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## An Argument for a Return to Plessy v. Ferguson: Why Illinois Should Reconsider the Doctrine of "Separate but Equal" Public Schools

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# An Argument for a Return to *Plessy v. Ferguson*: Why Illinois Should Reconsider the Doctrine of “Separate but Equal” Public Schools

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## I. INTRODUCTION

In 1896, the Supreme Court gave its blessing to the much maligned “separate but equal” doctrine.<sup>1</sup> “Under that doctrine,” established in the *Plessy v. Ferguson* case, “equality of treatment is accorded when the races are provided substantially equal facilities even though these facilities be separate.”<sup>2</sup> While the *Plessy* doctrine has been almost uniformly criticized as an immoral and racist doctrine, this article will point out how many African-American and minority students would in many ways be better-off under the doctrine of “separate but equal” than under today’s watered-down interpretation of the Court’s landmark decision in *Brown v. Board of Education*,<sup>3</sup> which struck down “separate but equal” as unconstitutional.

Despite insistence to the contrary, there were actually two primary objectives being sought—and to some extent recognized—in the landmark *Brown v. Board of Education* case: first, racial integration/public school desegregation; and second, “equal educational opportunity.”<sup>4</sup> More than fifty years later, and with precious few exceptions, *neither* goal has been meaningfully achieved on nearly any level whatsoever. Today, minority public school students continue to receive “markedly inadequate and *unequal* educational opportunities.”<sup>5</sup>

In Illinois today, because the majority of the state’s worst schools are predominantly African-American, a black student is 4000% more likely to attend a chronically failing public school than a white student. This is not a typographical error—not 50% more likely, which would be a tragic disparity, not twice as likely, or even 10, 20, or 30 times more likely, but 40 times more likely.<sup>6</sup> This is due, in large part, to the state’s overreliance on property taxes to fund its system of public education, combined with the fact that public schools in Illinois today are as segregated, “if not more so,” than they were pre-*Brown*.<sup>7</sup> Nationwide, public schools are resegregating at an

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1. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

2. *Brown v. Bd. of Educ.*, 347 U.S. 483, 487 (1954) (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

3. 347 U.S. 483 (1954).

4. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2791 (Kennedy, J., concurring in part and concurring in the judgment) (citing *Brown*, 347 U.S. 483 (1954)).

5. *Grutter v. Bollinger*, 539 U.S. 306, 346 (2003) (Ginsburg, J., concurring) (emphasis added); see also Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1655-56 (2007).

6. Diane Rado, Darnell Little & Grace Aduroja, *Still Separate, Unequal*, CHI. TRIB., May 9, 2004, § 1, at 1.

7. Christine Rienstra Kiracofe, *Diversity as a Compelling Interest*, 208 EDUC. L. REP. 691, 702 (2006).

alarming rate.<sup>8</sup> In Illinois, specifically, “fully two-thirds of Illinois schools were 80%–100% single race.”<sup>9</sup> Clearly, Illinois has mastered the “separate” part of the doctrine; the least it could do is strive for some meaningful level of equality in its public schools.<sup>10</sup>

Of course, desegregation of Illinois public schools should ultimately still be a primary goal, but given the clear trend of the U.S. Supreme Court since the late 1960s, which has progressively limited the types of voluntary, affirmative steps that states and school districts may employ to achieve racial integration in schools, this goal will almost certainly have to be achieved through a narrowly-tailored, legislatively-crafted solution.<sup>11</sup> Moreover, the Illinois Supreme Court has also imposed an additional hurdle in the path of furthering this goal by removing the Illinois courts as an avenue to address disparate school funding, citing the U.S. Supreme Court’s federal constitutional analysis, while summarily dismissing its own ability to rule on the state constitutionality of Illinois’s system of school funding.<sup>12</sup> Achieving the benefits of racial integration over the long term will, therefore, require narrowly tailored racial classifications to achieve the mutually-

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8. *Seattle*, 127 S. Ct. at 2801-02 (Breyer, J., dissenting). Despite substantial progress in racial integration from 1968–1980, those trends “reversed direction” between 1980 and 2000. *Id.* at 2801. “Today, more than one in six black children attend a school that is 99%–100% minority.” *Id.* at 2802.

9. Kiracofe, *supra* note 7, at 692 (citing ILL. STATE BD. OF EDUC., 2004 ILLINOIS STATE REPORT CARD (2004), [http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2004&code=2004StateReport\\_E.pdf](http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2004&code=2004StateReport_E.pdf)).

10. See Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts’ Role*, 81 N.C. L. REV. 1597, 1622 (2003). “Tragically today, America has schools that are increasingly separate and unequal.” *Id.* at 1622 (emphasis added).

11. See *Seattle*, 127 S. Ct. 2738 (2007) (plurality opinion) (striking down voluntary state busing and school selection programs designed to create racial diversity); *Missouri v. Jenkins*, 515 U.S. 70 (1995) (invalidating a Kansas City plan to desegregate by incentivizing whites to move from the suburbs to the city through the creation of a “magnet” district); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976) (prohibiting enforcement of a previously mandated desegregation order on the grounds that the district had achieved desegregated or “unitary” status for one year); *Milliken v. Bradley*, 418 U.S. 717 (1974) (striking down a Michigan plan to desegregate Detroit schools by interdistrict busing between the white suburbs and black city); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (upholding Texas’s system of financing public education despite inequalities, and holding that education was not a fundamental right).

12. *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1193, 1196 (Ill. 1996) (holding that the state had a rational-basis interest in furthering “local control” of schools, and that the issue of whether the state’s funding system comports with the Illinois Constitution’s requirement of a “system of high quality public educational institutions and services” was nonjusticiable (emphasis added)).

beneficial, compelling interest of creating educational diversity<sup>13</sup> and/or the alternative, permissible state actions involving socioeconomic integration and at least some level of school funding equality.<sup>14</sup>

## II. ORGANIZATION OF THE ARTICLE

This article will give a brief statistical overview of de facto segregation<sup>15</sup> and inequality in public schools, including trends toward racial integration from the mid-1960s through the early 1980s, and the subsequent trends towards resegregation over the past twenty-five years.<sup>16</sup> Second, this article will provide a short history of educational rights jurisprudence including applicable Supreme Court equal protection analysis and a critique of the Court's inconsistent and sometimes contradictory holdings as they pertain to both education as a right, as well as racial and socioeconomically based classifications.<sup>17</sup> The article will also provide a brief survey of school funding litigation based on state constitutions, with special attention to the Illinois case of *Committee for Educational Rights v. Edgar*.<sup>18</sup> Several policy arguments will be advanced in contravention of the holdings of both the Illinois and U.S. Supreme Court, and finally, short- and long-term policy proposals will be discussed, both in terms of the challenging precedent and political realities that exist, as well as positive indicators and the exam-

13. *Seattle*, 127 S. Ct. at 2797 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

14. See Christine Rienstra Kiracofe, *The Natural Relationship Between Desegregation and School Funding Litigation*, 184 EDUC. L. REP. 1, 3-4, 14 (2004).

15. De facto segregation is essentially defined as segregation or "resegregation [that] is a product not of state action but of private choices," which according to Supreme Court precedent "does not have constitutional implications." *Freeman v. Pitts*, 503 U.S. 467, 495 (1992). Only "de jure" segregation—that segregation supported and/or required by a state—violates the constitution. *Id. But see* *Milliken v. Bradley*, 418 U.S. 717, 761 (1974) (Douglas, J., dissenting) ("[T]here is so far as the school cases go no constitutional difference between de facto and de jure segregation. Each school board performs state action for Fourteenth Amendment purposes when it draws the lines that confine it to a given area, when it builds schools at particular sites, or when it allocates students. The creation of the school districts in Metropolitan Detroit either maintained existing segregation or caused additional segregation. Restrictive covenants maintained by state action or inaction build black ghettos. It is state action when public funds are dispensed by housing agencies to build racial ghettos. Where a community is racially mixed and school authorities segregate schools, or assign black teachers to black schools or close schools in fringe areas and build new schools in black areas and in more distant white areas, the State creates and nurtures a segregated school system, just as surely as did those States involved in *Brown v. Board of Education*, 347 U.S. 483, when they maintained dual school systems.").

16. *Seattle*, 127 S. Ct. at 2801-02 (Breyer, J., dissenting).

17. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

18. *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996).

ple set by other states in terms of providing more equitable educational opportunities.

The short-term proposal of providing equal educational opportunities within Illinois's already [de facto] segregated schools will look not only at how Illinois's holding on justiciability is part of a very small minority position, but also at the questions raised by the results of funding parity in the one state in which a state high court ruled that de facto segregation constitutionally requires equality in school funding.<sup>19</sup> The long-term policy proposal of socioeconomic integration and its corollary, racial integration for the mutual benefit of all students, is dependent upon the achievement of the first, in that, politically, it seems unlikely that it could be achieved in a system of publicly funded education in which the tables were turned and members of higher socioeconomic classes were forced to send their children to schools receiving unequal levels of funding.<sup>20</sup> The article will end with an analysis of the challenges and shortcomings of school funding litigation and a look at the recent Supreme Court holdings in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>21</sup> a 2007 case, and *Grutter v. Bollinger*,<sup>22</sup> a 2003 case. While there are some negative implications from Chief Justice Roberts's plurality opinion in *Seattle*, there is promise and a potential roadmap for successful legislation found in *Grutter*, as well as in Justice Kennedy's decisive concurrence in *Seattle*.<sup>23</sup>

### III. STATISTICAL OVERVIEW: THE CURRENT STATE OF SEGREGATION AND INEQUALITY NATIONWIDE, AND ILLINOIS'S DUBIOUS DISTINCTION AS ONE OF THE WORST STATES IN THE NATION

#### A. SEGREGATION

In 1966, Dr. Martin Luther King, Jr. was persuaded to move his family to Chicago to focus his and the Southern Christian Leadership Conference's efforts on serious race issues in the North. While the movement ultimately centered much of its efforts around the issue of fair housing practices, the initial motivation was in response to the policies of Chicago Public Schools

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19. See *id.* at 1193; see also *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996).

20. See Derrick Bell, *Brown and the Interest-Convergence Dilemma*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 91, 95 (Derrick Bell ed., 1980) ("The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites . . .").

21. 127 S. Ct. 2738 (2007).

22. 539 U.S. 306 (2003).

23. *Seattle*, 127 S. Ct. at 2788-97 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

that had resulted in starkly segregated schools.<sup>24</sup> While Chicago made some progress under a court-ordered desegregation order<sup>25</sup> forty years after Dr. King's stay in Chicago, Chicago public schools are as segregated as they were when Dr. King was assassinated.<sup>25</sup> This problem is not limited to just schools in Chicago. In fact, a recent study by The Civil Rights Project at Harvard University ranked Illinois as a whole "among the top four segregated states in the nation for black students."<sup>26</sup>

Nationwide, resegregation is a consistent trend characterized by substantial progress and "considerable racial integration" between 1968 and 1980 and an unfortunate reversal of direction in the past twenty-five years.<sup>27</sup> It should be further noted that the resegregation trends are not insubstantial or isolated by any means—in fact, both the percentage of black students attending schools that have a majority of minority students (despite making up only 13.4% of the national population<sup>28</sup>), as well as the percentage of black students attending schools in which more than 90% of the students are nonwhite, have increased significantly in every region of the United States.<sup>29</sup> Notably, in the Midwest, the percentage of black students

24. James Ralph, *Martin Luther King, Jr., in Chicago*, in THE ELECTRONIC ENCYCLOPEDIA OF CHICAGO, <http://www.encyclopedia.chicagohistory.org/pages/1438.html> (last visited Nov. 4, 2008).

25. Clarence Page, *What Brown Did Not Bring to Education*, CHI. TRIB., May 17, 2004, § 1, at 29; see also SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM xvii (2004) ("Black and brown public school children are now more segregated than at any time in the past thirty years. Typically they are relegated to high-poverty, racially identifiable schools that offer a separate and unequal education.").

26. Rado et al., *supra* note 6, § 1, at 1.

27. *Seattle*, 127 S. Ct. at 2801-02 (Breyer, J., dissenting).

28. Press Release, U.S. Census Bureau, *Minority Population Tops 100 Million* (May 17, 2007), available at <http://www.census.gov/Press-Release/www/releases/archives/population/010048.html> (on file with author).

29. CHARLES T. CLOTFELTER, AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 56 tbl.2.1 (2004). While the table clearly shows a trend towards resegregation in each region of the country, there is some slight variance in when that trend began. See *id.* Not surprisingly, the table shows virtually 100% of black students in the South attending segregated schools with at least 90% minority populations, while this was true for only 53% of black students in the Midwest; however, it is interesting to note that in some instances these measurements of segregation are approaching pre-*Brown* levels, and in some cases, show worse levels of segregation in 2000 than in 1960. *Id.* For example, in western states, while the trend toward resegregation in schools with 90% or more minority populations did not begin until the late 1980s, the percentage of black students attending majority minority schools has actually increased significantly over 1960s levels. *Id.* Conversely, in northeastern states, while the percentage of black students in mostly minority districts peaked in 1980 at nearly 80% and then declined during the remainder of that decade, only to trend, once again, toward resegregation during the 1990s, disturbingly, the percentage of black students in the Northeast who attend schools that are more than 90% minority now substantially outnumbers the percentage from nearly fifty years ago in 1960. *Id.* More alarm-



who attended public schools that were more than 90% nonwhite actually increased after *Brown*, before it began to decrease during the 1970s and 1980s, only to increase again during the 1990s.<sup>30</sup> The percentage of black students in the Midwest attending highly segregated (defined as 90% or more) minority schools is within just seven percentage points of the pre-*Brown* level of segregation.<sup>31</sup> Perhaps even more disheartening, Justice Breyer noted in his recent dissent to the *Parents Involved in Community Schools v. Seattle School District No. 1* decision, that “[t]oday, more than one in six black children attend a school that is 99–100% minority.”<sup>32</sup> Since Caucasians constitute a substantial majority in this country,<sup>33</sup> yet comprise less than 1% of the student population where more than 2.3 million African-American and Latino students attend school,<sup>34</sup> these public schools have been dubbed “apartheid schools” by some commentators.<sup>35</sup>

In Illinois, and Chicago particularly, it is easy to see how these shocking statistics create “apartheid schooling”<sup>36</sup> when one looks at the geographically concentrated demographics of Chicago’s neighborhoods, as well as other areas of the state. Of course, Chicago is famous for its ethnic diversity, with the city’s population being nearly evenly white, Hispanic, and African-American.<sup>37</sup> Even Chicago’s white population is diverse.<sup>38</sup> But

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ing still, the percentage of black students attending public schools where more than 90% of the students are nonwhite is now higher than any other region in the country, including the South, which is actually comparatively near the bottom of the segregation scale by these measurements. *Id.*

30. CHARLES T. CLOTFELTER, AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 56 tbl.2.1 (2004).

31. *Id.*

32. *Seattle*, 127 S. Ct. at 2802 (Breyer, J., dissenting).

33. Press Release, U.S. Census Bureau, Minority Population Tops 100 Million (May 17, 2007), available at <http://www.census.gov/Press-Release/www/releases/archives/population/010048.html> (on file with author).

34. *Seattle*, 127 S. Ct. at 2802 (Breyer, J., dissenting).

35. *E.g.*, JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA 238 (2005).

36. *Id.*

37. U.S. Census Bureau, State and County Quick Facts: Chicago, Illinois, <http://quickfacts.census.gov/qfd/states/17/1714000.html> (last visited Sept. 16, 2008). Chicago is roughly 42% white, 37% African-American, 26% Hispanic, and 4% Asian or Pacific Islander. *Id.*

38. *Demographics of Chicago, in* WIKIPEDIA, [http://en.wikipedia.org/wiki/Demographics\\_of\\_Chicago](http://en.wikipedia.org/wiki/Demographics_of_Chicago) (last visited Sept. 16, 2008). Chicago has a Polish population that is second only to the capital of Poland, the second-largest concentration of Gorals outside of Europe, one of the largest concentrations of Italian-Americans with approximately half a million in the metropolitan area, a large population of Bulgarians and Lithuanians, the second-largest Serbian and the third-largest Greek population of any city in the world, a Romanian population of more than 100,000, and approximately 80,000 Assyrians. *Id.* On top of that, Chicago’s nonwhite population is also diverse and is home to the third-largest South Asian population in the United States, the second-

Chicago is also terribly segregated within the seventy-seven different official neighborhoods that the city recognizes within its city limits.<sup>39</sup> While many of these neighborhoods are large and contain several smaller neighborhoods with even tighter pockets of segregation, the vast majority of African-Americans in Chicago, nearly 75%, live in neighborhoods that are overwhelmingly—at least 90%—black.<sup>40</sup> In fact, Chicago was ranked as one of the most racially segregated metropolitan areas in the United States, and was recognized as the fourth most segregated in terms of black–white school segregation by the recent Chicago Urban League study, *Still Separate, Unequal: Race, Place, Policy and the State of Black Chicago*.<sup>41</sup> And of the city's fifteen most impoverished neighborhoods in 1999, fourteen were disproportionately black, eleven were 94%–98% percent black, and all fifteen of the city's poorest neighborhoods were more than 80% minority.<sup>42</sup>

The effect of racially segregated housing patterns within Chicago's neighborhoods has had the inevitable result of creating racially segregated schools; however, the degree of racial segregation is exacerbated by white parents sending their children to private schools. To wit, while 36% of the population of Chicago is white, only 9.1% of the Chicago Public School students are white.<sup>43</sup> Of course, Chicago is not the only city with segregated schools. East St. Louis is a de facto segregated city with over 98% of its residents being African-American and where “[s]everal schools are still 100 percent black.”<sup>44</sup> In Aurora, Illinois, an interesting contrast can be made between its School District 131, whose lone high school has a combined Hispanic and black student population making up over 90% of its student

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largest Puerto Rican population in the continental U.S., and is the center of the Palestinian and Jordanian immigrant communities in the United States as well. *Id.*

39. See CityofChicago.org, <http://egov.cityofchicago.org> (follow “Chicago Maps” link to “Census Maps” link) (last visited on Sept. 16, 2008); see also Chicago Neighborhoods, <http://neighborhoods.chicago.il.us/> (last visited Dec. 21, 2007) (providing maps of Chicago's seventy-seven neighborhoods, as well as limited demographic information).

