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Litigated Learning and the Limits of Law

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I. INTRODUCTION

The fiftieth anniversary of *Brown v. Board of Education*[1] certainly warrants well-deserved celebration, but not one that deflects careful analysis of its legacy. *Brown*'s legacy and what it says about the efficacy of litigation as a vehicle to achieve social change mean different things to different people. Perspectives on what *Brown* "means" and what it has accomplished vary tremendously and reveal just as much about ourselves as they do about the decision itself.[2] This ambiguity invariably muddles *Brown*'s legacy.

I argue that *Brown*'s legacy does not bode well for future litigation efforts seeking to enhance the equal educational opportunity doctrine, principally due to how the doctrine has evolved during the past fifty years. Even if one concludes that *Brown* succeeded in the school desegregation context (itself a contested point), the nature of equal educational opportunity contests has changed over the decades in ways that make them even less amenable to litigation. Unlike past efforts, emerging litigation focuses more directly on student academic achievement rather than on race or school funding. Academic achievement implicates teaching and learning activities — activities located deeper inside schools and classrooms, and consequently, further from litigation's reach. If past education reformers and litigants found it difficult to influence such factors as school demographic profiles and funding levels, litigation efforts seeking to influence student achievement will likely encounter even greater difficulty. Furthermore, this substantive legal area's insulation from even successful litigation underscores its inherent complexity, the salience of nonlegal components and, more generally, the structural limitations of law and litigation as tools to achieve desired social change.

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1. 347 U.S. 483 (1954).

2. Professor Balkin describes the *Brown* opinion as a quasi-Rorschach test for legal scholars. Jack M. Balkin, Brown *as Icon*, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID 3, 8 (Jack M. Balkin ed., 2002).

Any understanding of *Brown*'s implications for current and future education litigation requires a clear understanding of *Brown*'s past accomplishments. In *Brown*, the Court placed the finishing touches on a multidecade legal assault designed to render the infamous "separate-but-equal" doctrine from *Plessy v. Ferguson*[3] inconsistent with the Fourteenth Amendment. While the *Brown* opinion did not expressly overrule *Plessy* as a formal matter, few doubted[4] that *Brown* implicitly did so.[5] Although much of the heavy legal lifting took place prior to 1954, the Court in *Brown* preempted any further torturing of the *Plessy* doctrine's application by concluding that "[s]eparate educational facilities are inherently unequal."[6]

Popular mythology emphasizes *Brown*'s critical role in securing equal educational opportunity for all students. Critical reflection, however, reveals that the decision's legacy is anything but clear. A narrow slice of the equal educational opportunity doctrine—one focusing on school desegregation—suggests *Brown*'s legacy in this context is aptly characterized as one of unfulfilled promise. School desegregation data reveal a picture that is far from pretty, further complicating *Brown*'s legacy, and serving as yet another reminder of the limits of well-intentioned efforts to improve educational practice, policy, and results through litigation.

An equally plausible alternative perspective on the equal educational opportunity doctrine includes the school finance litigation movement. This broader perspective, while also admittedly incomplete, possesses the virtue of reflecting the expanse of the terrain that the *Brown* decision occupies. This broader view casts a more positive light on *Brown*'s legacy as school finance litigation illustrates the *Brown* decision's enduring influence on the equal educational opportunity doctrine. Although experiencing many of the same difficulties the *Brown* decision encountered in the segregation context, school finance litigation also evidences the *Brown* decision's flexibility and ability to evolve over time.

Of perhaps greater import is how *Brown* and its legacy might inform future litigation efforts seeking education reform. Although education litigation theories have evolved over time, the equal educational opportunity doctrine has evolved dramatically over these

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3. 163 U.S. 537 (1896).

4. Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2036 n.22 (1996) (declaring that *Brown* is now "universally seen" as overruling *Plessy*).

5. *Brown*, 347 U.S. at 494-95 ("Any language in *Plessy v. Ferguson* contrary to this finding is rejected.").

6. *Id.* at 495.

same years. Unlike past and present reform efforts focusing on race and finance, future efforts will engage more directly with student academic achievement. Lingering achievement gaps separate students by race and ethnicity and pose an important threat to the promise of equal educational opportunity.[7] Student academic achievement involves a host of complicated and interacting variables, including teaching and learning, as well as school and non-school relations critical to the learning process.[8] These variables reside deep *inside* schools and classrooms and, as such, reside further away from the reach of litigation and court decisions. The resilience of such variables to successful litigation underscores their underlying complexity, nonlegal components, and, more generally, the structural limitations of law and litigation as tools to achieve desired policy goals. Addressing student achievement challenges will likely place at least as much of a premium on collaboration as on adversarial litigation.[9] If my central claims are correct, future education reform litigation will require manifestly greater effort, and greater effort alone will not ensure success.

Although the efficacy of litigation efforts seeking to enhance student academic achievement is unclear, at best, what is abundantly clear—indeed, painfully obvious to all—is that far too many schools fail to educate far too many children. Worse still, such failure is hauntingly easy to predict. As Professor Howard Gardner notes:

> Tell me the ZIP code of a child and I will predict her chances of college completion and probable income; add the elements of family support (parental, grandparental, ethnic and religious values) and few degrees of freedom remain, at least in our country.[10]

The empirically demonstrable correlations Professor Gardner describes—correlations easily replicated by most competent second-year graduate students—drive a stake through American education's "Holy Grail" and what I take to be central to *Brown*'s ideal. Although reasonable minds can and surely do differ about what equal education

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7. *See* DIANE RAVITCH, NATIONAL STANDARDS IN AMERICAN EDUCATION 72 (1995) (noting that the racial and ethnic achievement gap "has narrowed, but it remains large").

8. *See* JAMES S. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY 21-23 (1966) (studying student achievement and finding stronger correlation between student achievement and nonschool factors than between achievement and school factors) [hereinafter COLEMAN REPORT].

9. *See* Harold Howe II, *Foreword* to LAW AND SCHOOL REFORM, at vii-x (Jay P. Heubert ed., 1999) [hereinafter LAW AND SCHOOL REFORM] (noting that lawyers are better known for litigating than for collaborating); *see also* Michael A. Rebell & Robert L. Hughes, *Schools, Communities, and the Courts: A Dialogic Approach to Education Reform*, 14 YALE L. & POL'Y REV. 99, 114-36 (1996) (proposing a deliberative engagement among a wide array of school finance stakeholders).

10. Howard Gardner, *Paroxysms of Choice*, N.Y. REV. OF BOOKS, Oct. 19, 2000, at 44, 49.

means in any particular context, fair and reasonable minds converge on the proposition that if the doctrine means *anything*, at the very least, it must mean that ZIP codes should not predict a child's educational destiny. Nor should the influence of ZIP codes crowd out the influence of more palatable variables, including talent, effort, and drive. This is part of the larger set of problems that *Brown* sought to fix. This challenge persists after fifty years, despite *Brown*'s shining achievement and fifty years of litigation. It is important to understand why.

My analysis includes three main parts. Part II focuses on the effort launched by *Brown* to desegregate America's public schools. I consider what the decision achieved, what it did not fully achieve, and what factors help explain why the decision delivered something less than it sought. Part III examines how school finance litigation took up where desegregation efforts left off. A brief review of the education litigation terrain covered during the past fifty years reveals two broad themes considered in Part IV. First, the equal educational opportunity doctrine now focuses on outcomes rather than such inputs as race and resources. Second, student academic achievement is the salient outcome and, as such, thrusts education litigants deeper into the education enterprise. Consequently, if litigants found the effort to desegregate difficult, emerging efforts will encounter even greater difficulties. In a concluding section, I argue that education reform is unlikely absent greater coordination among the legal and relevant social, economic, and political institutions.

II. SCHOOL DESEGREGATION

Although the *Brown* decision has always been about more than school desegregation, it has, at the same time, always been at least about school desegregation. Any assessment of *Brown*'s legacy needs to account for the decision's impact on the integration of public schools. Although *Brown* succeeded in eliminating *de jure* segregation, it fell short of eliminating *de facto* segregation.

A. De Jure *School Segregation: Full Circles*

By eliminating formal, state-sponsored segregated schools, *Brown* manifestly succeeded on one critical level. Despite well-documented resistance, it is clear that *de jure* school segregation no longer exists. *Brown* rendered state-enforced "whites only" public schools to little more than a painful relic of American history. Although *Brown* did not expressly overrule *Plessy*'s odious "separate-

but-equal" doctrine, the decision was well understood to mean that racially separate education facilities were not permitted under the Fourteenth Amendment.[11]

It is difficult to overstate the *Brown* decision's significance. The decision has been described as "cataclysmic"[12] and "canonical."[13] *Brown* is easily one of the most important legal decisions in the second half of the twentieth century, if not the most important. One commentator went even further when he described *Brown* as "assuredly the most important litigation of any kind . . . since the Civil War."[14] Aside from a single handful of other cases, *Roe v. Wade*,[15] *Miranda v. Arizona*,[16] and *Marbury v. Madison*[17] among them, few legal decisions penetrate more deeply into the nation's collective conscious and reveal more about one's thoughts about the courts' proper role in our constitutional structure than *Brown*.[18] Professor Balkin notes that no theory of constitutional law is deemed acceptable unless it can "explain and justify" the result reached in *Brown*.[19] Similarly, "[n]o federal judicial nominee and no mainstream national politician today would dare suggest that *Brown* was wrongly decided."[20]

Brown's clarity on the unconstitutionality of racially separate school facilities, however, was insufficient to deflect modern contemplation regarding public schools that were restricted to African-American students.[21] Analogous reform efforts promoting sex-exclusive public schools remain the subject of continued and, indeed, growing public and scholarly debate.[22] While race-exclusive policy

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11. *See supra* notes 4-5 and accompanying text.

12. ROSEMARY C. SALOMONE, EQUAL EDUCATION UNDER LAW 3 (1986).

13. Balkin, *supra* note 2, at 12.

14. Louis H. Pollak, *Thurgood Marshall: Lawyer and Justice*, 40 MD. L. REV. 405, 406 (1981).

15. 410 U.S. 113 (1973).

16. 384 U.S. 436 (1966).

17. 5 U.S. (1 Cranch) 137 (1803).

18. *See Roe*, 410 U.S. at 164-66 (finding blanket statutory prohibitions of abortion unconstitutional); *Miranda*, 384 U.S. at 467-74 (requiring warning upon arrest and questioning); *Marbury*, 5 U.S. (1 Cranch) at 179-80 (articulating power of judicial review). It remains conceivable that the relatively recent decision in *Bush v. Gore*, 531 U.S. 98 (2000), might warrant inclusion on this list. At this early juncture, however, not enough time has passed to assess its significance accurately.

19. Jack M. Balkin, *Preface* to WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID *supra* note 2, at ix, x-xi.

20. Balkin, *supra* note 2, at 4.

21. For a general discussion, see ROSEMARY C. SALOMONE, SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING (2003). *See also* Michael Heise, *Are Single-Sex Schools Inherently Unequal?*, 102 MICH. L. REV. 1219 (forthcoming 2004) (reviewing SALOMONE, *supra*).

22. *See, e.g.*, *supra* note 21.

initiatives have not withstood legal challenge,[23] that such policies are even contemplated evidences just how far American society has traveled these past fifty years.[24] That the *Brown* opinion was used by *both* sides of the debate over publicly-funded African-American-only schools further evidences the decision's rich texture and malleable quality.[25]

That public discussion of racially exclusive public schools surfaced at all, let alone within five decades of the *Brown* decision, reflects growing frustration with some sectors of public education, especially urban public schools, many of which serve a disproportionate number of students from low-income households. One source of the growing frustration is clear. Low-poverty schools almost always outperform high-poverty urban schools. Students attending low-poverty schools typically score 50 to 75 percent higher on reading and math tests than do students in high-poverty schools.[26] Similar evidence supporting this conclusion abounds.[27]

Low student achievement is only one of the ills that plague numerous urban districts. Dropout rates in high-poverty schools usually exceed rates in low-poverty schools.[28] Problems also persist for those students who remain in these high-poverty, urban institutions. Urban public school teachers report spending more time on classroom discipline than their nonurban counterparts,[29] as well as having more problems relating to student absenteeism,[30] pregnancy,[31]

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23. *See generally* Garrett v. Bd. of Educ. of Detroit, 775 F. Supp. 1004, 1006-08 (E.D. Mich. 1991) (finding that Detroit's publicly-funded exclusively African-American male academies violated the Equal Protection Clause on gender grounds).

