in Connecticut, two years before the filing of the Minneapolis NAACP complaint, the Minnesota [\*44] Supreme Court had found that the state's education clause created a fundamental right to education. n242

The Minneapolis NAACP case, however, did not result in a final court decision. After surviving two separate motions to dismiss, certified questions to the state supreme court, n243 and multiple attempts at mediation, the case finally settled in 2000, nearly five years after being filed. n244 Though small in scope and scale, the settlement has largely been viewed as a success, albeit a limited one. n245 The settlement established a four-year experimental program that provided students in the most racially isolated neighborhoods in Minneapolis to have free transportation and guaranteed seats in successful suburban schools and the highest performing magnet schools in Minneapolis. n246 The legislature voted to continue the program even after the four-year [\*45] settlement expired, n247 and a version of the main provision of the settlement still exists today. n248

Shortly after the settlement in the Minnesota case, plaintiffs filed a Sheff-like case in Rochester, New York, directly challenging segregation under the New York state constitution. n249 Like the plaintiffs in Sheff and Minneapolis NAACP, the plaintiffs in Paynter v. State alleged racial and socioeconomic segregation deprived them of an adequate education under the state constitution. n250 Unlike Sheff and Minneapolis NAACP, however, the plaintiffs in Paynter lost, as the New York Court of Appeals affirmed a motion to dismiss the claim without letting it go to trial, saying the plaintiffs had failed to state a claim under the state constitution's education article. n251 As commentators have pointed out, this result is more likely because of the particularly limited reading of state constitutional rights in education in New York, which narrowly defines adequacy to include only "minimal acceptable facilities and services." n252 New York also has an unusual adherence to principles of local control. n253

[\*46] H. Cruz-Guzman v. State of Minnesota: A New Beginning to Remedy the Harms of Brown in State Court

Cruz-Guzman is the most recent in a limited series of educational-adequacy cases committed exclusively to restoring the promise of Brown. n254 The complaint and legal theories follow closely from the litigation of the Minneapolis NAACP case in the 1990s. n255 The plaintiffs clearly linked this new case to that previous Minnesota case from twenty years ago. n256 Like its predecessor, Cruz-Guzman challenges racial segregation, although this version has expanded its coverage to both Minneapolis and St. Paul. n257 In addition to their complaint, the [\*47] plaintiffs published background materials to clarify that the purpose of Cruz-Guzman is to continue where Minneapolis NAACP left off and promote "metropolitan-wide desegregation." n258

The conditions in Minneapolis and St. Paul are arguably even worse today then the situation confronting the previous case. n259 Segregation is more intense, and there are far more highly segregated schools than in 1995. There are now 36 public schools at 90% or more students of color in Minneapolis and St. Paul combined. n260 Such a high number of racially isolated schools is remarkable in a state that is less than 30% students of color. n261 The most recent test scores show that students of color have proficiency rates in reading, math, and science at less than 1/3 the proficiency rates of white students. n262

While the case is still in the very early stages, plaintiffs have already survived the first major barrier. On July 8, 2016, the district court denied the main parts of the defendants' motion to dismiss. n263 Importantly, the court acknowledged the link between Cruz-Guzman and previous adequacy cases that established that education clauses contain a "qualitative standard" as established by Rose and the other progressive adequacy cases. n264

[\*48] V. MERGING BOTH APPROACHES: HOW STATE CONSTITUTIONAL CLAIMS COULD ADDRESS SEGREGATION

A. State-based Desegregation Cases: Will Others Follow?

The approach of Cruz-Guzman, along with the earlier decision in Sheff and promising settlement in Minneapolis NAACP, represent an important step toward merging Brown and its progeny with educational adequacy litigation in state courts, but the paucity of such cases suggests this approach may also carry serious drawbacks. On the one hand, it makes sense to use educational adequacy principles to address the harm of segregation that Brown recognized over sixty years ago. Segregated schools undermine educational adequacy certainly as much as inadequate funding. n265

State constitutions include explicit rights to education not recognized in federal constitution. State courts avoid issues that have derailed the federal courts, namely requirements of intentional discrimination and concerns over federalism that obstruct effective remedies. The jurisprudence of adequacy litigation has empowered state courts with remedial flexibility not available to federal courts.

On the other hand, no decision other than Sheff has supported Cruz-Guzman' s theory, and the New York high court in Paynter rejected a similar approach. Many commenters have suggested that without the specific anti-segregation language of the Connecticut constitution, such state-based claims may not work. In addition, remedies in adequacy cases have delivered far less than what plaintiffs originally demanded or, at times, needed, much as it has been with Sheff and subsequent efforts to desegregate the Hartford schools.

[\*49] B. The Benefits of State-Based Educational Adequacy Claims for Desegregation

As a starting point, state courts do not have to worry about two key problems with federal desegregation jurisprudence. Federal courts were highly restricted by the self-imposed distinction of de jure versus de facto segregation and the requirement of intentional discrimination on the part of school districts. This requirement largely prevented federal courts from addressing segregation in the North, and led to eventual limitations on enforcement and oversight in the South. With Milliken, the Court imposed another game-changing requirement of restricting the geographic reach of desegregation remedies, imposing federalism concerns that thwarted metropolitan-wide remedies. State courts have neither one of these requirements.

1. More expansive rights

Education has a special place in state constitutional law. Education has always been recognized as the primary responsibility of states, not the federal government. n266 While the word "education" does not appear in the federal constitution, all fifty states have some form of an education clause. n267 State constitutions have generally singled out education to receive special protection under the state constitution. As the Supreme Court of Vermont put it, "[o]nly one governmental service--public education--has ever been accorded constitutional status in Vermont. " n268

[\*50] Many states already consider education a fundamental right. n269 Twenty-two states have interpreted their education clause to confer an affirmative obligation on the state to provide an adequate education. n270 Without exception, the right to education under state constitutional law has always required at least a minimal guarantee of quality of education. n271 Because the federal Constitution does not contain an education clause, there is no federal constitutional supremacy issue limiting what states can derive from their state constitutions. n272 State courts can follow their own interpretation. n273 As a result, state court decisions based on the education clause "create no tension with federal law." n274

2. More expansive remedies

The affirmative right to education is reflected in how far state courts are willing to go to protect that right. Educational adequacy jurisprudence has been significantly expansive in its remedial powers. Cases like Rose, Serrano, Robinson, and Pauley, in particular, reflect "substantial judicial flexibility." n275 State courts have imposed broad remedial measures in two ways. First, state courts have invalidated large pieces of state education [\*51] systems in light of constitutional violations, n276 including in one instance invalidating the entire state school system. n277 Second, state courts have imposed stringent guidelines and measures against which legislatures must enact remedial educational policy. n278 The momentum is pushing state courts to go even further. n279

The constraints the U.S. Constitution imposes on federal desegregation cases do not limit state courts in their application of state constitutional principles. n280 The prohibition on metropolitan-wide remedies first articulated in Milliken does not apply to state courts [\*52] enforcing state constitutional principles. n281 Additionally, to the extent the Supreme Court imposed limitations on what districts can do to address segregation, recently in Parents Involved, the Court left open plenty of options for districts working under a state court mandate to create desegregation policies. n282

3. Easier to show a violation -- failure to provide an adequate education vs. intentional discrimination

Limiting federal court intervention to only those school districts with a clear record of de jure segregation has undermined the promise of Brown as much as any other restriction imposed by the Supreme Court. n283 The Supreme Court's prohibition against addressing de facto segregation means most of the segregation in the North and the resegregation of the South is out of the reach of federal courts. n284

State courts applying educational adequacy principles do not have to worry about the distinction between de jure and de facto segregation. The state has an affirmative obligation to provide an adequate [\*53] education. Failure to do so, regardless of whether such failure includes intentional conduct or simple inaction, is irrelevant. n285 As the high court in Connecticut found, "The fact that the legislature did not affirmatively create or intend to create the conditions that have led to the racial and ethnic isolation in the Hartford public school system does not, in and of itself, relieve the defendants of their affirmative obligation to provide the plaintiffs with a more effective remedy for their constitutional grievances." n286 In other words, an educational-adequacy analysis is interested only in the impact on students, not the intent of the school district." n287

#### State constitutional law can be used to challenge segregation

Hilbert, 17 --- Associate Professor of Law at Mitchell Hamline School of Law, one of the plaintiffs' attorneys for the Minneapolis NAACP in the 1995 desegregation case (Winter 2017, Jim, Journal of Law & Education, “Restoring the Promise of Brown: Using State Constitutional Law to Challenge School Segregation,” 46 J.L. & Educ. 1, Lexis-Nexis Academic, JMP)

[\*1] I. INTRODUCTION

On November 5, 2015, seven families filed a class action lawsuit challenging the racial and socioeconomic segregation in their public schools. n1 This potentially transformative case with national implications, Cruz-Guzman v. State of Minnesota, alleges that segregated schools deny schoolchildren their right to receive an adequate education under their state constitution. n2 While the complaint explicitly references Brown v. Board of Education, n3 Cruz-Guzman represents a major departure from Brown and its progeny in the federal courts, a departure that reflects the many disappointments that have followed the Brown decision and left [\*2] America's public schools more segregated today than in generations. n4 It is remarkable enough that such a lawsuit was necessary more than sixty years after the historic ruling in Brown, which prohibited segregated schools. n5 Equally noteworthy is that unlike Brown, this lawsuit was filed in state court relying on state constitutional law.

Cruz-Guzman represents the joining of two strands of legal approaches that have spent the last few decades headed in different directions. n6 For more than forty years, state courts have played a major role and have had varied success in addressing issues of educational inequality under school finance and educational adequacy theories. n7 Federal courts, on the other hand, have departed sharply from the initial promise n8 of the Brown decision and have spent the last few decades undermining desegregation. n9

Both state and federal court strategies have largely failed to address inequalities and segregation in America's schools. n10 Despite the limited progress in state courts and the long past progress in federal courts, our [\*3] schools remain deeply segregated. n11 Levels of segregation have generally been increasing over the past thirty years. n12 In both academic and social outcomes, students in these segregated schools lag far behind their peers. n13

Part I of this article discusses the Brown decision and the federal jurisprudence of desegregation that has followed in the Supreme Court. While hailed as one of the Supreme Court's greatest accomplishments, the iconic Brown decision has been largely dismantled. Federal courts have not only allowed segregation to return; they have also gone so far as to place limits on school districts that are willing to address segregation on their own. It is no wonder that plaintiffs hoping to address segregation in their schools, like the ones in Cruz-Guzman, find themselves looking for options other than the federal courts.

Part II discusses the promise of Brown and why addressing segregation in the courts remains a priority. Segregation has been so pervasive and enduring that by now there are decades of research on both the harms of segregation and the benefits of desegregation. The research is fairly clear: segregation impacts not only the educational outcomes of students, but it has long-lasting negative effects on social aspects as well. Desegregation has clear academic and social benefits, which remain as important today as they were in the days of the Brown decision.

Part III discusses the divergent jurisprudence in state court, which has largely ignored segregation and focused instead on funding and educational adequacy to improve educational opportunities. Relying on state constitutions, which unlike the federal constitution recognize educational rights, plaintiffs in state courts have made important progress in reforming educational systems, particularly with respect to funding. A few state court cases have even addressed segregation, with mixed results.

[\*4] Part IV discusses how state constitutional claims can bring new life to the promise of Brown and address segregation in the schools. n14 Cruz-Guzman is in some respects a combination of the best of federal courts and state courts. While it is certainly too early to tell, the Cruz-Guzman litigation represents the next logical step in addressing inequality in our schools, combining the many advantages of state court litigation with the original promise of Brown.

#### State courts can use different legal theories to successfully challenge segregation

Lawson, 13 --- J.D. 2013, University of Michigan Law School (Aaron, Brigham Young University Education and Law Journal, “EDUCATIONAL FEDERALISM: A NEW CASE FOR REDUCED FEDERAL INVOLVEMENT IN K-12 EDUCATION,” 2013 BYU Educ. & L. J. 281, Lexis-Nexis Academic, JMP)

II. The Political Dynamic

The key to the effectiveness of state-level educational policymaking is a political dynamic in which courts and legislatures work together, but in their own separate spheres to effectuate state-level constitutional guarantees of educational opportunity. This dynamic has been borne out on the judicial side within state-level education litigation. Although the education litigation in the federal courts that famously deals with segregation and equal access to public schools is more well-known, education litigation in state courts, dealing pertinently with a certain level of opportunity, is more relevant to the current policy debate.

Section A of this Part traces the historical development of education litigation, particularly state-level education litigation. Section B then examines the consistent framework [\*287] that courts across the nation have adopted for dealing with education litigation. Finally, Section C looks at how this framework translates into a judicially manageable role for the courts in education litigation, and the political dynamic that is so crucial to education reform.

A. The Historical Development of State Education Litigation

Although only state constitutions, and not the Federal Constitution, contain language creating a substantive right to education in some form, education litigation began on the federal level. n26 The first wave of education litigation is the most well-known. Through the Fourteenth Amendment, this wave of litigation sought to remove the stain of de jure segregation from public schools. n27 Ultimately, of course, this wave of litigation achieved its principle purpose of legally desegregating public schools in the landmark 1954 Brown v. Board of Education case. n28 However, as one contemporary education reformer noted, "soon after the glow began to fade from Brown's initial luster, education reformers saw the need to devise political and legal methods for ensuring the provision of adequate resources to the large numbers of poor and minority students who would continue to attend segregated schools." n29 The Supreme Court held in the 1970s that Brown did not require integration where any de facto segregation was not the result of intentional state action, leaving students in [\*288] underperforming urban schools without any recourse to the Fourteenth Amendment. n30 Thus, advocates began to search for new legal tools with which to challenge subpar schools. n31

As a result, a second wave of litigation commenced that focused on providing all students with an adequate educational opportunity. This second wave targeted "wealth-based inequities in the nation's education system, which allegedly led to children from poorer school systems receiving worse educations than children from wealthier school systems ... ." n32 Typically, these poorer school systems were also predominantly filled with minority students, for whom educational opportunity was already endangered, even putting to one side these wealth-based inequities. n33

Noting that the inequity in educational opportunity came directly from the inequity of the funding system in many states, education reformers initially premised the second wave of litigation attacking these funding schemes on the Equal Protection Clause of the Fourteenth Amendment. In 1973, one of these cases quickly made its way to the Supreme Court. In San Antonio Independent School District v. Rodriguez, parents of schoolchildren in property-poor districts alleged that Texas' school-funding system, premised on the levying of property taxes, violated the guarantee of equal protection. n34 The Texas school-funding system had been developed at a time when Texas had a predominantly rural, dispersed population. n35 However, the discovery of oil had changed Texas' demographic landscape. Although the state had undertaken to remedy the funding problems caused by the population shift, its solution, particularly property taxes, was premised on the amount of assessable property within a given school district. n36 Because of huge disparities in the assessed value of property and size of the student population from one district to the next, major per-pupil funding disparities existed. n37 Still, the [\*289] Supreme Court held that Texas' school funding system did not violate the Equal Protection Clause, even though one dissenting Justice described the system that resulted as "chaotic and unjust." n38 Significantly, the Court also held that strict scrutiny was not required of state and local education finance decisions, indicating that education is neither a fundamental right guaranteed by the Constitution nor the impoverished a suspect class. n39

State-level education litigation is largely a reaction to Rodriguez and the inability or unwillingness of federal courts to do what is needed to truly remedy the underlying problems in many of our educational systems. n40 State constitutional law provided two new opportunities for success following Rodriguez. First, state guarantees of equal protection are not necessarily co-extensive with their federal analogues, allowing for protection of education as a fundamental right within the state constitution, notwithstanding Rodriguez. n41 Second, every state constitution contains an additional textual hook: a guarantee of education in its constitution, n42 indicating that [\*290] education is afforded a higher status on the state level than on the federal level.

Litigators at the state level proceeded under two theories: first, Equal Protection and then educational adequacy. Some equal protection challenges to education-funding schemes initially met with success, even before the Supreme Court's Rodriguez decision. n43 Today, a handful of states review educational laws under an equal protection framework. n44 However, many state courts, following the Supreme Court's lead, have been reluctant to declare that their own state constitutions made education a fundamental constitutional right. n45 Courts have declared that "local control of schools served as the rational basis" for many funding schemes with a disparate impact, and some courts "criticized plaintiffs for failing to show that funding disparities had a negative impact on school children." n46 When state-level Equal Protection failed reformers, they turned to educational adequacy theories, inaugurating the third wave of educational reform litigation.

Educational adequacy challenges were premised on persuading state courts to endorse a reading of state constitutions that required that each child be provided with an "adequate" education. n47 Adequacy litigation also met with success because the states themselves provided the remedy. n48 In response to new studies suggesting that declining educational performance was threatening America's position as the world superpower, states began creating academic requirements and testing standards in the mid-1980s. n49 These standards provided the vague concept of adequacy with substantive content, [\*291] instead of leaving it as an aspirational goal with no clear end point. n50 As one reformer put it, "standards-based reform also put into focus the fundamental goals and purposes of the nation's system of public education" and gave "contemporary significance" to Founding-era educational provisions. n51

The standards-based reform movement proved to be a significant boon to the reform movement, such that adequacy reform lawsuits succeeded in the vast majority of states where plaintiffs had not prevailed under equal protection theories. n52 Courts in some states cited specifically to the new state-level academic standards when declaring inadequacy. n53 Thus, by the end of these three waves of education litigation, reformers could use one of two legal theories and find success in just about any state.

### 2nc Solvency – Civil Rights Specific

#### States have to have lead on civil rights protections in education --- Trump administration is gutting its infrastructure in this area

Wall, 3/20/17 --- Spencer Education Reporting Fellow at Columbia University's Graduate School of Journalism in 2016-17 (Patrick, “How Betsy DeVos Could End the School-Integration Comeback; Federal attention to classroom diversity made a resurgence in the final months of the Obama administration. Will the established programs peter out?” <https://www.theatlantic.com/education/archive/2017/03/how-betsy-devos-could-end-the-school-integration-comeback/520113/>, accessed on 5/27/17, JMP)

Under President Trump, the federal role in education is set to be drastically curtailed. Last Thursday, Trump proposed slashing federal spending on schools by $9 billion. His education secretary, Betsy DeVos, has vowed to shrink her agency and return power to local officials, which could mean scaling back civil-rights enforcement. All of these signals may also foreshadow a retreat on school integration.

Integration made a brief return to the national stage last year when President Barack Obama, who had mostly avoided the issue before then, proposed a $120 million grant program in his final budget that would fund local socioeconomic school-integration plans. After that proposal died in Congress, Obama’s education secretary, John King, launched a much smaller version last December. He also used his brief tenure to trumpet the benefits of diversity. “He talked about school diversity in a way that federal officials had not in years and years and years,” said Richard Kahlenberg, a senior fellow at The Century Foundation, a think tank that promotes socioeconomic school integration.

Now, even that smidgen of progress has stalled. Trump and DeVos appear to be single-mindedly focused on expanding access to school choice—particularly private-school tuition vouchers and charter schools, which are often highly segregated. Meanwhile, advocates fear that DeVos might abolish the few incentives created by the Obama administration to spur local integration efforts. Either way, any new attempts to curb segregation in the Trump era likely will come from the ground up, with local officials who choose to pursue integration having to make do without much federal support.

“Unlike the prior administration, where there was an appetite for this work at the federal level, I think states are really going to have to be in the driver’s seat,” said Anne Hyslop, a former policy advisor in Obama’s education department, who is now a senior associate at Chiefs for Change, an education-reform advocacy group. “It’s going to take a tremendous amount of state and district leadership to execute on it.”

In her new role, DeVos has spoken about the importance of school diversity. “I think experiencing and being a part of a diverse environment is really critical to the development of any young person,” she said last month at a meeting of magnet schools, which she praised for their historical role as a desegregation tool. But while the principle of student diversity in schools tends to enjoy bipartisan support, many conservatives view government efforts to promote integration as social engineering that restricts parents’ choices of schools. In a speech to school superintendents last Monday, DeVos vowed not to infringe on families’ options: “No parent should feel like the Department of Education thinks it knows better than they what is best for their child,” she said, according to her prepared remarks.

As a longtime philanthropist without prior government experience, DeVos doesn’t have a documented track record on integration policy. For that reason, advocates are paying close attention to what she does with King’s $12 million integration-grant program, known as “Opening Doors, Expanding Opportunities.” It’s meant to help districts improve low-performing schools by adding academic programs that would draw more advantaged students to them, a goal based on extensive research showing that students perform worse in high-poverty schools. The grants are small—ranging from $350,000 to $1.5 million to fund planning work—but 26 districts expressed interest in submitting applications, which were due last month. Because the awards have not yet been made, advocates worry that DeVos could axe the program—a small cost-saving measure, but also one that would signal to districts interested in integration that they’re on their own.

“That’s going to be a real test of her commitment to school integration,” said Philip Tegeler, the executive director of the Poverty and Race Research Action Council.

Recently, Tegeler’s group and other members of the National Coalition on School Diversity sent DeVos a letter urging her to award the grants. An education department spokesman said in an email Friday: “The Department has no comment at this time."

The Obama administration also tried to encourage integration efforts by taking into account whether applicants for other grants—including charter-school funding—had plans to make their schools more diverse. DeVos could preserve those grant competitions but scrap the integration incentives in future rounds, experts said.

Trump’s budget plan represents a clear statement of his priorities. It calls for a new $250 million private-school-choice program and a $168 million increase in charter-school funding. It doesn’t include a request for more magnet-school funding—the type of school choice most commonly used for integration—even though those schools actually enroll more students than charters. In a statement last Thursday, the membership group Magnet Schools of America noted that magnets were “[n]oticeably and regrettably absent” from Trump’s school-choice spending plan.

Some critics say that pouring more money into vouchers and charters will lead to more segregation. While charter schools and traditional public schools are both often highly segregated, white and black students tend to be even more racially isolated when they attend charters. The research on vouchers and segregation is mixed: Though students often use them to leave segregated public schools, many end up at private schools where their classmates are disproportionately the same race as them—as was the case with Louisiana’s voucher program.

Mike Petrilli, the president of the pro-charter Fordham Institute, said many charter schools are racially isolated because they are predominantly located in segregated city neighborhoods. He said he expected DeVos to prioritize unrestricted choice over school diversity. “Everything we know about Betsy DeVos is about empowering parents to decide where to send their kids,” he said. “That’s the top priority by a long shot.”

Even if DeVos doesn’t urge districts to pursue integration, they can still decide to do so on their own. That’s not new: After a decades-long dismantling of desegregation plans and a federal focus on accountability over integration, most new integration efforts happen voluntarily at the local level. A Century Foundation study last year found that 91 districts and charter-school networks have established admission policies or school boundaries meant to foster socioeconomic integration—that’s a fraction of all districts, but still twice as many as a decade ago. (Of course, those policies can always be reversed: Republican lawmakers in Kentucky recently targeted Louisville’s longtime busing and magnet program.) Under the new federal education law, known as the Every Student Succeeds Act, states and districts have even more policymaking authority than they did under the No Child Left Behind version of the law. For instance, they now can include boosting diversity as an option for ways that low-performing schools can make improvements—an idea that New York State policymakers are currently considering, according to local advocates.

Matt Gonzales, the school-diversity project director at New York Appleseed, has been helping organize monthly meetings of New York City educators, parents, and advocates concerned about the city’s severe school segregation. He said he’s worried the coalition could lose some of its momentum as progressives fight what they consider a Trump-DeVos plan to privatize public education. Still, he added, many advocates believe the push for integration is now more important than ever. “If we double down on this work,” he said, “it’s a political slap on the face to this administration.”

### AT: Perm

#### Federal involvement fails and undermines more effective state action

Lawson, 13 --- J.D. 2013, University of Michigan Law School (Aaron, Brigham Young University Education and Law Journal, “EDUCATIONAL FEDERALISM: A NEW CASE FOR REDUCED FEDERAL INVOLVEMENT IN K-12 EDUCATION,” 2013 BYU Educ. & L. J. 281, Lexis-Nexis Academic, JMP)

I. Introduction: A Legal Lens for Education Policymaking

A crucial part of the debate over education law and policy asks: Who should be creating education policy? When education policy is formulated, what is at stake is nothing less than success in life for our nation's young people. The twenty-first century has seen a pronounced shift in the way education policy decisions are made, as the educational policy making and regulatory epicenter has begun shifting from the state to the federal level, particularly with the passage of No Child Left Behind ("NCLB") n1 and Race to the Top ("RTTT"). n2

NCLB comprehensively reformed the Elementary and Secondary Education Act (ESEA), the primary federal education law. n3 Among the major changes were requirements (1) that states establish yearly testing of students in grades three through eight for reading and math and in three grades for science; n4 (2) that states establish standards for the adequate yearly progress of its students, incorporating a goal of total proficiency in all subjects by 2013-14; n5 (3) that students be allowed to transfer out of schools deemed in need of [\*282] improvement; n6 and (4) that states develop a number of new accountability measures to measure the progress of students with limited English language proficiency. n7 The focus on testing was meant to provide some accountability on the part of schools to parents and taxpayers and focus schools' efforts towards groups of students in need. n8

RTTT, on the other hand, was less a legislative program and more a set of spending conditions. n9 In order to receive money from the RTTT fund, states must submit ambitious plans in four core areas: (1) adoption of standards geared to workplace preparedness, (2) building systems to measure student success, (3) increasing teacher effectiveness, and (4) improving the lowest achieving schools. n10 States were encouraged, as part of their funding applications, to develop budgets reflecting the changes they proposed, and the Department of Education provided guidance as to the size of these budgets. n11

For the purpose of this Comment, what is important about these programs is not what they contain, but the fact that they represent a much larger role for the federal government in education. A growing body of legal scholarship argues that an increased role for the federal government in education is a normatively desirable development. One scholar, for instance, argues that limited state bureaucratic capabilities, which she asserts have developed compliance functions at the expense of true policy expertise, counsel in favor of an increased federal role. n12 Likewise, Professor Kimberly Jenkins Robinson, who served in the General Counsel's office at the U.S. Department [\*283] of Education, n13 noting the persistence of interstate educational disparities since Brown v. Board of Education, n14 argues that an increased federal role in education is necessary because history teaches that states are incapable, on their own, of addressing disparities in educational opportunity. n15 Another scholar argues that the central role education has always held in our society necessitates recognition of education as a judicially-enforceable fundamental right. n16 Similarly, Goodwin Liu, recently appointed to the California Supreme Court, argues that the very text of the Fourteenth Amendment and the concept of national citizenship at least authorizes, if not compels, the creation of a "common set of educational expectations for meaningful national citizenship." n17 However, increased federal involvement in education is worrisome for other reasons, explored below. This Comment pushes back on scholarship that supports federal solutions for the nation's education issues and argues that countervailing considerations militate in favor of less federal involvement in education.

Every state constitution, in contrast with the Federal Constitution, contains some guarantee of education. n18 State [\*284] courts split into two groups on how to give effect to these guarantees: (1) by evaluating education policy under Equal Protection by declaring education a fundamental right or by treating wealth as a suspect classification, n19 or (2) by evaluating education policies under a framework of educational adequacy. n20 In either case, these clauses establish substantive educational guarantees on the state level that do not exist at the federal level and provide the courts with a role in ensuring the fulfillment of these guarantees. n21 These clauses also help to create a valuable political dynamic, which has inured to the benefit of children. As part of this political dynamic, courts define the contours of these affirmative guarantees, and the legislature fulfills its own constitutional duty by legislating between those boundaries. n22

However, when the federal government legislates or regulates in a given field, it necessarily constrains the ability of states to legislate in that same field. n23 In the field of education, the ability of courts to protect the rights of children is dependent on the ability of legislatures freely to react to courts. As such, anything that constrains state legislatures also constrains state courts and upsets this valuable political [\*285] dynamic created by the interaction of state legislatures and state courts. An expansive federal role in educational policymaking is normatively undesirable when it threatens to interfere with this political dynamic. This dynamic receives scant attention in the literature described above. However, mindfulness of this dynamic is crucial to the proper placement of the educational policymaking and regulatory epicenter.

Constraints on state legislatures would not be as problematic if the federal government had proven itself adept at guaranteeing adequate educational opportunity for all students. However, RTTT and NCLB have, in some cases, proven remarkably unhelpful for poor and minority students. n24 These negative outcomes, of course, are not guaranteed. However, the fact that federal involvement in education has produced undesirable outcomes for poor and minority students should cause policymakers to reexamine whether it is most desirable for the federal government to play such a significant role in education. This Comment argues that it is not.

Using policies adopted in New York State in response to RTTT as an example, this Comment argues that the federal government should step aside to the extent necessary to allow state courts more flexibility to protect the substantive educational rights of poor and minority children. Specifically, where federal constitutional rights are not at issue, federal involvement in education should be minimized to the point that state courts have an unrestrained ability to protect the educational needs of, and ensure adequate educational opportunity for, each state's children. n25 This Comment does not argue for an end to all education policymaking at the [\*286] federal level. Rather, it argues that the functioning of the state's court-legislature dynamic should act as a limitation on the policies enacted at the federal level. The educational rights of poor and minority children in particular may be more efficiently safeguarded by putting the power in the hands of state courts and legislatures, whereas recent federal programs have taken that ability from the states in a way that may be detrimental to the nation's youth.

In particular, the expansion of the federal presence in the education arena has changed policymaking dramatically. Federal policy will be off limits to the remedial powers of state courts and legislatures, limiting the array of options they have when seeking to enforce constitutional guarantees of education. Unless state courts prove themselves unwilling and unable to deal with the structural problems created by educational policies, the federal government should assume a role that leaves sufficient space for state courts to operate.

This Comment proceeds in three parts. Part II of this Comment briefly examines the history of education litigation and outlines the contours of the political dynamic that allows state-level government actors to efficiently protect educational rights. Part III looks at recent federal policies and some of their occasionally troubling side effects. In doing so, it also explains how these policies interfere with the political dynamic described in Part II and why that is problematic. Part IV answers some objections to this approach to educational reform.

#### Permutation fails --- federal involvement undermines federalism and progressive state court action

Lawson, 13 --- J.D. 2013, University of Michigan Law School (Aaron, Brigham Young University Education and Law Journal, “EDUCATIONAL FEDERALISM: A NEW CASE FOR REDUCED FEDERAL INVOLVEMENT IN K-12 EDUCATION,” 2013 BYU Educ. & L. J. 281, Lexis-Nexis Academic, JMP)

As such, it remains true that in the mine run of cases it will be the legislature who is responsible in the first instance for fashioning the remedy for a constitutionally deficient educational system. It is for this reason that extensive and growing federal involvement in education is troubling.

Both NCLB and RTTT attach significant strings to state acceptance and receipt of federal funds, n106 which are vitally important if a state is to create a constitutionally adequate education system. Although a state theoretically has a choice as to whether or not to accept the proffered federal funds, n107 there is no other actor that can replace the funds that a state might otherwise receive from the federal government. n108 Given [\*301] these budgetary realities, as well as the constitutional imperative of educating children, state legislatures are significantly limited in their ability to reject these federal funds. Despite some initial resistance to NCLB, n109 every state eventually chose to accept the federal money and the attached conditions, at least initially.

Recently, however, due to a provision in the law that would have cut off federal funding if states failed to meet almost impossible goals, n110 most states were granted waivers from some of the program's more onerous requirements. n111 However, these waivers themselves came with conditions attached, as the Obama Administration used the waivers to force states to adopt favored reforms. n112 Thus, these waivers simply represent the shift from one federal policy to another. On the one hand, attaching such limitations on the use of federal money is affirmatively good because it protects federal legislative priorities; federalism is a two-way street and "concern for protecting the states should not obscure the need to vindicate the authority of Congress to choose whether and how to spend its money." n113

But there is another side to this coin, which is that "[a] state's freedom from federal interference ... is a freedom to [\*302] make choices, not just a freedom to choose wisely." n114 As such, although "Congress may use its spending power to create incentives for states to act in accordance with federal policies[,] ... when pressure turns into compulsion, the legislation runs contrary to our system of federalism." n115 This is particularly important in the context of education. Where conditions on federal money are too restrictive, they limit the array of choices available to state legislatures in any given area of policy. In the context of education, where a court will establish limits on the exercise of legislative discretion but call upon the legislature to formulate a remedy in the first instance, a state court's action will be less effective since the legislature is already constrained by conditions attached to the receipt of federal funds. Indeed, where the effect of the federal policy is as harmful as some policies may be, n116 the court's ability to vindicate the rights of students might be entirely ineffective. This possibility becomes more plausible as federal intervention grows.

III. The Problem with Federal Involvement

Restrictions on the ability of state legislatures and courts to remedy constitutionally deficient education systems are problematic, in large part because the federal government has proven inept at formulating education policy that is responsive to the needs of states. Nothing about the federal government suggests that it should be unskilled at formulating education policy. However, there are times in which federal education policy is ineffective. These instances should force us to ask whether and when it is normatively desirable for the federal government to be formulating educational policy, particularly when a substantive guarantee of some level of educational opportunity exists in the vast majority of states but not at the federal level. Accordingly, this Part describes instances in which federal involvement in education has proven to be less-than-successful.

[\*303]

A. The Example of New York State

New York, a state that recently adopted a policy developed pursuant to RTTT, provides a useful case study for the issues raised by federal involvement. New York is useful as a case study because of its relatively well-developed adequacy jurisprudence, its recent fight over RTTT-inspired policy, and the availability of relevant social science evidence. New York's policy was enjoined and then modified, but that result developed apart from the state's educational adequacy jurisprudence. However, the very adoption of the policy raised the specter of the issues considered in this Comment, making this case apt for consideration.

Subsection 1 briefly covers New York's adequacy case law. Subsection 2 examines the policy that was proposed and which would have been enacted absent action by the teachers. Subsection 3 applies New York's adequacy jurisprudence to the policy at hand and considers the situation in which the legislature might have found itself had the policy been enacted and/or litigated in a different setting.

1. New York's adequacy framework

New York's Constitution requires that the state provide for all children "a system of free common schools, wherein all the children of [New York] may be educated." n117 New York's courts interpret this to require that the state provide a "sound basic education." n118 Consistent with other adequacy cases, New York's Court of Appeals has written that "such an education should consist of basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury." n119 The State's constitutional obligation is satisfied "if the physical facilities and pedagogical services and resources made available ... are adequate to provide children with an [\*304] opportunity to obtain these essential skills." n120

In interpreting whether or not this obligation is met, like most courts, New York courts look at inputs and outputs: that is, whether the resources used to educate students provide students with adequate educational opportunity. n121 The "teaching" input has been described as "surely [the] most important." n122 In Campaign for Fiscal Equity, Inc. v. State, the New York Court of Appeals rejected an approach that would have evaluated teacher quality using only one metric (principal evaluation) and instead held that "teacher certification, test performance, experience and other factors measure quality of teaching." n123 And even where those factors may demonstrate adequate teacher quality in some areas of the state,

the constitutional history of the Education Article shows that the objective was to make it imperative on the State to provide adequate free common schools for the education of all of the children of the State and that the new provision would have an impact upon places in the State of New York where the common schools are not adequate. n124

Thus, when a policy provides insufficient educational opportunity in one area of the state, its sufficiency in other parts of the state does not preclude New York courts from declaring inadequacy.

New York courts further require a causal link between state action and inadequate educational opportunity. n125 Thus, "allegations of academic failure alone, without allegations that the State somehow fails in its obligation to provide minimally acceptable educational services, are insufficient to state a cause of action under the Education Article." n126 On the other hand, "quality of teaching correlates with student performance." n127 Where it is state policy that has an identifiable and quantifiable effect on the quality of teaching that schools are able to provide and there is a causal link to poor student [\*305] performance, plaintiffs - generally school boards, school districts, parents, and students - have a viable cause of action in New York.

2. New York's response to RTTT

Like many other states, New York participated in Phase II of the Obama Administration's RTTT Program, eventually receiving $ 696,646,000 for their application. n128 Pursuant to this application, New York State adopted a policy that essentially made student performance on high-stakes testing - testing that carries with it incredibly high consequences, such as student eligibility for promotion from one grade to the next n129 - dispositive of teacher evaluations. n130 Under the policy, student scores on yearly high-stakes tests would have comprised 40% of a teacher's yearly evaluation. n131 Fortunately, the program was enjoined by court order because the implementing regulations went beyond the scope of their enabling statutes. n132 However, the regulation, had it been enacted, would have weighed heavily on the educational rights of New York's racially and socioeconomically disadvantaged children.

