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INTRODUCTION

The academic achievement gap between Black and Latino students and their White counterparts may well be the most important problem in

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education today.[1] As measured by the National Assessment of Educational Progress ("NEAP") standardized reading scores of 17 year olds, educational disparities continually narrowed from the 1970's to the 1980's.[2] However, in the late 1980's, the steady and sharp increases in the standardized test scores of Black students leveled off and began fluctuating for Hispanic students.[3] Recent news reports indicate that scores on the math and verbal components of the SAT, the test most colleges and universities use in admission procedures, have risen for over a decade.[4] Yet there remains as much as a 100 point gap between the average scores of Black and Hispanic students and those of White and Asian American students.[5] Even as the scores increased overall, the gap widened.[6] Students from low-income families scored lower than their wealthier counterparts as well.[7] The fact that many minority students taking the exam cannot afford the costly SAT prep courses that wealthier students take exacerbates the problem. The intersecting problems of class and race compound to present a daunting challenge to many who view access to quality education as the great social equalizer.[8]

Teachers, parents, policymakers, and experts in learning and the law continue to debate solutions by looking at the problem from the perspective of their own fields. Most measures addressing the issue fail to consider the role that our collective consciousness about race plays in creating the problem and can play in the formulation of solutions. Professor Charles Lawrence argues that our unwillingness to have a candid discussion about race and racism continues to undermine the goals of *Brown v. Board of*

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1. ROBERT E. SLAVIN & NANCY A. MADDEN, *"Success for All" and African American and Latino Student Achievement in* BRIDGING THE ACHIEVEMENT GAP 74 (John E. Chubb & Tom Loveless, eds., 2002).

2. Institute of Education Sciences, *Indicator 13: Reading Proficiency, at* http://nces.ed.gov/programs/youthindicators/Indicators.asp?PubPageNumber=13 (last visited November 7, 2006).

3. For example in 1970, the average National Assessment of Educational Progress score for Black students was 170. Rising steadily throughout the decade, by 1980, the average score for that group peaked at 190. In 1984, the average score was closer to 185. In 1989, the average score dropped to around 182, but rose to 185 in 1994 and about 191 in 1996 before dropping to around 186 in 1999. *See* SLAVIN & MADDEN, *supra* note 1, at 75. According to the Commissioner for the National Center for Education Statistics the average score for Blacks students in 2000 and 2005 reflected no substantial change from the 1996 average score. Institute of Education Sciences, *Commissioner's Remarks—National Assessment of Educational Progress NEAP 2005 Science Results, at* http://nces.ed.gov/whatsnew/commissioner/remarks2006/5_24_2006.asp (May 24, 2006).

4. *See* Robert Strauss, *The SAT Results Within the Results*, N.Y. TIMES, Sept. 4, 2005, at 3.

5. *Id.*

6. *Id.*

7. *Id.*

8. RICHARD ROTHSTEIN, CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK—WHITE ACHIEVEMENT GAP 2 (2004).

Education.[9] Our inability to address the issues of race and racism in today's discussion of education can, in part, be attributed to the discourse that was developed in nineteenth century race cases and continues in modern equal education decisions. It is a discourse that ignored the community harm done by inadequate education dictated by racism.

This Article combines analysis of case law at state and federal levels as well as federal educational policy in an effort to formulate a framework for addressing educational inequalities, of which the achievement gap is only one result. As individual rights concepts control the discourse of equal educational opportunity, community injury continues to be ignored. Because educational policy aimed at ending educational inequities is governed by equal protection analysis and guided by court decisions, limitations in legal opinions drive such policies. The lack of attention to community harm in law and educational policy limits the ability of education legal reforms and education policy initiatives to address the scope of the problem of educational inequalities. This essay contextualizes the issue to demonstrate how policies have reinforced a dominant narrative about race that is counter to the goal of ending educational disparities and continues to harm individuals and communities of color even as they try to respond to these issues.

Part I of the article examines the legal framework of the *Brown v. Board of Education* Court and traces it back to the 1899 decision of *Cumming v. Richmond Board of Education.*[10] The plaintiffs in *Cumming* challenged the Richmond School Board's decision to close Ware High School, the only public high school open to Blacks, while maintaining a public high school for White students. In upholding the constitutionality of the Board's decision, the *Cumming* Court embraced a paradigm that controlled even after the decision in *Brown.*

The facts surrounding the establishment and the closing of Ware High School demonstrate the almost intractable inter-relationship between politics, economics, race education and community. Yet, in an opinion written by Justice John Harlan, the decision in *Cumming* ignores the relationships and the impact of the Board's decision on the Black community in Augusta, Georgia. Part I of this Article discusses how the Board's decision drained economic, social and political capital embodied in the Ware High School. It argues that that this injury was ignored and even reinforced by *Brown* and in subsequent decisions. It demonstrates how this decontextualized view of the dynamics of the education system and its role in reflecting and promoting social, political and economic equality continues to govern today. Today, what some analysts call the "jurisprudence

9. Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353 (2005); *see also* Brown v. Board of Education, 347 U.S. 483 (1954).

10. 175 U.S. 528 (1899).

of choice"[11] and what others characterize as the "privatization of concern"[12] for education dominate public and legal discourse, but, like the choice offered by the Richmond School Board, choice today rarely incorporates the option of educating all students beyond a basic education.

Part II of this Article outlines the major policy initiatives and litigation efforts aimed at closing the gap between the quality of education poor Black and Hispanic (Brown) students often receive and the education that White students receive. It examines these fractured policies and litigation strategies and demonstrates their relationship to constitutional jurisprudence. It argues for a new model for ending disparities that incorporates attention to social, political and economic empowerment of communities of color and the poor as a way to address the marginalization they experience.

Part III explores the situation in the Ladera Heights neighborhood of Inglewood, California as a modern day example of the breakdown in the resources available to parents and communities in educating their children. In Ladera Heights, Black upper and middle class parents are attempting to secede from the predominantly Black Inglewood School District into which they currently are drawn. The parents want to relocate to a more affluent and largely White neighboring school district with a reputation for better scholastic outcomes and fewer behavioral problems than Inglewood Schools. Part III illustrates how Fourteenth Amendment jurisprudence and the policies it fostered have worked to the disadvantage of educational achievement in the Inglewood District and injured the entire Ladera Heights community.

I. THE ORIGINS OF A RIGHT: FEDERAL LAW AS A REFLECTION OF CULTURAL NARRATIVE

Pivotal to the analysis of the achievement gap problem is an understanding of the legal decisions that have addressed the issue of educational disparities. The Supreme Court decisions guiding educational equality began with *Brown v. Board of Education*,[13] and continued through *San Antonio v. Rodriguez*[14] and *Grutter v. Bollinger*.[15] These cases, along with state adequacy litigation and federal educational policy, have had significant influence on efforts to close achievement gaps. Importantly, they also follow a common theme about race and achievement that conflicts with ideas about achievement inequality coming from minority communities.

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11. *See* Nancy Levit, *Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, U. ILL. L. REV. 455, 492 (2005).

12. *See* Lawrence III, *supra* note 9, at 1396.

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

14. 411 U.S. 1 (1973).

15. 539 U.S. 306 (2003).

This theme and the narrative surrounding, which comes from the courts and policy makers, reduces the effectiveness of those in Latino and Black communities in seeking a solution to educational achievement problems. Thus, the theme and narratives have hampered efforts to end disparities. But even before *Brown*, *Cumming v. Richmond Board of Education* set the stage for the narrative theme of education desegregation and educational equity.

In many ways, much of law is about narratives. Competing narratives or stories are often what bring parties to trial. New narratives or even variations on the stories that brought the parties to trial can develop from court decisions. This is especially true in areas of the law where rights are intertwined with custom, culture, society and race. In his seminal work on law and narrative written in 1982, law professor Robert Cover described the storytelling role law plays.[16] Cover argued that society is made up of numerous communities, each guided by rules and standards that are located in and defined by community experiences.[17] In our society these communities are often defined by race, class and even language commonalities. However a community is defined, out of their shared experiences comes a vision of reality that is expressed in the community narrative.

Narratives can be further divided into "Master Narratives" and "Counter Narratives." Master Narratives are not often recognized as narratives—-instead, a Master Narrative is the internalized norms of a larger community as expressed in law and mores. Counter Narratives are the narratives of marginalized groups, like Blacks and women, which create "different perspectives" generally unavailable to "groups outside that particular [realm of] experience and reality."[18]

A. *Segregation, Labor and Public Schools*

In 1899, the Supreme Court adopted a position that accepted the segregation of Black and White students in the post war South.[19] In addition to the segregation that was a part of the culture of the Southern United States and that led to the *Brown* decision, various forms of *de facto* school segregation were practiced throughout the Southwestern states. In both areas, the segregation was based on race/ethnicity and related to the dominant agrarian economies of the regions. Southwestern segregation of Latinos was most entrenched in California and Texas. Historian

16. *See* Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

17. *Id.*

18. D. SOYINI MADISON, *That Was My Occupation: Oral Narratives, Performance, and Black Feminist Thought in* EXCEPTIONAL SPACES: ESSAYS IN PERFORMANCE AND HISTORY 319, 338 (Della Pollock ed., 1998).

19. *See* Cumming, 175 U.S. at 544–45.

Christopher Arriola has chronicled the social separation of Anglos and Mexicans in El Modena, California, the setting for one of the leading cases on segregation:

> It was more common than not during the 1920s for southern California towns to be segregated. Segregation in the citrus society encompassed many harsh and unjust realities, from segregated housing and public places, to inferior social status and political and economic exploitation. Mexicans and Anglos lived in truly separate worlds.[20]

Other historians have made similar observations. According to social historian Charles Wollenberg, "[s]egregation was the rule wherever Mexicans reside in sizable colonies,' and it was a reality, 'from cradle to grave' visible in all aspects of daily life."[21]

As with Blacks in the South, employment and labor expectations dictated educational opportunities for Mexican Americans in the Southwest. Language differences were also used as a basis for reducing educational opportunities to Mexican American children.

The pervasive nature of the role segregation played in the lives of Mexican Americans may have been lost on the courts. The first effort to end segregation in the court system was taken in *Alvarez v. Owen*.[22] The California state court concluded that the plaintiffs, Mexican American children, were White under the law and therefore the state did not have a legal basis for segregating them, unlike Black or Native American children. In deeming the children legally White, the court ignored the many ways in which Mexican Americans experienced discrimination throughout the society. Yet the parents of the children in the Lemon Grove School system (which was the subject of the suit) understood the link between their employment and the educational system. Lemon Grove was not only the name of the school and town in which the plaintiffs sued--it also reflected the agrarian economy that dominated the region. Many of the Mexican Americans in the region were employed in the citrus industry. School systems argued that the transient nature of the work of Mexican American school children's parents was a second pedagogical basis for the segregation of the children. Therefore, separate educational facilities could take into account seasonal patterns of attendance.[23]

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20. Christopher Arriola, *Knocking on the Schoolhouse Door: Mendez v. Westminster, Equal Protection, Public Education, and Mexican Americans in the 1940's*, 8 LA RAZA L.J. 166, 171 (1995).

21. CHARLES WOLLENBERG, ALL DELIBERATE SPEED: SEGREGATION AND EXCLUSION IN CALIFORNIA SCHOOLS 1855–1975 113 (1976).

22. No. 66-625 (San Diego County Super. Ct., Apr. 17, 1931).

23. *See* Frederick P. Aguirre, *School District: How it Affected* Brown v. Board of Education, 47 ORANGE COUNTY LAWYER 30, 35 (2005).

The next significant litigation to end segregation of Mexican Americans in California began a decade after *Alvarez*. The effort to integrate the schools in the Orange County school district of Westminster began when a group of Mexican American and Latinos convinced the school board to propose a bond issue for a new integrated school.[24] The bond issue failed, but the effort did not.[25] The individuals behind the bond issue pursued the desegregation effort in federal court. The ensuing litigation resulted in *Westminster v. Mendez*, in which the federal Court of Appeals for the Ninth Circuit ruled that the segregation of children of "Mexican and Latin descent" was a violation of the 14th Amendment of the Constitution. The litigation was a precursor for the decision in *Brown v. Board of Education*.[26]

Historian Leon F. Litwack has described the role that segregation and economics played in the education of Blacks in the post Civil War South.[27] The pervasive policy of oppression and subjugation of Blacks in the South was evident in the dilapidated facilities and inadequate learning tools available to Black students. Since local public officials had little interest in formally educating Blacks, many Black communities had to find their own buildings for teaching their children. Many were schooled in what Litwack describes as "makeshift, primitive, unpainted one-room board structures with shaky floors and cracks in the walls and roof and the pot-bellied wooden stove in the center of the room."[28]

There was no set school term. Instead it "varied with labor demands, the growing schedule of cotton, and the weather. If the children were sufficiently grown (eight years old), they did not come to class until after the cotton had been picked, often in November, sometimes as late as January, and they would have to leave school in the early spring to prepare fields for the new crop. In the experience of most rural youths, the school year consisted of two to five months, compressed between harvest and spring planting time... Attendance, then, varied sharply, usually defying prediction. No sooner had some students settled down to schoolwork than a parent or employer would appear at the door and order them to the fields.... Labor demands simply translated into irregular attendance—or no attendance at all—and it was the reason cited by most black youths who failed to obtain any kind of education. The average student dropped out of school in the fifth or sixth grade, having acquired the bare rudiments."[29]

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24. *See* WOLLENBERG, *supra* note 21, at 125.

25. *Id.*

26. *Id.* at 131–32.

27. *See* LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW (Alfred A. Knopf ed., Random House, 1998).

28. *Id.* at 64. (For example, my siblings were educated in the local church building from grades 1 through 6. My parents and their teachers and were expected to provide teaching materials including pencils, paper and textbooks.)

29. *Id.* at 64–65.

Black parents began to see education as a way to provide their children with protection from economic exploitation as well as a way to improve their prospects for better employment.

This effort was evident in Augusta, Georgia where, in 1880, Black parents successfully petitioned the county school authorities to establish a high school for Black children.[30] In 1897, Joseph W. Cumming and two other Black plaintiffs challenged the Richmond Board of Education's decision to close Ware High School in Augusta, Georgia. They based their claim on the Board's failure to use tax funds to maintain a high school for Black children while doing so for Whites. The plaintiffs sought to enjoin the school officials from operating the school for White students as long as Black students were deprived of the same opportunity.