40. Paul Street, Remarks at Meeting of the United Way: Still Separate, Unequal: Race, Place, Policy and Racism Avoidance in and Around Chicago (Aug. 4, 2005), in *DISSIDENT VOICE*, <http://www.dissidentvoice.org/Aug05/Street0812.htm> (on file with author) (citing THE CHI. URBAN LEAGUE, STUDY: STILL SEPARATE, UNEQUAL: RACE, PLACE, POLICY AND THE STATE OF BLACK CHICAGO (2005)).

41. Don Terry, *Northern Exposure: Nothing He'd Seen in the South Prepared Martin Luther King for the Streets of Marquette Park in 1966*, CHI TRIB., Jan. 15, 2006, (Magazine), at 12.

42. *Id.*; see also Rumanna Hussain, *Racial Segregation Holds Firm Grip*, Report Says, CHI. SUN TIMES, June 22, 2005 (on file with author), available at 2006 WLNR 7212870.

43. Press Release, Chicago Public Schools, New Settlement Could End Decades-Old Consent Decree (May 2, 2006), available at [http://www.cps.k12.il.us/AboutCPS/PressReleases/May\\_2006/deseg.htm](http://www.cps.k12.il.us/AboutCPS/PressReleases/May_2006/deseg.htm).

44. Rado et al., *supra* note 6, at 15.

body, and School District 203 in neighboring Naperville, Illinois, which has two high schools—one with a combined black and Hispanic student population of 5.3% and the other with a combined 7.7% (a minority percentage about fifteen times smaller).<sup>45</sup> Even more interesting is the difference between Aurora's School District 131 and School District 204 which is shared between Naperville and the part of Aurora that lies within the affluent county of DuPage.

While over 44,000 people live in a part of District 204 with an Aurora address,<sup>46</sup> one will almost never see an advertisement for a home for sale or apartment for lease in that area that will mention Aurora—instead such ads will use one of two code words: “Fox Valley” (signifying its proximity to the formerly named Fox Valley shopping mall), or more likely, “Naperville Schools.” As will be discussed in the next section, this distinction is likely made to point out to potential buyers the vast inequalities between the two school districts that result from Illinois's system of school funding, which functions as a mechanism that aids and even encourages de facto segregation within the same municipality as manifested by the fact that the overall percentage of white and Asian students in School District 204 (82%) is more than ten times higher than the percentage in East Aurora School District 131 (8.0% and shrinking).<sup>47</sup>

## B. INEQUALITY

Disproportionately high minority populations and inequality in public schools generally go hand in hand as evidenced by the fact that in Illinois, students in predominately white schools are 85% more likely to meet or exceed academic standards than students in predominately black schools.<sup>48</sup> Nationally, “[s]tudy after study documents that high-poverty and high-minority schools have less qualified and less experienced teachers,” as

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45. Ill. State Bd. of Educ., Illinois State, District, and School eReport Card, <http://webprod.isbe.net/ereportcard/publicsite/getSearchCriteria.aspx> (input search terms for various school districts to pull up specific report cards) (last visited Nov. 4, 2008) (showing that East Aurora High School in District 131 is comprised of 9.3% white, 76.9% Hispanic, 12.4% black, and 1.0% Asian students).

46. U.S. CENSUS BUREAU, 2000 CENSUS DATA (on file with author), *available at* <http://factfinder.census.gov>.

47. Ill. State Bd. of Educ., Illinois State, District, and School eReport Card, <http://webprod.isbe.net/ereportcard/publicsite/getSearchCriteria.aspx> (input search terms for various school districts to pull up specific report cards) (last visited Nov. 4, 2008) (showing that School District 131 is only 7.3% white and 0.7% Asian, while the neighboring School District 204 has a 68% white and 14.2% Asian population).

48. Rado et al., *supra* note 6, at 14 (reporting that by way of percentages, nearly twice as many students [70.5%] in predominantly white schools met or exceeded state standards compared to only 38.1% of students in predominantly black schools, according to this *Chicago Tribune* analysis of approximately 4000 Illinois public schools).

well.<sup>49</sup> Moreover, “[m]inority children are concentrated in large, outdated, overcrowded schools that need repair and have large proportions of teachers who are not certified to teach in their subject areas.”<sup>50</sup> Indeed, in Illinois, a black student is nearly four times more likely to have a teacher that is not certified to teach the subject matter being taught than a white student.<sup>51</sup> As Charles Ogletree, Jr. reflected upon the fiftieth anniversary of *Brown*, “it remains overwhelmingly true that black and Latino children in central cities are educated in virtually all-minority schools with decidedly inferior facilities and educational opportunities.”<sup>52</sup>

As demonstrated by the “Naperville schools” illustration in the previous section, the quality of public education can have a continuing impact on the maintenance and even intensification of de facto segregated housing patterns. To the extent that Illinois’s system of funding public schools is specifically designed to allow for this level of disparity under the guise of the state’s interest in “local control,”<sup>53</sup> it can fairly be said that such de facto segregation, manifesting itself in a discriminatory impact on the quality of education of many minority students, is being caused by the current system of school funding and a failure on the part of all three branches of the Illinois state government to provide “an efficient system of high quality public education.”<sup>54</sup> As a matter of fact, between the 1990 and 2000 censuses, there was a net gain of about 21,000 white, non-Hispanic residents between these two school districts—22,698 whites moved into the primary zip code for the affluent, predominantly white school, while the lower-performing,

49. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 974 (2004) (citing COMM. ON EDUC. FIN., NAT’L RESEARCH COUNCIL, MAKING MONEY MATTER 169 (Helen F. Ladd & Janet S. Hansen eds., 1999) (describing uniform results of various studies)); see also DORINDA J. CARTER ET AL., LEGACIES OF BROWN: MULTIRACIAL EQUITY IN AMERICAN EDUCATION 3 (Dorinda J. Carter et al. eds., 2004) (“[S]tudents of color continue to have fewer qualified and effective teachers and less access to challenging and rigorous curricula. Their schools, by and large, get less state and local money without legislative intervention, and public education, as represented by political will and financial support, invests fewer of its hopes, expectations, and aspirations in students of color.”).

50. JANICE PETROVICH, BRINGING EQUITY BACK: RESEARCH FOR A NEW ERA IN AMERICAN EDUCATIONAL POLICY 3, 8 (Janice Petrovich & Amy Stuart Wells eds., 2005).

51. Rado et al., *supra* note 6, at 14.

52. CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF BROWN V. BOARD OF EDUCATION 260-61 (Charles J. Ogletree, Jr. ed., 2004).

53. *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1196 (Ill. 1996) (defining “local control” as “not only the opportunity for local participation in decision making[,] but also ‘the freedom to devote more money to the education of one’s children’” (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973))).

54. *Id.* at 1207 (Freeman, J., concurring in part and dissenting in part). Justice Freeman specifically uses the terminology “efficient” and “high quality” to correspond with the mandate found in article X, section 1 of the Illinois Constitution. *Id.*

predominantly minority school saw a net *decrease* in its white population of 1638, and a substantial increase in its Hispanic population.<sup>55</sup>

While it is certainly possible that affluent whites and Asians would continue to populate the one Aurora school district (204) at a rate that is more than 900% greater than the other Aurora school district (131) due to subconscious—or even overt—racial considerations, it seems far more likely that the choice is being made on the basis of school quality and the associated property value stability.<sup>56</sup> To be sure, as compared to one another, the predominantly black and Hispanic district (131) had a 26% lower graduation rate and vastly inferior proficiency results.<sup>57</sup> While over 70% of the students met or exceeded reading standards in the predominantly white District 204 high school, fewer than 29% met the reading standards at the predominantly black and Latino District 131 high school. Disparities were even greater in math and science where the respective rates of proficiency among students were 65.5% and 66.2% for the predominantly white school, and 23.2% and 18.4% for the predominantly minority school.<sup>58</sup>

While there is some debate about the direct correlation between resources and school quality, which will be discussed in the next section, the one area that most agree has a direct effect upon the quality of a public school student's education is teacher quality.<sup>59</sup> The fact that District 204 can pay its teachers on average 20% higher salaries than the neighboring community within the same city can pay provides a substantial incentive for the best teachers to teach in the district that pays more.<sup>60</sup> Consequently, on

55. U.S. CENSUS BUREAU, 1990 AND 2000 CENSUS DATA (on file with author), *available at* <http://factfinder.census.gov>.

56. 2006 Ill. Dist. Report Card, *supra* note 47 (noting that School District 131 is only 7.3% white and 0.7% Asian, while the neighboring School District 204 has a 68% white and 14.2% Asian population).

57. Ill. State Bd. of Educ., *supra* note 47.

58. Ill. State Bd. of Educ., *supra* note 47 (comparing the lone East Aurora High School with Waubonsie Valley High School, the District 204 high school any Aurora residents would attend if they lived on the DuPage side of the county line—Waubonsie Valley's eleventh grade proficiency numbers in reading, math, and science were 70.4%, 65.5%, and 66.2% respectively, in contrast, East Aurora's were 27.8%, 23.2%, and 18.4% respectively).

59. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. Rev. 932, 971 n.172 (2004) (citing STEVEN G. RIVKIN, ERIC A. HANUSHEK & JOHN F. KAIN, *TEACHERS, SCHOOLS, AND ACADEMIC ACHIEVEMENT* 3 (2002), <http://edpro.stanford.edu/Hanushek/admin/pages/files/uploads/teachers.econometrica.pdf>) (“Eric Hanushek, for example, who has argued strongly and consistently that there is no systematic relationship between resources and outcomes, has recently acknowledged that ‘the effects of teacher quality [are] substantial.’”).

60. Ill. State Bd. of Educ., *supra* note 47 (noting that the average teacher salary in District 204 is \$60,450, as compared to \$50,345 in District 131); *see also* James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. Rev. 932, 971 n.174 (2004) (relating a near universal evidentiary finding that better teachers are found in more

top of having to deal with poverty rates that exceed their neighboring district at a rate of nearly ten low-income students for each one low-income student in District 204, East Aurora School District 131 is unable to meaningfully compete for the best teachers in the area.<sup>61</sup> In fact, students in the predominantly minority school district were over eleven times more likely to have a teacher that was not certified to teach the subject matter for which they were being employed, as compared with the predominantly white school in Aurora.<sup>62</sup> Moreover, the additional issues often related to racially isolated, high-poverty schools such as family stability, school safety, and other issues that affect student achievement, generally means that such schools will have to spend higher percentages of their budgets on student services to deal with these issues, or they will have cut other services, such as busing and extracurricular activities. In East Aurora School District 131 where there are no school buses at all, it has meant both.<sup>63</sup> Therefore, while the overall operational per pupil expenditure of School District 131 has been raised to within an acceptable range of its more affluent, neighboring district, it has been forced to spend its funds in substantially different ways. While District 204 can spend 53.6% of its funds on teacher salaries, District 131 can afford to spend only 38.3%—a difference that amounts to millions of dollars.<sup>64</sup>

While the per pupil expenditure for teachers is clearly not equal between the two districts, at least the state formula in this case is able to bring the overall per pupil expenditures within a decent range of one another.<sup>65</sup> Unfortunately, this is not the case for Illinois as a whole, which according

affluent, low-poverty schools) (citing Lynn Olson, *The Great Divide*, EDUC. WKLY., Jan. 9, 2003, at 9).

61. Ill. State Bd. of Educ., *supra* note 47 (stating that 56% of the students in School District 131 are designated as “low income,” while only 6% of the neighboring School District 204 is designated as such).

62. Ill. State Bd. of Educ., *supra* note 47 (noting that 6.8% of teachers at East Aurora High School had emergency or provisional credentials, compared to only 0.6% of teachers at Waubonsie Valley High School).

63. See Alex Ochoa, *The Future of District 131*, THE AURORAN, Jan. 2007, at 1, available at [http://www.eastaurorahighschool.org/pubs/auroran/januaryissue\\_07.pdf](http://www.eastaurorahighschool.org/pubs/auroran/januaryissue_07.pdf). In addition to having to take public buses to school, where available, due to a complete lack of school buses in the district, the failure of an April 2007 referendum means that \$6.7 million in budget cuts will need to be found over the next few years which, as reported in the East Aurora High School newspaper, “would ultimately eliminate all sports, music and extracurricular activities.” *Id.*

64. Ill. State Bd. of Educ., *supra* note 47. Moreover, the percentage of District 131’s budget that must be spent on operations and administration is almost twice as much as that of District 204’s—33.2% compared to only 18.0%. Ill. State Bd. of Educ., *supra* note 47.

65. Ill. State Bd. of Educ., *supra* note 47 (noting that the overall per pupil expenditures of Districts 204 and 131 are \$8616 and \$8300 respectively, while the portion of each districts’ per pupil expenditure allotted for teacher salaries is \$5629 and \$4895 respectively).

to both the 1990 and 2000 censuses ranked forty-ninth in terms of funding equality among public schools with “only one state [having] a greater level of disparity than Illinois in resources available to elementary and secondary school districts,”<sup>66</sup> and recent reports show Illinois’s ranking falling even further to the worst in the nation.<sup>67</sup> By way of example, in Cook County, Northbrook School District 27, which is over 97% white and Asian, has an annual per pupil expenditure of \$15,706, while the per pupil expenditure in 97.6% African-American Dolton School District 148 is approximately half that amount—\$7978.<sup>68</sup> Notably, the per pupil expenditure for instructors is nearly two and one-half times higher in the Northbrook School District, resulting in 42% higher average teacher salaries.<sup>69</sup>

C. ILLINOIS’S SYSTEM OF FUNDING PUBLIC SCHOOLS AND ITS  
OVERRELIANCE ON PROPERTY TAXES

Illinois’s school funding formula is incredibly complex, but it boils down to a system that sets a minimum per pupil expenditure, or “foundational” level, and then distributes General State Aid (GSA) based on a three-tiered formula that considers the ability of a school district to pay, average daily attendance, and the poverty concentration of students within the district.<sup>70</sup> While these factors do, for the most part, distribute state aid to the districts with the greatest need, the formula does very little to make up for the system’s overreliance on property taxes, and results in a dead last ranking among the nation’s fifty states in terms of per student funding disparities between the state’s highest- and lowest-poverty districts.<sup>71</sup> Not surprisingly then, Illinois also has the nation’s worst achievement gap between poor and wealthy students according to the National Assessment of Educational Progress (NAEP) Report Card.<sup>72</sup>

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66. Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1206 (Ill. 1996) (Freeman, J., concurring in part and dissenting in part) (citing Wayne Riddle & Liane White, *Variations in Expenditures Per Pupil Within the States: Evidence from Census Data for 1989–90*, 19 J. EDUC. FIN. 358 (1994)).

67. PEOPLE FOR THE AM. WAY FOUND., *INEQUALITY IN ILLINOIS: HOW ILLOGICAL SCHOOL FUNDING HAS ERODED PUBLIC EDUCATION* 10 (Nathan Richter ed., 2004).

68. Ill. State Bd. of Educ., *supra* note 47.

69. Ill. State Bd. of Educ., *supra* note 47. Respective instructional per pupil expenditures of Cook County Districts 27 and 14 were \$9857 and \$4087 for 2003–04, while their respective average teacher salaries were \$69,309 and \$48,889. Ill. State Bd. of Educ., *supra* note 47.

70. See A+ Illinois, *The Basics of School Funding in Illinois (K–12)*, <http://www.aplusillinois.org/toolbox/basics.asp> (last visited Nov. 4, 2008).

71. PEOPLE FOR THE AM. WAY FOUND., *INEQUALITY IN ILLINOIS: HOW ILLOGICAL SCHOOL FUNDING HAS ERODED PUBLIC EDUCATION* app. C (Nathan Richter ed., 2004).