For instance, under this policy as it would have been implemented in New York City, the measures adopted by the Board of Regents would have rated 18% of teachers "ineffective" - a number that would have been the highest in the nation. n133 Such a rating can get a teacher fired after two [\*306] years, tenure provisions notwithstanding. While such a number would likely not have been replicated elsewhere in the state, n134 the over-seven-fold increase in "ineffective" ratings that New York City would have experienced would be a likely candidate for repetition in other parts of the state, especially in urban school districts. While the previous system for rating teachers served the interests of neither students nor teachers (because its subjective factors were subject to potentially harmful manipulation by administrators), n135 the new system the Board of Regents attempted to institute may have been worse.

To begin with, the method used for evaluating student performance - high-stakes testing - is generally flawed. Racially disparate performance on standardized and high-stakes testing is a well-documented phenomenon. n136 This factor alone would suggest that minority students who tend to be concentrated in urban school districts n137 will score lower than their white peers - concentration in certain school districts logically should have a heavier impact on those teachers, accelerating turnover in those areas. Further, students attending school districts without adequate facilities or without enough books to go around will be disadvantaged relative to their counterparts in more affluent districts even before the school year begins - without regard for intelligence. In many cases, those students living in these poor districts are minorities. n138 In New York State, these resource disparities still threaten to and often do produce huge gaps in scores between affluent suburban and [\*307] poorer districts where the majority of students are of non-white backgrounds. n139

But even apart from the ways in which race and poverty serve as proxies for each other within public schools, one study that "examined the relationship between a student's location and his or her achievement" found that "for the country as a whole, the correlation [between the proportion of a school's pupils in poverty and its average achievement level] is about .5 or .6. No other single social measure is consistently more strongly related than poverty to school achievement." n140 As such, students in racially or socioeconomically disadvantaged schools are already behind the eight ball with respect to student achievement. The use of high-stakes tests to measure student achievement gives already vulnerable students yet another hill to climb. By making such performance dispositive of teacher evaluation, another obstacle develops. As one study noting the connection between race, poverty, and performance, along with the raw numbers already available from New York City, demonstrates, making student performance dispositive of teacher evaluations in this way will likely have the effect of increasing teacher turnover.

High rates of teacher turnover provide yet an additional disadvantage for minority students, as teacher turnover depresses student achievement and disproportionately harms minority student achievement. n141 This study documented [\*308] student performance and teacher turnover (whether a move within the same school or a move to a different school entirely) in New York City over a five-year period. n142 What these researchers found, importantly, was that the presence of inexperienced teachers by itself could not entirely explain variations or drops in student performance. n143 Instead, the data demonstrated that student performance dropped across the board in schools that experienced higher turnover rates, even among students who were assigned to teachers who retained the same job from year to year. n144 The authors posited a number of reasons for this, including decreased institutional memory and stability and the need to expend institutional resources on the hiring process. n145 Whatever the reasons, another inescapable conclusion was that the effects of teacher turnover were felt most heavily by minority students. n146

This research suggests, incredibly, that had the New York state teacher evaluation policy been allowed to go forward, it might have had the perverse effect of actually harming minority student performance over the long term, even though it was ostensibly designed to improve that performance. n147 By tying high-stakes testing performance to teacher effectiveness, there is a strong chance that the policy would have accelerated teacher turnover, robbing minority students, especially those in districts with a high proportion of minority students, of a very valuable resource: a stable learning environment.

3. New York's policy within the adequacy framework

New York's policy was adopted in response to RTTT. New York is not the only state to move in such a direction. n148 [\*309] Although New York's courts managed to turn back a potentially disastrous policy, the New York decision was grounded in statutory interpretation: the trial court found that the policy exceeded the power granted by the enabling statute. A simple change in the statute changes the outcome, allowing implementation of the policy outlined above. At that point, what might aggrieved students have done to protect their educational rights?

Posit for a moment that the New York policy just described was to have all of the effects that appear, for the moment, only to be frightening possibilities. Imagine that the effect on teacher turnover was as great as was feared and that minority student achievement suffered or, at best, stagnated while the achievement gap grew. If education reformers brought suit seeking to have this policy enjoined, they could present a persuasive argument that the policy was unconstitutional under New York's current educational adequacy jurisprudence. There is strong potential for an identifiable link between the policy itself and its impact on educational inputs, particularly the teaching input, n149 and harm to poor and minority student performance, n150 and New York law allows for a finding of inadequacy even if the deleterious effects are not felt uniformly throughout the state. n151

Thus, even if the governor were allowed to implement it, this policy might be ruled constitutionally inadequate in New York. But the policy was mandated by federal spending conditions. Although the vast majority of education clause lawsuits to date have been funding lawsuits, some commentators now note the possibility of a third wave of education litigation beyond the funding context. n152 When [\*310] should a state court declare that a federally mandated policy violates the state constitution? The system of teacher evaluation in New York was struck down, but there was still room in the applicable enabling legislation for a modified policy that comported with the dictates of RTTT. Constitutional infirmity, on the other hand, may not be so flexible. Would the state legislature follow the state court and reject the federal money? Or would it spurn the state court, arguing perhaps that it is also entitled to interpret the state constitution? That the federal government might place state courts and legislatures in such an uncertain position is problem enough to counsel against such extensive federal involvement in education.

Many of the potential effects of New York's policy have been observed in policies adopted in North Carolina pursuant to the Bush Administration's NCLB. n153 Although recognizing that accountability measures like those created by NCLB shine an important light on previously unexplored issues within public education, Professor Boger nevertheless concluded that NCLB's accountability measures were a major part of a perfect storm that was threatening educational opportunity for North Carolina's poor and minority students. n154 Boger found that "the convergence of racial segregation and high-stakes accountability testing all but dooms racially segregated, economically isolated public schools and their students to failure on state accountability tests, entrenching broad patterns of grade retention, student demoralization and dropout, and parental and teacher flight." n155 Therefore, accountability measures "threaten to exacerbate the isolation of African-American, Hispanic, Native-American, and low-income children, with negative consequences both for their access to highly performing classmates and for any prospect of attracting better, more highly qualified classroom teachers to [\*311] their schools." n156 The effects of NCLB Boger described in North Carolina are exactly the kinds of effects threatened by RTTT in New York.

Instances like these described in New York and North Carolina call into question the wisdom of allowing the federal government to set education policy on any kind of significant basis. On the one hand, reforms like those undertaken in New York, North Carolina, and elsewhere can prove and have proven successful. n157 However, given the importance of education to our success as a nation, the fact that education is explicitly provided for at the state level but not at the federal level, and existing state-level policymaking levers, that such reforms may prove and have proven counterproductive in some instances calls into question the whole policymaking endeavor.

For these reasons, policymaking on the federal level is undesirable when resulting policies prevent state courts from doing their part to ensure meaningful educational opportunity and, in doing so, threaten the educational opportunities available to poor and minority students. When the federal government creates disastrous policy, there is no judicial backstop, as exists at the state level. As such, the system of education reform that exists at the state level should be allowed full freedom to operate, facilitating the interplay between state legislatures and courts, thereby providing the fullest protection available for poor and minority students.

#### Centralized federal education policies fail --- plan and permutation undermine state based innovation and federalism

Roberts, 5/27/17 --- Ph.D., is a longtime educator and executive vice president of the Texas Public Policy Foundation (Kevin, “DeVos articulates a slimmer, more effective role for the feds in education,” <http://thehill.com/blogs/pundits-blog/education/335153-devos-articulates-a-slimmer-more-effective-role-for-the-feds-in>, accessed on 5/27/17, JMP)

The federal government has expanded its power in almost every policy area, but in no issue has that overreach been more damaging than in education. After four decades of profligate spending and onerous regulations, the great achievement of the U.S. Department of Education has been in sustaining the mediocrity of the status quo.

Earlier this week, Secretary of Education Betsy DeVos rightly identified the problem—the centralization of education policy decision-making in Washington. Though DeVos’ speech was short on specifics, she nonetheless provided some principles for reform that bode well for the nation’s 60 million schoolchildren.

First, the president and Congress must begin a steady devolvement of power from DC to the states, where most policy-making power—especially on education—resides.

Second, the secretary rightly identified the need to erode the entrenchment of the “education-industrial complex.” Those include teachers’ unions, superintendents’ associations, and testing companies that block any innovation within the system. The most promising innovation—true, parental choice, regardless of income and zip code—will no doubt be a cornerstone of DeVos’ reforms.

To unify proponents of parental choice, however, the administration must be careful to avoid using the very hammer—federal overreach—that is the root of the problem. As DeVos said, “We should have zero interest in substituting the current big government approach for our own big government approach.”

In practical terms, that means that states should drive education choice. DeVos’ articulation of a reinvigorated federalism is sorely needed in a department whose constitutional merits are questionable at best. Consequently, the administration is correct that we must simultaneously downsize the Department of Education while also nurturing a policy climate in which state take the lead in policy innovation.

Given the maturity of the parental choice movement—more than 30 states have enacted some type of educational choice program—fostering such a role would likely spur a bevy of choices and opportunities for America’s schoolchildren.

The good news is that the administration can thread the proverbial needle by taking action in three school systems which the federal government oversees: the federal district of Washington, D.C., which has approximately 90,000 students in public schools, public charters, and private schools; Bureau of Indian Affairs schools (48,000 students in 183 schools across the country); and students of U.S. military personnel (approximately 200,000 students). Offering these families the most modern form of parental choice—an education savings account—would give them educational opportunities that transcend the one-size-fits-all model of the current public school system.

So doing would also have an important political effect—an important consideration, considering how much educrats have politicized education. Though students in D.C., Indian Affairs schools, and of military personnel represent a small percentage of students nationwide, the administration could deploy its bully pulpit to highlight the effects of true educational choice. In states where parental choice has languished because of petty politics and entrenched interests—most recently, and surprisingly, Texas—this proper, federal action would be a boon.

There are, however, risks. The “education-industrial complex” is well-funded, well-organized, and hyperbolic. Secretary DeVos must be prepared for all manner of criticisms that the world will end because of expanded parental choice. But she should be buoyed by the preponderance of evidence showing that choice works. And most importantly, she should be buoyed by knowing it is the morally right thing to do for all children, especially those languishing in what she rightly calls “an antiquated system.”

But an equally important risk is within the choice movement itself. If the administration overreaches, implementing a top-down policy—such as a federal ESA or a tax-credit scholarship with the typical strings attached—it will not only have overstepped its authority, perpetuating the big government approach that created this problem in the first place. It will have also undermined the excellent, state-level work that has been going on for decades, and that marches on steadily, one state, one student at a time. That work has already borne fruit, so the administration must be careful to tend—and not over-fertilize—the orchard of innovation.

In sum, education reformers are rightly excited about the prospects for proper federal action in education policy. If the administration follows the precepts of Secretary DeVos’ address—and can find a sufficient number of allies in Congress who put children ahead of the system—the Department of Education may finally have found its proper role.

### AT: Perm – OCR Specific

#### OCR rule making is unconstitutional

Leef, 3/5/17 --- J.D., works at the John W. Pope Center for Higher Education Policy (George, “If We Can't Eliminate The Education Department, At Least Broom Out Its Office For Civil Rights,” <https://www.forbes.com/sites/georgeleef/2017/03/05/if-we-cant-eliminate-the-education-department-at-least-broom-out-its-office-for-civil-rights/#10bfe5d67dcf>, accessed on 3/5/17, JMP)

Among the great blunders of Jimmy Carter’s presidency was creating a U.S. Department of Education. The federal government has no constitutional role in education and this sprawling bureaucracy has chiefly enabled legions of bureaucrats to impose their misbegotten ideas on how schools and colleges should operate from their perches in Washington, D.C.

In recent years, the Department’s Office for Civil Rights (OCR) has been the spearhead for “progressive” change. With nothing more than some “Dear Colleague” letters supposedly meant to provide “guidance” to colleges and universities, OCR officials made dramatic changes in the law during the Obama administration.

The next head of the OCR should be someone who understands that those changes were both ill-advised and illegal, and work to eliminate them. A number of Americans (this writer included) have advocated that the job be offered to Gail Heriot, a professor of law at the University of San Diego.

Whether Professor Heriot or someone else is nominated, the foremost task for the next OCR head to do is to reverse its intrusion into discipline procedures for students accused of sexual assault. The toxic effects of that intrusion are the subject of a recent book by Brooklyn College history professor K.C. Johnson and journalist Stuart Taylor, Jr.

### AT: Solvency Deficits

#### Any solvency deficit doesn’t assume the Trump administration --- civil rights advocates have to target other actors

Kahlenberg, 4/6/17 ---- senior fellow at The Century Foundation and author of The Remedy: Class, Race, and Affirmative Action (Richard D., “The New Champions of School Integration; The Department of Education killed a federal program supporting diversity efforts, but the fight to desegregate the nation’s classroom is far from over,” <https://www.theatlantic.com/education/archive/2017/04/the-new-champions-of-school-integration/522141/>, accessed on 5/27/17, JMP)

Policies that promote school integration by race and class took a significant hit last week when the U.S. Department of Education announced that it was killing a small but important federal program to support local diversity efforts. The initiative, “Opening Doors, Expanding Opportunities,” was slated to provide $12 million to school districts to boost socioeconomic diversity. The brainchild of President Obama’s Secretary of Education, John B. King Jr., the program had attracted interest from 26 school districts across the country that believed kids would be better off in schools that educate rich and poor, and white and minority students, together rather than separately.

According to the Washington Post, an Education Department spokesperson said the program was nixed because “it was not a wise use of tax dollars, in part because the money was to be used for planning, not implementation.” But supporters of the plan rejected that view. Representative Bobby Scott, a Virginia Democrat and the ranking member of the House Committee on Education and the Workforce, said, “Continuing this important program would have been an easy way for the Trump Administration to affirm its commitment to civil rights. Unfortunately, the Trump administration missed that opportunity.”

By coincidence, as the news of the program’s discontinuation broke, proponents of school diversity, including King, were gathering at the Harvard Graduate School of Education for a strategic-planning conference on school-diversity efforts. The day-long meeting, sponsored by Harvard’s Reimagining Integration program, the National Coalition on School Diversity, and The Century Foundation (where I work), brought together 50 scholars, civil-rights activists, and educators to plot out new strategies for school diversity in the age of Trump.

The decision by Donald Trump’s education secretary, Betsy DeVos, to kill Opening Doors was a reminder, if any was needed, that proponents of school diversity need to look beyond the federal government for support during Trump’s administration. The decision on whether to proceed with the Opening Doors program, Philip Tegeler of the Poverty and Race Research Action Council told Patrick Wall in an Atlantic article last month, was “going to be a real test of her commitment to school integration.” And now she had failed.

At the conference, King called the decision a “heartbreaking signal” on an issue of utmost importance. Students of color represent more than 50 percent of public-school students, King noted, and “the fate of the country” will be determined by how well it decides to educate this new majority of students. School integration is also tied to “the fate of our democracy,” he suggested, because segregated schools allow politicians to scapegoat minorities, while integrated schools remind students of what they have in common as Americans. Research finds that school diversity reduces racial prejudice and improves academic attainment, which, in turn, is tied to higher voter participation.

The death of a small federal school-integration initiative is connected to a much larger concern that DeVos’s primary education-reform idea—using public money for private school vouchers—will produce poor academic results for students, and Balkanize students by religion, race, and class. As my Century Foundation colleague Halley Potter noted in a new report, “voucher programs on balance are more likely to increase school segregation than to decrease it or leave it at status quo.”

King reminded participants, however, that this was not a moment “to admire the problem,” but a time to engage in fresh thinking about new approaches. What options do supporters of diversity have? Could progressives capitalize on DeVos’s rhetoric around school choice—particularly, the compelling need to liberate kids from struggling, high-poverty schools—to encourage choice within the public-school system that is designed to bring children of different backgrounds together? Should progressives pivot from Washington to focus on progressive states and localities? What is the role of foundations? What about state courts?

Progressives in blue states appear to have a strong appetite for pushing against Donald Trump’s agenda on issues from immigration to climate change. Could this sentiment provide an important spark for school diversity initiatives? Under the federal Every Student Succeeds Act (ESSA), states are required to devote 7 percent of Title I funds to improving the lowest-performing schools. New York state has a program (begun by King when he was its education commissioner) to use federal school-improvement funds to turn around struggling schools by implementing attractive magnet programs. Research suggests that low-income students in mixed-income schools—surrounded by peers who expect to go on to college, parents in the school community who regularly volunteer in class, and strong teachers—perform substantially better than comparable students in high-poverty schools that often lack those ingredients for success.

State charter-school laws, likewise, could set aside a certain proportion of charter-school funds—say, 25 percent—for schools that are diverse by design, using a weighted lottery to ensure that school choice promotes socioeconomic diversity.

Local school districts, as well, can forge ahead with diversity plans, with or without federal support. The day after Trump's election, for example, the Charlotte-Mecklenburg, North Carolina, school board voted 9-0 to adopt a socioeconomic-integration plan for its magnet schools, a reminder that under the United States system of federalism, changes in Washington don’t have to spell the end of education movements. (I worked with the district on this project).

Nationally, the Century Foundation has identified 100 school districts and charter-school chains that voluntarily are pursuing diversity policies that consider student economic status in their student assignment plans. With philanthropic support, these districts could form a community of practice to support one another and expand the number of districts pursuing diversity policies by showing how it can be done in a politically palatable way that is also good for kids.

In growing the movement for integrated schools, participants at the Harvard conference discussed how various constituencies—civil-rights groups, business leaders, people of faith, students, and teachers unions—might support diversity. Sarah Camiscoli, the director of IntegrateNYC4me, a student group that is seeking school integration in New York City, suggested bringing in new constituencies, such as military veterans, firefighters, and police officers who are focused on the public good. A message that “integration is the fair choice that works for the common good and personal achievement” could resonate with people in these professions, she said, adding that veterans also have personal experience working in a diverse institution.

David Hinojosa, who works with the education department to provide school districts the technical support they need to promote civil rights, discussed ways in which low-income communities and communities of color can be reassured that integration does not suggest that they possess deficiencies but rather that they bring strengths that will add to a healthy school environment. Likewise, some participants asked, would framing school integration primarily around socioeconomic status unite the interests of working-class people of color who supported Hillary Clinton and working-class, white Trump supporters, thereby scrambling existing political alliances?

Finally, because the school-integration movement famously gained national attention with the landmark 1954 U.S. Supreme Court decision in Brown v. Board of Education, it is natural to ask: What should be the role of courts in pursuing school-diversity strategies today?

In recent years, the federal courts have been an impediment, such as when the Supreme Court struck down voluntary racial-integration plans in Louisville, Kentucky, and Seattle in 2007. But socioeconomic-integration plans are perfectly legal. And state courts have an important role to play interpreting state constitutions to foster school integration.

The best example is the Connecticut Supreme Court, which in the 1996 case of Sheff v. O’Neill ruled that segregation between Hartford schools and the surrounding suburbs violated the state constitution, whether or not the segregation was intentional. James Ryan, the dean of Harvard’s Education School, has been writing for decades about the idea of replicating Sheff-type state-level decisions in places where courts have found a constitutional right to a decent education. Given research suggesting that socioeconomic school integration is an even more powerful lever for boosting achievement than funding, he has suggested that state finance litigation be extended to integration. Now, at the conference, he wondered: Could the time be opportune, given that “courts have found their voice” in promoting democratic values in the age of Trump, resisting, for example, the ban on immigration from majority-Muslim nations? Might the courts be newly open to lawsuits that seek to encourage efforts to ensure that children of different backgrounds have the opportunity to learn together and from one another?

It may be the worst of times for school integration at the federal level, but could this be the best time for progressive school boards and state courts, newly energized by the national political scene, to embrace an education reform that will strengthen American democracy?

### AT: Federal Action Key

#### Federal action is unnecessary or premature --- state courts should be given flexibility to act

Lawson, 13 --- J.D. 2013, University of Michigan Law School (Aaron, Brigham Young University Education and Law Journal, “EDUCATIONAL FEDERALISM: A NEW CASE FOR REDUCED FEDERAL INVOLVEMENT IN K-12 EDUCATION,” 2013 BYU Educ. & L. J. 281, Lexis-Nexis Academic, JMP)

IV. Some Methodological Objections

As with any argument, this Comment's argument that the federal government needs to provide a larger space for state courts and state legislatures to formulate educational policy contains a number of contestable premises. This Part examines a number of the more salient objections that might arise is relation to the line of arguments advanced by this Comment. [\*312] The objections examined relate to the judicial involvement in educational policy formulation that is part and parcel of the state court-state legislature dynamic outlined above. This dynamic assumes that courts can and should play a useful role in education reform, but not all agree with this premise. n158 For those who see no role for the courts in education, there is no need for the interaction between state courts and legislatures to provide a limitation on the education policies that are enacted at the federal level. However, even those who see a role for courts in education reform might still raise significant objections to a diminished federal role in setting education policy. Although these objections raise important points, ultimately none is a sufficient response to the contention that state courts and state legislatures should be given ample space in order to effectively create constitutionally adequate educational policy.

In the first place, states have not always been very good at providing children with even a minimally adequate education, suggesting that national educational programs like NCLB and RTTT might be necessary. For example, prior to the 1950s, many states deprived students of equal educational opportunity by segregating their schools. In 1983, the National Commission on Excellence in Education published "an open letter to the American people" titled A Nation at Risk, which found that American students were falling behind their international counterparts and that "the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people." n159 However, if states are to be "laboratories of democracy," then the federal government should not be in the business of ossifying certain educational trends. The state courts have not had their final say on this matter, and until they do, federal intervention on the level [\*313] found in NCLB and RTTT is premature. n160

### AT: State Courts Fail – Top Level

#### Courts have learned from past errors --- they can reprioritize the legislative agenda and provide critical guidance to political branches

Koski, 11 --- Eric & Nancy Wright Professor of Clinical Education and Professor of Law, Stanford Law School; Professor of Education (by courtesy), Stanford University School of Education (April 2011, William S., Michigan Law Review, “COURTHOUSES VS. STATEHOUSES?” 109 Mich. L. Rev. 923, Lexis-Nexis Academic, JMP)

[\*935] Modern public law litigation is far from the ham-handed command-and-control model of judicial intervention that was often justly criticized during the desegregation era. n34 Courts have learned from that experience and have developed both the internal administrative mechanisms and a proper awareness of their institutional limitations that permit them to play a productive role in institutional reform. This is the coming-of-age of school reform litigation in which courts - fulfilling their obligation to ensure that constitutional values, not merely political and economic expediency, are considered in educational policymaking - are playing the more modest role of destabilizing the status quo, reprioritizing the legislative agenda, and providing the political branches with guidance on how to move educational policy in a more equitable direction. Courts act as catalysts and facilitators in what then becomes a political process in which the previously disempowered communities and actors find a place at the table. This experimentalist - or in Rebell's terms, "functional" - role for the courts is not the outdated and caricatured image of courts and the judicial process that many court critics deploy.

#### Fiat overcomes potential problems and State Courts still facilitate social change

Hilbert, 17 --- Associate Professor of Law at Mitchell Hamline School of Law, one of the plaintiffs' attorneys for the Minneapolis NAACP in the 1995 desegregation case (Winter 2017, Jim, Journal of Law & Education, “Restoring the Promise of Brown: Using State Constitutional Law to Challenge School Segregation,” 46 J.L. & Educ. 1, Lexis-Nexis Academic, JMP)

C. The potential downside to using state law

1. All states are not the same

There is substantial variation among the many states in terms of how they interpret their education clauses. n288 Not every state court may be capable or willing to impose its judicial oversight responsibilities, instead providing full discretion to the legislature. n289 While certainly [\*54] quite uncommon, state courts are capable of excusing state governments from a constitutional duty to provide an adequate education. n290 Some state courts have ruled that educational adequacy cases are non-justiciable, particularly where judges are "concerned about their institutional competence to deal with the questions presented." n291

2. Remedies have fallen short of what is necessary

Even victorious plaintiffs in adequacy cases come away with less than they wanted, and they often have to wait years and file multiple cases just to get modest relief. In Robinson, for example, the plaintiffs needed to go back to the high court in New Jersey six times, and only after the court closed the public schools did the plaintiffs secure their court-ordered remedy. n292 The remedy in Sheff fell well short of the large-scale desegregation plan that plaintiffs demanded, and it took years to achieve even the limited reforms they did get. n293 The settlement in Minneapolis NAACP case ultimately was insufficient, and now the plaintiffs in Cruz-Guzman are suing "because since the first suit, the [\*55] situation has become worse than it ever was." n294 The remarkable remedy imposed by the court in Rose indeed may be just an outlier. n295

Ultimately, state court solutions may be insufficient, but they can trigger much greater change and lead to important, if modest, reforms. The road to more effective state constitutional remedies may need many building blocks, much as the efforts of the NAACP to eventually bring and win Brown took years to complete. n296 This is not a reason to wait; on the contrary, the longer the wait, the further away the solution lies. Perfection may be the enemy of the good, particularly in securing education reform.

Furthermore, even though courts basically just hand it back to legislatures, such deference has, with court involvement, led to important results. Rose, and even Sheff, while delivering less over time than plaintiffs had hoped, did play essential roles in important progress. n297 State courts may not provide all of what is needed, but they can generate reform across the entire political system. n298 The Rose court "provided the legislature with both the nerve and the rationale to raise taxes, equalize school funding, and make other necessary changes." n299 Future state court rulings can do the same for school segregation.

[\*56] VI. CONCLUSION

The recent filing of Cruz-Guzman has restarted the discussion on whether educational adequacy litigation can address school segregation effectively. The segregation at issue in Cruz-Guzman is similar to that of many other cities across the country. Deeply segregated schools, with clearly inadequate educational opportunities, have become largely unreachable by federal courts. The constitutional violation of segregated education first articulated by the Supreme Court in Brown goes without a remedy.

But educational adequacy litigation, which has transformed numerous school systems through improved funding and resource allocation, may provide an alternative. Backed by state constitutional law that provides broad remedial power to enforce an affirmative right to an adequate education, plaintiffs could adopt the power of educational adequacy litigation to remedy school segregation, much as they already have done to reform school finance. Because segregated schools are inadequate, the right to an adequate education surely includes one free from segregation.

#### Even if courts can’t lead in every state the state legislatures can model other states

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On the other hand, despite the fact that courts have demonstrated that they are not bound by separation of powers clauses, some state courts have found that their state constitutions do not contain any substantive guarantee of some level of educational opportunity. n166 In these states, there are few, if any, opportunities for litigants to convince courts to prod state legislatures to give meaningful content to positive educational rights, and there is no court-legislature dynamic with which federal policies like NCLB and RTTT can interfere. However, this does not mean that resort to the courts in other states is misguided or unhelpful, even for those students in states without constitutional guarantees of a certain level of educational opportunity. Indeed, "trends in education show a remarkable tendency to follow a national pattern." n167 Even in those states in which the courts have a very limited role, legislatures should pick up on trends from outside of their borders, where the interplay between the legislature and the courts is working. This would be problematic where [\*315] educational systems in the neighboring states themselves are doing poorly. A system that is doing poorly, however, also sends a signal to try something else, and that something else may yet yield positive results. But where reforms are mandated, as through NCLB and RTTT, the ability of states to innovate or pick up on trends is stunted.

### AT: No Enforcement

#### State legislatures fashion remedies after the courts rule --- the court can provide necessary guidance and invoke its “veto power” if political branches don’t follow through

Lawson, 13 --- J.D. 2013, University of Michigan Law School (Aaron, Brigham Young University Education and Law Journal, “EDUCATIONAL FEDERALISM: A NEW CASE FOR REDUCED FEDERAL INVOLVEMENT IN K-12 EDUCATION,” 2013 BYU Educ. & L. J. 281, Lexis-Nexis Academic, JMP)

C. The Interplay Between Courts and Legislatures

After a court declares that an educational system is constitutionally inadequate, there is a need to define a remedy. It is the remedial phase, n79 rather than the demonstration of [\*296] inadequacy, that is the difficult part of education litigation. n80 Courts' own institutional concerns are at their apex in the context of education funding, where allocation of state monies is a quintessentially legislative function, as is the weighing of competing policy choices. n81 As such, courts have exhibited a "propensity ... to defer to the legislature for a remedy [as] a workable compromise between the judiciary and political branches ... ." n82 Moreover, courts are more likely to meet political resistance when they attempt to override legislative choices. n83

State courts, therefore, have, for the most part, followed a consistent pattern in the remedial phase: after declaring that inadequacy exists, and detailing the reasons why, the courts remand to the legislature to fashion a remedy. n84 In Alabama, for example, the state Supreme Court declared that "it is the legislature that bears the "primary responsibility' for devising a constitutionally valid public school system." n85 Although it acknowledged that a trial court might have a role in fashioning a remedy, it also recognized that "the judiciary should exercise this power only in the event the legislature [\*297] fails or refuses to take appropriate action." n86 In Texas, the state Supreme Court was quite explicit that its role went no further than declaration of a constitutional violation. n87 In New Hampshire, the state Supreme Court declared that the state constitution conferred a substantive right to education on the state's students, and then subsequently expressed confidence "that the legislature and the Governor will fulfill their responsibility with respect to defining the specifics of, and the appropriate means to provide through public education, the knowledge and learning essential to the preservation of a free government." n88 In Washington, while fending off a separation of powers argument, the state Supreme Court asserted that it could declare a constitutional violation and that it was "firmly convinced the other branches of government also will carry out their defined constitutional duties in good faith and in a completely responsible manner." n89

However, despite their reticence to fully define a remedy to a constitutionally inadequate educational system, courts do not merely declare inadequacy and then remove themselves from the picture, as this would likely do little to actually improve the situation. Instead, courts give some measure of guidance to legislatures in order for their decrees to have any effect. Some scholars see the positive nature of the educational right, as contrasted with the negative nature of most federally guaranteed rights, n90 as counseling an active judicial role. n91 For [\*298] instance, Professor Jonathon Feldman has argued that abdicating from enforcement of positive rights on separation of powers grounds "represents a serious misinterpretation of the negative separation of powers doctrine." n92 This scholar also asserts that "[a] court's articulation of a legislature's duty does not represent judicial tyranny." n93 Recognizing that governmental inertia represents the greatest threat to positive rights, he concludes that "as long as the legislature retains its core function as policymaker and allocator of public funds, the courts may establish the parameters within which legislative action must proceed." n94 Similarly, Helen Hershkoff has argued for state justiciability doctrines that "respond more closely to state and local concerns" and which are not subject to the same constraints as Article III courts, in part because of the positive rights contained within state constitutions. n95 Both Feldman and Hershkoff recognize that a right's character as "positive" does not preclude judicial enforcement. Indeed, a paradigm within which state courts actively participate in a dialogue with the political branches about vindication of those rights is likely to produce more fruitful outcomes. n96 Professor Rebell has noted that judicial involvement in other areas of public law, particularly administrative law, has proven beneficial to the development of public policy and has not been characterized by judicial ineptitude. n97

Courts have taken up this charge to define the scope of positive rights and do provide guidance to legislatures. n98 Following a declaration of inadequacy, courts often provide certain guidelines consistent with the positive character of the [\*299] substantive educational entitlement. n99 In the seminal case Rose v. Council for Better Education, Inc., n100 the Kentucky Supreme Court outlined what it termed "the essential, and minimal, characteristics of an "efficient' system of common schools." n101 The Kentucky court also held that education was a fundamental right in that state, n102 arguably justifying an even broader judicial role than that otherwise required for the enforcement of positive rights. Courts operating within an adequacy framework have also followed Kentucky's lead explicitly. n103 Such guidance does not violate the very real separation of powers concerns that play a large role in education lawsuits. This interplay between the judicial and legislative branches forms a political dynamic that creates the conditions necessary for educational reform. n104 Professor [\*300] William Koski, a noted education scholar and litigator, has described the dynamic at play in education adequacy jurisprudence:

A fuzzy standard allows plaintiffs to bring novel actions and permits the judiciary to invalidate what it views as an unjust educational finance scheme, while those same fuzzy standards permit legislatures to respond to the law in the face of competing political demands. Law, under this analysis, does little to shape legislative or executive behavior on the books. It is not self-executing. Litigation and judicial intervention, however, can influence legislative behavior, but only to a certain extent. Litigation and a court's decision to strike down an educational finance system can serve as the catalyst for legislative reform, as they can provide the political cover for reform-minded policy-makers to act. And if the political branches do not respond appropriately, the judicial "veto power" can again be invoked. n105

#### Courts can effectively implement remedies --- use administrative structures to monitor and enforce

Koski, 11 --- Eric & Nancy Wright Professor of Clinical Education and Professor of Law, Stanford Law School; Professor of Education (by courtesy), Stanford University School of Education (April 2011, William S., Michigan Law Review, “COURTHOUSES VS. STATEHOUSES?” 109 Mich. L. Rev. 923, Lexis-Nexis Academic, JMP)

3. The Judicial Capacity Objection

Hanushek and Lindseth argue that, as institutions and decision-making bodies, courts have neither the expertise nor the capacity to design and implement effective remedies for educational failure. Building on their argument that there are no workable standards for judicial remedies, they forcefully argue that the courts therefore tend toward "spending remedies [\*934] because they believe they will work and because they are the easiest to monitor and enforce" (Hanushek & Lindseth, p. 138). They go on to criticize generalist judges for their lack of educational-policy expertise, their limited access to information in a trial setting, and their reliance on distorted adversarial evidentiary presentations to develop remedies (though some of those presentations are hardly adversarial, Hanushek and Lindseth point out quite sagely; instead, they are wink-and-nod agreements to plunder the state treasury) (Hanushek & Lindseth, pp. 139-41).

Rebell meets this objection head-on in two different ways. He first points out that modern courts have developed processes and organizations to both formulate and administer complex reform decrees (Rebell, pp. 9-14). Courts have become adept at sifting through complex and contradictory social science evidence. Indeed, given the access to information parties enjoy during the discovery phase, two scholars have argued that judicial investigation into complex educational-finance issues may, at times, exceed the investigations of researchers. n33 Although Rebell does not specifically mention it, I note that even after the remedial decree is handed down (whether by consent or judicial fiat), courts employ numerous administrative structures to monitor and enforce their remedial schemes. These include monitoring committees that may be composed of party representatives, magistrates, and masters, who may be charged with resolving disputes or tweaking remedial schemes; and monitors who evaluate progress toward compliance with those decrees.

Rebell's second response to the capacity objection is, to be blunt, "compared to what?" This is the heart of his case for a principled and pragmatic judicial role in educational policymaking and governance - that courts possess unique institutional attributes that make them well suited to making certain types of educational-policy decisions, particularly when compared to the legislative and executive branches (Rebell, pp. 48-55). This comparative institutional analysis reveals that courts have the staying power to pursue educational reform, a notoriously long and arduous process (Rebell, p. 50). He further argues that the judiciary's relative political independence makes it more likely to advance equitable remedies in the face of majoritarian politics. And the courts' rational, analytic, and evidence-based decision-making method make them well suited to guiding rational, long-range reform efforts. Of course, this process must be done in "colloquy" with the political branches (Rebell, p. 52), particularly legislatures, which are better suited to making the delicate tradeoffs on specific policies; and executive agencies, which are better suited to day-to-day implementation on the ground. "When disputes arise on whether specific mechanisms are, in fact, meeting constitutional requirements, judicial fact-finding mechanisms should be invoked" (Rebell, p. 55). In other words, there is a proper judicial role in Rebell's functional separation-of-powers model of public education reform.

### AT: Courts Move Too Slow

#### Fiat solves this – the CP immediately fiats ruling against segregation

#### Even if Courts are slow that doesn’t preclude simultaneous action by the legislatures

Lawson, 13 --- J.D. 2013, University of Michigan Law School (Aaron, Brigham Young University Education and Law Journal, “EDUCATIONAL FEDERALISM: A NEW CASE FOR REDUCED FEDERAL INVOLVEMENT IN K-12 EDUCATION,” 2013 BYU Educ. & L. J. 281, Lexis-Nexis Academic, JMP)

A second problem with giving the courts a major role in formulating education policy - and a concern that would also [\*316] exist by giving the federal courts a say in this arena - is the inherently slow-moving nature of the court system. It takes a significant amount of time for a case to work its way through multiple levels of the court system. This delay would seem to negate the flexibility required by an adequacy framework. However, state courts, particularly in this context, do not speak only through the final judgments of their highest benches. In a system in which the courts are responsible for prodding the legislature and fighting inertia, the elected branches can also respond to filed suits, trial court orders, or evidentiary studies commissioned specifically for education litigation. n171 That a court's docket might be clogged does not counsel against using the judiciary for these purposes. Even filing a suit can have an effect, although it may take years for any case to reach a state's highest court.