The Richmond School Board argued that its decision to close the Ware High School was made for "purely economical reasons in the education of the Negro race." Thus Augusta officials justified their decision to close the school in order to provide funding for four primary schools for Black children. The Board traded the high school education of 60 Black students for the elementary school level education of 300 Black students who had been turned away by the system because of limited public resources. Because Georgia law required that children be provided an elementary school education,[31] the Board argued that its choice to close the high school was a reasonable choice. The Supreme Court agreed and refused to stop White high school students from receiving their education for the sake of Blacks.[32] Though the plaintiffs did not challenge the school system's segregation, the decision condoned the segregated school system and gave support to it by recognizing the segregated funding system the Board employed. In other words, the Board had a limited pool of money for Black schools and it chose to allocate it all to fund elementary education as required by the law, and no more. One scholar has argued that the legality of segregation was not before the Court and thus not the conclu-

30. *See* J. Morgan Kousser, *Separate But Not Equal*, 46 J. OF S. HIST. 17, 22 (1980).

31. Article VIII, sect. 1 of the Constitution of Georgia required that there to be a "thorough system of common schools for the education of children in the elementary branches of English education only, as nearly uniform as practicable, the expenses of which shall be provided for by taxation, or otherwise. The schools shall be free to all children of the State, but separate schools shall be provided for the white and colored races." Cumming, 175 U.S. at 543.

32. The Court failed to acknowledge that the Board could have chosen to close the high school it operated for Whites in order to educate the Black elementary students. Alternatively, the Board might have raised taxes to provide for all White and Black students who desired a high school education the option. In fact, in 1897, the Georgia legislature increased state appropriations for education for the 1898 school term. Money was available. KOUSSER, *supra* note 30, at 27. Either closing the opportunity of a high school education to both races or offering it to both races would have been more consistent with the Equal Protection Clause of the Fourteenth Amendment than to offer it to only Whites.

sion reached by Justice Harlan, who just three years before had dissented in the *Plessy* case and did not approve of segregation.[33] It is hard to reconcile the fact that Justice Harlan avoided the question of the validity of school segregation and approved the separate and unequal funding of the high schools with his dissent in *Plessy* and his disapproval of segregation. It seems that Justice Harlan, at the very least, accepted the idea that the Fourteenth Amendment allowed for some level of inequality in regard to public funding.

Unsurprisingly, the *Cumming* plaintiffs' claim for injunctive relief failed. In fact, it is difficult to imagine that even Justice Harlan would stop the educational progress of Whites for the sake of Blacks, especially when he concluded that the Black students "would not be advanced in the matter of their education by" such a remedy.[34] What stands out about the case is the way the decision of the Court reinforces the Master Narrative of White school board members and other politicians in the Jim Crow South when it came to educating Blacks. The Justices accepted the idea that there could be separate pools of money that could not be commingled to support the schools. More importantly, the court affirmed the Master Narrative about education for Blacks—that they should be educated but only to a certain degree. The idea of southern leaders was to allow education in so far as it reinforced respect for property, industriousness and efficient labor participation. In the words of the politicians, "We must educate the Negro to be the best possible Negro and not a bad imitation of a white man . . . what [he] needs is to be taught and shown that labor is his salvation—not books. The state appropriation is intended to encourage that teaching."[35] Thus, the education system served to subordinate Blacks economically and politically.

Through recognition of the separate funding basis, the Court supported the political subordination of the Black citizens of Augusta. Blacks paid taxes like Whites, but they were separate and subject to separate decisions made by Whites with or without Black representation. It seems unlikely that the Board's decision was based on "pure financial reasons in the education of" Black children as it was for economic reasons in the labor economy of the times. By accepting the Board's decision to limit the educational opportunities of all Blacks—including those who were educated at the elementary level, the Court gave weight to the economic system where White decision makers could control the labor market by giving Blacks only the education they needed for work in the agri-economy controlled by Whites.

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33. *See* C. Ellen Connally, *Justice Harlan's "Great Betrayal"? A Reconsideration of* Cumming v. Richmond County Board of Education, J. OF SUP. CT. HIST. 72 (2000).

34. Cumming, 175 U.S. at 544.

35. LITWACK, *supra* note 27, at 90–91.

The harm caused by the *Cumming* decision was experienced by the entire community as well as by the individuals who were denied the benefit of an education. The harm included the reduction of political power and economic capital that would come from having an educated population. The *Cumming* decision also provided two important elements for what was to become the constitutionally permissible model of education for Blacks in the South. The first element was that of bifurcation of the political system with separate funding and decision making in school matters. The second element was more substantive. *Cumming* reinforced the idea that limited educational access for Blacks was appropriate. *Cumming* endorsed limited choice for Black students' education. Because this latter element is more easily associated with individual rights than the former, it fits more closely in the frame of the Fourteenth Amendment's equal protection language. This element ultimately became the basis for the *Brown* litigation.

Though it began as the work of those in a marginalized community, *Brown v. Board of Education* ultimately became the source of the Master Narrative on racial segregation in the country. Charles Hamilton Houston, whose work initiated *Brown*, has been called the father of the modern civil rights movement and the man who killed Jim Crow.[36] In 1919, after serving in a segregated army in World War I, Houston came home in the midst of the infamous "Red Summer" and enrolled in Harvard Law School.[37] Before his graduation, he would become the first Black to be an editor of the Harvard Law Review.[38] After his graduation from law school, he went into private practice and served on the faculty and in the administration at Howard Law School.[39] In the mid 1930's Houston began to lay the groundwork for *Brown v. Board of Education*.[40]

Despite inadequate public support, communities of color established some schools that were very successful in educating Brown and Black students. Studies of successful, high-performing schools in the segregated South reveal four common factors: 1) exemplary and highly dedicated teachers; 2) rigorous curriculum; 3) committed parental support; and 4) strong administrative leadership.[41] However, the number of successful segregated schools was limited. Lack of systemic improvement in their

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36. *See* U. W. Clemon & Bryan K. Fair, *Making Bricks Without Straw: The NAACP Legal Defense Fund and the Development of Civil Rights Law in Alabama 1940–1980*, 52 ALA. L. REV. 1121, 1126 (2001).

37. *See* Robert L. Carter, *In Tribute: Charles Hamilton Houston*, 111 HARV. L. REV. 2149, 2167 (1998).

38. *Id.* at 2168.

39. *Id.* at 2169.

40. *See* JACK GREENBERG, BROWN V. BOARD OF EDUCATION: WITNESS TO A LANDMARK DECISION 3–4 (2004).

41. *See* Vivian Gunn Morris & Curtis L. Morris, *Before* Brown, *After* Brown: *What Has Changed for African American Children?*, 16 U. FLA. J. L. & PUB. POL'Y 215 (2005).

children's education led some Black and Latino parents to believe that integrating schools was the only way to ensure that their children received the same quality education as White children. Thus, lawsuits and other initiatives, which began as efforts to provide high schools for Latinos and Blacks, broadened into challenges to segregated school systems. Community leaders later convinced parents that education could be an avenue for dismantling the system of subordination and oppression that school segregation represented. Parents, motivated by the prospect of improved educational outcomes, allowed their children to be part of a legal strategy to combat all segregation. The involvement of Latino and Black parents with high expectations for improved socio-economic conditions was crucial to sustaining the integration litigation. Many minority parents also saw involvement in their children's education as critical to the achievement of positive outcomes in school and beyond.[42]

Brown was not just one case. It was a series of cases that, over two decades, set the legal stage for cases ultimately argued and won in the Supreme Court by Thurgood Marshall. *Brown* invalidated the segregated school systems that dominated the South and existed throughout the country, and declared that in the area of education, separate schools were inherently unequal and thus unconstitutional.[43] Yet, *Brown* only eliminated the most extreme choice, outright segregation by law of the races. *Brown* left many options that allowed for the exclusion of Black and Brown children from the educational opportunities it promised. It did little to address the political choices that city and county officials made that resulted in disparate funding, nor did it stop school officials from segregating students through tracking and learning classifications. Moreover, *Brown* allowed for private choices of White parents to flee inner-city school districts or send their children to private academies and drain abandoned public schools of funding.

Central to the Master Narrative of the Supreme Court *Brown* decisions were two themes that encouraged the choices that undermined the cases' potential: 1) Segregation and racial inequality harmed only Black school children; 2) Equality could be achieved only through a limited effort aimed at banning segregation. It is important to note that *Brown* did not articulate a mandate for integration, nor did it acknowledge the greater societal harm of the problem of racism as expressed in segregation.[44] *Brown* may have rejected de jure "white privilege," but it did nothing to stop advantages attributable to race not mandated by law. As one commentator stated, "In failing to clearly expose the real inequities produced by segregation, the status quo of substantive disadvantage was

42. *See* Molly Townes O'Brien, Brown *on the Ground: A Journey of Faith in Schooling*, 35 U. TOL. L. REV. 813, 818 (2004).

43. *See* Brown, 347 U.S. at 495.

44. Perhaps the strongest mandate for integration was made by Justice O'Connor in *Grutter*. *See* discussion of *Grutter infra*, pp. 79–84.

ratified."[45] Eventually, the limited view of racism's impact served as the basis for education cases to follow. The normative role that future education cases would play was framed by the perspective on racism adopted by the Court.

There may be many reasons that the Court failed to adopt a more textual approach to interpretation of the 14th Amendment. There is even the suggestion that in developing the strategy leading to *Brown*, the NAACP, after Houston, intentionally disregarded issues of funding disparities and instead focused on segregation.[46] School officials opposing the *Brown* decisions argued that it involved both the Supreme Court and other federal courts in issues that were outside of the scope of the judiciary. Though *Brown* marked a sea change in favor of the civil rights movement,[47] it did not produce a solution to the problem of discrimination and inequities in public education.[48] Whatever the reason for the Court's language, it has had an overall limiting impact in creating equality and ultimately ending the disparities that Marshall and Houston sought to address. The broader notion of the harm of segregation and thus broad based ideas about how to end it were lost in the interpretative narrative of the courts following *Brown*. *Brown* was not a bad decision, and it certainly was not a wrong decision. It was simply a limited decision, in part because of the limited perspective the Court had on race.

As the preeminent case on the issue of race and education, *Brown* left a legacy and message that are monumental. The limiting message of *Brown* was so strong that even in the period from the 1960s to the mid-1970s when desegregation efforts were at their height, rarely did the breadth of the problems in education get expressed in a way other than in the narrative as understood by the Supreme Court. However, this is not surprising. It reflects the power of legal precedent. Many of the strategies that immediately followed the decision and policies of the day suffered from this limited message. For example, resistance to desegregation efforts, the advancement of the colorblind standard of constitutional interpreta-

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45. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1753 (1993).

46. *See* Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 122 (1995).

47. *See* Paul Finkelman, *Civil Rights in Historical Context: In Defense of* Brown, 118 HARV. L. REV. 973, 976 (2005) (describing the decision as one of "revolution in law and justice" and positing that America might be a very different place if not for the *Brown* decision).

48. Many commenting at the 50th anniversary mark of the *Brown* decision lamented the fact that today's urban schools continue to be segregated by race and in many cases provide inadequate education for Black and Brown youth. See, e.g., Gary Orfield, *Why Segregation is Inherently Unequal: The Abandonment of Brown and the Continuing Failure of Plessy*, 49 N.Y.L. SCH. L. REV. 1041 (2004); *see also* CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION (2004).

tion, as well as the No Child Left Behind Act can be traced to one or both of the limiting themes of the Master Narrative of *Brown*.

The Counter Narrative coming out of the Black community around the integration movement was that segregation was political, legal, social and economic poison and that a whole host of barriers had to be broken down to achieve equality.[49] This broader notion of the evil of segregation was particularly evident in the life and work of Charles Hamilton Houston. In his work leading up to *Brown*, Houston chronicled the disparities in general funding methods, facilities, teachers salaries, curriculum, school attendance requirements, per pupil expenditures, housing, employment and income among many aspects of life that were held hostage by legally sanctioned segregation. The Counter Narrative recognized that racism had permeated nearly every aspect of the lives of people of color and that equality could not be achieved by desegregation alone. Civil rights advocates developed advanced nationwide policy and litigation strategies that recognized the all-encompassing nature of the problem. The strategies included supplemental federal funding in the form of Title I, challenges to school funding methods, and the promotion of affirmative action to increase integration at the higher education level.

II. FEDERAL POLICY AND EDUCATIONAL DISPARITIES

For equality advocates, the limitations of litigation strategy in ending disparities became evident in the years following *Brown*. The massive resistance to the *Brown* mandate as well as *Brown's* structural limitations hampered the efforts of lawyers and policy makers who sought equal education for Black children. In response, equality advocates proposed new redistributive measures aimed at the education system's financial inequities. As part of his "War on Poverty," President Lyndon Johnson signed into law Title I of the Elementary and Secondary Education Act of 1965.[50] The aim of Title I was to close the educational gap between poor children and middle class children by allocating federal funding to schools with high percentages of low-income students. The impact of racism on

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49. Interestingly, the breadth of the impact of racial distinctions can be traced back to the abolitionist attacks on slavery and even to the language of William Lloyd Garrison who believed that the original U.S. Constitution was irreparably flawed because it recognized slavery as legitimate. Under Garrison's leadership, the Anti-Slavery Society pronounced the Constitution "a covenant with death and an agreement with hell" because of its failure to abolish slavery in the newly formed United States. Garrison argued that the entire document should be redone to rid it of the taint of racial animus. *See* HENRY MAYER, ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY 327 (St. Martin's Press 1998).

50. James S. Liebman & Charles F. Sabel, *Symposium: Changing Schools: A Public Laboratory Dewey Barely Imagine: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE, 183, 283 n.430 (2003).

public education was such that many, though not all low income schools were majority minority. Title I is essentially an annual bloc grant to state educational agencies accompanied by requirements to target the funds towards programs that benefit educationally-disadvantaged students. However, the federal allocation of funds to local educational facilities has never been enough to bring parity to the public school system. Wealthier districts often have per pupil expenditures that double those of poorer school districts.[51] The huge disparities in expenditures have lead to a number of lawsuits aimed at equalizing funding for schools largely populated by poor minority children.[52]

In his 2006 budget request, President George W. Bush asked Congress for a total of 13.3 billion dollars for Title I funding of elementary and secondary schools. This represents an increase of over 4.6 billion dollars since the No Child Left Behind Act ("NCLB") was introduced. According to the federal government, the increase would help states meet the accountability requirements of the NCLB and provide support for expanded school choice for parents and students.[53] Gary Orfield, Co-Director of The Civil Rights Project at Harvard University argues that in order to effect change in the education system in general, society must pay attention to the relationship between race and poverty.[54] He suggests that a combination of school accountability that protects vulnerable minority students is imperative.[55] At its core, Title I aims to compensate students for the effects of poverty upon their schooling. As conceived, it suggested that desegregation alone would not bring about an end to disparities and it recognized the link between race and poverty. But as the funds are directed toward the goals of NCLB, it risks losing the connection Orfield speaks of and deviates from its initial message.