72. *Id.*

Despite the education article of the Illinois State Constitution, which declares that “[t]he State has the primary responsibility for financing the system of public education,”<sup>73</sup> the State pays only 36% of school expenses compared to the national average of 50%, leaving Illinois with an abysmal forty-seventh ranking in state share of school funding and fortieth ranking in terms of state funding to its highest poverty districts.<sup>74</sup> As a result, school districts must provide an average of 53% of the cost of public school education through local taxes—primarily property taxes—although this percentage varies greatly between poor and wealthy districts. Additionally, this overreliance on property taxes results in the dual injustice of wealthier districts being able to provide vastly superior educational opportunities and programs while at the same time taxing their residents at lower rates, resulting in “a greater tax burden on low- and moderate-income families than on wealthier ones.”<sup>75</sup> Consequently, the wealthiest school districts can have per pupil expenditures as much as four times that of poorer districts—again, the worst disparity in the nation.<sup>76</sup> Funding disparities also track with “stunning inequities between affluent areas that can afford to pour money into local schools and impoverished districts that can’t.”<sup>77</sup> Perhaps the most stunning statistic of how these circumstances result in an unbelievably disproportionate negative impact on minority students, a 2005 *Chicago Tribune* study of over 4000 Illinois public schools revealed that “[a] black child is about 40 times more likely than a white child to attend one of Illinois’s worst-of-the-worst ‘academic watch’ schools.”<sup>78</sup> It should be pointed out that a 10% greater likelihood would be statistically significant, and 50% would be tragic; however, a more than 4000% greater likelihood of attending a chronically failing school is evidence of “educational apartheid.”<sup>79</sup>

#### D. THE LINK BETWEEN FUNDING AND QUALITY

While the five-member majority in the seminal Supreme Court school funding case of *San Antonio Independent School District v. Rodriguez* called into question the general assumption that poor people live in the

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73. ILL. CONST. art. X, § 1.

74. PEOPLE FOR THE AM. WAY FOUND., *INEQUITY IN ILLINOIS: HOW ILLOGICAL SCHOOL FUNDING HAS ERODED PUBLIC EDUCATION* app. C (Nathan Richter ed., 2004).

75. *Id.* at 1-2.

76. *Id.* app. B. According to 2000–01 data from the Illinois State Board of Education, the lowest elementary school per pupil expenditure was \$4340 compared to the highest at \$18,193, while the disparity for high schools ranged from \$6509 in the lowest to \$17,291 in the highest funded districts. *Id.*

77. Rado et al., *supra* note 6, § 1, at 14.

78. Rado et al., *supra* note 6, § 1, at 14.

79. Rado et al., *supra* note 6, § 1, at 14 (quoting G. Alfred Hess, Jr., Northwestern University).



poorest districts, it is worth noting that the Court did not necessarily rule out the existence of an inherent correlation between educational quality and the level of school funding.<sup>80</sup> Nevertheless, it should be pointed out that despite the Court's attempt to draw a broad conclusion seemingly based on a single-cited report from Connecticut,<sup>81</sup> the notable scarcity of such exceptions almost warrants a total disregard of their significance, particularly in light of the mountain of evidence leading to the opposite conclusion.<sup>82</sup> Interestingly, another Connecticut study showed that following the only state court case to require absolute funding parity between inner-city minority schools and suburban, predominantly white schools, "inner-city Hartford students continued to perform at a significantly lower level than their suburban counterparts," despite equalized funding.<sup>83</sup> But perhaps the only appropriate conclusion of such a result is that funding equality *alone* may not be enough to establish equality of student performance where other factors, such as school safety, parental employment rates, and neighborhood poverty, have a predictable impact on poor and minority children living in previously underfunded schools.<sup>84</sup>

Indeed, in one of the many cases where a state supreme court found that their state constitution contained a fundamental right to an education, West Virginia clarified that "providing a safe and secure environment wherein our children can learn is implicit in the [state] constitutional guarantee of a 'thorough and efficient school system,'" and that "[w]ithout a safe and secure environment, a school is unable to fulfill its basic purpose of providing an education."<sup>85</sup> In fact, the West Virginia Supreme Court went on to point out that the U.S. Congress had made a similar finding that

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80. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 22-23 (1973) (noting that a recent Connecticut study had found that it was "clearly incorrect . . . to contend that the 'poor' live in 'poor' districts" since the study found "that the poor were clustered around commercial and industrial areas," which often provided a solid tax base).

81. *Id.*

82. Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1655-56 (2007) (citing numerous studies showing that "[r]esearch undeniably demonstrates that higher teacher quality results in better student achievement . . . , yet numerous studies show that schools that enroll higher numbers of poor and minority students employ less experienced and qualified teachers . . . [and that] low income and minority schoolchildren attend markedly inferior schools relative to their more affluent and white counterparts").

83. Christine Kiracofe, *The Natural Relationship Between Desegregation and School Funding Litigation*, 184 EDUC. L. REP. 1, 11-12 (2004) (citing James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 291 n.183 (1999)).

84. *See id.* at 13 ("The core issue for the achievement discrepancy [is] family poverty and concentrations of neighborhood poverty." (citing David J. Armor, *Facts and Fictions About Education in the Sheff Decision*, 29 CONN. L. REV. 981, 994-96 (1997))).

85. *Cathe A. v. Doddridge County Bd. of Educ.*, 490 S.E.2d 340, 347 (W. Va. 1997).

a safe and “disciplined environment conducive to learning” was a necessity to improved academic performance.<sup>86</sup>

To the extent that inner-city or urban districts often times have comparable or sometimes even slightly higher school budgets, it is important to bear in mind that “urban districts [must] spend less on programs for regular education because they have higher costs for special education and repairs for older buildings and equipment.”<sup>87</sup> As a matter of fact, schools that are predominantly minority are “more likely to have inflated special education populations, leading to dramatically increased (and disproportionate) per pupil costs” since African-American students are three times more likely to be labeled mentally retarded than white students and twice as likely to be identified as having a learning disability or being “emotionally disturbed.”<sup>88</sup> Moreover, in Chicago, for example, the eight neighborhoods with the highest number of returning parolees account for nearly half of the adult males cycling out of the state prison system and back into the city, which itself accounts for over half of the total returning parole population—meaning that approximately one in four convicted felons returning from prison each year in Illinois returns to one of these eight (out of seventy-seven) neighborhoods in Chicago.<sup>89</sup> These same neighborhoods are some of the most racially isolated in all of Illinois—none with a white population of more than 4%, and six of the eight with black populations of greater than 98%—meaning that students in the most racially isolated schools in Chicago are also dealing with issues of high crime neighborhoods/school safety issues, a majority of adult males being absent or somehow involved in the criminal justice system, and a lack of adult—particularly male—role models, on top of the highest poverty and unemployment rates in the entire state.<sup>90</sup>

It therefore remains true that while such factors as school safety, poverty, family stability, and special education issues will invariably have an impact on the degree to which underfunding will impact the quality of the education that a given school is able to provide, by and large, school fund-

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86. *Id.* at 348 (citing The Safe Schools Act of 1994, 20 U.S.C. §§ 5961-5968 (1994)).

87. Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1657 (2007).

88. Christine Kiracofe, *Diversity as a Compelling Interest: The Logical Application of Grutter v. Bollinger to K-12 Schools*, 208 EDUC. L. REP. 691, 696-97 (citing U.S. DEP'T OF EDUC., OFFICE OF SPECIAL EDUC. PROGRAMS, TWENTY-SECOND ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (2000)).

89. Rick Guzman, Presentation to the Governor's Community Safety and Reentry Commission at the Governor's Mansion, Springfield, Illinois (Oct. 10, 2005) (on file with author) (citing FY 2005 Illinois Department of Corrections and U.S. Census Bureau data).

90. *Id.*

ing parity cannot be the only factor to be examined when analyzing whether a correlation between resource availability and student performance exists. When taking these additional factors into account, there is still an indisputably clear relationship between substandard school funding and substandard educational quality, or, stated another way, between student performance and inadequate school funding, which, therefore, perpetuates and even exacerbates the minority achievement gap because “[i]t is the more disadvantaged districts that need the greater investment of funds[, and given that the vast majority of] black students in Illinois attend schools where most children are poor[,] . . . black students as a group come in dead last on state tests in every grade and every subject.”<sup>91</sup>

Most of this article has addressed the problem of school funding for predominantly poor, minority, urban districts. However, to the extent that many rural, predominantly white schools are also underfunded by systems that rely heavily on property taxes, the correlation between educational quality and school funding also holds true.<sup>92</sup> Moreover, while the overall population numbers in rural areas may be smaller, poverty rates are higher with “the poverty rate for rural children being 23.0 percent” and the poverty rate for rural black children being an alarming 48.2%.<sup>93</sup>

#### IV. HISTORY: THE RELATIONSHIP BETWEEN PUBLIC SCHOOL DESEGREGATION, EQUAL PROTECTION, AND SCHOOL FUNDING LITIGATION

##### A. A BRIEF HISTORY OF U.S. SUPREME COURT SCHOOL DESEGREGATION, EDUCATION RIGHTS, AND APPLICABLE EQUAL PROTECTION JURISPRUDENCE

###### 1. *Federal School Desegregation Cases*

The obvious starting point for discussing federally mandated public school desegregation is the Court’s decision to overturn the nearly sixty-year-old doctrine of “separate but equal,” established in *Plessy v. Ferguson*, in its landmark case *Brown v. Board of Education*.<sup>94</sup> The “separate but

91. Rado et al., *supra* note 6, § 1, at 1.

92. John Dayton, *Rural Children, Rural Schools, and Public School Funding Litigation: A Real Problem in Search of a Real Solution*, 82 NEB. L. REV. 99, 106 (“Most school districts in the state—especially nonurban—cannot reasonably raise sufficient revenues from local sources to provide even the average of total funds for education per pupil statewide.”) (citing *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993)).

93. *Id.* at 100 (quoting DOUG BOWERS & PEGGY COOK, U.S. DEPARTMENT OF AGRICULTURE, RURAL CONDITIONS AND TRENDS: SOCIOECONOMIC CONDITIONS ISSUE (1997)).

94. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

equal” doctrine required “substantially equal facilities” for black and white students “even though these facilities be separate.”<sup>95</sup> Ironically, as previously pointed out, if today’s grossly segregated schools in Illinois and most other states were measured by this standard of “equality of treatment,” as defined by the overtly racist Court in 1896,<sup>96</sup> it would be difficult to conclude that “the races are provided substantially equal facilities.”<sup>97</sup> The unanimous *Brown* Court went on to discuss the nearly unrivaled importance of education as a service provided by the state:

Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. *Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*<sup>98</sup>

Despite this plain language of *Brown* seemingly mandating that schools provide equal educational opportunity for all, the natural focus fell on the overwhelming task of desegregation since the Court had rightly con-

95. *Id.* at 487 (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

96. *Plessy v. Ferguson*, 163 U.S. 537, 551-52 (1896). Though the Court went to great lengths to rationalize its holding as not contradicting the idea of equality between the races, among other things, this conclusion clearly shows the prejudices of the majority Justices: “If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, [however] the constitution of the United States cannot put them upon the same plane.” *Id.*

97. *Brown*, 347 U.S. at 487 (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896)); *see also* Christine Kiracofe, *The Natural Relationship Between Desegregation and School Funding Litigation*, 184 EDUC. L. REP. 1, 2 (2004) (“A 2002 description of a 95% African-American Arkansas school district . . . [by] the Arkansas Supreme Court in *Lake View v. Huckabee*, notes that: “The Holly Grove School District has only a basic curriculum and no advanced courses or programs . . . [and] buildings [that] have leaking roofs[.] . . . the Barton Elementary School in Phillips County has two bathrooms with four stalls for over one hundred students[, and] . . . Lee County schools . . . [have] school buses that fail to meet state standards[.] . . . [and] some buildings have asbestos problems and little or no heating or air conditioning.” (citations omitted)); *supra* notes 2-7, 24-25, 27-30, 32-34, 42-43, 45-50, 55-56, 59-62, 64-69, 72, 74, 77-79, 81 and accompanying text.

98. *Brown*, 347 U.S. at 493 (emphasis added).

cluded that separateness itself was an inherent source of inequality.<sup>99</sup> Subsequently, the Court embarked on nearly two decades of court-ordered desegregation mandates before beginning to back away from the use of race-conscious measures to ensure racial integration of public schools in the 1974 case of *Milliken v. Bradley*.<sup>100</sup>

The year after *Brown* was decided, the Court clarified in *Brown II* that states were to begin dismantling dual systems of racially segregated schools “with all deliberate speed.”<sup>101</sup> Nevertheless, many southern states resisted the Court’s edict, or attempted to meet the mandate of *Brown* by simply adopting “freedom of choice” transfer plans that opened the door of all-white schools to African-Americans in theory, but rarely in practice.<sup>102</sup> In Little Rock, Arkansas, the Governor ordered state National Guard troops to block black students from entering a historically all-white school.<sup>103</sup> When President Eisenhower called in federal troops to enforce the desegregation plan, school officials petitioned the Supreme Court for a moratorium on implementing the plan due to a continued mob presence of antidesegregation demonstrators, even five months after the federal troops had remained in place.<sup>104</sup> The Court rejected this and other resistance to integration and finally provided clear guidance as to the requirements of full compliance with *Brown* in the 1968 case *Green v. School Board*.<sup>105</sup>

In *Green*, the Court held that school districts have an affirmative duty to establish a “unitary nonracial system,”<sup>106</sup> and outlined six areas that would require desegregation in order to meet that standard.<sup>107</sup> Racial integration applied “not just to the composition of student bodies[,] . . . but to every facet of school operations,” including faculty assignments, staff assignments, transportation, extracurricular activities, and facilities.<sup>108</sup> Building on *Green*, two years later, the Court set out specific tools that district courts were authorized to use in order to further the desegregation mandate

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99. *Id.* (“We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.”).

100. *Milliken v. Bradley*, 418 U.S. 717 (1974).

101. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

102. William D. Araiza, *Courts, Congress and Equal Protection: What Brown Teaches Us About the Section 5 Power*, 47 HOW. L.J. 199, 204-05 (2004) (describing the history of southern intransigence) (citing NORMAN DORSEN ET AL., *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 701-09 (4th ed. 1979)).

103. *Cooper v. Aaron*, 358 U.S. 1, 11 (1958).

104. *Id.* at 12-13.

105. 391 U.S. 430 (1968).

106. *Id.* at 440.

107. *Id.* at 435.

108. *Id.*

of *Green* in the case of *Swann v. Charlotte-Mecklenburg Board of Education*.<sup>109</sup> By most accounts, *Swann* is perceived as a “high-water mark” in terms of aggressive enforcement of *Brown*.<sup>110</sup>

In 1973, with four Nixon appointees now secured on the Supreme Court, the *Keyes v. School District No. 1* case marked the subtle beginning of the Court’s retreat from proactive enforcement of the less than twenty-year-old mandate of *Brown*.<sup>111</sup> In *Keyes*, the Court held that for school districts that had never officially sanctioned de jure segregated schools, “plaintiffs must prove not only that segregated schooling exists, but also that it was brought about or maintained by intentional state action.”<sup>112</sup> More damaging, however, was the holding in *Milliken v. Bradley* the following year where a narrow five-to-four vote by the newly realigned majority struck down a district court’s plan to combat the rapidly resegregating Detroit-area schools caused by a steady “white-flight” exodus from the city to the suburbs.<sup>113</sup> Holding that it was unconstitutional to require the “innocent” white suburbs to participate in the remedial desegregation plan of what had been an illegally segregated Detroit city school system,<sup>114</sup> the Court essentially sent a message that for those who wanted to escape the imperative of racially mixed schools, district courts would now be powerless to compel interdistrict integration without proving a new constitutional violation on the part of the growing, white suburban districts.<sup>115</sup>

Arguing in strong dissent of the Court’s dramatic shift away from racial desegregation, Justice Douglas noted that the Court’s decision “against

109. 402 U.S. 1 (1971); see also William D. Araiza, *Courts, Congress and Equal Protection: What Brown Teaches Us About the Section 5 Power*, 47 How. L.J. 199, 205 (2004) (“In *Swann*, a unanimous Court authorized district courts to supervise a wide variety of school board decisions, including student and teacher assignment, facilities equalization, school siting and student transportation, in pursuit of desegregation.”).

110. William D. Araiza, *Courts, Congress and Equal Protection: What Brown Teaches Us About the Section 5 Power*, 47 How. L.J. 199, 205 (2004).

111. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 200 n.11 (1973). In fact, the Court’s newest member, Justice Rehnquist, went so far as to argue in dissent that *Brown v. Board of Education* did not impose an ‘affirmative duty to integrate’ the schools of a dual school system but was only a ‘prohibition against discrimination’ ‘in the sense that the assignment of a child to a particular school is not made to depend on his race . . . .’ That is the interpretation of *Brown* expressed 18 years ago by a three-judge court in *Briggs v. Elliott*, 132 F. Supp. 776, 777 (1955): ‘The Constitution, in other words, does not require integration. It merely forbids discrimination.’

*Id.* (discussing the dissent of Justice Rehnquist).

112. *Keyes*, 413 U.S. at 198.

113. *Milliken v. Bradley*, 418 U.S. 717 (1974).

114. William D. Araiza, *Courts, Congress and Equal Protection: What Brown Teaches Us About the Section 5 Power*, 47 How. L.J. 199, 206 (2004).