24. Not surprisingly, proposals for race-exclusive schools attract severe attention and, frequently, harsh criticism. *Compare* Christopher Steskal, Note, *Creating Space for Racial Difference: The Case for African-American Schools*, 27 HARV. C.R.-C.L. L. REV. 187, 189 (1992) (arguing that the Constitution can accommodate all-black public schools), *with* Richard Cummings, *All-Male Black Schools: Equal Protection, the New Separatism and* Brown v. Board of Education, 20 HASTINGS CONST. L.Q. 725, 726 (1993) (arguing that black male-only schools are unconstitutional).

25. *Compare* Cummings, *supra* note 24, at 726 (invoking the *Brown* decision against black-only public schools), *with* Roberta L. Steele, Note, *All Things Not Being Equal: The Case for Race Separate Schools*, 43 CASE W. RES. L. REV. 591, 602-08 (1993) (invoking the *Brown* decision in support of black-only public schools).

26. MICHAEL J. PUMA ET AL., U.S. DEP'T OF EDUC., PROSPECTS: THE CONGRESSIONALLY MANDATED STUDY OF EDUCATIONAL GROWTH AND OPPORTUNITY: INTERIM REPORT 18 (1993).

27. *See, e.g.*, MICHAEL J. PUMA ET AL., U.S. DEP'T OF EDUC., PROSPECTS: FINAL REPORT ON STUDENT OUTCOMES 73 (1997).

28. RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 54 (2001).

29. LAURA LIPPMAN ET AL., U.S. DEP'T OF EDUC., URBAN SCHOOLS: THE CHALLENGE OF LOCATION AND POVERTY 116 fig.4.44 (1996).

30. *Id.* at 114 figs.4.41-4.42.

31. *Id.* at 124 figs.4.56-4.57.

and weapons possession.[32] Finally, those students who manage to graduate from high-poverty urban schools are less likely to attend college than those who graduate from low-poverty schools.[33] Thus, whatever one may think about the substantive policy merits of, for example, the Detroit School Board's proposal to establish all-African-American (and all-male) schools,[34] it is difficult to quarrel with the sentiment that an education disaster had arrived in Detroit and that drastic steps were warranted.[35] The very fact that predominately minority districts such as Detroit[36] contemplated such options that, on a conceptual level, turn the *Brown* decision on its head underscores the magnitude of the problems these school districts confront.

B. De Facto *School Segregation: What* Brown *Did Not Fully Achieve*

The Court's successful defeat of *de jure* school segregation did not translate into a defeat of *de facto* segregation. Given the decision's initial reception throughout parts of the nation, this result does not surprise. As one commentator noted: "The statistics from the Southern states are truly amazing. For ten years, 1954-64, *virtually nothing happened.*"[37] That is to say, many school districts—especially those in the South—simply ignored the mandate of one of the Supreme Court's most important rulings of the twentieth century.

Current national public school enrollment data are telling. Despite the absence of *de jure* segregation, most African-American and Hispanic students attend urban schools that predominately consist of minorities. In 1996-97, for example, nearly 70 percent of African-American and nearly 75 percent of Hispanic students attended schools that were between 50 percent and 100 percent minority.[38] More than one-third of African-American and Hispanic students attend schools

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32. *Id.* at 120 figs.4.50-4.51.

33. KAHLENBERG, *supra* note 28, at 54 ("Few students graduating from high-poverty high schools are likely to be going on to college: just 15 percent of inner-city graduates do.").

34. *See supra* note 24 (citing sources detailing constitutional and policy-based arguments regarding Detroit's African-American male academy).

35. *See* SALOMONE, *supra* note 21, at 129-32 and text accompanying note 21.

36. *See infra* Table 1.

37. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 52 (1991) (emphasis in original); *see also* Richard T. Ford, Brown's *Ghost*, 117 HARV. L. REV. 1305, 1305-06 (2004) (noting that "*Brown* did not accomplish what many people had hoped and believed that it would—integration—in the area that the case directly addressed: public primary education.").

38. GARY ORFIELD & JOHN T. YUN, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., RESEGREGATION IN AMERICAN SCHOOLS 14 tbl.9 (1999), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/resegregation_American_schools99.pdf.

that are almost exclusively (over 90 percent) minority.[39] In contrast, during the same period, the overwhelming majority of white students attended schools that were predominately white. Indeed, the average white student attends a school that is 81.2 percent Caucasian.[40] Notwithstanding the *Brown* decision and five decades of *Brown*-inspired litigation, "there has not been a single year in American history in which at least half of the nation's black children attended schools that were largely white."[41]

1. Urban Public School Districts

A shift in focus from national statistics to data on the nation's largest school districts helps bring the racial and ethnic segregation intensity into focus. As Table 1 illustrates, all but one (Hillsborough County, Florida) of the nation's largest school districts are mostly minority, and many overwhelmingly so. If anything, Table 1 fails to capture the full intensity of racial isolation in certain districts. As of 1995, *all* of the students in East St. Louis, Illinois, and in Compton, California, were minority.[42] Close to all—between 93 percent and 96 percent—of the students in Washington, D.C., Hartford, New Orleans, San Antonio, Camden, Los Angeles, Oakland, and Atlanta were minority.[43] In Richmond, Virginia, and Newark, New Jersey, over 90 percent of the students were minority.[44] In Detroit, almost 95 percent of the students were minority.[45] In New York City, the nation's largest public school district, meanwhile, over 83 percent of the more than one million students served are minority.[46]

Table 1 also illustrates another key—yet subtle—development. In every instance the proportion of white, non-Hispanic individuals residing in these large cities exceeds, in some districts by more than 100 percent, the proportion of white, non-Hispanic students attending public schools. This suggests that not only do white families pursue education options by departing urban areas when their children reach school age (or avoid living in cities to begin with), but that those white families living in the nation's largest areas avail themselves of private

39. *Id.*

40. *Id.* at 15 tbl.11.

41. PETER IRONS, JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE *BROWN* DECISION 338 (2002).

42. Craig D. Jerald & Bridget K. Curran, *By the Numbers: The Urban Picture*, EDUC. WK., Jan. 8, 1998, at 56.

43. *Id.*

44. *Id.*

45. ORFIELD & YUN, *supra* note 38, at 9 tbl.4.

46. Jerald & Curran, *supra* note 42, at 56.

school options at a rate that greatly exceeds their non-white counterparts. White families' mobility—both in terms of departing urban for non-urban areas and exiting public for private schools—fuels a disproportionate absence of white schoolchildren in urban public schools and contributes to levels of racial isolation in urban districts that exceed what general residential integration levels predict. Although numerous reasons help explain the migration of white families with school-age children from urban to non-urban areas (and some reasons remain disputed), many point to forced and voluntary desegregation efforts as a contributing factor.[47]

47. *E.g.*, DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 113 (1995).

TABLE 1. DISTRICT RESIDENTIAL POPULATION[48] AND TOTAL PUBLIC SCHOOL ENROLLMENT,[49] BY RACE AND ETHNICITY IN NATION'S LARGEST SCHOOL DISTRICTS[50] (PERCENT)

	Residential White, non-Hispanic	School District White, non-Hispanic
New York City	35.0	15.3
Los Angeles	29.7	9.9
Chicago	31.3	9.6
Dade Cty, FL	41.3	11.3
Broward Cty, FL	58.0	41.2
Clark Cty, NV	60.2	49.9
Houston	30.8	10.0
Philadelphia	42.5	16.7
Hillsborough Cty, FL	63.3	51.8
Detroit	10.5	3.7

Other implications flow from the persistence of racially-identifiable public schools. Concentrated poverty usually accompanies the racial and ethnic isolation of minorities. Indeed, the correlation between race and poverty, at least in the education context,[51] is

48. U.S. CENSUS BUREAU, CENSUS 2000 SUMMARY FILE 1, MATRICES P3, P4, *available at* http://www.census.gov/Press-Release/www/2001/sumfile1.html.

Beginning with the 2000 census, respondents were permitted to select more than one ethnicity or race, or they could write in their own racial description. To account for the possibility for double-counting, I present racial and ethnic data in terms of either "White, non-Hispanic" or "all other." To derive the percentage of white, non-Hispanic residents I divided the total number of single race, white-only non-Hispanics by the total population. The resulting percentage captures those individuals who described themselves as only white *and* non-Hispanic. Minimizing double-counting comes at the cost of a loss of greater racial specificity. Insofar as school desegregation has traditionally been construed in terms of white and non-white students, such a cost, though regrettable, is reasonable. For a description of problems that now confront demographers and researchers, see, for example, Tamar Jacoby, *An End to Counting Race?*, 111 COMMENTARY 6 (June 2001) (describing the changes to census policy); Glenn D. Magpantay, *Asian American Voting Rights and Representation: A Perspective from the Northeast*, 28 FORDHAM URB. L.J. 739, 748 n.69 (2001) (arguing that the Census Bureau's new policy on racial and ethnic identification will complicate enforcement of voting rights); Mireya Navarro, *Going Beyond Black and White, Hispanics in Census Pick 'Other,'* N.Y. TIMES, Nov. 9, 2003, at A1 (noting how Hispanic respondents react to the new census options regarding race and ethnicity).

49. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T. OF EDUC., COMMON CORE OF DATA, public school district data for the 2000-01 school year, *available at* http://nces.ed.gov/ccd/schoolsearch/.

50. Due to an array of anomalies, the list of the largest school districts excludes two districts—Puerto Rico and Hawaii.

51. For purposes of this discussion, I define poor students as those eligible for the federal reduced-lunch program.

startling. Conversely, a larger percentage of white students will typically guarantee a school a smaller percentage of poor students. These trends interact in devastating ways. Less than 10 percent of schools whose enrollments are between 10 percent and 20 percent minority are predominately poor.[52] Exactly half of the schools that are 50 percent to 60 percent minority are predominately poor.[53] And nearly 90 percent of schools that are 90 percent to 100 percent minority are predominately poor.[54] If we narrow our focus further and look at specific urban districts, the extent of poverty becomes even clearer. Over two-thirds of the students in Atlanta, New York City, New Orleans, Los Angeles, Chicago, St. Louis, Camden, Jersey City, Newark, and Bridgeport, are poor.[55] So, too, are nearly two-thirds of the students in Oakland, Washington, D.C., Baltimore, Detroit, Kansas City (Missouri), Buffalo, and Dallas.[56]

2. Increasingly Unstable 'Successfully' Integrated Public School Districts

Taken in isolation, Table 1 risks unduly diminishing school desegregation progress—progress clearly indebted to the *Brown* decision. Although debates about the *Brown* opinion's impact on school integration levels persist, that *Brown* contributed to increased school integration in some (indeed, perhaps many) districts is beyond dispute. Commentators rightly assume that *Brown*-inspired efforts to increase public school integration have yielded critical dividends in such communities as Shaker Heights, Ohio; Berkeley, California; and Evanston, Illinois.

A closer examination of districts especially noted for their successful desegregation and integrated educational experiences, however, reveals potential causes for concern. A comparison between school demographic profiles and the relevant residential demographic profiles hints at instability. Table 2 focuses on five of the most frequently cited examples of successful school integration efforts. These school districts are also among the nation's most desirable, high-performing suburban public high schools.