### AT: Courts Lack Educational Expertise

#### Courts have fact finding capabilities and the benefits of legislatures are exaggerated

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Moreover, Hanushek and Lindseth - though hardly overstating the effectiveness of legislative reform n35 - do not fully acknowledge the failures of the legislative and executive branches in ensuring equal and meaningful educational opportunities for all children. Rather, in claiming the superiority of the legislative process in developing remedies for school failure, they state that courts "do not have staff members with educational expertise at their disposal, in contrast to legislative bodies, which through their various senate and house committees and their permanent staffs, can draw upon a wide range of experience and expertise in complex education policy and finance issues" (Hanushek & Lindseth, p. 139). Two responses: (1) this, as noted, fails to recognize the fact-finding capabilities of courts, and (2) it appears to stylize the actual workings of harried, sometimes part-time state legislators and their overtaxed staffers. Beyond their staffing argument, and a modest defense of the legislative school appropriations process, n36 Hanushek and Lindseth have not made the case that legislatures and executive branches alone will ensure appropriate educational policies most of the time.

Perhaps equally important, state court judges in many school reform litigations appear to be keenly aware of their comparative institutional [\*936] strengths and know when to stay the course and when to stand aside to allow the political system to operate. Take, for example, the Massachusetts litigation. n37 In 1993, the court struck down the commonwealth's school finance system and the legislature responded with a robust set of reforms, including "large infusions of money into property-poor districts along with the introduction of rigorous standards, graduation exams, and overall accountability" (Hanushek & Lindseth, p. 167). This policy reform resulted in achievement gains, particularly among Hispanic students (Hanushek & Lindseth, pp. 168-70). In 2005, when the court was again asked to review the constitutionality of the finance system, it cited the achievement gains, and refused to intervene. n38 One interpretation of this is that the court found its proper role in educational-policy reform. n39

### AT: Courts Can’t Rule – SOP / PQD

#### SOP and PQD concerns should not prevent courts from ruling on education

Koski, 11 --- Eric & Nancy Wright Professor of Clinical Education and Professor of Law, Stanford Law School; Professor of Education (by courtesy), Stanford University School of Education (April 2011, William S., Michigan Law Review, “COURTHOUSES VS. STATEHOUSES?” 109 Mich. L. Rev. 923, Lexis-Nexis Academic, JMP)

1. The Separation-of-Powers Objection

As the authors all note, a number of courts in the past two decades have declined to review the merits of plaintiffs' claims that their states' school funding schemes are unconstitutional under separation-of-powers principles or the political question doctrine. n26 Hanushek and Lindseth do not discuss the extensive scholarly treatments of the countermajoritarian dilemma, opting instead to simply quote Hamilton's Federalist No. 78 for the abstract principle that the judiciary possesses neither the power of "the sword nor [\*932] the purse." n27 For that reason, their theoretical argument against court involvement seems thin, particularly compared to Rebell's more robust treatment of the subject. Rebell grounds his argument in favor of court intervention in a critique of the doctrinal underpinnings of the political question doctrine (Rebell, pp. 23-25) and, relying on John Hart Ely's famous case for judicial review, n28 a relatively robust theoretical case for the judiciary's authority and obligation to enforce positive state constitutional rights, such as the right to a "sound basic education" and to "correct malfunctions of the political process" where minority rights are compromised at the hands of electoral majorities (Rebell, pp. 50-52). To the extent that the primary objection to judicial intervention in educational policymaking is one of political theory and legal doctrine, Rebell would have the better of the matter, but that is hardly the authors' only concern about the courts.

### AT: Courts Can’t Apply Concepts in Education Reform

#### Courts can use legislatively mandated standards as guideposts for education reform to develop effective remedies

Koski, 11 --- Eric & Nancy Wright Professor of Clinical Education and Professor of Law, Stanford Law School; Professor of Education (by courtesy), Stanford University School of Education (April 2011, William S., Michigan Law Review, “COURTHOUSES VS. STATEHOUSES?” 109 Mich. L. Rev. 923, Lexis-Nexis Academic, JMP)

2. The Standards Objection

Rebell contends that courts, which must interpret constitutional terms such as "adequate" or "sound basic" education in their states' education articles, are capable of applying these concepts in school reform litigations (Rebell, pp. 17-18). Others, like Hanushek and Lindseth, counter that such language provides courts with no clear principles or standards to guide the development of school reform policies. n29 As Frank Michelman famously argued, such conceptual indeterminacy can stymie judicial intervention because reform proceeds without coherence or clear objectives. n30 Indeed the quest for a unified theory of equality of educational opportunity has bedeviled scholars, judges, and lawyers since the inception of equity-finance- [\*933] reform litigation through to the modern adequacy movement. n31 In response to this "standards objection," neither book attempts a comprehensive theory of educational opportunity; rather, both look at the same guideposts for reform and draw different conclusions.

Hanushek and Lindseth argue that the complex educational research, policy, and practice questions that must be answered to come up with an operational definition of "adequacy" doom the entire judicial educational-policymaking enterprise (Hanushek & Lindseth, pp. 118-28). What are the appropriate educational outcomes? What educational resources are correlated with educational outcomes? How much of those resources is enough? None of these is answerable with any degree of certainty, they argue. Consequently, courts cannot and should not be involved in dictating a standard for adequacy. Not to worry, responds Rebell: legislatively authorized state content standards "put into focus the fundamental goals and purposes of our system of public education" (Rebell, p. 20), and those standards provide courts with the politically recognized specific expectations and outcomes measures needed to develop appropriate remedies in school reform cases (Rebell, p. 59). But those standards are frequently mere aspirations (Hanushek & Lindseth, p. 119), are not intended to guide constitutional decision making (Hanushek & Lindseth, p. 120), and cannot be reliably linked with specific educational resources to be of any remedial guidance, n32 Hanushek and Lindseth reply.

So, this standards debate ultimately resolves itself into a debate over whether legislatively mandated standards for what all children should know and be able to do can, as a matter of judicial command, reliably guide educational-resource distribution. In Chapter Seven of their book, Hanushek and Lindseth unequivocally say "no," while Rebell argues that in the complex world of educational governance and policy, it is appropriate for courts to use those standards as guideposts for continuous improvement, even if scientific certainty is elusive. More on this in a moment.

### AT: Courts Don’t Increase Student Achievement

#### Assumes too small of a sample size and ignores other positive reforms spurred by court intervention

Koski, 11 --- Eric & Nancy Wright Professor of Clinical Education and Professor of Law, Stanford Law School; Professor of Education (by courtesy), Stanford University School of Education (April 2011, William S., Michigan Law Review, “COURTHOUSES VS. STATEHOUSES?” 109 Mich. L. Rev. 923, Lexis-Nexis Academic, JMP)

4. The Judicial Ineffectiveness Objection

Twenty years into the adequacy movement and some forty years into school-finance-reform litigation generally, it is fair to ask whether judicial involvement works. Here the authors diverge not only on their presentation and interpretation of evidence, but also on the standard for success.

Following in the tradition of "judicial impact" research in school finance, n40 Hanushek and Lindseth analyze observable educational outcomes - primarily fourth grade reading and math and eighth grade math achievement on the National Assessment of Educational Progress ("NAEP") - in four states that were subject to judicial decisions striking down the states' respective school-finance systems sufficiently long ago such that any results would have taken hold (Hanushek & Lindseth, Chapter Six). In three of those four states - Kentucky, Wyoming, and New Jersey n41 - they show that, from [\*937] 1992 to 2007, achievement did not grow any faster (and, in some places, grew slower) than the nation as a whole. n42 In Massachusetts, the fourth state, they acknowledge the quicker pace of growth among white and Hispanic students, while pointing out the mixed success of African American students (Hanushek & Lindseth, pp. 166-70). While one could quibble with the methodological choices they made, n43 Hanushek and Lindseth are very clear about their definition of "success" (raised achievement), while applying reasonable methods to available data to determine the extent of success. Their reliance on student achievement as an outcome measure is also based on the compelling case they make in Chapters One and Two for the link between achievement and various important life outcomes for individuals and the well-being of the nation generally. Even so, demonstrating that judicial intervention in three states did not unequivocally improve NAEP scores in fourth grade reading and math and eighth grade math cannot be dispositive on the question of court efficacy. Nor does it address the question whether litigation or threatened litigation has catalyzed reform in literally dozens of states - reform that has enhanced and may further enhance educational outcomes.

Rebell, however, in his second chapter - "Defining Success in Sound Basic Education Litigations" - does not specifically identify how success should be measured, but rather opts for a process orientation toward defining success. There he first rehashes the treadworn arguments over whether money matters (Rebell, pp. 30-34). (It does, if well spent.) He then criticizes the sole reliance on test scores as a measure of success (Rebell, pp. 35-37). (Agreed.) Then, as the suspense builds, he stops short of providing a specific definition of success:

[\*938]

Ultimately the measure of success for constitutional purposes - and indeed for all purposes - must be whether the state has succeeded in establishing and maintaining an educational system that provides meaningful educational opportunities to all students and graduates students who have the knowledge and skills needed to function as capable citizens and productive workers. And in the end, whether the state has provided its students with such a sound basic education is a judgment question that must be based not only on the available, but inherently limited, indicators of student outcomes but also on an assessment of the appropriateness and effective use of the standards, resources, and other inputs into the system and whether the systems in place are likely to prepare students to function productively in a modern, diverse society. (Rebell, pp. 37-38)

(Who could argue with that proposition, stated so vaguely?) Rather than providing specifics as to the measures of success, Rebell instead makes the case for a process orientation to these questions in which the judiciary serves as the body that makes specific determinations regarding the legislature's pursuit of the abstract outcomes he identifies. (Perhaps this is why he uses the gerund "Defining" in the title of the chapter, which suggests an ongoing process.) No doubt this is a productive proposal for approaching the process of remedying educational failure and a process orientation is quite comfortable territory for courts, but it does little to advance the specifics of how we gauge success.

This round cannot be called. Depending upon one's views of the judiciary's role, its capacity to develop and implement remedial measures, and the evidence of judicial efficacy, the authors present compelling cases to support either side. n44 What is most telling, however, is that neither book rejects judicial involvement wholesale. Rather, common ground might be found in defining a narrow and effective role for courts to play.

## Educational Equality CP

### 1nc Educational Equality CP

#### The United States federal government should fully commit to a strategy of ensuring educational equality, including:

#### Mandating that States provide equitable education funding;

#### Embracing and improving racially isolated schools;

#### Providing all necessary support and funding for culturally affirming schools.

#### The CP is comparatively better than a focus on integration --- ensures educational equality for minority students

Nelson, 09 --- Assistant Professor of Law, University of South Carolina School of Law, J.D. from Harvard (January 2009, Eboni S., University of Miami Law Review, “Examining the Costs of Diversity,” 63 U. Miami L. Rev. 577, Lexis-Nexis Academic, JMP)

Conclusion

In the wake of the Supreme Court's decision in Parents Involved, school officials, scholars, and civil-rights advocates immediately began discussing constitutional ways by which to create and maintain racially integrated schools. n287 They immediately clasped onto Justice Kennedy's [\*626] presumably constitutional laundry list of integrative measures as their guide to pursue racial diversity. n288 Interestingly, although, again, not surprisingly, conspicuously absent from many of these reported discussions were suggestions and strategies that could actually improve the educational resources and opportunities afforded to minority students. Instead, as evidenced below, recommendations mostly centered on the same type of ineffective integrative measures, such as busing and magnet programs, that succeeded in achieving racial representation but failed to ensure true educational equality.

When asked the practical impact of having the race policy [in Parents Involved] struck down, Raj Manhas, the [Seattle] district superintendent, said, "In reality, none."

Mr. Manhas said the district already was taking steps to encourage racial diversity through other means, including placing highly sought after International Baccalaureate and dual-language programs in locations where they are likely to draw a diverse student body. n289

This response demonstrates the costly and detrimental perpetuation of the diversity-equality disconnect post-Parents Involved whereby school districts continue to implement measures to ensure racial representation, despite the likelihood that such measures will not lead to equal educational opportunities for the greatest number of minority students. We, the stewards of our children's future, cannot afford to allow this disconnect to persist. We must set aside our integrative ideals and approach the arduous task of providing equal educational opportunities to minority students with a renewed realism - a realism that not only recognizes the shortcomings of the diversity rationale but also responds to this recognition by shifting efforts away from the pursuit of diversity and towards the attainment of educational equality, especially for those minority students who find themselves being educated in racially concentrated [\*627] schools. Obviously, there are tremendous challenges associated with embracing and improving racially isolated schools, n290 but until we commit to making that our goal, we will never truly take meaningful steps to achieve it.

#### CP avoids backlash and allows Black students to achieve and develop their cultural health

Stewart, 16 --- publishes Citizen Education, a weekly education reader focused on improving educational options for communities of color (6/10/16, Chris, Washington Post.com, “Our obsession with integration is hurting kids of color,” Factiva, JMP)

Each week, In Theory takes on a big idea in the news and explores it from a range of perspectives. This week, we're talking about school desegregation. Need a primer? Catch up here.

Chris Stewart publishes Citizen Education, a weekly education reader focused on improving educational options for communities of color. He is also the director of external affairs for the nonprofit publication Education Post.

Let's agree about the benefits of racial diversity in education. Social science has long settled the issue. Only members of America's most backward social networks are willing to speak in opposition.

Yet two of the biggest school integration supporters I have met — one in journalism, and one in research — have both admitted to selecting segregated schools for their own kids. One of them is white, the other is black, and both are preaching one thing while doing another.

They aren't alone. They are a parental cliche. The truth is, if the American majority wanted integrated schools, we would already have them. Instead, many white families select schools in ways that create social distance between their children and other races. This leaves people of color who love our children to wonder how long we can chase them and continue to further the insulting delusion that black student achievement can only be had in proximity to whiteness.

Most black parents are realists. There is no evidence that perfect integration will occur soon, but our kids need an education today. With this in mind, it is unnerving to see integration fundamentalists criticizing policies aimed at educating our kids where they are. To them, reforms that assist marginalized communities are a consolation prize for our failure to achieve an idealized picture of Martin Luther King Jr.'s dream community. To us, they're an imperfect but ultimately useful pathway helping us to navigate our kids through a racist society.

What if the supposed beneficiaries of public school integration aren't actually pining for it? There is a long line of black intellectual thought that questions the primacy of integration as an educational goal and as a means of cultural health for black children.

W.E.B. Dubois said: "The Negro needs neither segregated schools nor mixed schools. What he needs is Education. What he must remember is that there is no magic, either in mixed schools or in segregated schools. A mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk, is bad."

King himself expressed reservations about integration, too. Black educators from his church recall him saying of white schools and white teachers: "People with such a low view of the black race cannot be given free rein and put in charge of the intellectual care and development of our boys and girls."

Kenneth Clark, the famed psychologist whose scientific evidence about the deleterious effects of discrimination bolstered Brown v. Board of Education, expressed disappointment with its aftermath. Years later he conceded that civil rights leaders may have underestimated institutional racism, writing a paper for the Harvard Educational Review that called for "realistic, aggressive, and viable competitors" for the traditional public schools. His vision is not significantly different from today's school reform efforts.

Research continues to tell us black children mostly attend public schools where they are more likely to be suspended than white students and are less likely to be placed in gifted classes even when they qualify. Traditional school districts crowd the least effective, least prepared and lowest-paid teachers in schools with the most low-income children of color, and just as King feared, those teachers hold low opinions of their students' potential. Taken together, you can see why black parents are the fastest-growing demographic of home-schoolers, and when culturally affirming charter schools open up, waiting lists quickly develop.

Given all the evidence, the safest things parents of color can do is support new schools that get results. The fundamentalists can work on persuading the American majority to close the gap between what they say about integration and what they do when it's time to enroll their children in schools.

### 2nc Solvency

#### Ensuring equal educational opportunities is the best way to boost minority achievement --- the plan and permutation divert time, resources, and efforts by advancing diversity policies --- segregation is also inevitable in thousands of districts

Nelson, 09 --- Assistant Professor of Law, University of South Carolina School of Law, J.D. from Harvard (January 2009, Eboni S., University of Miami Law Review, “Examining the Costs of Diversity,” 63 U. Miami L. Rev. 577, Lexis-Nexis Academic, JMP)

This is not to say, however, that racial diversity has produced no positive educational outcomes for minority students. Indeed, the opposite is true. n222 As previously discussed, there is a substantial body of social-science research that supports the conclusion that minority students enjoy greater academic success when educated in racially diverse environments. n223 That said, there are also studies that assert that diversity and integration efforts have "no demonstrable educational benefits" and may actually harm minority students. n224 Even if one agrees with the vast body of research that details the academic benefits of racially diverse learning environments, it is unclear from this research whether the positive educational outcomes are caused by the racial makeup of the school itself or rather by the resources and opportunities available in those environments. n225

As commonly recognized in the realm of social-science research, correlation does not imply causation. Although there may be a positive association between two variables such that when one increases the [\*617] other is also likely to increase, one cannot infer from this association that one variable causes the other. n226 In applying these principles to the variables of racial diversity and academic achievement, it may very well be the case that there exists a positive correlation between diversity and minority students' academic performance; however, one cannot assume that this relationship is causal such that racial diversity, itself, will be successful in improving minority students' educational outcomes. n227 The positive relationship may very well be caused by other contributing variables such as "peer influence, role modeling, instructional quality, and educational expectations." n228

If racial diversity does not improve minority students' academic performance, n229 then racial diversity is not a prerequisite for the provision of equal educational opportunities to students of color. n230 If the positive academic outcomes experienced by minority students in diverse learning environments are more related to the beneficial resources available in those environments rather than the racial composition of the student body, could we not replicate those resources in racially identifiable schools to improve the educational outcomes for a greater number of minority students? n231 The next Part explains why such replication is an [\*618] endeavor of greater importance than current efforts to achieve racially diverse student bodies.

IV. The Case for Embracing Minority Concentrated Schools

If we are to provide equal educational opportunities to the greatest number of minority students, we must fervently address their educational issues where they are n232 instead of constantly, and some would argue futilely, n233 diverting time, resources, and efforts to policies aimed at creating and maintaining racially diverse student bodies. n234 As noted by Judge Carter:

Although integration is a very important goal that I refuse to give up on, the Supreme Court has forced us into a corner. It is no longer possible to wait for integration. We must focus on the crisis in our inner-city schools which have been abandoned. What is desperately needed is decent schools that will provide the means for a toehold on the ladder to mainstream employment. We need to develop legal and social programs to rescue poor African-Americans from the pit of human debris and waste to which society has consigned them. n235

The stark realities concerning the escalating number of racially isolated schools and the complex challenges that are present in such schools necessitate such immediate strategic shifts. Embracing and improving racially concentrated schools will benefit not only those students who [\*619] attend such schools, but also potentially the communities in which they live.

A. Reality Check

Scholars such as John Boger and Leland Ware have documented the extreme levels of residential and socioeconomic segregation that exist throughout our country. n236 When this reality is coupled with school administrators' adherence to the neighborhood-school concept n237 while making student assignment decisions, it is not surprising that racially identifiable schools result. n238 "Almost three-fourths of black and Latino students attend schools that are predominantly minority." n239 African-American and Latino students account for 2.3 million of the 2.4 million students who attend schools with a 99 to 100% minority-student population. n240 Such racially identifiable schools also have extremely high rates of student poverty. n241

The difficult challenges that plague such learning environments are well documented. They include lack of financial resources, n242 fewer college preparatory courses, n243 less experienced and qualified teachers, n244 and deteriorating school facilities. n245 Students attending high-poverty [\*620] minority schools must also overcome lowered teacher expectations, n246 negative peer influences, n247 and less parental involvement n248 to achieve academic success.

When contemplating strategies to address these and similar challenges to minority students' educational achievement, one cannot ignore the educational gains made by African American students during the height of the desegregation era. n249 During this time, the number of African American students attaining high-school diplomas and GEDs increased, as did their performance on reading, math, and science standardized tests. n250 Despite these increases, however, significant educational gaps remain between minority students and their white counterparts. Whether due to the Supreme Court's shift in its desegregation jurisprudence or the continuous stratification of our communities and neighborhoods, the continual pursuit of racial diversity is no longer (assuming it ever was) n251 the most effective approach to providing equal educational opportunities to minority students.

In many urban communities, in which a great number of students of color are educated, racial integration is no longer a viable option. As noted by Professor James Ryan, "Racial integration is an implausible if not impossible goal in thousands of school districts that are predominantly or exclusively white or predominantly or exclusively minority." n252 The creation of racially diverse student bodies is also hindered by community opposition to integration efforts. In school districts across the country, parents vocally and fervently oppose student assignment and school-boundary proposals that attempt to diversify schools, both in terms of race and socioeconomic status. n253 The often white, suburban parental constituencies lobby their elected-school-board members to prevent their children from attending the "bad" schools and to prevent the "bad" kids from attending their "good" schools. n254 While school-board members acquiesce to the parents' wants, the needs of the often black and brown children who are languishing in the "bad" schools go unmet. [\*621] In addition, within those school districts in which racial diversity can be achieved, it often comes at the expense of ensuring educational equality for minority students. As shown by the previous discussion regarding tracking, n255 magnet programs, n256 and race-based student-assignment plans, n257 the needs of many minority students largely go unmet as school officials attempt to assemble aesthetically pleasing student bodies with little regard for the unequal educational opportunities that are provided within such environments. n258

Admittedly, there are tremendous challenges and difficulties associated with improving racially identifiable schools, especially those that are also characterized as low income or high poverty. n259 Such schools are often unable to recruit and retain the most qualified teachers. n260 In addition, students attending such schools often have greater academic and non-academic needs, which require greater resources. n261 Despite these challenges, there have been success stories, n262 which evidence the educational benefits that can flow from racially identifiable schools.

#### Counterplan uniquely preserves Black schools and educators and improves minority neighborhoods --- they are empirically undermined by desegregation

Nelson, 09 --- Assistant Professor of Law, University of South Carolina School of Law, J.D. from Harvard (January 2009, Eboni S., University of Miami Law Review, “Examining the Costs of Diversity,” 63 U. Miami L. Rev. 577, Lexis-Nexis Academic, JMP)

B. Reaping the Benefits of Effective Minority Schools

Perhaps two of the most tragic and unintended consequences of desegregation were the closing of black-neighborhood schools and the expunging of African American educators from school systems throughout the South. n263 Not only did black students lose positive and influential role models, but black communities also lost institutions that had historically played an essential role in sustaining their neighborhoods. n264 As argued by former Topeka, Kansas school superintendent Robert McFrazier, "The closing of black neighborhood schools - with their traditions, yearbooks, mottoes, fight songs and halls of fame - ripped the centerpiece out of those communities." n265 Unfortunately, these centerpieces have yet to be restored, which is why the embracement and improvement of racially identifiable schools are necessary endeavors. n266

The embracement and improvement of minority-concentrated schools are also vital to counteracting the message of inherent inferiority that the closing of black schools conveyed not only to the black community but also to the country. As argued by scholars such as Wendy Brown-Scott, "The belief that Black people are inferior to white people underlies the call for integration and causes integration to take on its subordinating quality." n267 This belief led to the abandonment of black-neighborhood schools and the emergence of the myth that black students need to be educated alongside white students to achieve academic success. n268

[\*623] As argued by Professor Brown-Scott in the context of higher education, it is imperative that we preserve black educational institutions. n269 The same is true in the context of elementary and secondary education. To do so not only rejects the assumption "that anything that is predominantly black must be inferior" n270 but also instills pride, cultural values, and high academic expectations in minority students and communities. n271

Admittedly, one could argue, as did the U.S. Commission on Civil Rights in 1963, that "schools segregated in fact teach only subject matter and fail to fulfill one of the traditional goals of public education; they fail to prepare youth to function in a multiracial society as participating citizens." n272 I would assert, however, that effective minority schools succeed in teaching much more than reading, writing, and arithmetic. First and foremost, they teach minority children to have high expectations for academic achievement. In many highly effective minority schools, n273 the students are met at the schoolhouse door by principals, teachers, and administrators who have high expectations for their students' academic success. n274 Such expectations help to "create and reinforce a culture of achievement" that permeates the schools and contributes to minority students' educational success. n275 As noted about an Oakland, California [\*624] charter school that serves a predominantly American Indian student population, "College is assumed." n276 Considering the sociological research showing the positive impact of high expectations on students' achievement, n277 creating model minority schools that adhere to a culture of achievement and are staffed with teachers and principals who possess high expectations for their students could help to improve minority students' educational outcomes.

Effective racially identifiable schools also succeed in teaching students cultural values and skills that are necessary for them to overcome subcultures within their communities that can potentially impede their academic achievement. n278 As recognized by Professor Bell in the context of independent black schools, n279

These schools are designed to respond to the social ills disproportionately visited upon blacks - discrimination, joblessness, poverty, and crime, to name a few - by fostering a sense of cultural pride, providing students with positive black role models, and teaching the particular skills black children need to survive using pedagogical models that will attract and hold their interest. n280

By recruiting and employing highly qualified teachers to teach minority students "noncognitive skills" such as cooperativeness and self-discipline, effective minority schools can develop a school culture that combats the culture of poverty and the streets. n281 Such efforts can help to improve minority students' educational outcomes. n282

By embracing and reinvesting in minority neighborhood schools, we would also be embracing and improving minority communities. The [\*625] reestablishment of good schools as minority communities' centerpieces would evidence our society's commitment to communities of color - a commitment that has been missing for far too long. Such commitment is necessary to awaken minority children's hearts and minds to the promise of achievement.

One could argue that my proposal to embrace and improve racially identifiable schools rather than diversify them would result in foregoing benefits that are commonly attributed to racial diversity. n283 However, as previously discussed, the vast majority of minority students attend schools that are not racially diverse. n284 Therefore, those students are not currently experiencing or receiving the purported benefits associated with racially diverse learning environments. In addition, those minority students who do attend racially diverse schools often find themselves segregated from their white colleagues whether by choice or by institutional practices. n285 Consequently, the unfortunate reality is that, for most minority students, there simply are no diversity benefits to forgo by shifting the focus away from the diversification of racially identifiable schools and towards their improvement. Embracing and improving such schools can produce academic benefits, as well as social and democratic benefits, as they prepare minority students to be productive members of our society and also the future leaders of their communities. n286

#### Race-based integration fails --- ensuring educational equality is necessary to solve

Robinson, 16 --- resident fellow in education policy studies at the American Enterprise Institute (6/8/16, Gerald, Washington Post.com, “The biggest threat to education today isn't school segregation; Color-coding classrooms won't ensure equality of opportunity,” Factiva, JMP)

Each week, In Theory takes on a big idea in the news and explores it from a range of perspectives. This week, we're talking about school desegregation. Need a primer? Catch up here.

Gerard Robinson is resident fellow in education policy studies at the American Enterprise Institute.

Diamonds are forever. Desegregation orders will be, too, if our end goal for Brown v. Board of Education and the Civil Rights Act of 1964 is merely to color-code American classrooms rather than to create equality of opportunity.

The latest case comes from the state of Mississippi. On May 13, to meet a desegregation order that began in the 1960s, a U.S. district judge ordered the state's Cleveland School District to consolidate its two middle and high schools beginning in the 2016-'17 school year. According to Judge Debra M. Brown, Cleveland's failure to consolidate its largely racially separate schools in the past had "deprived generations of students of the constitutionally guaranteed right to an integrated education." This is just one of hundreds of cases like it; the Justice Department currently has 177 open desegregation cases.

Enforcing desegregation orders is important because desegregation's effects on American schooling have been positive. For example, a 2015 report found that black children born between 1945 and 1968 who attended a desegregated school were more likely to complete college, more likely to earn a higher salary, less likely to be incarcerated and had better health than their peers.

Yet if this race-balancing philosophy is the guiding logic for desegregation cases moving forward, a recent Government Accountability Office report on racial and economic disparities in public schools shows that progress will be an uphill battle. According to the report, between 2000 and 2014, the percentage of public schools with 75 percent to 100 percent poor black or Hispanic students increased from 9 percent to 16 percent. To rectify discrimination in high-poverty, segregated schools, the Education Department and Justice Department have supported the continuation of desegregation orders.

The implementation of desegregation orders has had its share of unintended consequences. On May 4, Missouri resident La'Shieka White filed a lawsuit against the state's Voluntary Interdistrict Choice Corporation, a nonprofit responsible for the implementation of a metropolitan area desegregation program, because it denied her son, E.L. White, admission to a St. Louis public school in another district because he is black. If E.L. White was white, his fate may have been different. Why? Because VICC's black-white interdistrict transfer plan from St. Louis County to the City of St. Louis gives a preference to skin color as part of a desegregation remedy dating to the Liddell case of the 1970s.

But black families are not the only ones denied the right to transfer from one public school to another. On Aug. 31, 2015, a U.S. Court of Appeals for the 8th Circuit upheld a decision to block white families from transferring their children to a wealthier school district with better educational offerings because the transfer would upset the racial balance formula in a desegregation order from the 1970s. These examples illustrate the fact that over time, educating students wherever they live has often taken a backseat to a "desegregation by any means necessary" mantra.

So, where do we go from here?

Fixing the "school segregation problem" is a tough web to untangle. With the majority of our 50 million public school students coming from Hispanic, black, Asian and multi-racial households, it is unlikely that we will be fully able to integrate them with a shrinking pool of white students, many of whom are poor, too. But exceptions to the rule exist. For example, the Metropolitan Council for Economic Opportunity program, which began in 1966 as an outgrowth of a parent-led effort to address racial imbalance in public schools, has more than 3,300 Boston and Springfield students (the majority black and Hispanic) attending school in surrounding, mostly white suburbs each year.

However, the biggest threat facing education today is inequality of opportunity, not school segregation. Closing the opportunity gap requires, among other things, smart investments in technology to deliver cost-effective educational services to students in rural and city schools, and strategic partnerships with social entrepreneurs and nonprofit organizations with proven track records of success.

On the nonprofit side of the equation, the Algebra Project, founded by civil rights advocate Bob Moses, is one model to consider. The program develops math curriculum, trains teachers and provides professional development. According to a National Science Foundation funded evaluation, low-income black, Hispanic and other high school students in the program improved on-time graduation and mathematics proficiency between 2009 and 2013.

For social entrepreneurship, we could turn to One University Network and UniversityNow, founded by social entrepreneur Gene Wade, a participant in Boston's public school busing program in the 1970s. His company is using an innovative technology platform to deliver an affordable postsecondary education to students in the United States and abroad, one that we could adopt to better prepare our high school students for college.

Given that all students require academic competencies to flourish in our knowledge economy, it is these efforts to leverage innovative solutions and foster creative partnerships that should be the enduring legacy of Brown and the Civil Rights Act of 1964 — not perpetual desegregation plans that color-code classrooms.

#### Charter schools can be culturally affirming --- forced integration won’t overcome white privilege that is the basis for segregation

Gross, 2/8/17 --- writer for Latino Ed Beat (Natalie, “The Benefit of Racial Isolation; The charter schools praised by Education Secretary Betsy DeVos are notoriously segregated. In some cases, that’s a benefit,” <https://www.theatlantic.com/education/archive/2017/02/the-benefit-of-racial-isolation/516018/>, accessed on 5/27/17, JMP)

Kriste Dragon grew up in Atlanta, a mixed-race child in a segregated school system.

When it came time to find a school for her children in her new Hollywood, California, home, Dragon was hopeful that the neighborhood’s highly diverse demographics would be reflected in its schools. But instead, she found a low-performing school system that was as segregated as—or worse than—what she’d experienced growing up.

So Dragon, equipped with experience as a classroom teacher and as the executive director of Teach For America Los Angeles, set out to create her own school.

Now the CEO and co-founder of the “intentionally racially and socioeconomically diverse” Citizens of the World Charter Schools network, Dragon shared her story with reporters at a recent Education Writers Association seminar in Los Angeles. She joined a discussion on segregation and whether charter schools perpetuate the problem, as some critics have claimed.

One of those critics is Gary Orfield, the co-director of the Civil Rights Project/ Proyectos Derechos Civiles at UCLA, who joined Dragon on a panel along with Chris Stewart of the Chicago-based nonprofit Education Post.

In a 2016 Civil Rights Project research brief, “Brown at 62: School Segregation by Race, Poverty and State,” Orfield and his co-authors wrote that it has been a long time since the challenge of school segregation has been met with viable approaches to integrate schools by race, ethnicity, and income levels.

Instead, we have spent decades trying another approach: policies that have focused on attempting to equalize schools and opportunity through accountability and high-stakes testing policies, not to mention the federal subsidization of entirely new systems of school choice, like charter schools, without any civil-rights provisions. These policies have not succeeded in reducing racial segregation or inequality.

The project’s last national look at charter schools, in 2010, found that racial and ethnic isolation of minorities is far more common in charter schools than traditional public schools. Seventy percent of black students enrolled in charters attended schools deemed “intensely segregated.” (The report defines such segregation as occurring when at least 90 percent of students were minorities.) This level of segregation was twice as high as in traditional public schools, the report said. The same analysis also found that half of Latino charter school students attended “intensely segregated” schools. Critics say the national data in the report are misleading, since so many charters serve inner-city neighborhoods.

“I don’t think the effect of segregation is very much different between these two systems,” Orfield said of charters and traditional public school districts. “The problem is, these are new schools. We’re creating new segregated schools….In most of them, nobody’s doing anything to make them diverse.”

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But is racial isolation necessarily a bad thing?

Stewart, who also is a regular contributor to the Citizen Ed blog, described a “homegrown” charter system in his home state of Minnesota that’s divided by choice, where the top priority is educating students and meeting their needs in ways the school district has not.

“We have Somali schools, we have Hmong schools, we have schools for Native American kids,” Stewart said. “And those communities don’t really see their schools as segregated or as isolated, they see them as kind of culturally affirming environments for kids that they can’t get in a very white state like Minnesota.”

Stewart later added, “When the government assigns you by race to inferior schools, that is traditionally what we have considered to be segregation. When parents pick a culturally affirming program for their child and they are from a historically marginalized population like Indians or black people—I happen to be a black Indian—that is so far from the traditional understanding of segregation that it’s almost insulting to call it that.”

But while Orfield sees nothing wrong with a school of choice emphasizing and celebrating a culture, he said charter schools should not be designed to limit entry to students who are not of that race and culture.

“They have a right to have schools of their own on their reservation, on tribal lands,” he said of Native Americans. “They don’t have a right to have a school for just one race using public funds and public spaces. That’s against our Constitution. That’s what the [Brown v. Board] decision is about.”

\* \* \*

For her part, Dragon said “integration in and of itself will not solve anything,” and described integrated schools that look diverse on paper but operate on two separate tracks based on students’ race—one college-bound and the other not.

While her charter network is committed to matching the demographics of the neighborhoods that surround its schools, that’s not the same thing as integration, she said. Families who send their children to Citizens of the World charter schools are pursuing a diverse learning environment, and their buy-in makes a difference.

“There are a lot of things that need to be considered … because even with a genuine desire to bring families together, we’re still living in a country that has real income disparity and a long—I would say dark—history around race and race relations,” Dragon said. “Both of those things will be present in these integrated schools.”

Ultimately, Stewart said, “durable, enduring white privilege” is at the root of segregation, and he sees “no basis” for claims that charters drive or aggravate segregation in schools.