Current policy does little to link the problems of poverty, race and achievement gaps to the solution of funding found in Title I. While Title I links economic disadvantage to educational programs, it does not go far enough. The amount of funding is too small to overcome the disparities

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51. *See* San Antonio v. Rodriguez, 411 U.S. 1, 12–13 (1973), (estimating that total state and local per pupil contribution to some predominantly Mexican-American school districts totaled $248 while the contribution in the most affluent and prominently "Anglo" districts was $558 per pupil). *See also id.* at n.38 (containing the findings of the District Court which outline disparities in state and local spending that range from $815 per pupil in wealthier districts to $305 in poorer districts).

52. *See* discussions of *San Antonio v. Rodriguez* and state funding lawsuits *infra.*

53. *See* U.S. Department of Education, *ESEA Title I LEA Allocations—FY06, at* http://www.ed.gov/about/overview/budget/titlei/fy06/index.html (last modified Oct. 16, 2006). *See* discussion of NCLB *infra.*

54. American Youth Policy Forum, *The Reauthorization of ESEA Title I, at* http://www.aypf.org/forumbriefs/1999/fb041299.htm (last visited Nov. 7, 2006).

55. *Id. See also* Harvard Graduate School of Education, *Hard Work for Good Schools: Facts not Fads in Title I Reform, The Civil Rights Project* http://www.gse.harvard.edu/news_events/features/1999/orfieldtitle04011999.html (last modified Aug. 16, 2006).

and in targeting educational outcomes does little to address other problems associated with poverty such as health and housing. These factors are "likely to have a palpable effect on academic achievement."[56]

Concurrent with legislative efforts like Title I aimed at ending funding disparities, civil rights advocates pursued litigation in the federal courts, which specifically addressed the systematic basis for disparities in funding. This effort combined equality arguments with redistribution strategies. The first round of funding cases found itself in the expression of federal constitutional challenges to school funding practices. This effort harkened back to Houston's early work and his documentation of the outright funding disparities that existed pre-*Brown*. *Brown* and its progeny certainly outlawed the kind of separate funding bases present in the Richmond School District and the *Cumming* case, as well as clear and deliberate decisions to underfund schools on the basis of race. However, local funding disparities continued, *Brown* and Title I notwithstanding.

By the 1970s, it was clear that the disparities in school funding were substantial and pervasive. What was also clear was that neither existing local, state or even federal efforts at finance reform nor school integration were going to correct the disparities. According to Erwin Chemerinsky:

In 1972, education expert Christopher Jencks estimated that, on average, each white child received fifteen to twenty percent more in education funding than each black child.[57] This trend continues throughout the country. For example, in the school year 1988–89, the Chicago public schools spent $5,265 for each student's education; but in the Niles school system, just north of the city, $9,371 was spent on each student's schooling. That same year, Camden, New Jersey spent $3,538 on each pupil; but Princeton, New Jersey spent $7,725. These disparities also correspond to race. For example, in Chicago, 45.4% of the students were white and 39.1% were African American; in Niles Township, the schools were 91.6% white and 0.4% black.[58]

Two related factors contribute to the funding disparities, property taxes and politics. In the United States, the system for funding public schools has been relatively unchanged since the 1800's.[59] States delegate the role of drawing school districts to local authorities. These districts are drawn on the basis of housing patterns and with little or no regard to

56. RICHARD ROTHSTEIN, CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK—WHITE ACHIEVEMENT GAP 3 (Teachers College Columbia University, 2004).

57. *See* CHRISTOPHER JENCKS, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA 27 (Harper Colophon Books 1973).

58. Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1470 (2003).

59. Molly S. McUsic, *The Future of* Brown v. Board of Education: *Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1348 (2004).

equalizing tax bases from district to district.[60] Since local property taxes are the major source of school funding, disparities will naturally occur in most districts. Some districts include areas where property values are high and provide a higher tax base. In other districts in the same system property values and thus taxes are very low. In addition, the tax rate may not tell the complete story. "Wealthier suburbs have significantly larger tax bases than poor inner cities. The result is that suburbs can tax at a low rate and still have a great deal to spend on education. Cities must tax at a higher rate and nonetheless have less to spend."[61]

In 1968, in conjunction with the "War on Poverty," parties attempted to utilize the courts to supplement the equalization goals of Title I. Litigants began to challenge the tax bases for funding local schools. In essence, they argued that the disparities in funding from district to district within school systems amounted to unequal protection under the law. The cases culminated in a lawsuit aimed at school officials in San Antonio, Texas where the funding system taxed poor districts at a high rate, but still left them with little money to spend on education. In some poor districts, per pupil funding was close to half that of per pupil spending in wealthier districts. The Supreme Court rejected the plaintiff's argument that this method of distribution impacted a class that warranted protection as "suspect" and invoking "strict scrutiny" review.[62] The Court also concluded that the federal Constitution provided no fundamental right to an education.[63] The court rejected the students' argument that education was so inextricably linked to the "exercise of constitutional rights such as freedom of speech and voting" as to amount to a fundamental right on its own.[64] The court posited that this linkage would force the consideration of whether the Constitution thus created protections for other "basic human needs such as subsistence and housing."[65] As Justice Douglas pointed out in *San Antonio Independent School District v. Rodriguez,* a later school case, the Supreme Court told poor people that they must pay their own way to equal educational opportunity.[66]

Thus *Rodriguez* limited the federal judiciary's involvement with regard to inequities in funding public in education and furthered the Master Narrative that equality could be achieved through the limited effort of effective desegregation. The Court, at least by implication, refused to make the link between race and the poverty of the largely Latino students

60. *Id.*
61. Chemerinsky, *supra* note 58, at 1470.
62. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28–29 (1972).
63. *Id.*
64. Chemerinsky, *supra* note 58, at 1471.
65. *Id.*
66. Milliken v. Bradley, 418 U.S. 717, 760 (1974) (Douglass, J. dissenting).

in San Antonio's poorer schools.[67] At the same time, the federal court system withdrew much of its support for the desegregation effort, in essence reinforcing the idea that segregation, racial inequality, harmed only Black and Brown children. *Rodriguez* was a retreat from what civil rights advocates hoped would be an emerging narrative of equality. *Milliken v. Bradley* soon followed and even further reduced the government's participation in desegregation efforts by limiting the federal court's ability to involve suburban districts in urban school district desegregation plans.[68] Both cases reflect the unwillingness of the Court to address the role political constructs played in limiting education, even in the face of evidence that they may have been conceived in an effort to avoid integration. In *Rodriguez*, the Court failed to recognize an individual or a community injury in the funding basis. As with the *Cumming* Court, the *Milliken* and *Rodriguez* Courts allowed the sanctity of political boundaries and decisions to override the interest of equality. Thus on the federal Constitutional front, successful efforts to limit segregation and its related disparities in funding were waning.

Not surprisingly, as federal courts pulled back on their willingness to oversee the administration of desegregation efforts, a new ideology emerged. The colorblind standard in legal reasoning received renewed attention. The rise of the colorblind standard reflects the times. It is an articulation of a subtext of the theme that minimal efforts at desegregation of schools were enough to end the problem of racism. Moreover, the idea of the Constitution as colorblind gave spiritual and ethical mooring to the Master Narrative. The modern colorblind standard developed from a rejected and even, at the time, idyllic vision first introduced in a dissent in *Plessy v. Ferguson*, the decision that locked segregation into place.[69] Yet, today, many argue that it is the measure by which all law and social policy should be governed.[70]

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67. For a discussion of the complex relationship of school desegregation and school financing litigation see Goodwin Liu, *The Parted Paths of School Desegregation and School Finance Litigation*, 24 LAW & INEQ. 81 (2006). Professor Liu offers a compelling analysis of *Rodriguez*, which suggests that the goal of redistributing resources for education and that of ending educational disparities were set on divergent paths by the Court's disparate resolutions in *Rodriguez* and a desegregation case argued on the same day, *Keyes v. Sch. Dist. No. 1, Denver, Col.*, 413 U.S. 189 (1973). *See also* Charles Berger, *Equity Without Adjudication: Kansas School Finance Reform and the 1992 School District Finance and Quality Performance Act*, 27 J.L. & EDUC. 1, 16 (1998) (positing that whether the goals of public finance reform were "educational equity, taxpayer equity [or] adequacy" is unclear).

68. Milliken, 418 U.S. at 741.

69. See Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896). As the sole dissenter in the landmark case that declared "separate but equal" the law of the land under the equal protection clause, Harlan declared that the 13th and 14th Amendments should be "color blind."

70. *See, e.g.*, PETER WOOD, DIVERSITY: THE INVENTION OF A CONCEPT (2003) and Peter H. Schuck, *Affirmative Action: Past, Present and Future*, 20 YALE L. & POL'Y REV. 1 (2004). In *Adarand Contractors Inc. v. Pena*, 515 U.S. 200 (1995), the Court adopts the colorblind standard

Proponents of the colorblindness concept argue that the consideration of race in any form is unconstitutional and that a permissible state rule or process must be "race neutral." In fact, they argue that any racial consideration violates the "central purpose of the Equal Protection Clause" to prevent the States from purposefully discriminating between individuals on the basis of race.

As attractive as the colorblind concept is today, it is difficult to believe that it was not the legal or social imperative historically. It was, in fact, a concept the court outright rejected in 1896 in its *Plessy v. Ferguson*[71] decision. Race consciousness prevailed as the ideological underpinning for most social and legal policy and governed much individual behavior until the Supreme Court's decision in *Brown v. Board of Education* in 1954. *Plessy*, in sanctioning race consciousness, made race neutrality an impossibility, because over time it institutionalized race as a decision making factor.

In 1979 law Professor William Van Alstyne denounced Supreme Court Justice Harry Blackman's opinion in *Bakke v. University of California*[72] which allowed race as a consideration in California's medical school admissions policies. Blackman argued that tailored race conscious strategies were necessary in order to "get beyond racism." Van Alstyne responded that

> [G]etting beyond racism in this fashion ... is as little likely to succeed as the now discredited idea that in order to 'get beyond' organized government it is first indispensable to organize a virtual dictatorship that, once it extirpates the evils that made organized government necessary, will itself just naturally wither away. We have not seen governments wither by the paradox of assigning them even greater powers. We shall not now see racism disappear by employing its own ways of classifying people and of measuring their rights. Rather, one gets beyond racism by getting beyond it now; by a complete, resolute and credible commitment never to tolerate in one's own life-or in the life or practice of one's government-the differential treatment of other human beings by race.[73]

Van Alstyn's argument suggests that colorblindness, is the only antidote to racism. He argues powerfully against any application of color consciousness in governmental decision making. As articulated by modern

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of review for federal affirmative action programs. *But see* Neil Gotanda, *A Critique of "Our Constitution Is Colorblind,"* 44 STAN. L. REV. 1 (1991) and J. MORGAN KOUSSER, COLORBLIND INJUSTICE (1999).

71. Plessy, 163 U.S. at 550.

72. 438 U.S. 265 (1978).

73. COSE, COLOR-BLINDNESS 99–100 (1997) *quoting* Van Alstyn, *Rites of Passage Race, the Supreme Court, and the Constitution*, U. CHI. L. REV. 56, 775–810 (1979).

proponents like Van Alstyn, the colorblind standard is a product of racial guilt and government mistrust. This approach reflects a fundamentalist concept of constitutional protections against racism that ignores the texture of reality that racism has created. Again, this supports the idea that a narrow approach to ending segregation is all that is needed to its extreme.

Even as conceived, the colorblind standard had its limitation which modern proponents have not reconciled, not the least of which is that it fails to address the racial correlated social disparities plaguing this American society throughout its history. The originator of the "color blind" constitution was Justice John Harlan, the author of the *Cumming* opinion. In his dissent in *Plessy*, Justice Harlan argued that the law "takes no account of . . . color."[74] Yet, even in his dissent, Harlan never advocated for social equality of Blacks and Whites.[75] One is left to conclude that Justice Harlan endorsed a colorblind standard that would have allowed for decisions that were reasonable despite their negative impact. Such is the case under modern day applications of the colorblind standard, where decisions leave in place the vestiges of past prejudices and presumptions of inferiority under the guise of race neutral choices.[76]

A. *State Constitutions, School Financing Litigation, and Disparities*

The Counter Narrative continued in litigation form in two more waves of school financing cases. This time, the cases were in state and not federal courts. One wave of litigation relied on state constitutional texts with explicit reference to education as a state constitutional right. Such a reference to education is clear in at least 49 of 50 state constitutions and has produced a series of state court cases challenging funding on two distinct bases.

Almost immediately after *Rodriguez* was decided, new school finance cases were initiated. This litigation focused on funding equality arguments and redistribution of resources from wealthier districts. From 1974–1989, these cases, often referred to as the "second wave," were largely based on equal protection clauses found in the various state constitutions. However, issues of residence and taxation, generally localized and complex, were difficult for courts to remedy. Early suits resulted in victories for the states. Also, equality did not necessarily provide a satisfactory solution because while initially and philosophically appealing, it could produce less enviable results.[77] With limited funds, equality would mean lowering funding and the competitive edge found in wealthier school districts rather than

74. 163 U.S. at 559.

75. *See id.*

76. *See* Bryan K. Fair, *Why* Grutter *Will Help Very Little*, 78 TUL. L. REV. 1843 (2005).

77. Enrich, *supra* note 46.

merely increasing the wealth and educational opportunities afforded to poorer districts.[78] This "Robin Hood" philosophy did not yield success judicially or legislatively, given the political power of wealthier districts. The nexus was not yet right for equal educational opportunity to emerge as a Master Narrative.

Importantly, the third wave of education litigation, from 1989 to present, shifted strategy. Third wave litigants learned from the failures of the second wave of cases. Instead of focusing on the equality of education, they shifted their focus to the actual level of education provided by the various school districts and whether the education provided was adequate to prepare children to be successful members of society. "Educational adequacy" was based, in part, on the explicit textual language of state constitutions making education a fundamental right, as well as statewide accountability initiatives, which provided judicially manageable standards.