115. *Milliken*, 418 U.S. at 752.

the metropolitan area remedy . . . will likely put the problems of the blacks and our society back to the period that antedated the 'separate but equal' regime of *Plessy v. Ferguson*."<sup>116</sup> Indeed today, Detroit is the most heavily African-American segregated large city in the country, and perhaps the most pronounced example of the devastating impacts of the "white flight" phenomenon tacitly sanctioned by the Court in *Milliken*.<sup>117</sup> Since the time of *Brown*, "[n]o other Midwest city has stumbled as badly as Detroit," moving from being the fourth largest city in America to the eleventh, and "[f]rom 1.8 million in 1950, the city's population has collapsed to less than 900,000."<sup>118</sup> Whites have fled to the growing Detroit suburbs, leaving the city itself with a sparse 8% white population as compared to the 84% of its residents who are African-American—"making it the major American city with the largest black population."<sup>119</sup> Meanwhile, the opposite is true of its suburbs where 85% of the residents are nonblack.<sup>120</sup> Not surprisingly, both the poverty and unemployment rates in Detroit are nearly three times higher than the rest of the country, and the Detroit public schools are among the most problem-plagued, financially-strapped districts in the nation, with aging, inefficient, and inadequate buildings.<sup>121</sup>

Two years after *Milliken*, yet another distressing precedent curtailing the racial desegregative progress of the 1970s was set in the *Pasadena City Board of Education v. Spangler* case.<sup>122</sup> Here, the Court struck down the district court's continued imposition of requirements regarding the racial mix of a previously segregated school district on the ground that the district had for *one year* complied with the required racial mix, and had thus achieved unitary status.<sup>123</sup> In other words, what had been *required* by the courts just one year prior in *Pasadena* for the purpose of fulfilling the district's "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated

116. *Id.* at 759 (Douglas, J., dissenting) (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

117. See Stephen Franklin, *A Gulf of Our Own*, CHI. TRIB., Oct. 16, 2005, § 5, at 1.

118. *Id.*

119. *Id.*

120. *Id.*

121. Diane Bukowski, *Takeover Debt Closes 52 Schools*, MICH. CITIZEN, Aug. 7, 2007, available at [http://michigancitizen.com/print\\_this\\_story.asp?smenu=1&sdetail=4015](http://michigancitizen.com/print_this_story.asp?smenu=1&sdetail=4015); see also DETROIT PUB. SCH., DEFICIT ELIMINATION PLAN, Executive Summary at 5 (2005), available at [http://www.detroitk12.org/importantNews/Deficit\\_Elimination\\_Plan1.pdf](http://www.detroitk12.org/importantNews/Deficit_Elimination_Plan1.pdf) (noting that 50.8% of Detroit Public School buildings were built *before* 1930, and fewer than 10% have been built since 1970).

122. *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976).

123. William D. Araiza, *Courts, Congress and Equal Protection: What Brown Teaches Us About the Section 5 Power*, 47 HOW. L.J. 199, 206 (2004).

root and branch,"<sup>124</sup> was now *forbidden*.<sup>125</sup> In this astonishing example of circular logic, the Court essentially posits that it would be inconceivable for the Pasadena district, having reached "unitary" status through *artificial* court-imposed measures designed to remedy the overt or covert discrimination of the past 100+ years (that had been proven as the basis for the court-ordered desegregation plan in the first place), to continue to have an effect on whatever resegregation might occur once the mandated integration measures were lifted.<sup>126</sup> Thus, the new conservative majority on the Court had successfully set a tone of disengagement from the issue of school desegregation *and* resegregation with the "watershed" *Spangler* and *Milliken* decisions.<sup>127</sup> That tone has only recently been called into question by a favorable fifth vote in favor of the use of race-conscious measures to move toward "the important work" of racial integration from Justice Kennedy in the 2007 *Seattle School* case,<sup>128</sup> which will be discussed in the final section of this article. While this fact was largely obscured by Chief Justice Roberts's leading (yet nonmajority) opinion, which was labeled "inconsistent"<sup>129</sup> and precedent-distorting<sup>130</sup> by five of the nine members of the Court, it must nevertheless be viewed in light of the past thirty years of antidesegregation cases that began largely with *Milliken* and *Spangler*.<sup>131</sup> Beginning in the 1990s with the *Board of Education v. Dowell* and *Freeman v. Pitts* cases, the Court had moved so far from the landmark *Brown* case that it began speaking of desegregation only "to the extent practicable."<sup>132</sup> In the 1992 *Freeman v. Pitts* decision, the Court stretched its reasoning further yet to explain that:

As the *de jure* violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a

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124. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 200 (1973) (quoting *Green v. County Sch. Bd.*, 391 U.S. 430, 437-38 (1968)).

125. *Spangler*, 427 U.S. 424.

126. *Id.* at 443 (Marshall, J., dissenting) ("In insisting that the District Court largely abandon its scrutiny of attendance patterns, the Court might well be insuring that a unitary school system in which segregation has been eliminated 'root and branch,' will never be achieved in Pasadena." (quoting *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968))).

127. William D. Araiza, *Courts, Congress and Equal Protection: What Brown Teaches Us About the Section 5 Power*, 47 *How. L.J.* 199, 206 (2004).

128. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2797 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

129. *Id.* at 2788 (Kennedy, J., concurring in part and concurring in the judgment).

130. *Id.* at 2800 (Breyer, J., dissenting).

131. *Milliken v. Bradley*, 418 U.S. 717 (1974); *Spangler*, 427 U.S. 424.

132. William D. Araiza, *Courts, Congress and Equal Protection: What Brown Teaches Us About the Section 5 Power*, 47 *How. L.J.* 199, 206 (2004) (citing *Bd. of Educ. v. Dowell*, 498 U.S. 237, 250 (1991)).



vestige of the prior *de jure* system. The causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith.<sup>133</sup>

Here, the Court reasoned that Atlanta, Georgia, home of one of the most divisive and oppressive systems of discrimination for over 200 years, had “likely” erased the impact of officially sanctioned discrimination in a single generation, and that ongoing racial imbalances had an “attenuated” link to the resistance and outright refusal on the part of many government officials in Georgia to follow the original mandate of *Brown*.<sup>134</sup> The *Freeman* decision allowed school districts to be released from their required achievement of “unitary status” bit by bit, as opposed to being required to meet all six of the *Green* criteria.<sup>135</sup>

Three years later in 1995, the Court found that even an effort to incentivize whites to move back to inner-city Kansas City schools by creating an entire district of magnet schools was constitutionally *prohibited*,<sup>136</sup> despite the fact that the court ordered remedial measures for the Kansas City, Missouri School District (KCMSD) had been in effect for only ten years based on the district court’s finding of officially sanctioned policies resulting in unacceptable school segregation and inequality in 1985.<sup>137</sup> As Justice Ginsburg pointed out in her dissent, Missouri’s Attorney General had publicly declared the Supreme Court’s decision in *Brown* unenforceable, and the state had only rescinded its constitutional provision allowing for segregation nineteen years prior to the case and did so after having officially sanctioned such practices for more than 150 years, going back to the state’s entry into the union as a slave state.<sup>138</sup> Despite this remarkably recent history of unconstitutional school segregation, incredibly, then Chief Justice Rehnquist averred that KCMSD’s remedial efforts were “simply too far removed” from the “vestiges of segregation.”<sup>139</sup>

Unfortunately, school desegregation was not the only area from which the Court began a steady retreat following the appointment of the majority formed by President Nixon’s public campaign to move the Supreme Court

133. *Freeman v. Pitts*, 503 U.S. 467, 496 (1992).

134. *See id.*; *see also* James L. Hunt, *Brown v. Board of Education After Fifty Years: Context and Synopsis*, 52 *MERCER L. REV.* 549, 553 n.28 (2001) (“Not until Jimmy Carter’s election in 1970, sixteen years after *Brown*, did a Georgia governor state publicly his support for equality for black persons.” (citation omitted)).

135. *Green v. County Sch. Bd.*, 391 U.S. 430, 435 (1968).

136. *Missouri v. Jenkins*, 515 U.S. 70, 92-94 (1995).

137. *Id.* at 176 (Ginsburg, J., dissenting).

138. *Id.* (Ginsburg, J., dissenting).

139. *Id.* at 100 (majority opinion).

to the right.<sup>140</sup> The year after Justice Rehnquist was appointed to the Court, the fifth and decisive vote was added for yet another narrowly decided landmark decision in *San Antonio Independent School District v. Rodriguez*, where the Court took a giant step backward from the promise of *Brown* in declaring that despite *Brown*'s proclamation that education is "the most important function of state and local governments,"<sup>141</sup> it was not a fundamental, constitutional right.<sup>142</sup>

## 2. Federal Education Rights Jurisprudence

### i. San Antonio Independent School District v. Rodriguez<sup>143</sup>

In 1973, following a California Supreme Court decision that cited *Brown* in declaring education to be a fundamental state right requiring equality in school funding, the U.S. Supreme Court put an end to the idea that *Brown* stood for any true measure of educational equality.<sup>144</sup> Building upon the strongly pro-integration Supreme Court precedents in *Green* and *Swann* in 1968 and 1971 respectively, in 1972, the U.S. District Court for the Western District of Texas declared the State of Texas's school funding scheme violative of the Constitution's guarantee of equal protection in so far as the system discriminated against people on the basis of wealth—or a lack thereof.<sup>145</sup> Furthermore, the lower court held that equal protection was also violated because they believed education to be a fundamental right, and Texas had not only failed to show a compelling state interest in its school funding scheme, but had failed "even to establish a reasonable basis for these classifications."<sup>146</sup>

While these conclusions seemed like the natural progression of the Court's equal protection, education, and desegregation cases through the 1971 *Swann* case, the change in the composition of the Court cannot be

140. Edward de Grazia, *Freeing Literary and Artistic Expression During the Sixties: The Role of Justice William J. Brennan, Jr.*, 13 CARDOZO L. REV. 103, 141 (1991).

141. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

142. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37-38 (1973).

143. *Rodriguez*, 411 U.S. 1.

144. Christine Kiracofe, *The Natural Relationship Between Desegregation and School Funding Litigation*, 184 WEST'S EDUC. L. REP. 1, 4-5 (2004) (describing *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), and the high hopes of education equal funding advocates); see also *Rodriguez*, 411 U.S. at 132 (Marshall, J., dissenting) ("The possibility of legislative action is . . . no answer to this Court's [failed] duty under the Constitution to eliminate unjustified state discrimination.").

145. *Rodriguez*, 411 U.S. at 15-16 (citing *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 282 (W.D. Tex. 1972)).

146. *Id.* (citing *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 282-84 (W.D. Tex. 1972)).

underestimated in terms of its dramatic effect on the Court's ultimate abandonment of "its role as protector of minority interests, particularly under the Equal Protection Clause," and the resulting establishment of numerous constitutional principles by a single vote.<sup>147</sup> As a result, by the time *Rodriguez* got to the Supreme Court, the Court's new, more conservative membership was such that even its most recent equal protection precedent could no longer be relied upon. Not surprisingly then, the argument put forth by the *Rodriguez* appellees that "education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote" was rejected by the five-member majority, which reasoned that "we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice."<sup>148</sup>

Next, the Court picked apart the second, and perhaps more glaring, ground for an equal protection violation by concluding that the "major factual assumption of *Serrano*"—that the "'poor' live in 'poor' districts" and that "the educational financing system [therefore] discriminates against the 'poor'—is simply false."<sup>149</sup> Astoundingly, the majority's calculated, sweeping generalization seems to be based on a single, uncorroborated study from a small New England state, Connecticut, that could fairly be said to be Texas's polar opposite. Putting the issue to rest indefinitely by hastily concluding that "at least where wealth is involved, the Equal Protection Clause does not require *absolute* equality or *precisely* equal advantages,"<sup>150</sup> the Court ignored evidence that in many cases the inequality between wealthy and poor districts was overwhelming.<sup>151</sup>

147. WILLIAM D. ARAIZA, PHOEBE A. HADDON & DOROTHY E. ROBERTS, *CONSTITUTIONAL LAW: CASES, HISTORY AND DIALOGUES* 898 (3d ed. 2006).

148. *Rodriguez*, 411 U.S. at 36; compare with *Rodriguez*, 411 U.S. at 117 (Marshall, J., dissenting) ("This [statement by the Court] serves only to blur what is in fact at stake. With due respect, the issue is neither provision of the most *effective* speech nor of the most *informed* vote. Appellees do not now seek the best education Texas might provide. They do seek, however, an end to *state discrimination resulting from the unequal distribution of taxable district property wealth that directly impairs the ability of some districts to provide the same educational opportunity that other districts can provide with the same or even substantially less tax effort.* The issue is, in other words, one of discrimination that affects the quality of the education which Texas has chosen to provide its children; and, the precise question here is what importance should attach to education for purposes of equal protection analysis of that discrimination. As this Court held in *Brown v. Board of Education*, the opportunity of education, 'where the state has undertaken to provide it, is a right which must be made available to all on equal terms.'" (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)) (citation omitted) (emphasis added)).

149. *Rodriguez*, 411 U.S. at 23.

150. *Id.* at 24 (emphasis added).

151. See, e.g., JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* 223 (1991) (noting that not much has changed in San Antonio, the very source of

The dissenting Justices, whose opinions would have created the opposite constitutional rule had the issue reached the Court just a year or two earlier, wrote particularly strong dissents, noting that the majority misapplied previous precedent,<sup>152</sup> overstated principles,<sup>153</sup> ignored facts,<sup>154</sup> and disregarded constitutional rules.<sup>155</sup> Justice Marshall, who saw this issue as being directly implicated and controlled by the Court's decision in *Brown*, observed an outright failure of a duty on the part of the majority to "eliminate unjustified state discrimination . . . in a particularly invidious form, against an individual interest of large constitutional and practical importance."<sup>156</sup> Marshall pointed out that "[t]he Court's suggestions of legislative redress" simply served to rationalize the Court's avoidance of its own duty since "the hope of an ultimate 'political' solution sometime in the indefinite future [was unpromising and unsatisfactory] while, in the meantime, countless children unjustifiably receive[d] inferior educations that 'may affect their hearts and minds in a way unlikely ever to be undone.'"<sup>157</sup>

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the *Rodriguez* litigation; twenty-three years later per pupil spending is at a disparity range of \$2000 for the poorest districts and upwards of \$19,000 per pupil in the richest districts).

152. *E.g., Rodriguez*, 411 U.S. at 62-63 (Brennan, J., dissenting) ("[O]ur prior cases stand for the proposition that 'fundamentality' is, in large measure, a function of the right's importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed. . . . Here, there can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment.").

153. *See, e.g., Missouri v. Jenkins*, 515 U.S. 70 (1995).

154. *See, e.g., id.*

155. *E.g., Rodriguez*, 411 U.S. at 67-68 (White, J., dissenting) ("The Equal Protection Clause permits discriminations between classes but requires that the classification bear some rational relationship to a permissible object sought to be attained by the statute. It is not enough that the Texas system before us seeks to achieve the valid, rational purpose of maximizing local initiative; the means chosen by the State must also be rationally related to the end sought to be achieved. . . . Neither Texas nor the majority heeds this rule. If the State aims at maximizing local initiative and local choice, by permitting school districts to resort to the real property tax if they choose to do so, it utterly fails in achieving its purpose in districts with property tax bases so low that there is little if any opportunity for interested parents, rich or poor, to augment school district revenues."); *see also Rodriguez*, 411 U.S. at 126 (Marshall, J., dissenting) ("'[N]ot only are defendants unable to demonstrate compelling state interests for their classifications based upon wealth, they fail even to establish a reasonable basis for these classifications.' . . . For, on this record, it is apparent that the State's purported concern with local control is offered primarily as an excuse rather than as a justification for interdistrict inequality." (quoting *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 284 (W.D. Tex. 1972))).

156. *Id.* at 132 (Marshall, J., dissenting).

157. *Id.* at 71-72, 132 (Marshall, J., dissenting) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954)).

ii. *Plyler v. Doe*<sup>158</sup>

Nine years later, the Court once again took up a case dealing with the right to an education; however, this time Justice Powell, who had authored the *Rodriguez* opinion, was unable to apply the mere rationality review that the four most conservative dissenting Justices urged.<sup>159</sup> Consequently, the Court invalidated a Texas law that would have denied the right of an education to the children of nonlegal immigrants as “an affront to one of the goals of the Equal Protection Clause.”<sup>160</sup> While the Court was addressing a total deprivation of public education in this case, it noted that “[i]lliteracy is an enduring disability” and that “[t]he inability to read and write will handicap the individual deprived of a basic education each and every day of his life.”<sup>161</sup> Even the dissenting Justices agreed that the Texas law was “senseless” and unenlightened. Meanwhile, the majority employed a rationale that substantially blurred the difference between a total deprivation of a “right” and vast inequalities in the delivery of state-provided education. For example, the Court seemed to base its primary rationale on the unfair and discriminatory effects that the Texas law would have in terms of literacy rates, individual advancement, self-sufficiency,<sup>162</sup> and “[t]he inestimable toll . . . on the social, economic, intellectual, and psychological well-being of the [affected] individual.”<sup>163</sup> But this rationale can certainly be no less applicable to a system of education that produces these same results only based on the provision of grossly unequal education. Indeed, Illinois’s local property-tax-based system has created precisely the same undesirable results where entire classes of children are being utterly deprived of equal opportunity for “advancement on the basis of individual merit,”<sup>164</sup> creating classes of “disfavored groups” that are functionally illiterate or more than 90% nonprofi-

158. 457 U.S. 202 (1982).