One key trend joins school districts where judicial efforts to increase school integration have failed (Table 1) and districts that are widely acknowledged to have successfully established integrated

52. ORFIELD & YUN, *supra* note 38, at 17, tbl.13.

53. *Id.*

54. *Id.*

55. The district poverty figures are reported in Jerald & Curran, *supra* note 42, at 64-65.

56. *Id.*

school systems (Table 2). In *every* instance, the percentage of white, non-Hispanic residents residing in the successfully integrated school districts exceeds the percentage of white students attending the district's public high school.[57] To be sure, the magnitude of the differences in the successfully integrated school districts in Table 2 is less than the differences noted in Table 1. This is a question of degree and not of kind, however. What is critical is that the same trend persists. White households—even in successful, well-to-do school districts celebrated for academic achievement and integration—continue to exercise education options by removing their children from integrated public high schools at a much higher rate than their non-white counterparts. Despite residing in some of the nation's most sought-after suburban locations (highly sought after, in large part, due to their high-achieving public schools), white families nevertheless continue to favor private schools over public schools. Current trends suggest that gradual resegregation, already in progress even in "successfully" desegregated districts, will likely persist.[58]

57. These suburbs were selected, in part, because they each have only one public high school serving the community. Thus, the high schools' demographic profiles capture the entire areas' high-school-age cohorts attending public school.

58. *See, e.g.*, William D. Henderson, *Demography and Desegregation in the Cleveland Public Schools: Toward a Comprehensive Theory of Educational Failure and Success*, 26 N.Y.U. REV. L. & SOC. CHANGE 457, 543-44, 544 tbl.11 (2001) (noting the slow decline in the number of white students attending public school in Shaker Heights, Ohio).

TABLE 2. DISTRICT RESIDENTIAL POPULATION[59] AND PUBLIC HIGH SCHOOL ENROLLMENT,[60] BY RACE AND ETHNICITY IN "SUCCESSFULLY" INTEGRATED DISTRICTS (PERCENT)

	Residential White, non-Hispanic	Public High School White, non-Hispanic
Shaker Heights, OH	59.3	44.3
Evanston, IL	62.6	50.6
White Plains, NY	54.2	40.4
Berkeley, CA	55.2	41.4
Oak Park-River Forest, IL	69.9	64.6

From the admittedly narrow perspective of school desegregation, even a charitable read of the data suggests that *Brown* has delivered little more than limited success. Moreover, what frequently counts as "success" in this context is both tenuous and fragile. In sum, a fifty-year judicial effort to integrate public schools—launched by the *Brown* opinion—has generated, at best, mixed results. Prospects for future success appear dim. Indeed, some school desegregation proponents—those on the frontlines of this effort—conclude that, if anything, public school integration will likely degrade in the future.[61]

C. *Accounts of* Brown *and School Desegregation*

Many standard explanations about *Brown*'s failure to integrate fully American schools dwell on the courts. Although it is abundantly clear that *Brown II*'s "all deliberate speed"[62] relief valve facilitated resistance to *Brown* in the South and elsewhere, responsibility for implementation delay and overall inefficacy is appropriately borne by other court decisions (as well as numerous nonlegal factors). The Supreme Court's subsequent decision in *Milliken*[63] clipped the *Brown* decision's wings far more severely than *Brown II*. Where *Brown II*

59. *See supra* note 48.

60. *See supra* note 49.

61. *See, e.g.*, Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1622 n.190 (2003) (calling for a "major national initiative" for school desegregation).

62. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) [hereinafter *Brown II*].

63. Milliken v. Bradley, 418 U.S. 717 (1974) [hereinafter *Milliken* I] (holding that suburban school districts cannot be compelled to participate in metropolitan remedies absent suburban school district constitutional violations).

slowed down the pace of school desegregation, the *Milliken* decision effectively brought it to a close, at least in any meaningful sense. Finally, about the same time that school desegregation was atrophying under its own weight, the courts accelerated the process by establishing criteria to unwind judicial supervision of court-ordered school desegregation monitoring.[64]

More recent explanations gaze deeper into the legal terrain and place substantial responsibility on the Supreme Court. Professor Chemerinsky argued that a series of Supreme Court decisions interacted in a way that "substantially contributed to" recent resegregation.[65] Specifically, Chemerinsky argues that *Brown II* and the *Milliken* decisions, along with related decisions bearing on school finance (*Rodriguez*[66]), intent (*Keyes*[67]), and unitary status (*Dowell*[68]) evidenced the Court's failure to embrace *Brown* and doomed the legal effort to achieve school integration.[69] Chemerinsky's conclusion is quite clear: "Desegregation likely would have been more successful, and resegregation less likely to occur, if the Supreme Court had made different choices."[70]

It would be easy, perhaps, to quibble with such qualifiers as "more successful" and "less likely." It would be equally easy to mire in the debate about whether school integration levels are "bad" or "good" and what they might suggest about *Brown*'s efficacy. To do so, however, risks obscuring a larger point. As is frequently the case, the interaction of legal and nonlegal factors accounts for social change, including school desegregation.

Two nonlegal factors that explain a lot about school integration today are absent from many accounts of why the *Brown* decision achieved so little in terms of school desegregation. These two factors are: (1) where people choose to live, and (2) middle- and upper-income families' access to private schools. Both factors animate school desegregation due to their interactions with two seminal Supreme Court decisions, *Pierce v. Society of Sisters*[71] and *Milliken v. Bradley*.[72]

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64. *See, e.g.*, Bd. of Educ. v. Dowell, 498 U.S. 237, 246-50 (1991) (requiring a showing of good faith compliance and elimination of "the vestiges of past discrimination" to modify a desegregation decree instead of the more rigorous *Swift* standard that required a showing of "grievous wrong").

65. Chemerinsky, *supra* note 61, at 1600.

66. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

67. Keyes v. Sch. Dist. No. 1, Denver, Colorado, 413 U.S. 189 (1973).

68. 498 U.S. 237 (1991).

69. Chemerinsky, *supra* note 61, *passim*.

70. *Id.* at 1620.

71. 268 U.S. 510 (1925) (holding that states may compel education, but not public education).

The consequence of both factors remains largely outside the direct reach of law and legal institutions. The mixed school desegregation evidence reflects the limits of litigation as a tool for social change as much as it does the limits of *Brown* and subsequent Supreme Court decisions.

1. Where People Live

Among the numerous and complex factors that explain today's low school integration levels, persisting residential segregation surely occupies an exalted position. Although national residential segregation levels declined between 1980 and 1990, the decline was neither large nor evenly distributed throughout the United States.[73] Specifically, most of the decline concentrated in the South and West, comparatively newer population centers, and in areas where the absolute and relative percentages of African-Americans were small.[74] At the risk of disparaging progress on the residential front, the more salient points are that residential segregation remains significant and that change is both arduous and slow.

Residential segregation is important both in and of itself, and in terms of how it interacts with other factors, notably preferences for neighborhood school assignment policies. The consequence of the interaction is obvious: The application of neighborhood school assignment policies onto residentially segregated areas will, in turn, generate segregated schools. The prominence of neighborhood school assignment policies makes disaggregating school and residential segregation patterns necessary. To understand the latter is to better understand the former.[75]

Despite decades of efforts aimed at eliminating racial residential segregation,[76] data suggest that residential segregation has increased. African-Americans are more segregated today than they were in 1940.[77] Moreover, one-third of all African-Americans live

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72. 418 U.S. 717 (1974) (preferencing local school district autonomy over urban districts' integration needs).

73. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 221-23 & tbl.8.1 (1993).

74. *Id.*

75. Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795, 796 (1996) ("One need not delve exhaustively into the research on school desegregation to find acknowledgment of the important effect of residential segregation on school segregation.").

76. Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1965, 1975-81 (2000).

77. *Id.* at 1980.

under "hypersegregated" conditions, which means that they live in large, contiguous, racially homogeneous neighborhoods clustered around major urban centers.[78] What this means in a practical sense is that many African-Americans, living in cities like Atlanta, Baltimore, Chicago, Dallas, Detroit, Los Angeles, Milwaukee, and New York City are not likely to encounter *any* whites in their own neighborhoods, the neighborhoods adjacent to theirs', or the ones adjacent to those.[79] A similar general pattern holds for Hispanics, the fastest growing segment of the public-school population.[80]

The same Court that endorsed an effort to integrate public schools[81] also concluded that local autonomy precluded interdistrict school desegregation remedies. These two principles—a desire for integrated schools and respect for local governmental autonomy—collided when it came to school desegregation. Simply put, the Court could not have it both ways. In the end, local autonomy trumped. In *Milliken II* the Court implicitly realized the empirical realities of the collision and concluded that monetary relief in the form of supplemental state and federal funds would have to suffice for minority children attending racially identifiable schools.[82] Thus, "[w]hat was true for Detroit became true for a host of other metropolitan areas in the North and West: Students in urban school districts would be confined to those districts but would receive additional resources under the guise of 'desegregation' remedies."[83]

What is clear after fifty years is that the *Brown* decision did not dislodge the tight link bonding residential patterns and school enrollment patterns. Moreover, the *Milliken I*[84] decision in 1974 can be read to imply that the link endures partly *because* of the *Brown* decision. For whatever reason, the overwhelming majority of public school students attend neighborhood schools and, as a consequence, public schools are as segregated as the neighborhoods in which they

78. MASSEY & DENTON, *supra* note 73, at 74-78.

79. *Id.*

80. ORFIELD & YUN, *supra* note 38 at 3-4, 6-7.

81. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29-30 (1971) (approving court-ordered intradistrict busing to achieve school integration); Green v. County Sch. Bd., 391 U.S. 430, 439 (1968) (ordering the school board to come forward with a plan to integrate its schools).

82. Milliken v. Bradley, 433 U.S. 267, 286-90 (1977) [hereinafter *Milliken II*] (holding that states could be required to fund remedial and compensatory programs in formerly segregated schools).

83. James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2055 (2002); *see also* James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 263-66 (1999) [hereinafter Ryan, *Schools, Race, and Money*] (discussing school districts' attempts at getting resources for "desegregation remedies").

84. 418 U.S. 717 (1974).

are located and serve. Thus, Professor Chemerinsky is surely correct to identify such Court decisions as *Milliken* as degrading *Brown*'s ability to integrate public schools.[85] *Milliken* and other decisions, however, are only part of the story. Another critical part involves the individual decisions about where to live. *Milliken* only becomes relevant after families make housing decisions. Just how the *Milliken* decision itself might feed into individual housing decisions is a critical counterfactual without a clear answer. What is clear, however, is that, owing to individual choices and, perhaps, other factors, neighborhoods in most metropolitan areas are remarkably segregated by race and class.

Given the severity of residential segregation and the *Brown* decision's inability to overcome it, that public schools remain similarly segregated by class and race should surprise few, if any. Thus, while *Brown* perhaps succeeded in eliminating *de jure* segregated schools, it did not achieve the larger goal of integrating public schools. Simply put, a critical variable—residential housing patterns—fell outside of the Court's jurisdiction and control. In addition, judicial and nonjudicial efforts to overcome residential housing patterns (for example, mandatory and voluntary busing plans and racially sensitive magnet schools) proved inadequate to overcome the immense force of residential and socioeconomic patterns.

2. School Choice

Another critical factor influencing school integration levels since *Brown* is families' access to private schools, especially white families' access. Historically, the intersection of school choice and race is cast in an unflattering light. In the middle of the twentieth century, school choice, as an education policy, flourished in the South principally as a tool of white resistance to federal court desegregation efforts.[86] More recent history, however, rehabilitates school choice policies' implication for minorities and integration. During the 1980s and 1990s, school choice was a policy lever designed to *increase* racial integration, principally through magnet schools and intradistrict transfer policies.[87] It is deeply ironic that, despite their odious

85. *See generally* Chemerinsky, *supra* note 61, at 1607-09.

86. Betsy Levin, *Race and School Choice, in* SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW 266, 267-68 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999) [hereinafter SCHOOL CHOICE].