Most of the 50 states, whose constitutions were reviewed for this report, have an education clause. Kentucky merely provides for "an efficient system of common schools throughout the State"[79] while Massachusetts acknowledges that it is the "duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences" which are necessary to achieving "wisdom, and knowledge, as well as virtue."[80] New York offers to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated"[81] and in New Jersey, "the Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years."[82]

Education adequacy evokes a New Deal Pattern of legislation. In creating accountability initiatives, legislators deliberately leave key terms or outcomes undefined and mandates under-funded. Such constructions are thus delegated to the courts. While such legislation often results in fragmentation of power and conflict between branches of government, it also allows for incremental policy implementation and ongoing social and legal construction of desired policy outcomes. Education advocates have used this approach, quite successfully, in the Education for All Handicapped Children Act of 1975 (EAHCA). In EAHCA, courts were given significant latitude in defining disability and free and appropriate public education. The policy goals of EAHCA have, in large part, been achieved.

Adequacy offered courts a rationale for plaintiff victories. It is not clear whether adequacy litigation led to statewide accountability initia-

78. *Id.*
79. KY. CONST. § 183.
80. MASS. CONST., pt. 2, ch. 5, § 2.
81. N.Y. CONST. art. XI, § 1.
82. N.J. CONST. art. VIII, § 4, ¶ 1.

tives or whether the initiatives led to adequacy. However, both, as designed, work in tandem to improve educational outcomes for poor children. Statewide accountability initiatives eventually put structural and political foundations in place for our nationwide movement towards standards. Arguably, the federal No Child Left Behind Act originated from the Texas accountability initiative. Whatever the source, the result of this legislation was a cementing of a "standards perspective" that spread to the federal level. This represents only a part of the impact of NCLB. A full discussion of the significance of the policy including its impact on desegregation is included below.

B. *The Move from Equality to Adequacy*

The failure of the plaintiffs in *San Antonio v. Rodriguez* to prevail in their claim for a federally constitutional right to an education and the deference the court showed to states in determining their tax structures meant that there would be no federally mandated reallocation of funds in local school settings absent and absolute denial of benefits.[83] It also meant that there would be no uniform standard for providing education for children from state to state. Lack of federal equal protection means that, for example, Connecticut can provide more for its students than its neighboring states of Massachusetts and Rhode Island and the students in the latter states have no basis for complaint. The funding litigation moved from the federal court to state courts with each state providing its own definition for the state's obligation. At the same time, new legal rhetoric was coined. Instead of focusing on equality under the federal constitution, the litigation sought adequacy under various provisions in state constitutions throughout the country.

1. Kentucky

In the first significant adequacy case, the Supreme Court of Kentucky reviewed both the equality and adequacy of the state's public school system.[84] The court articulated a substantive standard in the form of "seven capabilities" as follows:

- sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
- sufficient knowledge of economic, social, and political systems to enable students to make informed choices;

83. 411 U.S. 1, 28–29 (1972).

84. Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989).

- sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
- sufficient self-knowledge and knowledge of his or her mental and physical wellness;
- sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
- sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
- sufficient level of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[85]

Basing its decision only on the Kentucky Constitution's education clause, the court found that "Kentucky's entire system of common schools is unconstitutional."[86] The breadth of the court's decision is worth noting. In effect, the court called for a change in the entirety of the system, including the programmatic content, not just in financing as had been the challenge in *San Antonio v. Rodriguez*. "While the Kentucky court simultaneously addressed the severe inequalities in the state's financing system and found that the state's education clause required substantial uniformity of resources, its findings of substantive inadequacy played a central role in its declaration that 'the whole gamut of the common school system in Kentucky,' and not just the education finance structure, failed to pass constitutional muster."[87]

2. Massachusetts

Four years later, Massachusetts adopted Kentucky's "seven capabilities" in *McDuffy v. Secretary of the Executive Office of Education*.[88] The case was first brought under the "equality" rationale, but plaintiffs amended their complaint "to refocus on the claim that the substantive quality of the education provided in the plaintiff's poor districts did not satisfy the legislature's constitutional [duty] . . ."[89] In what is later described by some as overreaching, "the court . . . directed its inquiry to the qualitative demands implicit in the constitutional text, ultimately adopting the same list of

85. *Id.* at 212.
86. *Id.* at 215.
87. Enrich, *supra* note 46, at 140–41.
88. 615 N.E.2d 516 (1993).
89. Enrich, *supra* note 46, at 141.

guidelines previously used by the Kentucky court."[90] The Massachusetts Court did not adopt these capabilities out of thin air, rather there was legislation, the Massachusetts Education Reform Act, in the works and in fact passed just days after the Court's *McDuffy* decision.

In 2004, Massachusetts Superior Court Judge Margot Botsford concluded that adequacy was impacted by "inadequate financial resources" at both the local level and the state oversight level.[91] She directed that costs associated with implementing all seven of the Massachusetts curriculum frameworks be established.[92] A year later, in *Hancock v. the Commissioner of Education*, the Supreme Judicial Court ("SJC"), reviewed Judge Botsford's decision.[93] While *Hancock* provided an opportunity to help define "adequacy" in terms of implementation of the state curriculum frameworks, in the end the court relinquished any role or responsibility and left such policy decisions to the elected branches of the state government.[94]

The plurality opinion in *Hancock* represents two interesting developments in adequacy litigation. First, courts are hesitant to step into this policy arena, lest they overstep their powers by intervening in an area reserved for the legislature. Second, by finding that the policy of setting the parameters of adequacy was a non-justiciable issue, the SJC notes that had the issue been raised as one of equal protection or due process, it would have been within the court's domain to decide. So while the SJC did not define "adequacy" in *Hancock*, the door is left open for the court's involvement.

While the Chief Justice "reaffirmed" the "constitutional imperative" found in the *McDuffy* case, she refused to find that the current situation in the four focus districts failed to meet the constitutional mandate. Citing the *McDuffy* decision and the education clause of the Massachusetts Constitution, there is an "enforceable duty on the magistrates and Legislatures of this Commonwealth to provide education in the public schools for the children there enrolled, whether they be rich or poor and without regard to the fiscal capacity of the community or district in which such children live."[95] Further, "[t]his reflects the conviction of the people of Massachusetts that, because education is 'fundamentally related to the very existence of government,' the Commonwealth has a constitutional duty to prepare all of its children 'to participate as free citizens of a free State to meet the needs and interests of a republican government, namely the Commonwealth of

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90. *Id.*

91. Hancock v. Driscoll, 2004 WL 877984 (Mass. Super. Apr. 26, 2004).

92. *Id.*

93. 443 Mass. 428, 445 (Mass. 2005).

94. This decision has been criticized as a return to pre-*Brown* days where "a high court says the children of the public schools must continue to suffer the state's sloth." Derrick Z. Jackson, *Separate and Unequal Schools*, THE BOSTON GLOBE, at A19 (Feb. 18, 2005).

95. Hancock v. Comm'r of Educ., 443 Mass. 428, 431 (2005) (Marshall, C.J., concurring), *citing* McDuffy v. Sec'y of the Exec. Office of Educ., 415 Mass. 545, 621 (1993).

Massachusetts.' "[96] This is the "constitutional imperative" the Chief Justice applied in determining whether the Commonwealth is currently meeting its "duty to educate."[97]

She distinguished the school system in the *McDuffy* decision as one where the Commonwealth had completely abdicated its constitutional duty to the local communities.[98] With the passage of the Education Reform Act in 1993, three days after the *McDuffy* decision, the Legislature had taken back its constitutional mandate and established a foundation budget, curriculum frameworks, and had reviewed the certification and tenure of public school teachers.[99] In such an environment, in spite of the "painfully slow process" in which changes were achieved, the Chief Justice reasoned she could not find that the Commonwealth was neglecting its constitutional duty, as was the case when *McDuffy* was decided.[100]

The analysis of the Commonwealth's constitutional duty and the Legislature's response indicates and may be predictive of a minimal role for the court to play in education policy. The language the court uses suggests that it is applying a rational review test. The legislature's response:

> While the plaintiffs have amply shown that many children in the focus districts are not being well served by their school districts, they have not shown that the defendants are acting in an arbitrary, non-responsive, or irrational way to meet the constitutional mandate.[101]

Where the Commonwealth's "abdication" of its constitutional duty in the *McDuffy* era would not pass a rational review, the legislature's passing of the ERA and subsequent funding does pass constitutional muster. Since the Commonwealth is not "neglecting" its duties, no judicial intervention is required.[102]

Further, "[t]he court has not been called on to interpret the equal protection and due process provisions of the Massachusetts Constitution, nor are we confronted with a wholesale abandonment of children that the record in [the *McDuffy*, *Brown*, and *Deshaney*] cases evidenced."[103] Judicial intervention is limited to situations like *McDuffy* where the Commonwealth has entirely neglected its constitutional duty to educate and situations where the justiciability of the issue is unquestionable, such as interpreting the equal protection or due process constitutional provisions.

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96. *Id.* at 431.
97. *Id.*
98. *Id.* at 433.
99. *Id.* at 432.
100. *Id.* at 434.
101. *Id.* at 435.
102. *Id.* at 457.
103. *Id.*

Therefore, the political question doctrine is a significant impediment for courts in adequacy litigation and the door is still ajar for equality litigation under equal protection or due process.

Where Chief Justice Marshall's plurality opinion underscores the limited role the court may play in reviewing legislative educational policy, both dissenting opinions assert a role for the court.

Unlike the plurality justices, Justice Greaney, the author of the dissent, writes that the plaintiff's situation requires relief from this court.[104] The constitutional duty to educate means that all of the Commonwealth's students "have a reasonable opportunity to acquire an adequate education, within the meaning of *McDuffy*, in the public schools of their communities."[105] Whether the Commonwealth is meeting its duty should be a results-oriented evaluation, rather than the effort-oriented evaluation suggested by the Chief Justice's opinion.[106] Since the results in the four focus districts were found to be seriously lacking, Justice Greaney would remand the case for remedial supervision of the process so that "the court will play a vital role in ensuring that the Commonwealth's public schools are adequately financed [which] would not intrude on the other two branches."[107] Justice Greaney, cognizant of the political issue, advocates a position of the three branches of government working collectively on education adequacy.[108]

With *Hancock*, the Massachusetts SJC delivered a set-back to the use of adequacy for improving educational opportunity and outcomes for disadvantaged children in state courts. While state courts have invalidated funding schemes on adequacy grounds, they might not invalidate inadequate educational opportunities or outcomes on the education clause alone (if other state courts follow Massachusetts). This means that plaintiffs will need a new, or at least altered, strategy to continue to successfully litigate the issue of disparities and increasing stratification of educational opportunity in our public schools. One possibility, suggested by the *Hancock* decision, is for plaintiffs to use both the education and the equal protection clauses in state constitutions. Equal protection is clearly a justiciable issue. Maybe in the context of equal protection, state courts will be more comfortable assessing whether children receive equal educational opportunities to public education. Perhaps the Massachusetts SJC has highlighted the appropriate legal pathway, one that meshes adequacy and equality, state constitution education clauses and equal protection, to move us toward equal educational opportunity for all children. Yet the

104. Hancock v. Comm'r of Educ., 443 Mass. 428, 473 (Mass. 2005) (Greaney, J., dissenting).

105. *Id.* at 479.

106. *Id.* at 481.

107. *Id.* at 480.

108. *Id.*

SJC's decisions in *McDuffy* and *Hancock* show that the path adequacy litigators take to reaching their goal does not always follow a straight line.

Of course, adequacy litigation also continues in various states throughout the country. Other important state court decisions noted below indicate the various ways courts have found and defined the right to an education.

3. Wisconsin

In an adequacy case that arrived at the Supreme Court of Wisconsin in 2000, the court addressed two issues.[109] First, it tested the constitutionality of the state school finance systems under the education clause.[110] Next, it tested the constitutionality of the system under equal protection.[111] The court applied the rational basis test used in the Supreme Court decision in *San Antonio Independent School District v. Rodriguez* to the petitioner's claim.[112] The court concluded that the "legislative classifications set forth in Wis. Stat. ch. 121 [and the state financing system were] rationally related to the purpose of educating Wisconsin's children."[113] The court found that

> Wisconsin students have a fundamental right to an equal opportunity for a sound basic education" defined as one that will provide an "opportunity for students to be proficient in mathematics, science, reading and writing, geography, and history, and for them to receive instruction in the arts and music, vocational training, social sciences, health, physical education and foreign language, in accordance with their age and aptitude."[114]

The court also concluded that the state's fiscal obligation was to provide "sufficient resources so that school districts offer students the equal opportunity for a basic education as required by the constitution, the state school finance system will pass constitutional muster."[115]

Wisconsin's state constitution education clause contains a "uniformity" provision, which mandates that the legislature is to provide schools "which shall be as nearly uniform as practicable."[116] The court interpreted this detail in the clause to relate to the "character of instruction" and not

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109. Vincent v. Voight, 614 N.W.2d 388, 396 (Wis. 2000).
110. *Id.* at 397.
111. *Id.* at 413.
112. *Id.* at 414.
113. *Id.*
114. *Id.* at 415.
115. *Id.*
116. WIS. CONST. art. X, § 3.

the "method of forming school districts".[117] Further, the court defined "[c]haracter of instruction" as "the training that these schools should give to the future citizens of Wisconsin."[118]

4. New York

The Campaign for Fiscal Equity ("CFE") cases are at the heart of New York's adequacy litigation. CFE brought suit in 1995, at which point the New York Court of Appeals announced a "sound basic education" standard and remanded the case to the trial court to gather evidence on what constitutes such an education.[119] The trial court's general conclusion provided that "[p]roductive citizenship means more than just being qualified to vote or serve as a juror, but to do so capably and knowledgeably."[120]

In 2002, the New York Supreme Court reviewed the trial court decision and cited the "sound basic education" standard, as announced by the Court of Appeals, that "requires the State to provide a minimally adequate educational opportunity, but not ... to guarantee some higher, largely unspecified level of education, as laudable as that goal might be."[121] This minimally adequate education standard relates to facilities, instrumentalities of education, teaching quality, and curriculum.[122] Under this standard, the court found that the State's method of funding was constitutional, reversing the lower court.[123]

The New York Court of Appeals then reversed the New York Supreme Court's decision, stating "voters should have the cognitive skills and the level of knowledge necessary as voters to be able to identify their own political interests, to find information relevant to those interests, and to assess this information ... in light of those interests."[124] While the court cited various pending reforms, it based its decision on the record before it, rather than on the possible results of such reforms.[125] In light of that record, the court found that the state funding system dramatically underfinanced New York City schools. The court ordered the state to determine the

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117. 614 N.W.2d at 402.

118. *Id.* at 409.