### Backlash Net Benefit

#### Desegregation creates a self-fulfilling prophecy --- the media and public lowers the reputation of desegregated schools and portrays them as incredibly dangerous which spurs white flight --- turning the case

Wells, et. al, 04 - Professor of Sociology and Education, Columbia Teacher's College

(October 2004, Amy Stuart Wells, Anita Tijerina Revilla – Assistant Professor of Women's Studies at UNLV, Jennifer Jellison Holme – Post-doctoral Fellow, Graduate School of Education and Information Studies at UCLA, and Awo Korantemaa Atanda – Senior Survey Specialist, Mathematica Policy Research, Inc., Virginia Law Review, “50 YEARS OF BROWN V. BOARD OF EDUCATION: ESSAY: THE SPACE BETWEEN SCHOOL DESEGREGATION COURT ORDERS AND OUTCOMES: THE STRUGGLE TO CHALLENGE WHITE PRIVILEGE,” 90 Va. L. Rev. 1721, Lexis-Nexis Academic, SR)

D. The Self-Fulfilling Prophecies of Becoming a "Bad" School: Challenge White Privilege and There Goes the School ...

Finally, one more finding related to the way in which the promise of Brown remained unfulfilled in the context of a highly unequal and stratified society is that the reputations of the six high schools we studied tended to rise and fall with the demographic changes of their student bodies. Echoing the rationales for closing black schools in the 1960s and early 1970s, we found that the public's perception of racially mixed schools tended to deteriorate as the racial makeup of those schools became predominately nonwhite and the enrollment of upper-middle-class students declined. This phenomenon was particularly marked for the two schools in our study that had shifted from majority white to majority nonwhite in the late 1970s: Muir High School and Dwight Morrow High School. Two additional schools from our study, West Charlotte High School and Shaker Heights High School, have faced the same issues more recently because they have become majority nonwhite schools in the last ten years. Austin High School, meanwhile, has managed to maintain its majority white student population, though barely. Topeka High School has been the most racially stable.

In this section, we will highlight the experiences of Muir and Dwight Morrow because the white flight from these schools peaked during the era we studied. We think the lessons learned from the experiences of these two schools have a general relevance because, according to our interviews, West Charlotte had similar experiences in the more recent past, and both Shaker Heights and Austin High School appear to be facing some of these issues today.

1. Increasing Racial Diversity, Declining Reputations

Both Muir and Dwight Morrow high schools had maintained reputations as "good" and even "elite" schools as recently as the early 1970s, before they began to lose their wealthiest white students. [\*1745] For instance, both of these schools were more than fifty percent white in the late 1960s, but they were rapidly losing their white populations by the late 1970s. **As the African-American and Latino populations began to increase in the two schools, people in the local communities began to question their quality.** Former educators and graduates of these schools talked about these changing public perceptions and said that their schools had been unfairly maligned by both the public and the media. Both educators and graduates firmly believed that the declining reputation of their schools had little to do with the quality of programs offered, since those had not changed, especially for students in the upper-level classes. For instance, Dwight Morrow High School shifted from a predominately white student population in the late 1960s to a predominately African-American student population by the late 1970s, and as wealthy white parents from both the city of Englewood and Englewood Cliffs began to pull their high school students out of Dwight Morrow, there was a real sense that the quality of the school was in decline, even before the teaching staff, course offerings, or Ivy League acceptances had changed. A former Dwight Morrow teacher observed, "as the population in the school changed, that's when the reputation began to change. As there was a change in the population then they said, "Oh the quality of education is not as good.'" A Dwight Morrow guidance counselor, when asked why this change in perception had occurred, noted:

I think a lot of it is just racism, I really do, because even - I mean I was in Teaneck High School in 1959 and Teaneck and Englewood and Hackensack had the only Black kids in the whole area, and you'd always hear something about Teaneck, Hackensack or Englewood. Now this is at a time when the schools were academically superior schools, so it wasn't like you could point [to]... the academic part. And I just think it snowballed until you had the white flight and there was always this perception.

John Muir High School in Pasadena suffered similar public perception problems as its African-American and Latino student populations increased. Muir had once been the crown jewel high school of the Pasadena school district, serving the children of wealthy white West Pasadena and La Canada families. After La Canada seceded from the district and built its own high school, [\*1746] **Muir lost a large number of white students, and at that point its reputation began to** decline. Many educators believed that this reputation was further hindered by the school's geographic location in the heart of what was becoming a heavily black area of Pasadena. As one former teacher explained:

Muir was known in the community as that school on that side of town. Strictly racial... At one point if you drew a line down the middle of this town... it was pretty much Black and White on either side. And in those days there weren't a lot of Latinos...So [Muir] was pretty much, you know, a ghetto school, if you will, - this was the mindset. There are people in this community that still think that way.

According to another teacher who taught at Muir in the late 1970s, there were a lot of rumors being passed around Pasadena about what a dangerous school Muir was. He recalled that people were saying, "This is a very dangerous place and people get knifed there all the time, they have shootings, they have this - that wasn't true. If that was true I would have transferred to another school. I mean, I'm not suicidal... And these stories just passed through the community."

The rumors and perceptions of these schools were far removed from the educators' and students' daily experiences. While many teachers and students blame racism for the misperception, our respondents were also quick to point out that the local media fed these misperceptions by consistently covering minor racial incidents at these schools. The media also ignored the positive things happening there, as well as the problems in the more predominantly white schools.

2. The Media and Public Perceptions of Racially Diverse Schools

In Englewood, most of the educators and Class of 1980 graduates that we interviewed spoke of the negative reporting by the local news outlets, particularly the local newspapers. As a white graduate noted:

I think it was more this notion that the media was making [Dwight Morrow] out to be a bad school, that it was a problem school, that it was a dangerous school, and I just felt that it was [\*1747] being portrayed inaccurately. While, I didn't deny that there were problems and there were squabbles here and there, I think they were minor and I think if it happened between two white people in an all-white school no one would have made a big deal about it. But because it happened between a black and a white person... people read a lot more into it... I think things were being portrayed inaccurately and the media was kind of fueling things, it wasn't giving the school a chance to really kind of show how good it was and that people really did get along.

A long-time African-American teacher at Dwight Morrow also found the news coverage inaccurate, which reported that girls were raped and guys carried knives at the school:

In the thirty years that I've been here I've never seen a guy carrying a knife or a gun. I mean, there have been idle threats, people have gotten beat up - that happens in any school - but to say that it was a place that was violent, it's not true at all.

A white teacher at Englewood noted that the local newspapers not only highlighted negative incidents in the community's schools, but downplayed anything positive that went on there:

I remember one year our math club won the state championship, and it was a paragraph on like page 28 of the [the local paper]. But on the front page... was, "Student At Dwight Morrow Brings Knife to School." And no one ever even acknowledged that this math club had won the state championship.

Similar frustration with the media was expressed by the educators and graduates of John Muir High School. They complained particularly about coverage from the local newspaper, which they believed favored the high school in the white area of town, Pasadena High School ("PHS"), over Muir. A black 1980 graduate of Muir, like many of his classmates, observed that Muir always got a "really bad rap" in the local paper. He argued that while his school received a lot of negative publicity, most people did not hear about anything bad that happened at PHS. A white graduate echoed these sentiments, noting that "Any-any-any negative publicity that they could scrape up from Muir, they would! And did!" Meanwhile the graduate's wife, also a Muir graduate, said, "if there was a [\*1748] fight at PHS, it was a small mention...You know, in the back of the paper. If it was a fight at Muir, it was front-page."

As an African-American former teacher noted, "I think Muir has always gotten a bad rap" because of where it is located or because it was more black and Latino than other schools. She told us that the reports of violence and other disturbances were wrong:

I was never afraid to work here... There were some experiences that maybe weren't so hot, like breaking up fights and making sure things did not happen, but those are normal things connected with education, but as far as it being the roughest and toughest, I don't think we had any more incidents than the other high school, it was just that Muir was always highlighted.

This teacher told us about a group of Muir teachers who went so far as to have meetings with the local newspaper staff to try to convince them to stop their negative reporting. The teachers were not successful.

3. Self-Fulfilling Prophecies Amid the Absence of White Privilege

Today, more than twenty years after the period we studied, our interview data suggest that perhaps both Dwight Morrow and John Muir have become more like the schools that newspapers were reporting them to be in the 1970s: troubled by gangs and concentrated poverty. Total enrollment in both schools is down, there are virtually no white students left, and the range of course offerings has dwindled, leading to a more watered down curriculum. Average test scores are also down, leaving both high schools ranked very low on their state assessments. n26

Perhaps these two high schools, along with predominantly black West Charlotte High School, stand as a testament to the old adage that "green follows white." One of the primary motivations behind pushing for desegregation was that schools with large percentages of white and wealthy students are more likely to have resources, the best teachers, and a more challenging curriculum. Either [\*1749] through parental donations or political clout, such schools usually secure sufficient resources to make their schools the very best. Once those white and affluent families left, over time, predominantly black and Latino schools too often came to resemble the poor reputations that preceded their decline.

The greatest irony we learn from studies such as ours is that from the perspective of African-American and Latino parents, students, and educators, it is hard to live with white privilege and hard to live without it. In other words, because white privilege pervades so many aspects of our society, schools with large numbers of white and affluent students are likely to be the most prestigious. When these schools also have significant numbers of black and Latino students in them, they are likely to be fairly segregated by classrooms, with white students comprising the majority of the students in the upper-level classes. At the same time, once the white students leave and upper-level classes become more integrated, the reputation and eventually the quality of the schools decline because the resources and status decrease.

Interestingly, the three schools from our study that have lost the majority of their white populations were the three schools most likely to challenge, albeit rather meekly, the automatic privilege of whites and the status quo within their schools. For instance, of the six schools that we studied, Muir and Dwight Morrow had moved further along the path towards instituting multicultural curriculum than the other four schools, and it was in Englewood and Charlotte that African-American parents and activists challenged the tracking system.

In the end, such challenges appear to be pyrrhic victories, as these three schools have lost not only their white students but also the prestige and status in their communities that they once enjoyed.

### AT: Desegregation Key to Equality

#### \*\*\*Note when prepping file --- there is other evidence in the case section that also substantiates the “segregation within schools” argument (Wells, et. al, 04)

#### Quantitative measures can’t ensure educational equality --- they don’t address unique challenges that minority students face --- including second generation segregation within schools

Nelson, 09 --- Assistant Professor of Law, University of South Carolina School of Law, J.D. from Harvard (January 2009, Eboni S., University of Miami Law Review, “Examining the Costs of Diversity,” 63 U. Miami L. Rev. 577, Lexis-Nexis Academic, JMP)

If we, as a society, are to fulfill our moral obligations to provide truly equal educational opportunities to all students regardless of race, we must immediately do three things: first, recognize the disconnect that [\*604] currently exists between the theory of racial diversity and the reality of educational equality; second, temper our reliance on race-based and race-neutral measures that are primarily designed to achieve quantitative goals of racial representation; and, third, develop and implement reforms that effectively address the qualitative educational challenges confronting many minority students.

6A. Dismantling the Diversity-Equality Disconnect

Today, many minority students must overcome great challenges to achieve academic success. Such challenges range from lack of guidance and encouragement regarding educational goals n151 to overcrowded classrooms, less qualified teachers, and lack of parental involvement. n152 Many minority students, whether educated in diverse or non-diverse environments, have low aspirations regarding their academic careers. n153 For those minority students who possess high aspirations, many are unaware [\*605] of the necessary steps they must take to achieve their goals. n154 In addition, many minority students must "confront peers who devalue education," which has the potential to negatively impact their academic achievement. n155 Traditional race-based admissions and assignment programs, which narrowly focus on quantitative measures of racial representation, n156 fail to adequately address these and other impediments to the provision of equal educational opportunities to minority students. n157 Despite this inadequacy, efforts to create and maintain racially diverse student bodies continue to be pursued. n158 Such pursuits demonstrate the disconnect currently existing between the theory of racial diversity and the reality of educational equality.

As facilitated by the Supreme Court's prior sanctioning of admissions and assignment measures that center on racial representation rather [\*606] than true racial equality, n159 the ideal of assembling a racially diverse student body has been mistakenly equated with the ultimate goal of ensuring equal educational opportunities for minority students. n160 This has resulted in the former often being thought of as both a prerequisite for and guarantor of the latter. n161 The employment of educational policies, such as tracking and magnet programs, in schools with racially diverse student bodies evidences the fallacy inherent in such beliefs. As the following discussion will show, simply because a school is diverse on its face does not mean that it is also diverse in practice or that it is providing equal educational opportunities to students of color. More than racial diversity is needed in these so-called "diverse learning environments" to ensure that the educational needs of all students are being met. n162

1. "tracking" toward inequities

Within racially diverse schools, students are often segregated by race due to the implementation of various instructional practices. Such intra-school separation is often referred to as "second-generation segregation." n163 As noted by Professor Roslyn Arlin Mickelson, schools began to employ practices such as "ability grouping, curricular tracking, special education, and gifted programs" in their efforts to subvert desegregation. n164 Although purported to achieve educational benefits by assigning students to "tracks or curriculum levels according to the school's assessment of each student's ability to learn," n165 such programs [\*607] were historically used to intentionally segregate black and white students, and they continue to have a segregative effect today. n166

Social-science research reveals that tracking and other similar measures often lead to a disproportionate number of minority and low-income students being "assigned to lower ability groups, non-college-bound tracks, and to special education programs." n167 Despite this detrimental outcome, the use of such practices is a widespread and common occurrence in our education system. n168 One need only look to the Seattle School District in Parents Involved to demonstrate the disparate impact of such policies.

Take, for instance, Garfield High School, one of Seattle's most sought-after high schools, n169 which also happens to be one of its most racially diverse. On its face, Garfield reflects the epitome of the integrationist ideal, so much so that it had been previously praised as "a model for integration success." n170 In 2000, the student population was "47 percent white, 35 percent black, 13 percent Asian, 4 percent Latino, and 1 percent Native American." n171 Despite this "achievement," it is very clear that most minority members of this diverse student body were not receiving equal educational opportunities. Consider the following statistics from the 1999-2000 school year:

[Seventy-three] percent of students in the advanced classes at Garfield [were] white, while 19 percent [were] Asian and only 4 percent [were] black (Latinos and Native Americans together make up 4 percent of Advanced Placement classes). On the other end of the scale, 62 percent of all African American students at the school [were] on [\*608] the "D and E list" (which is, itself, made up of mostly black students), meaning they [were] in danger of flunking out. n172

Whether facilitated through tracking, ability grouping or some other segregative practice, n173 the vast majority of students of color in many Seattle schools are not afforded access to equal educational opportunities, despite their "inclusion" in a racially diverse student body. A recently issued report concerning the Seattle Public Schools' Accelerated Progress Program confirms this disturbing reality. n174

The report, issued in 2007 by an outside review panel, detailed significant racial and socioeconomic gaps in the number of students participating in the program. Of the 1300 students involved in the program, seventy percent of them are white, even though white students make up only forty percent of the overall student population. n175 In addition, "only 5 percent of students in the Accelerated program are eligible for free or reduced lunch, while nearly 40 percent of the overall district student body qualifies [for such assistance]." n176 Not only are students of color underrepresented in the program, but some of those who do participate in the program report being subjected to racist comments from teachers and others involved in the program. n177

As admitted by parents and school and district administrators, many minority students in Seattle are not being provided equal educational opportunities. n178 In the case of Garfield, "the school is so focused on ... kids who have the greatest potential to go on to college" that it, in large part, neglects the academic needs of many minority students. n179 Sadly, [\*609] this is the reality in many school districts throughout the country - one that cannot be altered simply by creating and maintaining racially diverse student bodies.

As we have seen, even if a school is racially balanced, measures such as tracking operate "to ensure that white educational privileges remain largely intact." n180 As noted by Judge Carter,

Even ostensibly integrated schools channel their resources into predominantly white "honors" classes, while blacks are tracked into unchallenging lower level programs. Black children are more likely to be placed into low ability or special education classes early on in their education. These decisions essentially seal the fate of many black children for a lifetime. n181

This had led many to conclude, as did the Charlotte-Mecklenburg associate superintendent, that our schools "don't teach black children." n182 If we are to remedy this dire circumstance, we must recognize and reject the fallacy inherent in the belief that racial diversity alone will result in educational equality for minority students. As demonstrated by tracking and as further confirmed by school's reliance on magnet programs to achieve diverse student bodies, it simply will not.

2. exposing the magnet program mirage

The disconnect between the theory of racial diversity and the reality of educational opportunity also manifests itself when school officials attempt to use race-neutral measures such as magnet schools and programs n183 to diversify their student bodies. Originally created to promote integration and diversity, n184 such programs seek to attract white, middle- [\*610] and upper-class students to otherwise high-minority, low-income schools. n185 They do so by offering specialized and thematic academic courses of study. n186 Like busing, such programs have increased the levels of racial and economic diversity at several schools throughout the country. n187 However, the aesthetically pleasing student body often masks the racial inequities that persist in such "diverse" learning environments.

In reality, the classrooms in which students are educated are often not racially diverse at all. n188 Many students who participate in magnet programs are white, middle-and high-class imports from neighboring suburbs, n189 thereby facilitating the creation of a "school within a [\*611] school," which is similar to the educational disparities precipitated by practices such as tracking and ability grouping. While the white students flourish within the hallowed walls of the magnet program, many of their black and brown counterparts are consigned to overcrowded classrooms where they are taught by lesser-qualified teachers. n190

Not only are magnet-program students afforded better teachers, but they also receive greater educational resources, such as money for equipment and supplies. As noted by Richard Kahlenberg, "On average, magnet schools spend 10-12 percent more for each pupil than other schools, and some magnets spend as much as double the average amount." n191 In schools where the majority of participants in the magnet program are white students, such expenditures only exacerbate the educational inequities that hinder many disadvantaged, minority students' academic success.

Magnet schools were created with the sole purpose of racial representation and balance. n192 While they may be effective in achieving this narrow goal, n193 they perpetuate unequal education by draining resources that could be used to improve the quality of education provided in racially concentrated schools. n194 Yes, the student body within a magnet school may be diverse; however, the educational opportunities within the school are often not equal. While school officials concentrate efforts and resources in the magnet program, minority children continue to be afforded a substandard education. n195

Such segregated "diverse" learning environments also harm minority students by placing on them a badge of inferiority that Brown and its [\*612] progeny were intended to remove. n196 By using admissions criteria, testing, and tracking to separate minority students from the often white participants in the magnet program, schools "suggest to white and minority students alike that the separation of races is an indication of superior white ability, social importance, or academic potential." n197 If an asserted social benefit underlying the diversity rationale is the correction or elimination of such views, n198 one must question whether using race-neutral measures such as magnet programs to achieve diverse student bodies may actually foster such views rather than reduce them.

#### Equating diversity with equality undermines the attainment of educational equality --- the CP avoids this pitfall

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As the next Part will illustrate, the Supreme Court has a long history of embracing the diversity rationale. Unfortunately, by sanctioning measures that primarily centered on racial representation rather than equal educational opportunities, the Court also encouraged the creation of the disconnect that currently exists between the quantitative theory of racial diversity and the qualitative reality of educational equality.

II. Tracing the Historical Roots of the Diversity Rationale

Although often considered to have first appeared in Justice Powell's opinion in Bakke, n78 the roots of the diversity rationale can be traced back nearly sixty years to the Court's desegregation and integration [\*593] jurisprudence. The Court's recognition of the democratic, social, and educational benefits of racially inclusive learning environments is evident in pre-Brown cases such as Sweatt v. Painter n79 and McLaurin v. Oklahoma State Regents for Higher Education. n80 The Court continued to rely on the benefits of racial inclusion as it sanctioned and promoted integrationist ideals in cases such as Brown and Swann v. Charlotte-Mecklenburg Board of Education. n81 It is upon this foundation that Justice Powell pronounced the constitutional justification now commonly referred to as the "diversity rationale." n82 The rationale was embraced by the Court in subsequent affirmative-action cases n83 and most recently invoked by justices in Parents Involved. n84 These cases not only evidence the evolution of the diversity rationale but also reveal the sowing of seeds that would eventually germinate into the diversity-equality disconnect that currently stifles the attainment of true educational equality for minority students.

A. Diversity's Democratic and Social Missions as Evidenced Pre-Brown

In cases such as Sweatt and McLaurin, which are often considered precursors to the Brown decision, n85 we see the Court's allusion to the democratic and social benefits flowing from a racially diverse student body. In Sweatt, the Court was asked to determine whether the University of Texas Law School (Law School) violated Sweatt's equal protection rights by rejecting his law-school application solely on the basis of his race. n86 The State contended that it had complied with Plessy v. Ferguson n87 by providing "substantially equal facilities" to Sweatt and other members of the black community by authorizing "the opening of a law [\*594] school for Negroes." n88 The Court rejected the State's contention and, in so doing, acknowledged the democratic significance of affording every citizen, regardless of race, the opportunity to attend those educational institutions that serve as entryways into American society. n89

In characterizing the superiority of the Law School, the Court did not confine its analysis to obvious and objectively measureable attributes such as the number of faculty members, curricular and extracurricular offerings, and breadth of library resources. n90 It also highlighted the Law School's intangible qualities such as "position and influence of the alumni, standing in the community, traditions and prestige," finding them to be of significant import in establishing the greatness of the Law School. n91 In acknowledging these features, the Court recognized that the goals of higher education are not confined to academic instruction.

The Court noted that, as "one of the nation's ranking law schools," the Law School provides its graduates access to "the most distinguished positions ... in the public life of the State." n92 For this reason, it was imperative and constitutionally mandated that the petitioner have the opportunity to obtain such access. Without it, certain segments of our society would remain closed to Heman Sweatt and countless other minority persons, which does not comport with the egalitarian values that are supposed to define us as a nation.

In finding that the Equal Protection Clause required Sweatt's admittance into the Law School, n93 the Court embraced the social and democratic benefits of racial integration and "acknowledged the value of integration in educational terms." n94 As recognized by the Court, the educational resources available in institutions of higher education extend well beyond books, professors, and facilities. They also encompass intangibles such as networking, leadership, and socialization opportunities. This notion that educational institutions provide more than academic knowledge becomes central to the diversity rationale. n95

On the same day as the Sweatt decision, the Court issued another opinion in which it also embraced the social benefits undergirding the diversity rationale. In McLaurin, a black doctoral student challenged the University of Oklahoma's segregated educational practices. n96 The appalling [\*595] features of the practices warrant an exact description as set forth by the Court:

He was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table and to eat at a different time from the other students in the school cafeteria ... .

... .

In the interval between the decision of the court below and the hearing in this Court, the treatment afforded appellant was altered. For some time, the section of the classroom in which appellant sat was surrounded by a rail on which there was a sign stating, "Reserved For Colored," but these have been removed. He is now assigned to a seat in the classroom in a row specified for colored students; he is assigned to a table in the library on the main floor; and he is permitted to eat at the same time in the cafeteria as other students, although here again he is assigned to a special table. n97

In finding such abominable practices unconstitutional, n98 the Court articulated and embraced the social and civic benefits commonly associated with racially inclusive learning environments - the opportunity to interact with and learn from students of different cultures and backgrounds. n99 As previously discussed, supporters of race-based government decision-making often rely on the positive social outcomes resulting from interracial interactions to justify the consideration of race in admissions and assignment decisions. n100 The Court in McLaurin specifically acknowledged these outcomes when it referred to the abatement of "individual and group predilections, prejudices and choices." n101

However, as the Court mentioned (and scholars and researchers have noted), voluntary separation and isolation may take place on school campuses such that essentially no interracial interaction takes place and no social benefits are realized. n102 While it is true that individuals may [\*596] very well erect barriers that preclude potentially beneficial interracial contact, McLaurin, in its recognition of the societal benefits of diversity, forbids the State from doing so. n103

B. Integration To Achieve Diversity's Democratic and Educational Goals

After acknowledging the democratic and civic benefits of racial diversity in the context of higher education, the Supreme Court began to champion these benefits in the context of elementary and secondary education. In Brown, the Court specifically referenced the democratic and social benefits of racially diverse learning environments as recognized in Sweatt and McLaurin and concluded that "such considerations apply with added force to children in grade and high schools." n104 The Court discussed the civic role of education in "awakening the child to cultural values" and acknowledged education as "the very foundation of good citizenship." n105 It also observed the detrimental effects the denial of educational opportunities can have on a child and concluded that the state has the responsibility of providing equal educational opportunities to all students, regardless of race. n106

In holding that "separate educational facilities are inherently unequal," n107 the Court did not rely on the tangible features of the schools in question. In fact, it remarked that the lower courts had found that the black and white schools either had been equalized or were in the process of being equalized. n108 Instead, the Court based its decision on the intangible [\*597] benefits associated with racially integrated learning environments.

The social benefits that serve as a basis for the diversity rationale are evident in the Court's discussion of the harms associated with legally sanctioned segregation. n109 The Court recognized that integrating the school system, thereby allowing students of different races to learn and play together, would be instrumental in eradicating the feelings of white superiority and black inferiority that state-imposed segregation had previously denoted. The Court also concerned itself with the academic benefits of diversity by noting the detrimental effects segregation can have on black students' motivation to learn and educational development. n110 By granting black students access to schools that had been previously closed to them, the hope was that they would experience not only increased academic achievement but also greater social and democratic benefits that are thought to accompany diverse educational environments. n111

As evident in its desegregation jurisprudence, the Court continued to adhere to this "minority access" model of integration n112 in its attempt to provide equal educational opportunities for minority students. In so doing, however, it unfortunately laid the groundwork that has led to the present disconnect between racial diversity and educational equality, which mistakenly equates quantitative racial representation and the provision of equal educational opportunities. n113

Following Brown, the Court's "desegregative" remedies, in large part, centered on implementing integrative measures to eliminate racially segregated schools. n114 Take, for instance, the Court's decision in Swann v. Charlotte-Mecklenburg Board of Education. In this case, the Court furthered the social goals of diversity and integration by approving the school district's civic mission to "prepare students to live in a pluralistic society." n115

However, the Court also embraced racial balance as the means by which to achieve this goal. n116 By endorsing integrative measures such as [\*598] busing, n117 without requiring additional remedial measures, such as facility, teacher quality, and curricular equalization, to improve the quality of education afforded to black students, n118 the Court facilitated the emergence of educational policies that mistakenly rely on racial ratios and minority representation as the primary means to achieve educational equality. n119 School officials that employ such policies often concentrate on the racial makeup of their institutions while neglecting the broader unequal educational opportunities being provided to minority students. n120 One such educational policy is the use of racial preferences in higher-education admissions.

#### Forced integration disrupts students’ education --- other factors ensure that defacto segregation will endure regardless of the plan

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I was a white 5-year old when the Supreme Court handed down its landmark 1954 decision, Brown v. Board of Education, declaring that separate schools for black and white Americans were unconstitutional. Last week, a federal court ordered the school system that my two African-American grandsons attend to desegregate.

Our three-generation family is a microcosm of the topsy-turvy history of race in American schools. A federal policy that has not worked is being forced on my grandkids. I, a white liberal from the North, once favored it. They, black students at a Mississippi public high school now don’t.

They’re two exceptionally talented young men, the oldest children of my son – who, during a two-year tour of duty with Teach for America in the Mississippi Delta, married a brilliant black woman.

One is class president. Both play on sports teams. When they showed me pictures of the teams, I see them flanked by kids of all skin colors smiling, their arms around each others’ shoulders.

Their school, Cleveland High School, is fairly evenly split between black and white. The other high school in town, East Side High School, is almost 100 percent black, which I assumed was the cause of the court order. As I understand it, the federal court wants their city – Cleveland, Miss. – to merge or mix the two schools so that they both have a statistically similar multiracial student body.

During a recent visit, I learned that my grandsons like their school and they don’t want it to be forced to merge with another school. They fear that the Civil Rights Division of the Department of Justice will disrupt their education and achieve nothing except more bureaucracy and years of chaos. When I asked them about the view of others, they said that their friends, both white and black, were opposed to the court’s interference.

Still not convinced, I inquired further and learned that they and their fellow students are free to choose between either high school. For some, the all-black school is the more compelling choice; it has higher test scores in some key subject areas than does the integrated school my grandsons attend.

After my visit with my grandkids, I remained puzzled. So I sought one one of the most highly respected scholars who has spent his professional life studying this issue: Gary Orfield, co-director of the Civil Rights Project at the University of California, Los Angeles, and a distinguished professor of Education, Law, Political Science, and Urban Planning.

As Professor Orfield explained it, the southern states had laws and regulations, sanctioned by their state or local governments, which officially ordered the schools to be racially segregated. That was how the Supreme Court defined the problem: government-mandated racial segregation.

In most of the North, however, the segregation was often not officially mandated. It was de facto segregation, the product of social and economic exclusion. So, from the Supreme Court’s perspective, communities in North just “happened” to be divided. In the South, it was on purpose.

According to Orfield, many schools across the north — from New York to Illinois to California — are overwhelmingly segregated, yet there are not being subjected to court orders mandating that they change. As a citizen as well as a grandfather, I wanted to know: was the Department of Justice unfairly picking on this Mississippi Delta town — and if so, why?

Then I remembered a clue from my own past. I had first experienced the paradox of desegregation in 1994. At that time, I was leading a community action project of the Rockefeller Foundation which took me on a fact-finding trip to the city on which the Supreme Court’s Brown vs Board of Education ruling was based: Topeka, Kan. During the four decades since the highest court in the land had specifically instructed that city to desegregate its schools, segregation had gotten worse, not better. The policy had failed.

When I interviewed various officials in Topeka — the mayor, the head of the NAACP, local businessmen and real estate officials — they all pointed to the same set of variables: employment, income inequality, the economics of housing, formal and informal exclusionary real estate practices, etc. Together, these factors ensured that, no matter what the Supreme Court decided, the city of Topeka grew over those forty years along racial lines. So even though the city was officially desegregating, it was unofficially segregating.

What I could not understand was why this failed policy was now being imposed on my grandsons’ school. Even though I have always worked for social justice and believed strongly in equality in education, the heavy-handed and rigid intrusion by the federal government into Cleveland, Miss.,in 2016 now makes no sense to me. Even my African-American grandsons, the supposed beneficiaries of such intrusion, don’t want it.

As Professor Orfield points out, what is needed to achieve equality in education today is adequate funding and support for a new coalition of local officials in education and housing and employment. This multi-pronged approach would also take into consideration the simple fact that more than 25 percent of the children in America’s public schools are neither black nor white, but Latino and a Technicolor range of ethnicities from all over the world.

So for the sake of my grandkids, and all school children in America, let’s wake up from our trance. We are not less segregated now in America; in many places, we are more segregated.

It is time to let go of conventional liberal and conservative positions that are, frankly, obsolete. If we want equal educational opportunity, let’s stop trying to enforce sixty-year-old, one-dimensional policies that don’t work and start designing, systemic 21st century strategies that do.

### AT: Desegregation = Cross Cultural Understanding

#### Desegregated schools are de facto assimilationist institutions --- colorblind curriculum ensures that race is not discussed in a way to further cross-cultural understanding

Wells, et. al, 04 - Professor of Sociology and Education, Columbia Teacher's College

(October 2004, Amy Stuart Wells, Anita Tijerina Revilla – Assistant Professor of Women's Studies at UNLV, Jennifer Jellison Holme – Post-doctoral Fellow, Graduate School of Education and Information Studies at UCLA, and Awo Korantemaa Atanda – Senior Survey Specialist, Mathematica Policy Research, Inc., Virginia Law Review, “50 YEARS OF BROWN V. BOARD OF EDUCATION: ESSAY: THE SPACE BETWEEN SCHOOL DESEGREGATION COURT ORDERS AND OUTCOMES: THE STRUGGLE TO CHALLENGE WHITE PRIVILEGE,” 90 Va. L. Rev. 1721, Lexis-Nexis Academic, SR)

C. Colorblind Curriculum for Colorblind Schools: We Do Not Talk About Race Here

Students of color were further marginalized within desegregated schools by a commonly held belief that race did not matter and that the goal of desegregation was to create a "colorblind" society. n21 This ideology was promoted in at least two ways. First, the late 1970s curriculum in the schools we studied endorsed a white, Eurocentric view of the world, very close to the same curriculum that had been taught for years in these schools when all but West Charlotte High School had been predominantly white.

[\*1739] Second, neither the students nor the educators in these schools talked about race or racial issues in their efforts to work with one another on school activities or in less formal social interactions. The absence of discussions of race meant that students and educators could not learn from one another's experiences in confronting and resolving racial concerns. The ability to learn from one another would have been particularly useful given that many educators and students were working and learning with people of different racial backgrounds for the first time. Thus, while cross-racial tensions, concerns, and discoveries were occurring all the time, no one was talking about them. Beyond what was going on in the schools, the broader issues of racial inequality and injustice that were (and are) rampant in these local communities were not part of what students were grappling with during school hours. Discussions of such racial conditions might have helped to build important bridges across groups of students who were not only different in terms of their racial and ethnic backgrounds, but in terms of their social classes as well.

The lack of a dialogue about race combined with the maintenance of a "traditional" Eurocentric curriculum became a de facto assimilationist project. Students of color were required to "fit" into the norms of the schools, including rules and understandings about what was right, smart, and appropriate. n22 Many African-American and Latino students were left to feel that the teachers did not value their input or perspective. When values, racial norms, knowledge, and history go unchallenged, so does the privilege of one racial or ethnic group over another. n23

[\*1740]

1. Curriculum - Rarely a Multicultural Moment

One of the more surprising findings from this study was just how little the curriculum in the racially mixed schools we studied had changed during the 1970s, considering that the racial makeup of the students had changed a great deal. For the most part, the schools offered a white, Eurocentric perspective on the world. When changes were made to the curriculum, they were usually marginal changes, such as the addition of electives or a special assembly, in reaction to racial unrest or specific demands by students of color. Even in Topeka, Kansas, a city at the heart of the Brown v. Board of Education case, 1980 graduates do not recall learning much about race or racial inequality in school. One Topeka High graduate who is now a lawyer noted that she had no idea how important the Brown decision and the Topeka-based case were until she went to law school many years later.

At Muir High School in Pasadena, the graduates and educators reported that for the most part, the curriculum did not reflect a diversity of perspectives. The lack of diversity was the result of several factors, including the fact that teachers at Muir had a great deal of autonomy in their classrooms and there was no systematic effort at Muir to expand the core curriculum in the 1970s to include nonwhite authors. Students' exposure to a more multicultural curriculum was entirely dependent upon the individual teachers and student experiences were thus not consistent. While a few teachers made a concerted effort to include nonwhite authors and perspectives, the vast majority of teachers were far more traditional. As one former counselor at Muir said, "as far as the teaching goes, [desegregation] didn't really start to affect the canon until about the mid-1980s, so we were still teaching the Dead White Man for a long, long time."

The absence of overt discussions of race in the curriculum profoundly affected many of the graduates of color we interviewed, particularly those who had been taught different lessons in their homes and communities. For instance, one African-American 1980 graduate of Austin High School spoke about the difficulties he had accepting and relating to his high school history teacher: "He was a good teacher, it's just that I didn't believe in what they was teaching. Cause everything was white...and I used to get so tired and frustrated...sitting and listening what all these great white people [\*1741] [had done]." The lack of diversity in the curriculum contributed to the distrust that many students of color felt toward their white teachers.

When the teachers did stray from their Eurocentric base to add something more multicultural, they were often in uncharted territory, which tended to leave them less certain about how to present and teach the material. A good example of the difficulties many teachers had in presenting multicultural materials was conveyed to us by an African-American graduate of Dwight Morrow High School in Englewood. The graduate recalled the time her white English teacher required them to read The Bluest Eye by Toni Morrison, n24 a story about a black girl who wants blue eyes. In the story, someone tells the girl that if she killed a dog, she would be given blue eyes, and the girl consequently kills the dog. The graduate recalled:

And so, you know, I raised my hand and I said, well, you know, when she killed the dog she kind of killed her own beliefs in everything that was ugly about herself and dah, dah, dah. [The teacher said] "No, I think you're reading it too deeply'... you know, I mean, and that was the type of reactions that I would get out of this woman.

This particular graduate's mother had demanded that the school place her daughter in the advanced classes after the student had been placed in regular classes despite her high grades. Thus, this graduate was often one of a very few African-American students in advanced classes. Through her experience in these classes, she quickly learned that race was a taboo subject, even though so much of her daily experience was grounded in race.

2. Shhhhh - Don't Talk About Race!

Educators in the schools we studied were often bent on not talking about race, either within their classrooms or as part of the extra-curricular activities they were sponsoring. There were different reasons given for this lack of discussion about race. For some interviewees, it seemed as though talking about or acknowledging race was bad in that it was un-American or racist. A former West [\*1742] Charlotte teacher, a white woman, exemplified this: "It just seemed like color didn't seem to make a difference to anyone. We just, again, viewed people as people. Not emphasizing, I guess would be the fact... I mean, we emphasized the fact that we were not emphasizing color of skin."

A white graduate of West Charlotte echoed the thoughts of this teacher and many others whites interviewed for this study: "At West Charlotte we focused on how we were alike...That is one of the reasons we didn't focus on cultural diversity." What is most interesting about this insistence on "sameness" is that it was often discussed by the same people who, in other parts of their interviews, focused on how much they learned about people from different backgrounds by attending racially diverse schools.