87. JEFFREY R. HENIG, RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR 110-11 (1994) (describing "controlled choice" plans); KAHLENBERG, *supra* note 28, at 116-30 (same); JOSEPH VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 58-60 (1999) (same).

beginnings, school choice policies are now advanced as a way to increase school integration.

Although a variety of school choice options now exist,[88] including the largest variant—parents selecting where to live based on the quality of public schools in a residential area[89]—a critical point is that decisions to exit public for private schools benefit from constitutional protection, notwithstanding their implications for school integration. Just as *Milliken* helped insulate decisions about where people live from the full reach of court-ordered school desegregation plans, *Pierce v. Society of Sisters*,[90] decided decades before *Brown*, insulated private decisions about whether to exit public schools.

Numerous factors account for private schools' attractiveness for white and non-white families that have nothing to do with race. Such factors include school size and teacher satisfaction. Growing evidence hints at the impact of school and classroom size on student learning,[91] and private schools have the advantage of smaller average school enrollments.[92] Another comparative advantage is that private school teachers reported higher levels of satisfaction across an array of dimensions compared to their public school counterparts.[93]

Despite some private schools' comparative attractiveness, it is important to emphasize the comparatively small footprint that private elementary and secondary schools generate in the elementary and secondary school market. In 1999-2000, private schools accounted for just over 24 percent of the nation's schools and served just over 10 percent of the nation's schoolchildren.[94] Because private school students do not benefit from public tuition subsidies,[95] access to many private schools is largely a function of household wealth. To the extent that race and household wealth correlate, one would expect to find private schools attended by a disproportionate number of white students. Private school enrollment data comport with this

88. For a full discussion, see Ryan & Heise, *supra* note 83, at 2063-85.

89. For a comprehensive discussion of residential public school choice, see Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice, in* SCHOOL CHOICE, *supra* note 86, at 14-17.

90. 268 U.S. 510 (1925).

91. *See* KAHLENBERG, *supra* note 28, at 86-90.

92. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., PRIVATE SCHOOLS: A BRIEF PORTRAIT 6 tbl.3 (2002) [hereinafter A BRIEF PORTRAIT].

93. *Id.* at 16 tbl.9.

94. *Id.* at 3 tbl.1.

95. I exclude for sake of discussion the relatively and absolutely small number of publicly-funded private school voucher programs. *See* Ryan & Heise, *supra* note 83, at 2078-85 (describing the three existing programs in the nation, which accounted for a total of less than 15,000 students, and why the programs have met with such modest success).

expectation. Compared to public schools, private schools educate a disproportionately higher percentage of white students and correspondingly lower percentage of African-American and Hispanic students.[96]

Regardless of the reasons for private schools' attractiveness, what is clear is that white households disproportionately exercise their constitutionally protected option of exiting public for private schools. As Tables 1 and 2 illustrate, this pattern holds in the nation's largest cities as well as in some of the most sought-after and integrated suburban communities. As a consequence, school desegregation efforts suffer. Public schools are even less integrated than the residential population would otherwise predict. While school desegregation policy and law can (and does) seek to influence such private decisions, they cannot control such decisions.

III. POSTDESEGREGATION EFFORTS TO ENHANCE EDUCATIONAL OPPORTUNITY THROUGH LITIGATION

Although the *Brown* decision may have fallen short of integrating America's public schools, it would be a manifest mistake to assess the decision's legacy solely from the necessarily narrow and incomplete lens of school desegregation. Postdesegregation efforts to enhance equal educational opportunity through litigation—efforts that flow directly from *Brown*—evidence a significant and singular achievement. The *Brown* decision succeeded in stimulating a sustained effort—notably, but not exclusively, in the area of school finance litigation—to deploy the courts to help insure greater equal educational opportunity by supplying a necessary precedential foundation upon which successive efforts rest.

A. School Finance Reform

The distribution of education resources, especially funding, occupies a key role in current debates about equal educational opportunity. Central to debates about the distribution of education resources is school finance litigation. Consequently, this area of the law has emerged during the past three decades as a tool to enhance equal education opportunity.

School finance reform issues arise due to the interaction of three factors. First, most school finance systems rely on a mixture of state and local revenue, with localities funding the bulk of their

96. *See* A BRIEF PORTRAIT, *supra* note 92, at 9 fig.3.

contributions through property tax revenues.[97] Second, different localities' property values vary and thus can raise disparate amounts of funding for schools with similar property tax rates. Higher property value areas find it comparatively easier (from a tax effort perspective) to raise funds for their schools. States, especially since the mid-1980s, make an array of efforts to equalize funding between high- and low-property value areas. The persistence of school spending differences, not to mention the persistence of school finance lawsuits, however, suggests that states' equalizing efforts fall short. Third, the slow and uneven pace of school desegregation frustrates many civil rights advocates. Advocates had hoped that by attacking funding inequalities, they would be able to improve the education available to poor and minority students.

Unlike the federal court strategy deployed by school desegregation activists, school finance litigants had to push their claims in state rather than federal courts. Despite some early promise,[98] hopes for a federal litigation strategy were dealt an early death in *Rodriguez*,[99] where the Supreme Court concluded that unequal school funding schemes do not violate the U.S. Constitution.[100] Rather than terminate a litigation strategy for school finance reformers, however, the *Rodriguez* decision instead redirected the litigation strategy. School finance advocates turned their attention to state constitutions and state courts, where they have experienced mixed results. Since 1974, litigants have challenged the finance schemes in over forty states, and nearly twenty state supreme courts have declared their respective school funding programs unconstitutional.[101] Prior to 1989, those challenging school finance systems generally sought to equalize resources among districts within a state.[102] Since 1989, however, adequacy-based challenges have largely supplanted equality-based claims. Most litigants now contend not that all students are entitled to the same resources, but rather that all students should receive the funds necessary to finance an

97. For an overview of school finance systems, see Allan R. Odden, *School Finance and Education Reform*, *in* RETHINKING SCHOOL FINANCE 1 (Allan R. Odden ed., 1992).

98. *See* Serrano v. Priest, 487 P.2d 1241, 1249-62 (Cal. 1971) (finding that a school funding scheme based on local property taxes resulted in unconstitutional wealth-based discrimination).

99. 411 U.S. 1, 44-45 (1973).

100. *Id.*

101. For descriptions of, and citations to, the cases, see Ryan, *Schools, Race, and Money*, *supra* note 83, at 266-69 & nn.70-86.

102. Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 121-40 (1995); Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1157-62 (1995).

adequate education.[103] Although much has been and could be said about these cases,[104] two features warrant emphasis. The first has to do with the remedies that have been provided. The second has to do with the changing nature of the claims that have been brought.

As for the remedies, an important aspect of school finance litigation is that even successful challenges have not led to equal funding, nor have any of the suits done much to alter the basic structure of school finance schemes.[105] Indeed, only Nevada and Hawaii have finance systems that could be described as providing equal funding to all districts, and Hawaii is anomalous in that there is only one school district for the entire state.[106] Inequalities caused by differing property values thus continue to exist in nearly every state, even in those states whose courts have ordered equalization.[107] Thus, similar to school desegregation litigation, the school finance litigation effort has encountered numerous difficulties.

Explanations for the inefficacy of even those school finance lawsuits that were successful are not hard to fathom. To equalize school funding, lawmakers confront one of two basic options: raise all school districts to the budgetary level of the highest-spending ones, or bring all districts down to a specified level and cap any spending beyond that level. The first option is financially impractical in most states.[108] The second option, while financially possible, is so controversial that it is politically infeasible in most areas.[109]

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103. *See* Ryan, *Schools, Race, and Money*, *supra* note 83, at 268-69 (describing the shift in theories and pointing out that not all cases since 1989 have shifted from equity to adequacy claims).

104. For an excellent overview of the cases and discussion of the commentary, see Enrich, *supra* note 102, at 185-94.

105. There is a good deal of disagreement in the relevant literature regarding the precise impact of court decisions on school funding. *See* Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543, 585-89 (1998). There is no disagreement, however, regarding the central point made in the text: No school finance suit has led to equalized funding among school districts in any state.

106. For a discussion of Hawaii's finance scheme, see John A. Thompson, *Notes on the Centralization of the Funding and Governance of Education in Hawaii*, 17 J. EDUC. FIN. 286 (1992). For a discussion of Nevada, see U.S. GEN. ACCOUNTING OFFICE, SCHOOL FINANCE: STATE EFFORTS TO EQUALIZE FUNDING BETWEEN WEALTHY AND POOR SCHOOL DISTRICTS 26 (1998) [hereinafter SCHOOL FINANCE]. Nevada does not guarantee that all districts will have the same funds; rather, in Nevada (and only in Nevada) all districts can raise the average per-pupil funding amount at the same tax rate. *See id.*

107. *See* SCHOOL FINANCE, *supra* note 106, at 2-8; *see also* Kirk Vandersall, *Post*-Brown *School Finance Reform*, *in* STRATEGIES FOR SCHOOL EQUITY 11, 17-18 (Marilyn J. Gittell ed., 1998) [hereinafter STRATEGIES FOR SCHOOL EQUITY] (discussing studies indicating little improvement in funding equity during the 1980s, despite successful school finance litigation).

108. *See* Enrich, *supra* note 102, at 156 (noting that "bringing all districts up to the spending or service level of the top districts would be prohibitively expensive in most states"); Thomas

Much of the consternation arises because equalizing funding by controlling local spending would require either a cap on local spending or redistributing locally-raised revenues to other school districts. Not surprisingly, neither option has proven to be politically popular. Local citizens, especially parents, do not like to be told that they cannot raise and spend local revenues on their own schools.[110] Many like even less the idea that their locally raised revenues might be redirected to schools throughout the rest of the state.[111] Such "Robin Hood" schemes have succeeded mainly in provoking intense political squabbling, public protests, and litigation.[112]

Due to the controversy triggered by spending caps and recapture plans, it is not surprising that almost no school finance systems—even those reformed in response to a court order—limit the amount that local districts can raise.[113] Similarly, very few states rely on explicit recapture provisions.[114] Rather, states typically respond to court orders by increasing state aid to poorer districts.[115] Although states usually hold aid to wealthier districts constant or increase it at

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Vitullo-Martin, *Charter Schools and Tax Reform in Michigan*, *in* STRATEGIES FOR SCHOOL EQUITY, *supra* note 107, at 115, 121-22 (calculating that it would cost Michigan an additional $7 billion in state aid (which would double state spending) to bring all districts up to the level of the wealthiest districts).

109. For a discussion of the political difficulties raised by limiting spending or redistributing locally-raised revenues, see Margaret E. Goertz, *Steady Work: The Courts and School Finance Reform in New Jersey*, *in* STRATEGIES FOR SCHOOL EQUITY, *supra* note 107, at 101, 111-13; Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, *in* LAW AND SCHOOL REFORM, *supra* note 9, at 88, 108-15; Enrich, *supra* note 102, at 157-59.

110. *See generally* Richard Rothstein, *Assessing Money's Role in Making Schools Better*, N.Y. TIMES, Nov. 14, 2001, at D12 (discussing the "extraordinary growth of private gifts to public schools); WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 156 (2001) (explaining the tight link between local school quality and housing values).

111. For a discussion of this point, see William H. Clune, *New Answers to Hard Questions Posed by* Rodriguez*: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721, 731, 739 (1992); Enrich, *supra* note 102, at 156-59.

112. For a discussion of legislative reactions in Texas, see Albert Cortez, *Power and Perseverance: Organizing For Change in Texas*, *in* STRATEGIES FOR SCHOOL EQUITY, *supra* note 107, at 181, 181-97; Mark Yudof, *School Finance Reform in Texas: The* Edgewood *Saga*, 28 HARV. J. ON LEGIS. 499 (1991); Sam Howe Verhovek, *Texans Reject Sharing School Wealth*, N.Y. TIMES, May 3, 1993, at A12. For Kansas, see FISCHEL, *supra* note 110, at 120-21.

113. *See* FISCHEL, *supra* note 110, at 93 (noting that "Colorado and Washington are among the very few states that place limits on how much revenue school districts can choose to raise on their own").

