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Socioeconomic School Integration

Richard D. Kahlenberg

SOCIOECONOMIC SCHOOL INTEGRATION*

RICHARD D. KAHLENBERG**

While most of education reform in the early twenty-first century is focused on trying to find ways to make high-poverty schools effective, a more promising strategy seeks to integrate schools by socioeconomic status. Given the overwhelming evidence that it is very difficult to make high-poverty schools work well on a systemwide basis, about forty U.S. school districts are seeking to break up concentrations of school poverty by using the socioeconomic status of students as a factor in student assignment. The federal No Child Left Behind Act of 2001, if amended, could facilitate greater economic school integration by allowing children in failing high-poverty urban schools to attend higher-performing middle class suburban schools. In addition, the legal principle that states must provide "adequate" education to students should be extended to require that pupils receive access not only to adequate levels of school expenditures, but also to other important school "resources" that have a powerful effect on academic achievement—positive peer influences, active parents, and high-quality teachers. Because these resources are not normally found in high-poverty schools, an adequate education requires giving all students access to good, economically mixed public schools.

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** A.B., Harvard College; J.D., Harvard Law School. Mr. Kahlenberg is a Senior Fellow at the Century Foundation in Washington, D.C.

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INTRODUCTION

What is to be done about the manifold problems associated with "high-poverty"[1] elementary and secondary schools? Fundamentally, there are two basic strategies available: improve them or abolish them. We can accept economic school segregation as a fact of life and do our best to try to make "separate but equal" work—as most of modern education reform does—or we can seek to integrate school populations by socioeconomic status, significantly reducing the number of high-poverty schools and allowing many more children to

1. High-poverty schools are defined here as those with more than 50% of students eligible for free and reduced-price lunch. *See* RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 106–12 (2001). Students are eligible for subsidized lunches if their families make less than 185% of the poverty line. Child Nutrition Programs—Income Eligibility Guidelines, 70 Fed. Reg. 13,161, 13,161–62 (Mar. 18, 2005). In the 2005–06 school year, a student from a family of four making less than $35,798 was eligible for subsidized lunch. *Id.* at 13,162.

attend high-quality, mixed-income public schools. This Article argues for the latter strategy.

Part I of this Article outlines the empirical evidence that suggests high-poverty schools are very difficult to fix in a systemic fashion. This portion of the Article also outlines the reasons why such schools present difficult learning environments, analyzing the effects of peers, parents, and teachers on schools.

Part II surveys voluntary efforts by school districts to break up concentrations of school poverty and improve student achievement by socioeconomic integration. This Part next reviews the legal and educational advantages that socioeconomic integration offers compared with voluntary efforts to integrate students by race. This Part also examines the new provisions available under the Federal No Child Left Behind Act of 2001 ("NCLB")[2] to pursue socioeconomic integration. It concludes with a discussion of how housing policy could promote socioeconomic integration in schools.

Part III examines legal strategies for pursuing socioeconomic school integration. This Part reviews existing legal efforts to promote socioeconomic integration in Connecticut, New York, and Minnesota, and outlines a legal theory under which plaintiffs in other states could argue that the remedies required under many state constitutional provisions for an "adequate"[3] education should be extended beyond school financing to require affirmative steps to break up concentrations of school poverty. This Part ends with a discussion of how state precedents in housing law might lend support for socioeconomic school integration.

I. HIGH-POVERTY SCHOOLS ARE VERY HARD TO "FIX"

Researchers have consistently found that schools with high concentrations of poverty present, on average, a very difficult environment for student learning.[4] While isolated high-poverty schools with charismatic principals and especially dedicated teachers have proved to be successful, the overwhelming majority of high-poverty schools struggle. Although some studies from groups across the political spectrum purport to find large numbers of successful

2. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. §§ 6301–6578 (Supp. II 2002)).

3. Aaron Jay Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 858 (2006) (explaining the significance of the word "adequate" in education litigation).

4. *See infra* notes 12–24 and accompanying text.

high-poverty schools,[5] most of these "successes" turn out to be unreplicable or to be flukes: most schools identified as "high flying" are unable to sustain high levels of achievement over time and at multiple grade levels. According to a recent study conducted at Florida State University by Douglas N. Harris, high-poverty schools are twenty-two times less likely than middle class schools to be consistently high performing.[6]

Of course, low-income schools are less likely to perform well, in part, because individual low-income students come from families that have less access to health care, adequate nutrition, a quiet place to work, and the like.[7] However, a separate problem arises when low-income students are concentrated in schools separately from their middle class peers. The legendary "Coleman report" of the 1960s found that after the influence of the family, the socioeconomic status of a school is the single most important determinant of a student's academic success.[8] This basic finding of the report—that all children do better in middle class schools—has been affirmed again and again in social science literature.[9] In 2005, for example, University of California professor Russell Rumberger and his colleague Gregory J. Palardy found that a school's socioeconomic status had as much

5. *See, e.g.*, SAMUEL CASEY CARTER, NO EXCUSES: LESSONS FROM 21 HIGH-PERFORMING, HIGH-POVERTY SCHOOLS (2000) (detailing the successful practices of twenty-one principals of low-income schools); CRAIG D. JERALD, DISPELLING THE MYTH REVISITED: PRELIMINARY FINDINGS FROM A NATIONWIDE ANALYSIS OF "HIGH FLYING" SCHOOLS 6–7 (2001), *available at* http://www2.edtrust.org/NR/rdonlyres/A56988EB-28DE-4876-934A-EE63E20BACEE/0/DTMreport.pdf (reporting data that thousands of high-poverty and high-minority schools are also high-performing schools).

6. DOUGLAS N. HARRIS, ENDING THE BLAME GAME ON EDUCATIONAL INEQUALITY: A STUDY OF "HIGH FLYING" SCHOOLS AND NCLB 20 tbl.2 (2006), *available at* http://epsl.asu.edu/epru/documents/EPSL-0603-120-EPRU.pdf. In the study, "high-poverty" is defined as having at least 50% of students eligible for free and reduced-price lunch. *Id.* at 18. "High-performing" is defined as being in the top third in the state in two subjects in two grades and over a two-year period. *Id.* at 18, 20 tbl.2.

7. RICHARD ROTHSTEIN, CLASS AND SCHOOLS 37–47 (2004).

8. JAMES S. COLEMAN ET AL., U.S. DEP'T OF HEALTH, EDUC., & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 325 (1966). Coleman's comprehensive report used a sample of more than 150,000 students to study educational opportunity in the United States. A recent reanalysis of Coleman's data by Geoffrey D. Borman of the University of Wisconsin at Madison found the effects of attending a high-poverty or predominantly minority school were even greater than Coleman found. *See* Debra Viadero, *Fresh Look at Coleman Data Yields Different Conclusions*, EDUC. WK., June 21, 2006, at 21.

9. *See* KAHLENBERG, *supra* note 1, at 25–35 (2001) (citing numerous studies finding that a school's socioeconomic status is second only to family background as a determinant of students' academic successes).

impact on the achievement growth of high school students as a student's individual economic status.[10]

Low-income students do not typically perform as well academically as middle class children, with one striking exception: low-income students attending middle class schools perform better, on average, than middle class students in high-poverty schools. Scores from the 2005 National Assessment of Educational Progress ("NAEP") among fourth-graders in math indicate that low-income students in more affluent schools score eight points higher on average—more than half a grade level—than middle class students in schools with between 75% and 100% of students eligible for free and reduced-price lunch.[11]

Why is it advantageous for students to avoid concentrations of poverty? Virtually everything that educators talk about as being desirable in a school—high standards, good teachers, active parents, adequate resources, a safe and orderly environment, and a stable student and teacher population—are found in middle class schools but not in low-income schools.[12] While money matters a great deal in education, people matter more. Consider the three main sets of actors in a school: students, parents, and faculty (teachers and principals).

Research suggests that students learn a great deal from their peers, so it is an advantage to have classmates who are academically engaged and aspire to go on to college. Peers in middle-income schools are more likely to do homework and to graduate, and less likely to watch television and cut class than their counterparts in high-poverty schools—all of which have been found to influence the behavior of classmates.[13] Middle class schools report disorder problems half as often as low-income schools, so more learning goes on in these schools.[14] It is also an advantage to have high-achieving peers, whose knowledge is shared informally with classmates all day long. Middle class peers come to schools with twice the vocabulary of low-income children, so any given child is more likely to expand his vocabulary in a middle class school through informal interaction.[15]

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10. Russell W. Rumberger & Gregory J. Palardy, *Does Segregation Still Matter? The Impact of Student Composition on Academic Achievement in High School*, 107 TCHRS. C. REC. 1999, 2014 (2005).

11. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 2006, at 47 (2006), *available at* http://nces.ed.gov/pubs 2006/2006071.pdf.

12. KAHLENBERG, *supra* note 1, at 47–76.

13. *Id.* at 51–58.

14. *Id.* at 58.

15. *Id.* at 50.

Parents are also an important part of the school community, and research finds that students perform better in schools where parents are actively involved, volunteer in the classroom, and hold school officials accountable.[16] In this regard, middle class schools have a definite advantage over low-income schools. Parents with meager incomes, particularly those working multiple jobs, may not have the time to be active volunteers.[17] Yet, irrespective of the cause, the disparity between schools on opposite sides of the socioeconomic spectrum is sizeable. Parents of students in middle class schools are four times more likely than those in low-income schools to be members of parent-teacher organizations and are much more likely to participate in fundraising.[18]

Finally, research finds that the best teachers, on average, are attracted to middle class schools.[19] Nationally, teachers in middle class schools are more likely to be licensed to teach in their field of expertise,[20] to have high teacher test scores, to be experienced, and to have greater formal education.[21] Teachers generally consider it a promotion to move from poor to middle class schools, and the best teachers usually transfer into middle-income schools at the first opportunity.[22] Moreover, teachers in middle class schools are more likely to have high expectations. Nationally, research has found that the grade of C in a middle-income school is the same as a grade of A in a low-income school, as measured by standardized tests results.[23] Middle class schools are also more likely to offer advanced placement classes and high-level math.[24]

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16. *Id.* at 61–67.