159. *Id.* at 239 n.3 (noting that the case in *Plyler* involved neither a fundamental right, nor a suspect class, the four dissenting Justices argued that a mere rationality review should have been applied; however, the overwhelming importance of education led the majority to conclude that an education could not be denied to any class of persons—even where their residency is itself illegal).

160. *Id.* at 221-22.

161. *Id.* at 222.

162. *Id.* Here, the Court specifically noted that “[p]aradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, ‘education prepares individuals to be self-reliant and self-sufficient participants in society.’” *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

163. *Plyler*, 457 U.S. at 222. The Court went on to explain that this “inestimable toll . . . make[s] it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.” *Id.*

164. *Id.*

cient.<sup>165</sup> In Illinois, only 7% of black eighth graders scored well enough to be considered proficient in math, while more than seven times as many white students were considered proficient—and low income fourth graders were three times less likely to be able to read at grade level than their more affluent counterparts.<sup>166</sup>

### 3. *Applicable Equal Protection Clause Jurisprudence*

The Supreme Court has a long and varied history of decisions that relate to differential treatment or classifications that are based on or consider race. Therefore, any examination of modern-day school desegregation, creating diversity in schools, or efforts to equalize racial and class disparities in education, must start with an understanding of the constitutional challenges and possibilities presented by the precedents of the U.S. Supreme Court. One significant limitation to the Equal Protection Clause was exposed relatively early on, following the ratification of the Fourteenth Amendment to the Constitution in 1868, in a collection of cases known as *The Civil Rights Cases*.<sup>167</sup> Following Congress's passage of the Civil Rights Act of 1875, which among other things prohibited discrimination on the basis of race in places of public accommodation (e.g., hotels, restaurants, etc.), the Court employed a very strict construction of the Amendment's language which provided that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>168</sup>

Reasoning that the Amendment only applied to states, the Court invalidated the Act, ruling that Congress lacked the constitutional authority to prohibit private individuals from discriminating on the basis of race even in places open to the public.<sup>169</sup> Interestingly, this precedent has never been overruled and Congress was forced to find an alternative means to outlaw this type of discrimination, utilizing the much less directly related Commerce Clause as the basis of its authority ninety years later in Title II of the Civil Rights Act of 1964.<sup>170</sup> By that time, much of the damage had been done as the decision by the Supreme Court paved the way for private discrimination to entrench segregated housing patterns, employment practices,

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165. See Stephanie Banchemo, *Illinois Students Failing to Keep Pace*, CHI. TRIB., Sept. 26, 2007, § 1, at 1.

166. *Id.*

167. *The Civil Rights Cases*, 109 U.S. 3 (1883).

168. U.S. CONST. amend. XIV, § 1.

169. *The Civil Rights Cases*, 109 U.S. 3 (1883).

170. See U.S. CONST. art. I, § 8; 42 U.S.C. § 2000a(e) (2006).

and overall relegation of African-Americans to a substantially lower class, much like Justice Harlan had predicted in his dissent.<sup>171</sup>

Unfortunately, the Supreme Court's retreat from the school equality and desegregation mandate of *Brown*, which began in the early 1970s with the decidedly conservative shift in Court membership, was paralleled in the Court's overall enforcement of equal protection as it pertained to racial discrimination. In *Washington v. Davis*, the Court explained that "[t]he school desegregation cases have . . . adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."<sup>172</sup> In order for a law to violate equal protection, this discriminatory purpose or intentional state action must have been the direct cause of an existing condition of segregation.<sup>173</sup> In upholding the use of a literacy test as a part of screening for employment, even though the test had the effect of screening out significantly higher percentages of African-American applicants, the Court noted that "[d]isproportionate impact is not irrelevant, but . . . [s]tanding alone," a disproportionate impact is insufficient to trigger the strict scrutiny analysis that is nearly always needed to find a violation of equal protection.<sup>174</sup>

One year later in *Arlington Heights v. Metropolitan Housing Development Corp.*, the Court clarified that among other things, legislative history could be used to show that a state (or municipality) had been motivated by a discriminatory purpose, but reaffirmed that absent a rare and stark pattern of even vastly disproportionate racial effect, "impact alone is not determinative, and the Court must look to other evidence."<sup>175</sup> As if to drive home the degree to which the Court would essentially ignore the often overwhelmingly disproportionate racial impacts of many state laws and actions, the Court upheld Georgia's system of capital punishment in 1987 despite the clearly presented facts that "blacks who kill whites are sen-

171. The Civil Rights Cases, 109 U.S. 3, 57 (1883) (Harlan, J., dissenting) ("[W]e shall enter upon an era of constitutional law when the rights of freedom and American citizenship cannot receive from the nation that efficient protection which heretofore was accorded to slavery and the rights of the master.").

172. 426 U.S. 229, 240 (1976).

173. *Id.* The Court explained that

[t]his is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race.

*Id.* at 241 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

174. *Id.* at 242 (citing *McLaughlin v. Florida*, 379 U.S. 184 (1964)).

175. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (footnote omitted).

tenced to death at nearly 22 *times* the rate of blacks who kill blacks, and more than 7 *times* the rate of whites who kill blacks.”<sup>176</sup>

Moreover, this case served to underscore the difficulty of overcoming what amounts to a presumption against finding a discriminatory purpose on the part of the government since, in this case, even the majority acknowledged the fact that “prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims,” yet sought the death penalty in only 19% of the cases where a white person killed a black person and 15% of the time when a black person killed a black person.<sup>177</sup> This disproportionate application on the part of the state represents a disparity of 4.67 times, and so, the remaining source of the disproportionate impact must come from juries’ decisions to apply the law in a way that reflects a general feeling that black on white murder is the most deserving of the death penalty and black on black murder is apparently the least troubling and least deserving of capital punishment. That a law which burdens a class of people on the basis of race with a more than 2000% greater likelihood of being put to death<sup>178</sup> apparently has no constitutional implications results from two separate Supreme Court doctrines working together to produce this extraordinary result. Despite the spectacularly disproportionate application of the government’s power to seek the death penalty against blacks who killed whites, the Court reasoned that because the studies were unable to omnisciently account for every mitigating, aggravating, or intangible consideration of every prosecutor with a death-eligible case, this stark pattern of disproportionate impact did not meet the Court’s threshold for being “unexplainable on grounds other than race.”<sup>179</sup> The additional multiplier causing the leap of disparate impact to jump from 4.67 times to nearly twenty-two times was merely a result of private citizens (assembled in juries) exercising their personal choice to impose the death penalty disproportionately against blacks, and particularly against those blacks who had white victims. The Court’s protection of the individual right to discriminate, combined with its unreasonably high threshold for demonstrating discriminatory purpose or intentional state action via disproportionate impact, sub-

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176. *McCleskey v. Kemp*, 481 U.S. 279, 326 (1987) (Brennan, J., dissenting).

177. *Id.* at 286-87. While the Court’s lack of constitutional concern for what appeared to be obviously disproportionate application of the law on the part of the government is disheartening, it is clear that prosecutorial choice was not the only source of the disparate treatment. Prosecutors sought the death penalty 4.67 times more often for blacks who killed whites as compared to blacks who killed blacks, and so the additional multiplier necessary to achieve the full extent of the discriminatory or disproportionate impact came via Georgia’s “Witherspooned” juries.

178. *Id.* at 326 (Brennan, J., dissenting).

179. *Arlington Heights*, 429 U.S. at 266.



sequently render a clearly racist system<sup>180</sup> of capital punishment constitutionally permissible.

Yet the Court's rules and thresholds are inconsistently applied—particularly when the tables are turned and a state action has a seemingly disproportionately negative impact on whites. In *Shaw v. Reno*, white petitioners successfully challenged North Carolina's reapportionment scheme as a five-to-four majority proclaimed the state action "so irrational on its face that it [could] be understood only as an effort to segregate voters into separate voting districts because of their race."<sup>181</sup> As Justice Blackmun pointed out in his dissent:

[I]t is particularly ironic that the case in which today's majority chooses to abandon settled law and to recognize for the first time this "analytically distinct" constitutional claim, is a challenge by white voters to the plan under which North Carolina has sent black representatives to Congress for the first time since Reconstruction.<sup>182</sup>

Again, two years later in *Miller v. Johnson*, the Court utilized its "presumptive skepticism of all racial classifications" to invalidate a redistricting plan that would have served to give African-Americans equal access to the political system pursuant to the Justice Department's enforcement of the Voting Rights Act of 1965.<sup>183</sup> Finally, Justice Marshall's observation that there is a "profound difference [that] separates government actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral government activity from perpetuating the effects of such racism" was flatly rejected by a five-to-four majority of the Court in the 1989 case of *City of Richmond v. J.A. Croson Co.*,<sup>184</sup> which concluded essentially that there was no difference in constitu-

180. See generally *McCleskey*, 481 U.S. 320-45 (Brennan, J., dissenting).

181. 509 U.S. 630, 658 (1993). Just as the Court had done with gender classifications in *Craig v. Boren*, 429 U.S. 190 (1976), where the Court invalidated a statute discriminating against men and established the intermediate/heightened scrutiny standard for any classifications discriminating on the basis of gender, the Court once again seems to be awakened to a constitutional dilemma when the tables are turned and it is the historically empowered and advantaged party that is being discriminated against.

182. *Shaw*, 509 U.S. at 676 (Blackmun, J., dissenting).

183. 515 U.S. 900, 922 (1995).

184. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 551-52 (1989) (Marshall, J., dissenting) (noting the "deep irony" in striking down a law designed to help minorities based on congressional findings of discrimination in Richmond, Virginia, "the former capital of the Confederacy," and pointing out that "[i]n concluding that remedial classifications warrant no different standard of review under the Constitution than the most brutal and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards

tional analysis between a law that considered race for racist purposes and one that considered race for beneficial or remedial purposes—both would have to survive the strictest form of constitutional scrutiny.<sup>185</sup>

#### 4. Diversity as a “Compelling Interest”

The final area of Fourteenth Amendment equal protection jurisprudence that must be understood in order to address the issue of separate and unequal public schools is the constitutionally accepted and reaffirmed notion of diversity in education forming the “compelling interest” upon which to craft legislative solutions to historic and present day inequalities. Beginning with the 1978 case of *Regents of the University of California v. Bakke*, the Court rejected the idea of racial quotas as a legitimate method of establishing diversity, but simultaneously established the constitutional rule that racial diversity could be factored into the admissions process of an educational institution provided it was not the only admissions factor considered.<sup>186</sup> In *Bakke*, Justice Powell announced the opinion of the Court, but two separate five-member majorities produced the two aforementioned constitutional rules that came out of the case.<sup>187</sup> Four Justices joined Justice Powell in forever striking down the use of racial quotas in affirmative-action-like cases,<sup>188</sup> while the remaining four Justices joined Powell to form the still standing constitutional rule that race may indeed be considered in an admissions process and that racial diversity, properly considered as a part of “educational diversity,” may form the basis for establishing a compelling interest for purposes of satisfying the difficult to overcome strict scrutiny analysis.<sup>189</sup>

Relying heavily on Justice Powell’s reasoning in *Bakke*, Justice O’Connor reaffirmed *Bakke*’s holding in 2003 and explained Powell’s analytical methodology, clarifying that:

[T]he only holding for the Court in *Bakke* was that a “State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.” Thus we

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racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice”).

185. *Id.* (Marshall, J., dissenting); *id.* at 519 (Kennedy, J., concurring) (“I accept the less absolute rule contained in Justice O’CONNOR’s opinion, a rule based on the proposition that *any racial preference must face the most rigorous scrutiny by the courts.*” (emphasis added)).

186. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 271-72, 315-16 (1978).

187. *Id.* at 271-72.

188. *Id.* at 271.

189. *Id.* at 315-16.

reversed that part of the lower court's judgment that enjoined the university "from any consideration off the race of any applicant."<sup>190</sup>

Justice O'Connor went on to explain that "Justice Powell's opinion [in *Bakke*] has served as the touchstone for constitutional analysis of race-conscious admissions policies."<sup>191</sup> Twenty-five years after *Bakke*, the Supreme Court took up another college admissions case, testing the limits of race-conscious admissions practices in the case of *Grutter v. Bollinger*.<sup>192</sup> One of the important distinctions made in that case was that the purpose and goal of establishing a diverse student body at the University of Michigan Law School was not focused so much on diversity as a remedy to past racial discrimination as it was on "diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts."<sup>193</sup>

Noting that "when race-based action is necessary to further a compelling governmental interest," even the difficult to satisfy strict scrutiny standard is met and the constitutional guarantee of equal protection (in this case, equal protection of nonminorities) is complied with so long as such race-based actions are "narrowly tailored" to fulfill those ends.<sup>194</sup> Clarifying an often over- or misstated equal protection rule, O'Connor pointed out that the Court "has never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination . . . [and t]oday, we hold that the Law School has a compelling interest in attaining a diverse student body."<sup>195</sup> O'Connor's majority opinion reiterated many of the "substantial" benefits of racial diversity that Justice Powell had outlined in the *Bakke* decision:

"[C]ross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." These benefits are "important and laudable," because "classroom discussion is livelier,

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190. *Grutter v. Bollinger*, 539 U.S. 306, 322-23 (2003) (quoting *Bakke*, 438 U.S. at 320).

191. *Grutter*, 539 U.S. at 323.

192. *See Grutter v. Bollinger*, 539 U.S. 306 (2003).

193. *Id.* at 315.

194. *Id.* at 327. In this case, the majority decided that the University of Michigan Law School's admissions policies were in fact narrowly tailored to fulfill their stated purpose. *Id.* at 334. However, in the companion case of *Gratz v. Bollinger* announced on the same day, the Court held that the University's undergraduate admissions policies were not narrowly tailored enough to survive strict scrutiny and invalidated them in their current form. *See Gratz v. Bollinger*, 539 U.S. 244 (2003).

195. *Grutter*, 539 U.S. at 328.

more spirited, and simply more enlightening and interesting” when the students have “the greatest possible variety of backgrounds.”<sup>196</sup>

O'Connor went on to point out the dozens of amicus curie briefs that the Court received supporting the law school's position in this case that “numerous studies show that student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’”<sup>197</sup> Despite the overwhelming support from major corporations, bar and teacher associations, and other universities and law schools, both public and private, which came in the form of thirty-three amicus curie briefs, many of which had fifty or more signatories, President George W. Bush's administration filed one of only five amicus curie briefs opposing the University of Michigan's policy.<sup>198</sup> Not a single law school or law school dean joined the administration, while scores of deans, law schools, and other institutions of higher education filed their support of the University of Michigan's practices.<sup>199</sup> This strong opposition by the Bush administration would foreshadow the dramatic rhetorical shift of the Court and the intense hostility toward race-conscious efforts to achieve diversity following President George W. Bush's two successive appointments to the Court in 2005 and 2006.<sup>200</sup>

*i. Parents Involved in Community Schools v. Seattle School District No. 1*<sup>201</sup>

The headlines announcing the Court's decision in the *Seattle* case that read “Top Court Rejects Diversity Plans”<sup>202</sup> or “High Court Strikes Down

196. *Id.* at 330.

197. *Id.* (citing Brief for American Educational Research Association et al. as Amici Curiae Supporting Respondent at 3, *Gutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241); WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* (1998); *COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES* (Mitchell J. Chang, Daria Witt, James Jones & Kenji Hakuta eds., 2003); *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* (Gary Orfield & Michael Kurlaender eds., 2001)). O'Connor also points out that “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.” *Gutter*, 539 U.S. at 332.

198. *See Gutter v. Bollinger*, 539 U.S. 306, 395 (2003) (see briefs and other related documents).

199. *Id.*

200. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

201. *Id.*

School Integration Plans”<sup>203</sup> may have been somewhat misleading inasmuch as they implied that the Court had invalidated voluntary diversity, busing, or integration plans of all types that took race into account. While most articles did eventually point out that the Court’s decision did not in fact reject all diversity or integration plans, the press naturally focused on the sharp divide among the Justices, including the senior member of the Court, Justice Stevens’s, lamenting of the “cruel irony in the chief justice’s reliance on our decision in *Brown*” and concluding that “[i]t is my firm conviction that no member of the court that I joined in 1975 would have agreed with today’s decision.”<sup>204</sup> Not surprisingly, newspapers were also nearly unanimously drawn to Roberts’s egregiously oversimplified summation of the issue found in the final sentence of his opinion: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>205</sup> This comment was often contrasted by pointing out that Justice Breyer took the uncommon step of reading his entire “impassioned” dissent into the record—a dissent which referred to Roberts’s opinion as “radical,” and one that “the Court and nation will come to regret.”<sup>206</sup>

While it seems clear that the four most conservative members of the Court, including the two newest Justices, would have ruled that any efforts to desegregate public primary and secondary schools are in fact *unconstitutional* insofar as they would require decisions to take race into account,<sup>207</sup> Chief Justice Roberts was unable to muster more than three additional votes among the seven Republican-nominated Justices for this “radical” proposition.<sup>208</sup> Thus, for the time being, the noteworthy shift in the Court is primar-

202. N.Y. Times News Serv., *School Decision Divides Justices, Top Court Rejects Diversity Plans*, CHI. TRIB., June 29, 2007, § 1, at 26.