114. *See id.*; Enrich, *supra* note 102, at 158; McUsic, *supra* note 109, at 111.

115. *See* SCHOOL FINANCE, *supra* note 106, at 20-29 (discussing state efforts at equalization); William N. Evans et al., *Schoolhouses, Courthouses, and Statehouses After* Serrano, 16 J. POL'Y ANALYSIS & MGMT. 10, 12 (1997) (concluding from a study of litigation and legislative responses that "[c]ourt-ordered reform reduced inequality by raising spending at the bottom of the distribution while leaving spending at the top unchanged").

a slower rate than aid to poorer districts,[116] wealthier districts usually retain the authority to use their own revenues and spend more than the poorer districts can afford.[117] Providing more state aid to poorer districts while holding such aid to wealthier districts constant is redistributive and not without controversy of its own.[118] But the controversy generated by redistribution is nowhere near as intense as that created by recapture provisions.

A second notable feature of school finance litigation is the evolution in litigation strategies from equalization claims to adequacy claims. Legislators are not the only ones to have recognized the political difficulty in equalizing resources. Litigants have as well, and these difficulties have generally altered the goal of school finance litigation. Prior to 1989, legal challenges to school funding programs primarily sought greater equalization in per-pupil spending.[119] Since 1989, however, adequacy-based theories have largely displaced equity theories. Presently, most school finance litigants argue not that all students are entitled to equalized per-pupil spending, but rather that all students deserve the funds necessary to support an adequate education.[120] Adequacy lawsuits make peace with funding inequality and abandon the idea of tying districts together financially by requiring access to equal resources. Wealthy school districts possessing the ability and willingness to self-fund a more-than-adequate education remain free to do so.

A number of factors help explain the switch in legal strategies and goals in 1989 from equity to adequacy. School finance equity theory's inefficacy was one such factor. Equity-based school finance lawsuits had win rates that were not satisfactory.[121] Moreover, similar to many successful school desegregation lawsuits, even successful school finance equity lawsuits failed to achieve the litigants' desired goals. To make this point more specifically, empirical research on successful equity lawsuits' ability to increase total state education spending reveals mixed results.[122]

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116. Evans, *supra* note 115, at 12.

117. Enrich, *supra* note 102, at 158.

118. The long-running controversy in New Jersey is probably the most well-known example. For an insightful discussion of the school finance saga in that state, see Goertz, *supra* note 109.

119. Enrich, *supra* note 102, at 121-40; Heise, *supra* note 102, at 1152-53.

120. Ryan, *Schools, Race, and Money*, *supra* note 83, at 268-69 (describing the shift in school finance litigation theory).

121. *Id.* at 268-69.

122. Heise, *supra* note 105, at 623; *see also* Bradley W. Joondeph, *The Good, The Bad, and The Ugly: An Empirical Analysis of Litigation-Prompted School Finance Reform*, 35 SANTA CLARA L. REV. 763, 774 (1995) (same). *But cf.* DOUGLAS S. REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY 34-35 (2001) (surveying the empirical

A second factor involves school finance activists' desire to bring many urban school districts back into the school finance movement. Historically, many urban districts were on the forefront of school finance litigation. In New Jersey, for instance, the *Robinson v. Cahill*[123] litigation exemplifies the initial joining of urban school districts and the school finance movement. During the 1970s, urban districts in New Jersey were among the state's poorest. Their financial plight resulted from low property values, high tax burdens, high noneducation claims upon the cities' financial resources, and relatively high cost-of-education rates per student.[124] These factors, among others, contributed to many urban districts' embrace of early school finance litigation.

Over time, however, per-pupil spending in urban districts improved. This improvement diminished the appetite for the equity version of school finance reform in these districts. By 1990, unadjusted per-pupil spending in urban districts exceeded suburban and rural spending levels.[125] A distinct, though related, development was that as a school district's percentage of minority students rose, so too did per-pupil spending.[126] Once urban districts began spending as much as other districts, if not more, potential plaintiffs realized that litigation efforts seeking strict equality of resources state-wide might harm them financially.[127] Consequently, as urban school spending levels came up to state per-pupil spending averages, the taste in urban districts for school finance equity litigation cooled. Once school finance litigation's theoretical base shifted from equity to adequacy, however, urban districts' relatively high per-pupil spending no longer precluded them from joining such lawsuits.

Third, along with increasing the number of political allies, school finance litigants also sought to minimize political foes. Seeking adequate instead of equal resources is politically less controversial, because it does not raise the specter of leveling down through spending caps or recapture provisions. Adequacy arguments pose less of a political threat than equality arguments because they do not

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literature and noting that the weight of scholarly authority supports the proposition that equity and adequacy school finance lawsuits influence education spending).

123. 303 A.2d 273 (1977).

124. Paul L. Tractenberg, Robinson v. Cahill: *The "Thorough and Efficient" Clause*, 38 LAW & CONTEMP. PROBS. 312, 316 (1974).

125. NAT'L CTR. FOR EDUC. STATISTICS, DISPARITIES IN PUBLIC SCHOOL DISTRICT SPENDING, 1989-1990 A1-E7 (Appendix) (1995) [hereinafter DISPARITIES]; *see also* Heise, *supra* note 102, at 1151, 1173 tbl.1. When per-pupil spending is indexed by cost and need deflators, urban spending levels remain above suburban levels, but below rural spending. *Id.*

126. DISPARITIES, *supra* note 125, at 15 tbl.1; Heise, *supra* note 102, at 1174 tbl.2.

127. *See* Heise, *supra* note 105, at 579-83; Heise, *supra* note 102, at 1172-74.

interfere with local control over resources or preclude wealthy districts' ability to retain superior funding positions.[128]

B. Themes: An Enduring and Evolving Equal Educational Opportunity Doctrine

Although school desegregation and finance litigation movements differ in important ways, they also share important attributes. That the two movements differ merely states the obvious: the former dwells on race, the latter on money. Given the persistent challenges attributable to the American "dilemma,"[129] even this symbolic change in focus should not be discounted. These important differences notwithstanding, the school desegregation and finance movements also resemble one another in critical ways. As Professor James Ryan has noted, "[O]ne cannot fully understand the dynamics and limitations of school finance reform without considering the dynamics of race in general and school desegregation in particular."[130] Put simply, although the technical focus may have shifted from race to resources, many of the underlying objectives persist. Shared goals, history, focus on inputs, and an enduring belief in the power of litigation bind school desegregation and finance.

1. Goals and History

Although the school desegregation and finance movements pursue different means, they share common goals. At bottom, both movements seek to enhance educational opportunity for poor and minority (and all too frequently, poor minority) students.[131] This shared goal is unsurprising given the movements' shared history. The substitution of race for resources—the touchstone of school finance litigation—emerged in a desegregation case. Having previously struck

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128. Enrich, *supra* note 102, at 168-69; *see also* McUsic, *supra* note 109, at 119 (arguing that adequacy claims have "political" advantages over equality claims, including the fact that "[u]nder adequacy claims, [wealthy] districts remain free to exploit their local property wealth in pursuit of educational excellence").

129. *See generally* GUNNAR MYRDAL, AN AMERICAN DILEMMA (1944) (chronicling the findings of "a comprehensive study of the Negro in the United States").

130. James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 476 (1999).

131. Ryan, *Schools, Race, and Money*, *supra* note 83, at 254. *Compare* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY *passim* (1975) (describing the NAACP's school desegregation strategies and litigation goals), *with* RICHARD F. ELMORE & MILBREY W. MCLAUGHLIN, REFORM AND RETRENCHMENT: THE POLITICS OF CALIFORNIA SCHOOL FINANCE REFORM 21-32 (1982) (describing school finance litigation goals).

down the lower court's metropolitan school desegregation plan in *Milliken I*,[132] the Supreme Court all but precluded a racially integrated educational experience for most of Detroit's public school students. In response to the Court's decision in *Milliken I*, the district court ordered an array of compensatory educational programs designed to offset the harms generated by racially identifiable schools. In *Milliken II*,[133] the Court assessed the appropriateness of the court-ordered school desegregation remedy which, in essence, swapped supplemental funding for the absence of an integrated school setting. As Justice Powell noted, the complaining party in *Milliken II* was the State of Michigan, and its complaint pivoted not on desegregation but on the $5.8 million cost to the state for implementing the remedial plan.[134] The Court concluded that the district court's mandated compensatory program, while perhaps not ideal, was a constitutional "second-best" and aptly tailored to address and remedy the educational consequences of the constitutional violation.[135] While some desegregation proponents continue to bemoan the 5-4 *Milliken I* decision and its consequences,[136] few dispute the nature of the exchange that implicitly took place.

2. Tying Strategy

The school desegregation and finance efforts share a key strategic attribute in that they each initially pursued a "tying" strategy.[137] On the dual assumption that minority students would be at a political disadvantage in terms of assuring adequate education resources, and that whites would ensure that their children benefited from adequate school resources, school desegregation proponents sought to protect minority students' interests by eliminating *de jure* segregation policies. That is, minority students would benefit financially just by having legal access to white schools.[138] Of course, the *Brown* decision's elimination of *de jure* school segregation and minority students' legal access to white public schools were not enough to insure integrated public schools. Many minority students

132. 418 U.S. 717.

133. 433 U.S. 267.

134. *Id.* at 293 (Powell, J., concurring).

135. *Id.* at 290.

136. *See, e.g.*, Gary Orfield, *Conservative Activists and the Rush Toward Resegregation*, *in* LAW AND SCHOOL REFORM, *supra* note 9, at 48-49.

137. Sources for discussion of the "tying" strategy include Ryan, *Schools, Race, and Money*, *supra* note 83, at 259-60, and Ryan & Heise, *supra* note 83, at 2058-59.

138. For a discussion of the "green follows white" hypothesis, see Martha Minow, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 275 (1999).

still attend overwhelmingly minority schools. As a result, the "green follows white" hypothesis was not fully tested.[139] Consequently, the desegregation effort which aimed to protect the fates of minority students by tethering them to the fates of white students through student assignment policies proved insufficient to guarantee an equitable distribution of educational resources. That is, in a world of *de facto* school segregation, minority students' education remained exposed to the politics of school finance.

To preserve a tying strategy, school finance litigants sought to enhance equity by changing the unit of analysis from the student to the school. Specifically, whereas school desegregation sought to tie the fates of white and black students together by placing them in the same schools, school finance equalization sought to tether the fates of poor and wealthy schools together by ensuring equal distribution of resources.[140] Similar to desegregation litigants, so long as one assumes that constituents of wealthy school districts will exert sufficient political force to guarantee sufficient resources for their schools, efforts to link the political fates of poor and wealthy school districts in terms of educational resources should provide students attending poor schools additional protections.

Ironically, the school desegregation and finance movements also share an abandonment of the tying strategy. In the end, efforts to legally link the fates of minority and nonminority students as well as wealthy and nonwealthy school districts proved largely futile. In the desegregation setting, the *Milliken I* decision combined with residential demographic patterns that remain segregated by both race and socioeconomic status to preclude meaningful efforts to commingle minority and nonminority students in public schools. *Milliken II*'s explicit swap of integrated education for additional resources implicitly extinguished the tying strategy in the school desegregation context. A similar abandonment of the tying strategy took place in the school finance context. The legal, political, and economic difficulties associated with equalizing school spending gave way to an adequacy theory that no longer seeks to bind the fates of wealthy and nonwealthy school districts.

3. Focus on Inputs Over Outcomes

A shared belief in the power of inputs to influence desired education outcomes binds the school desegregation and school finance

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139. *Id.* at 274-75.