17. *Id.*

18. *Id.* at 62–64.

19. *Id.* at 67.

20. Because of teacher shortages in hard-to-staff schools, low-income schools frequently fill vacancies by granting emergency licenses to teachers who do not have sufficient education or experience to otherwise obtain teaching certification.

21. KAHLENBERG, *supra* note 1, at 67–72.

22. *Id.*; *see also* Charles Clotfelter et al., *High-Poverty Schools and the Distribution of Teachers and Principals*, 85 N.C. L. REV. 1345, 1362–64 (2007) (explaining the tendency of existing teachers to move to more advantaged districts).

23. MICHAEL J. PUMA ET AL., PROSPECTS: FINAL REPORT ON STUDENT OUTCOMES 12 (1997), *available at* http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/22/64/0a.pdf.

24. *Id.* at 72–74; *see also* Henry M. Levin, *On the Relationship Between Poverty and Curriculum*, 85 N.C. L. REV. 1381, 1399 (2007) (explaining that low-income students have fewer opportunities to access advanced placement classes).

II. VOLUNTARY PLANS FOR SOCIOECONOMIC SCHOOL INTEGRATION

For years, policymakers consciously and consistently ignored the wide body of research finding that educating low-income and middle class students in separate schools was inherently unequal. Many school officials have accepted economic school segregation as inevitable, because efforts to provide greater economic balance in schooling challenges the deeply held notion that wealthy parents have a right to purchase homes in affluent neighborhoods and send their children to public schools that in effect exclude less well-off children.

But in recent years, as policymakers have grappled with the goal of reducing the achievement gap under NCLB, some have come to terms with the reality that no one really knows how to make high-poverty schools work on a systemwide basis. Some districts have concluded that, rather than trying to achieve the nearly impossible, measures should be taken to ensure that more students have a chance to attend good, solidly middle class public schools. In a nation in which nearly two-thirds of students are middle class,[25] some officials have sought to eliminate the existence of high-poverty schools.

Today, about forty districts nationally, with some 2.5 million students, are known to consider socioeconomic status as a factor in student assignment.[26] One of the leading districts to pursue

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25. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., PUBLIC ELEMENTARY AND SECONDARY STUDENTS, STAFF, SCHOOLS, AND SCHOOL DISTRICTS: SCHOOL YEAR 2003–04, at 1 (2006), *available at* http://nces.ed.gov/pubs2006/2006307.pdf (noting that 36% of students were eligible for free or reduced-price meals).

26. Many more districts may in fact consider socioeconomic status. RICHARD D. KAHLENBERG, A NEW WAY ON SCHOOL INTEGRATION 2 (2006), *available at* http://www.tcf.org/publications/education/schoolintegration.pdf. Jurisdictions with districtwide plans include the following (student populations are listed in parentheticals): Cambridge School District, Mass. (6,103); Christina School District, Del. (19,364); Coweta County Public School District, Ga. (19,685); La Crosse School District, Wis. (7,300); McKinney Independent School District, Tex. (19,743); Moorpark United School District, Cal. (7,773); Rochester City School District, N.Y. (34,000); San Jose Unified School District, Cal. (31,874); St. Lucie County Public School District, Fla. (34,786); Wake County School District, N.C. (109,424); and Williamsburg-James County School District, Va. (9,402). *Id.* at 11 n.10. Jurisdictions in which socioeconomic status is used as a factor in student assignment to some of the schools include Austin Independent School District, Tex. (79,707); Baltimore Public School District, Md. (108,523); Berkeley Unified School District, Cal. (8,904); Brandywine Public School District, Del. (10,602); Charles County School District, Md. (25,610); Charlotte-Mecklenburg Public School District, N.C. (114,071); Clark County Public School District, Nev. (270,607); Duval County Public School District, Fla. (128,023); Eugene Public School District, Or. (18,207); Fresno Unified School District, Fla. (80,760); Greenville County Public School District, S.C. (64,245); Guilford County Public School District, N.C. (66,971); Hamilton County Public School District, Tenn. (40,655); Manatee County School District, Fla. (40,006); Manchester

socioeconomic school integration is Wake County, North Carolina, a dynamic and growing jurisdiction of more than 120,000 students, which includes the city of Raleigh and its surrounding suburbs.[27] In 2000, the Wake County School Board voted to replace a longstanding racial integration plan with a goal that no school in the district should have more than 40% of students eligible for free and reduced-price lunch, and no school should have more than 25% of students performing below grade level.[28] Wake County's plan is receiving considerable national attention because the early results suggest it is working to raise achievement of all students and narrow the gap between socioeconomic groups.[29]

The challenge, of course, is in determining precisely how to overcome residential segregation by economic status. Wake County decided to implement economic school integration in part by redrawing school district boundaries and in part through extensive use of magnet schools, with special arts and music programs, foreign language options, and the like.[30] Almost all of the special-theme magnets, established during the district's earlier efforts to promote racial integration, are located in high-poverty areas in Raleigh.[31] In general, 30% of the magnet students are assigned from the local

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School District, Conn. (7,800); Miami-Dade Public School District, Fla. (369,223); Montgomery County Public School District, Md. (139,311); New York City Public Schools: Community School Districts 10, 13, 14, 15, 20, and 21, N.Y. (206,151); Omaha Public School District, Neb. (46,035); Palm Beach County School District, Fla. (169,381); Portland Public School District, Or. (44,169); Proviso Township High Schools, Ill. (4,852); Rock Hill Public School District of York County, S.C. (16,179); Rutherford County/Murfreesboro School District, Tenn. (32,959); San Francisco Unified School District, Cal. (56,236); Seminole County Public Schools, Fla. (21,457); South Orange-Maplewood Public School District, N.J. (6,559); and Springdale Public School District, Ark. (13,678). *Id.*

27. Wake County Public School System, Basic Facts, http://www.wcpss.net/basic_facts.html (last visited Apr. 5, 2007).

28. Susan Leigh Flinspach & Karen E. Banks, *Moving Beyond Race*, *in* SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 261, 271 fig.12.1 (John Charles Boger & Gary Orfield eds., 2005).

29. *See, e.g.*, Todd Silberman, *Wake County Schools: A Question of Balance*, *in* DIVIDED WE FAIL: COMING TOGETHER THROUGH PUBLIC SCHOOL CHOICE 141, 162 (Century Found. Task Force on the Common Sch. ed., 2002), *available at* http://www.tcf.org/Publications/Education/silberman.pdf; Alan Finder, *As Test Scores Jump, Raleigh Credits Integration by Income*, N.Y. TIMES, Sept. 25, 2005, § 1, at 1; Jeffrey Robb, *N.C. City Refocused Its Integration Goal in 2000*, OMAHA WORLD-HERALD, Jan. 24, 2006, at 1A.

30. Telephone Interview with Caroline Massengill, former Senior Director of Magnet Programs and current Special Assistant for Year-Round Schools, Wake County Public School System, North Carolina (Feb. 3, 2006).

31. *Id.*

neighborhoods and the rest are drawn in from other areas.[32] Although many of the magnet programs are located in tough neighborhoods, several are oversubscribed—particularly those programs which allow students to take electives in elementary school.[33] In the 2004–05 school year, more than half of magnet school applications in Wake County were denied.[34] The popularity of Wake County's magnet schools suggests that parents will not oppose integrated schooling when the school system makes integration part of an attractive offering.

Other communities pursuing socioeconomic integration have gone even further in the use of magnet schools. Cambridge, Massachusetts, for example, has a plan in which all schools should have comparable percentages of students who are eligible for free or reduced-price lunch, and every school in its system is a magnet school[35]—a school chosen by parents with a particular theme or teaching approach. Using a system known as "controlled choice," devised by Charles Willie of Harvard and Michael Alves, a private consultant formerly with Brown University, all families choose among several elementary schools, each of which offers a distinctive program.[36] Parents rank their preferences, and students are assigned with an eye to achieving economic school integration.[37] The vast majority—more than 90%—receive one of their first three choices.[38]

These socioeconomic integration programs are fairly new but are beginning to show signs of success. In Wake County, for example, the county's low-income students are doing substantially better than low-income students in other large urban North Carolina districts with concentrated poverty. On the 2005 high school end-of-course exams, 63.8% of Wake County's low-income students passed, compared with low-income passage rates of 47.8% in Mecklenburg County, 47.9% in Guilford County, 51.8% in Forsyth County, and 48.7% in Durham

32. *Id.*

33. *Id.*

34. OFFICE OF INNOVATION & IMPROVEMENT, U.S. DEP'T OF EDUC., CREATING SUCCESSFUL MAGNET SCHOOLS PROGRAMS 51 (2004), *available at* http://www.ed.gov/admins/comm/choice/magnet/report.pdf.

35. *See* CAMBRIDGE PUB. SCH., CONTROLLED CHOICE PLAN 1–2 (2001), *available at* http://www.cpsd.us/web/pubinfo/controlledchoice.pdf.

36. KAHLENBERG, *supra* note 1, at 116.

37. Edward B. Fiske, *Controlled Choice in Cambridge, Massachusetts*, *in* DIVIDED WE FAIL: COMING TOGETHER THROUGH PUBLIC SCHOOL CHOICE, *supra* note 29, at 167, 192–93, *available at* http://www.tcf.org/Publications/Education/fiske.pdf.

38. Sara Rimer, *Schools Try Integration by Income, Not Race*, N.Y. TIMES, May 8, 2003, at A1.

County.[39] Likewise, 64.3% of Wake County's African-American students passed, compared with black passage rates of 46.8% in Mecklenburg County, 47.5% in Guilford County, 51.9% in Forsyth County, and 52.7% in Durham County.[40]

Meanwhile, Wake County's middle class students are achieving at very high levels, and there is no evidence that they are being harmed academically by economic mixing. The results in Wake County are consistent with national research that finds middle class students do well in economically integrated schools so long as concentrations of poverty do not reach above the 50% level.[41] This is true in part because the majority sets the tone in a school, and in part because middle class students, on average, are less affected (for good or ill) by school environment than low-income students.[42] In switching from race to socioeconomic status as a basis for school integration, Wake County and other districts—like Cambridge, Massachusetts, and San Francisco, California—were driven by both legal and educational considerations: voluntary economic integration is less risky as a legal matter, and it is more directly related to raising student achievement than is racial integration.