The lack of discussion about race was also due in part to a desire to avoid racial conflict. In some schools, most notably Topeka High School, Austin High School, and West Charlotte High School, there had been a great deal of racial tension and black-white fighting in the early and mid-1970s. In our interviews, nearly every student and educator we interviewed from these schools talked about the racial turmoil that preceded the Class of 1980's arrival. School-level administrators and teachers were determined to keep things calm. The idea of opening up issues of race or working through racial differences with students was therefore not particularly inviting.

A white English teacher from Austin High School explained that by the late 1970s and 1980s, the initial controversies and racial animosities had quieted down and no one wanted to stir the water. She recalled that when African-American students first came to Austin High School in the early 1970s after the old Anderson High School was closed, they were extremely unhappy because many of them had been highly involved in Anderson high school and in charge of extracurricular activities. When they came to Austin High School, those clubs and offices were already filled. The teacher noted, however, that by 1980, "everything was all over, anything controversial or any unhappiness, you know, that was all settled, and we were settled in as a school." Interviews with the Austin High School graduates of color present different views on this issue, but the point is that from the perspective of the educators, [\*1743] there were no racial problems, and thus there was no need to deal with racial issues.

While many white educators denied that race was an issue, some of the same people, along with many other interviewees, particularly people of color, also talked a great deal about just how salient race was in their day-to-day experiences in these schools. For instance, as we noted above, race clearly seemed to matter in terms of who ended up in which classes. Furthermore, in two of the schools we studied, Topeka and West Charlotte, there were fairly strict quotas regarding the racial make-up of popular student awards and offices, such as homecoming courts, student government, and cheerleading squads. There was an awareness of such quotas, which in many instances benefited white students more than black or Latino students, and an acknowledgment of their impact on students' experiences in high school. As one white West Charlotte graduate noted, although there were no explicit discussions of race in her high school in the late 1970s, issues of race were everywhere. When asked whether or not race was discussed in school, she replied:

"Discussed," like...like we discuss things now?... No, there were no discussions of that. But, but was it a known fact that we had three white candidates, three black candidates, and three at-large [for student government elections]? Yeah! And - I don't even remember the ballot, but the ballot probably said it! I mean, you know, I-I don't know. But did we sit around and have round tables about... how to be better people and like each other and live together in harmony and all that stuff? No! No. But were there white kids in the Gospel Choir? Yes!.. And we'd have, you know, the black guys come to the Choir with cornrows, and [the African-American choir teacher] would tell them... "get rid of those cornrows, you know? Just because you're a black boy - don't be wearing those cornrows." So... was there a discussion? No. But was race everywhere? Yeah!

Thus, while race was not regularly discussed in these schools, it was lived in a very real and intuitive sort of way. With no forum or dialogue in which to make better sense of the racial differences they experienced every day, many of these graduates walked away from high school with fairly superficial understandings of race and [\*1744] its role in American society, understandings which would not lead one to challenge the racial status quo. n25

### AT: Desegregation = Social, Democratic & Academic Benefits

#### Integration is not enough to achieve social, democratic, and academic benefits

Nelson, 09 --- Assistant Professor of Law, University of South Carolina School of Law, J.D. from Harvard (January 2009, Eboni S., University of Miami Law Review, “Examining the Costs of Diversity,” 63 U. Miami L. Rev. 577, Lexis-Nexis Academic, JMP)

D. Coming Full Circle in Parents Involved

In Parents Involved, we see the latest iteration of school officials' employment of the diversity rationale to create and maintain racially diverse student bodies by providing minority students access to educational institutions. n129 To achieve the educational benefits of diversity in elementary and secondary schools, the school districts in Seattle and Louisville employed racial tiebreakers and guidelines when making their student-assignment decisions. n130 Although the plurality found that the plans were not narrowly tailored and, thus, did not directly address the constitutionality of the school districts' goals, n131 Justice Kennedy as well as the four dissenting justices found that the goals of the plans were constitutionally permissible. n132

[\*601] In his dissenting opinion, Justice Breyer included a lengthy discussion of the multifaceted compelling interest in achieving the social, democratic, and academic benefits associated with racially diverse schools. He cited the increases in students' academic performance and in their interracial friendliness and understanding. n133 He also noted the importance of instilling the civic values that define our democracy into the hearts and minds of children. n134 While the pursuit of these benefits is indeed laudable and worthwhile, one must question whether merely providing minority students access to certain educational institutions is enough to ensure that these benefits will be realized and that students of color will be provided equal educational opportunities once they have been admitted.

Relying on the precedents as established in Swann and Grutter, the school districts in Parents Involved used race-based measures to attain minority representation in their student bodies. n135 Underlying the use of such measures was the belief that such representation would produce the desired educational benefits. n136 However, as noted by Justice Thomas in his concurring opinion, "simply putting students together under the same roof does not necessarily mean that the students will learn together or even interact." n137 As further contended by scholars, such as Derrick Bell, racial diversity and integration do not guarantee educational equality for minority students. n138 Despite this reality, many school officials, activists, and scholars continue to advocate for the employment of race- [\*602] based and race-conscious educational policies in the relentless pursuit of racial diversity, even if such a pursuit proves harmful to the very students they are trying to benefit. n139

#### Integration is not key to boosting minority student academic achievement --- can even be harmful

Nelson, 09 --- Assistant Professor of Law, University of South Carolina School of Law, J.D. from Harvard (January 2009, Eboni S., University of Miami Law Review, “Examining the Costs of Diversity,” 63 U. Miami L. Rev. 577, Lexis-Nexis Academic, JMP)

I. The Three Facets of Diversity Benefits

Central to an educational institution's employment of the diversity rationale is its attempt to obtain the benefits that are often associated with racially diverse student bodies. n44 Although often collectively referred to as "educational benefits," n45 the benefits schools hope to produce can be divided into three distinct types: social, democratic, and educational. n46

[\*587]

A. Social Benefits of Racial Diversity

The reputed social or civic benefits of racial diversity generally concern the interaction between members of different races and the positive outcomes that result from such interaction. Referring to the "contact hypothesis," n47 many academics and social-science researchers have concluded that levels of racial prejudice and stereotypes can be significantly reduced through interracial and intergroup contact. n48 Studies show that students who learn in racially diverse environments harbor fewer feelings of intergroup hostility, distrust, and fear. n49 From opportunities to interact with members of racial groups other than their own, these students are more likely to form friendships across racial lines n50 and to [\*588] develop cross-racial understanding. n51 According to the perpetuation theory, only when students are afforded such opportunities in "sustained desegregated [environments] will they lead more integrated lives as adults." n52 It is often asserted, therefore, that students educated in racially diverse learning environments are better equipped to successfully function as citizens "in our pluralistic society." n53

B. Democratic Benefits of Racial Diversity

Closely related to these civic goals are the democratic benefits associated with the diversity rationale. Educational institutions that use race-based decision-making to assemble a diverse student body embrace their charge of imparting not only knowledge to their students but also the democratic values and ideals that serve as the foundation of our society. n54 Inherent in these values and ideals is the inclusion of every racial group in all aspects of our society, particularly those that serve as gateways to fulfillment of America's democratic promise of "Life, Liberty [\*589] and the pursuit of Happiness." n55 Although Congress and the Supreme Court have previously recognized other institutions, such as representative government n56 and marriage, n57 as embodiments of this promise, there is, arguably, none more vital to the attainment of democratic citizenship than the institution of public education. n58

As consistently acknowledged by the Supreme Court, public education serves a pivotal role in instilling and preserving the cultural and civic values that define our society. n59 As aptly recognized by Chief Justice Earl Warren over fifty years ago:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities ... . It is the very foundation of good citizenship. n60

For many, the historical exclusion of racial minorities from educational institutions necessitates race-based decision-making in efforts to provide minority students access to previously denied opportunities. n61 [\*590] However, as recognized by Professor Lani Guinier, "racial diversity extends beyond the classroom to include the fundamental role of public education in a democracy." n62 By seeking to accomplish "the broad democratic goal of providing upward mobility to a diverse cadre of future leaders," n63 school administrators who employ the diversity rationale legitimize such persons by training and educating them in an environment that reflects the racial diversity of our society. n64

C. Educational Benefits of Racial Diversity

The final facet of diversity benefits concerns the positive academic outcomes experienced by students attending racially diverse schools. n65 Educational institutions that employ racial preferences to create and maintain racially diverse student bodies often rely on the extensive body of social-science research that has found a correlation between diversity and minority students' academic achievement to support their efforts. n66 Researchers such as Dr. Gary Orfield have concluded that minority students who are educated in racially diverse learning environments experience [\*591] increased levels of academic achievement, as commonly measured by test scores. n67

They also credit racially inclusive learning environments with improving students' critical-thinking skills. n68 Similar to the social benefits produced in integrated settings, the opportunity to interact with students of different ethnic and racial backgrounds results in exposure to "different cultural knowledge and social perspectives." n69 Students experiencing such interactions are more likely to engage in complex thinking as they process new information and cross-racial understandings. n70

One can also look to the higher levels of educational attainment achieved by students of color who attend racially integrated schools to demonstrate the academic benefits of racial diversity. For example, as compared to their counterparts who attend racially concentrated schools, students of color who attend racially diverse schools have higher high-school-graduation rates, n71 higher rates of college attendance, n72 and higher college-graduation rates. n73 Proponents of diversity and integration also assert that racially diverse schools provide minority students access to intangible educational benefits ranging from scholarship and job information to new and more beneficial social networks and opportunities. n74

Producing these educational benefits, as well as the social and democratic benefits discussed above, serves as the rationale for educational institutions' use of race-based measures to achieve diverse student bodies. While important and worthwhile, these benefits have not resulted in closing the achievement gap between white and minority students n75 or [\*592] ensuring educational equality for minority students. Even proponents of diversity admit that the effect on minority students' academic achievement is "modest" at best. n76 Other researchers have concluded that diversity efforts may actually harm minority students rather than benefit them. n77 In light of the potential negative impact of diverse student bodies on minority students, it is vital that we question school officials' reliance on the diversity rationale to create such environments.

#### Integration has not ensured equal educational opportunities for most minority students – hasn’t resolved the achievement gap

Nelson, 09 --- Assistant Professor of Law, University of South Carolina School of Law, J.D. from Harvard (January 2009, Eboni S., University of Miami Law Review, “Examining the Costs of Diversity,” 63 U. Miami L. Rev. 577, Lexis-Nexis Academic, JMP)

III. Assessing the Harmful Effects of Equating Diversity with Educational Equality

In both the K-12 and higher-education contexts, adherence to racial preferences in order to achieve diversity goals represents the status quo when it comes to providing educational opportunities to minority students - a status quo that has relied upon racial integration and minority representation to fulfill the promise of Brown. While such reliance has indeed provided educational access for many minority students, n140 it has not been tremendously successful in providing equal educational opportunities for the vast majority of minority students. n141 As noted by Charles Ogletree with regard to affirmative action, the use of race-based admissions measures is "geared toward an attempt to remedy educational inequality that occurs too late to do any good to the majority of the population" n142 and has done little to change the existence of two Americas, "separated by race, income, and opportunity." n143

Despite educational institutions' continuous reliance on race-based admissions and assignment plans, disparities continue to persist in minority students' academic achievement as measured by standardized- [\*603] test scores, n144 high-school dropout and graduation rates, n145 college-matriculation rates, n146 and post-graduate degrees. n147 In 2005, African American and Hispanic students combined to account for only 23.5% of the total number of students enrolled in a degree-granting institution. n148 And, while the percentage of black and Hispanic adults with bachelor's degrees or higher increased 12.8% and 6.5%, respectively, between the years of 1971 and 2007, the white-black gap regarding this measure increased 3.8%, and the Hispanic-white gap increased approximately 10.1%. n149 Despite many years of pursuing racial diversity in elementary, secondary, and higher education, racial minorities are increasingly underrepresented in postsecondary education and continue to lag behind their white counterparts. n150 Simply employing racial preferences to create diverse student bodies will not remedy these disparities.

### AT: Permutation

#### Still links to all of our arguments that fundamentally indict the premise of integration, including our backlash turn.

#### CP alone is best --- the permutation perpetuates the diversity-equality disconnect and prevents a necessary focus on education equality. That’s Nelson.

#### The plan and permutation still retain the flawed diversity rationale --- detracts officials from achieving racial equality of educational opportunity

Nelson, 09 --- Assistant Professor of Law, University of South Carolina School of Law, J.D. from Harvard (January 2009, Eboni S., University of Miami Law Review, “Examining the Costs of Diversity,” 63 U. Miami L. Rev. 577, Lexis-Nexis Academic, JMP)

The contemporary cornerstone of the theoretical framework underlying race-based n11 government decision-making in the education context n12 is the employment of the diversity rationale to support the [\*580] constitutionality of race-based admissions and assignment programs. n13 Although this Article focuses on the diversity rationale as the modern justification for race-based policies, the remedial use of race-based measures to eliminate present and past effects of discrimination is a profoundly significant aspect of the jurisprudence and history concerning race-based government decision-making. It is important to recognize that the debilitating effects of racial discrimination prompted the taking of affirmative governmental steps in attempts to rectify the harms imposed on an entire class of people. n14 Today, however, due to the difficulty and in some cases impossibility of proving present or past discrimination to defend the use of race-based policies, n15 many affirmative-action proponents have retreated from their reliance on remedial justifications and have, instead, embraced the "greener pastures" of the diversity rationale. n16

Ever since Bakke, school officials interested in assembling a diverse student body have relied on the diversity rationale to constitutionally [\*581] defend the use of racial preferences in admission decisions. n17 Twenty-five years following Justice Powell's pronouncement, affirmative-action proponents rejoiced when Justice O'Connor, writing for the majority in Grutter v. Bollinger, reaffirmed the pursuit of a diverse student body as a compelling interest. n18 Likewise, in the wake of Parents Involved, proponents of race-based measures will seek refuge in the protections of Justice Kennedy's concurring opinion in which he pronounces the achievement of a diverse student body and the avoidance of racial isolation as constitutionally permissible goals in the context of elementary and secondary education. n19 Indeed, scholars, school officials, and civil-rights advocates have already armed themselves with Justice Kennedy's concurrence as they continue the pursuit of racially diverse student bodies. n20 This Article questions the wisdom of such a pursuit.

As this Article will demonstrate, the origins of the diversity rationale [\*582] are established in the Supreme Court's desegregation jurisprudence. n21 Therefore, a discussion questioning the efficacy of employing the rationale to achieve educational equality naturally implicates questions regarding the effectiveness of integration to provide equal educational opportunities for minority students. n22 The integration debate has a long and well-known history during which numerous scholars and civil-rights advocates have questioned the pursuit of integration to achieve educational equality. n23 For example, upon reflection on his prior work to desegregate schools, former NAACP civil-rights attorney Professor Derrick Bell concluded that the employment of integrative measures has been unsuccessful in ensuring educational equality for black children. n24 This Article serves as a continuation of this debate; however, it shifts the inquiry from the context of court-imposed desegregation to schools' voluntary consideration of race to create and maintain racially diverse student bodies.

While this Article fully acknowledges the benefits of racial diversity in education, n25 it also recognizes the costs and casualties associated with the relentless pursuit of the Holy Grail that is racial diversity. n26 Notwithstanding the contention asserted by Professor James Ryan that "racial integration is not on the agenda of most school districts and has [\*583] not been for over twenty years," n27 the creation and preservation of racially diverse student bodies clearly remain on the agenda of many school officials and civil-rights organizations such as the NAACP. n28 Professor Ryan, himself, admits that the pursuit of racial integration may be "merely dormant" and may be resuscitated via efforts such as interdistrict choice plans. n29 In light of this possibility, it is imperative that we examine the potential costs associated with the pursuit of racial diversity in our efforts to provide equal educational opportunities to the greatest number of minority students.

As demonstrated by the educational disparities currently plaguing the Seattle School District in Parents Involved, this Article exposes the educational inequities that persist despite schools' efforts to create racially diverse student bodies. n30 While integration and diversity efforts have by no means been fruitless endeavors, n31 their current incarnations, which, unfortunately, focus on quantitative approaches for achieving racial representation rather than qualitative measures for improving minority students' educational opportunities, have distracted school officials from achieving the true promise of Brown n32 - racial equality of educational opportunity. n33

This Article contends that currently a disconnect exists between the theory of racial diversity and the reality of educational equality. Proponents of diversity who advocate for the use of race-based and race-neutral measures to create and preserve racially diverse student bodies have been lured into a false sense of security that such quantitative measures will adequately address the qualitative challenges that many minority [\*584] students must overcome to achieve academic success. Similar to arguments made by Professor Bell regarding integration, n34 this Article argues that despite the benefits of student-body diversity, it is not the most effective approach for ensuring the provision of equal educational opportunities to the greatest number of minority students. Consequently, this Article urges school officials to reject the lure of Justice Kennedy's concurrence and craft and implement creative and effective initiatives that embrace and improve racially concentrated schools, rather than merely seeking to diversify them.

Admittedly, in an ideal world, school officials would earnestly pursue both diversity and educational equality. n35 However, experience shows us that, in many school districts, this has not been the case n36 and, if one subscribes to the "interest convergence" theory as articulated by Professor Bell, will most likely not be the case in the future. n37 As evidenced in Seattle, school officials have pursued racial diversity while neglecting the needs of many minority students, n38 especially those who find themselves being educated in racially concentrated schools. n39 Therefore, as urged by former civil-rights attorney Judge Robert L. Carter, the time has come to "focus on the crisis in our inner-city schools which have been abandoned" and endeavor to reform them to provide equal educational opportunities to the greatest number of minority students. n40

Part I of the Article begins with a discussion of the social, democratic, [\*585] and educational benefits that are often attributed to racially diverse learning environments. Although the attainment of these benefits serves as the goal underlying the employment of the diversity rationale to create and maintain racially diverse student bodies, they are insufficient to close the achievement gap between white and minority students or to ensure educational equality.

Part II traces the historical roots of the diversity rationale as developed by the Supreme Court. Although the diversity rationale is often thought to have been announced first by Justice Powell in Bakke, this Part details the evolution of the rationale from the Court's desegregation jurisprudence in cases such as Sweatt v. Painter n41 and McLaurin v. Oklahoma State Regents for Higher Education n42 to its present-day embodiment in Parents Involved. Throughout this evolution, we see the Court's recognition of the democratic, social, and educational benefits that result from racially diverse learning environments. Unfortunately, by the Court's endorsement of integrative and diversity measures that center on racial balance and representation rather than equal educational opportunities, we also witness the creation of an educational environment that is ripe for the disconnect between diversity and educational equality to take root and flourish.

Part III assesses the harms of equating diversity and educational equality and will expose and dismantle this diversity-equality disconnect. This Part asserts that the ideal of racial diversity and the reality of equal educational opportunity have been mistakenly equated such that granting minority students access to particular schools is often thought to guarantee them educational equality. The detrimental effects that educational policies such as tracking and magnet programs have on students of color demonstrate the fallacy of this belief and the need to extend educational opportunity beyond mere access. This Part questions whether the educational benefits discussed in Part I are due to the racially diverse student bodies themselves or rather to the resources provided in such learning environments. If minority students' achievements are more related to their exposure to beneficial resources, such as highly qualified teachers, smaller class sizes, and heightened expectations for academic success, could we not replicate these resources in racially identifiable schools in an effort to achieve positive educational outcomes for a greater number of minority children?

Part IV explores why such replication, in the context of elementary and secondary education, is an endeavor of greater importance than current efforts to achieve racially diverse student bodies. As discussed in [\*586] Part III, reliance on diversity efforts has not benefited the majority of minority students. When this reality is coupled with the devastating facts associated with the growing number of racially concentrated schools n43 and the often insurmountable challenges that pervade such learning environments, the immediate need to embrace racially identifiable schools becomes apparent. The improvement of such schools can result in educational, social, and cultural benefits not only for minority students but also for the communities in which they live. While recognizing and respecting the historic ideals of diversity, this Article seeks to move us further towards the reality of achieving educational equality for minority students.

#### The plan and permutation still enshrine the diversity rationale by pursuing racial representation --- trades off with school officials addressing qualitative obstacles for minority students

Nelson, 09 --- Assistant Professor of Law, University of South Carolina School of Law, J.D. from Harvard (January 2009, Eboni S., University of Miami Law Review, “Examining the Costs of Diversity,” 63 U. Miami L. Rev. 577, Lexis-Nexis Academic, JMP)

B. "No Education Without Representation"-Diversity by the Numbers

As demonstrated by magnet programs, race-based and race-neutral measures designed to achieve racial representation are often not successful in ensuring equal educational opportunities for minority students. Nevertheless, school officials, civil-rights activists, and scholars continue to rely on the diversity rationale to advocate for the use of such measures. n199

Although it may be difficult to clearly define the term "diversity rationale," n200 it most commonly refers to the pursuit of "educational and societal benefits that flow from an educational institution's 'enroll[ment [\*613] of] a critical mass of minority students.'" n201 In Grutter, school administrators employed race-based admissions preferences to achieve these benefits. n202 In Parents Involved, the school districts utilized racial classifications, tiebreakers, and guidelines in their efforts to eliminate racial isolation and achieve racial integration. n203 These cases demonstrate a core tenet of the diversity rationale as presently employed - the pursuit of racial representation. n204 Unfortunately, such quantitative pursuits have distracted school officials from addressing more pressing qualitative obstacles that hinder the academic achievements of many students of color. n205

Take, for instance, the diversity efforts as employed by the Seattle School District in Parents Involved. In their efforts to create and maintain racially diverse schools, school officials employed an "integration tiebreaker" when assigning students to oversubscribed schools. n206 The racial tiebreaker worked in favor of a student whose race would positively contribute to the racial diversity of a particular school and bring the school's racial composition to within ten percentage points of the district's overall white/nonwhite racial composition. n207 The district's [\*614] numerical diversity goal went well beyond the arguably flexible and unquantifiable "critical mass" that the University of Michigan Law School in Grutter sought to obtain. n208 Unlike the University of Michigan Law School, which permissibly paid "some attention to numbers," n209 the Seattle School District mechanically sought to attain a fixed percentage of forty percent white and sixty percent nonwhite students plus or minus ten percent. n210 According to the plurality, such rigid pursuits not only amounted to impermissible racial balancing, but also had not been shown to be necessary to produce the desired educational benefits. n211

Interestingly, although not surprisingly, three of the five oversubscribed schools were located in the predominantly white northern section of Seattle and had predominantly white student bodies. n212 Although the school district contended that the oversubscribed schools "offered a similar array of educational and extracurricular programs," n213 this does not speak to the educational disparities that existed and continue to exist between the predominantly white oversubscribed schools and their predominantly minority undersubscribed counterparts - disparities that, in part, led to the oversubscription problem that the racial tiebreakers were intended to address. n214 As noted by Judge Bea in his dissenting opinion:

In the 2000-01 school year, 82% of the students selected one of the oversubscribed schools ... as their first choice, while only 18% picked one of the undersubscribed schools as their first choice. Clearly, the students' and their parents' "market" appraise some of the schools as providing a better education than the others... .

It is common sense that some public schools are better than others. Parents often move into areas offering better school districts [\*615] ... . It may be that soothing, if self-interested, bureaucratic voices sing a lullaby of equal educational quality in the District's schools. But the facts show that parents and children have voted with their feet in choosing some schools rather than others. The verdict of that "market" makes a hash out of such assurances by the District. n215

The educational disparities between the predominantly white and minority schools in Seattle are evidenced by measures ranging from curricular offerings to facilities to quality of leadership. n216 One can also look to students' performance on standardized tests to demonstrate the effects of such disparities. As noted by Seattle writer and mom Linda Thomas,

The public high schools where students have the highest test scores are Roosevelt, Nathan Hale and Ballard, all in North Seattle. On average, 66 percent of their 10th-graders passed the math, reading, writing and science portions of the WASL [Washington Assessment of Student Learning]. The lowest scores are in South Seattle schools, with a passing average of 28 percent at Cleveland, Franklin and Chief Sealth. n217

In addition, the number of students taking the Scholastic Assessment Test (SAT) and their performance on the test vary greatly between the oversubscribed and undersubscribed schools. In 2000, the percentage of seniors taking the SAT at Ballard, Nathan Hale, and Roosevelt were forty-six percent, forty-eight percent, and seventy-seven percent, respectively, as compared to an average twenty-seven percent for the five undersubscribed schools. n218 Students at the three oversubscribed schools earned an average SAT score of 1048, while the average score of the students at the undersubscribed schools was 929. n219 Further disparities can be seen in the students' high-school-graduation rates. Students attending the aforementioned oversubscribed schools graduate high school at a rate nearly twenty-five percent higher than students attending [\*616] the undersubscribed schools. n220 These disparities demonstrate the reality that is too often associated with the pursuit of racial diversity and integration - the lucky few who are admitted into the oversubscribed schools have access to greater educational resources and opportunities, while the educational needs of the minority students who are left behind in racially concentrated schools largely go unmet. n221

## Politics

### Political Capital / Bipart Link

#### Plan will trigger massive political backlash --- already growing calls to eliminate the DOE

Bowman, 17--- Vice Dean of Academic Affairs and Professor of Law, Michigan State University (last revised 4/27/17, originally published 11/28/16, Kristi L., University of Michigan Journal of Law Reform, Forthcoming, “The Failure of Education Federalism,” <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2876889>, JMP)

There are disadvantages to Congressional action and Executive enforcement, of course. If actually enforced, funding cutoffs are not particularly helpful in a situation of constrained resources.192 A legislative policy is much easier to overturn than a judicial one, thus education would remain politicized, albeit at a different level. Perhaps even more significantly, though, the perception that the federal government should have an incredibly limited role in social welfare services such as education is deeply held,193 even though the U.S. is an outlier in this regard on the global stage. Indeed, the 2015 version of ESEA (ESSA) pulled back from NCLB’s highly regulatory approach, deferring more to the states.194 Relatedly, it is not unusual to hear a politician propose eliminating the U.S. Department of Education altogether, and in fact a member of Congress introduced such a bill in February 2017.195 Thus, while ease of statutory repeal is one disadvantage, inability to enact a statutory reform in the first place may be an even more significant one, especially in today’s political climate. Finally, the more directive federal education legislation becomes, the closer it gets to the trigger the Court established in NFIB v. Sebilus196 when it struck down legislation as having “cross[ed] the line from coercion to compulsion.” It appears highly likely that current federal education legislation remains compliant with Spending Clause requirements, but future legislation must be mindful of this decision.197

### Base DA Link

#### Base opposes federal protections --- believes it is a states right issue

Brown, 2/28/17 (Emma, “Obama also called education ‘the civil rights issue of our time’” <https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/real-time-fact-checking-and-analysis-of-trumps-address-to-congress/obama-also-called-education-the-civil-rights-issue-of-our-time/?utm_term=.458ec738dc98>, accessed on 4/30/17, JMP)

Trump is not the first to say that education is the “civil rights issue of our time.” George W. Bush said it when he worked to pass No Child Left Behind, and it was almost a refrain for President Obama and his longtime education secretary, Arne Duncan.

Obama and Duncan injected new energy into the Education Department’s Office for Civil Rights, which investigates discrimination complaints in schools and colleges. Under Obama, OCR encouraged schools to reform discipline policies to disrupt the school-to-prison pipeline. It also led the administration’s charge to overhaul how schools handle complaints of campus sexual assault, and it laid out how schools should accommodate transgender students.

Critics argued that Obama and Duncan overreached their federal authority, creating rules and regulations that had no basis in law. Civil rights advocates cheered the administration for its efforts to protect vulnerable youth.

Those same advocates now fear that the Trump administration will roll back civil rights protections for students in schools, including by potentially starving the Office for Civil Rights of money or authority.

Those fears were stoked last week when Education Secretary Betsy DeVos — in her first major policy move since taking office — joined with Attorney General Jeff Sessions to withdraw the Obama administration’s guidance on transgender students. White House Press Secretary Sean Spicer said that it was a “states’ rights issue” that the federal government should not be involved in, a position cheered by many on the right who agreed.

#### GOP will backlash --- opposes perception of OCR overreach

Murphy, 3/13/17 (James S., “The Office for Civil Rights's Volatile Power; The influence of the office has waxed and waned with each administration. How will it fare under Betsy DeVos?” <https://www.theatlantic.com/education/archive/2017/03/the-office-for-civil-rights-volatile-power/519072/>, accessed on 5/10/17, JMP)

In another interview, DeVos talked about “when we had segregated schools and when we had a time when, you know, girls weren't allowed to have the same kind of sports teams—I mean, there have been important inflection points for the federal government to get involved.” There is strong evidence that school segregation is worse now than it has been for more than 30 years. The Obama administration tackled desegregation; campus sexual violence; harassment against transgender students; and disparities in discipline that made African American students and students with disabilities much more likely to be restrained, secluded, arrested, suspended, or expelled. There was a sense of urgency in the OCR during the Obama years. DeVos sees things differently. Asked if there any remaining issues where the federal government should intervene, DeVos said “I can't think of any now.”

Given this milquetoast response, it was surprising to learn that DeVos raised an objection to Attorney General Jeff Sessions and President Trump’s decision to rescind the Department of Education’s protections of transgender students’ rights. DeVos’s push-back was overridden, and though she could have refused to go along with the administration, in the end, she capitulated, and the acting assistant secretary of civil rights in the Department of Education signed off on the the new guidance. Speaking to an audience at the Conservative Political Action Conference a day later, she called the Title IX guidance “a very huge example of the Obama administration’s overreach.” None of this was unexpected—at least, not to anyone familiar with the history of the OCR.

Michael Petrilli, the president of the Thomas B. Fordham Institute, a conservative education-policy research center, suggested that the OCR under Trump would be “more humble in its goals.” He said it would likely return to the “traditional role of responding to complaints,” as previous Republican administrations have, rather than using the power of the office “more proactively to launch complaints.” President Obama and his two secretaries of education, King and Arne Duncan, certainly put much more emphasis on students’ civil rights than their predecessors did, likely because school seems to play such a large role in their visions of both citizenship and progress. Education appears to play a smaller role in Trump’s worldview, however. During his campaign and his inauguration speech, education served as just another example of American decline (“an education system flush with cash, but which leaves our young and beautiful students deprived of all knowledge”). What follows from such a view, or from DeVos’s remark that traditional public schools are a “dead-end,” is not nearly so clear.

Because the OCR has long been subject to pendulum swings between Republican and Democratic administrations, history provides the best guide to what is likely to happen to the office in the next four years.

\* \* \*

The OCR bears the primary responsibility to enforce laws that “prohibit discrimination … on the basis of race, color, national origin, sex, disability, or age.” Although the office has always worked with institutions to resolve complaints filed against them, its ultimate enforcement tools are to withhold federal funds or to refer a complaint to the Department of Justice for prosecution. In an interview, Catherine Lhamon, the second assistant secretary of Civil Rights for the Department of Education under Obama, said, “Happily, we almost never need to initiate [either] process.” Lhamon was appointed to a six-year term as chair of the U.S. Civil Rights Commission in the last weeks of the Obama presidency. People who work in schools, she pointed out, are there because they want to help students, so they typically work with the OCR to satisfy the law.

Republican critics of the OCR do not see things in such a warm light. They have accused the office of overreach, overregulation, and intimidation during President Obama’s administration and have promised change. Representative Virginia Foxx, a Republican from North Carolina and the new chair of the House Committee on Education and the Workforce, wants “to see the [entire] department scaled back.” At a recent post-election event, David Cleary, the chief of staff for Senator Lamar Alexander—a former secretary of education himself and the current chairman of the Senate Health, Education, Labor, and Pensions Committee—predicted a weaker role for the office: “Certainly we think that the Office [for] Civil Rights has overreached ... and, there will be a very natural shrinking of the expansive interpretations of Title IX and civil-rights laws.”

### AT: Agency Action Doesn’t Link

#### OCR guidance on civil rights spurs long term political controversy

Murphy, 3/13/17 (James S., “The Office for Civil Rights's Volatile Power; The influence of the office has waxed and waned with each administration. How will it fare under Betsy DeVos?” <https://www.theatlantic.com/education/archive/2017/03/the-office-for-civil-rights-volatile-power/519072/>, accessed on 5/10/17, JMP)

When Arne Duncan became Barack Obama’s secretary of education, he declared in his confirmation hearing that the department would be recommitting to civil rights: “Quality education is also the civil-rights issue of our generation. It is the only path out of poverty, the only road to a more equal, just, and fair society. In fact, I believe the fight for a quality education is about so much more than education. It is a fight for social justice.”

Under Duncan, the OCR assumed a more prominent place in the Department of Education, quite literally, as it was moved into the department’s headquarters. Like Clinton before him, Obama appointed an assistant secretary of civil rights with a strong background in both civil rights and education. Russlynn Ali had served, among other positions, as the vice president at the Education Trust (which has come under the new leadership of former Education Secretary John King) and a liaison for the president of the Children’s Defense Fund.

On March 8, 2010, at a site whose symbolic meaning could be lost on no one, Duncan gave a speech on the Edmund Pettus Bridge in Selma, Alabama. He announced that the Department of Education would be “issuing a series of guidance letters to school districts and postsecondary institutions that will address issues of fairness and equity.” And issue them it did, creating a cloud of controversy that would hang around the department and the OCR for the remainder of Duncan’s term as well as his successor’s. The office’s supporters have applauded the OCR for doing the work it is required to do: analyzing and clarifying the law so schools and colleges can better comply with it.

Much of the controversy that has surrounded the OCR for years has been driven by its Title IX guidance, which since 2011 has pushed colleges to do more to prevent sexual violence and harassment and, even more recently, clarified that Title IX protects educational access for transgender students. Criticism of this guidance has come not just from organizations such as the Foundation for Individual Rights in Education, which Betsy DeVos has donated to in the past, but also from a group of Harvard Law School lawyers and the American Association of University Professors. Their complaints are basically the same: The guidance acts as a de facto law, which the OCR has no authority to issue, and the office’s guidance denies the accused of their right to due process.

Asked about these complaints at an OCR event in December, Assistant Secretary Lhamon, declared, “We are aggressively interested in protecting the rights of all students, all participants in student-misconduct proceedings.” She cited a recent resolution agreement with Wesley College in Delaware, which found that the school had violated the rights of an accused student. At the same event, Secretary King described the office’s work on Title IX, which included the publication of the names of schools under investigation for violation, as transformative. Title IX, he said, is “something that college presidents now own.”

## Case

### 1nc Solvency

#### Devos will cut budget and not hire individuals with expertise to implement the aff

Quinlan, 2/17/17 (Casey, “Betsy DeVos’ interviews show a willingness to cut the Department of Education; In her second week on the job, DeVos has shown she distrusts department staff and plans an audit of all programs,” <https://thinkprogress.org/betsy-devos-education-policies-46608a6da03a>, accessed on 5/27/17, JMP)

Betsy DeVos has only been education secretary for a week and a half, but it’s already clear that she will make decisions that would cut the Department of Education significantly, undermine civil rights and protection from sexual assault, and continue more partisan hires.

During the confirmation process, DeVos, who does not have any experience running or working for public schools, showed a lack of knowledge of major federal laws and education concepts. She refused to commit to collecting data on civil rights matters, keep guidance on how to investigate campus sexual assault, or not cut public education funding. DeVos’ only experience with education has been through her work as a philanthropist and a political operative.

Here’s what we can expect:

Devos wants to cut funding for the department.

Although DeVos tried to strike a conciliatory tone in her first speech as education secretary before the department staff, her remarks since then have been fairly hostile to the department — promising audits and assuring Americans that the department could do much less.

In an interview with Michael Patrick Shiels of the Big Show radio program on Tuesday, DeVos said that although she has only been on the job for few days, she can “guarantee there are things the department has been doing that are probably not necessary or important for a federal agency to do.”

DeVos added:

“We’ll be examining and auditing, and reviewing all of the programs of the department and really figuring out what is the core mission and how can the federal department of education really support and enhance the role of the departments in the states. Because really when it comes down to it, education and the provision of education is really a state and local responsibility to a large extent. So these sorts of things will be part of our focus in the coming weeks and I think we’ll have some good robust conversations about that.”

In an interview with Axios on Friday, DeVos responded to a question about whether the federal government should have any role in education by saying, “It would be fine with me to have myself worked out of a job, but I’m not sure that — I’m not sure that there will be a champion movement in Congress to do that.”

During President Donald Trump’s campaign, he said he wanted to cut the department significantly, if not eliminate it entirely. The Department of Education’s responsibilities include data collection, awarding Pell grants and federal financial aid through loans, and provides oversight over states in cases of discrimination. Although it would be difficult to eliminate the department, and it is not likely to happen, it could be significantly weakened depending on what is requested for the education budget.