140. *See supra* note 137.

movements. School desegregation and school finance lawsuits were designed to increase school integration and school spending levels, respectively. These lawsuits assumed that manipulating racial balances and resources would lead to improved student achievement. Upon finding unconstitutional school segregation in Kansas City, Missouri, the district court in *Jenkins v. Missouri*[141] developed a remedy with the goal of eliminating "all vestiges of state imposed segregation," with a particular emphasis on eliminating "low student achievement."[142] School finance court opinions are no less specific. In *Rose v. Council for Better Education*,[143] the Kentucky Supreme Court construed the state's education clause to provide each and every child with, among other things, "sufficient levels of academic or vocational skills to enable [Kentucky] public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market."[144]

The school desegregation and finance movements' belief that attention to such inputs as race and funding could improve student academic achievement is not without controversy. For many involved in education reform efforts, the ultimate barometer of success or failure is student academic achievement. However, precisely what causes some students to perform well and others to perform poorly remains hotly debated in the research literatures. Thus far, a loose consensus gels on the importance of peer effects on student academic achievement and social behavior.[145] There is also emerging agreement that good teachers, strong principals, small schools, small class sizes, and parental involvement can improve student achievement, but the significance of these variables remains subject to heated debate.[146] Added to these specific areas of contest is the more general dispute

141. 639 F. Supp. 19, 23-25 (W.D. Mo. 1985).

142. *Id.* at 23; *see generally Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (noting that segregation adversely impacts the educational development of African-American students); JAMES S. COLEMAN, EQUALITY AND ACHIEVEMENT IN EDUCATION 211-13 (1990) (recognizing African-American student academic achievement as a central policy goal of desegregation).

143. 790 S.W.2d 186, 212 (1989).

144. *Id.* at 212; *see also* William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 612-15 (1994) (describing school finance litigation as a strategy to improve student academic achievement).

145. James Coleman was the first to report this, in his famous 1966 study for the (now) Department of Education, which has since become known simply as "The Coleman Report." COLEMAN REPORT, *supra* note 8, at 304. Scores of subsequent studies have confirmed Coleman's conclusion. For citations to the literature, see KAHLENBERG, *supra* note 28, at 25-28; Ryan, *Schools, Race, and Money*, *supra* note 83, at 286-87 & nn.165-66.

146. *See generally* KAHLENBERG, *supra* note 28, at 86-90 (discussing research).

over the extent to which expenditures correlate with achievement—that is, over whether money "matters."[147]

Setting aside such long-standing debates, what is reasonably clear is that something as complex as student academic achievement almost assuredly does not pivot on any single variable, such as funding, teacher quality, racial composition, or class size. Equally clear is that schools with a majority of poor students rarely, if ever, perform as well as their middle-class counterparts.[148] This holds true even when substantial resources are provided to these schools. Although several reasons explain why this is so, the key point is the clear and undisputed one that schools of concentrated poverty almost always perform poorly. Although the litigants' focus on school desegregation and finance is hardly inapt, a belief that either school integration levels[149] or funding levels[150] alone could influence academic achievement ignores the rich complexity that characterizes student academic achievement.

4. Faith in Litigation and Legal Impact

The school desegregation and finance litigation movements share a faith in the ability of lawsuits to influence social change. The coordinated litigation strategy that culminated with the *Brown* decision helped animate a movement towards pressing courts into the

147. For research generally skeptical of a correlation between educational spending and educational achievement, see Eric A. Hanushek, *The Impact of Differential Expenditures on School Performance*, 18 EDUC. RESEARCHER 45, 49-50 (1989); ERIC A. HANUSHEK ET AL., MAKING SCHOOLS WORK: IMPROVING PERFORMANCE AND CONTROLLING COSTS 25-48 (1994); ALLAN R. ODDEN & LAWRENCE O. PICUS, SCHOOL FINANCE: A POLICY PERSPECTIVE 277-81 (1992). For research generally supportive of such a correlation, see Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465, 483-90 (1991); Larry V. Hedges et al., *Does Money Matter? A Meta-Analysis of Studies of the Effects of Differential School Inputs on Student Outcomes*, 23 EDUC. RESEARCHER 5, 13 (1994).

148. For a fuller account of this point, see Ryan & Heise, *supra* note 83, at 2103-08.

149. Although the empirical evidence on the influence of school desegregation on student academic achievement remains contested, a few general themes have emerged. On balance, desegregation appears to have a positive — though moderate — impact on black student achievement, though no corresponding effect on white student achievement. Other researchers imply, however, that, rather than desegregation, per se, what matters is socioeconomic integration that happens to correlate, though obviously not perfectly, with racial integration. For a sampling of the debate, compare Rita E. Mahard & Robert L. Crain, *Research on Minority Achievement in Desegregated Schools*, *in* THE CONSEQUENCES OF SCHOOL DESEGREGATION 103, 121-25 (Christine R. Rossell & Willis D. Hawley eds., 1983) (finding a consistent, positive impact from school desegregation), with ARMOR, *supra* note 47, at 113 (largely pessimistic of a school desegregation effect independent of a socioeconomic influence).

150. *See supra* note 147 and accompanying text.

service of "litigated reform."[151] The service quickly extended beyond schools, and the nation's activist lawyers and judges grew accustomed to permanent injunctions as well as court supervision of public institutions. What emerged was a "new kind of case" that assisted litigants seeking to achieve institutional reform through litigation.[152] This "new kind of case" substantially departed from Lon Fuller's vision of the court's role as an adjudicator of private disputes through the structured, adversarial process.[153]

Legal scholars soon followed with descriptions of public law litigation[154] and defenses of it.[155] According to Chayes, public law litigation enriches our democracy by helping dislodge underperforming public institutions from the status quo. Public law litigants are less amenable to capture and, paradoxically, better positioned to introduce change into public institutions than the bureaucratic mechanisms that have formal governing and policymaking authority. Critics, however, dwell on public law litigation's tenuous fit within traditional notions of separation of powers. Questions about political legitimacy persist.[156]

Independent of important theoretical and normative questions surrounding the courts' role in helping to achieve reform or social change, equally important empirical questions lurk regarding whether courts can be effectively deployed in such a manner. The legal impact debate benefited from the discussion prompted by Professor Gerald Rosenberg's analysis, which asked: "To what degree, and under what conditions, can judicial processes be used to produce political and social change?"[157] Rosenberg, a trained political scientist as well as law school graduate, noted that in law school classes "the idea that the Supreme Court played a fundamental role in reshaping modern

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151. Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 1995 (1999) (reviewing MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998)).

152. *Id.* As Professor Schlanger notes, this "new kind of case" was termed, variously, "public law," "institutional," and "structural" litigation. *Id.*

153. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363-72 (1978). As Professor Schlanger notes, Fuller's article—published in 1978—was written in 1957. *See* Schlanger, *supra* note 151, at 1996 n.11.

154. *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1288-1313 (1976).

155. *See, e.g.*, Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 44-50 (1979).

156. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1017 (2004).

157. ROSENBERG, *supra* note 37, at 1.

American society was *uncritically* assumed by all."[158] That uncritical assumption was welcomed by many, especially many legal scholars and activists.[159]

Rosenberg critically examines the assumption that courts can produce political and social change and advances a conclusion that disappoints those who look to courts to end-run political processes resulting in policy change. Rosenberg concludes that courts can influence policy change only when non-judicial actors support such a change[160] and notes that "U.S. courts can *almost never* be effective producers of significant social reform."[161] Not surprisingly, Rosenberg's book attracted substantial criticism.[162]

A softer form of Rosenberg's thesis—that courts, under certain conditions and with certain issues, can produce social and political change, but not nearly as much as many people seem to think[163]—would not surprise those current in the political science, legal impact, and constitutional theory literatures. Robert Dahl's influential work led many to view the judicial process as one among many critical factors that inform national policy issues.[164] Other scholars, such as Alexander Bickel, emphasized structural factors that limit the scope of courts' reach in the policy setting.[165] Finally, Donald Horowitz began to assess with more focus court decisions' consequences—unanticipated and otherwise—on policy.[166]

If *what* Rosenberg wrote is noted for provoking criticism, *how* he developed his thesis represents a significant contribution. Though

158. *Id.* at xi (emphasis added).

159. *See, e.g.*, ARYEH NEIER, ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE 9 (1982) (arguing that "litigation has earned the acceptance it now enjoys of its place in resolving public policy questions").

160. ROSENBERG, *supra* note 37, at 30-36.

161. *Id.* at 338.

162. *See, e.g.*, Neal Devins, *Judicial Matters: The Hollow Hope: Can Courts Bring About Social Change?*, 80 CAL. L. REV. 1027, 1030 (1992) (reviewing GERALD. N. ROSENBERG, THE HOLLOW HOPE (1991)) ("The book deserves harsh criticism because its conclusions are checkered by problems of emphasis, articulation, and analysis."). To be fair, the same reviewer also noted that Rosenberg's book can "stand tall, if not erect, even in the face of the deficiencies noted above." *Id.*

163. ROSENBERG, *supra* note 37, at 342-43 (noting that courts "rarely . . . can make a difference").

164. Robert A. Dahl, *Decision-Making In a Democracy: The Supreme Court As a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

165. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23, 254-72 (1962).

166. DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 284-93 (1977).

not the first of such work,[167] Rosenberg's analysis represents a growing recognition of the need to link legal theory and empirical reality to increase our understanding of when and how courts influence social policy. Indeed, empirical work on the relation between courts and education policy is comparatively more developed than in other contexts. Although Rosenberg finds little reason for faith in courts' ability to bring about increased school integration,[168] other scholars interpret available data as rebutting the general claim that the "judiciary lacks the resources, expertise, or comprehensive perspective needed to implement education reforms successfully."[169] Within the more hounded context of school finance litigation, the efficacy of successful lawsuits in bringing about desired social change remains contested. Emerging evidence suggests that different school finance litigation theories might generate different probabilities of success.[170]

Notwithstanding empirical ambiguity about litigation's efficacy as a vehicle to achieve social change, public law litigation now enjoys something of a renaissance. In a recent article, Professors Sabel and Simon describe how public law litigation has been transformed and, as a consequence, is "becoming—again—an influential and promising instrument of democratic accountability."[171] According to the authors, what has changed over the years is the structure of public litigation's remedies. Public litigants now shy away from "command-and-control" injunctive judicial regulation and favor more "experimental" judicial intervention.[172] Sabel and Simon understand such judicial interventions to form a new genre of claims they describe as "destabilization rights"—or, rights to disentrench public institutions, such as public schools, which have failed to meet their obligations and are immune to traditional political reform efforts.[173] Although their claim that public law litigation, newly transformed, will resurrect itself as an instrument of democratic control remains speculative, at a descriptive level, the nature of the trend that Professors Sabel and

167. *See, e.g.*, David M. Trubek, *Back to the Future*, 18 FLA. ST. U. L. REV. 4, 42 (1990) (noting that due to "two decades of gap studies, impact studies, and implementation research," law's independent ability to influence policy is in doubt).

168. ROSENBERG, *supra* note 37, at 155.

169. MICHAEL REBELL & ARTHUR BLOCK, EDUCATIONAL POLICY-MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM 210 (1982).

170. For a discussion, see REED, *supra* note 122, at 34-35.

171. Sabel & Simon, *supra* note 156, at 1016.

172. *Id.* at 1019.

173. *Id.* at 1020.

Simon observe is generally correct, at least as it relates to equal educational opportunity litigation since *Brown*.[174]

IV. *BROWN*'S IMPLICATIONS FOR THE FUTURE OF EQUAL EDUCATIONAL OPPORTUNITY LITIGATION

Future litigants seeking to enhance equal educational opportunity will confront far more challenging policy terrain. Similar to education litigation theories, education policy continues to evolve over time. Where past and present reform efforts focused on inputs such as race and resources, current reform efforts construe equal educational opportunity in terms of student achievement. A review of student achievement data reveals lingering achievement gaps that separate students by race and ethnicity. Many view these achievement gaps as posing an especially potent threat to the promise of equal educational opportunity.[175] Reducing these gaps is difficult because student academic achievement involves an array of complicated and interacting variables, including teaching and learning, as well as delicate school and non-school relations that are essential to the learning process. Critical to litigation efforts is that these variables are located deeper *inside* schools and classrooms and, as such, further away from the reach of lawsuits and court decisions. These variables' resistance to successful litigation evidences their complexity as well as the structural limitations of law and litigation as tools to influence such variables. To an even greater degree than for school desegregation or finance, courts and lawsuits seem ill-equipped to shoulder this task.