A. Legal Considerations

Some districts are pursuing socioeconomic school integration, in part, because they value racial diversity and know that using socioeconomic status will produce a racial dividend in a race-neutral way. Under longstanding Fourteenth Amendment jurisprudence, the government's use of race is held to a tough standard of "strict scrutiny,"[43] while the use of economic status need meet only the more relaxed "rational basis" test.[44] Indeed, the use of race in elementary and secondary school assignment is now being challenged in the U.S. Supreme Court in two cases: *Parents Involved in Community Schools*

39. *See* ACCOUNTABILITY SERVS. DIV., N.C. STATE BD. OF EDUC., STATE/LEA AND SCHOOL TEST PERFORMANCE, http://www.ncpublicschools.org/accountability/reporting/leaperformancearchive (follow "2004–2005" hyperlink, select each school system individually in the school system pull down bar, select "LEA" on the school pull-down bar, select "Composite" on the subject pull down bar, click the "View Report" button). North Carolina's focal cities in Mecklenburg, Guilford, Forsyth, and Durham counties are Charlotte, Greensboro, Winston-Salem, and Durham, respectively.

40. *Id.*

41. KAHLENBERG, *supra* note 1, at 39–40.

42. *Id.* at 37–42.

43. *See* Adarand Constructors v. Pena, 515 U.S. 200, 201 (1995).

44. *See* Williamson v. Lee Optical, 348 U.S. 483, 486–88 (1955).

v. Seattle School District No. 1[45] and *McFarland v. Jefferson County Public Schools*.[46]

On the merits, a strong case exists for continuing to use race in student assignment where socioeconomic status does not by itself produce sufficient racial diversity. Promoting academic achievement is not the sole function of a school. Instead, schools also work to foster tolerant adults and good citizens. Racial integration is important to furthering these goals.[47] By definition, there is no better way to ensure racial integration than employing race per se in student assignment. And the use of race in K–12 assignment does not normally raise the thorny issues of merit that are implicated in racial affirmative action policies or programs at selective institutions of higher education.[48] Should the U.S. Supreme Court decide to curtail the use of race in the Seattle and Louisville cases, however, socioeconomic integration would provide an attractive alternative for a number of school districts seeking to promote racial integration in a race-neutral manner. Even opponents of using race in student assignment concede that using socioeconomic status is perfectly legal.[49] And while there is clearly no better way to ensure a certain racial mix than by using race per se, socioeconomic integration can produce a substantial racial dividend.

First of all, African-American and other minority students are almost three times as likely as white students to be low-income. For

45. 426 F.3d 1162 (9th Cir. 2005), *cert. granted*, 74 U.S.L.W. 3676 (U.S. June 5, 2006) (No. 05-908) (challenging the use of a race-based "tiebreaker" in Seattle high school assignments).

46. 416 F.3d 513 (6th Cir. 2005) (per curiam), *cert. granted sub nom.* Meredith v. Jefferson County Bd. of Educ. 74 U.S.L.W. 3676 (U.S. June 5, 2006) (No. 05-915) (challenging the use of racial guidelines in student assignments).

47. *See, e.g.*, Jomills Henry Braddock II et al., *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, 66 PHI DELTA KAPPAN 259, 260 (1984) ("Data ... suggest that school desegregation is leading to desegregation in several areas of adult life."); Nancy A. Denton, *The Persistence of Segregation*, 80 MINN. L. REV. 795, 822–23 (1996) ("Research continues to show benefits to race relations from interracial contact ....").

48. For two examples of the difficulty presented by racial affirmative action policies in the forum of higher education, see *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), companion cases which considered—and drew fine line distinctions between—admission policies at the University of Michigan that used race as a factor in considering applicants.

49. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioner at 24–25, Parents Involved in Community Schools v. Seattle School District No. 1, No. 05-908 (U.S. Aug. 21, 2006), *available at* 2006 WL 2415458 (citing socioeconomic considerations as a valid race-neutral alternative); Brief for Pacific Legal Foundation et al. as Amici Curiae Supporting Petitioner at 25, Meredith v. Jefferson County Board of Education, No. 05-915 (U.S. Feb. 23, 2006), *available at* 2006 WL 460622 (same).

example, among fourth-grade students nationally in 2005, 24% of whites, but 70% of African Americans and 73% of Latinos were eligible for free or reduced-price lunch.[50] Moreover, within the universe of low-income students, poor blacks are more likely than poor whites to live in *concentrated* poverty and attend high-poverty schools. The Civil Rights Project at Harvard University, for example, found that in the 2003–04 school year, only 15% of schools with less than 10% minority populations were high-poverty, compared with 76% of schools with greater than 90% minority populations.[51]

Given these realities, policies that break up concentrations of poverty will disproportionately affect African Americans. According to a 2002 Century Foundation study conducted by Duncan Chaplin of the Urban Institute, integrating poor and nonpoor students results in 55.6% as much black/white integration as poor/nonpoor integration when schools pursue districtwide integration programs.[52] If integration occurs at the metropolitan level—integrating city and suburb—79.9% as much black/white integration occurs as compared to poor/nonpoor integration.[53] Chaplin concluded, "To summarize, although economic integration is no guarantee of racial integration, it does appear that substantial impacts are possible and that the largest impacts may occur where they are needed most."[54]

When Wake County schools switched in 2000 from a policy of racial integration to one that emphasizes socioeconomic integration, much of the racial integration was preserved. Susan Leigh Flinspach of the University of California found that there was a 73.2% agreement between the old racial standard—that all schools should be between 15% and 45% minority—and the new income diversity policy that all schools should have no more than 40% of students be eligible for subsidized lunch and no more than 25% performing below grade level.[55] Moreover, Flinspach and Karen Banks found that 64.6% of Wake County schools were racially desegregated in 1999–

50. *See* NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 11, at 119 tbl.6-1.

51. GARY ORFIELD & CHUMGMEI LEE, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 31 tbl.14 (2006), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Racial_Transformation.pdf.

52. Duncan Chaplin, *Estimating the Impact of Economic Integration of Schools on Racial Integration*, *in* DIVIDED WE FAIL: COMING TOGETHER THROUGH PUBLIC SCHOOL CHOICE, *supra* note 29, at 87, 98 tbl.2.

53. *Id.*

54. *Id.* at 102.

55. Susan Leigh Flinspach, Desegregation in the Post-*Brown* Era: Socioeconomic Diversity Policies in Student Assignment 12 tbl.1 (Apr. 2004) (unpublished manuscript presented at the American Educational Research Association Conference, on file with the North Carolina Law Review).

2000 under the old racial integration policy and that 63.3% of schools were racially desegregated under the new socioeconomic integration policy two years later.[56] Wake County, in other words, was able to sustain virtually as much racial integration under its new policy of socioeconomic integration as its old race-conscious integration policy.

B. Educational Considerations

Socioeconomic integration is not, however, just a backdoor way of achieving racial integration; it has important positive effects on academic achievement which, in fact, exceed those associated with racial integration. Education research has long suggested that the economic mix of a school matters more than the racial mix in determining the academic achievement of students. In 1966, Coleman found that the "beneficial effect of a student body with a high proportion of white students comes not from racial composition per se, but from the better educational background and higher educational aspirations that are, on the average, found among white students."[57] More recent research confirms this notion.[58] Indeed, Harvard professor Gary Orfield, a strong proponent of racial desegregation, notes that "[e]ducational research suggests that the basic damage inflicted by segregated education comes not from racial concentration but from the concentration of children from poor families."[59]

Racial desegregation raised the academic achievement of African-American students in some districts, not because blacks benefited from sitting next to whites, but because low-income students do better in middle class schools. In places like Charlotte, North Carolina, where racial mixing also involved economic mixing, achievement gains were strong.[60] In comparison, no significant achievement gains were found in places like Boston, Massachusetts, where low-income white students were integrated with low-income black students.[61] This contrast makes sense when one thinks about

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56. Flinspach & Banks, *supra* note 28, at 261, 275.

57. COLEMAN ET AL., *supra* note 8, at 307.

58. *See* KAHLENBERG, *supra* note 1, at 36, 275 n.61.

59. GARY ORFIELD, MUST WE BUS? SEGREGATED SCHOOLS AND NATIONAL POLICY 69 (1978). *See generally* GARY ORFIELD & CHUMGMEI LEE, WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY (2005), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Why_Segreg_Matters.pdf (exploring school and student segregation by poverty and how it relates to racial inequality).

60. KAHLENBERG, *supra* note 1, at 35–37.

61. *See id.* at 222.

the mechanics of why integration matters. For example, it is an advantage to have both peers who are academically engaged—not cutting class or choosing television over homework—and parents who are actively involved in the school. These behaviors track much more closely by class than race.[62]

In sum, socioeconomic integration and racial integration are both important. While integrating students of various socioeconomic backgrounds proves more effective than racial integration at improving the academic achievement of poorer students, socioeconomic integration does not guarantee the same level of racial diversity.

C. *Socioeconomic Integration Through No Child Left Behind Transfers*

In theory, NCLB dovetails nicely with the efforts in Wake County, Cambridge, and elsewhere to promote economic school integration through public school choice.[63] One of the key provisions in the Act, section 1116, provides that if a Title I school—a school with a significant share of low-income students—fails to make adequate yearly progress ("AYP") for two consecutive years, students have the right to transfer to a better-performing public school, and the district must pay for transportation costs.[64] By limiting the transfer remedy to Title I schools—roughly speaking, the bottom economic half of American public schools[65]—the law recognizes that students stuck in higher-poverty schools have a greater need to seek better opportunities.

Moreover, the mechanism the law uses for identifying failing schools maximizes the chances that those Title I schools with the most highly concentrated poverty will be subject to the transfer provision. NCLB measures AYP in absolute terms, rather than by examining the value added by a school.[66] It requires schools to reach a certain

62. *Id.* at 35–37.

63. *See supra* notes 27–38 and accompanying text.