119. CFE v. State, 631 N.Y.S.2d 565, 569 (Ct. App. 1995).

120. Michael Rebell, *Adequacy Litigation: A New Path to Equity, in* BRINGING EQUITY BACK 291, 306 (Janice Petrovich and Amy Stuart Wells ed., New York: Teachers College Press, 2004) (*quoting CFE v. State, 719 N.Y.S.2d 475 (N.Y. 2001)*).

121. CFE v. State, 794 N.Y.S.2d 130, 134 (A.D. 1 Dept. 2002).

122. *Id.* at 135.

123. *Id.* at 148.

124. *See* Rebell, *supra* note 120, at 307.

125. CFE v. State, 769 N.Y.S.2d 106 (Ct. App. 2003).

amount it would cost to offer each of the city's students a "sound basic education" and then to provide the funding.[126]

The Court of Appeals addressed the political question issue in the opinion, but the issue did not impede it from ordering a cost study and appropriate reforms. The court specifically addressed the dissent by defining its role as one of "assur[ing] the protection of constitutional rights" rather than making educational policy.[127] However, the court recognized that it lacked authority to "micromanage education financing" and that it must "defer to the Legislature in matters of policymaking, particularly in a matter so vital as education financing . . ."[128]

While the outcome of the court-ordered study is still unknown, CFE is optimistic.[129] "The New York Court of Appeals' holding that students must be prepared to be capable citizens and the trial court's detailed analysis of the specific skills and the level of cognitive functioning that students need to function in that manner are likely to inspire similar analyses and analogous holdings by other courts."[130] In June of 2006, CFE filed a brief with the New York Court of Appeals asking for a final order "that would bring the long-running CFE school-funding case to a close." On October 10, 2006, attorneys appeared before the Court of Appeals for oral arguments on that filing.[131]

5. New Jersey

New Jersey, along with Kentucky, was one of the first states to litigate education adequacy. The litigation culminated in two series of cases: *Robinson v. Cahill*[132] and *Abbott v. Burke*[133]. The New Jersey Supreme Court found the system of funding public education to be unconstitutional in *Robinson*.[134] The funding system in *Robinson* fell short of the constitutional mandate to provide a "thorough and efficient system of free public

126. *Id.* at 128; Greg Winter, *New York Schools Ruling: Overview*, N.Y. TIMES, Abstract, June 27, 2003, at A1.

127. 768 N.Y.S.2d at 129.

128. *Id.* at 125.

129. "But to get anyone's attention on funding gaps, it had to be as bad as New York, where its high court this week ordered the state to give New York City $9.2 billion over the next five years for school renovation." Derrick Z. Jackson, *Separate and Unequal Schools*, THE BOSTON GLOBE, Feb. 18, 2005, at A19.

130. *See* Rebell, *supra* note 120, at 307.

131. Campaign for Fiscal Equity, *Campaign for Fiscal Equality Lawyers Urge Court to Issue an Enforceable Order Directing Lawmakers to Abide by Previous Rulings to Provide New York's Children with a Sound Basic Education*, http://www.cfequity.org/pressrelease10.10.06.pdf (Oct. 10, 2006).

132. 62 N.J. 473 (N.J. 1973).

133. 153 N.J. 480, 490 (N.J. 1998).

134. *See* Robinson, 62 N.J. at 520.

schools."[135] In 1975, New Jersey enacted the Public School Education Act, which the "Court found to be facially constitutional."[136] The *Abbott* litigation commenced in 1981 and focused on the constitutionality of funding and the 1975 Act as applied to several poorer districts ("*Abbott* districts").[137] Several iterations of *Abbott*, court ordered remedial measures, and legislative response followed.

As a result of finding that the 1975 Act was unconstitutional in the *Abbott* districts, the court ordered the legislature to enact new legislation, which it did with the Quality Education Act of 1990.[138] However, the court did not find the subsequent legislation to be constitutional "because it failed to ensure parity of educational spending."[139] The ensuing legislation, the Comprehensive Educational Improvement and Financing Act of 1996 ("CEIFA"), was also challenged, but the court found it "to be facially constitutional in its adoption of substantive standards . . . that served to define a thorough and efficient education."[140] Yet, the court made clear that educational adequacy involved more than providing for programmatic changes. The state's constitutional obligation included providing sufficient financial resources to fund the reforms. Thus, "the Court found CEIFA to be unconstitutional as applied to the [*Abbott* districts] because the statute failed to guarantee sufficient funds to enable students in those districts to achieve the requisite academic standards . . ."[141]

In 1998, a judge assigned to report on the needs of the *Abbott* districts made the following recommendations: "whole-school reform, full-day kindergarten for five-year-olds, full-day pre-kindergarten for four- and three-year olds, summer school, school-based health and social services, an accountability system, and added security."[142] In reviewing these recommendations, the New Jersey Supreme Court held that the Commissioner of Education was obligated to implement programmatic measures recommended by the judge as well as "funding measures and fiscal reforms."[143]

> After ordering these remedial measures, the court acknowledged the commitment of both the legislative and executive branches to education reform.[144] But the court noted that the response of all three branches of government was insufficient

135. N.J. CONST. art.VIII, § 4.
136. *See* Abbott, 153 N.J. at 489, referring to Robinson, 62 N.J. 473.
137. *Id.* at 490–91.
138. *Id.* at 491.
139. *Id.* at 492.
140. *Id.* at 499.
141. *Id.* at 511.
142. *Id.* at 637.
143. *Id.* at 527.
144. *Id.*

> until "it is possible to say with confidence that the most disadvantaged school children in the State will not be left out or left behind in the fulfillment of that constitutional promise."[145]

The most recent *Abbott* case was brought by the Department of Education ("DOE"), due to concerns about the remedial process as well as a budget crisis.[146] The court order granted relief requested by the DOE, which largely related to budget requests and a one-year suspension of certain remedial measures.[147]

Though each state has its own standard for what constitutes compliance with its educational obligation, the above cases represent a significant legal trend. Like the concept of education and its role in society that lead the plaintiffs to file *Brown*, adequacy litigation emerges from a Counter Narrative. And like the themes that sprang from the *Brown* decision's adoption of the Master Narrative, adequacy as a concept is limited. As articulated by the courts it provides no clear mandate for equal educational opportunity for all, nor does it address the issue of education as a fundamental right. The right articulated by adequacy proponents is equal funding. The right articulated by the *Brown* litigants was integration. The strategies of the former are "redistribution of money"; the strategies of the latter are "redistribution of schoolchildren."[148]

Moreover, the language of the adequacy decisions is limiting. The hope is that the ensuing fourth wave of adequacy litigation will move poor children forward via judicial discourse to define "adequacy" broadly. "Adequacy" is a concept in the process of legal construction by state courts across the nation. Legislatures have helped in this construction by providing standards and measures for accountability. However, adequacy still needs to overcome hurdles, such as the political question doctrine and responsibility for implementation. Alternatively, the equality rationale is clearly a justiciable issue.[149] Adequacy may provide more of a compromise than equality and progress may be incremental and hence, slower. Though compromise may be better than no solution and incremental progress is still progress, children do not get a second chance. It appears that the American education system may be slipping.[150] Time is of the essence.

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145. *Id.*

146. Abbott v. Burke, 798 A.2d 602 (N.J. 2002).

147. *Id.* at 604.

148. Liu, *supra* note 67.

149. *See* Hancock v. Comm'r of Educ., 443 Mass. 428 (2005); Vincent v Voight, 236 Wis. 2d 588, n.2 (Wis. 2000).

150. According to the Organization for Economic Cooperation and Development (OECD), in 2003, American 15 year olds ranked 24th in math from students among 29 industrial countries. Paul E. Peterson, *The Children Left Behind*, EDUCATION NEXT, Spring 2005, at 3.

Unfortunately, in its current iteration, the concept of "adequacy" reflects more of a *Richmond* Choice than a *Cumming* Choice. *Hancock* reinforces the problem by requiring that legislative choices meet only a rationality standard.[151] In general adequacy litigation provides for only a basic education for a large number of students. Even as it is increasingly linked with the NCLB, standards are minimal. In fact, NCLB as it is applied may limit efforts to expand upon what is an "adequate" education.

The adequacy litigation movement in state courts will need to be reflective of societal consensus that education is a fundamental right and that prescribed outcomes need to be achieved. Just like evolving societal norms were reflected in the *Brown* and *Grutter* decisions, so might the guarantee of an education by the United States Supreme Court one day.[152] Yet in that context, notwithstanding the wide variations in the definition of what constitutes adequacy, adequacy must be the baseline. It must not be the goal.

C. *No Child Left Behind*

The adequacy litigation and accountability movements in state and local law and policy continue to work in tandem. As stated earlier, they spanned the Texas education plan of then Governor George W. Bush. That plan served as the basis for President Bush's federal education policy, the No Child Left Behind Act ("NCLB"). In addition to standard setting based on state controlled testing, NCLB establishes the consequences for schools that fail to meet those standards. In this respect, NCLB takes a narrow approach to education quality by targeting "failing schools" instead of viewing the problem systemically, including failing to look at the disparities between schools. In taking this limited approach to improving education, it furthers the Master Narrative of *Brown* that the education problem is limited to children in failing schools, many of which are populated by minority students.

The NCLB is driven to a large extent by the choice ideology. Yet the "choice" offered today is much the same as the choice presented to the Richmond School District, educate a few at an elite level or educate many at a basic level. The *Richmond* Choice, the choice endorsed by the Supreme Court, was to educate many students at the basic level because that best comported with the economic and political system of the day. The *Cumming* plaintiffs were never offered the choice they wanted. The *Cumming* Choice likely would have been to educate all Black children to their capacity. NCLB, today's jurisprudence in education cases, and even litigation strategies established to address the problem of educational inequalities reflect the *Richmond* Choice.

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151. 443 Mass. at 435.

152. *See generally* Chemerinsky, *supra* note 58.

NCLB was signed into law on January 8, 2002.[153] The stated intent of this act "[t]o close the achievement gap with accountability, flexibility, and choice, so that no child is left behind"[154] and the rhetoric surrounding it is laudable. In sum, it posits that standardized testing, which is developed and defined by each state, will improve academic outcomes for poor, minority, disabled, non-English proficient and at-risk children.

One must look beyond the rhetoric to determine the location of NCLB in the Master Narrative of *Brown*. Implicit in the way the law is designed is the rejection of the notion that funding restructuring will cure the deficiencies. NCLB relies more on a market approach to ending disparities by introducing elements of choice into the education process. Thus it ignores the broad based harm of segregation and its links to current inequities or the broad based methods of ending it.

States are expected to set standards for academic testing and achievement, and must monitor student progress to ensure that the standards are being met.[155] Test results must be reported separately according to student race, ethnicity, disability and English proficiency.[156] The goals of NCLB are achieved through this rigorous testing process and through school reforms, transfer options for those students in low-achieving schools, increased participation of parents and improved training and quality of teachers.[157] NCLB further provides that students who attend schools identified as needing improvement may transfer to other public schools within the same school district.

When NCLB was enacted, federal funding was assured for all states that received Title I funding and complied with the tenets of the NCLB. To receive this funding, however, states must report "failing" schools along with a plan for meeting the obligations of the law. Therefore, schools and school districts are made more accountable and transparent under the NCLB, since all of this information is made available to the public.[158]

The most significant aspects of the law were outlined by Secretary of Education Rod Paige in a press release on November 26, 2002:[159]

- The NCLB requires that schools achieve "adequate yearly progress" ("AYP") as part of the accountability

153. The White House, *Fact Sheet: No Child Left Behind Act*, *at* http://www.whitehouse.gov/news/releases/2002/01/20020108.html (Jan. 8, 2002).

154. No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2002).

155. U.S. Department of Education, *A Guide to Education and No Child Left Behind*, http://www.ed.gov/nclb/overview/intro/guide/guide.pdf (Oct. 2004).

156. *Id.* at 18.

157. No Child Left Behind Act of 2001 § 1001, 20 U.S.C. § 6301 (2002).

158. James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. Rev. 1703 (2003).

159. U.S. Department of Education, *The No Child Left Behind Act Title I: Improving the Academic Achievement of the Disadvantaged Summary of Final Regulations*, *at* http://www.ed.gov/news/pressreleases/2002/11/regs_sum.html (Nov. 26, 2002).

provision. Accountability is assured through standards determined by the state through testing. Schools, local educational agencies ("LEAs") and state educational agencies ("SEAs") are held accountable for the successes (and failures) of students, using these test results.

- As part of the AYP requirement, states must also submit graduation rates and "one other academic indicator."
- Schools needing improvement must be identified by LEAs, based upon the SEA assessment, before the school year begins, in order that steps be taken to immediately begin improvement. This provision is intended to make schools accountable and to provide students with options.
- Schools identified as "failing" that are undergoing restructuring must meet the AYP guidelines for "two consecutive years" or the LEA must continue to provide students with alternate school and supplemental choices.
- Students with disabilities and limited English proficiency must be provided with appropriate services as described above.
- Teachers must be "highly qualified," as defined by state standards, in the subjects they are teaching to their students by 2005–2006.

Schools that fail to meet the academic achievement standards set by the state and outlined in the NCLB are subject to the sanctions listed in Table 1.

TABLE 1
NCLB INTERVENTIONS FOR SCHOOLS
NOT MEETING AYP GOALS

Number of years missing performance goals based on tests administered in prior school year	NCLB interventions for schools that receive Title I funds
First year missed	None
Second year missed	In the first year of school improvement, schools must offer choice
Third year missed	In the second year of school improvement, schools must offer choice and supplemental educational services
Fourth year missed	Schools are in corrective action* and are required to offer choice and supplemental educational services
Fifth year missed	Schools are in the planning stages for restructuring**

	and are required to offer choice and supplemental services
Sixth year missed	Schools are now in the implementation stages of restructuring and must continue to offer both choice and supplemental services.
* Corrective action: is a significant intervention designed to remedy persistent inability of the school to make adequate progress toward all students becoming proficient in reading and mathematics	
** Restructuring is a major reorganization that involves fundamental reforms such as changes in school staffing and governance.	
Adapted from GAO-05-7 No Child Left Behind Act	

Thus failing schools are not closed immediately. Yet they operate in a category that might result in better students leaving them for higher performing schools. Moreover, as the following discussion indicates, funding for raising the performance rates of failing schools may be substantial.