203. Naftali Bendavid, *High Court Strikes Down School Integration Plans: Close Ruling Calls Race-Based Policies Discrimination, Dissent Decries ‘Radical’ Opinion*, CHI. TRIB., June 29, 2007, § 1, at 1.

204. *Id.* (citing *Seattle*, 127 S. Ct. at 2800 (Stevens, J., dissenting)).

205. *See, e.g., id.* (citing *Seattle*, 127 S. Ct. at 2768); Mark Sherman, *Schools’ Race Policies Banned; Conservative Justices Limit How Districts Can Force Racial Integration*, CHI. SUN TIMES, June 29, 2007, at 32.

206. *See, e.g.,* Naftali Bendavid, *High Court Strikes Down School Integration Plans: Close Ruling Calls Race-Based Policies Discrimination, Dissent Decries ‘Radical’ Opinion*, CHI. TRIB., June 29, 2007, § 1, at 1; Editorial, *Diversity the Right Way*, CHI. TRIB., July 1, 2007, (Perspective), at 6.

207. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 at 2768. “[T]he way ‘to achieve a system of determining admission to the public schools on a nonracial basis,’ is to stop assigning students on a racial basis.” *Id.* (citing *Brown II*, 349 U.S. 294, 300-01 (1955)).

208. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 at 2813 (Breyer, J., dissenting) (decrying the plurality’s treatment of unanimous Court precedent as an approach that overemphasizes dicta which serves to “mask the radical nature” of Roberts’s opinion).

ily one of rhetoric as opposed to consequence since the only actual holding expressed by Roberts's opinion was that the specific integration plans of Seattle and Louisville were invalid because they were not narrowly tailored to their stated purposes.<sup>209</sup>

Despite this lack of far-reaching consequences, the Chief Justice's four member plurality opinion is worth noting for several reasons. More than just for its dramatic language, the Roberts plurality opinion is noteworthy for the possible chilling effect that it may have on voluntary integration since just one vote would have dramatically changed the scope and applicability of the Court's decision.<sup>210</sup> Given the hostility that the plurality holds towards any consideration of race, whether such consideration "burdens or benefits on the basis of [race],"<sup>211</sup> some school districts might be hesitant to undertake efforts seeking the "substantial" benefits of "student body [racial] diversity" which the Court affirmed just four years prior in *Grutter*,<sup>212</sup> especially given that the three youngest members of the Court all signed onto the plurality opinion.

The Stevens and Breyer dissents are quick to jump on the errors and ironies found in the Roberts plurality. First, Justice Stevens observed the "cruel irony" and utter inappropriateness of Roberts comparing the present situation with that of Jim Crow segregation in the concluding paragraph of his opinion which begins: "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin."<sup>213</sup> Drawing from early twentieth century French literature, Stevens declared:

This sentence reminds me of Anatole France's observation: "[T]he majestic equality of the la[w], forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." THE CHIEF JUSTICE fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other

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209. *Id.* at 2743 (plurality opinion).

210. Dana Slagle, *Blacks View High Court's Vote To End Race-Based Integration Plans As A Step Backward*, JET MAG., July 16, 2007, at 5 (quoting Reg Weaver, President of the National Education Association: "This ruling could have a chilling effect on local school districts making efforts to cure the desegregation of the public schools.").

211. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct 2738, 2751 (2007) (plurality opinion).

212. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

213. *Seattle*, 127 S. Ct. at 2797-98 (Stevens, J., dissenting) (citing *Seattle*, 127 S. Ct. at 2768 (plurality opinion)).

ways, THE CHIEF JUSTICE rewrites the history of one of this Court's most important decisions.<sup>214</sup>

Even Justice Kennedy, who concurred with Roberts in the judgment of this specific case, took issue with the plurality's out-of-context use of past precedents or declarations, including Justice Harlan's oft quoted assertion that "[o]ur Constitution is color-blind," which was "most certainly justified in the context of his dissent in *Plessy v. Ferguson*," but in the present context, serves as a "regrettable" oversimplification of the issue.<sup>215</sup> Justice Breyer's four-member dissent goes further, alleging that:

The plurality pays inadequate attention to this law, to past opinions' rationales, their language, and the contexts in which they arise. As a result, it reverses course and reaches the wrong conclusion. In doing so, it distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing re-segregation of public schools, it threatens to substitute for present calm a disruptive round of race-related litigation, and it undermines *Brown*'s promise of integrated primary and secondary education that local communities have sought to make a reality. This cannot be justified in the name of the Equal Protection Clause.<sup>216</sup>

In fact, these strong dissenting words are for the most part not directed at the decisive, majority sections of Roberts's opinion, but rather, at those sections for which Roberts was unable to obtain a majority. The fact that five members of the Court wrote separately or joined opinions that took special care to both respond to and distance themselves from the Chief Justice makes some of the specific arguments put forth by Roberts worth noting, despite his inability to obtain a majority for his most extreme ideas, simply to observe the possible direction that the Court could move under his tenure as Chief Justice, especially since that tenure is likely to span the next several decades.<sup>217</sup>

Again, the parts of Chief Justice Roberts's opinion that received five votes announced no new rules, though Roberts did seek to distinguish *K-12*

214. *Id.* at 2798 (Stevens, J., dissenting).

215. *Id.* at 2791-92 (Kennedy, J., concurring in part and concurring in the judgment).

216. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 at 2800-01 (Breyer, J., dissenting).

217. *See generally Seattle*, 127 S. Ct. at 2797 (Stevens, J., dissenting); *Seattle*, 127 S. Ct. at 2800 (Breyer, J., dissenting); *Seattle*, 127 S. Ct. at 2788 (Kennedy, J., concurring in part and concurring in the judgment).

education from the rationale employed in the *Grutter* opinion which held that educational diversity—including racial diversity—could form the basis of a compelling interest to justify the use of race in decision making in the context of higher education.<sup>218</sup> Perhaps the most astounding part of Roberts's plurality opinion is his attempt to argue that his plurality opinion is "more faithful to the heritage of *Brown*" than the parties and amici curie seeking to integrate segregated public schools and advocate for more equal educational opportunities.<sup>219</sup> To the dismay of the dissenting Justices and to many who have devoted their lives to the cause of civil rights,<sup>220</sup> Chief Justice Roberts grandly declared that "the position of the plaintiffs in *Brown* . . . could not have been clearer," and then proceeds to quote from a brief that was coauthored by Thurgood Marshall.<sup>221</sup> Amazingly, Roberts does not limit his argument to the holding of the *Brown* Court itself, but continues his brazenly out-of-context citation from the *Brown* plaintiffs' briefs and the oral arguments of Marshall's cocounsel, Robert L. Carter, and proudly asserts that "[t]here is no ambiguity in [Carter's] statement" that "no State has any authority . . . to use race as a factor in affording educational opportunities," despite the dramatically different circumstances under which Carter made his assertion.<sup>222</sup> Continuing with a rhetorical question, Roberts implied that the situation in the *Seattle* case was no different than what the Court faced in its historic decision to outlaw Jim Crow segregation in 1954, and that the plurality is, therefore, not only more faithful to the precedent of *Brown*, but more faithful to the remedy sought by the *Brown* plaintiffs.<sup>223</sup> But unless the Chief Justice can honestly contend that Thurgood Marshall would have joined his plurality opinion, the implication is disingenuous at best and can rightfully be viewed as a direct attack on both the Court's tra-

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218. *Seattle*, 127 S. Ct. at 2754 (majority opinion) (affirming that the proper standard for racial classifications is strict scrutiny and emphasizing that in *Grutter*, "this Court relied upon considerations unique to institutions of higher education" (citing *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003))).

219. *Seattle*, 127 S. Ct. at 2767 (plurality opinion).

220. *E.g.*, Slagle, *supra* note 210, at 4-6 (quoting several black leaders' reactions to the plurality opinion in *Seattle* [including, Rev. Jesse Jackson, Sr., Rep. Kilpatrick, the chair of the Congressional Black Caucus, and Julian Bond, Chairman of the NAACP] who commented that "[a]t a time when school segregation is increasing, in the half-century since the *Brown* decision, a plurality of the current court has condemned minority children to a back seat in the race for life's chances").

221. *Seattle*, 127 S. Ct. at 2767 (plurality opinion) (quoting Brief for Appellants in Nos. 1, 2, 4 and for Respondents in No. 10 on Reargument at 15, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (notably, Thurgood Marshall is one of the authors of this brief)).

222. *Seattle*, 127 S. Ct. at 2767-68 (quoting Transcript of Oral Argument at 7, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)) (internal quotation marks omitted).

223. *Id.*



ditional view as well as the layperson's understanding of what *Brown v. Board of Education* stood for.<sup>224</sup>

Today, the precedential value of the Court's landmark *Brown v. Board of Education* decision amounts to little more than a promise that no state may return to a system of legally required school apartheid.<sup>225</sup> The aforementioned cases established that the Constitution does not require schools to desegregate or provide equal educational opportunities no matter how extreme the inequality or how stark the separation of the races.

Clearly troubled by this stripped down interpretation of *Brown*, Justice Kennedy concurred in judgment with the Roberts opinion, but was careful to distance himself from the harsh language of the Chief Justice. Most notably, Kennedy's "respectful" approach, nevertheless, clearly highlights his discomfort with Roberts's treatment of *Brown* and his oversimplification of the important issues:

The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality's postulate that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," is not sufficient to decide these cases. Fifty years of experience since *Brown v. Board of Education* should teach us that the problem before us defies so easy a solution. School districts can seek to reach *Brown's* objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial

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224. Indeed, after the *Seattle* opinion was announced, civil rights leader Rev. Jesse Jackson, Sr. remarked that:

The conservative right wing has always disagreed with federal intervention to secure racial justice for all Americans. They continue to chip away at the nation's legal precedents that struck down Jim Crow segregation, and turn reality on its head by arguing that the efforts to end discrimination are now "discriminatory." *The conservative right wing never agreed with the original 1954 Brown decision; they fought against the Voting Rights Act and Civil Rights Act—and even after their passage, never stopped in their efforts to thwart their implementation.*

Slagle, *supra* note 210, at 5 (emphasis added).

225. 347 U.S. 483 (1954).

isolation in schools, it is, in my view, profoundly mistaken.<sup>226</sup>

In fact, Kennedy's opinion is notable much more for its distinct differences with the Roberts plurality opinion than it is for almost any similarity whatsoever.<sup>227</sup> In this way, Justice Kennedy's 4-1-4 opinion becomes the basis for two separate majority holdings, whereby he provides the fifth vote needed for the judgment of the case—but also the fifth vote for key matters of law that are paralleled in the dissenting opinions—much like Justice Powell's opinion in *Bakke* nearly thirty years prior.<sup>228</sup>

Kennedy's opinion directly rejects Roberts's attempt to limit racial considerations to the realms of remedial actions and higher education by flatly stating that “[i]n the administration of public schools . . . it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.”<sup>229</sup>

Emphasizing that strict scrutiny must always be applied to such considerations, Kennedy in fact recognizes two compelling state interests that would be sufficient to satisfy that constitutional standard; not only the one recognized in *Grutter* of achieving “a diverse student population,” but a second compelling interest that “exists in avoiding racial isolation.”<sup>230</sup> Noting that the “[n]ation has a moral and ethical obligation” to create an integrated society in which all children possess an equal opportunity, Kennedy specifically addresses the potential “chilling” effect of Roberts's opinion by underscoring that “[t]he decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds.”<sup>231</sup>

Finally, Kennedy's decisive opinion is important not only because it accounts for a fifth vote in favor of seeking equal opportunity and avoiding racial isolation, but because he provides clear examples of the specific types of measures that states and school boards may undertake that would survive strict scrutiny analysis under an analysis by the present Court.<sup>232</sup> More importantly, he signals that the Court would likely not even require strict scrutiny analysis for many race-conscious strategies such as “strategic site se-

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226. *Seattle*, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and concurring in the judgment).

227. *See id.* at 2788.

228. *Id.*; *see also* *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

229. *Seattle*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

230. *Id.* at 2797.

231. *Id.*

232. *Id.* at 2792.

lection of new schools[,] . . . allocating resources for special programs[,] . . . recruiting students and faculty in a targeted fashion[,] and tracking enrollments performance and other statistics by race,” so long as they do not lead to different treatment of students based on race.<sup>233</sup>

While Kennedy stresses that state executive and legislative branches should not be deterred by the *Seattle* decision from employing such strategies “with confidence that a constitutional violation does not occur” when the impact on different racial minorities is factored into decision making, unfortunately, the political realities of attempting these types of strategies make them nearly impossible to pull off—especially without a constitutional mandate to change the way that states inequitably fund public schools.<sup>234</sup> Though Kennedy is clear that he (and four other members of the Court) believes that being faithful to the landmark *Brown* case requires states to strive toward equal educational opportunities as well as racial integration, the Court’s own precedent and reasoning has created an obstacle to the primary method that advocates have sought to further equal education opportunities through state court systems: by challenging public education funding schemes under education clauses in state constitutions.

#### B. STATE SCHOOL FUNDING LITIGATION

Thus far, thirty-six state high courts have ruled on their varying state constitutions’ mandates for equal educational opportunities with just over half of them upholding the challenged systems despite varying levels of inequality.<sup>235</sup> Many of the state supreme courts employed rationales similar to the U.S. Supreme Court’s in the *Rodriguez* case and often cited that case directly.<sup>236</sup> However, even those state high courts that have ruled that their state’s education funding schemes do not comport with their own state constitutions have deferred the difficult task of creating a more equitable funding system to their state legislatures—nearly none of which have been able

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233. *Id.* (citing *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion)).

234. *Id.*; see also *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 22-23, 35 (1973) (holding that education was not a fundamental right and that the poor were not a suspect class and therefore a system of funding public schools with substantially varying levels of funding based on the property tax wealth of a given school district had no constitutional implications).

235. John Dayton & Anne Dupre, *School Funding Litigation: Who’s Winning the War?*, 57 VAND. L. REV. 2351, 2353 (2004) (“To date, the highest courts in thirty-six states have issued opinions on the merits of funding litigation suits, with nineteen courts upholding state funding systems and seventeen declaring the systems unconstitutional.”).

236. See, e.g., *Edgar v. Comm. for Educ. Rights*, 672 N.E.2d 1178, 1196 (Ill. 1996) (“In accordance with *Rodriguez* and the majority of state court decisions . . . we conclude that the State’s system of funding public education is rationally related to the legitimate State goal of promoting local control.”).

to muster the political mandate to equalize education funding across socio-economic lines.<sup>237</sup>

The outcome of state constitutional challenges to unequal public school funding schemes has, not surprisingly, often turned on the continuous debate over the link between educational quality and per pupil expenditure. In the landmark California case of *Serrano v. Priest* which preceded *Rodriguez* (U.S. Supreme Court) by two years, the California Supreme Court found that the state's system of funding public education discriminated against the poor.<sup>238</sup> Since *Serrano*, no other plaintiff challenging a state's system of public education funding has ultimately prevailed without convincing the court of the correlation between equality in funding and educational quality.<sup>239</sup> Though some state high courts have recognized this correlation yet upheld systems with unequal funding nonetheless, most state courts that have explicitly recognized this correlation have ruled in favor of the plaintiffs and overturned the state's system of funding—though ultimately leaving the task of creating a constitutional system to state legislatures.<sup>240</sup>

Though all fifty state constitutions recognize the states' responsibility to provide a free system of public education, and though most state constitutions contain express guarantees of equality, the specific language used is extremely varied and can often have a significant impact on whether a state joins the nineteen states that have upheld their system of public education funding in spite of funding disparities, or joins the seventeen states that have demanded a higher degree of equality.<sup>241</sup>

### 1. *Edgar v. Committee for Educational Rights (1996)*

Unfortunately, despite the State of Illinois's appalling statistics, as documented throughout this article, making it one of the worst states in the nation in terms of school-funding disparities between rich and poor districts as well as predominantly white and predominantly minority districts, Illinois finds itself as one of the nineteen states whose high court has determined that its state constitution does not guarantee equality in school funding.<sup>242</sup> Not surprisingly, the language of the Illinois Constitution itself

237. Dayton & Dupre, *supra* note 235, at 2409.

238. 487 P.2d 1241 (Cal. 1971).

239. Dayton & Dupre, *supra* note 235, at 2378.

240. *Id.*; see also *id.* at 2377 n.158 (describing cases where a correlation between school expenditures and educational opportunities was recognized by a state supreme court and in which the plaintiffs prevailed).

241. *Id.* at 2382.