64. 20 U.S.C. § 6316(b)(1)(A), (E) (Supp. II 2002). Section 1116 is the key provision on public school choice.

65. Roughly 50,000 of America's 94,000 public schools receive Title I funding based on their relatively high concentrations of poverty. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, NO CHILD LEFT BEHIND ACT: EDUCATION NEEDS TO PROVIDE ADDITIONAL TECHNICAL ASSISTANCE AND CONDUCT IMPLEMENTATION STUDIES FOR SCHOOL CHOICE PROVISION 1, 6 (2004), http://www.gao.gov/new.items/d057.pdf. Approximately twenty-five million of America's forty-nine million public school students attend Title I-receiving schools. *Id.* at 5.

66. *See* 20 U.S.C. § 6311(b)(2)(B)–(C), (b)(3).

threshold, irrespective of the percentage of students facing disadvantages at home. As a result, the Act conflates the influence of family and school on achievement. Because low-income students, on average, perform at lower levels academically, even before they begin school, requiring schools to reach an absolute threshold of achievement tends to overidentify higher-poverty schools as failing. In the 2003–04 school year, those Title I schools identified as failing—thereby being required to provide transfers to their students—were comprised of a student population that was, on average, 62% low income.[67] In contrast, those Title I schools that were not required to provide school choice had student populations that were only 49% low income.[68] In the 2005–06 school year, 16% of Title I schools nationally were identified as in need of improvement; among the highest-poverty schools (90% to 100% low income), however, that figure was 36%.[69]

Guidance issued by the U.S. Department of Education pushes even further in the direction of encouraging economic school integration by 1) requiring districts to give a priority in certain circumstances to low-income, low-achieving students wishing to transfer;[70] 2) providing that capacity and limitations on space cannot be used as a valid excuse for higher-performing schools to refuse to take in transferring pupils,[71] and 3) encouraging districts to set up cooperative enterprises for interdistrict public school choice.[72] Receiving schools must, for example, reconfigure unused space to make room for transfer students.[73]

Philosophically, NCLB directly challenges the idea that, through the choice of housing, parents may "purchase" the right to send their children to a public school where all the children come from privileged backgrounds. Implicit in the provisions providing a federal right to transfer to better-performing public schools is the message that good public schools should be open to all—not just those who

67. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 65, at 11 fig.2.

68. *Id.*

69. Jeff Archer, *Building Capacity*, *in* LEADING FOR LEARNING S3, S12 (2006), *available at* http://www.edweek.org/media/03wallace.pdf.

70. U.S. DEP'T OF EDUC., PUBLIC SCHOOL CHOICE: NON-REGULATORY GUIDANCE 8 (Draft 2004), *available at* http://www.ed.gov/policy/elsec/guid/schoolchoiceguid.pdf.

71. *Id.* at 14–15.

72. *Id.* at 16–17.

73. CYNTHIA G. BROWN, CITIZENS' COMM'N ON CIVIL RIGHTS, CHOOSING BETTER SCHOOLS: A REPORT ON STUDENT TRANSFERS UNDER THE NO CHILD LEFT BEHIND ACT 62 (Dianne M. Piché & William L. Taylor eds., 2004), *available at* http://www.cccr.org/ChoosingBetterSchools.pdf.

can afford to live in a certain neighborhood. In addition, by mandating that districts pay transportation costs for students, NCLB rejects the argument that spending dollars on busing is a wasteful diversion of money from the classroom.[74] In theory, then, NCLB should be a strong vehicle for economic school integration—a feature of the law that some liberal backers of NCLB highlight.[75]

Experience under NCLB so far has tested this theory, however, and several problems have emerged that undercut the promise of integration under NCLB. A December 2004 study by the Government Accountability Office ("GAO") found that of the roughly 3.3 million students in Title I schools who were eligible to transfer in the 2003–04 school year, only 31,500 transferred, which is less than one percent.[76] Moreover, there is some early evidence to suggest that middle class children in Title I failing schools are more likely to take advantage of choice provisions than low-income students, but the data is very limited and the differences are sometimes small.[77]

The low levels of student transfers have been linked primarily to two key limitations in the Act.[78] First, there are strong incentives for middle class, high-performing schools to refuse to take in low-income transfer students. As the University of Virginia's James Ryan notes, a receiving school that takes in low-income students faces a double risk.[79] Because low-income students, on average, score lower than

74. *See* 20 U.S.C. § 6316(b)(9)–(10) (Supp. II 2002).

75. *See* BROWN, *supra* note 73, at 3 ("[B]oth public school choice and supplemental services can be very useful tools in improving educational opportunities for disadvantaged children."). "[C]hoice will in some instances offer opportunities for desegregation as well, opportunities that will benefit all children." *Id.*

76. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 65, at 15 fig.5. Other studies come to a similar conclusion. In their study of ten states and fifty-three additional districts, the Citizens' Commission on Civil Rights put the estimate at 1.7%. BROWN, *supra* note 73, at 6; *see also* Lynn Olson, *NCLB Choice Option Going Untapped, but Tutoring Picking Up*, EDUC. WK., Mar. 16, 2005, at 1 (finding that 1% of eligible students transferred to a higher-performing school); NAT'L CTR. FOR EDUC. EVALUATION & REG'L ASSISTANCE, U.S. DEP'T OF EDUC., NATIONAL ASSESSMENT OF TITLE I: INTERIM REPORT, at xii, 62 exhibit 41 (2006) [hereinafter NATIONAL ASSESSMENT] (finding that 1% of students transferred in 2003–04).

77. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 65, at 17–18. For a more powerful finding of middle class take-up in the Washington, D.C. area, see Maria Glod, *High Achievers Leaving Schools Behind*, WASH. POST, Nov. 10, 2004, at A1.

78. A third problem involves an administrative issue. Many districts notify parents that their children are eligible to transfer only after the school year has begun. *See* NATIONAL ASSESSMENT, *supra* note 76, at xiii (finding that 49% of school districts notified parents after the school year had begun).

79. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 961–63 (2004).

middle class children,[80] an influx of low-income transfer students is likely to initially depress aggregate school scores, increasing the chances that the receiving school will itself fail to make AYP. The other risk stems from a laudable feature of the legislation: the requirement that schools do a good job not only of raising proficiency in general, but also of raising the scores of certain groups of students, disaggregated by race and income.[81] Homogenous schools with few poor or minority students are exempt from this requirement, because a critical mass of students is required to make disaggregation statistically valid.[82] An influx of poor and/or minority students, however, may increase the risk that the school fails to meet AYP. Such an influx might push a receiving school over the threshold number, triggering disaggregation and increasing the number of targets a school has to hit to make AYP.[83] This provides, says Ryan, "an incentive to minimize the number of African American or poor students in a school or district."[84]

The second major problem that has emerged with respect to the student transfer provision is the shortage of high-quality receiving schools in certain high-poverty districts. In Chicago, for example, the GAO found that, although 19,000 students applied for transfers in 2003–04, the vast majority—almost 18,000—were unable to transfer because higher-performing schools were full to capacity.[85] In Baltimore, only 301 seats in high-performing schools were available for some 27,000 students who were eligible to transfer.[86] In a study of ten states and fifty-three additional districts, the Citizens' Commission on Civil Rights found that in 2003–04, less than half of those who requested a transfer received one.[87]

The GAO also found that the receiving schools that many districts offered as transfer options were only marginally better than the home schools. Some had failed to make AYP for one year and were themselves at risk of having to provide transfers out the

80. ROTHSTEIN, *supra* note 7, at 61.

81. *See* 20 U.S.C. § 6311(b)(2)(C)(v) (Supp. II 2002).

82. Ryan, *supra* note 79, at 962.

83. *See id.* (citing a report finding that Texas schools just below the threshold number were rated as "exemplary" at a rate of more than double those schools that were right on the threshold mark).

84. *Id.*

85. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 65, at 26 tbl.7.

86. PAUL T. HILL, PROGRESSIVE POLICY INST., PUT LEARNING FIRST: A PORTFOLIO APPROACH TO PUBLIC SCHOOLS 5 (2006).

87. BROWN, *supra* note 73, at 6.

following year.[88] A study of ten urban districts by the Civil Rights Project at Harvard University also found that receiving schools "did not have substantially higher achievement levels or lower poverty rates, on average, than schools required to offer the NCLB transfer option. As a result, many students who transferred went from one school with low achievement levels to another with similarly low achievement levels."[89]

Although NCLB encourages school districts, when faced with capacity problems, to set up "cooperative agreements" with other districts to handle transfers, doing so is entirely voluntary.[90] The Citizens' Commission on Civil Rights reported in their May 2004 study of several states and districts that only two had provided interdistrict transfers under NCLB.[91]

With a few critical changes to the law, however, NCLB could translate its theoretical potential into actual support for socioeconomic school integration of the type taking place in communities like Wake County and Cambridge.[92] As amended, NCLB could move what a small number of communities are doing on their own to a national program of giving poor children a chance to attend middle class schools. The basic framework and philosophical assumption is already written into the legislation: poor children stuck in bad schools should have the right to transfer to better public school schools. Five key changes are needed, however, to move from theory to practice.

1. Change the Incentive Structure so that High-Performing Schools Are Encouraged To Recruit, Rather than Shun, Low-Income Transfer Students

First, steps should be taken to change the incentives so that it is easier for students to transfer out of failing schools into succeeding ones. There is a growing consensus across the ideological spectrum

88. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 65, at 23–24.

89. JIMMY KIM & GAIL L. SUNDERMAN, DOES NCLB PROVIDE GOOD CHOICES FOR STUDENTS IN LOW-PERFORMING SCHOOLS? 6 (2004), *available at* http://www.civilrightsproject.harvard.edu/research/esea/good_choices.pdf.

90. *See* BROWN, *supra* note 73, at 62 (citing U.S. DEP'T OF EDUC., *supra* note 70, at 16).

91. *Id.* at 67. There are more than 14,000 school districts in the United States. *See* NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS, 2004, tbl.85 (2005), *available at* http://nces.ed.gov/programs/digest/d04/list_tables.asp (follow "Schools and School Districts" hyperlink; then follow "Table 85" hyperlink).