A. The Persistently Evolving Equal Educational Opportunity Doctrine—Standards and Assessments

Conceptions of what equal educational opportunity doctrine means and how to construe it continue to evolve. Recent developments evidence that the doctrine's focus is changing once again, this time to include notions of educational excellence and quality. Since the mid-1980s, equal educational opportunity has increasingly been construed in terms of outputs (for example, student and school academic achievement) rather than the traditional inputs (such as racial composition of schools and per-pupil spending). This

174. Not surprisingly, school litigation figures prominently in their exposition of how public law litigation has evolved over the decades. *Id.* at 1022-28.

175. *See, e.g.*, No Child Left Behind Act, 20 U.S.C. § 6301 (2001) (emphasizing the necessity of closing the achievement gap to provide equal educational opportunity to all students).

change in focus led educational reformers to push the development and implementation of academic standards, as well as assessment instruments designed to gauge progress toward those standards. This change in focus reflects the belief that what matters most is whether children are learning and that this can only be assured if regular assessments are administered to measure progress toward clear performance standards. Proponents of standards and assessments justified them partly as a way to increase student achievement and school accountability.[176] Not surprisingly, the standards and assessments movement also nests itself firmly in the post-*Brown* effort to secure greater educational opportunity.[177]

A convergence of four factors helps explain this recent shift in education policy focus. First, concerns about student achievement have increased. Despite decades of well-intended education reforms, American students do not perform at desired academic levels, especially when compared to their foreign counterparts.[178] Also, persisting achievement gaps continue to separate African-American and Hispanic students from white and Asian students.[179] Second, the 1983 publication of the report, *A Nation At Risk: The Imperative For Educational Reform*, publicized growing concerns about student achievement.[180] When it came to describing the scope of the problem confronting American education, the report did not mince words: "[T]he educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people."[181] Third, many states increased their absolute and relative financial contributions to local school budgets. Partly in exchange for an increasing appetite for policy control and in response to school finance litigation, between 1970 and 1990, states'

176. For a helpful summary of the social history of the standards and assessment movement and its focus on student academic achievement, see CHESTER E. FINN, JR., WE MUST TAKE CHARGE: OUR SCHOOLS AND OUR FUTURE (1991); DIANE RAVITCH, DEBATING THE FUTURE OF AMERICAN EDUCATION: DO WE NEED NATIONAL STANDARDS AND ASSESSMENTS? (1995).

177. *See, e.g.*, William L. Taylor, *Assessment as a Means to a Quality Education*, 8 GEO. J. ON POVERTY L. & POL'Y 311, 311-12 (2001) (describing standards-based education reform as a method for improving educational quality for all students).

178. Paul E. Peterson, *Ticket To Nowhere*, 3 EDUC. NEXT, Spring 2003, at 39, 45-46 & fig.5 (arguing that American students do not fare well in terms of international achievement).

179. *See generally* Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: An Introduction, in* THE BLACK-WHITE TEST SCORE GAP 1 (Christopher Jencks & Meredith Phillips eds., 1998) (documenting persisting student achievement gaps between black and white students).

180. *See* THE NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 5-23 (1983).

181. *Id.* at 5.

contribution to total educational spending (as a percentage of total educational spending) grew by more than 18 percent.[182]

School reform in Texas is emblematic. In 1995, largely owing to protracted school finance litigation, the Texas Supreme Court provisionally accepted a new school funding scheme that accompanied broader education reforms that included the creation of the Texas School System Accountability program.[183] The Texas Board of Education administers the Accountability program and is charged with designing and implementing student standards and assessments.[184] Public schools in Texas are annually assessed on the basis of student test scores and other proxies of academic success.[185] Successful schools are rewarded; unsuccessful schools face the prospect of a state takeover.[186] A critical component of the Texas school reform plan is its transparency. Data on student performance (aggregated at the school level) as well as school and district performances are available on the Internet. Parents of Texas schoolchildren receive assessment information about their children's school directly through the mail.[187]

Fourth, the federal government dramatically increased its involvement with elementary and secondary public schools. In 1994, President Clinton signed into law the *Goals 2000: Educate America Act*,[188] which included financial incentives for states to embark upon the standards and assessments development processes.[189] In response, many states initiated the difficult process of launching efforts to articulate educational standards for their students and schools as well as assessment mechanisms designed to assess progress toward the articulated standards.[190]

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182. Heise, *supra* note 105, at 560 & fig.1.

183. Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 725-30 (Tex. 1995); *see also* TEX. EDUC. CODE ANN. § 39 (Vernon 1996 & Supp. 2004) (describing provisions of Texas' Public School Accountability program).

184. TEX. EDUC. CODE ANN. § 39.022 (Vernon 1996 & Supp. 2004); *see also id.* § 7.102.

185. *Id.* §§ 39.051-.052

186. TEX. EDUC. CODE. ANN. §§ 39.023-.028, 39.051-.054, 39.071-.076, 39.093-.095, 39.131 (Vernon 1996 & Supp. 2004). For a fuller discussion of the Texas Accountability plan, see Sabel & Simon, *supra* note 156, 1025-28.

187. Sabel & Simon, *supra* note 156, at 1027.

188. Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (2000) (codified as amended in scattered sections of 20 U.S.C.) [hereinafter Goals 2000].

189. For a full discussion of the Goals 2000 legislation, see Michael Heise, *Goals 2000: Educate America Act: The Federalization and Legalization of Education Policy*, 63 FORDHAM L. REV. 345 (1994).

190. For a brief description of two states' efforts, see Michael Heise, *The Courts, Educational Policy, and Unintended Consequences*, 11 CORNELL J.L. & PUB. POL'Y 633, 636-41 (2002)

Goals 2000, however, was only the beginning of the federal government's newly-discovered taste for general elementary and secondary education policy. The second part of what some states believe amounts to a "one-two punch" is the *No Child Left Behind Act of 2001* ("NCLBA").[191] Supported by an overwhelming majority in Congress and signed into law by President Bush in 2002, the NCLBA is remarkable for its ambition and intrusion into what was once considered a traditional state and local domain.[192] The NCLBA revises the Elementary and Secondary Education Act ("ESEA"),[193] first enacted in 1965 and reauthorized periodically ever since.[194] The most important and well-known component of the ESEA, Title I, is the federal government's single largest aid program and ostensibly seeks to assist disadvantaged students. In exchange for this federal funding, which all states receive, states and local school districts must comply with various federal education requirements.

Under the NCLBA, states are now obligated to develop and implement "challenging" academic content and performance standards in reading, math, and science.[195] States must now also implement assessments, aligned with their academic standards, to measure student and school performance.[196] Finally, accountability measures must reveal whether schools are making adequate yearly progress in bringing all students to a level of proficiency within twelve years.[197] The NCLBA requires adequate yearly progress reports from all public school districts, regardless of whether they receive federal Title I funds.[198] These requirements now include a robust testing regime with accountability measures that can trigger substantive

(describing New York's and North Carolina's development of education standards and assessments).

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

192. *See, e.g.*, Sam Dillon, *Thousands of Schools May Run Afoul of New Law*, N.Y. TIMES, Feb. 16, 2003, at A33 (quoting Paul Houston, executive director of the American Association of School Administrators, who called the law "the largest federal intrusion into the educational affairs of the states in the history of this country"). For a description of the bipartisan congressional support for the NCLBA, see Dan Seligman, *Children Will Be Left Behind*, FORBES, Mar. 15, 2004, at 86.

193. Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended in scattered sections of 20 U.S.C.).

194. Prior to the NCLBA, the most recent reauthorization of Title I occurred in 1994. *See* Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified as amended in scattered sections of 20 U.S.C.) [hereinafter IASA].

195. NCLBA, § 1111(b)(1)(A), (C).

196. NCLBA, § 1111(b)(3), 1116.

197. NCLBA, § 1111(b)(2)(C), (F).

198. Districts receiving Title I funding are held to stricter accountability mechanisms. *See* NCLBA, § 1111(b)(1)(A), (b)(5), (b)(7), (b)(8).

consequences, ultimately leading to a state takeover of any school that fails to make adequate progress after five consecutive years.[199] Although some commentators praise and others criticize this new federal foray into educational policymaking terrain, few dispute that the new federal legislation reflects a clear orientation on outcomes rather than inputs.[200]

One of the NCLBA's key strategic elements is that it leverages a state's *own* standards and assessment program. That is, the NCLBA functionally holds states to educational standards that they have articulated for themselves. This element, while politically shrewd, is not without cost, however. By leveraging a state's own standards as the trigger for the imposition of federally-imposed consequences for a district's failure to achieve NCLBA transforms a potential reform asset—state efforts to monitor student and school performance—into a potential liability.[201] State test scores that might have been used by a state to its advantage now amount to a potential liability in that they trigger under the NCLBA a single judgment regarding yearly progress: success or failure.[202] States must affix a failing label to every school that does not succeed. This label will likely become a chief proxy for school quality, one that will be difficult to rebut.[203] As educators readily understand: "It's going to take a lot of explaining," if and when large numbers of schools fail to make adequate yearly progress under the NCLBA.[204] Indeed, not surprisingly, many states confronting new federal consequences flowing from failing to meet their own standards have begun to dilute

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199. 20 U.S.C. § 6301 et seq. *See also* Paul T. O'Neill, *High States Testing Law and Litigation*, 2003 B.Y.U. EDUC. & L.J. 623, 633 (2003) (describing various statutory requirements imposed by NCLBA).

200. *See e.g.*, Heise, *supra* note 189 (describing Goals 2000); James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703 (2003) (describing the No Child Left Behind Act).

201. For a general critique of the NCLBA, see James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004).

202. *See, e.g.*, June Kronholtz, *Education Plan Falling Short: States Struggle to Meet Standards of No Child Left Behind*, WALL ST. J., Sept. 17, 2003, at A4.

203. *See* Lynn Olson, *All States Get Federal Nod on Key Plans*, EDUC. WK., June 18, 2003, at 1, 20 (reporting that Virginia's chairman of the state board of education agreed to comply with the federal law "only under strong protest," expressing concern that schools given the highest rating under the state accountability system might nonetheless "be viewed as 'failing' in some respect under the federal law").

204. *Id.* at 21 (quoting Michael Ward, North Carolina's education superintendent). Ward also admitted that one of the North Carolina's "most intensive efforts has been around a communication plan," presumably to provide an explanation that will placate parents and others concerned by schools' failure to make AYP. *Id.*

state standards rather than risk public censure and federal sanctions.[205]

The idea behind identifying high- and low-performing schools under accountability systems is to assist school officials' efforts to improve them. The welcome goal, and a rationally-related means to that goal, combine to generate a defensible, perhaps attractive policy. Such an accountability system, however, can generate alternative consequences as well—some of which may undermine school integration efforts. Classifying schools as high- and low-achieving on the basis of standardized tests will inevitably and quickly become the principal prism through which people form impressions about school quality[206] and thereby threatens to crowd out other plausible proxies for quality.[207] Identifying schools as underperforming might induce impatient parents, who are unwilling to wait for the unpredictable fruits of a school remediation plan or reform measure, and who possess the economic ability, to depart districts served by failing schools. To the extent that such parents are more likely to be white, wealthy, or both, standards-based accountability systems provide more impetus toward neighborhood—and thus public school—stratification.

Indeed, researchers have already begun to detect evidence of standardized testing's adverse influence on the resegregation of integrated high schools.[208] They note how parents of children in these schools have become more skeptical of the value of integration in light of the schools' decline in performance on standardized tests.[209] Their findings suggest that middle-class households will tolerate school integration, but only so long as it does not adversely impact test performance.[210] As a result, well-regarded integrated schools,

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205. *See* Sam Dillon, *States are Relaxing Education Standards to Avoid Sanctions from Federal Law*, N.Y. TIMES, May 22, 2003, at A29; Peter Schrag, *Bush's Education Fraud*, AM. PROSPECT, Feb. 2004, at 38, 40.