A conservative group with ties to the Trump administration as well as DeVos in particular, published a document pushing for the dismantling of the department, The Washington Post reported on Wednesday. The Council for National Policy document is a proposal for a “gradual, voluntary return at all levels to free-market private schools, church schools and home schools as the normative American practice.” The proposal to abolish the department dovetails with the long-held views of many Republicans, and Trump suggested during the 2016 campaign that the agency could be “largely eliminated.” The Council for National Policy took the document down after the Post reported on it.

Devos has little regard for civil rights or sexual assault.

In her interview with Axios, DeVos said that the department tackled important civil rights issues, but did not acknowledge that those issues still exist today. She said Title IX and school desegregation are important issues, but when asked if there are “remaining issues like that” where the federal government should intervene, she responded, “I can’t think of any now.”

That statement may be cause for concern for educators, parents, and advocates for disadvantaged students, since it indicates DeVos could propose making cuts to the Office for Civil Rights. That office handles complaints about Title IX violations, which includes women’s access to sports and the investigation of campus rape, the rights of students with disabilities, and racially disparate student discipline.

These issues have not been resolved. School segregation by race and class persists. In K-12 education, black students are 1.9 times more likely than white students to be expelled from school without educational services. Black students were also 2.3 times more likely to be disciplined through involvement of officers.

A 2015 national poll from the Washington Post and the Kaiser Family Foundation found that one in five women who attended a residential college said they had been sexually assaulted. Although two in five girls play sports in school now, compared to 1 in 27 when Title IX was enacted, they still have far fewer opportunities to play sports in high school compared to boys. Girls are also more likely to drop out of sports earlier in life.

DeVos’ vision for the department will become clearer when it comes time to prepare a budget, said Lindsey Tepe, senior policy analyst for education policy program for New America. By April at latest, Americans will know what DeVos intends to improve funding for — and what areas she would like to reduce funding for.

“If they have hope of implementing a large scale voucher program or putting any money behind the initiatives they’ve spoken to it has to be brought up in the budget and it as to be done right away,” Tepe said. “You’ll see if certain offices, such as the Office for Civil Rights, get the funding they need to support the current personnel they have in place … The dollars really talk.”

DeVos needs staff with expertise. She may not welcome them.

It is particularly important for DeVos, someone with no experience working in a public school, to surround herself with people with the experience and expertise to help her guide the department, said Tepe. However, her choices so far have been mostly political and ideological rather than veterans of the department who have worked through both Republican and Democratic administrations.

“In the next couple weeks if she doesn’t start assembling people who have some leadership in the department, who have policy chops, it’s going to be really troubling,” Tepe said. “It should be troubling for everyone frankly.”

But DeVos does not appear to trust staff at the department. Townhall, a conservative website, interviewed DeVos and published a piece on Thursday that says she believes there are people in the department “who are committed to her not succeeding” and that she “pledges to do whatever can be done to render them ineffective.”

The department has a fairly small staff for the number of programs it administers, so it wouldn’t be easy to cut the department without significantly hampering its effectiveness, Tepe said. According to the Congressional Budget Office, more than 95 percent of the department’s 2012 budget was obligated for grants for students attending college or to state and local governments.

“The department is, for the number programs they administer and for amount of responsibilities they do have, it’s a really small staff,” Tepe said. “A lot of new leaders coming in will do these audits, but the tone and buying into conventional wisdom that ‘Of course there must be waste,’ from the get-go is going to sour a lot of relationships with people she will depend on and rest of her appointees will depend on to enact any sort of agenda.”

There is also some evidence that the department may not be properly vetting staff. A field organizer for Trump’s campaign, Teresa UnRue, left her position at the department only a few days after she was hired, Politico reported, after it was discovered that she made Islamophobic statements on social media.

#### Desegregation re-inscribes antiblackness and is distinct from theorizing about its existence in education policy --- segregated schools allow for an education that creates spaces to disrupt the exclusion of the Black from cultural and political regard

Dumas, 16 --- Assistant Professor in the Graduate School of Education and Department of African American Studies at UC Berkeley (Michael J., Theory Into Practice, “Against the Dark: Antiblackness in Education Policy and Discourse,” <http://dx.doi.org/10.1080/00405841.2016.1116852>, Taylor & Francis Online, JMP)

Education Policy as a Site of Antiblackness

What does it mean to suggest that education policy is a site of antiblackness? Fundamentally, it is an acknowledgment of the long history of Black struggle for educational opportunity, which is to say a struggle against what has always been (and continues to be) a struggle against specific anti-Black ideologies, discourses, representations, (mal)distribution of material resources, and physical and psychic assaults on Black bodies in schools. During the years of statesanctioned slavery, white slaveowners would often beat their Black property for attempting to learn to read; for Black people in bondage, learning to read was understood not only as a pathway to economic mobility, but, perhaps more importantly, as assertion of their own humanity, a resistance to being propertied (Anderson, 1988; Dumas, 2010). A century later, Black children faced down snarling, spitting mobs of white parents and elected officials who were incensed that their own white children would have to sit next to Black children, and fearful that their white education would be sullied by the presence of the Black. And this, then, is the essence of antiblackness in education policy: the Black is constructed as always already problem—as nonhuman; inherently uneducable, or at very least, unworthy of education; and, even in a multiracial society, always a threat to what Sexton (2008, p. 13) described as “everything else.”

School desegregation is perhaps the most prominent education policy of the past century in which Black people have been positioned as problem. Racial desegregation of schools in the United States has been made necessary due to generations of state-supported residential segregation, a form of “American apartheid” (Massey & Denton, 1993) in which government housing policies allowed whites to accumulate land (and, therefore, wealth) at the expense of Black people (Dumas, 2015; Roithmayr, 2014). Residential segregation was rationalized as a necessary means to avoid race mixing—the presence of Black people particularly, but other people of color as well, was seen as a detriment to the quality of life and economic stability to which white people were entitled as a result of their skin color. A similar narrative emerged as whites organized in opposition to school integration; anti-Black racism was at least one primary cause of white flight from school districts that were ordered to desegregate (Kohn, 1996). In many cities, whites went to great lengths to create districts or school-assignment plans that concentrated whites in the most heavily resourced schools, and relegated Black children to underfunded schools with less experienced teachers and crumbling physical infrastructures (Dumas, 2011, 2014; Horsford, Sampson & Forletta, 2013).

In short, school desegregation policy was precipitated by antiblackness. However, school desegregation researchers are more likely to frame their analyses through the lenses of access and diversity, emphasizing the educational benefits of cross-cultural interaction and the importance of providing more equitable allocation of educational resources (Orfield & Eaton, 1996; Orfield & Lee, 2004; Wells, 1995; Wells, Duran, & White, 2008). In contrast, theorizing antiblackness in school desegregation policy shifts the focus to interrogation of policies that led to the displacement of Black educators and the destruction of school communities that affirmed Black humanity (Tillman, 2004). Antiblackness allows one to capture the depths of suffering of Black children and educators in predominantly white schools, and connect this contemporary trauma to the longue dure´e of slavery from bondage to its afterlife in desegregating (and now resegregating) schools. And taking Sexton’s (2008) analysis of multiracialism into account leads to a more nuanced and careful critique of how schools pit the academic success of (some) Asian American students against and above the academic difficulties of Black students. Here, schools can be celebrated as diverse despite the absence of Black students in the building and/ or in the higher academic tracks. Ultimately, the slave has no place in the most privileged and highly-regarded school spaces; the Black becomes a kind of educational anachronism, not quite suited for our idealized multicultural learning community.

Education Practice and the Possibility of Black Life

W. E. B. DuBois, writing about integration of schools in 1935, argued that segregated schools were still needed due to the “growing animosity of the whites” (p. 328). White public opinion, he explained, was overwhelmingly opposed to establishing racially integrated schools. In such a context, he believed, it was impossible for Black children to receive “a proper education,” which, in his view, included “sympathetic touch between teacher and pupil” and the teaching of knowledge about Black history and culture as a group, as citizens. One can read DuBois as seeking an education for Black people that creates spaces to disrupt the exclusion of the Black from the cultural and political regard extended to those who are presumed Human.

Most educators would like to believe that modern Americans live in a different time than DuBois—that the animosity of whites against Black people has declined, or is no longer the norm, especially among well-intentioned educators who profess to care about all children and who are likely to have been educated in colleges of education with expressed commitments to equity and diversity. The scholarship on antiblackness insists that the very imagination of all children was never intended to include the Black, and that the Black becomes antagonistically positioned in relation to diversity visions and goals. It is the Black that is feared, despised, (socially) dead.

But how is any of this helpful? First, as Wilderson (2010) suggested, it is important for educators to acknowledge that antiblackness infects educators’ work in schools, and serves as a form of (everyday) violence against Black children and their families. This acknowledgement is different from a broad stance against intolerance or racism, or an admission of the existence of white privilege. Teachers, administrators, and district leaders should create opportunities to engage in honest and very specific conversations about Black bodies, blackness, and Black historical memories in and of the school and local community. They all might explore together what it means to educate a group of people who were never meant to be educated and, in fact, were never meant to be, to exist as humans.

More systemically, educators might begin to imagine an education policy discourse and processes of policy implementation that take antiblackness for granted. Thus, any racial disparity in education should be assumed to be facilitated, or at least exacerbated, by disdain and disregard for the Black. Differences in academic achievement; frequency and severity of school discipline; rate of neighborhood school closures; fundraising capacity of PTAs; access to arts, music, and unstructured playtime—these are all sites of antiblackness. That is to say, these are all policies in which the Black is positioned on the bottom, and as much as one might wring one’s hands about it all, and pursue various interventions, radical improvements are impossible without a broader, radical shift in the racial order. This is perhaps, however fittingly, a pessimistic view of education policy. However, its possibility is in fomenting a new politics, a new practice of education, committed to Black—and therefore human—emancipation.

### --- XT: Devos Won’t Enforce the Plan

#### DeVos is gutting the DOE’s capacity and willingness to investigate civil rights violations

Green, 6/17/17 (Erica L., The New York Times, “Education Dept. Plans to Scale Back Its Civil Rights Investigations,” Factiva, JMP)

WASHINGTON -- The Department of Education is scaling back investigations into civil rights violations at the nation's public schools and universities, easing off mandates imposed by the Obama administration that the new leadership says have bogged down the agency.

According to an internal memo issued by Candice E. Jackson, the acting head of the department's office for civil rights, requirements that investigators broaden their inquiries to identify systemic issues and whole classes of victims will be scaled back. Also, regional offices will no longer be required to alert department officials in Washington of all highly sensitive complaints on issues such as the disproportionate disciplining of minority students and the mishandling of sexual assaults on college campuses.

The new directives are the first steps taken under Education Secretary Betsy DeVos to reshape her agency's approach to civil rights enforcement, which was bolstered while President Barack Obama was in office. The efforts during Mr. Obama's administration resulted in far-reaching investigations and resolutions that required schools and colleges to overhaul policies addressing a number of civil rights concerns.

That approach sent complaints soaring, and the civil rights office found itself understaffed and struggling to meet the department's stated goal of closing cases within 180 days.

The office's processing times have ''skyrocketed,'' the Education Department spokeswoman, Liz Hill, said, adding that its backlog of cases has ''exploded.'' The new guidelines were to ensure that ''every individual complainant gets the care and attention they deserve,'' she said.

In the memo, which was first published by ProPublica, Ms. Jackson emphasized that the new protocols were aimed at resolving cases quickly.

''Justice delayed is justice denied, and justice for many complainants has been denied for too long,'' Ms. Hill said in a statement.

But civil rights leaders believe that the new directives will have the opposite effect. They say that Education Department staff members would be discouraged from opening cases and that investigations could be weakened because efficiency would take priority over thoroughness.

''If we want to have assembly-line justice, and I say 'justice' in quotes, then that's the direction that we should go,'' said Catherine Lhamon, who was the assistant secretary of the Education Department's civil rights office under Mr. Obama, and who now heads the United States Commission on Civil Rights.

The commission -- an independent, bipartisan agency charged with advising the president and Congress on matters of civil rights -- voted on Friday to conduct a two-year investigation of federal civil rights enforcement, saying it had ''grave concerns'' about the Trump administration's agenda. The commission identified the Education Department as an agency that was particularly troubling.

Nevertheless, the department's move was lauded by advocates who believe that the office for civil rights has been overzealous in its enforcement activities in recent years.

Robert Shibley, the executive director of the Foundation for Individual Rights in Education, an advocacy group, said the measures will be welcomed on college campuses where the department has overstepped in carrying out sexual assault investigations. The organization is financially supporting a lawsuit against the department over a letter issued in 2011 directing campuses to change the burden of proof in cases of sexual assault.

''So many of the campus hearings are kangaroo courts with low due process, and you can't really have any confidence in the outcomes,'' Mr. Shibley said.

Both sides of the civil rights issue keyed on the department's decision to reverse its practice of automatically broadening investigations and scrutinizing years of data, searching for patterns of violations.

The practice of systematic reviews, which Ms. Lhamon supported while leading the civil rights office, uncovered significant evidence of discrimination in school districts.

''It's really a way of curtailing the way civil rights enforcement should be handled,'' Ms. Lhamon said, reacting to the department's new direction. ''It's literally a stick your head in the sand approach.''

For example, the department received a complaint that a black student at the Lodi Unified School District in California, about an hour south of Sacramento, received harsher punishment than a white student after the two were in a fight.

According to a published settlement agreement, the investigation found that schools with higher percentages of black students established stricter punishment for discipline incidents, and a review of four years of data revealed that black students across the district received disproportionately higher levels of discipline than white students.

But Mr. Shibley said the practice of systematic reviews was a significant burden, especially on colleges and universities, which sometimes had to review years of previous sexual assault complaints, and remedy anything they were found to have mishandled.

''That was quite alarming from a double jeopardy and civil liberties perspective,'' Mr. Shibley said.

Since her appointment as the education secretary, Ms. DeVos has come under fire from lawmakers and civil rights advocates for her remarks about the department's role in enforcing civil rights laws in the public school system.

The office is charged with enforcing legal prohibitions against discrimination by race, color, national origin, sex and disability.

Ms. DeVos has denounced discrimination in any form and has said schools that receive federal funds must follow federal laws. But she also believes in a limited federal role in education. She has signaled that her office is ''not going to be issuing any decrees'' on civil rights and that those should come from Congress or the courts.

In the memo issued last week, Ms. Jackson wrote that the department would ''robustly enforce the civil rights laws under our jurisdiction, and we will do so in a neutral, impartial manner and as efficiently as possible.''

Ms. Jackson issued another internal memo last week about how her office would respond to cases of discrimination after the rollback of Obama administration rules that encouraged states to allow transgender students to use the bathroom corresponding to their gender identity.

Ms. Hill, the department spokeswoman, declined to release the internal document, but said it guides staff members on how to ''functionally execute on these cases.'' Transgender cases will be investigated by the department ''fully and fairly'' and will not be dismissed or referred because of a lack of guidance.

However, the office has indicated that it will also be more judicious in tackling complaints in general.

In the administration's budget request for the fiscal year that begins in October, the Education Department has proposed cutting more than 40 staff positions from the office for civil rights, which would require the office to ''make difficult choices, including cutting back on initiating proactive investigations,'' the department wrote.

#### Devos won’t enforce the plan --- she thinks states should have the flexibility to exclude marginalized groups

Cauterucci, 5/24/17 (Christina, “Betsy DeVos All Smiles as She Endorses States’ Rights to Discriminate Against Children,” <http://www.slate.com/blogs/xx_factor/2017/05/24/betsy_devos_is_all_smiles_as_she_endorses_states_rights_to_discriminate.html?utm_content=inf_10_2641_2&wpsrc=socialedge&tse_id=INF_9c55bb8041c011e780b645b806a7020f>, accessed on 5/27/17, JMP)

Betsy DeVos is loving life right now. In a Wednesday hearing with the House Appropriations subcommittee, the Secretary of Education gleefully defended her school-choice philosophy from Rep. Katherine Clark of Massachusetts, who asked DeVos whether charter schools that refuse to admit students of certain demographics would still get federal funding.

Clark used Bloomington, Indiana’s Lighthouse Christian Academy as an example. The school currently gets more than $665,000 in state funding through a school voucher program, Clark said. It also openly reserves the right to deny admittance to any student in a family where there is “homosexual or bisexual activity” or family members who practice “alternate gender identity.” If Indiana applies for federal funding for schools like these, Clark asked DeVos, would her Department of Education require them to stop discriminating against LGBTQ students and families?

DeVos didn’t say yes or no. She just smiled and stuck to the generations-old cover for violent oppression in America. “The states set up the rules,” she said. “I believe states continue to have flexibility in putting together programs.”

“You are the backstop for students and the right to access a quality education,” Clark continued. “Would you in this case say, ‘we are going to overrule, and you cannot discriminate—whether it be on sexual orientation, race, special needs in our voucher programs’?” She also asked DeVos whether a school that refused to accept African-American students, for instance, would be eligible for federal funding under the voucher system DeVos endorses.

The U.S. Secretary of Education declined to provide even one example of any kind of discrimination that might preclude a school from receiving federal funding. “I think the Office of Civil Rights and our Title IX protections are broadly applicable across the board,” DeVos said, which is quite rich, considering that the Republican Party has made a major stink over what they consider OCR’s overreach in addressing sexual assault and discrimination in schools. “But when it comes to parents making choices on behalf of their students—”

“This isn’t about parents making choices,” Clark interrupted. “This is about use of federal dollars.”

In the final moments of the exchange, DeVos delivered what she must have imagined to be an inspiring call to arms on behalf of American children. “I go back to the bottom line, is we believe that parents are the best equipped to make choices for their children’s schooling and education decisions and too many children today are trapped in schools that don’t work for them,” she said. “We have to do something different than continuing a top-down, one-size-fits-all approach. And that is the focus, and states and local communities are best equipped to make these decisions and framework on behalf of their students.”

DeVos calls what she’s endorsing “state flexibility.” States, she’s saying, should have the flexibility to exclude marginalized demographics from federally funded public schools if they deem it appropriate for their students. No cookie-cutter integrated school solutions for DeVos, who once praised education under Jim Crow as a pioneering example of school choice! The Secretary of Education wants students to have all of the options, including federally funded options that allow them to avoid learning alongside queer students, students of color, students of faith, or students with disabilities, if their parents prefer it that way.

### --- XT: Antiblackness

#### Failure to theorize antiblackness prevents any solvency --- can’t be achieved with policy changes

Dumas, 16 --- Assistant Professor in the Graduate School of Education and Department of African American Studies at UC Berkeley (Michael J., Theory Into Practice, “Against the Dark: Antiblackness in Education Policy and Discourse,” <http://dx.doi.org/10.1080/00405841.2016.1116852>, Taylor & Francis Online, JMP)

Inspired by this theoretical work on antiblackness, I argue here that any incisive analyses of racial(ized) discourse and policy processes in education must grapple with cultural disregard for and disgust with blackness. I aim to explain how a theorization of antiblackness allows one to more precisely identify and respond to racism in education discourse and in the formation and implementation of education policy. Briefly, I contend that deeply and inextricably embedded within racialized policy discourses is not merely a general and generalizable concern about disproportionality or inequality, but also, fundamentally and quite specifically, a concern with the bodies of Black people, the signification of (their) blackness, and the threat posed by the Black to the educational well-being of other students.

I begin with an, albeit brief, discussion of the scholarship on antiblackness, highlighting a number of themes and commitments in this interdisciplinary body of work. Then, using school (de)segregation as an example, I demonstrate how policy discourse is informed by antiblackness, and conclude with some brief discussion of what an awareness of antiblackness means for educational practice, and for the survival and well-being of the Black children and communities we serve.

First, a brief explanation: In my work, I have decided to capitalize Black when referencing Black people, organizations, and cultural products. Here, Black is understood as a selfdetermined name of a racialized social group that shares a specific set of histories, cultural processes, and imagined and performed kinships. Black is a synonym (however imperfect) of African American and replaces previous terms like Negro and Colored, which were also eventually capitalized, after years of struggle against media that resisted recognition of Black people as an actual political group within civil society (Tharps, 2014, November 18). White is not capitalized in my work because it is nothing but a social construct, and does not describe a group with a sense of common experiences or kinship outside of acts of colonization and terror. Thus, white is employed almost solely as a negation of others—it is, as David Roediger (1994) insisted, nothing but false and oppressive. Thus, although European or French are rightly capitalized, I see no reason to capitalize white. Similarly, I write blackness and antiblackness in lower-case, because they refer not to Black people per se, but to a social construction of racial meaning, much as whiteness does. Finally, I sometimes reference the Black, which refers to the presence of Black bodies, or more precisely, the imagination of the significance of Black bodies in a certain place. As such, it could be written in lower case, to the extent that I am referring to the social construction of blackness. However, I choose to use uppercase to signify that what is being imagined here is the material Black body.

Theorizing Antiblackness

Antiblackness is the central concern and proposition within an intellectual project known as Afro-pessimism.1 Afro-pessimism theorizes that Black people exist in a structurally antagonistic relationship with humanity. That is, the very technologies and imaginations that allow a social recognition of the humanness of others systematically exclude this possibility for the Black. The Black cannot be human, is not simply an Other but is other than human. Thus, antiblackness does not signify a mere racial conflict that might be resolved through organized political struggle and appeals to the state and to the citizenry for redress. Instead, antiblackness marks an irreconcilability between the Black and any sense of social or cultural regard. The aim of theorizing antiblackness is not to offer solutions to racial inequality, but to come to a deeper understanding of the Black condition within a context of utter contempt for, and acceptance of violence against the Black.

Afro-pessimist scholars contend that the Black is socially and culturally positioned as slave, dispossessed of human agency, desire, and freedom. This is not meant to suggest that Black people are currently enslaved (by whites or by law), but that slavery marks the ontological position of Black people. Slavery is how Black existence is imagined and enacted upon, and how non-Black people—and particularly whites— assert their own right to freedom, and right to the consumption, destruction, and/or simple dismissal of the Black. “Through chattel slavery,” Frank Wilderson (2010) argued,

the world gave birth and coherence to both its joys of domesticity and to its struggles of political discontent; and with these joys and struggles the Human was born, but not before it murdered the Black, forging a symbiosis between the political ontology of Humanity and the social death of Blacks. (pp. 20–21)

This “social death” of the slave is introduced most explicitly in the work of Orlando Patterson (1982), who detailed how slavery involves a parasitic relationship between slave owner and slave, such that the freedom of the slave owner is only secured and understood in relation to power over the slave. For Patterson, slavery is “the permanent, violent domination of natally alienated and generally dishonored persons” (p. 13). Although slavery involves personal relationships between groups, it also operates as an institutionalized system, maintained through social processes that make it impossible for the Slave to live, to be regarded as alive for her- or himself in the social world.

This focus on slavery might seem anachronistic in the current historical moment, some 150 years after the (formal) end of the institution in the United States. However, Wilderson maintained that the relations of power have not changed. He explained:

Nothing remotely approaching claims successfully made on the state has come to pass. In other words, the election of a Black president aside, police brutality, mass incarceration, segregated and substandard schools and housing, astronomical rates of HIV infection, and the threat of being turned away en masse at the polls still constitute the lived experience of Black life. (p. 10)

This lived experience serves as a continual reinscribing of the nonhumanness of the Black, a legitimization of the very antiblackness that has motivated centuries of violence against Black bodies. In this sense, even as slavery is no longer official state policy and practice, the slave endures in the social imagination, and also in the everyday suffering experienced by Black people.

As Saidiya Hartman (2007) insisted, Americans are living in what she described as “the afterlife of slavery:”

Black lives are still imperiled and devalued by a racial calculus and a political arithmetic that were entrenched centuries ago. This is the afterlife of slavery—skewed life chances, limited access to health and education, premature death, incarceration, and impoverishment. I, too, am the afterlife of slavery. (p. 6)

Importantly here, the afterlife of slavery is not only an historical moment, but deeply impressed upon Black flesh, in the embodiment of the Black person as slave. Thus, Hartman maintained, she is also this afterlife of slavery.

Salamishah Tillet (2012) made clear the heaviness of the historical memory, the ever-presence of slavery in Black life:

Because racial exclusion has become part and parcel of African American political identity since slavery, it cannot simply be willed or wished away. This protracted experience of disillusionment, mourning, and yearning is in fact the basis of African American civic estrangement. Its lingering is not just a haunting of the past but is also a reminder of the present-day racial inequities that keep African American citizens in an indeterminate, unassimilable state as a racialized ‘Other.’ While the affect of racial melancholia was bred in the dyad of slavery and democracy, it persists because of the paradox of legal citizenship and civic estrangement. (p. 9)

To the extent that there is ample evidence of the civic estrangement of Black people—their exclusion from the public sphere—one can theorize that the Black is still socially positioned as the slave, as difficult as it may be to use this frame to understand contemporary “race relations.” Here, “race relations” is necessarily in quotations because there is really no relation to be had between master and slave in the way one might conceptualize human relationships. For Afro-pessimists, the Black is not only misrecognized, but unrecognizable as human, and therefore there is no social or political relationship to be fostered or restored. As Wilderson argued,

Our analysis cannot be approached through the rubric of gains or reversals in struggles with the state and civil society, not unless and until the interlocutor first explains how the Slave is of the world. The onus is not on one who posits the Master/Slave dichotomy but on the one who argues there is a distinction between Slaveness and Blackness. How, when, and where did such a split occur? (p. 11)

And this is the broader challenge posed by a theory of antiblackness: There is no clear historical moment in which there was a break between slavery and acknowledgement of Black citizenship and Human-ness; nor is there any indication of a clear disruption of the technologies of violence—that is, the institutional structures and social processes—that maintain Black subjugation. Thus, Afro-pessimists suggest that one must consider the Black as (still) incapable of asking for (civil or human) rights. This does not deny the long legacy of Black racial struggle, but it positions this struggle as an impossibility, because the Black is (still) imagined outside of the citizenship that allows claims for redress to be regarded as legitimate, or even logical.

Part of the challenge in theorizing blackness in contemporary race discourse is that Americans are living in an officially antiracist society, in which, as Jodi Melamed has documented, post- World War II racial liberalisms and neoliberalisms make some space for the participation of multicultural subjects (Melamed, 2011). That is, even as race continues to structure capitalism, which in turn facilitates white accumulation, the official stance of the state is against racism; blatantly racist laws and government practices have been declared illegal, and the market embraces outreach to a wide multicultural range of consumers. In this context, there is a rush to celebrate the social and economic advancement of select Black individuals and, perhaps more significantly, the success of other groups of people of color. In fact, it is the social and cultural inclusion of non-Black people of color that is often offered as evidence of the end of racial animus and racial barriers in the society. Therefore, the failure of large swaths of the Black population is purported to be a result of cultural deficits within the Black. The slave, always suspected of being lazy and shiftless, now must bear primary responsibility for not making it in a society, which—officially, anyway—thrives on multiracial harmony and civic participation.

Jared Sexton (2008, 2010) contended that in this era, multiracialism thrives largely at the expense of, and firmly against, blackness. His argument rests on the premise that the color line is more fluid during periods in which Black freedom is thought to be most contained. Thus, during slavery in the United States, multiracial communities could serve as “buffer classes between whites and blacks” which often “corroborated and collaborated with antiblackness” (Sexton, 2008, p. 12). The current period is marked by similar dynamics, with little organized Black political movement, resegregation of neighborhoods and schools, and, in fact, an easy deterritorialization and gentrification of historic Black urban homeplaces. The current Black Lives Matter movement (Garza, 2014), which has emerged in the wake of so many cases of anti- Black violence, may yet shift Americans into a period of heightened anxiety about Black bodies, but Sexton’s description of the current period is valid: There is little fear of Black bodies and, arguably, an emboldened antipathy to the Black overall. This, in Sexton’s theorizing, opens up new spaces for multiracial inclusion. In this moment, the Black–white divide is seen as less consequential and not as much the result of white attitudes and behaviors. In these moments, Sexton maintained, the more significant boundary is the one constructed “between blackness and everything else” (2008, p. 13). And this is a boundary seemingly constructed and maintained by recalcitrant Black people against multiracialism, and more to the point, multiracial progress.

Multiracialism, in Sexton’s view, “premises its contribution to knowledge, culture and politics upon an evacuation of the historical richness, intellectual intensity, cultural expansiveness, and political complexity of Black experience, including, perhaps especially, its indelible terrors” (2008, p. 15). Transcending the Black-white binary, multiracialism ostensibly moves people past the narrowness and anachronism of blackness and toward a more profitable global economy and more sophisticated cultural milieu. Embracing non-Black bodies of color thus facilitates, and is facilitated by, antiblackness, and can be justified as antiracist precisely because it is inclusive of more than white.

“The [B]lack body,” Lewis Gordon contended, “is confronted by the situation of its absence” (1997, p. 73). This absence—this social death or afterlife of/as the slave—positions Black people as the embodiment of problem, a thing rather than a people suffering from problems created by antiblackness. Part of the aim of Afropessimist scholarship is to insist on the humanity of Black people. “Those of us who seek to understand [B]lack people,” Gordon concluded, need to “bear in mind that [B]lack people are human beings” (p. 78). In an anti-Black world, this is easier said than done. In the end, there may be, as Wilderson suggested, no “roadmap to freedom so extensive it would free us from the epistemic air we breathe” (2010, p. 338). Even so, like Gordon, Wilderson suggested that theorizing antiblackness is important simply as an existential and political recognition of Black humanity, as a means “to say we must be free of air, while admitting to knowing no other source of breath” (p. 338; italics in original).

#### Only a prior examination of antiblackness allows for an effective response to racism in education discourse

Dumas, 16 --- Assistant Professor in the Graduate School of Education and Department of African American Studies at UC Berkeley (Michael J., Theory Into Practice, “Against the Dark: Antiblackness in Education Policy and Discourse,” <http://dx.doi.org/10.1080/00405841.2016.1116852>, Taylor & Francis Online, JMP)

Although most educational researchers and practitioners would acknowledge all of these stories as lamentable examples of racism or (multi)cultural insensitivity (or in more critical scholarship, as the enactment of white supremacy), thus far there has been little theorizing in education on the specificity of anti-Black racism, or what I contend is the broader terrain of antiblackness. Intellectual inquiry on antiblackness, which is mostly situated in comparative literature, philosophy, performance studies, and cultural studies, insists that Black humanity is, as Frank Wilderson asserted, “a paradigmatic impossibility” because to be Black is to be “the very antithesis of a Human subject” (2010, p. 9). Antiblackness scholarship, so necessarily motivated by the question of Black suffering, interrogates the psychic and material assault on Black flesh, the constant surveillance and mutilation and murder of Black people (Alexander, 1994; Tillet, 2012). It also grapples with the position of the Black person as socially dead—that is denied humanity and thus ineligible for full citizenship and regard within the polity (Patterson, 1982). And in all the theorizing on antiblackness, there is a concern with what it means to have one’s very existence as Black constructed as problem—for white people, for the public (good), for the nation-state, and even as a problem for (the celebration of) racial difference (Gordon, 1997, 2000; Melamed, 2011).

Inspired by this theoretical work on antiblackness, I argue here that any incisive analyses of racial(ized) discourse and policy processes in education must grapple with cultural disregard for and disgust with blackness. I aim to explain how a theorization of antiblackness allows one to more precisely identify and respond to racism in education discourse and in the formation and implementation of education policy. Briefly, I contend that deeply and inextricably embedded within racialized policy discourses is not merely a general and generalizable concern about disproportionality or inequality, but also, fundamentally and quite specifically, a concern with the bodies of Black people, the signification of (their) blackness, and the threat posed by the Black to the educational well-being of other students.

I begin with an, albeit brief, discussion of the scholarship on antiblackness, highlighting a number of themes and commitments in this interdisciplinary body of work. Then, using school (de)segregation as an example, I demonstrate how policy discourse is informed by antiblackness, and conclude with some brief discussion of what an awareness of antiblackness means for educational practice, and for the survival and well-being of the Black children and communities we serve.

### 1nc Desegregation Adv

#### Desegregation won’t solve—racism is too entrenched in society and white privilege is maintained within the context of desegregated schools

Wells, et. al, 04 - Professor of Sociology and Education, Columbia Teacher's College

(October 2004, Amy Stuart Wells, Anita Tijerina Revilla – Assistant Professor of Women's Studies at UNLV, Jennifer Jellison Holme – Post-doctoral Fellow, Graduate School of Education and Information Studies at UCLA, and Awo Korantemaa Atanda – Senior Survey Specialist, Mathematica Policy Research, Inc., Virginia Law Review, “50 YEARS OF BROWN V. BOARD OF EDUCATION: ESSAY: THE SPACE BETWEEN SCHOOL DESEGREGATION COURT ORDERS AND OUTCOMES: THE STRUGGLE TO CHALLENGE WHITE PRIVILEGE,” 90 Va. L. Rev. 1721, Lexis-Nexis Academic, SR)

While few commentators have made the connection between greater segregation and a growing achievement gap, and even fewer have contemplated efforts to stem the tide of racial segregation, there has been no shortage of ideas regarding how to equalize student achievement across separate schools. Some argue in favor of tougher accountability measures, and some encourage school finance equity lawsuits designed to bring more money to segregated and poor urban schools. n6

The collective conclusion emanating from this commentary is as follows: The Brown decision was a historic ruling, clearly one of the most significant Supreme Court decisions of the twentieth century. Still, despite the optimism that this case fostered fifty years ago, school desegregation failed as a public policy. Thus, today, we need to find alternative means of fulfilling the promise of Brown within more racially separate schools.

Is this a more acceptable way of saying we gave up on Brown and now we are simply trying to do right by the promise of Plessy v. Ferguson? n7 What is lost by fast-forwarding history from 1954 to today is a consideration of the daily struggles within local communities to desegregate public schools and how the vision of Brown was compromised by many facets of racial politics in the United States.

In other words, if, as some have argued, segregation is but a symptom of the larger disease of white supremacy or racism, n8 it is clear that efforts to desegregate public schools and thereby eradicate the symptom have been compromised by the ongoing disease. In the process of attempting to alleviate segregation amid a society still firmly grounded in a belief system based on white supremacy, [\*1723] the public schools were forced to swim against a tide so powerful and so pervasive that we should not blame them for failing, but should applaud what progress they made in spite of larger societal forces.

We have just completed a five-year study of six communities that tried to racially balance their public schools during the 1970s. n9 Through this research we have learned of the details that lie between the court orders (or whatever desegregation policy existed) and the student outcome and demographic data that have been captured in quantitative analyses. In the space between the mandates of desegregation and the results, we found that the schools and communities we studied often unwittingly reproduced racial inequality by maintaining white privilege within the context of desegregated schools. Yet at the same time, these schools provided spaces where students and educators crossed the color line in ways they had never done before and have not done since.

We argue that the school desegregation policies that existed in these school districts were better than nothing, but simply were not enough to change the larger society single-handedly. We illustrate how difficult it was for the people in these schools to live up to the goals of school desegregation given the larger societal forces, including racial attitudes and politics, housing segregation, and economic inequality working against them. We also document how deeply committed some of these actors, both educators and students, were to trying to bring about change.

In this way, our study speaks to larger lessons about the role of schools in society and the uphill but worthwhile efforts of lawyers and judges to use schools as one of very few tools for social change. The desegregated schools of the 1970s embodied both the hope and the disappointment of Brown's promise to lessen racial inequality in the United States. We should not view the disappointment as an indictment of the idea of school desegregation or the legal levers that allowed it to happen in hundreds of school districts across the country. Rather, we should use this historical, qualitative data to help us better understand the degree of burden we placed [\*1724] on the public schools to solve a systemic, societal problem that affects every dimension of our lives, from where we live and how much money we make to who we pray with and who our close friends are. Racial inequality and the resultant segregation did not begin in the public schools; thus, we should not expect remedies in the public schools to solve the problem alone. But we can rely on racially diverse public schools - to the extent that current policies allow them to exist - to be important sites in the struggle for a more just society. Lawyers and legal scholars who helped fight for school desegregation and who continue to push for racial diversity in educational settings need to understand this more complex view of the history and reality of school desegregation in the United States in order to move forward with new legal strategies.