92. *See supra* notes 27–38 and accompanying text.

that the existing incentive structure is flawed because it pushes good schools away from accepting transfers under NCLB. Liberal groups like the Citizens' Commission on Civil Rights and the Civil Rights Project at Harvard University, and conservative commentators such as Chester Finn of the Fordham Foundation and Frederick Hess of the American Enterprise Institute, note that the current system penalizes principals who accept low-income NCLB transfer students into their high-performing schools because they are immediately held accountable for the incoming students' home environments and previous (and inferior) educational opportunities.[93]

To curb the *disincentive* for receiving schools, Finn and Hess suggest assessing transfer students based on whether schools strengthen the academic growth of incoming students, not based on whether they fail to make heroic gains toward an absolute standard.[94] They also suggest basing AYP "only on the performance of [those] pupils who have been [in a school] for at least two years."[95] The Citizens' Commission for Civil Rights, likewise, suggests a grace period before schools are held accountable for transfer student performance, particularly if 10% or more of a school's enrollment is made up of such students.[96] Likewise, research has consistently found that it is more expensive, on average, to educate low-income students to high levels of achievement than to do the same for middle class students.[97] In order to reduce resistance to transfers from receiving schools, the Civil Rights Project at Harvard suggests that receiving schools should be provided extra funds in order to compensate for those increased costs.[98]

Given the strong evidence suggesting that socioeconomic integration will reduce the achievement gap and raise overall levels of achievement, NCLB should also bestow *affirmative* financial bonuses to receiving middle class schools to provide an incentive to spur such

93. BROWN, *supra* note 73, at 13–14; Chester E. Finn, Jr. & Frederick M. Hess, *On Leaving No Child Behind*, PUB. INT., Fall 2004, at 52; *see also* GAIL L. SUNDERMAN ET AL., NCLB MEETS SCHOOL REALITIES: LESSONS FROM THE FIELD 55 (2005) (advocating the use of "financial incentives" to encourage high-performing schools to admit transfer students).

94. Finn & Hess, *supra* note 93, at 52.

95. *Id.*

96. BROWN, *supra* note 73, at 13–14.

97. *See, e.g.*, MD. COMM'N ON EDUC. FIN., EQUITY, AND EXCELLENCE, FINAL REPORT 11, 13 (2001), *available at* http://mlis.state.md.us/other/education/final/2002_final_report.pdf (citing a school adequacy study that concluded that in order to achieve state educational standards, a school system would need to spend approximately 1.39 times as much on students eligible for free and reduced-price meals as on other students).

98. KIM & SUNDERMAN, *supra* note 89, at 33.

schools to actively recruit transfer students. A weighted student-funding formula, in which low-income students receive extra funds, might encourage more suburban schools to receive low-achieving students if the weighting is sufficiently pronounced.[99]

One of the central insights of NCLB is that a system of standards and accountability can meld the important benefits of public education with the incentive structure of the private sector. The system of testing, accountability, and sanctions is built around the concept that incentives matter—and that insight must be extended to the student transfer process as well.

2. Require Interdistrict Public School Choice Where Individual Districts Lack Capacity

Second, where individual school districts lack the capacity to offer room at better-performing public schools, NCLB should require that interdistrict public school choice options be made available. NCLB took the important step of amending the Elementary and Secondary Education Act of 1965, which had previously *encouraged* districts to give students stuck in failing high-poverty schools the chance to transfer to a better public school, to *require* districts to do so if they wish to receive federal funds.[100] The same lesson now applies to interdistrict public school choice. NCLB *encourages* districts to allow public school choice across school district lines in cases where there is not enough room in good schools within the district, but virtually no group of school districts has done so voluntarily.[101] Interdistrict choice should become mandatory.

Such a requirement faces severe political obstacles. When the issue was debated during deliberations on NCLB in 2001, Democratic lawmakers fought against an interdistrict school choice requirement, fearing a loss of funds for city schools.[102] But interdistrict school choice programs have long existed outside of NCLB, and it is possible

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99. *See* THOMAS B. FORDHAM INST., FUND THE CHILD: TACKLING INEQUITY & ANTIQUITY IN SCHOOL FINANCE 21 (2006), *available at* http://www.100percentsolution.org/fundthechild/FundtheChild062706.pdf (advocating a weighted student funding approach). For a variation on this idea, see Julian R. Betts, *The Economic Theory of School Choice*, *in* GETTING CHOICE RIGHT: ENSURING EQUITY AND EFFICIENCY IN EDUCATION POLICY 14, 33–35 (Julian R. Betts and Tom Loveless eds., 2005) (suggesting a tradable market in the right to enroll high-achieving students).

100. *See* BROWN, *supra* note 73, at 22.

101. *See id.* at 67 (finding in a study of several states that only two provided interdistrict transfers under NCLB).

102. Diana Jean Schemo, *Schools Face New Policy on Transfers*, N.Y. TIMES, Dec. 10, 2002, at A26.

to learn from the political lessons of these programs to construct workable transfer provisions for NCLB.

One lesson is that financial incentives work. In Michigan, school districts actually compete to attract interdistrict transfers because state funds travel with students to receiving districts. Between the 1996–97 and 2002–03 school years, the number of interdistrict transfers increased from 7,836 (0.5% of Michigan students) to 43,756 (2.3% of students), and the percentage of districts electing to accept nonresident students increased from 36.8% to 69.4%.[103] Likewise, St. Louis's large scale urban-suburban transfer program, initially set up under a court-monitored desegregation agreement, was continued voluntarily in 1999 by the legislature in part because suburban districts became dependent on state funding from the program and provided critical political support.[104]

A second lesson is that placing caps on transfers can help assure nervous middle class school districts that an influx of city students will not result in poverty concentrations within suburban schools. In St. Louis, where the transfer program focused on race, suburban school district populations were never required to become more than 25% African American under the plan.[105] Both concepts—financial incentives and a cap on the number of student transfers (say, at 50% free and reduced-price lunch)—should be written into NCLB so that the success of students in St. Louis can be replicated throughout the nation.

There is a third reason to think interdistrict transfers can be made politically acceptable: the threat of private school vouchers. Today, there is widespread agreement across the political spectrum that limiting transfers to other schools within certain urban jurisdictions is unworkable: it is patently clear that there simply are not enough good schools into which students can transfer.[106] The primary conservative answer to this dilemma is to open up choice to private schools, allowing students to use taxpayer-financed vouchers

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103. David N. Plank & Christopher Dunbar, Jr., *Michigan: False Start*, *in* LEAVING NO CHILD BEHIND? OPTIONS FOR KIDS IN FAILING SCHOOLS 137, 138–39 (Frederick M. Hess & Chester E. Finn, Jr. eds., 2004).

104. William H. Freivogel, *St. Louis: Desegregation and School Choice in the Land of* Dred Scott, *in* DIVIDED WE FAIL: COMING TOGETHER THROUGH PUBLIC SCHOOL CHOICE, *supra* note 29, at 209, 209–11.

105. CENTURY FOUND. TASK FORCE ON THE COMMON SCH., REPORT OF THE TASK FORCE, *in* DIVIDED WE FAIL: COMING TOGETHER THROUGH PUBLIC SCHOOL CHOICE, *supra* note 29, at 9, 42–43.

106. *See, e.g.*, BROWN, *supra* note 73, at 6, 8–9; SUNDERMAN ET AL., *supra* note 93, at 53–55.

to attend private school.[107] While vouchers are a bad proposal for several reasons,[108] the *threat* of vouchers may push advocates of public schools (including teacher unions) to endorse interdistrict public school choice as a superior alternative. Politically, if the battle comes down to interdistrict public school choice versus publicly funded private school vouchers, history suggests public school choice will prevail. An estimated 300,000 to 500,000 students cross school district lines every day to attend public school in another district—more than ten times the number who use publicly funded vouchers for private school.[109]

Interdistrict choice is already receiving support from some surprising quarters. Prominent conservative educator Chester Finn supports strengthening NCLB's interdistrict transfer provisions.[110] Further, the Department of Education's 2007 competition for grants under the Voluntary Public School Choice Program provides a substantial preference for interdistrict school choice.[111]

3. Manage Transfers To Avoid a Cascade of Failing Schools

Third, steps should be taken to avoid the problem identified by the GAO: that students from failing schools (those which failed to make AYP for two consecutive years) often transfer to near-failing schools (those which have not made AYP for one year).[112] A large influx of low-income students into a school on the verge of failure can quickly tip the scales against it. To address this problem, student transfers should be provided only to schools which have consistently made AYP and are thus not in danger of failing. Moreover, given the

107. Florida's voucher program—recently struck down by the courts—was based on the idea that students stuck in failing public schools should have a right to publicly funded private school vouchers. *See* Sam Dillon, *Florida Supreme Court Blocks School Vouchers*, N.Y. TIMES, Jan. 6, 2006, at A16.

108. *See generally* PUBLIC SCHOOL CHOICE VS. PRIVATE SCHOOL VOUCHERS (Richard D. Kahlenberg ed., 2003) (outlining the arguments against voucher programs).

109. BROWN, *supra* note 73, at 67 (estimating that "well over one-half million" students attend public school in another district); Richard Lee Colvin, *Public School Choice: An Overview*, *in* LEAVING NO CHILD BEHIND? OPTIONS FOR KIDS IN FAILING SCHOOLS, *supra* note 103, at 11, 16 (showing that roughly 36,000 students receive publicly supported private school vouchers); Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice*, *in* SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW 13, 29 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999) (estimating that 300,000 students attend public school in another district).

110. Chester E. Finn, Jr., Book Review, EDUC. GADFLY, May 27, 2004, http://www.edexcellence.net/institute/gadfly/issue.cfm?edition=&id=150#1844.

111. Notice Inviting Applications for New Awards for Fiscal Year (FY) 2007, 72 Fed. Reg. 4700, 4700–01 (Feb. 1, 2007).

112. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 65, at 23–24.

strong relationship between concentrations of poverty and school learning environment, opportunities should be provided first for students to transfer to lower-poverty schools;[113] and once schools reach a 50% threshold, they should no longer be required to receive additional low-income students.