D. *Costs Associated with the NCLB*

The changes outlined by NCLB will be costly to SEAs and LEAs. In 2003, the House Education Chairman defended federal funding for the NCLB as being adequate.[160] By 2004, the House Democratic Caucus Chairman cited inadequate funding of the law as "deceitful" on the part of the federal government.[161] The National Conference of State Legislatures (NCSL) has named the NCLB the most costly (to states) of all unfunded federal mandates.[162]

According to the Department of Education, the federal government has allocated $410 million to states for purposes of developing and implementing testing programs.[163] However, in a report issued in May 2003, the GAO estimated that the costs of developing and implementing standardized tests from 2002–2008 could be as high as $5.3 billion if testing includes a significant written component, or $3.9 billion if the questions remain as they were when reported to the GAO.[164]

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160. U.S. Newswire, *House Education Chairman Challenges AFT Attack on Bush Education Budget, at* http://releases.usnewswire.com/getrelease.asp?id=12521 (Feb. 5, 2003).

161. Democratic Caucus U.S. House of Representatives, *Menendez: Bush Fails Children by Underfunding No Child Left Behind Act, at* http://www.dems.gov/ index.asp?Type=B_PR&SEC={B314ED6A-7FD8-4401-B0A0-879E1546ED7D}&DE={0A 19B504-CFC7-4570-927F-62E51ED4802F} (Jan. 8 2004).

162. 1 MANDATE MONITOR 1, *available at* http://www.ncsl.org/programs/press/mandatemonitor.pdf (Mar. 31, 2004).

163. U.S. Department of Education, *A Guide to Education and No Child Left Behind,* http://www.ed.gov/nclb/overview/intro/guide/guide.pdf (Oct. 2004).

164. U.S. General Accounting Office, *GAO-03-389, available at* http://www.gao.gov/new.items/d03389.pdf (May 2003).

The most costly aspect of the standardized testing is the cost to states of scoring, administering and then reporting the tests. If states implement only multiple-choice tests, it is unlikely that extra costs will be incurred above those appropriated for the NCLB. If, on the other hand, states choose to offer both multiple choice and open-ended questions, then the costs to states will far exceed what the federal government is likely to pay. Costs vary significantly by state. The following table provides estimates of the costs to the five states being considered in this report.[165]

TABLE 2
ESTIMATED EXPENDITURES FOR TITLE I ASSESSMENTS, 2002–2008

State	Cost in Millions of Implementation per Type of Testing				Federal Government Payments as Percent of Costs		
	Multiple Choice	Current Type	Mixed*	Federal Dollars Assigned	Multiple Choice	Current Type	Mixed
Kentucky	28	62	71	43	155	70	61
Massachusetts	38	109	109	55	144	50	50
Mississippi	25	63	63	39	154	61	61
New Jersey	43	127	127	67	153	53	53
New York	83	276	276	121	146	44	44
* Mixed refers to both multiple choice and open-ended questions							
Adapted from GAO -03-389 Title I							

If the states listed here opt for multiple choice testing alone, then federal funding will be adequate, at least in the near future. However, if states choose more comprehensive testing strategies, the money benchmarked for these programs will fall short.

Testing represents only one aspect of the costs associated with the mandates outlined in NCLB. The costs of providing students in failing schools with technical assistance in the form of tutoring or transportation to non-failing schools are significant. These costs will vary by SEA and LEA, according to the number of "failing" schools.

A GAO report of Title I schools, conducted in 2004, found that 1 in 10 schools had been "identified for school choice," meaning that students had the right to transfer to other schools.[166] Approximately 31,000 students, about 1% of those eligible, did choose to transfer.[167] For districts already overcrowded and with limited time to arrange for student choices, these transfers were a hardship. Title I schools that were required to provide

165. *Id.* at 19.

166. U.S. General Accounting Office, *GAO-05-7, available at* http://www.gao.gov/new.items/d057.pdf at 8 (Dec. 2004).

167. *Id.* at 8, 14.

choice to students ranged from 0–4% in some states to as high as 47% in other states.[168] Clearly the costs associated with this requirement will depend upon the LEA and may change over time.

The GAO report of 2004 describes the percentage of Title I schools in each state that were required to offer choice.[169] These numbers changed significantly between the 2002/03 school year and the 2003/04 school year.[170] Those states faring the worst in 2003/04 are Georgia and Hawaii at 47.8% and 40.2%, respectively.[171] Nevertheless, this is down from the 2002/03 school year, in which 56.39% and 58.99% of those schools, respectively, were identified for choice.[172] Some states have seen significant declines in the percentage of choice schools, such as Indiana and Delaware, whereas other states have seen tremendous increases in the number of choice schools, such as Arkansas and Nevada.[173] Table 3 presents the changes in percent of Title I schools identified for choice of the states being studied in this report.

TABLE 3
PERCENTAGE OF TITLE I SCHOOLS IDENTIFIED FOR CHOICE BY STATE

State	Percentage of Schools Identified for Choice 2002/03	Percentage of schools Identified for Choice 2003/04
Kentucky	2.89	2.86
Massachusetts	17.27	17.88
Mississippi	1.35	1.05
New Jersey	18.78	19.00
New York	14.65	17.56
Adapted from GAO-05-7, Appendices II and III		

As described by Secretary Paige, up to 20% of Title I Part A funds from the federal government can be used to pay for costs of transportation and supplemental services for students attending schools identified as "failing." Although Federal funding for Title I programs in FY04 is $12.3 billion,[174] the National Conference of State Legislatures ("NCSL") reports that the NCLB will be underfunded by approximately $10 billion in FY05. The cost of implementing the NCLB represents the largest fiscal

168. *Id.* at 13.
169. *Id.* at 12.
170. *Id.* at 43–46.
171. *Id.* at 45.
172. *Id.* at 43.
173. *Id.* at 43, 45.
174. U.S. Department of Education, *Education Department History of Appropriations, at* http://www.ed.gov/about/overview/budget/history/edhistory.pdf (Feb. 6, 2006).

gap of all federal programs, higher even than the cost to states of providing drugs for "dual eligibles" (patients who are eligible for both Medicare and Medicaid benefits) and the costs associated with the Individuals with Disabilities Education Act.[175]

For states like Georgia and Hawaii in which nearly half of all Title I schools are required to offer choice, the costs for transportation to alternate schools and for supplemental education may be prohibitive. In the Fresno Unified School District in California, for instance, more than 34,000 students were eligible for choice but only 0.3% of those students actually transferred.[176] The logistics of sending a child to a school that is not failing in a state where a large percentage of schools are required to offer choice is also a great concern. The GAO report cautions that the problems of transferring students are unlikely to abate in the near future and may in fact be exacerbated by the increasing number of schools identified as failing. The cost of offering transfers and the limited capacity of schools to accept transferring students will need to be addressed the near future.

E. *Standardized Testing and No Child Left Behind*

The discussion so far has centered on the costs associated with NCLB. Some authors and organizations caution that there are significant problems associated with the NCLB aside from costs. For example, NCLB assumes that standardized testing is the best way to measure achievement and that improving scores through sanctions will improve educational outcomes, particularly for minority, poor and disabled students. The GAO report and others do not support these claims.[177]

Standardized testing that treats all students alike may actually exacerbate the problems of equity in the public school system, according to some researchers.[178] It is suggested that high-stakes testing actually discriminates against some students because of differences in background and "learning styles" and that such tests provide only scores, without suggesting how to

175. 1 MANDATE MONITOR 1, *available at* http://www.ncsl.org/programs/press/mandatemonitor.pdf (Mar. 31, 2004).

176. U.S. General Accounting Office, *GAO-05-7*, *available at* http://www.gao.gov/new.items/d057.pdf at 40 (Dec. 2004).

177. *See, e.g.*, U.S. General Accounting Office, *GAO-06-815 available at* http://www.gao.gov/new.items/d06815.pdf (July 2006) (recommending that the Education Department "explore ways to provide additional flexibility for measuring annual progress for" students with "limited English proficiency" and U.S. General Accounting Office, *GAO-05-618, available at* http://www.gao.gov/new.items/d05618.pdf at 28 (July 2005) (recommending that the Education Department provide better information on "alternate assessment requirements for students with disabilities ... linked to information on the research, development, and use of these assessments").

178. Donald C. Orlich, *No Child Left Behind: An Illogical Accountability Model*, 78 THE CLEARING HOUSE 6 (2004).

improve those scores.[179] Furthermore, "high-stakes" testing may not necessarily be the best gauge of how well or how poorly students, teachers and schools are performing. Some caution that "near-total reliance on test scores" can be "misleading and damaging."[180]

The capacity of test scores to provide an overall measure of student ability seems to be limited by the tests themselves.[181] It is unclear from the research whether or not standardized testing is a fair or appropriate measure of student ability and teacher competence.[182] Also, in a high accountability environment where outcomes are measured using high-stakes tests, overall test scores may improve without improving critical thinking skills.[183] The GAO therefore recommends that more research needs to be done in this area to determine the validity and reliability of such testing, and whether tests are measuring what educators, administrators and legislators believe the tests are measuring.[184]

Nevertheless, testing is a means of interpreting what students have learned and is an integral part of education. It is part of the "feedback loop" that allows teachers to discern what students know and do not know.[185] For now, standardized testing is the tool with which the Federal Government is measuring whether or not students, teachers and schools are meeting NCLB requirements.

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179. Paul W. DeVillier, *High-stakes testing: Florida comprehensive assessment test. A true measure of acquired skills or a political ruse?, available at* http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/22/e8/51.pdf (June 14, 2003).

180. Lisa Guisbond & Monty Neill, *Failing our children: No Child Left Behind undermines quality and equity in education. The Clearing House*, 78 THE CLEARING HOUSE 12, 13 (2004).

181. Paper Presented by Michael Kane, at the Annual meeting of the Am. Educ. Research Ass'n, *The Role of Policy Assumptions in Validating High-stakes Testing Programs, available at* http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/00000006/80/26/22/a4.pdf (April 2001).

182. Donald C. Orlich, *No Child Left Behind: An Illogical Accountability Model*, 78 THE CLEARING HOUSE 6, 6–11 (2004).

183. Paper Presented by Brian A. Jacob, at a conference at the John F. Kennedy Sch. Of Gov., Harv. Univ., *Test-based Accountability and Student Achievement Gains: Theory and Evidence, available at* http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/00000006/80/28/1a/d9.pdf (June 10–11, 2001).

184. U.S. Government Accountability Office, *Major management challenges at the Department of Education, at* http://www.gao.gov/pas/2005/doe.htm (last visited November 7, 2006).

185. Samuel E. Krug, *Maybe We Learned All We Really Needed to Know in Kindergarten: But How Could Anybody Be Sure Until We Took the Test? in* MEASURING UP: ASSESSMENT ISSUES FOR TEACHERS, COUNSELORS AND ADMINISTRATORS 485, 485–95 (Janet E. Wall & Garry R. Wale eds., 2003).

F. *Adequacy and No Child Left Behind*

The language in state constitutions regarding education is typically vague, requiring that courts make the final decision about what constitutes an "adequate education." This type of litigation has met with limited success as LEAs and SEAs attempt to fund the mandates set forth in the NCLB.[186]

A case in point is *Reading School District v. Department of Education* argued in June 2004.[187] The Secretary of Education identified 13 of the district's 20 schools as failing to meet AYP as defined by NCLB. The Reading School District argued that 1) the department did not provide native language testing, 2) that technical assistance to the district was inadequate and 3) that the minimum number assigned for subgroups requiring assistance was arbitrarily defined.[188]

The NCLB does not require that schools provide tests in a student's native language except to the "extent practicable." Because there are 125 languages used in the Pennsylvania school system, the Department argued that providing native language testing was not feasible at the time. Furthermore, such tests take time to develop and test in the field and would not be available until 2005. The court held that "it is not practicable at this time to provide native language testing."[189]

The PSSA requires that 35% of all students enrolled in schools receiving Title I funds demonstrate proficiency in mathematics, and 45% of students be proficient in reading by the end of the 2004 school year. If that level is not met, then the school has not achieved AYP, according to the NCLB guidelines set by the state of Pennsylvania.

These goals must be achieved by all subgroups of students as mentioned above (non-English proficient students, students in minority groups, those students who live in poverty, and students living with disabilities) if there are more than a certain number of students in each of these groups. Pennsylvania has set this number at 40, which means that when the number of students in each of these subgroups is 40 or above, then these subgroups of students should be evaluated separately. However, these students are also required to achieve AYP.

The number of students that constitute a subgroup, known as the "N" number, has to be defined by each state based upon "sound statistical methodology." The school district argued that this number was arbitrarily chosen in Pennsylvania and was not based on any statistical formula. The

186. *See* Jennifer Brown, *Court Tosses Claim That School Funding Low, Unconstitutional*, THE DENVER POST, Mar. 10, 2006, at B-03; *see also* Jeffrey Robb Bob Glissman, *Suit by Rural Schools Dismissed Thirty-Four Districts Contended that the State Did Not Provide Adequate Funding for Them to Offer a Quality Education*, OMAHA WORLD-HERALD, Oct. 7, 2005, at 01B.

187. Reading Sch. Dist. v. Dep't of Educ., 855 A.2d 166 (Pa. Commw. Ct. 2004).

188. *Id.* at 168–69.

189. *Id.* at 172.

court disagreed and held that the "N" number was determined appropriately and not arbitrarily.

The district claimed that the funding from the Department was inadequate to meet requirements of the NCLB, particularly given that the district is "extremely impoverished." The court again disagreed, ruling in favor of the Department of Education. The district, although one of the poorest in the state, had already received $6 million in Title I funds and had begun to make some of the necessary changes as required under the NCLB for schools identified as needing improvement. The court held that the Department had no obligation to provide technical assistance until *after* schools had been identified as needing improvement.

The court was correct that funding for technical assistance is not required prior to identification of a school as needing improvement. Nevertheless, the GAO recommends that the Department of Education provide states with more technical assistance and that proven strategies be shared among states to decrease costs of implementation.[190] Within states, the ability to provide more technical assistance will depend upon federal funding for the NCLB, which is lacking.[191]

The Pennsylvania constitution states that "[t]he General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth."[192] Providing "maintenance and support" after a school has been identified as needing improvement is both short-sighted and damaging to poor and minority students.

G. Integration and No Child Left Behind

Criticism of the NCLB policy around issues of funding and costs abounds, as does criticism of the validity and reliability of some state's testing requirements and procedures. Troubling anecdotal evidence indicates that improvement in Massachusetts Comprehensive Assessment System ("MCAS") passing scores reflects the reality that more Black and Latino students are lost from the testing pool. In fact, there is some evidence that a whole category of "All But MCAS" students are leaving the public school systems in Massachusetts.