206. *See infra* Part IV.B.3.

207. Amy Stuart Wells & Jennifer Jellison Holme, No Accountability for Diversity: Standardized Tests and the Demise of Racially Mixed Schools (Aug. 30, 2002) (unpublisbed paper, on file with author) at 10 ("Overall, we see a trend in our data from school reputations based on a broad array of factors – *i.e.*, athletics, theater, band, curriculum, diversity, national merit scholars, college acceptance of graduates, and student diversity – to much more narrowly defined reputations, based much more heavily on standardized test scores.").

208. *See* John C. Boger, *Education's "Perfect Storm"? Racial Resegregation, High Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375, 1441-42 (2003) (noting standards and assessments' adverse impact on school integration in North Carolina); Wells & Holme, supra note 207 (studying the effects of standardized test results on the racial composition of six integrated public high schools).

209. Wells & Holme, *supra* note 207, at 1.

210. *See generally id.*

including some in Table 2, have lost or are in the process of losing white students, as well as many middle-class African-American and Hispanic students.[211] Whereas these integrated schools were once valued based on an array of criteria, schools are now increasingly judged on test scores alone.

B. Implications for Future Equal Educational Opportunity Litigation: Litigated Learning?

On the eve of the fiftieth anniversary of the *Brown* decision, a new generation of policymakers (and future litigants) prepares to launch a new line of litigation that seeks to equalize student academic achievement. Litigants will soon ask the very courts that proved unable to integrate the schools or equalize school spending to shoulder the even more arduous goal of enhancing equal education by equalizing student educational outcomes. And to an even greater degree than for school desegregation or finance, courts and lawsuits seem ill-equipped to shoulder this task.

The next generation of education reform litigation will confront important challenges that flow from a relatively new focus on standards and assessments. The three main challenges to achieving success arise from the inherent complexities surrounding student achievement, the location of critical variables deep inside the classroom, and suburbanites' educational interests.

1. Education's Black Box: Student Achievement

Student academic achievement remains notoriously difficult to understand. Although achievement differences between and among students are manifestly clear, answers to such questions as *what* variables systematically influence student achievement and *why* differences emerge elude. These questions persist not for want of study, however. As previously discussed, debates about American student achievement appear ceaseless.[212]

Although most concede that the precise determinants of student academic achievement might never be fully understood, a few broad themes have survived the test of time in the research literatures. Professor James Coleman's seminal work rightfully

211. *See* Wells & Holme, *supra* note 207, at 13.

212. *See supra* Part III.B.3.

anchors discussions about student achievement.[213] A review of Coleman's work reveals two pivotal yet seemingly conflicting themes. First, Coleman noted that peer (or socioeconomic) effects are more important than school spending.[214] Second, institutions (such as certain schools) that generate social capital can also enhance student achievement.[215] The two themes appear at one level to run in opposite directions: peer effects emphasize variables outside of schools, and institutional effects emphasize schools themselves. At another level, however, the two themes harmonize. That is, certain types of schools have the ability to generate positive peer interactions.

Notwithstanding the emergence of general themes, much about what variables influence student achievement remains unknown. Such uncertainty makes it difficult for policymakers to raise student achievement. What is difficult for policymakers is even more difficult for litigators seeking to generate policy outcomes through the courts.

2. From Outside to Inside the Classroom

Changes in how equal educational opportunity is construed implicate the focus of related litigation efforts. Past reform and litigation efforts seeking to enhance equal educational opportunity focused on such variables as race and finance. Both variables are located outside the classroom. Reform and litigation efforts, however, increasingly focus on such variables as academic standards and assessments. These factors are located inside the classroom, attend more directly to learning processes, and implicate teaching and curriculum practices and policy. On the one hand, such variables are more likely to influence the desired outcome of increased student achievement. On the other hand, because these variables go to the core of delicate relations between teachers, students, and parents, these variables are much less amenable to deft manipulation by the blunt instrument of litigation.

In the service of education, the many intersections involving students, teachers, and parents play critical roles. Given the sometimes complementary and sometimes competing individual and

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213. For an insightful essay synthesizing Coleman's research, see Richard D. Kahlenberg, *Learning From James Coleman*, 144 PUB. INT. 54 (2001).

214. *See generally* COLEMAN REPORT, *supra* note 8, at 22 (noting that "[i]t appears that variation in the facilities and curriculums of the schools account for relatively little variation in pupil achievement," whereas "it appears that a pupil's achievement is strongly related to the educational background and aspirations of the other students in the school").

215. *See generally* JAMES S. COLEMAN ET AL., HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED (1982) (noting the comparative advantages enjoyed by private Catholic schools).

institutional incentives, what frequently arises is a delicate balance that, with any luck, will yield desired student achievement. This delicate balance is fraught with nuances and is frequently highly individualistic. While this balance of interests certainly responds to policy pushes and pulls, to think that it can be guided through the litigation process and court decisions is naive, at best.

School desegregation supplies a helpful analogy. Even if it was the case that litigation could increase school integration levels, increased racial understanding—part of *Brown*'s promise—does not necessarily follow. While perhaps integration is a necessary predicate to increased racial understanding, an increase in the former does not guarantee an increase in the latter. That is, the most one can rightfully expect from litigation is to increase integration levels. As previously discussed, it is unclear whether litigation can achieve even that. Consequently, it is far too much to ask for any legal institution to deliver the more important—yet subtle—increases in racial understanding and tolerance. Those outcomes, however desirable, are the product of a host of complicated factors that fall far outside of the reach of litigation and law.

3. Suburban Opposition

Increasingly important, though often ignored, stakeholders in many education reform efforts are suburbanites, particularly suburban parents.[216] Received wisdom suggests that suburban school districts should either support or at least not resist the new focus on student and school outcomes. After all, higher performing students and school districts are more likely found in suburban areas.[217] Consequently, suburban parents are generally satisfied with the public schools they support and their children attend.[218] This general satisfaction, in turn, helps fuel and buoy favorable suburban property values.[219]

Efforts—through litigation or legislation—by those seeking to enhance education equity involving implementing robust standards and assessment regimes can expect some degree of opposition from many suburbanites. Test-based standards and assessment

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216. The argument in this subpart is a further refinement of an argument articulated in Ryan & Heise, *supra* note 83, *passim*.

217. *See* Ryan & Heise, *supra* note 83, at 2106 & n.331.

218. TERRY M. MOE, SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC 34-35 (2001).

219. *See, e.g.*, Sandra E. Black, *Do Better Schools Matter? Parental Valuation of Elementary Education*, 114 Q.J. ECON. 577, 578 (1999) (noting correlation between student test scores and district residential home values).

accountability regimes can pose something of a threat to the status quo for some suburban school districts. Many suburban districts fear that the inevitable pull of standardized tests will lead to increased "dumbing down" in the curriculum and standardization in academic offerings.[220] Many desirable suburban school districts are justifiably proud of their rich curricula. The more esoteric elements of an advanced curriculum might give way to a defensive posture reflecting a desire to ensure strong test results. Some districts might understandably and prudently devote additional class time to state-mandated test material at the expense of advanced creative writing or a class in Shakespeare's tragedies.[221] As a consequence, the interests of the district as a whole and specific subsets of students might depart more sharply.

A second, related source of suburban opposition involves the emerging consequences of recent state and federal education legislation. Suburban school districts that presently benefit from desirable reputations might resist any new testing system that threatens to tarnish their academic reputation. The tarnish flows from the combination of two factors. First, there is an emerging push for accountability. Second, there is an increased call for the public dissemination of assessment results in a form that fuels comparisons among schools within a district, as well as across districts. Even the potential for a conflict between new standardized test results and existing expectations will generate great concern among suburban parents and homeowners. For many, the price might be too high, especially in light of the substantial investment many suburban communities make in their public schools. This group will surely demand to know why their local schools, which they believed to be of high quality and are crucial to local property values, fail to perform as expected.[222]

Evidence from Florida's test-based school accountability system illustrates these fears. Florida grades its public schools and assigns a letter grade (A through F) on the basis of test scores.[223] Economists have noted that even slight distinctions between school grades translated into consequential fluctuations in home values.[224]

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220. *See, e.g.*, James Traub, *The Test Mess*, N.Y. TIMES MAG., Apr. 7, 2002, at 46.

221. This was part of the concern raised in Scarsdale, New York. *Id.* at 51.

222. *See* David N. Figlio & Maurice E. Lucas, *What's in a Grade? School Report Cards and the Housing Market*, 94 AM. ECON. REV. 591 (2004). (while controlling for other measures of school quality, as well as for neighborhood and property attributes, providing data, although inconclusive, that the impact may be temporary).

223. *See* Ryan, *supra* note 201.

224. *See generally* Figlio & Lucas, *supra* note 222, at 595-600, 599 tbl.2.

If Florida's example is even remotely illustrative, the stakes to suburbanites posed by standards and assessments are considerable. Setting aside the likely discomfort that would inexorably flow from a revelation that suburban schoolchildren might not be as "advanced" as conventional wisdom implies, significant economic consequences might befall suburban America as well. One asset highly exposed to education reform, discomforting to suburban schools, is suburban housing values. In many areas, suburban home values are tightly bound to the perceived or real performance of suburban schools.[225] Only after realizing that for middle-class Americans equity in their homes represents their most significant financial asset can one begin to fully grasp the enormity of the economic interest at stake.[226] Another critical aspect of suburbanites' role in education reform is that when they "perceive a threat" to their interests—especially their public schools—they fight back, and they usually win."[227] To the extent that future education reform battles will implicate suburban interests and place their interests in perceived or real jeopardy, there is little or no reason to think that suburbs' success rate at self-protection will not continue.

V. CONCLUSION

The legendary (and ongoing) difficulties incident to an effort to influence the demographic composition of public schools pale in comparison to the difficulties that will be encountered as litigants seek to influence student academic achievement through litigation. If the reach of the courts was stretched in the school desegregation and finance contexts, it will hit a frustrating "wall" quickly as such litigation seeks squarely to address student achievement through standards- and assessments-based lawsuits. This is so because, compared to school demographic and spending profiles, student academic achievement is exceptionally complex and involves a host of variables that fall far outside of courts' province. Even if such variables were within courts' reach, reformers that press litigation into service are deploying a blunt instrument into terrain noted for its need for nuance and subtlety.

That litigation possesses structural limitations that restrict its ability to achieve desired social change is surely no reason to ignore

225. *See* FISCHEL, *supra* note 110, at 1-18; Black, *supra* note 219, at 577-78.

226. *See* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 8, 16 (1995) ("Home ownership is without question the single most important means of accumulating assets.").

227. Ryan & Heise, supra note 83, at 2046. For a full explication of this thesis, see *id.*

the need for education reform or to relinquish the quest for greater educational opportunity. *Brown* achieved the seminal goal of calling attention to education's crucial role in our society and constitutional structure. Greater understanding of education's critical roles made the need for greater equity in the distribution of educational resources more compelling. Moreover, although the courts play a role in enhancing equal educational opportunity—indeed, perhaps, a critical role—courts must join other complementary social, economic, and political institutions and actors to realize the desired social change. Efforts to reform something as complicated as education that fail to see how the courts need to work in consort with other critical institutions are guilty of either hubris, naiveté, or both. More important, such efforts are doomed to fail.

Just as the fiftieth anniversary of the *Brown* decision calls for an appropriate celebration of what law can achieve—especially in the education field—it is an equally appropriate moment to consider what law cannot achieve. Recognizing the law's limitations in this context does not diminish *Brown*'s legacy. If anything, a deeper and fuller understanding of what law can and cannot achieve and law's role within a broader institutional context will enhance reformers' efforts at making the equal educational opportunity doctrine come alive. Such a result fully comports with *Brown*'s legacy.

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