4. Increase Funding for Magnet Schools in Urban Areas

Fourth, to balance the flow of students and money under an interdistrict public school choice program, federal funding for magnet schools in urban areas should be substantially increased. Allowing students to move from bad schools to good schools will, in the short term, usually mean transferring from high-poverty city schools to middle class suburban schools, but many districts—including Wake County—have successfully achieved socioeconomic integration by simultaneously attracting middle class children into urban schools through magnet programs.[114] Choice should allow movement in both directions, and in places like Hartford, Connecticut, a roughly equal number of students travel from suburb to city as from city to suburb.[115] Experience suggests that given the right program, magnet schools can attract middle class suburban students to schools located in some of the toughest urban neighborhoods. In Hartford, for example, a Montessori magnet school, located near boarded-up buildings, has a long waiting list of white, middle class suburban children because the program offered at the end of the bus ride is excellent.[116] Nationally, an estimated 150,000 students are on waiting lists for magnet schools.[117] Some 1.2 million students attend an estimated 2,400 magnet schools across the country.[118]

The federal government currently appropriates roughly $100 million for the Magnet Schools Assistance Program.[119] This compares

113. For the purposes of this Article, lower-poverty schools are those with 50% or fewer students receiving free and reduced-price lunch. *See supra* note 1 and accompanying text.

114. *See supra* notes 27–34 and accompanying text.

115. RICHARD D. KAHLENBERG, CENTURY FOUND., HELPING CHILDREN MOVE FROM BAD SCHOOLS TO GOOD ONES 11 (2006), *available at* http://www.tcf.org/Publications/Education/kahlenbergsoa6-15-06.pdf.

116. Richard D. Kahlenberg, *The New* Brown*: Integration by Class, Not Race, Can Fix Schools in Poor Cities*, LEGAL AFF., May/June 2003, at 30–31, *available at* http://www.legalaffairs.org/issues/May-June-2003/feature_kahlenberg_mayjun03.msp.

117. Colvin, *supra* note 109, at 13.

118. *Id.* at 25.

119. BROWN, *supra* note 73, at 26.

to the more than $12.7 billion spent on Title I[120]—a ratio of 1:127. Given the powerful evidence that socioeconomic school integration is generally much more promising than compensatory spending in low-income schools, this imbalance needs to be remedied.

5. Track Student Academic Success Through a Rigorous Research Program

Fifth, NCLB should include a targeted research component. The NCLB transfer program offers an important opportunity to study the effects of socioeconomic integration on student achievement. The achievement of students who remain in failing, high-poverty schools should be tracked against those who transfer to higher-achieving, middle class schools. Because it is possible that transferring students come from more highly motivated families than those who stay behind in failing schools, research should compare students who wish to transfer to better schools, but are unable to because of space limitations, with those given the opportunity to move.[121] It is also important to measure the effect of the changing economic composition on the achievement of students in receiving middle class schools.

The U.S. Department of Education has already established a program to look at student achievement outcomes of transfer students as part of a study known as the National Longitudinal Study of No Child Left Behind.[122] It would make good sense to break down the findings by the socioeconomic status of the receiving school (majority middle class vs. majority low-income) to see whether the success of places like Wake County, North Carolina, are replicated elsewhere. NCLB represents a rare opportunity to study the effects of transferring from low-income to middle class schools, and the federal government is uniquely positioned to sponsor this type of research.

D. Housing Policy

While public school choice is an important tool for achieving socioeconomic school integration, housing policy offers a

120. Press Release, U.S. Dep't of Educ., Fiscal Year 2007 Budget Request Advances NCLB Implementation and Pinpoints Competitiveness (Feb. 6, 2006), http://www.ed.gov/news/pressreleases/2006/02/02062006.html.

121. A similar study is being undertaken on the achievement effects of the federal private school voucher program in Washington, D.C. *See* V. Dion Haynes, *Voucher Program at Full Capacity*, WASH. POST, Sept. 20, 2005, at B1.

122. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 65, at 17–18 & n.18.

complementary strategy. Author David Rusk has persuasively argued that "[h]ousing policy *is* school policy."[123] Because roughly three quarters of American students attend neighborhood public schools, reducing residential segregation by economic status will translate into greater socioeconomic school integration.[124]

Over one hundred local communities have adopted inclusionary zoning laws that require new developments to set aside a certain share of housing stock for low- and moderate-income households.[125] Montgomery County, Maryland, for example, has a longstanding policy requiring that "private homebuilders sell or rent 10 percent of any new development of fifty or more units to eligible households in the lowest third of the income scale."[126] An additional "5 percent of the units must be sold to or rented by the county's public housing authority."[127] Along the same lines, former Senator John Edwards has discussed using housing vouchers, rather than private school vouchers, as a way of providing low-income parents "a chance to move into neighborhoods with better schools."[128]

III. LEGAL STRATEGIES FOR SOCIOECONOMIC SCHOOL INTEGRATION

In many jurisdictions, voluntary political strategies for achieving socioeconomic school integration may need to be supplemented by legal strategies to nudge communities in the right direction. Ideally, the legal argument would be made at the federal level—merging the theories of *San Antonio Independent School District v. Rodriguez*,[129] with its focus on inequalities related to economic class,[130] and *Brown v. Board of Education*,[131] with its focus on integration rather than school spending.[132] In the 1960s, there was some reason to believe that de facto economic concentrations might be found

123. David Rusk, Inclusionary Zoning: Opening Up Opportunity Based Housing 3, (Aug. 20, 2004), http://www.gamaliel.org/DavidRusk/IZ%20articleB.pdf.

124. CENTURY FOUND. TASK FORCE ON THE COMMON SCH., *supra* note 105, at 21–22; KAHLENBERG, *supra* note 1, at 149.

125. CENTURY FOUND. TASK FORCE ON THE COMMON SCH., *supra* note 105, at 21–22.

126. *Id.* at 22.

127. *Id.*

128. John Edwards, Address at the Center for American Progress, Washington, D.C.: Restoring the American Dream—Combating Poverty and Building One America 10 (Sept. 19, 2005) (transcript available at http://www.americanprogress.org/atf/cf/%7be9245fe4-9a2b-43c7-a521-5d6ff2e06e03%7d/transcript050919.pdf).

129. 411 U.S. 1 (1973).

130. *Id.* at 4.

131. 347 U.S. 483 (1954).

132. *Id.* at 487.

unconstitutional, and one federal court, in the case of *Hobson v. Hansen*, did so hold.[133] But the problem, of course, is that the U.S. Supreme Court ruled against the plaintiffs in *Rodriguez*, holding that there is no fundamental right to education.[134] And the Court over the years has curtailed the radical promise of *Brown* by limiting its reach to de jure segregation.[135] Instead, legal efforts to spur socioeconomic integration are likely to be more fruitful at the state level.

A. State Education Law

In 1977, Justice William Brennan suggested that because a conservative U.S. Supreme Court had given a cramped reading to equal protection guarantees, state courts should take up the slack. He wrote, "State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."[136] Litigators have taken up Justice Brennan's suggestion with particular gusto in the field of education, for while the U.S. Constitution does not even mention education, forty-eight of fifty states have provisions in their constitutions guaranteeing education to the citizens of the state.[137]

The legal theory in support of socioeconomic integration is straightforward. Some twenty-six state courts have interpreted state constitutions to require that students be provided an "adequate" or "equal" education and have used the findings to strike down inequitable and inadequate spending across school district lines.[138] Greater funding, however, is a necessary but insufficient remedy because even when districts spend equal amounts, large school-based inequalities remain. As we have seen, part of receiving an adequate

133. *See* Hobson v. Hansen, 269 F. Supp. 401, 406 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

134. *Rodriguez*, 411 U.S. at 18–19.

135. *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208 (1973); *id.* at 218–31 (Powell, J., concurring); *see also* Washington v. Davis, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.").

136. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977); *see also* Gayl Shaw Westerman, *The Promise of State Constitutionalism: Can It Be Fulfilled in* Sheff v. O'Neill*?*, 23 HASTINGS CONST. L.Q. 351, 353 (1996) (citing Justice Brennan's observations).

137. *See Rodriguez*, 411 U.S. at 35. While states do not generally guarantee nutrition, shelter, or subsistence, all but two guarantee education. James S. Liebman, *Three Strategies for Implementing* Brown *Anew*, *in* RACE IN AMERICA: THE STRUGGLE FOR EQUALITY 112, 120–21 (Herbert Hill & James E. Jones, Jr. eds., 1993).

138. Nat'l Access Network, "Equity" and "Adequacy" School Funding Court Decisions (Sept. 18, 2006), http://www.schoolfunding.info/litigation/equityandadequacy table.pdf.

education is having access to "resources" provided in mixed-income schools like positive peer influences, active school parent volunteers, and high-quality teachers who teach a rigorous curriculum.[139] These nonfinancial resources are more closely tied to academic achievement than per pupil expenditure, the traditional remedy in adequacy cases.[140] James Coleman argued that

> the educational resources available to each child in a school include as an important component the educational backgrounds of the other children in the school—and any state which dictates the school or school district to which each child goes is unequally distributing those educational resources, however equally it is distributing financing.[141]

At the state level, three major cases bear on this important question: *Sheff v. O'Neill*[142] (Hartford); *Paynter v. State*[143] (Rochester); and *Minneapolis Branch of the NAACP v. State*[144] (Minneapolis). The results of this litigation have been mixed, with a legal victory in Connecticut,[145] a loss in New York,[146] and a settlement in Minnesota.[147] Each case is worth examining for the lessons it may impart for possible litigation in the other forty-seven states.

1. Victory in Connecticut: *Sheff v. O'Neill*

Although no state court has yet squarely held that de facto economic concentrations pose a state constitutional violation, one major court has come tantalizingly close. In 1989, plaintiffs in

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139. *See supra* note 12 and accompanying text.

140. For the failure of spending initiatives alone to provide genuine equal educational opportunity, see KAHLENBERG, *supra* note 1, at 77–102.