Additional troubling aspects of the relationship between race, income and NCLB are emerging. In 2002, the GAO found that of all public schools receiving Title I funding, those identified as needing to provide choice to students had higher percentages of minority and low-

190. U.S. General Accounting Office, *GAO-05-7*, *available at* http://www.gao.gov/new.items/d057.pdf at 35–36 (Dec. 2004).

191. 1 MANDATE MONITOR 1, *available at* http://www.ncsl.org/programs/press/mandatemonitor.pdf (Mar. 31, 2004).

192. PA. CONST. art. III, § 14.

income students. Specifically, among the schools required to offer choice, 80% of the students were from minority groups and 62% of students were from low-income families, compared to 46% minorities and 49% low-income students in schools not required to offer choice.[193]

The GAO also found that, in one school district, among students who were eligible to transfer from one of the schools but did not, 76% were minority and 93% were from low-income families. On the other hand, of students who actually *transferred*, only 47% were minorities and 87% were low-income. Thus, minority students were not transferring at the level of their eligibility and a higher proportion of those minorities who were transferring were not in the low-income category. Across the five schools in that district studied by the GAO, the number of eligible and transferring students did not vary as significantly: 68% of eligible students were minority and 62% of those who actually transferred were minority; 85% of eligible students were low-income and 82% of those who transferred were low-income.[194]

Clearly, a large proportion of students currently attending "failing" schools are poor and minorities. This seems to suggest that education for these students, as defined by the Federal Government, is already "inadequate" and requires remediation. Providing transportation and technical assistance to students once a school has been identified as needing improvement is both costly and time consuming. Moreover, if a whole district is impoverished and many of its schools are required to provide choice, then to which school should students be transferred? The GAO reports that the number of failing schools is increasing and will continue to increase over time.[195]

Nevertheless, some educators assert that the integration of poor and minority students into more economically advantaged schools can improve academic achievement,[196] and the NCLB could be a vehicle through which desegregation occurs.[197] However, forced choice may actually exacerbate existing disparities.[198] Parents who are involved and informed may choose to transfer their children out of failing schools, while parents with limited English proficiency may not have the information necessary to make informed choices about which school is most

193. U.S. General Accounting Office, *GAO-05-7*, *available at* http://www.gao.gov/new.item/d057.pdf at 11 (Dec. 2004).

194. *Id.* at 18.

195. *Id.* at 34.

196. *See* McUsic, *supra* note 59, at 1355–56, *cited in Some Districts Find Economic Integration Boosts Achievement*, 35 YOUR SCHOOL AND THE LAW 2 (2005).

197. James S. Liebman and Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703 (2003).

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

appropriate. Children left behind in failing schools may be exactly the children who would benefit most from transfer.

In addition, NCLB provides that students who attend schools identified as needing improvement may transfer to other public schools within the same school district. This provision, known as the school choice provision, is in conflict with the desegregation orders that remain in place in many Southern and some Northern school districts because students transferring out of their current schools may upset the racial balance mandated by court desegregation orders. Despite the stated intent of legislators that NCLB supports both court ordered and voluntary desegregation, recently drawn regulations under the school choice provisions undermine that intent.[199] The United States Department of Education has responded to the concerns of the school districts by instructing them to follow the school choice provision of NCLB at the expense of desegregation plans. These regulations are relatively new law, and much is to be learned about how they are implemented and what the results will be. Nevertheless, despite many concerns, newly appointed Secretary of Education Margaret Spelling says that many of the topics of NCLB which have been the subject of criticism are "off the table" for discussion, let alone reform.

H. *Restructuring: The Consequences of Failure*

There are critical consequences for schools failing to meet NCLB standards that go beyond allowing students to transfer to other schools. Some strategies focus on supplementing services of failing schools. They include providing expert consultations, training teaching staff and even extending the length of the school day. Other interventions focus on school management. If schools continue to under-perform after one year of corrective action, schools are subject to restructuring, including reopening the school as a charter school or privatizing the school's operation. These strategies deal with the consequences more than the causes of failure. And according to S. Paul Reville, the strategies "have little or no research evidence to support their effectiveness."[200]

I. *Retrieving Quality from Adequacy: Toward Diversity and Cultural Competence*

Legal theorists continue to attempt to advance the Counter Narrative idea that segregation was harmful not only to Black children but to society as a whole. Justice Blackman's opinion in *Bakke* supported that

199. Nick Lewin, *The No Child Left Behind Act of 2001: The Triumph of School Choice over Racial Desegregation*, 12 GEO. J. ON POVERTY L. & POL'Y 95, 118 (2005).

200. S. Paul Reville, *Bring Teachers to the Table*, BOSTON GLOBE, Jan. 3, 2006, at A-13.

effort and provided theoretical support for diversity/affirmative action movement.[201] The effort toward diversity responds to the first element of the Master Narrative, which views segregation's harm as limited to Blacks. It posits that all education is benefited from a multi-racial student body and that all education is harmed by racially exclusive practices. Diversity thus becomes the goal and affirmative action the methodology for achieving it. In fact the diversity/affirmative action movement asserts that racial homogeneity harms the education process in general or, put positively, that all students benefit from diversity in the classroom.

Justice Sandra Day O'Connor wrote for the Court in the case of *Grutter v. Bollinger*,[202] which involved an affirmative action plan used at the University of Michigan Law School. While approving the plan, her carefully crafted opinion defines the parameters of permissible affirmative action and provides a framework for understanding the social conditions that lead to the Court's decision, particularly through her recognition of historic educational disadvantages that minority students have experienced and the value of a diverse body to the educational experiences of all students.[203] The contextualization O'Connor provides is significant in its potential for reconciling differences over the legally and socially divisive issue of race-conscious decision making. O'Connor cites legal precedent as well as historical and current racial disparities in reaching the conclusion that diversity is a compelling interest and one that justifies consideration of race.

In passages that demonstrate an appreciation of the dilemma raised by the affirmative action, Justice O'Connor cites "our Nation's struggle with racial inequality" as contributing to racial disparities in educational outcomes, making affirmative action necessary.[204] But the opinion makes clear that we are not to be controlled by this history forever: "We expect that 25 years from now, the use of racial preferences will no longer be necessary."[205] This language was the immediate subject of legal commentary and various interpretations. A somewhat benign interpretation is that 25 years is a benchmark for measuring affirmative action's effectiveness. This interpretation sounds no alarm to affirmative action supporters and suggests to its critics that they must accept the idea, but only for the time being. Others view the reference as a "sunset" provision, the end of which will mark the end of affirmative action. Supporters of affirmative action favor the language's most generous interpretation as providing a protective time frame during which the Court would withhold from review of affirmative action plans. At the very least, separate from any legal

201. 438 U.S. 265, 402–08 (1978).
202. 539 U.S. 306 (2003).
203. *Id.* at 338.
204. *Id.*
205. *Id.* at 343.

interpretation of the 25-year projection, O'Connor's words are a challenge to a new generation to take additional measures, beyond affirmative action, to bring about an end to racial disparities in education.

In affirming diversity as a compelling state interest, Justice O'Connor rejected a basic assumption of the Master Narrative as expressed in *Brown*. She concluded that the benefit of integration accrued to the entire learning process and not simply the students of color. If integration helps everyone, then the notion, promoted by *Brown*, that segregation harmed only Blacks must be rejected. Moreover, O'Connor linked the need for affirmative action measures to the disparity question, positing that in 25 years we may not need such measures, but that disparities in educational achievements justified them currently. She contextualizes the issue of racial disparities, using historical and current references, and in part rejects the notion that color-blindness will secure the end of disadvantages. Given O'Connor's acknowledgment of the numerous Amici Curiae briefs in support of diversity, her opinion read broadly asserts that desegregation benefits education as well as larger society.

Grutter's reasoning was recently expanded and applied to public school education in the case of *Comfort v. Lynn School Committee*.[206] At issue in the case was a voluntary school integration plan that took race into consideration only when granting transfer requests. Lynn School officials argued that integration produced positive outcomes including "higher attendance rates, declining suspension rates, a safer environment, and improved standardized test scores."[207] The American Psychological Association supported the Lynn School plan in a brief that argued the educational benefits of a diverse student population. The brief "educated the court concerning some of the processes involved in prejudice and discriminatory behavior, including negative stereotypes, in-group bias, aversive racism, intergroup anxiety, and implicit stereotypes" as well as "the importance of intergroup contract for the development of children's social and moral reasoning."[208] In upholding the school district's consideration of race, the United States Court of Appeals recognized that was in the public primary school system's interest.

The diversity concept is significant to the discussion of the achievement gap issue. The *Comfort* case establishes a positive link between diversity and improved educational and social outcomes. The decision also contributes significantly to the contextualization that needs to take place in legal reasoning in order to address the dual problem of educational

206. 418 F.3d 1 (1st Cir. 2005).

207. *Id.* at 14.

208. Brief for American Psychological Association as Amicus Curiae Supporting Defendants-Appellees, Comfort v. Lynn Sch. Comm., 418 F.3d 1 (1st Cir. June 14, 2004) (No. 03-2415), *available at* http://www.apa.org/psyclaw/comfort-v-lynn.html (June 2004).

outcome and positive racial legal policy. Further expansion of the concept and research on diversity and improvement in education is needed to move the current discussion further. Nevertheless, the importance of *Comfort* in expanding the racial narrative of the court in educational matters should not be underestimated. This case and the research supporting the Lynn School plan serve as models for sound judicial reasoning. They also expand understanding of the complex problems involved in improving education for both children of color and White children.

Though courts at the federal level have moved from equality in *Brown* (1954) to diversity in *Grutter* (2003), the two are analogous. Increasingly, the courts are diminishing their role in desegregation,[209] yet there is evidence that a number of school districts are moving towards the concept of voluntary integration to promote diversity.[210] Diversity, like adequacy, is a still-evolving social and legal construct. Also like adequacy, diversity when properly defined minimizes income, class, and racial stratifications. Both concepts focus on universal policy outcomes, avoiding polarization of political interests. The success of both diversity and education adequacy policy is the result of a holistic approach to policy benefits. An adequate education is intended to permit all children to acquire capabilities that enable them to be productive citizens. The financial implications of these policies are less visible and open ended in the policy design.

The limitations of the diversity concept as articulated in the *Grutter* and *Lynn* decisions are practical as well as philosophical. As a concept that promotes equality of education for all, it deviates toward better options for parents. However, as a practical matter, these options are limited because such programs are voluntary and isolated. Moreover, neither the plan adopted by the University of Michigan Law School nor the plan used by Lynn School District address the broader issues of inequalities, and it is unclear whether attempts to do so would pass the *Grutter* requirement of being "narrowly tailored."[211]

Recent efforts at ending racial and class disparities have directed attention to cultural competence.[212] Simply defined, cultural competence is

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209. Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 112 (2004).

210. The NAACP Legal Defense and Educational Fund, Inc., *Looking to the Future: Voluntary K-12 School Integration*, *available at* http://www.civilrightsproject.harvard.edu/resources/manual/manual.pdf at 31 (last visited Nov. 7, 2006).

211. Fair, *supra* note 76, at 1859 (arguing that *Grutter* leaves in place "white educational hegemony," which ignores white privilege and a history of racial exclusion in education). Professor Fair is correct in his criticism if one views diversity as a remedial effort. Diversity as described by *Grutter* and its proponents is better seen as an enhancing measure. That is, diversity and cultural competence were viewed by the Michigan Law School as measures that enhanced the education of all students.

212. Focus on cultural competence has been particularly significant in health care, social work and educational arenas. *See, e.g.*, C. Daniel Mullins et al., *Health disparities: A*

"the ability of teachers to understand their students' culture and incorporate it" into the lessons and learning in a class.[213] Culture impacts our view of the world and implicates "the deep structures of knowing, understanding, acting, and being" in it.[214] In the area of education, the movement has spawned initiatives that range from multicultural education in teacher preparation programs[215] to providing culturally sensitive supports and interventions.[216] For individuals who share a racial identity, cultural knowledge and understanding may be transmitted over many generations and may transcend issues of class.[217] Moreover, research shows that the impact of culture on learning and cognition is profound no matter what the subject matter, effecting achievement in subjects from math to music.[218] Yet some experts are skeptical about the significance of cultural competence in academic programs and the role it plays in changing educational outcomes. They argue that culture is not a determining factor in educational achievement.[219] However, as existing programs and policies are developed around notions that evolve from dominant culture, cultural awareness must play a part in our evaluation those efforts and development of news ones.

Cultural competence, like diversity, enriches the educational experience of all students. It is "the ability of teachers to understand their students' culture and incorporate it" into the lessons and learning in a class.[220] Cultural competence involves many areas of skill development including relationship building, communications and problem definition.[221] The latter area of skills development is particularly relevant to the

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Barrier to High-Quality Care, 62 AM J. HEALTH-SYST PHARM. 1873, 1877–78 (2005); Yooson Park, *Culture as Deficit: A Critical Discourse Analysis of the Concept of Culture in Contemporary Social Work Discourse*, 32 J. OF SOC. AND SOC. WELFARE 11 (2005); *see also* Tara J. Yosso, *Whose Culture Has Capital? A Critical Race Theory Discussion of Community Cultural Wealth*, 8 RACE, ETHNICITY AND EDUC. 69 (2005).

213. The Associated Press, *Education Groups Push for Greater Diversity in Teaching Force*, 21 BLACK ISSUES IN HIGHER EDUC. 14 (2004).

214. Gloria Ladson-Billings, *It Doesn't Add Up: African American Students' Mathematics Achievements*, 28 J. FOR RES. IN MATHEMATICS EDUC. 697, 700 (1997).

215. Wendy W. Brandon, *Toward a White Teacher's Guide to Playing Fair: Exploring the Cultural Politics of Multicultural Teaching*, 16 INT'L J. OF QUALITATIVE STUDIES IN EDUC. 31 (2003).

216. Frances S. Caple, Ramon M. Salcido, John di Cecco, *Engaging Effectively with Culturally Diverse Families and Children*, 17 SOCIAL WORK IN EDUC. 156, 159 (1995).

217. *Id.*

218. M. COLE, J. GAY, J.A. GLICK, & D.W. SHARP, THE CULTURAL CONTEXT OF LEARNING AND THINKING: AN EXPLORATION IN EXPERIMENTAL ANTHROPOLOGY (N.Y.: Basic Books, 1971).

219. Jacquetta Hill-Burnett, *Commentary: Paradoxes and Dilemmas, Anthropology & Education Quarterly*, Vol. 7, No. 4, ANTHROPOLOGICAL PERSPECTIVES ON MULTI-CULTURAL EDUC. 37, 37–38 (Nov. 1976).