242. *Edgar*, 672 N.E.2d 1178, 1206-07 (Ill. 1996) (Freeman, J., concurring in part and dissenting in part) ("As of this writing, it is questionable whether [the executive and

played a large role in the court's decision in the 1996 case of *Edgar v. Committee for Educational Rights*.<sup>243</sup> Specifically, the court pointed out that article X of the Illinois Constitution's bill of rights provides the following:

A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law. The State has the primary responsibility for financing the system of public education.<sup>244</sup>

In *Edgar*, the plaintiffs challenged Illinois's system of school funding by demonstrating that the state's school funding formula<sup>245</sup> was far too reliant on the local property wealth of a given district and did not do enough to effectively or efficiently equalize funding to provide for a high-quality education for all students since "[d]uring the 1989-90 school year, the average tax base in the wealthiest 10% of elementary schools was over 13 times the average tax base in the poorest 10%."<sup>246</sup> While the state's formula guaranteed a certain minimal "foundation level," it was not enough for poorer districts to reasonably compete for the best teachers or administrators, let alone deal with older, higher-maintenance facilities, needed student resources, or special education programs, even though the poorer districts taxed at substantially higher rates as "on average, the poorest school districts tax at higher rates than the wealthiest."<sup>247</sup> Arguing that no such system could possibly be called "efficient" or "high quality," particularly for those on the lower end of the equation, the *Edgar* plaintiffs sought a declaratory judgment that the system was violative of the Illinois Constitution because, among other reasons, it violated the education article.<sup>248</sup>

Looking to the language of the Illinois Constitution and the legislative history of the 1970 constitutional framers surrounding the adoption of the

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legislative branches of Illinois] have met their constitutional duty under the education system provision. According to one study, in the 1989-90 school year, only one state had a greater level of disparity than Illinois in resources available to elementary and secondary schools." (citing Wayne Riddle & Liane White, *Variations in Expenditures Per Pupil Within the States: Evidence from Census Data for 1989-90*, 19 J. EDUC. FIN. 358, 360 (1994)).

243. See *id.* at 1183.

244. ILL. CONST. art. X, § 1.

245. *Edgar*, 672 N.E.2d at 1181 (citing 105 ILL. COMP. STAT. 5/18-8 (West 1995)).

246. *Id.* at 1182.

247. *Id.*

248. *Id.* (citing ILL. CONST. of 1970, art. X, § 1).

education article, the majority noted that alternative language and proposals that would have guaranteed a greater level of equality or funding parity had been considered by the framers, but after much compromise, the Committee adopted language simply stating that it was the “goal” of the state to provide the best possible education to all students and to take on greater responsibility generally for school funding and funding disparities.<sup>249</sup> The majority therefore observed that “[t]he framers of the 1970 Constitution grappled with the issue of unequal educational funding and opportunity, and chose to address the problem with a purely hortatory statement of principle.”<sup>250</sup> Concluding that “[t]he mere utterance of sentiments favoring educational equality does not itself give rise to a constitutional guarantee,”<sup>251</sup> the majority concluded that the “efficiency” requirement of section one was not offended by “disparities in educational funding resulting from differences in local property tax wealth.”<sup>252</sup>

The majority next turned to the phrase “high quality,” noting that “[t]he constitution provides no principled basis for a judicial definition of high quality.”<sup>253</sup> While the majority was forced to note that nearly every other state high court had held to the contrary, the majority chose to side with the dissenters in the more than ten state supreme court cases that had held that it was within the realm of judicial authority to interpret similar constitutional requirements of “quality,” “adequacy,” or “thoroughness.”<sup>254</sup>

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249. *Edgar*, 672 N.E.2d at 1186-87. The majority discusses several alternative proposals that the Education Committee had put forth, including a proposal designed to achieve greater funding parity by having education funds controlled more centrally by the state and then “limiting local contributions to school operational costs to 10% of the amount received from the General Assembly.” *Id.* at 1186. Another proposal would have allowed funding from local taxation to equal state funding, but then require that state funds be distributed to essentially provide for “substantial parity of educational opportunity throughout the state.” *Id.* While both of these proposals were rejected by the framers, Delegate Dawn Clark Netsch was successful in adding language placing primary responsibility for financing public education on the state, explaining that “the purpose of the amendment was ‘to put the Convention on record’ that the state should bear greater responsibility for school funding both to reduce the burden of property taxes and to cure inequality in education.” *Id.* at 1187. Though in order to get the amendment to pass, she explained that “the added language was ‘not a legally obligatory command to the state legislature[,] . . . [but rather] something that can be pointed to every time the question of appropriations from the state to the school districts is at issue.’” *Id.*

250. *Edgar*, 672 N.E.2d at 1187.

251. *Id.*

252. *Id.* at 1189.

253. *Id.* at 1191.

254. *Id.* at 1191-92; *see also* *Neely v. West Orange-Cove Consol. Ind. Sch. Dist.*, 176 S.W.3d 746, 780-81 (Tex. 2005) (“Like the *majority* of these states, we conclude that the separation of powers does *not* preclude the judiciary from determining whether the Legislature has met its constitutional obligation to the people to provide for public education.” (emphasis added)).

Holding instead that "the question of whether the educational institutions and services in Illinois are 'high quality' is outside the sphere of the judicial function," the majority concluded that the Illinois Constitution's guarantee of a high quality education was nonjusticiable, and therefore insufficient to base a claim upon.<sup>255</sup> This unusual conclusion prompted dissenting Justice Freeman to lament that "the majority today abandons its responsibility to interpret the Illinois Constitution. The judiciary joins the legislative and executive departments in failing to fulfill our state government's constitutional responsibility of providing for an efficient system of high quality public education."<sup>256</sup> In fact, Justice Freeman pointed out that a holding which found Illinois's system of funding public education to be violative of the constitutional requirement for a "high quality" public education would not have intruded upon the legislature's role at all since, in the case of such a holding, it would have clearly "been up to the legislative and executive departments of state government to recreate and reestablish a public school funding scheme that would comply with the Illinois Constitution."<sup>257</sup>

Consistent with the rationale employed by other states that have upheld public school funding systems in spite of the funding disparities that result, the majority reasoned that "[a] guarantee of equal educational funding does not secure any particular level of quality."<sup>258</sup> Instead, the majority focused on a "curtailing" of liberty that results when funding is equalized between districts since such efforts require "redistribution of resources from wealthy districts to poor ones," thereby reducing "local control."<sup>259</sup> Citing the U.S. Supreme Court's holding in *Rodriguez* that education is not a fundamental right nor are the poor a suspect class,<sup>260</sup> the majority applied the highly deferential rational basis standard and resolved that "we have no basis to conclude that the manner in which the General Assembly has struck the balance between equality and local control is so irrational as to offend the guarantee of equal protection."<sup>261</sup>

Justice Freeman, on the other hand, pointed to the "widely recognized" body of evidence identifying the correlation between educational resources

255. *Edgar*, 672 N.E.2d at 1193.

256. *Id.* at 1207 (Freeman, J., concurring in part and dissenting in part).

257. *Id.* at 1206 (Freeman, J., concurring in part and dissenting in part). Justice Freeman was careful to point out the obvious: that "the [court] could not have instructed the General Assembly to enact any specific legislation or to raise taxes" any more than it could instruct the Governor on "how to implement or enforce any public school funding policy or plan." *Id.* It was, however, indisputably and distinctly the "duty of the judicial department of Illinois government . . . to determine what the Illinois Constitution requires." *Id.* (emphasis added).

258. *Id.* at 1195.

259. *Id.* at 1195-96.

260. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 53-54 (1973).

261. *Edgar*, 672 N.E.2d at 1196.

or funding and educational quality or opportunity.<sup>262</sup> Justice Freeman went on to point out the irony in the majority's rejection of this well-supported principle given that this "proposition form[s] the very premise upon which the Illinois public school funding scheme is based . . . [since] . . . supplementary aid is 'designed to ameliorate in part the dollar disparities generated by a system of local taxation.'"<sup>263</sup>

Perhaps in recognition of the entrenched and well-represented interests of the state's affluent population who are well served by a system that provides their children with superior education funding with, in general, substantially lower rates of taxation, Justice Freeman insightfully concludes:

The legislative and executive departments of Illinois government need such a call. As of this writing, it is questionable whether they have met their constitutional duty under the education system provision. According to one study, in the 1989–90 school year, only one state had a greater level of disparity than Illinois in resources available to elementary and secondary school districts.<sup>264</sup>

Over twenty years prior to the *Edgar*<sup>265</sup> case, Justice Thurgood Marshall articulated this same concern about the critical role of the judiciary in achieving any meaningful level of school equality or desegregation.<sup>266</sup> Noting that the executive and legislative branches of government had "proved singularly unsuited to the task of providing a remedy for this discrimination," Justice Marshall found it difficult to "accept the [majority's] notion that it is sufficient to remit these [underserved] appellees to the vagaries of the political process."<sup>267</sup> Today, thirty-five years after the *Rodriguez*<sup>268</sup> decision and more than fifty years after the *Brown*<sup>269</sup> decision, the entrenched interests of those living in wealthier, predominantly white school districts have proved far too powerful of an obstacle to even adequate educational services for many Illinois schoolchildren or reasonably safe school build-

262. *Id.* at 1205-06 (Freeman, J., concurring in part and dissenting in part).

263. *Id.* (Freeman, J., concurring in part and dissenting in part) (citing *Robinson v. Cahill*, 303 A.2d 273, 277 (N.J. 1973)).

264. *Edgar*, 672 N.E.2d at 1207 (Freeman, J., concurring in part and dissenting in part).

265. *Id.* at 1178.

266. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 70-71 (1973) (Marshall, J., dissenting).

267. *Id.* at 71.

268. *Rodriguez*, 411 U.S. 1.

269. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).



ings and facilities.<sup>270</sup> Without a court mandate to give even the slightest shred of meaning whatsoever to the Illinois Constitution and the terms such as “quality” (let alone “high quality”), “efficient,” or “the state has the primary responsibility” contained therein, the political process will continue to be dominated by those who already have adequate resources, at the direct cost and detriment to those who are in the most desperate need of them.<sup>271</sup>

Three years after *Edgar*,<sup>272</sup> a group of East St. Louis schoolchildren attempted another lawsuit challenging Illinois’s system of school funding, this time seeking a declaratory judgment that the students had “the right to a safe, adequate education under the Illinois and United States Constitutions, the School Code, and [the] common law.”<sup>273</sup> The plaintiffs in *Lewis v. Spagnolo* argued that they were presenting a different issue than that which had been before the court in the *Edgar* case.<sup>274</sup> Instead of arguing that the Illinois Constitution guaranteed some level of educational equality, these plaintiffs merely argued that the Illinois Constitution’s education article at least granted them the right to a “minimally adequate education,” and that insofar as they had been deprived of certain “basic components” of education defined as “[certified] teachers, textbooks, and reasonably safe school buildings,” that they were in fact being “denied a free public education in violation of [the education] article.”<sup>275</sup> In *Lewis*, countless examples of unsafe conditions had been documented including “fire hazards; chronic flooding; structural flaws . . . ; malfunctioning heating systems; unsanitary restrooms; . . . asbestos [problems]; broken windows; . . . the presence of

270. See *Lewis E. v. Spagnolo*, 710 N.E.2d 798, 817 (Ill. 1999) (Freeman, C.J., concurring in part and dissenting in part).

By any reasonable measure, the public schools of District 189 (the appellant’s district) are neither safe nor adequate. . . . Classrooms are sealed to protect students from asbestos and dangerous structural flaws.

In dark corridors, light bulbs go unreplaced and rain seeps through leaky roofs. In heavy rains, backed-up sewers flood school kitchens, boilers, and electrical systems . . . . Bathrooms are unsanitary and water fountains are dry or spew brown water.

In winter, students sit through classes in heavy coats because broken windows and faulty boilers go unrepaired. They struggle to learn with meager instructional equipment and tattered, dated textbooks. . . . [The district] is chronically short staffed, and teachers are often absent or disengaged from students.

*Id.* (Freeman, C.J., concurring in part and dissenting in part).

271. See ILL. CONST. art. X, § 1.

272. *Edgar v. Comm. for Educ. Rights*, 672 N.E.2d 1178, 1178 (Ill. 1996).

273. *Lewis*, 710 N.E.2d at 801.

274. *Lewis*, 710 N.E.2d at 804 (“The plaintiffs assert, however, that *Committee for Educational Rights* is not dispositive here because that decision did not address a claim that children were being deprived of a ‘minimally adequate’ education as opposed to a ‘high quality’ education.” (citing *Edgar*, 672 N.E.2d at 1178)).

275. *Id.* at 801-02.

cockroaches and rats; and cold, nonnutritious lunches in the cafeterias.”<sup>276</sup> Moreover, the school district was plagued with “meager instructional equipment, . . . systematic staffing deficiencies, . . . high drop-out rates[,] and low test scores.”<sup>277</sup>

The majority of the Illinois Supreme Court, however, was “unpersua[ded]” that the East St. Louis schoolchildren presented any distinguishable issue from the plaintiffs in *Edgar* and reaffirmed their three-year-old precedent that “questions relating to the quality of education are solely for the legislative branch to answer.”<sup>278</sup> Unfortunately, this complete abdication<sup>279</sup> of responsibility to interpret the Illinois Constitution affirmed a precedent of circular logic whereby nothing is likely to ever be accomplished since the legislature would undoubtedly concede that it is the role of the judiciary to interpret the Illinois Constitution, yet at the same time has proved incapable or unwilling to change the currently deteriorating and discriminating system of public education funding. Ironically, however, the Illinois Supreme Court was insistent that it is somehow “solely for the legislative branch” to interpret what the Illinois Constitution means by its explicit guarantee of a “high quality education” for all.<sup>280</sup>

Then Chief Justice Freeman, this time joined by newly elected Justice Harrison, once again took exception to the majority’s conclusion that it is somehow *not* “the function and duty of the supreme court—[as opposed to] the legislature—to act as the final arbiter of the Illinois Constitution.”<sup>281</sup> Noting the unfortunate result from the *Edgar* case—which essentially closed the “courthouse door” to any claim involving section one of the Illinois Constitution’s education article whatsoever<sup>282</sup>—in this case, Chief Justice Freeman bemoaned the majority’s decision to effectively “nail[] that door shut” and “turn the [education article of the constitution] into a dead letter.”<sup>283</sup> Referring again to the “squalid” and inadequate facilities and resources,<sup>284</sup> Chief Justice Freeman reiterated that:

I am troubled by the majority’s view that District 189 schools are better than a vacant building marked with the word “School.” I am at a loss as to what additional allega-

276. *Id.* at 801.

277. *Id.*

278. *Lewis*, 710 N.E.2d at 804 (citing *Edgar*, 672 N.E.2d at 1178).

279. *Edgar*, 672 N.E.2d at 1203 (Freeman, J., concurring in part and dissenting in part).

280. *Lewis*, 710 N.E.2d at 804.

281. *Id.* at 818.

282. *Id.* at 816 (Freeman, C.J., concurring in part and dissenting in part) (citing *Edgar*, 672 N.E.2d at 1178).

283. *Id.* at 816, 819 (Freeman, C.J., concurring in part and dissenting in part).

284. *Id.* at 817 (Freeman, C.J., concurring in part and dissenting in part).

tions the majority needs. Plaintiffs plead facts that are disgusting and shameful. Curiously, the majority doubts "that the legislature would ever set standards for education so as to allow for such a situation." However, the facts alleged here plainly show that "such a situation" exists.<sup>285</sup>

Though the majority was careful to emphasize that their decision in these cases "in no way represents an endorsement of the present system of financing public schools in Illinois," and even hints that such a system "might be thought unwise, undesirable[,] or unenlightened from the standpoint of contemporary notions of social justice,"<sup>286</sup> they nonetheless "abandon"<sup>287</sup> their duty and leave the job to the branch of government that has proved to be the most "singularly unsuited to the task."<sup>288</sup> Sadly, the state of public education in East St. Louis remains largely the same—if not worse—since buildings are now nearly a decade older.<sup>289</sup>

## V. POLICY ARGUMENTS

### A. THE ILLINOIS SUPREME COURT SHOULD REVISIT ITS DECISIONS IN *EDGAR AND LEWIS*

In addition to the policy arguments advanced throughout this article, some additional policy arguments exist in support of a major shift in how Illinois public schools are funded. First of all, it is becoming more and more apparent that a judicial declaration is needed to affirm that the Illinois Constitution's education article represents more than an empty declaration or "dead letter,"<sup>290</sup> and that the state's explicit constitutional "responsibility for financing the system of public education"<sup>291</sup> means that the state must ensure that poorer school districts are minimally afforded sufficient resources to provide physically safe school facilities and at least some level of adequacy—even if the Illinois Constitution is still interpreted to require no level of equality. Given the impracticability and political difficulty of an unprompted, dramatic shift being accomplished through the legislative and

285. *Id.* at 819 (Freeman, C.J., concurring in part and dissenting in part).

286. *Edgar*, 672 N.E.2d at 1196.

287. *Id.* at 1207 (Freeman, J., concurring in part and dissenting in part).

288. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 71 (1973) (Marshall, J., dissenting).

289. *Rado et al.*, *supra* note 6, § 1, at 15 ("In East St. Louis, though, segregation still prevails in one of the most historically troubled districts in the state. Several schools are still 100 percent black.").

290. *Lewis E. v. Spagnolo*, 710 N.E.2d 798, 819 (Ill. 1999) (Freeman, C.J., concurring in part and dissenting in part).