141. James S. Coleman, *Foreword* to JOHN E. COONS ET AL., PRIVATE WEALTH AND PUBLIC EDUCATION, at xiv. (1970).

142. 678 A.2d 1267 (Conn. 1996).

143. 797 N.E.2d 1225 (N.Y. 2003).

144. Minneapolis Branch of the NAACP v. State, No. 95-014800 (Minn. Dist. Ct. 1995). For trial purposes, the court consolidated *NAACP v. State* with *Xiong v. State*, No. 98-2816 (Minn. Dist. Ct. 1998). *See* KAHLENBERG, *supra* note 1, at 176; Settlement Agreement at 1, Minneapolis Branch of the NAACP v. State, Xiong v. State, Case Nos. 95-014800, 98-2816 (Minn. Dist. Ct. 2000) (on file with the North Carolina Law Review) [hereinafter Settlement Agreement] ("On October 16, 1998, the Court ordered that the actions be consolidated for purposes of trial only.").

145. *Sheff*, 678 A.2d at 1270–71.

146. *Paynter*, 797 N.E.2d at 1231.

147. *See* Settlement Agreement, *supra* note 144, at 1; *see also* DeRolph v. State, 758 N.E.2d 1113, 1115 (Ohio 2001) (explaining that *NAACP v. State* settled). The issue of poverty concentrations has also been raised in implementation of North Carolina's adequacy litigation. *See* Hoke County Bd. of Educ. v. State, 358 N.C. 605, 610–11, 599 S.E.2d 365, 372 (2004); Leandro v. State, 346 N.C. 336, 342, 488 S.E.2d 249, 252 (1997).

Hartford, Connecticut, filed a complaint in *Sheff v. O'Neill*, arguing that de facto racial *and* economic segregation of students in Hartford and its suburbs violated the Connecticut Constitution.[148] Though the argument was novel—and clearly departed from the insistence of federal courts that only de jure segregation requires a remedy—in 1996 the plaintiffs prevailed in a state supreme court decision that, if replicated, could have a revolutionary impact on school desegregation and education generally. Three justices on the Connecticut Supreme Court itself agreed that *Sheff* might have been "the most significant ruling of this court in this century."[149]

Sheff was the brainchild of civil rights attorney Jack Boger, who teamed up with like-minded lawyers John Brittain, Marianne Lado, Wesley Horton, and others.[150] The case had at its heart a simple fact: "Hartford children attend schools that are the most racially, ethnically, and economically isolated in the state."[151] In Hartford, fully 63% of students were eligible for free and reduced-price meals, while the subsidized meal rate of fifteen of twenty-one surrounding suburbs was less than 10%.[152] Racially, Hartford public schools were 95% minority, while the suburbs were heavily white.[153]

In a typical Hartford fifth-grade class of twenty-three students, Columbia's Gary Natriello testified, a teacher

> would have 3 [children] who were born with low birth weights, 3 born to mothers using drugs, and 5 born to teen-age mothers; 15 living below the poverty line, 15 living with single parents, and 8 living in inadequate housing; 21 members of minority groups; up to 12 from homes in which English is not spoken, and 9 whose parents do not work.[154]

The contrast to the suburbs could not be more striking. Journalist James Traub noted that Hartford, one of the ten poorest cities in America, sits in the middle of the wealthiest state in the

148. *See* Sheff v. O'Neill (*Sheff I*), 609 A.2d 1072, 1074 (Conn. Super. Ct. 1992), *rev'd*, 678 A.2d 1267 (Conn. 1996); CONN. CONST. art. I, § 20.

149. *Sheff*, 678 A.2d at 1310 (Borden, J., dissenting).

150. SUSAN EATON, THE CHILDREN IN ROOM E4: AMERICAN EDUCATION ON TRIAL 84–93 (2006).

151. Plaintiffs' Brief at 1, Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996) (S.C. 15255) (on file with the North Carolina Law Review).

152. *Id.* at 22.

153. *See Sheff*, 678 A.2d at 1272–73, 1287.

154. George Judson, *In Hartford, Data Portray Schools in Crisis of Poverty*, N.Y. TIMES, Jan. 2, 1993, § 1, at 26 (citing Natriello's testimony).

country.[155] Achievement in the city was abysmal.[156] Over the years, Hartford had tried everything, including contracting the Hartford schools out to a private company—but all had failed.[157]

The plaintiffs' case was different than traditional state cases focusing on spending because it noted that although Hartford already outspent the surrounding suburbs, money was not enough to produce equal opportunity.[158] In addition, the case was different than traditional desegregation cases in two respects: it focused on economic as well as racial segregation, and it went after de facto segregation. Then University of Connecticut School of Law professor John Brittain noted that *Sheff* involved "a new theory of unequal educational opportunity due to a high concentration of poor children in an urban school district."[159]

In addition to making a traditional racial claim, plaintiffs argued that concentrations of poverty had a harmful effect on students.[160] Brittain declared: " 'The most signal fact about Hartford is not that it's 92 percent non-white but that it's 63 percent poor.' "[161] Teachers and administrators in Hartford told the *New York Times* that while "[t]he most obvious difference" between Hartford and suburban schools "is race," in fact "a greater chasm . . . is poverty."[162] While civil rights groups have focused on race, these teachers said that "economic isolation is the real root that has made segregated schools a problem."[163]

155. James Traub, *Can Separate Be Equal? New Answers to an Old Question About Race and Schools*, HARPER'S MAG., June 1994, at 36, 40.

156. *Sheff*, 678 A.2d at 1273.

157. Rene Sanchez, *Hartford Public School Privatization Deal Collapses*, WASH. POST, Jan. 25, 1996, at A3.

158. James E. Ryan, Sheff, *Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 540 (1999).

159. John C Brittain, *Educational and Racial Equity Toward the Twenty-First Century—A Case Experiment in Connecticut*, *in* RACE IN AMERICA: THE STRUGGLE FOR EQUALITY, *supra* note 137, at 167, 167.

160. *See* Plaintiffs' Brief, *supra* note 151, at 21–24. George Judson, *Civil Rights Lawyers Hope To Use Hartford Schools Case as a Model*, N.Y. TIMES, Aug. 15, 1996, at B1 (stating that the NAACP Legal Defense and Educational Fund treated *Sheff* as a poverty and justice case, not a racial desegregation case).

161. Traub, *supra* note 155, at 41. Traub argued that "*Sheff* is about poverty, not race." *Id.* at 37.

162. Kirk Johnson, *Two Schools, Separated by Poverty*, N.Y. TIMES, Apr. 29, 1989, § 1, at 29.

163. *Id.*

The plaintiffs cited testimony of experts—including Mary Kennedy, author of congressionally sponsored studies of Chapter 1,[164] William Trent of the University of Illinois, and Gary Orfield of Harvard—on the harms associated with concentrations of poverty in a school. Kennedy noted that the achievement of all students is "lower in high poverty concentration schools"; that they fall "increasingly behind as they proceed in their education"; and that "reductions in poverty concentration have been shown to have positive effects."[165] Trent noted that, after controlling for family socioeconomic status and race, concentrations of poverty in a school reduce education attainment, occupational attainment, and future income.[166] Plaintiffs also noted that even David Armor, who testified for the State in defense, "conceded the harmful effect of the concentration of poverty in the schools."[167] Likewise, the State conceded that "by eliminating concentrations of poverty we should see improved student achievement."[168] The lower court, which was generally hostile to the plaintiffs' case, had also acknowledged that "the concentration of poverty and at-risk students lead to adverse educational outcomes."[169]

Plaintiffs also cited testimony of teachers that "the concentration of at-risk children in Hartford's classrooms overwhelms the normal teaching process."[170] One principal told journalist James Traub, "It's not like they don't have these problems in the suburbs too. But you can deal with it if it's isolated."[171] High-poverty, predominantly minority schools offered fewer advanced course offerings and had less

164. *See, e.g.*, M.M. KENNEDY ET AL., U.S. DEP'T OF EDUC., POVERTY, ACHIEVEMENT AND THE DISTRIBUTION OF COMPENSATORY EDUCATION SERVICES: AN INTERIM REPORT FROM THE NATIONAL ASSESSMENT OF CHAPTER 1 (1986). Title I of the Elementary and Secondary Education Act was for a time renamed Chapter 1, but the Title I designation was subsequently restored. Title I and Chapter 1 are identical. 20 U.S.C. §§ 6301–6578 (2000).

165. Plaintiffs' Brief, *supra* note 151, at 23–24.

166. *Id.* at 24; *see also* Robert A. Frahm, *Students Gain from Desegregation, Sociologist Testifies*, HARTFORD COURANT, Dec. 30, 1992, at B1; Interview with Marianne Lado, former staff attorney, NAACP Legal Defense and Educ. Fund, current Gen. Counsel to N.Y. Lawyers for the Pub. Interest, in N.Y., N.Y. (Dec. 12, 1997) (transcript on file with the North Carolina Law Review).

167. Plaintiffs' Brief, *supra* note 151, at 23. David J. Armor, *Facts and Fictions About Education in the* Sheff *Decision*, 29 CONN. L. REV. 981, 984 (1997) (acknowledging that socioeconomic disparities between schools coincide with differences in academic benefit to students).

168. Plaintiffs' Brief, *supra* note 151, at 28.

169. *Id.* at 44 n.65.

170. *Id.* at 22 n.44.