220. The Associated Press, *supra* note 213.

221. Caple, *supra* note 216.

incorporation of Counter Narratives into solutions that aim to end educational disparities. The narrative a minority community develops about the educational process as well as about the solutions to the process can determine its responses to solutions offered. Utilizing a culturally sensitive approach to defining education problems and solutions may result in greater success. For example, striking a balance between traditional culture and American culture may be difficult for many immigrant families. Many educators view lack of parental involvement as part of the reason for student failure. Yet, in some immigrant communities teacher expectations about parental involvement in schools may be greater than parental expectations. For immigrants, lack of involvement may not be perceived as part of the problem at all.[222] An arrangement which enlists cultural understanding in negotiating the when, where and how of parental participation is likely to be more fruitful.

A broad range of initiatives needs to be undertaken to incorporate the Counter Narrative into efforts at improving educational outcomes. Identifying the problem is only one element of the teaching and services changes that need to take place and problem identification represents only one way cultural competence can be helpful. A broader development of the concept of cultural competence than is currently available is needed to develop a real understanding of the relationship between the various policy and programmatic initiatives discussed in this paper and the narratives that have developed around education. In sum, as currently understood and applied, cultural competence is an important element in ending disparities, but it is not enough.

III. THE LESSON FROM THE NARRATIVE: TODAY'S HIGH PERFORMING SCHOOLS

Despite their limitations, educationally enriching policies like cultural competence and diversity are important. In part they are valuable because they lead us away from simplistic solutions to the complex problem of educating an economically, racially and ethnically diverse population. The approach taken by the Court in *Cumming* in assuming that the school board's choice was one of educating more Black students rather than a choice between educating White over Black students illustrates one of the most naïve ways of viewing the issue. The Court's response to the issues presented by *Cumming* belies the complexity of the facts and context from which the case arose. The Board's decision to close the Ware High School came in 1897, 17 years after it had opened. Four factors combined to make the Ware High School possible, "the black masses' strong desire for

222. Diana L. Rogers-Adkinson, Theresa A. Ochoa, & Bernadette Delgado, *Developing Cross-Cultural Competence*, 18 FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISABILITIES 4, 4–8 (2003).

education, black political power, the activities of the black elite, and the attitudes of white leaders."[223] From the day it opened, the "black community" exercised considerable political and social resources in controlling the Ware High School's teacher recruitment, mission and curriculum.[224] Ware, the only public high school for Blacks in Georgia before 1915, offered a classical curriculum with the idea that it would provide "well-trained" teachers for Black elementary schools in Richmond and the surrounding counties. At that time, a high school education was the equivalent of today's college education, and few of the citizens of Georgia of any race attained this level of education. In post-war Georgia, literacy was not a public priority and Ware was one of five Black schools established in the confederate South. There is evidence that the Black elite in Augusta also saw Ware as a mechanism for maintaining the Black middle-class, beyond providing school teachers.[225] White officials also supported the school's mission of educating local teachers and used the school as an example of their magnanimity in appealing to Black Augustans for votes.[226] As Ware students did well, so did the Augusta community. Commencement exercises and names of graduates were featured in local newspapers along with those of graduation announcements from White high schools. Augusta Whites took ownership of the Ware High School and the responsibility to educate Black students rather than relying on private schools operated by religious organizations that were open to Blacks seeking a high school education. The Richmond County School Commissioner, Lawton B. Evans supported the idea of educating "some Negroes of exceptional capacity" to serve as "teachers and leaders of their race."[227]

White leaders were motivated by something personal as well. Ware was supported by a close-knit circle of Black families who were closely connected to these White leaders. Historian J. Morgan Kousser noted that Augusta Black elite's "fair skin made them generally indistinguishable from the white population, and they were also related to prominent white families by blood."[228] A late nineteenth century drawing of Augusta shows the location of the Ware School.[229] One block over is Cumming Street, named after one of the White ancestors of the plaintiff in the lawsuit or one of his relatives.[230] For a variety of reasons, Augusta Blacks and Whites

223. Kousser, *supra* note 30, at 28.

224. *Id.* at 22–23.

225. Nearly 70 percent of the Black signers of a petition to keep Ware open were identified by occupation as professional, business owners or skilled laborer. In comparison, only 32% of the people of both races signing the petition fit those categories. *Id.* at 27.

226. *Id.* at 23.

227. *Id.* at 23.

228. Connally, *supra* note 33, at 76.

229. Id. at 74.

230. Kousser, *supra* note 30, at 28.

had reached an agreement that allowed not only for the education of Blacks beyond the rudimentary level typical in the post Civil War South. That agreement also included political engagement and economic advancement of a number of Blacks in the Augusta community.[231] In 1887 the Black middle-class and elite of Augusta would use their social and political capital to protest the Board's closing of Ware and the breaching of the social compact.[232] In 1898, when the school closed, 60 students were prepared to enroll in the school.[233] A month after the Supreme Court's decision upholding the Ware High School closing, Blacks were eliminated from municipal offices in an all-White primary.[234]

A. *Today's Richmond Choice*

As it was with *Brown*, *Rodriguez*, *Milliken* and every other education case, *Cumming* was a case about community. More specifically, these are all cases about breakdowns in the flawed community agreements. The lawsuits simply reflect an attempt to reconstruct these flawed agreements when political and social strategies failed.

The situation in the Ladera Heights neighborhood in Inglewood, California is also about community. The move by Black middle class parents to secede from the Inglewood School District to the adjacent Culver School District reflects the reality that many parents see public schools as a place to educate their children as well as a "marker of community membership or citizenship."[235] Parents who seek secession to a higher performing school are simply trying to assert community membership. One parent who is against the effort describes the transfer racist and "as an attack on the African American male."[236] A Black columnist for the Los Angeles Times describes the secession effort as "self loathing" and "self interested."[237]

While the thinking of those who want to move has a disturbing racial dimension, it is predictable in the context of education, where achievement can be so easily predicted by the race and class of a schools' community. Meaningful choices are limited and the choice to redefine one's community is understandable. That choice is not limited to Ladera Heights parents who seek to redefine community by redrawing boundaries. Their choices are political and social as well as racial. Parents in

231. *Id.* at 23. *See also* Connally, *supra* note 33, at 76.

232. Kousser, *supra* note 30, at 27.

233. Cumming, 175 U.S. at 533.

234. Kousser, *supra* note 30, at 43.

235. Lawrence III, *supra* note 9, at 1377.

236. Randal C. Archibold, *Wanting Better Schools, Parents Seek Secession*, N.Y. TIMES, Jan. 28, 2006.

237. Erin Aubry Kaplan, *Race Education and the Wrong Answers*, L.A. TIMES, Jan. 25, 2006.

Ladera Heights are deciding which governing body will control their children's educational destiny. They are also deciding with whom their children will associate on a daily basis. Finally, they could be deciding their children's earning potential.[238] It is the same choice that is evident in the facts leading to *Milliken v. Bradley*, where White parents in Detroit moved from the city to the suburbs and school district lines defined community in ways that excluded the predominantly Black inner-city Detroit.[239] The Supreme Court supported that choice by upholding the sanctity of the school district boundaries of suburban school districts.

The choice to redefine one's community is evident in the parental resort to school vouchers to move their children to private schools despite the fact that there is little evidence that private schools provide better achievement outcomes for Black or Brown students. The community choice is also apparent in the provisions of NCLB, which allow the transfer out of failing schools and to schools often located outside the neighborhood in which students reside. The alternative offered to middle-class Ladera Heights parents is to stay in the Inglewood School District and work to change it, with limited resources, or to leave the system for a private school. The Inglewood District is thus in jeopardy of losing its social, economic and political capital to the detriment of all members of the community.

In practical terms, the choice presented is also about educational opportunity. There is mounting evidence that the choices presented do not enhance education for everyone, but reflect a paradigm that elects to educate those remaining in the public school system to a minimum level. By dividing communities by race or class, as the Richmond School Board did in 1899, today's choices encourage school abandonment and lower the standards for those who remain in the system. Reports of the NEAP test results indicate that while the accountability efforts are raising student scores on state exams, they are doing little to raise the federal test scores of fourth and eighth graders. The gap between national and state scores may suggest that the states have "embraced low standards and grade inflation."[240] Moreover, the report suggests that racial and economic achievement gaps continue to persist.[241] Choices today mimic the choice of the *Richmond* Board.[242]

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238. *See* Michael Olneck, *The Brown Conferences: Economic Consequences of the Academic Achievement Gap for African Americans*, 89 MARQ. L. REV. 95 (2005).

239. Milliken, 418 U.S. at 723.

240. *See* Diane Ravitch, *Every State Left Behind*, N.Y. TIMES, November 7, 2005, at A3.

241. *See* Jason Spencer, *Report card mixed for Texas students; Students beat national peers in 3 of 4 areas, but achievement gaps fail to improve*, THE HOUSTON CHRONICLE, Oct. 20, 2005, at B1. *See also* Ross Wiener, *Guess Who's Still Left Behind*, THE WASH. POST, Jan. 2, 2006, at A13 (asserting that the low scores of Black and Brown students shut "these students out from meaningful civic engagement and economic opportunity").

242. *See* Connally, *supra* note 33, at 84.

What is evident from examination of the facts behind the *Cumming* case is the critical role the Ware School played in the community's democratic, economic and social participation in the larger Augusta community and the relationship between that role and individual student performance. Today, despite the array of options both public and private in school offerings, local schools still play that community role.

Educational stratification precedes social stratification.[243] Some of the best predictors of educational achievement are economic and social background. Race, class and community location are all relevant factors in analyzing the issue of academic disparities. High poverty schools are likely to be characterized by "overcrowded classes, weak curricula, insufficiently trained teachers, high teacher turnover, low standardized test scores, high grade retention and school drop-out rates, and low rates of parental involvement."[244] However, to assume that poverty consigns students to lower academic achievement equates to a declaration of "poverty as destiny," which results in abandoning efforts to help all students learn regardless of their socio-economic circumstance.[245] Because of the relationship between race and income, poverty as destiny also amounts to a declaration of race as destiny. Such declarations are tantamount to a denial of equal educational opportunity for poor children and are inconsistent with the moral mandate of the equal protection clause. Constitutional analysis like successful education strategies must take into account a variety of factors including: "communities, leadership, curriculum and teaching, resources, students, demographics, mobility."[246] Thus, what is required to improve schools, even on the individual performance level, is jurisprudence along with policies, practices and litigation strategies that understand this interaction.

The role the law and the interpretation of the Fourteenth Amendment must play can not be ignored because community, in many cases, is defined by race and or class.[247] The Supreme Court has never held that the right to education is a fundamental right protected by the Constitution. Yet, the Court in *Plyer v. Doe* acknowledged that education is more than "some governmental 'benefit,' "[248] but without articulating what that ele-

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243. Dekkers, Bosker and Driessen, 6 *Complex Inequalities of Educational Opportunities, Educational Research and Evaluation*, 59, 59–82 (2000).

244. Orfield, Gary and Chungmei Lee, *Brown at 50: King's Dream or Plessy's Nightmare*, THE HARVARD CIVIL RIGHTS PROJECT (2004) *available at* http://www.civilrightsproject.harvard.edu (last visited Nov. 7, 2006).

245. Reville, S. Paul, Testimony before the United States Commission on Civil Rights, February 6, 2003.

246. *See* Reville, *supra* note 200.

247. *See* Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 132 (2004) (arguing that the courts must play a greater role in ensuring educational equality because the political process will not work to that end).

248. 457 U.S. 202, 221 (1982).

vated status requires in terms of Fourteenth Amendment scrutiny. As public schools become more and more segregated, the need for constitutional analysis that recognizes the importance of the role of education becomes even more important. Nevertheless, the trend is for federal courts to withdraw from the role as instrument of desegregation.[249] Similarly, on the level of policy and public discourse, we have moved to a view of educational issues as involving liberty and private choices rather than equality and public responsibility.[250] It is also evident that the paradigm driven by a focus on the limited concept of racism's impact has not served the law well in ending educational disadvantages.[251]

Policies that follow the narrative of race and racism, such as those that promote the idea of "choice" in a segregated system where choices are already limited, will ultimately fail to enhance the educational achievement of those in the system. To the extent that policies and strategies like Title I and adequacy litigation are drawn into the web of the NCLB "choice" philosophy, they too will fail. Moreover, we will never begin to institutionalize the kinds of school reform and pedagogical measures that have proven successful. Systemic measures that acknowledge the impact of poor health, bad housing and crime on achievement can serve learning as well as the overall community environment in which learning takes place for many low income, minority students.[252] Pedagogical approaches that draw on the knowledge and skills of minority teachers can serve to reengage low income parents and parents of color in their children's education, thereby promoting achievement and community.[253] School partnerships such as those that pair schools with local businesses or colleges can help improve the achievement level of poor students of color and engage those students with sponsoring institutions. All of these are based on enhancement and equality models, not on a choice model.

CONCLUSION

Narratives do more than tell stories. They describe behavior from which we can ascertain a society's values. Narratives do more than tell us where we are. They express a vision for where society can go. Thus, the

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249. The NAACP Legal Defense Fund Inc., The Civil Rights Project at Harvard, and The Center for Law and Policy at the University of Virginia School of Law, *Looking to the Future: Voluntary K-12 School Integration* at 6–7, *available at* http://www.civilrightsproject.harvard.edu/resources/manual/manual.pdf (last visited Nov. 7, 2006).

250. *See* Lawrence III, *supra* note 9, at 1357–1359.

251. Professor Lawrence asserts that unacknowledged racism has so distorted the democratic process that we must engage in "affirmative disestablishment of subordination" in order to overcome it. *Id.* at 1383–1386.

252. *See* Rothstein, *supra* note 8.

253. *See* Yosso, *supra* note 212, at 75.

Master and Counter Narratives that followed *Brown* are instructive of the law as it exists as well as the law's normative potential. As Robert Cover advised, every narrative is insistent in its demand for a prescriptive point that is located in history.[254] No educational policy or law is complete without some conformation to the historical and contemporary narratives of the communities most impacted. Policies addressing educational inequalities must address the related class and race issues as well as language realities of the communities where today's "failing" schools are most often located. Policies and litigation must develop strategies that include parental inputs and community aspirations for the children most affected. The economic, political and spiritual future of our communities is tied to our children's abilities to utilize the talents they possess. The laws and policies we seek as solutions to contemporary problems must be informed by a collective experience and vision that incorporates the realities of all communities.

254. Cover, *supra* note 16, at 5.