#### Changing residential segregation is necessary to solve school segregation

Rothstein, 16 --- research associate of the Economic Policy Institute, a senior fellow at the Thurgood Marshall Institute of the NAACP Legal Defense and Educational Fund, Inc. (12/12/16, Richard, “We Can’t Meaningfully Integrate Schools Without Desegregating Neighborhoods,” <http://www.naacpldf.org/news/thurgood-marshall-institute-senior-fellow-richard-rothstein-we-can%E2%80%99t-meaningfully-integrate-sch>, accessed on 5/5/17, JMP)

A bill introduced in the New York City Council proposes to establish “an office of school diversity within the human rights commission dedicated to studying the prevalence and causes of racial segregation in public schools and developing recommendations for remedying such segregation.”

But it is not reasonable, indeed it is misleading, to study school segregation in New York City without simultaneously studying residential segregation. The two cannot be separated.

School segregation is primarily a problem of neighborhoods, not schools. Schools are segregated because the neighborhoods in which they are located are segregated. Some school segregation can be ameliorated by adjusting school attendance boundaries or controlling school choice, but these devices are limited and mostly inapplicable to elementary school children, for whom long travel to school is neither feasible nor desirable. We have adopted a national myth that neighborhoods are segregated “de facto;” i.e., because of income differences, individual preferences, a history of private discrimination, etc. In fact, neighborhoods in NYC are segregated primarily because of a 20th century history of deliberate public policy to separate the races residentially, implemented by the city, state, and federal governments. Just a few examples:

when the city and state created Stuyvesant Town in the 1940s, they cleared an integrated low-income neighborhood to build a segregated development for whites only;

when the government financed suburbs like Levittown, it did so with a federal requirement that no homes be sold to African Americans, and whites left the city for these federally subsidized segregated suburbs;

when the federal government and city collaborated to build public housing in the mid-twentieth century, they built separate projects for whites (e.g., the Williamsburg Houses) and for African Americans (e.g., the Harlem River Houses). It was only after most whites in public housing were given suburban housing options in federally segregated subdivisions that vacancies in public housing for whites were opened to African Americans.

The most important service the proposed Office of School Diversity could perform would be to call attention to this history, educate the public about it, and develop political support to remedy NYC’s unconstitutional residential segregation with housing policies that integrate the city. Without this, schools in NYC will continue to be segregated.

Most Americans today believe that the policies followed by government to segregate New York City were characteristic of cities in the South, not the North, Midwest, or West. This belief is mistaken. Such policies were pursued by government in every region and metropolitan area in the nation. These policies were conscious, purposeful, not the unintended consequences of benign policies, and not pursued primarily from an accommodation with southern politicians. The policies have never been remedied; they are the cause of the school and residential segregation we see everywhere around us.

Multiple other government and societal structures fill in to ensure racism continues

Cobb 14 – Professor of Journalism at Columbia University, he won the 2015 Sidney Hillman Prize for his journalistic race opinions.

(Jelani Cobb, Professor of journalism at Columbia University, won the 2015 Sidney Hillman Prize for his journalistic race opinions. 4/16/14, “The Failure of Desegregation”, <http://www.newyorker.com/news/news-desk/the-failure-of-desegregation>, SR)

The Supreme Court decision on Brown, in 1954, marked a moral high point in American history, but the practice that it dispatched to the graveyard had already begun to mutate into something less tangible and far more durable. What would, in the end, preserve the principle of “separate inequality” was not protests like the one staged by Orval Faubus, the governor of Arkansas, who deployed the National Guard to Little Rock’s Central High School, in 1957, in order to keep black students out. Instead, it was policies like the Interstate Highway Act, whose passage one year earlier helped spawn American suburbia. In the wake of Brown, private schools, whose implicit mission was to educate white children, cropped up throughout the South. The persistent legacies of redlining, housing discrimination, and wage disparity conspired to produce segregation without Jim Crow—maintaining all the familiar elements of the past in an updated operating system.

To the extent that the word “desegregation” remains in our vocabulary, it describes an antique principle, not a current priority. Today, we are more likely to talk of diversity—but diversification and desegregation are not the same undertaking. To speak of diversity, in light of this country’s history of racial recidivism, is to focus on bringing ethnic variety to largely white institutions, rather than dismantling the structures that made them so white to begin with.

And so, sixty years after Brown, it is clear that the notion of segregation as a discrete phenomenon, an evil that could be flipped, like a switch, from on to off, by judicial edict, was deeply naïve. The intervening decades have shown, in large measure, the limits of what political efforts directed at desegregation alone could achieve, and the crumbling of both elements of “separate but equal” has left us at an ambivalent juncture. To the extent that desegregation becomes, once again, a pressing concern—and even that may be too grand a hope—it will have to involve the tax code, the minimum wage, and other efforts to redress income inequality. For the tragedy of this moment is not that black students still go to overwhelmingly black schools, long after segregation was banished by law, but that they do so for so many of the same reasons as in the days before Brown.

### --- XT: Segregation Within Schools

#### Racism gets replayed within desegregated schools --- advanced-level classes are only accessible to certain groups

Wells, et. al, 04 - Professor of Sociology and Education, Columbia Teacher's College

(October 2004, Amy Stuart Wells, Anita Tijerina Revilla – Assistant Professor of Women's Studies at UNLV, Jennifer Jellison Holme – Post-doctoral Fellow, Graduate School of Education and Information Studies at UCLA, and Awo Korantemaa Atanda – Senior Survey Specialist, Mathematica Policy Research, Inc., Virginia Law Review, “50 YEARS OF BROWN V. BOARD OF EDUCATION: ESSAY: THE SPACE BETWEEN SCHOOL DESEGREGATION COURT ORDERS AND OUTCOMES: THE STRUGGLE TO CHALLENGE WHITE PRIVILEGE,” 90 Va. L. Rev. 1721, Lexis-Nexis Academic, SR)

B. Together But So Far Apart: Uneven Knowledge of and Access to High-Track Classes

The privilege and political power of white parents and students not only influenced the way school desegregation plans were designed, it also strongly influenced who had knowledge of and access to certain classes within racially diverse schools. We recognize that there were many factors affecting the resegregation of students within desegregated schools, including the often unequal schooling that blacks and Latino students had been receiving prior to desegregation, as well as the higher poverty rates of their families, and even these students' hesitancy to demand access to predominately white classes. n19 But we also have a great deal of evidence in our data to suggest that white students were given more information about and easier access to the upper-level classes.

From blatant tracking practices that labeled students as "gifted" or "non-gifted" as early as kindergarten and then channeled them through the grade levels in the "appropriate" classes, to more subtle forms of sorting students that used teacher recommendations to decide who got into the best classes, the schools and districts we studied managed to create incredible and consistent levels of segregation within each school. As with the more frequent busing of black students, the preferred access to upper-level classes given to whites was in part a strategy to appease white parents. The timeframe we are studying is important in this regard because it was the late 1970s when the Advanced Placement ("AP") program was just becoming prominent, especially in high schools serving students from upper-middle-class backgrounds. n20

At all six of the high schools we studied, students talked about seeing many of the same students in all of the upper-level classes. "Schools within schools" was a phrase that was used often to describe [\*1736] the special, predominantly white configuration of advanced classes and students within desegregated schools. A white, 1980 graduate of Shaker Heights High School noted that while it was not always the exact same twenty students in every upper-level class, "it would be very unusual to see somebody, like a new face in one class that you didn't see in any other class."

At Dwight Morrow High School in Englewood, New Jersey, which was only about 36% white by the time the Class of 1980 arrived, a high-track white student commented that the more "academically stringent" the class, the fewer black students there were enrolled. He noted that in his AP biology class, there were one or two black students, and in calculus there was only one, even though the school was almost 60% black. When asked if the racial makeup of the upper-level classes was something that students at Dwight Morrow talked about, this white graduate stated that "there was like two societies going on at the academic level."

The graduate also recalled that many African-American students in the lower-level classes lacked the information they needed to go on to college, including when or why to take the SATs. In contrast, white students were very well informed regarding what it took to get into college. The graduate commented: "There were people that knew that you're gonna do this stuff, and they just kind of marched along and did it, and there were other people who were totally out of it. Most people were just not included in it." A powerful theme emerging from Dwight Morrow was that the African-American graduates seemed to have much less understanding of the tracking system overall. At the same time, white students, whether they were in the most advanced classes or not, tended to be more aware of where they and their classes fit into the hierarchy.

#### Whites are able to maintain their privileged status within the context of desegregation --- Black and Latino communities empirically have their schools shutdown and are forced to travel to new ones

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(October 2004, Amy Stuart Wells, Anita Tijerina Revilla – Assistant Professor of Women's Studies at UNLV, Jennifer Jellison Holme – Post-doctoral Fellow, Graduate School of Education and Information Studies at UCLA, and Awo Korantemaa Atanda – Senior Survey Specialist, Mathematica Policy Research, Inc., Virginia Law Review, “50 YEARS OF BROWN V. BOARD OF EDUCATION: ESSAY: THE SPACE BETWEEN SCHOOL DESEGREGATION COURT ORDERS AND OUTCOMES: THE STRUGGLE TO CHALLENGE WHITE PRIVILEGE,” 90 Va. L. Rev. 1721, Lexis-Nexis Academic, SR)

II. The Power of White Privilege in Racially Mixed Schools and Districts: The Broader Social Context of Desegregation

In the following sections we highlight some of the most powerful cross-case themes to emerge from our study. n11 These themes illustrate the distance between the intent behind school desegregation policy, to vindicate Fourteenth Amendment rights for African-Americans and other minority groups, and the actual results these policies achieved. In all of the six school districts we studied, powerful whites were able to maintain their privileged status even in the context of an equity-minded reform movement such as school desegregation. In each of the six communities and schools in our study, policy makers and educators tried to make desegregation as palatable as possible for middle-class white parents and students. On a political level, this made perfect sense. The idea was to stave off white and middle-class flight, which would leave the public schools politically and economically vulnerable. In concentrating on appeasing white parents, however, school districts often disregarded the needs of both students of color and poor students.

Across the school districts studied, we saw the disillusionment of African-American and Latino advocates, educators, and students as they gave up on a "remedy" they once thought would solve many educational problems for students of color. While they acknowledged many gains that resulted from efforts to desegregate public schools and create more diversity within these educational institutions, they voiced clear disappointment about how little progress had been made overall and the price that communities of color had to pay to accommodate the demands and threats of whites.

We realize that some of our findings are not "new" to the literature on school desegregation. For instance, other authors have highlighted many of the shortcomings of desegregation policy that we address. n12 We, however, are attempting to add a new sense of [\*1730] "dual consciousness" n13 to the discussion. In other words, we think it is important to celebrate the accomplishments of Brown and the role that public schools and the courts have played in trying to right the wrongs of racial inequality in our society, while being very clear about just how inadequate school desegregation policy - as an isolated policy affecting but one of many racially unequal institutions in our society - was in overcoming the legacy of white privilege.

This is not to absolve the schools and educators of all wrongdoing - rather, we are simply examining them within the broader social context in which they were enmeshed and rethinking future policy proposals in light of how desegregation proceeded after Brown. As one Latino former school board member in Austin, Texas, explained to us, desegregation amounted to "societal problems ... being dumped on the children."

A. What's in the Black Community is Not Good Enough for White Children: How the Burden of Busing Was Placed on Blacks and Latinos

As other school desegregation scholars and observers have noted, n14 usually the historically black or Latino public schools were closed once districts were forced, either by judges, the federal government, or other political pressure, to desegregate their schools. This meant that black and Latino students were more likely to be riding buses longer distances at younger ages than most white students in desegregating school districts. n15

In five of the six school districts that we studied, at least one historically black school was eventually closed. Furthermore, in five of the six districts, black students, parents, and activists felt that their communities bore the burden of achieving racial balance in the [\*1731] schools. We learned from our data that this burden did not merely relate to the issue of inconvenience, such as black students having to get up early and get home late. Rather, the closing of black schools that required students of color to bear the brunt of busing dealt a blow to these communities' pride and dignity. It was as if white society were saying that there was nothing of value in the black or Latino communities.

In Austin, Texas, the first phase of school desegregation entailed the closing of black schools on the east side of town and transferring students out of those neighborhoods to other schools, many with large Latino populations. One school that was closed early on was Anderson High School, a historically black high school with a long tradition and strong ties to the African-American community. Prior to closing Anderson, the federal judge overseeing desegregation in the Austin case made an attempt to reassign nearby white students to the school. As one long-time district administrator recalled, however, when the judge ordered that white students be assigned to Anderson:

You know, people [at the school] got revved up for that ... the black kids did a lot of work on trying to get ready for these [white] kids. And, of course, the [white] kids didn't come. So, there was like total flight, you know. Well, that was a downer as well. That was another unfortunate situation that helped solidify an adversarial deal because feelings were hurt.

In other words, despite the pride members of the black community had in Anderson High School and their attempts to fix it up for the reassigned white students, the white families chose not to abide by the court order. After this act of resistance, the judge rescinded the plan that reassigned white students and ordered a new plan that resulted in the closing of the black schools, including Anderson High School, and the one-way busing of black students out of their community.

The same Austin administrator noted that the alteration to the desegregation plan was both a good and a bad step. The new plan was good in that it was more effective in creating racially balanced schools, but it was bad in that it reinforced the idea that what the black community had to offer was not worthwhile and that black schools were inferior. He said, "Well, when you tell people that their schools are inferior to some degree you're telling them they're inferior."

[\*1732] Many others spoke of the sense of shame and loss felt by members of the black community when white students refused to attend black schools. The manner in which Anderson High School was shut down was particularly insulting. At the time of Anderson's closing, the Austin school board committed to building a new "Anderson" high school in the northwest and mostly white section of the city. Members of the black community thought that the new Anderson should house the memorabilia of its namesake school. But they soon learned that such memories of the old, all-black Anderson High School were not welcome in the new, predominantly white school. As one African-American community leader explained, the people leading the new Anderson High School said that they did not want the trophies or anything else from the old Anderson school. He noted that the "new" Anderson was related to the "old" Anderson in name only, which "insulted and infuriated the Afro-American community, justifiably so."

In the 1970s, Austin also implemented majority-to-minority transfers, a voluntary desegregation plan through which students of any race could transfer from a school in which they were in the racial majority to a school in which they would be a racial minority. This program did not succeed in fully desegregating the district, however, because no white students opted to transfer to historically black or Latino schools. As one local Latino politician noted, "The majority-to-minority transfer rule did not meet the test of integration because all [of] the burden for moving was on the minorities. No white guy would say, "I want to go into a minority school.'"

Given the history of racial discrimination in cities such as Austin, it is not surprising that white families did not want to send their children to historically black and Latino schools. Most of these schools were inferior to the white schools in terms of resources and facilities. Furthermore, the communities in which these schools existed were more likely to be poor and unfamiliar to whites, particularly the more affluent whites. Still, we know from school desegregation history that such schools, with a great deal of extra support and funding, can be made more appealing to white families. n16

[\*1733] Other sites in our study were similar to Austin in not making such an investment in black schools and thus closing the schools in black neighborhoods, and putting black children on buses in larger numbers and at younger ages than white students. For instance, in Pasadena, the school desegregation plan paired black, Latino, and white elementary schools so that all the students - black and white - from the two schools went to one building for kindergarten through third grade and then to the other school for grades four through six. But all of the kindergarten-through-third-grade schools were in the previously predominantly white schools in the white neighborhoods, which meant the youngest students of color were always sent the farthest. By fourth grade, many white parents had enrolled their children in private schools to avoid sending them to schools in black or Latino communities. As several people we interviewed noted, private schools flourished in Pasadena.

In Charlotte, North Carolina, one of the most comprehensive school desegregation plans in the country was implemented three years after the 1971 United States Supreme Court decided Swann v. Charlotte-Mecklenburg Board of Education. n17 The Court held that, if necessary to achieve racial balance, school districts should reassign students to schools outside their neighborhoods and bus the students to these schools. n18 Thousands of Charlotte students were bused every day to schools across town, but it was the African-American students from the west side of town who were bused in greater percentages, at younger ages, and for many more years on average than most of the white students. This was partly because of the demographics of the district and the high concentration of black students in certain neighborhoods, but it was also the result of deliberate choices made by the judge, lawyers, and school board to appease white parents and stave off white flight.

According to one of the lawyers who represented the black plaintiffs in Swann, the biggest problem with the plan was that [\*1734] those in charge "compromised and placed a greater burden on black parents than we did on others." He said the federal judge in charge of the case purposely decided to close the kindergarten through third grade schools in the black neighborhoods and put all such grade schools in the suburban areas of the county. This plan was implemented, the lawyer argued, "so that white kids wouldn't have to go to school in the inner city and that supposedly made it easier for white parents to send their kids to school."

When asked if he would proceed differently if he had a chance to negotiate the plan again, this particular civil rights attorney said he was not sure, in the long run, that insisting on having elementary schools in the inner city would have been the answer. Such a plan may well have increased the rate of white flight. The attorney noted that by leaving the white students in their own neighborhoods and sending the black students out to the suburbs, the architects of the plan gained broader acceptance of the court order. He noted, however, "we still had white flight, and we may or may not have had as much white flight if we had sent the white kids in to the elementary schools in the inner city."

Thus, in Charlotte, as well as in Pasadena, Austin, Englewood, and eventually Shaker Heights and Topeka, African-American and Latino children were more likely to bear the logistical burdens of integration. Meanwhile, black communities lost neighborhood schools in the name of appeasing white parents who would otherwise flee the public system. Often these white parents pulled their children out of the public schools anyway, leaving African-American parents, educators, and activists angry, hurt, and frustrated.

Ironically, the high school in Charlotte that we chose to study, West Charlotte High School, is one of the few historically black schools that survived the implementation of school desegregation by enrolling large numbers of white students. Nevertheless, the story of West Charlotte - the extra resources it received in order to attract the white students as well as changes the school went through once the white teachers and students arrived - provides some of the most solid evidence that white privilege can assert itself even within the context of a historically black school.

### --- XT: Desegregation Can’t Solve Societal Racism

#### Segregation and racism in other sectors of society undermine the transformative effect of the plan

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(Winter 2007, Bryan L., The Scholar: St. Mary's Law Review on Minority Issues, “A THOUSAND HUMILIATIONS: WHAT BROWN COULD NOT DO,” 9 SCHOLAR 187, Lexis-Nexis Academic, SR)

VI. Conclusion

"Even the smallest victory is never to be taken for granted. Each victory must be applauded, because it is so easy not to battle at all, to just accept and call that acceptance inevitable." -Audre Lorde No measure of a court's equitable power, no measure of a government's dismantling of de jure barriers, no number of buses could solve what James Baldwin and others have seen as our nation's core moral failing: racism. Brown set the stage for dismantling racism, segregation, and discrimination in public school systems. However, addressing the racism, segregation, and discrimination in politics, suburbanization, housing, and transportation policy went unabated for too long, and frustrated the ability of Brown's edict to be wholly fulfilled.

Though we recently commemorated the fiftieth anniversary Brown, reflection is still warranted. For many, that reflection invites a profound sense of disappointment in light of the promise Brown signaled for African-Americans, educational achievement, and racial integration. However, as the history of Brown makes painfully clear, courts "cannot produce social reform on its own, and [] judges are unlikely to challenge established social consensus." n143 Given that the issue of educational achievement for African-Americans has shifted to the statehouses across the country, the same can be said of legislators.

Today, with the benefit of hindsight, we can all reflect upon the Brown decisions and implementations with an arched eyebrow of skepticism. To the extent that skepticism has transformed itself into disappointment, it is worth considering that perhaps, just perhaps, our expectation for what Brown could achieve for African-Americans was outsized, or at least, misplaced. What we hoped for was not necessarily what Brown promised. While Brown set us "on the path of rejecting the kind of racial exclusion that had made African Americans a people apart since before the nation's founding," n144 Brown could not break through that smothering pattern of a thousand humiliations beyond courts' reach.

#### Desegregation policies made without first confronting broader societal racism fail and are met with huge white resistance

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I. Introduction

Even measuring the Brown v. Board of Education decisions n1 by the most modest standard is to acknowledge a dream not realized. While Brown represented, most unequivocally, a blow to segregation in public schools, some fifty years later, many public schools have become racially identifiable again. Today, 37% of African-Americans and Latinos attend schools which are overwhelmingly comprised of minorities. n2 In Detroit, 80% of the White students attend schools with only 3% African-American; 80% of African-Americans attend schools which are only 4% of White. n3 In Texas, 40% of its 1.8 million students attend "overwhelmingly" Hispanic schools. n4 In Cleveland, over half of all African-American students attended racially isolated schools in the 1970's and 1980's. n5 In 2001, that number actually rose to over 65%. n6

Prior to Brown, the education gap between Whites and African-Americans was overwhelming. In 1950, 6.5% of America's nonwhite population had no formal education, 24.9% had completed less than five years of schooling, and over 31% were functionally illiterate. n7 Contrast that with Whites in 1950: only 2.1% had no formal education, only 6.6% had completed less than five years of schooling, and only 8.7% could be considered functionally illiterate. Today, these disparities have narrowed, but are no less distressing. According to the National Assessment of Educational [\*189] Progress, in 2003, 65% of African-Americans in K-12 were unable to read at that their grade level, compared to 25% of Whites. n8 Over 15% of African-Americans could not read proficiently upon leaving high school. n9 Furthermore, only 50.2% African-Americans graduated from high school in four years, versus 74.9% of Whites. n10 African-American college enrollment and completion rates are similarly low. African-Americans earn only 50% of the college degrees that Whites earn. It is no mystery that educational outcomes have a significant, if not dispositive impact on earning power and sustained economic prosperity. Thus, it should come as little surprise that African-American wage earnings are only 67% of those earned by Whites. n11

Before Brown, it ws presumed that the primary cause for then-existing achievement gaps and the racial identity of public schools was the system of de jure segregation which relegated African-American children to inferior educational resources, high classroom populations, and racial isolation. It was the Brown litigation that brought those problems into relief, including the psychological damage caused by de jure segregation and its pernicious impact on academic achievement. The promise abided that public school desegregation would ensure equal, thus better educational opportunities for African-Americans. However, given the current racial make-up of public urban schools, and the persistent achievement gaps, many view the promise of Brown woefully unfulfilled.

It might be said that Brown was supposed to do two things: 1) provide immediate relief to the litigants and the school districts, and 2) provide a directive steeped in constitutional doctrine to eliminate all vestiges of segregation and discrimination in not only those schools directly involved in the litigation, but public school systems nationwide. n12 However, it quickly became clear that Brown could not "simply" be about school segregation and discrimination. To be an unmitigated success, Brown would have to address the segregation and discrimination that infected virtually every aspect of our country.

Brown could never do that. For all of Brown's potential, it was simply incapable of addressing the myriad social, political, and economic forces [\*190] that profoundly impacted the decision itself, and equally as important, would frustrate the desegregation remedies prescribed. As the late Roy Wilkins described, the states "insisted and wove into a smothering pattern a thousand different personal humiliations, both public and private, based upon color." n13 The purpose of this Article is to illuminate how the Brown decisions - flawed in themselves - had to overcome that "smothering pattern" of racism and discrimination in areas beyond the courts' equitable and temporal reach. In sum, Brown proved to be no match for rank racism, unchecked political power, judicial capitulation, housing segregation and even interstate highway construction policies.

Part One of this Article examines the Brown decisions and the aftermath. Part Two revisits the desegregation saga post-Green v. County School Board of New Kent County, Virginia, n14 and the subsequent political and judicial forces which would doom desegregation efforts. Part Three examines the role that suburbanization and interstate highway transportation policies contributed to the frustration of desegregation efforts. This Article concludes by positing that in the context of modern public school reform, the promise of Brown is still elusive due to proposed legislative solutions, which once again, marginalize the interests of African-Americans.

II. What Brown did not do

A. Brown I as a Triumph of Racial Restorative Justice? Well, Not Quite

Certainly, there has been plenty of justifiable praise for Brown's impact. It has been described in almost mythic terms, noted as "a defining moment in American history," n15 and is credited for the growth of the black middle class. n16 Many more, however, have cast sobering eyes toward [\*191] its legacy. Derrick Bell has remarked upon Brown's "unassertive and finally failed implementation" because it did not boldly rebuke the likelihood that Whites were only going to abide by desegregation remedies that converged with their interests, if at all. n17 In a similar vein, Charles Ogletree observed that the Brown II's "with all deliberate speed" directive was a bow to White resistance to desegregation and ensured that Brown would never be "implemented as a social imperative." n18 Professor Lani Guinier, reflecting upon Brown, noted that the decision allowed to continue, "uninterrupted," White America's compulsion to use race as a scapegoat, which ultimately led to our re-stigmatization. n19 Gary Orfield commented that the Brown holding would have been remembered as a failure, but for the civil rights movement. n20 Still others have placed the current racial disparities in academic achievement, as well as the re-segregation of public school systems throughout the country, squarely on the shoulders of African-Americans. n21

#### Other racist structures and backlash inevitably overwhelms desegregation efforts

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Nine years after Brown II, the Supreme Court proclaimed that "the time for mere 'deliberate speed' has run out." n63 It was four years after that, in Green v. County School Board of New Kent County, Virginia, n64 [\*200] the Supreme Court ordered school districts under desegregation plans to identify any policy or practice "traceable to the prior de jure system of segregation" that "continued to have discriminatory effects." n65 Once identified, remedies were now bound to address "not just ... the composition of student bodies ... but ... every facet of school operations." n66 The Green decision empowered those who sought broad remedies to eradicate the discrimination that impacted public schools and the education of African-American children. Emboldened plaintiffs set out to eliminate all vestiges of de jure segregation "root and branch." n67

Predictably, racial discrimination impacting school segregation could be found virtually everywhere: faculty and staff hiring; training and retention; establishing school district boundary lines; distribution of education expenditures; student discipline; special education placement; physical plant conditions; educational achievement and opportunities for students in reading, math, science, communication, and other curricular fundamentals; vocational education placement, counseling and career guidance; extra-and co-curricular activity support; school transportation; employment; and especially in housing. n68 By identifying the "hard" and [\*201] "soft" indicia of school segregation and discrimination, courts belatedly began to use their equitable powers to demand broad remedies. Consequently, between 1966 and 1975, 523 school districts had desegregated. n69 Ultimately, these gains would be short-lived, as politicians, housing discrimination, suburbanization, and federal interstate highway plans would hinder efforts to achieve Brown's goals.

B. "Root and Branch": Too Little, Too Late

"Southern White Democrats will desert their party in droves the minute it becomes a black party." - Kevin Phillips, campaign strategist to Richard Nixon, 1967 n70 As quickly as the Supreme Court stepped in to accelerate the pace of desegregation, another backlash brewed. Particularly, the implementation of busing plans caused white citizens from Los Angeles to Boston to violently defy desegregation orders. It was during this time that Americans saw the image which came to symbolize the rank anti-black hatred: attorney Theodore Landsmark, outside of Boston City Hall, being held by a White man as another man attacks him with the spire of the pole waving the American Flag. n71

More insidiously, President Richard Nixon stepped in to hasten the retreat. His hostility to busing well-documented, n72 Nixon set out to challenge and stall desegregation orders, part of his overall "Southern Strategy" for Republicans to claim - once and for all - the southern vote. n73 He fired Leon Panetta, his Assistant Secretary of Health, Education, [\*202] and Welfare, for his aggressive pursuit of desegregation. n74 In Swann v. Charlotte-Mecklenburg School District, n75 Attorney General John Mitchell explained that the Nixon Administration "supported Charlotte in principle, in that we are taking the position that the Fourteenth Amendment does not require racial integration as a matter of law." n76 After the Swann decision, which ordered a busing desegregation remedy, Nixon signed legislation stopping all busing until all appeals had been filed, or the appeal times had lapsed. n77

Nixon then trained his eye upon Supreme Court appointments. In addition to his appointment of Harry Blackmun and William Rehnquist, Nixon also appointed Lewis Powell, Jr. to the Supreme Court with the expressed hope that he would be instrumental in "eliminating busing and decelerating housing desegregation efforts." n78 Powell did not disappoint; his presence on the high court proved pivotal in two of the most devastating anti-desegregation decisions ever issued. Powell's vote was dispositive in the Milliken v. Bradley n79 decision, which held that an inter-district, urban-suburban Detroit, Michigan busing remedy to achieve racial balance was unconstitutional. n80 The Supreme Court's rejection of urban-suburban remedies ensured that Detroit and other metropolitan school districts-especially in northern cities-could only watch helpless as the districts tipped toward minority-majority composition. Milliken also ensured that it would be only a matter of time when northern school districts would throw up their hands and argue the impossibility of Brown, and for the release from desegregation orders.

In another decision, San Antonio Independent School District v. Rodriguez, n81 Powell wrote for the 5-4 majority, reversing the district court finding that Texas' property tax-school funding mechanism violated the Equal Protection Clause. n82 Holding that there was neither a constitutional right to a public education nor financial equalization, n83 it would take twenty [\*203] years and two more iterations of school finance litigation to only partly nullify Rodriguez's impact.

Ronald Reagan continued the assault on desegregation started by Nixon to solidify the white southern Democratic base. After refusing an invitation to speak before the National Association for the Advancement of Colored People at its annual convention, Reagan instead went to Philadelphia, Mississippi - the town made infamous by the murders of Goodman, Cheney, and Schwerner at the height of the civil rights movement - to kick off his presidential campaign, and extol the virtues of "state's rights." n84 In 1981, he rescinded the Emergency School Aid Act, which had documented success at supporting desegregation remedies, and attempted to eliminate Desegregation Assistance Centers. n85 The head of his Department of Justice Civil Rights Division, William Reynolds, n86 also hostile towards school desegregation and busing, set about dismantling those efforts. n87 Finally, it was Reagan's Supreme Court appointees, Kennedy, O'Connor, and Scalia, and Bush's appointment of Thomas who ensured the end of all court-ordered desegregation plans owed to the Brown decisions. n88

As the causal connection between de jure segregation and present vestiges became more attenuated, the increasingly conservative Supreme Court would begin to ensure that court-ordered desegregation - regardless of successes or failures - would come to a halt. In Missouri v. Jenkins, n89 the Supreme Court set time limits on equalizing funding. Freeman v. Pitts n90 limited equitable remedies, and held that districts would not have to show correction of all violations as a condition of finding unitary status. n91 Finally, in Oklahoma v. Dowell, n92 even though the Oklahoma City School District had not met all of the goals set out in the desegregation [\*204] order, the Supreme Court affirmed the dissolution of the desegregation order. The school board promptly voted to return to segregated neighborhood schools. With this, "the Supreme Court exhumed some of Plessy's basic assumptions," n93 viz., segregated schools would be a reality again, but with no assurance that they would be equal.

#### De jure and de facto anti-black systems are woven into American society—enabling school districts, authorities, politicians, and the courts to circumvent desegregation policies

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B. Brown II as a Triumph of Racial Restorative Justice? Absolutely Not

"What one hand giveth, the other hand taketh away." - Proverb Overruling Plessy was just the beginning of the end of de jure segregation in public education. The questions next became: How were the governmental entities - school districts, state and local bodies - going to go about eliminating the dual systems of education? What did it mean to "desegregate?" And when would desegregation have to occur? A year after its Brown I decision, the Supreme Court gave its "wholly unassertive" reply in Brown II.

In doing so, what the Supreme Court gave in Brown I, it took away in Brown II. Yielding to a fear of massive white resistance, the Supreme Court softened the potential impact of its Brown I pronouncement with a phrase that would have a devastating impact. The Court cited the need to give weight to "public and private considerations," and the "elimination of a variety of obstacles" to implement its desegregation order. n33 The elimination of those obstacles "in a systematic and effective manner" required taking "into account the public interest[.]" n34 Consequently, the Supreme Court blinked, directing school boards to admit students "to public schools on a racially nondiscriminatory basis" not at once, but "with all deliberate speed." n35

[\*195] This textual reading of Brown II provides the persuasive premise of Professor Ogletree's hypothesis, and confirms Professor Bell's interest-convergence theory. The remedy prescribed in Brown II would not be "pure," but only one that accommodated majority interests. With those four words, Marshall and others sadly recognized which "public" Chief Justice Warren meant when he said public interest: Whites resistant or hostile to integration. They also knew that the "obstacles" of which Warren spoke were largely those de jure and de facto anti-black systems which had been woven, by that "public," into every conceivable aspect of American life. The greatest "obstacle," of course, was the endemic racism of white resistance that would not be cowed by judges who had "substituted their personal political and social ideas for the established law of the land." n36 As Professor Ogletree recounts, events unfolding over the next decade would define what Chief Justice Warren failed to articulate in Brown II. "All deliberate speed" meant change would come slowly, cautiously, warily, and at a pace dictated by whites. n38

C. "Nullification and Interposition" Throughout the South

I have a dream that one day, down in Alabama, with its vicious racists, with its governor having his lips dripping with the words of 'interposition' and 'nullification' - one day right there in Alabama little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers. I have a dream today!

- Reverend Dr. Martin Luther King, Jr. n39

The Reverend Doctor Martin Luther King, Jr. saw it, and called it what it was. The "all deliberate speed" directive amounted to a "white pass," [\*196] **enabling contrary school districts, authorities, politicians, and the courts to effectuate Brown on their own terms - terms that denoted passive resistance, delay, avoidance, obfuscation, and in too many instances, violence.** This says nothing of the Brown plaintiffs' sufferings: threatened, fired from their jobs, unable to secure loans and financing, or arrested on spurious charges. n40 To be sure, in the years following Brown II, resistance to integration, famous and infamous, was legion, unfolding at a pace and with a ferocity that - figuratively and literally - stopped hearts.

In 1955, NAACP leader Reverend George Wesley Lee of Belzoni was murdered, as was Florida's NAACP President and his wife. n41 Sixteen-sticks of dynamite outside of his bedroom window sent the Reverend Fred Shuttleworth through the floor and into the basement of his Birmingham home on December 25, 1956; he survived this one of several attempts to take his life. n42 Within the first four years of the Brown I decision, there were reportedly "530 cases of overt racial violence and intimidation - including 6 murders, 29 shootings, 44 beatings, 5 stabbings and the bombings of 30 homes, 7 churches, 4 synagogues and 4 schools. In the tense battle over desegregation, 17 southern towns were threatened with mob violence." n43 At the federal, state, and local levels, politicians met the Supreme Court's decision with bold-faced contempt. George Wallace's vitriolic invocation - "Segregation today! Segregation [\*197] tomorrow! Segregation forever!" n44 stands today as a chilly, emblematic testament to the intense defiance. The NAACP was outlawed from operating in Alabama by a circuit court judge's order in 1956. n45 One hundred United States legislators from southern states vowed to "resist forced integration by any lawful means." n46 Those legislators endorsed a "Southern Manifesto" which decried the Supreme Court's "abuse of judicial power." n47 Governor Orval Faubus asserted that Arkansas was not bound by Brown, posting guardsmen at the doors of Little Rock's Central High School to prevent entry of African-American students. n48 The Gray Commission of Virginia was established by the governor to study methods by which to keep the schools separate. n49 Both Delaware and Texas legislatures passed laws stating that no child could be compelled to attend a racially mixed school, n50 as did nineteen other legislatures. n51

Southern anti-integrationists found their outlets to oppose Brown through organizations such as the Mississippi White Citizens Council and the Mississippi Sovereignty Commission, the latter whose state-sanctioned charge was "to do and perform any and all acts and things deemed necessary and proper to protect the sovereignty of the State of Mississippi, and her sister states, from encroachment thereon by the federal government or any branch, department or agency thereof[.]" n52

[\*198] School boards were also defying Brown with impunity. Across the South, districts delayed integration through "pupil placement plans," requiring a school board's permission if African-American students requested a transfer. Invariably, African-American students requesting transfer were found to be "unfit," and were therefore denied. n53 While state administrators in Virginia, South Carolina, and Georgia threatened to close their schools if made to integrate, n54 one particular district made good on the threat. Rather than admit African-American children, education officials in Prince Edward County, Virginia concluded that no child - whether white, black, brown, yellow, green, blue or purple - would be educated within its public school walls. n55 The county shut down its entire public school system for five years, during which time the state subsidized the creation of "private" schools for Whites. n56

By May 1964, southern states had enacted 450 laws and resolutions to frustrate the Brown decision. n57 It was little wonder, then, a year after Dr. King stirred the nation's soul and conscience, only one out of fifty southern African-American school-age children attended integrated schools. n58

#### Empirics prove schools can’t transform society at large

Wells, et. al, 04 - Professor of Sociology and Education, Columbia Teacher's College

(October 2004, Amy Stuart Wells, Anita Tijerina Revilla – Assistant Professor of Women's Studies at UNLV, Jennifer Jellison Holme – Post-doctoral Fellow, Graduate School of Education and Information Studies at UCLA, and Awo Korantemaa Atanda – Senior Survey Specialist, Mathematica Policy Research, Inc., Virginia Law Review, “50 YEARS OF BROWN V. BOARD OF EDUCATION: ESSAY: THE SPACE BETWEEN SCHOOL DESEGREGATION COURT ORDERS AND OUTCOMES: THE STRUGGLE TO CHALLENGE WHITE PRIVILEGE,” 90 Va. L. Rev. 1721, Lexis-Nexis Academic, SR)

E. Racially Mixed Schools Need Much Attention and Care: Summing it all Up

Putting these six racially mixed high schools from the late 1970s into their broader social, political, and historical contexts has proven to be a valuable exercise, one that helps us rethink the current, overly simplistic debate about the "success" or "failure" of school desegregation policy in this country. Indeed, rather than [\*1750] portray the struggles of these schools as evidence that we have fallen short of the ideal of a racially more equal and just society, we want to point to these stories as evidence of both how far we have come and how much further we need to go.