291. ILL. CONST. art. X, § 1.

executive branches, the Illinois Supreme Court should at least revisit its decision on the nonjusticiability of challenges to the Illinois public school funding scheme and join the majority of state high courts in concluding that “separation of powers does not preclude the judiciary from determining whether the Legislature has met its constitutional obligation to the people to provide for public education.”<sup>292</sup>

Moreover, in light of the recent Supreme Court cases where diversity in schools was identified as a *compelling state interest* (by the majority in *Grutter*<sup>293</sup> and by five Justices in *Seattle*<sup>294</sup>), the Illinois high court should reconsider the “legitimacy” of the state goal of “local control” identified in *Edgar*<sup>295</sup>—especially considering how significantly the state of Illinois’s schools exemplify the opposite of diversity—as such an interest is significant enough to be considered compelling and sufficient to overcome strict scrutiny analysis on a federal constitutional level.<sup>296</sup> While the U.S. Supreme Court has not gone so far as to show signs of reconsidering its thirty-five-year-old constitutional jurisprudence with respect to a federal right to education, there is in fact a five-member majority of Justices currently on the Court that is on record as noting the nation’s “moral and ethical obligation” to create an integrated and more equal society with specific emphasis on “avoiding racial isolation” and “achiev[ing] diverse student population[s]” in public schools.<sup>297</sup> While education may not be a fundamental right under the Court’s interpretation of the Federal Constitution, state constitutions deal with education much more explicitly and should involve an entirely distinct type of analysis.<sup>298</sup> According to the Supreme Court, “the key to discovering whether education is [a] ‘fundamental’” right “lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.”<sup>299</sup> Applying the Supreme Court’s test to Illinois’s constitution would in fact make education a fundamental right in Illinois by the express terms of the state constitution, which specifically enumerates education in its bill of rights.<sup>300</sup> While language used in state

292. *Neeley v. West Orange-Cove Consol. Ind. Sch. Dist.*, 176 S.W.3d 746, 780-81 (Tex. 2005).

293. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

294. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2753 (2007).

295. *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996).

296. *See Seattle*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

297. *Id.*

298. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 133 n.100 (1973) (Marshall, J., dissenting) (“Of course, nothing in the Court’s decision today should inhibit further review of state educational funding schemes under state constitutional provisions.”)

299. *Id.* at 33 (majority opinion).

300. ILL. CONST. art. X, § 1.

constitutions to discuss educational rights varies, Illinois's constitution uses particularly strong language of state responsibility. In fact, legal scholars have developed a four-part framework based on the strength of constitutional language, and Illinois's constitution uses comparatively stronger language with respect to the right to an education than the vast majority of states.<sup>301</sup> Combined with the U.S. Supreme Court's clear, unanimous declaration that education is "the most important function of state and local governments,"<sup>302</sup> the Illinois Supreme Court's reliance on the *Rodriguez* decision to deny the existence of a fundamental right to an education based on Illinois's *state* constitution seems misplaced.<sup>303</sup>

Even in the absence of concluding that Illinois's constitution provides a fundamental right to education, the supposed "rational basis" of allowing such an inequitable system of school funding in order to preserve "local control" is far less sufficient under a state constitutional analysis.<sup>304</sup> In *Rodriguez*, four Justices found that even under the Federal Constitution, which does not mention education, that a similar system of school funding was not "rationally related to . . . maximizing local [control]," and thus the preservation of a school district's local control "utterly fails" to justify such an extensively unequal school funding scheme.<sup>305</sup> Given the explicit language of Illinois's constitution and the U.S. Supreme Court's very recent affirmation of the importance placed on a state's "obligation" to provide "integrated" and "equal" educational opportunities,<sup>306</sup> the Illinois Supreme Court should revisit its decision in *Committee for Educational Rights v. Edgar* since Illinois's legislative branch continues to demonstrate that, short of a judicial declaration that the Illinois Constitution requires some minimum degree of equality, there will be no meaningful provision of equal educational opportunity for most poor and minority school children.

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301. John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351, 2387 (2004). Illinois is cited as one of only seven states ranked in the "Category IV" states that "impose the highest level of state obligation." *Id.* at 2387 n.209.

302. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

303. *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1193-96 (Ill. 1996).

304. *Id.* at 1196.

305. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 64 (1973) (White, J., dissenting).

306. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2770, 2797 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

B. A NOTE ABOUT “APARTHEID SCHOOLS”<sup>307</sup>

As previously discussed, in the 2007 *Seattle* case, Justice Breyer pointed out that some 2.3 million minority school children (one in every six nationwide) attend schools where the population of white school children is just 1% or less.<sup>308</sup> This makes it easy to see why these schools have been dubbed “apartheid schools” since if one assumes class sizes of approximately twenty-five, the typical minority child at one of these schools might never have a white classmate, and on average would share a classroom with a white student only once every four years. Nevertheless, the U.S. Supreme Court has explicitly rejected most efforts to desegregate where such segregation is not directly caused by government action and is therefore deemed to be de facto, as most segregation is interpreted to be today.<sup>309</sup> However, a strong argument can be made that the very existence of “apartheid schools” that occur as result of intentional “private choice”<sup>310</sup>—as opposed to officially sanctioned government actions—creates an even more compelling interest in purposeful government intervention.

While the complicity of a larger percentage of the population is needed for the creation and maintenance of these apartheid schools (and segregated schools in general) than was the case with Jim Crow laws and de jure segregation, the elimination of today’s apartheid schools would be nearly impossible without some form of coordinated governmental intervention. For example, in most cases where de jure/Jim Crow segregation existed, there was typically a significant minority of citizens who opposed such practices, but theoretically, if that minority were to succeed in becoming even the slightest of majorities, then the government sanctioned de jure segregation would eventually disappear through the normal political process without the need for direct government intervention. However, under today’s reality of de facto segregation, a 51% majority—or even a far greater majority—could not put an end to the type of neighborhood and school district segregation that has been established through “private choice.”<sup>311</sup> It would still be possible—and indeed inevitable—that segregated neighborhoods and schools would still exist and that children born into those areas would re-

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307. ERICA FRANKENBERG, CHUNGMEI LEE & GARY ORFIELD, *A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM?* (2003), available at <http://www.civilrightsproject.ucla.edu/research/reseg03/finalexec.pdf> (identifying schools which are 95%–100% single race as “apartheid schools”). In the Northeast and Midwest, 1/4 of all black students attend apartheid schools; nationwide, 1/6 of all black students attend apartheid schools. *Id.*

308. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2802 (2007) (Breyer, J., dissenting).

309. See *Milliken v. Bradley*, 418 U.S. 717 (1974).

310. See *Freeman v. Pitts*, 503 U.S. 467, 495 (1992).

311. *Id.*

ceive inferior educations and unequal opportunities. Indeed, given this state of de facto segregated schools and neighborhoods, the only way to prevent a resulting discriminatory impact upon minority schoolchildren would be to provide for at least some level of equal educational opportunity—something that Illinois and many other states have utterly failed to do.<sup>312</sup>

While the U.S. Constitution apparently does not compel the government to take such action, the harm produced by apartheid schools is identical to that which was identified in *Brown* as resulting from the racial separation “from others of similar age and qualifications . . . [which] generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>313</sup> If such irreparable harm results from de jure segregation because such segregation has the “sanction of law”<sup>314</sup> and sends a message of inferiority, is there a substantially different effect or message sent when segregation is the result of the majority of one’s fellow citizens deciding to segregate themselves from poor or minority students? What message is sent by the Court when it views such a system of apartheid schooling and declares that not only does (de facto) apartheid schooling not violate the Constitution, but that most efforts to remedy such segregated systems *do* in fact violate the Constitution to the extent that they take race into account?<sup>315</sup> As many have noted, “the Court’s reticence suggests willingness to participate in perpetuating exclusion—by choice, abandoning its role as protector of minority interests, particularly under the Equal Protection Clause.”<sup>316</sup>

Likewise, the Illinois Supreme Court sends the wrong message in essentially holding that they are not empowered “to determine whether the education system provision [of the state constitution] has been violated,” thus rendering it impossible for any plaintiff to ever “state a cause of action . . . based on a violation of the education article” no matter how severe the deprivation or disparity in educational opportunity may be. It is regularly argued by past and present conservative members of the Court that differential treatment—even when it seeks to bestow a benefit—based on race is likely to have a negative impact on minority children.<sup>317</sup> However, it is far

312. *E.g.*, JONATHAN KOZOL, *THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA* 238 (2005); Rado et al., *supra* note 6, § 1, at 1.

313. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

314. *Id.*

315. *See, e.g.*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 274 (1978) (“[T]he Court has insisted upon some showing of prior discrimination by the government unit involved before allowing limited use of racial classifications in order to remedy such discrimination.”).

316. Phoebe A. Haddon, *Epilogue to BROWN v. BOARD, CONSTITUTIONAL LAW: CASES, HISTORY AND DIALOGUES* 898 (William D. Araiza et al. eds., 3d ed. 2006).

317. *E.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2770 (Thomas, J., concurring) (“The Constitution abhors classifications based on race, not only

more likely that the practical ramifications of *Rodriguez*, *Milliken*, and the *Seattle* plurality opinion is to reinforce the already pervasive sentiment (aggravated in the post-Katrina political environment) that government does not care about poor, especially black, communities; and, as Justice Kennedy points out in his *Seattle* concurrence, “that the Constitution” not only has nothing to say, but actually “requires school districts to ignore the problem of de facto resegregation in schooling.”<sup>318</sup>

### C. THE POLICY ISSUE OF UNEQUAL EDUCATION IN RURAL COMMUNITIES

Illinois’s three-tiered formula for determining the state contribution, based entirely on the district’s ability to raise funds, results in huge inequalities and inadequate educational opportunities for large numbers of rural white public school students as well. Since the remainder of school funding must be raised locally and is based primarily on property values, typically “[m]ost school districts[—] . . . especially nonurban [ones]—cannot reasonably raise sufficient revenues from local sources to provide even the average amount of total funds for education per pupil state-wide.”<sup>319</sup> Poverty rates of rural children nationwide are substantially higher—at 23%<sup>320</sup>—than the rest of the state’s population of children. Of course, rural blacks—who nationwide suffer from poverty rates more than double that of rural whites—are ill-served by this funding scheme as well.<sup>321</sup>

Moreover, higher transportation costs for students who are more spread out and the inability of rural districts to compensate for low revenue generation with sales tax revenue (since there are few shopping centers in rural areas) are all part of the failure of the state system “to reflect the costs related to low population density to the detriment of the affected students.”<sup>322</sup> These problems are compounded by the geographic isolation of rural schools and low numbers of representatives in the state legislature—resulting in a comparative lack of political influence and thus less hope of improving their already unequally funded schools through the legislative

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because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.” (citing *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part))).

318. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2791 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

319. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 143 (Tenn. 1993).

320. John Dayton, *Rural Children, Rural Schools, and Public School Funding Litigation*, 82 NEB. L. REV. 99, 100 (2003).

321. *Id.*

322. *Id.* at 106.



process.<sup>323</sup> While this article gives primary emphasis to the vast disparities between predominantly white suburban school districts and predominantly minority urban districts, this should in no way be interpreted to discount the significance of the injustice suffered by many rural schoolchildren at the hands of Illinois's unequal and unfair system of determining how much tax revenue will be available to fund one's education.

#### D. THE FAIR TAX POLICY ARGUMENT

##### 1. *Why Illinois's Current Funding Scheme is Overly and Unfairly Regressive*

Illinois's school funding system, which overrelies on local property taxes to generate the bulk of education funding, creates a default system of regressive taxation whereby wealthier school districts are able to both raise more school funds and tax at often substantially lower rates than poorer school districts.<sup>324</sup> This dual cruelty was described by the Connecticut Supreme Court as follows:

In sum, taxpayers in property-poor towns such as Canton pay higher tax rates for education than taxpayers in property-rich towns. The higher tax rates generate tax revenues in comparatively small amounts and property-poor towns cannot afford to spend for the education of their pupils, on a per pupil basis, the same amounts that property-rich towns do. These facts were affirmed by a conclusion of the governor's commission on tax reform:

In short, many towns can tax far less and spend much more; and those less fortunate towns can never catch up in school expenditure because taxes are already as high as homeowners can tolerate. . . . This dual inequity—a family can pay more and get less for its children—is the fundamental issue of school finance.<sup>325</sup>

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323. *Id.* at 100.

324. See PEOPLE FOR THE AM. WAY FOUND., *INEQUALITY IN ILLINOIS: HOW ILLOGICAL SCHOOL FUNDING HAS ERODED PUBLIC EDUCATION* 1, app. C (Nathan Richter ed., 2004).

325. Horton v. Meskill, 376 A.2d 359, 367 (Conn. 1977) (citing 2 GOVERNOR'S COMM'N ON TAX REFORM, STATE OF CONNECTICUT: THE REPORT OF THE GOVERNOR'S COMMISSION ON TAX REFORM, 53-54 (1972)).

In Illinois, which has the nation's worst disparities between wealthy and poor school district per pupil funding, the state's low input into education—covering just 36% of overall expenses, compared to the national average of 50%—also results in a low ranking (forty-seventh) and heavy dependence on local taxes.<sup>326</sup> This system of raising educational funds “unfairly imposes a greater tax burden on low- and moderate-income families than on wealthier ones.”<sup>327</sup>

#### E. PROPOSAL FOR LEGISLATION

There are many possibilities for the creation of some level of equality in Illinois public schools, but at the heart of any legislative proposal must be a significant change in the method by which funds are raised and distributed. At the very least, Illinois should strive for a level of equality that is based on the National Education Association's principle of “fiscal neutrality,” whereby tax burdens and tax efforts are equalized in a way that provides that “equal tax effort should result in equal expenditures per pupil throughout the state.”<sup>328</sup> Moreover, as the superintendent of Louisville schools pointed out after their voluntary desegregation plan was struck down in the *Seattle* case, Justice Kennedy's opinion has “blessed” a variety of different approaches to achieving both racial integration and equal educational opportunity.<sup>329</sup> Some of these “blessed” practices are already in use within some Illinois school districts. For example, Oak Park and Evanston have been known for their integrated schools achieved by drawing “meandering school boundaries to ensure a racial and economic mix.”<sup>330</sup> Other legislative proposals have focused on a shift away from property taxes altogether—offset by a progressive increase in income taxes.<sup>331</sup> For the most part, these proposals have not gained significant traction in the legislature, underscoring again the need for judicial intervention to supply the “call” to action that “[t]he legislative and executive departments of Illinois government need.”<sup>332</sup>

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326. See PEOPLE FOR THE AM. WAY FOUND., *INEQUALITY IN ILLINOIS: HOW ILLOGICAL SCHOOL FUNDING HAS ERODED PUBLIC EDUCATION 2* (Nathan Richter ed., 2004).

327. *Id.*

328. See John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351, 2359 n.26 (2004).

329. Editorial, *Diversity the Right Way*, CHI. TRIB., July 1, 2007, § 2, at 6.

330. Rado et al., *supra* note 6, § 1, at 1.

331. See, e.g., A+ Illinois, Sample Resolution in Support of Reforming School Funding and Improving Student Achievement, <http://www.aplusillinois.org/toolbox/resolution.asp> (on file with author).

332. Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1206 (Ill. 1996) (Freeman, J., concurring in part and dissenting in part).

## VI. CONCLUSION

As crazy as the premise may sound, a return to the “separate but equal” doctrine of *Plessy v. Ferguson* is a serious proposal. While this is of course *not* an argument in favor of a return—or in Illinois’s case, an introduction of proactive, de jure segregation—it is a proposal to deal with the reality of Illinois’s already racially and socioeconomically segregated schools by achieving some meaningful level of the “substantially equal facilities” and resources called for under *Plessy v. Ferguson* for predominantly black schools and white schools alike, “even though these facilities be separate.”<sup>333</sup> In the short term, this would help accomplish the goals of: (1) shrinking the gap between rich, predominantly white suburban school districts, and poor, predominantly minority urban school districts; and (2) providing a minimum level of adequacy, if not “efficiency” and “high quality” education for all Illinois schoolchildren, even if they are geographically isolated, racially segregated, or divided along socioeconomic lines. In the short term, Illinois should seek to minimally fulfill that which was supposedly promised to minority children over 110 years ago by the overtly racist *Plessy* Court. Accomplishing some semblance of equality between Illinois’s separate and segregated schools will be an important step toward the long-term target of the yet unaccomplished goals of *Brown*: equal educational opportunity *and* racial integration.

While political realities and entrenched societal factors block a simple or expedient solution in the midst of what might appear to be the end to most efforts to desegregate after the Supreme Court’s decision in *Seattle*, perhaps the pathway has been identified by the recognition of a “compelling state interest” in providing a diverse learning environment (racially *and* socioeconomically), in both higher education<sup>334</sup> and K–12 schools.<sup>335</sup> But in order to achieve racial and socioeconomic integration, there must first be some meaning given to Illinois’s constitutional right to a “high quality” education,<sup>336</sup> including some significant degree of equality. So long as the state fails to provide equal educational opportunities across urban, suburban, and rural geographic boundaries, the “market” will continue to find ways to trump constitutional notions of equality, rendering such documents “dead letter”<sup>337</sup> law. The time has come to fulfill the promise of the 1950s

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333. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

334. *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003).

335. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

336. ILL. CONST. art. X, § 1.

337. *Lewis v. Spagnolo*, 710 N.E.2d 798, 819 (1999) (Freeman, C.J., concurring in part and dissenting in part).

civil rights litigation and hold our legislative, executive, and judicial branches of government to account for the abysmal state of education for poorer schoolchildren and the appalling correlation between a student's race and the quality of education he or she receives.

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