Much of the burden of righting the historical wrongs was placed on the public schools, while much of the rest of the society, except for the military, continued along its separate and unequal path. If white privilege was not strongly challenged in other realms of our society, we should not be at all surprised that it was barely challenged at all in racially mixed schools. What we have learned from our six districts and schools is that, despite what many adults thought back in the 1970s, their journey toward equal educational opportunities was not complete once white, black, and Latino students walked through the same school doors; it had only just begun.

A white school district administrator in Charlotte, who was one of the many principals of West Charlotte High School in the 1970s, reflected on how different the understandings of the goals of school desegregation were in the 1970s. He said that back then there was a tension among liberal white educators who supported desegregation and racial equality in theory, but who also wanted to teach the predominantly white high-track classes. Many of these educators were not ready to close the black-white achievement gap at that time. The administrator noted:

Our moral issue [in the 1970s] was to get two groups of people together who had never been together before, and let them succeed, or let the institution succeed as a result of creating that kind of grouping. I think the moral dilemma today is, you got to go deeper than that. It's not enough just to put two groups of people together. Those two groups of people had to be put together and come out on equal terms. I don't think that was in our thought process at the time.

Another central paradox is that by the time educators began to figure out how and what they could and should try to accomplish in racially mixed schools, the number of such schools was declining. For instance, shortly after we conducted our interviews, the Charlotte-Mecklenburg schools ended their court-ordered school desegregation [\*1751] plan, and West Charlotte High School, as we noted, is now predominantly black once more.

### --- XT: Housing Segregation

#### Neighborhood segregation is most important things blocking greater integration in education

Rothstein, 5/16/17 --- fellow at the Thurgood Marshall Institute of the NAACP Legal Defense Fund and research associate at the Economic Policy Institute (Richard, “Brown v. Board is 63 years old. Was the Supreme Court’s school desegregation ruling a failure?” <https://www.washingtonpost.com/news/answer-sheet/wp/2017/05/16/the-supreme-courts-historic-brown-v-board-ruling-is-63-years-old-was-it-a-failure/?utm_term=.22ef4c1f316f>, accessed on 6/13/17, JMP)

Seemingly permanent segregation is not what we expected. In 1954, a few hours after Brown was announced, Thurgood Marshall, leader of the NAACP’s Legal Defense Fund, told reporters that it would take, at most, five years for schools to desegregate nationwide.

He didn’t anticipate the massive resistance of Southern states to the decision, yet that’s no longer the most important factor impeding integration. Rather, schools remain segregated mostly because their neighborhoods are segregated. Had civil rights lawyers been able to attack neighborhood rather than school segregation, they would have accomplished more for educational equality than by focusing on schools directly.

#### Desegregating neighborhoods is a necessary precondition to integrating schools and closing the achievement gap

Rothstein, 5/16/17 --- fellow at the Thurgood Marshall Institute of the NAACP Legal Defense Fund and research associate at the Economic Policy Institute (Richard, “Brown v. Board is 63 years old. Was the Supreme Court’s school desegregation ruling a failure?” <https://www.washingtonpost.com/news/answer-sheet/wp/2017/05/16/the-supreme-courts-historic-brown-v-board-ruling-is-63-years-old-was-it-a-failure/?utm_term=.22ef4c1f316f>, accessed on 6/13/17, JMP)

In 1948, the Supreme Court prohibited courts from evicting black families who moved to white neighborhoods and in 1968, the Fair Housing Act banned future housing discrimination. The Act’s enforcement has been imperfect, but some African Americans have successfully integrated suburban communities. But even with perfect enforcement, most would have been, and were, unable to do so. Racially restricted single-family homes that sold in the 1940s and ‘50s for twice national median income now sell for three times that much. Working-class black families who could have bought suburban homes when they were first built can no longer afford them.

Most Americans have forgotten this history, aided by Supreme Court opinions that declare residential segregation to be “de facto,” resulting mostly from private discrimination. But de facto segregation is mythical. In reality, neighborhood segregation has resulted from intentional government policy, as unconstitutional as the “de jure” school segregation imposed by Southern legislatures prior to 1954. The governmentally-sponsored residential segregation imposed by federal, state, and local authorities in the mid-twentieth century established a segregated landscape in every metropolitan area that has never been remedied.

Once the Supreme Court decided Brown, children of either race could attend their neighborhood schools if the decision were obeyed. But if courts were now to recognize that residential segregation is rooted in unconstitutional policy, undoing it would be daunting. Children can easily walk to nearby schools but families can’t easily pick up and move to integrated and now-unaffordable neighborhoods, when no longer barred from doing so.

On May 17, 1954, when Thurgood Marshall and his colleagues predicted rapid school desegregation, they said that they would now turn attention to housing. But their resources were soon consumed by defending Brown, as state after state sabotaged it. And it was already too late for straightforward attacks on neighborhood segregation — the government’s scheme to segregate metropolitan areas was by then mostly complete, with residential patterns solidified.

Dismantling de jure residential segregation is incomparably more difficult now than it would have been 70 or 80 years ago. But that’s no excuse for avoiding it. Unless we desegregate neighborhoods, Brown’s promise of integrated education will remain unattainable.

The Color of Law asserts that “letting bygones be bygones” is not a policy worthy of a constitutional democracy. The achievement gap with which educators struggle can never be closed until we recognize that some of the most important education policy dilemmas cannot be addressed in isolation. Fundamentally, education policy is housing policy.

#### White suburbanization and the highway’s devastating effect on inner-city funding for education makes integration and desegregation impossible

Adamson, 07 --- Associate Professor of Law, Seattle University School of Law

(Winter 2007, Bryan L., The Scholar: St. Mary's Law Review on Minority Issues, “A THOUSAND HUMILIATIONS: WHAT BROWN COULD NOT DO,” 9 SCHOLAR 187, Lexis-Nexis Academic, SR)

IV. Housing Discrimination, Suburbanization and the Great American Highway

A. Housing Discrimination as a Barrier to School Integration

"'You might have the cash, but you can ... not cash in your face[;] we don't want you livin' in here!!" - Stevie Wonder n94 Without argument, housing discrimination played a fatal role in Brown's undoing. The McMichael's Appraising Manual, originating in the early 1930's, was the leading residential appraisal guide for decades. The manual provided the blueprint upon which housing discrimination would be institutionalized, rank-listing racial groups from least-to most-desirable.

1. Mexicans

2. Negroes

3. South Italians

4. Russians, Jews (lower class)

5. Greeks

6. Lithuanians

7. Poles

8. Czechs or Bohemians

9. North Italians

10. English, Germans, Scotch, Irish, and Scandinavians n95

Real estate appraisers used this manual, and its odious gauge of racial worth, at least into the 1950's. n96 The manual's impact began taking shape in 1933 when it was adopted by President Roosevelt's Homeowners Loan [\*205] Corporation program to provide homeowner financial assistance during the Great Depression. Two governmental engines that drove housing finance development over the next sixty years further institutionalized and perpetuated racist housing practices. The Federal Housing Administration (the FHA), established in 1934, financed surburbanization beyond World War II. Along with the Veteran's Administration (established in 1944), the FHA sought to encourage lenders to invest in residential lending through the provision of insurance. n97 Their underwriting guidelines were cribbed directly from the McMichael's manual, directing "that properties shall continue to be occupied by the same social and racial classes," n98 and warned against introducing "inharmonious racial groups" into neighborhoods. n99

It was not until 1950 that the FHA officially altered this policy. However, it still "recommended suitable restrictive covenants." n100 This was so despite the fact that the Supreme Court declared such covenants unconstitutional in Shelly v. Kraemer in 1948. n101 Redlining became rampant, and "by the late 1950's many blacks were denied access to traditional sources of housing finance by institutionalized procedures." n102 Through the 1960's, government housing policies continued to perpetuate segregation, especially as suburban growth took off. Until 1962, federally-sponsored public housing works were classified for occupancy by race, and even after that, city officials went to great lengths to keep housing projects out of white neighborhoods.

Though measures such as the Fair Housing Act, the Home Mortgage Disclosure Act, the Community Reinvestment Act and the Equal Credit Opportunity Act were enacted as responses to housing discrimination and economic flight, they came too late for Brown. The incipient government housing programs and policies "put a seal of approval on ethnic and racial discrimination," n103 and were eventually adopted non-governmental actors. However, those adopting the government's racist practices took those practices to another level, and to the suburbs. Banks, real estate agents, mortgage brokers and appraisers would transform redlining into a [\*206] science, carving up cities by race with a precision that would put heart surgery to shame.

B. No Whites to Integrate: Suburbanization's Role in Undoing Brown

"We shall solve the city problem by leaving the city." - Henry Ford n104 In the 1950's and 1960's, suburban population increased from 35 million to 84 million. The so-called "urban crisis" accelerated this migration. School desegregation, racial strife, crime, increasing social services costs and taxes hastened the migration of white families to the suburbs. n105 By 1980, 100 million people lived in suburbs. n106 Henry Ford's words, in the context of school desegregation efforts, proved prophetic.

As whites left the city, African-Americans continued to move into the cities. During the post-World War II era and into the 1970's, the migration of poor, southern African-Americans to the north changed cities dramatically. Between 1960 and 1970 alone, central cities lost 1.92 million whites, and gained 2.8 million African-Americans. n107 **As a result, for those cities under desegregation orders, achieving the racial balance was becoming impossible**, n108 **in short, because there were no whites to integrate.** n109

With white flight came economic flight. In the post-segregation era, suburbs enjoyed unprecedented industrial and commercial growth. According to a 1968 study, between 1954 and 1963, the United States' 40 largest cities lost nearly 26,000 manufacturing jobs, while suburbs gained almost that exact amount. n110 By 1980, suburban employment went from 14 million to 33 million jobs. n111 To be sure, many African-Americans moving into the cities, "found no work, and instead, faced discrimination and economic deprivation." n112

[\*207] Public mass transportation policy exacerbated the economic plight of inner-city African-Americans, who disproportionately lacked access to suburbs and the emerging job opportunities. n113 The distance to suburban employment "imposed unreasonable costs burdens of centrally located blacks, and [] public transit ... was badly oriented for traveling from the ghetto to outlying centers of employment." n114 However, it was in the same year as Brown I that another transportation initiative was born which would serve an underappreciated role in undermining desegregation efforts.

C. The Federal Highway System's Role in Keeping Schools Separate and Unequal

"As often happens with interstate highways, the route selected was through the poor area of town, not through the area where the politically powerful people live." - Justice William O. Douglas n115 The Federal Highway Transportation Act of 1956 n116 was first proposed by President Eisenhower in 1954 and shepherded by Lucius Clay, then Chairman of General Motors. Over the following three decades, construction of federal highways would do more than just hasten the economic demise of inner cities by facilitating white flight and economic flight to the suburbs. n117 Those highways also tore apart inner-city neighborhoods, [\*208] resulting in the destruction of millions of homes and countless inner-city communities. n118 In Kansas City, Missouri, for example, the South Midtown Freeway, for which planning began in the 1960's, was built through a section of the city that, in 1980, had over 122,000 African-American residents. n119 In Columbus, Ohio, the Interstate 670 spur was built through a neighborhood that was between 50% and 90% African-American. n120

In Nashville, Tennessee, Interstate 40 "swings suddenly in a wide loop, avoiding the downtown area, but passing north through what was once the center of Nashville's black community." n121 That is because, in order to build the interstate in 1971, twenty-seven apartments and 626 residences were leveled. Moreover, buildings used by 128 African-American businesses, three community colleges, and one-third of north Nashville's park facilities were destroyed. n122 Finally, at the dawn of the Interstate age, and hard on the heels of the Brown decisions, Detroit's oldest established African-American neighborhood, the historic Black Bottom, was bulldozed to make way for Interstate 75. n123

Furthermore, federal highways built through the poorest neighborhoods lowered residential property values already artificially devalued by racially discriminatory housing practices. Until recently, virtually every state relied upon local property tax values and assessments to finance public K-12 education. As urban districts became poorer on average, and [\*209] experienced drops in residential property values as well as revenue from businesses, **inner-city school districts were receiving disproportionately less monies per pupil.** n124 **Consequently, public school financing would suffer a** crippling **crisis**. n125

Thus, **the interstate highway system served a triple blow to Brown: 1) it continued and reinforced residential segregation; 2) it enabled business and industry to leave the inner-city; and 3) it caused a lower yield for inner-city property tax assessments.** But for the Supreme Court's rejection of Detroit's urban-suburban desegregation remedy, much of the damage wrought by housing discrimination and highway construction could have been mitigated. For whites, however, the "city problem" had been solved - they left the city, insulated by suburban discriminatory housing practices and Milliken from having to be under the edict of school desegregation orders. n126 The most aching paradox is the fact that Lucious Clay was the chief engineer of one tool (the highway), and heir to another tool (the car) n127 that enabled the white flight from Detroit, and necessitated the urban-suburban remedy in Milliken in the first place. n128

V. And One Thousand and More: The Power of Suburban Interests and the Current State of Public Education Reform

"You don't have to live next to me--just give me my equality" -Nina Simone, Mississippi Goddam n129 It has long been clear that public schools would not achieve racial integration envisioned by Brown. The persistence of racism, the political and judicial retreat, suburbanization, transportation policy, and the inability to effectively combat the re-segregation of the inner cities have driven [\*210] advocates of education reform for African-Americans to explore new solutions. Public school finance reform, school vouchers, and "pupil choice" plans are currently being tested and evaluated. However, three facts about the current state of school finance reform do not bode well for the legacy of Brown: 1) current reforms are being led by state legislatures; 2) those legislatures are controlled by suburban interests; n130 and 3) suburban constituents and legislators are, at best, ideologically opposed to ensuring the most fundamental mandates of education reform as it regards African-American public school students. n131 Consequently, as we see happening today, those legislators most compelled to protect the interests of inner city (and largely minority) students will be marginalized in legislative outcomes. n132

Voucher and school choice programs were once hailed as a solution to not only enhancing the education opportunities for African-Americans, but also as a means of achieving something that could not be done by Brown and its progeny: meaningful racial integration. However, even under these programs, suburban school districts have been successful in staving off meaningful integration. n133 Since racial integration is not achievable, initiatives now focus on ensuring adequate school funding.

Funding equalization has been the focus of several state class action suits challenging public school financing methodologies - methodologies which have had the effect of under-funding minority and/or poor school districts. As a result of court orders, now legislatures in 45 states have been directed to address these inequities. n134 However, by the very nature of legislative institutions, political ideology, legislative party control, majority/minority ratios, and the inherent complexities of legislator roles and approaches will impact school finance reform inputs and outcomes. n135

[\*211] What is more, legislative majorities in several states have trended towards suburban interests, and consequently favors those most opposed to school finance adequacy which would best benefit inner cities. The debate over school finance adequacy, as a result, has at times taken on unsettling racial subtext. n136 In response to court-ordered finance reform mandates, legislators have decried the "activist judges" "imposing" their will upon the people; the "trashing of the separation of powers" n137 or taking away "local control." n138 Suburban legislator and constituent resistance to finance reform have been most vociferous in states in which class actions were led by minority plaintiffs and school districts. n139 The specific objection lies in the raced perception that urban (read: minority) school districts stand to benefit from school finance reform, with no apparent benefit to suburban (read: white) school districts. n140 Consequently, the rhetoric and resistance evokes disturbing reminders of post-Brown defiance of integration orders.

Where suburban politicians direct legislative inputs, processes and outcomes, solutions most effective in addressing the needs of minorities in public education funding are likely to be elusive. n141 Those in control most strongly opposed to meaningful reform which is court-directed, demands taxation as a means to provide more financial resources, threatens local control, or results that solely or disproportionately benefit inner-city school districts. n142 True reform will require a legislative collective that is ideologically, socially, morally, and fiscally committed to remedying the problem. Unfortunately, once again, we hear little about moral imperative to remedy the unforgivable racial disparities in public education systems, only of solutions which are palatable to majoritarian interests.

#### Focusing on housing is a necessary precondition to solve

Bouie, 14 (5/5/14, Jamelle, “Still Separate and Unequal; Why American schools are becoming segregated once again,” <http://www.slate.com/articles/news_and_politics/politics/2014/05/brown_v_board_of_education_60th_anniversary_america_s_schools_are_segregating.html>, accessed on 5/5/17, JMP)

Saturday is the 60th anniversary of Brown v. Board of Education, the landmark case where a unanimous Supreme Court held that “separate educational facilities are inherently unequal.” The following year the justices ordered that states end school segregation with “all deliberate speed.”

In the popular narrative, this is the beginning of American integration, a process that goes from Rosa Parks to Martin Luther King to the Civil Rights Act and eventually to President Obama.

But for as much as we share an integrated culture, millions of Americans—and blacks in particular—live in segregated worlds, a fact illustrated by the persistence and retrenchment of school segregation, as detailed in a new report from the Civil Rights Project at the University of California–Los Angeles.

Before considering the report, it’s worth taking a closer look at the process of school desegregation. Almost immediately after Brown, white Southerners met the decision with “massive resistance.” In Virginia, segregationist Democrats pushed sweeping educational changes to combat integration. In 1956, the Commission on Public Education—convened by Gov. Thomas Stanley—asked the General Assembly to repeal compulsory education, empower the governor to close public schools, and provide vouchers to parents to enroll their children in segregated private schools. In the next few years, whites would open “segregation academies” across the state, while closing public schools to block integration.

Following Stanley’s lead, whites across the South worked to keep blacks out of their schools with rules, legislation, angry mobs, and outright violence. But it failed. Within the decade, new civil rights laws had enhanced federal power. By the end of the 1960s, the federal government was authorized to file suit against segregated school districts and work to dismantle them “root and branch.”

As Nikole Hannah-Jones details for ProPublica, federal desegregation orders helped “break the back of Jim Crow education in the South, helping transform the region’s educational systems into the most integrated in the country.” She continues, “In 1963, about 1 percent of black children in the South attended school with white children. By the early 1970s, the South had been remade—fully 90 percent of black children attended desegregated schools.”

The problem today is that these gains are reversing. As the Civil Rights Project shows, minority students across the country are more likely to attend majority-minority schools than they were a generation ago.

The average white student, for instance, attends a school that’s 73 percent white, 8 percent black, 12 percent Latino, and 4 percent Asian-American. By contrast, the average black student attends a school that’s 49 percent black, 17 percent Latino, 4 percent Asian-American, and 28 percent white. And the average Latino student attends a school that’s 57 percent Latino, 11 percent black, 25 percent white, and 5 percent Asian-American.

But this understates the extent to which minority students—and again blacks in particular—attend hyper-segregated schools. In 2011, more than 40 percent of black students attended schools that were 90 percent minority or more. That marks an increase over previous years. In 1991, just 35 percent of black students attended schools with such high levels of segregation.

Even more striking is the regional variation. While hyper-segregation has increased across the board, it comes after staggering declines in the South, the “border states”—Delaware, Kentucky, Maryland, and Missouri, i.e., former slaveholding states that never joined the Confederacy—the Midwest, and the West. In the Northeast, however, school segregation has increased, going from 42.7 percent in 1968 to 51.4 percent in 2011. Or, put another way, desegregation never happened in the schools of the urban North.

Today in New York, for instance, 64.6 percent of black students attend hyper-segregated schools. In New Jersey, it’s 48.5 percent and in Pennsylvania it’s 46 percent. They’re joined by Illinois (61.3 percent), Maryland (53.1 percent), and Michigan (50.4 percent). And these schools are distinctive in another way: More than half have poverty rates above 90 percent. By contrast, just 1.9 percent of schools serving whites and Asians are similarly impoverished.

It’s this poverty and segregation that leads to other, more dramatic problems. As shown in a report from the Journey for Justice Alliance, these schools are understaffed, under-resourced, and most likely to face closure. Indeed, of the schools closed by shrinking budgets and “charter-ization,” the vast majority are in communities of color, even as the geography of school dysfunction includes predominantly white areas.

But while we’ve moved backward, Brown wasn’t a failure. For minority students in general, there’s more exposure to each other—and to whites—than there’s been in the past. And for black students in particular, there’s much greater integration in almost every region of the country. “Outside of the Northeast,” notes the Civil Rights Project, “the share of black students in more than 90 percent minority schools remains lower in 2011 than in 1968, even with the reversals of civil rights gains in recent decades.” What’s more, states like Virginia and Louisiana—once at the forefront of opposition to desegregation—are now among the most integrated for black students.

At the same time, the backlash to civil rights has taken its toll, as has American complacency and a pervasive belief in “colorblindness.” “With increasing frequency,” writes Nikole Hannah-Jones, “federal judges are releasing districts from court oversight even where segregation prevails, at times taking the lack of action in cases as evidence that the problems have been resolved.”

Likewise, the highest courts have all but prohibited school districts and elected officials from considering race to balance school enrollments. “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” wrote Chief Justice John Roberts in 2007, striking a Seattle plan for racial diversity in its schools.

School segregation doesn’t happen by accident; it flows inexorably from housing segregation. If most black Americans live near other blacks and in a level of neighborhood poverty unseen by the vast majority of white Americans, then in the same way, their children attend schools that are poorer and more segregated than anything experienced by their white peers.

We could fix this. If the only way to solve the problem of school segregation is to tackle housing, then we could commit to a national assault on concentrated poverty, entrenched segregation, and housing discrimination. We could mirror our decades of suburban investment with equal investment to our cities, with better transportation and more ways for families to find affordable housing. And we could do all of this with an eye toward racism—a recognition of our role in creating the conditions for hyper-segregation.

To do this, however, requires a commitment to anti-racism in thought, word, and deed. And given our high national tolerance for racial inequality, I doubt we’ll rise to the challenge.

### 1nc Framing

#### Saving the greatest number of lives should be your first ethical priority

Cummisky 96 (David, professor of philosophy at Bates, “Kantian Consequentialism”, p. 131)

Finally, even if one grants that saving two persons with dignity cannot outweigh and compensate for killing one—because dignity cannot be added and summed in this way—this point still does not justify deontological constraints. On the extreme interpretation, why would not killing one person be a stronger obligation than saving two persons? If I am concerned with the priceless dignity of each, it would seem that I may still save two; it is just that my reason cannot be that the two compensate for the loss of the one. Consider Hill's example of a priceless object: If I can save two of three priceless statutes only by destroying one, then I cannot claim that saving two makes up for the loss of the one. But similarly, the loss of the two is not outweighed by the one that was not destroyed. Indeed, even if dignity cannot be simply summed up, how is the extreme interpretation inconsistent with the idea that I should save as many priceless objects as possible? Even if two do not simply outweigh and thus compensate for the loss of the one, each is priceless; thus, I have good reason to save as many as I can. In short, it is not clear how the extreme interpretation justifies the ordinary killing/letting-die distinction or even how it conflicts with the conclusion that the more persons with dignity who are saved, the better.8

#### Ethical policymaking requires calculation of consequences

Gvosdev 5 – Rhodes scholar, PhD from St. Antony’s College, executive editor of The National Interest (Nikolas, The Value(s) of Realism, SAIS Review 25.1, pmuse, AG)

As the name implies, realists focus on promoting policies that are achievable and sustainable. In turn, the morality of a foreign policy action is judged by its results, not by the intentions of its framers. A foreign policymaker must weigh the consequences of any course of action and assess the resources at hand to carry out the proposed task. As Lippmann warned, Without the controlling principle that the nation must maintain its objectives and its power in equilibrium, its purposes within its means and its means equal to its purposes, its commitments related to its resources and its resources adequate to its commitments, it is impossible to think at all about foreign affairs.8 Commenting on this maxim, Owen Harries, founding editor of The National Interest, noted, "This is a truth of which Americans—more apt to focus on ends rather than means when it comes to dealing with the rest of the world—need always to be reminded."9 In fact, Morgenthau noted that "there can be no political morality without prudence."10 This virtue of prudence—which Morgenthau identified as the cornerstone of realism—should not be confused with expediency. Rather, it takes as its starting point that it is more moral to fulfill one's commitments than to make "empty" promises, and to seek solutions that minimize harm and produce sustainable results. Morgenthau concluded: [End Page 18] Political realism does not require, nor does it condone, indifference to political ideals and moral principles, but it requires indeed a sharp distinction between the desirable and the possible, between what is desirable everywhere and at all times and what is possible under the concrete circumstances of time and place.11 This is why, prior to the outbreak of fighting in the former Yugoslavia, U.S. and European realists urged that Bosnia be decentralized and partitioned into ethnically based cantons as a way to head off a destructive civil war. Realists felt this would be the best course of action, especially after the country's first free and fair elections had brought nationalist candidates to power at the expense of those calling for inter-ethnic cooperation. They had concluded—correctly, as it turned out—that the United States and Western Europe would be unwilling to invest the blood and treasure that would be required to craft a unitary Bosnian state and give it the wherewithal to function. Indeed, at a diplomatic conference in Lisbon in March 1992, the various factions in Bosnia had, reluctantly, endorsed the broad outlines of such a settlement. For the purveyors of moralpolitik, this was unacceptable. After all, for this plan to work, populations on the "wrong side" of the line would have to be transferred and resettled. Such a plan struck directly at the heart of the concept of multi-ethnicity—that different ethnic and religious groups could find a common political identity and work in common institutions. When the United States signaled it would not accept such a settlement, the fragile consensus collapsed. The United States, of course, cannot be held responsible for the war; this lies squarely on the shoulders of Bosnia's political leaders. Yet Washington fell victim to what Jonathan Clarke called "faux Wilsonianism," the belief that "high-flown words matter more than rational calculation" in formulating effective policy, which led U.S. policymakers to dispense with the equation of "balancing commitments and resources."12 Indeed, as he notes, the Clinton administration had criticized peace plans calling for decentralized partition in Bosnia "with lofty rhetoric without proposing a practical alternative." The subsequent war led to the deaths of tens of thousands and left more than a million people homeless. After three years of war, the Dayton Accords—hailed as a triumph of American diplomacy—created a complicated arrangement by which the federal union of two ethnic units, the Muslim-Croat Federation, was itself federated to a Bosnian Serb republic. Today, Bosnia requires thousands of foreign troops to patrol its internal borders and billions of dollars in foreign aid to keep its government and economy functioning. Was the aim of U.S. policymakers, academics and journalists—creating a multi-ethnic democracy in Bosnia—not worth pursuing? No, not at all, and this is not what the argument suggests. But aspirations were not matched with capabilities. As a result of holding out for the "most moral" outcome and encouraging the Muslim-led government in Sarajevo to pursue maximalist aims rather than finding a workable compromise that could have avoided bloodshed and produced more stable conditions, the peoples of Bosnia suffered greatly. In the end, the final settlement was very close [End Page 19] to the one that realists had initially proposed—and the one that had also been roundly condemned on moral grounds.

#### Ignoring the consequences of their advocacy is devastating for the cause of fighting racism, which REQUIRES that we evaluate the unintended consequences of policy choices. Their affirmative subverts meaningful policy debate, which recreates racism.

Bracey 6(Christopher A. Bracey, Associate Professor of Law, Associate Professor of African & African American Studies, Washington University in St. Louis, September 2006, Southern California Law Review, 79 S. Cal. L. Rev. 1231, p. 1318)

Second, reducing conversation on race matters to an ideological contest allows opponents to elide inquiry into whether the results of a particular preference policy are desirable. Policy positions masquerading as principled ideological stances create the impression that a racial policy is not simply a choice among available alternatives, but the embodiment of some higher moral principle. Thus, the "principle" becomes an end in itself, without reference to outcomes. Consider the prevailing view of colorblindness in constitutional discourse. Colorblindness has come to be understood as the embodiment of what is morally just, independent of its actual effect upon the lives of racial minorities. This explains Justice Thomas's belief in the "moral and constitutional equivalence" between Jim Crow laws and race preferences, and his tragic assertion that "Government cannot make us equal [but] can only recognize, respect, and protect us as equal before the law." [281](http://web.lexis-nexis.com/universe/document?_m=cd9713b340d60abd42c2b34c36d8ef95&_docnum=9&wchp=dGLbVzz-zSkVA&_md5=9645fa92f5740655bdc1c9ae7c82b328" \l "n281" \t "_self) For Thomas, there is no meaningful difference between laws designed to entrench racial subordination and those designed to alleviate conditions of oppression. Critics may point out that colorblindness in practice has the effect of entrenching existing racial disparities in health, wealth, and society. But in framing the debate in purely ideological terms, opponents are able to avoid the contentious issue of outcomes and make viability determinations based exclusively on whether racially progressive measures exude fidelity to the ideological principle of colorblindness. Meaningful policy debate is replaced by ideological exchange, which further exacerbates hostilities and deepens the cycle of resentment.

#### Intervening actors don’t absolve responsibility

**Cummiskey 99** – philosophy professor, Bates College (David, Gewirth, p 134)

According to Gewirth, anyone whose objective needs are effected by my choice is the “recipient” of my action (RM 129). What is important, he rightly argues, is the “impact [of one’s choice] on freedom and well-being, and more generally on the conditions of agency” (RM 131-32). Of course, the causal fact that there is an intervening action by another agent is clearly relevant in assessing the likely consequences of one’s choices, but it simply does not alter the fundamental moral requirement that we respect both the positive and negative rights of all. Indeed the Principle of Intervening Action simply asserts what must be shown. As Gewirth emphasizes, all agents have a right not to be killed. The question at issue is whether it is sometimes obligatory to kill to prevent more killings. If one responds that it is not because another agent is doing the killing, then one is simply assuming that the duty in question is an agent-relative restriction. This unargued assumption, however, conflicts with the basic PGC (Principle of Generic Consistency) to respect the rights of all persons affected by one’s choice. Since the persons being killed have a right not to be killed, and since they are going to be killed as a result of my refusal, they are indeed recipients of my action in the sense that is decisive as far as morality is concerned.

### --- XT: Consequentialism

#### Moral tunnel vision is complicit with evil

Isaac, Prof of Pol Sci, 2 – Professor of Political Science, Indiana (Jeffrey, “Ends, Means and Politics,” Dissent 49.2, p 35-6, ebsco)

As writers such as Niccolo Machiavelli, Max Weber, Reinhold Niebuhr, and Hannah Arendt have taught, an unyielding concern with moral goodness undercuts political responsibility. The concern may be morally laudable, reflecting a kind of personal integrity, but it suffers from three fatal flaws: (1) It fails to see that the purity of one's intention does not ensure the achievement of what one intends. Abjuring violence or refusing to make common cause with morally compromised parties may seem like the right thing; but if such tactics entail impotence, then it is hard to view them as serving any moral good beyond the clean conscience of their supporters; (2) it fails to see that in a world of real violence and injustice, moral purity is not simply a form of powerlessness; it is often a form of complicity in injustice. This is why, from the standpoint of politics--as opposed to religion--pacifism is always a potentially immoral stand. In categorically repudiating violence, it refuses in principle to oppose certain violent injustices with any effect; and (3) it fails to see that politics is as much about unintended consequences as it is about intentions; it is the effects of action, rather than the motives of action, that is most significant. Just as the alignment with "good" may engender impotence, it is often the pursuit of "good" that generates evil. This is the lesson of communism in the twentieth century: it is not enough that one's goals be sincere or idealistic; it is equally important, always, to ask about the effects of pursuing these goals and to judge these effects in pragmatic and historically contextualized ways. Moral absolutism inhibits this judgment. It alienates those who are not true believers. It promotes arrogance. And it undermines political effectiveness.

#### Moral absolutes and deontological claims are violent, reductionist, and shouldn’t dictate public policy

Woller ’97 (Gary, Economics Professor at BYU, Policy Currents, June, http://apsapolicysection.org/vol7\_2/72.pdf, p. 11)

At the same time, deontologically based ethical systems have severe practical limitations as a basis for public policy. At best, a priori moral principles provide only general guidance to ethical dilemmas in public affairs and do not themselves suggest appropriate public policies, and at worst, they create a regimen of regulatory unreasonableness while failing to adequately address the problem or actually making it worse. For example, a moral obligation to preserve the environment by no means implies the best way, or any way for that matter, to do so, just as there is no a priori reason to believe that any policy that claims to preserve the environment will actually do so. Any number of policies might work, and others, although seemingly consistent with the moral principle, will fail utterly. That deontological principles are an inadequate basis for environmental policy is evident in the rather significant irony that most forms of deontologically based environmental laws and regulations tend to be implemented in a very utilitarian manner by street-level enforcement officials. Moreover, ignoring the relevant costs and benefits of environmental policy and their attendant incentive structures can, as alluded to above, actually work at cross purposes to environmental preservation. (There exists an extensive literature on this aspect of regulatory enforcement and the often perverse outcomes of regulatory policy. See, for example, Ackerman, 1981; Bartrip and Fenn, 1983; Hawkins, 1983, 1984; Hawkins and Thomas, 1984.) Even the most die-hard preservationist/deontologist would, I believe, be troubled by this outcome. The above points are perhaps best expressed by Richard Flathman, The number of values typically involved in public policy decisions, the broad categories which must be employed and above all, the scope and complexity of the consequences to be anticipated militate against reasoning so conclusively that they generate an imperative to institute a specific policy. It is seldom the case that only one policy will meet the criteria of the public interest (1958, p. 12). It therefore follows that in a democracy, policymakers have an ethical duty to establish a plausible link between policy alternatives and the problems they address, and the public must be reasonably assured that a policy will actually do something about an existing problem; this requires the means-end language and methodology of utilitarian ethics. Good intentions, lofty rhetoric, and moral piety are an insufficient, though perhaps at times a necessary, basis for public policy in a democracy.

### --- XT: Intervening Actor Answers

#### Solving racism requires evaluating the consequences of policy choices – that means they should be beholden to even unintended consequences

Silliman 3Mathew R. Silliman, Professor of Philosophy at the Massachusetts College of Liberal Arts, 2003, Theory & Research in Education, Vol. 1, No. 3, p. 307-309

This brings me to my second proposal about the source of the problem: it will not I think be possible to validate, understand, and thereby combat the various levels upon which racism operates without finding a place in moral reasoning for outcomes as well as intentions. Blum is attracted, for what I take to be entirely sound reasons, to a non-consequentialist view of morality. On such a view, unintended consequences that are morally undesirable are unfortunate, but not wrong in a strictly moral sense of the term, unless closely connected in some way to actual bad intentions. I share with Blum a preference for this deontological approach to moral analysis, but as the persistence of structural racism shows, we need some way to admit the robust moral significance even of unintended consequences or seriously risk the irrelevance of our moral theory. This is not as difficult to do as it appears, for the idea that these two strains of modern moral thought, consequentialism and deontology, are wholly contradictory is more a product of 18th century intellectual politics than of anything inherent in their moral insights; admitting that consequences matter morally need not involve capitulation to the slippery slope of utilitarian calculation. One inexpensive way to bridge the imaginary gap is just to parse the utilitarian demand as a deontological obligation (and it need not even be the highest of our prima facia duties): one of our moral duties is to live our lives, within the limits of our knowledge and ability, so as to make the world a better and more just place overall. Simple as this seems, and easy to reconcile with principles like the dignity of persons, it is subversive, for it removes a bias in favor of the (oppressive, unjust, racist) social status quo sometimes thought to characterize deontic moral theories. It also revises the relation between individuals and their enabling communities from accidental association to mutual obligation: social structures owe individuals support, (relative) independence, and the best available approximation of justice, whereas individuals in turn owe those same social institutions the impetus for continual moral revitalization.