171. Traub, *supra* note 155, at 38 (quoting principal Don Carso).

experienced and less educated teachers. Hartford had twice as many first-year teachers as the state average; and a lower proportion of teachers with master's degrees than any of the surrounding twenty-one communities.[172] Student expectations were low; one teacher told Traub, "And if you talk about college, they'll say, 'What's college? I don't know anyone who's been to college.' "[173] One minority parent said she was hesitant to send her child to a predominantly white school, because she didn't want her child exposed to white racism. However, when she found that her child's ninth-grade class was using the same text used in the suburbs for a remedial fifth-grade class, she signed her son up for the transfer program immediately.[174]

The State of Connecticut, pointing to federal precedents for guidance, said the State should be held responsible only for de jure racial segregation, and it prevailed in the lower court.[175] But the Connecticut Supreme Court, in its pathbreaking 1996 decision, held that de facto racial segregation of the public schools violates the Connecticut Constitution. Citing the equal education clause, read in conjunction with a special clause in the Connecticut Constitution forbidding racial segregation, the court held that "the existence of extreme racial and ethnic isolation in the public school system deprives schoolchildren of a substantially equal educational opportunity and requires the state to take further remedial measures."[176] The court chose not to decide the more novel question of whether economic segregation is unconstitutional but explicitly left open that possibility.[177]

The racial rather than economic focus of the court's decision was unfortunate for psychological, legal, sociological, and political reasons. First, the racial focus left the decision open to the attack from both the left and right that it was condescending to say blacks need integration to achieve.[178] Second, the emphasis on racial de facto segregation left the decision vulnerable to legal attack under the Federal Constitution because some courts have held that basing student assignment decisions on race in an effort to combat de facto

172. Plaintiffs' Brief, *supra* note 151, at 19.
173. Traub, *supra* note 155, at 38 (quoting teacher Delia Bello).
174. *See* EATON, *supra* note 150, at 104.
175. *See* Sheff v. O'Neill, 678 A.2d 1267, 1272 (Conn. 1996).
176. *Id.* at 1281.
177. *See id.*
178. *See* Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375, 2380 (1997); Bobbie Roessner & Laurence D. Cohen, *Liberal and Conservative Agree—Sort of—on School Choice*, HARTFORD COURANT, July 14, 1996, at D3.

racial segregation is itself unconstitutional and impermissible.[179] Likewise, the court's invocation of Connecticut's racial segregation clause, which is highly unusual among state constitutions, had the unfortunate effect of leading some commentators to incorrectly conclude that *Sheff* was not replicable in other states.[180] Third, the racial emphasis left the majority open to the dissent's pointed criticism that the lower court had found academic achievement is *not* linked to the racial makeup of a student body but rather to the effects of poverty, both in the family and in the school.[181] An emphasis on class segregation, by contrast, would have been consistent with both the findings of the dissent and the thrust of the plaintiffs' argument—as the *New York Times* noted—that "the heart of the problem" was economic segregation.[182] Fourth, given the unfortunate realities of racial politics, an economic-based decision might not have carried the political baggage associated with race that the *Sheff* case now carries.[183]

Although not a direct precedent for the proposition that economic school segregation violates a state's obligation to provide equal or adequate education, *Sheff*'s ruling that de facto segregation by race is unconstitutional is a highly relevant precedent for the economic segregation argument because it represents a crucial departure from the federal requirement that segregation be intentional in order to present a violation. The *Sheff* court found that in allowing de facto segregation of the schools, the State failed to meet its affirmative obligation to provide "a substantially equal

179. *See, e.g.*, Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 129 (4th Cir. 1999). Three circuit courts have upheld the use of race in student assignment in cases involving Louisville, Kentucky; Seattle, Washington; and Lynn, Massachusetts. *See supra* notes 43–46 and accompanying text. However, the Supreme Court stepped in to review those cases, and proponents of race-conscious plans were discouraged at oral argument in December 2006. Linda Greenhouse, *Court Reviews Race as Factor in School Plans*, N.Y. TIMES, Dec. 5, 2006, at A1.

180. This issue is discussed more fully *infra* at Part III.B, C.

181. *Sheff*, 678 A.2d at 1298, 1304 (Borden, J., dissenting).

182. *See* Judson, *supra* note 160. The dissent repeatedly emphasized the fact that the trial court found no evidence that racial isolation negatively affects the achievement of minority students. *See Sheff*, 678 A.2d at 1298, 1304, 1334 (Borden, J., dissenting). For Judge Harry Hammer's focus on family poverty and school poverty concentrations, see Sheff v. O'Neill, No. CV89-0360977S, 1995 Conn. Super. LEXIS 1148, at *17, *32, *40 (Conn. Super. Ct. Apr. 12, 1995), *rev'd*, 678 A.2d 1267 (Conn. 1996), and Sheff v. O'Neill, No. S.C. 15255, 1995 Conn. LEXIS 249, at *30–32 (Conn. June 27, 1995).

183. *See* Carole Bass, *School Face-Off—New Lawsuit: A Whiter Shade of* Sheff?, NEW HAVEN ADVOC., Apr. 30, 1998, http://www.newhavenadvocate.com/articles/raceschool.html (last visited Sept. 23, 1998).

educational opportunity."[184] The Connecticut Supreme Court cited two reasons that the de facto/de jure distinction from federal constitutional law does not apply under state constitutional law—reasons that parallel the way in which state courts have distinguished state spending decisions from *Rodriguez*.

First, whereas the Federal Constitution imposes only a negative obligation—thou shalt not segregate by law—and contains no fundamental right to education,[185] Connecticut's state constitution imposes an affirmative obligation to provide schoolchildren with "substantially equal educational opportunity," so the State is responsible for *omissions* as well as affirmative acts.[186] And second, where the federal courts were constrained by concerns about federalism, the Connecticut court noted that this principle does "not restrict *our* constitutional authority to enforce" the state constitution.[187]

The step from *Sheff*'s central holding (that de facto racial segregation is unconstitutional) to a holding that the State must also remedy de facto economic segregation is a very small one. Indeed, if equal educational opportunity is the key principle, the economic composition of a school is *more* important than its racial composition, according to a mountain of sociological evidence[188]—evidence that even the *Sheff* dissenters explicitly acknowledged.[189]

The breakthrough in *Sheff*, that de facto segregation presents a constitutional violation, is significant not only on the violation side, but also in terms of the remedy. A corollary of the U.S. Supreme Court's decision to limit *Brown* to de jure segregation was its 1974 decision in *Milliken v. Bradley* to extend desegregation remedies only to parties guilty of segregation.[190] Since the scope of the remedy can only reach the extent of the violation, desegregation normally is limited to a given school district's boundary—which effectively exempts most suburban school districts from remedies involving urban school segregation. But when the violation involves de facto segregation, the *Milliken* boundary limitation no longer applies.[191]

184. *Sheff*, 678 A.2d at 1280.
185. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37–38 (1973).
186. *Sheff*, 678 A.2d at 1279.
187. *Id.*
188. KAHLENBERG, *supra* note 26, at 4–6 (citing numerous sources).
189. *Sheff*, 678 A.2d at 1313 (Borden, J., dissenting).
190. 418 U.S. 717, 744–46 (1974).
191. Likewise, the hesitation of the *Milliken* Court to impose a federal interdistrict remedy on a locality does not apply to state courts which need not be concerned about

That is the truly revolutionary impact of *Sheff*: because the violation involved de facto segregation, Hartford could reach out to the suburbs in crafting a meaningful remedy. Former NAACP Legal Defense and Educational Fund ("LDF") attorney Marianne Lado said *Sheff* "sends a message that you have to conceive of the people of a metropolitan area as being in the same boat, and you can't draw a line around an inner city and say, 'Survive or die on your own.' "[192] The case applied not only to the Hartford area but to the entire State of Connecticut.[193]

In addition, the *Sheff* decision is not subject to the ticking time bomb that hangs over *Brown*. The remedy of de facto segregation by race or class is not tied to an act of wrongdoing which can be cured through a process of achieving "unitary" status.[194] Because the violation involves de facto rather than de jure segregation, the remedy is required as long as de facto segregation exists, and therefore it will not "expire" in the way *Brown* remedies have. It is permanent.

In practice, implementing an adequate remedy in *Sheff* has proven difficult. The Connecticut Supreme Court decision called for the state legislature to devise an appropriate remedy.[195] The plaintiffs informally suggested an interdistrict remedy in which 25% of Hartford students would attend suburban schools, and ten magnet schools would be built in Hartford to attract middle class white students.[196] Plaintiffs noted that 70% of Connecticut school children already rode buses to school.[197] Instead, Republican Governor John G. Rowland appointed a twenty-two member Education Improvement Panel to make recommendations.[198] In January 1997, the panel recommended a series of reforms including public school choice across district lines and expanded charters and magnet schools.[199]

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issues of federalism. *See* Missouri v. Jenkins, 515 U.S. 70, 97–98 (1995); *id.* at 131–32 (Thomas, J., concurring).

192. Judson, *supra* note 160.

193. George Judson, *Hartford Court Bars Imbalance in the Schools*, N.Y. TIMES, July 10, 1996, at A1.

194. Green v. County Sch. Bd. of New Kent County, Va., 391 U.S. 430, 437–38 (1968).

195. Sheff v. O'Neill, 678 A.2d 1267, 1290 (Conn. 1996).

196. Traub, *supra* note 155, at 47.

197. Eve Nagler, *Connecticut Q&A: John C. Brittain; The Color Line and Children's Education*, N.Y. TIMES, June 18, 1995, § 13, at 3.

198. Jonathan Rabinovitz, *Hartford School Integration Panel Formed*, N.Y. TIMES, July 26, 1996, at B2.

199. *See* Michael A. Rebell & Robert L. Hughes, *Efficacy and Engagement: The Remedies Problem Posed by* Sheff v. O'Neill*—and a Proposed Solution*, 29 CONN. L. REV.

In 1997, Connecticut's state legislature enacted a more modest plan, incorporating some but not all of the panel's ideas: interdistrict choice, magnets, and financial incentives for integration.[200] By the 1998–99 school year, more than 800 students in Hartford, New Haven, and Bridgeport were attending school in the suburbs.[201]

Plaintiffs called the remedy inadequate and returned to court.[202] In March 1999, Superior Court Judge Julia L. Aurigemma ruled that the State had done much to alleviate segregation—pointing to the State's new charter schools (required to reduce racial and economic isolation), interdistrict magnets, and the statewide public school choice programs paying districts to accept students from other districts—and that these remedies should be given time to be implemented.[203] Interestingly, although the Connecticut Supreme Court's decision spoke to race alone, the plaintiffs argued that racial integration must also involve socioeconomic integration and that the percentage of students on Aid to Families with Dependent Children ("AFDC") or free lunch "need[s] to be part of the plan" in addition to the percentage of minority students.[204] More importantly, the legislation adopted by the State of Connecticut spoke to "racial, ethnic and economic isolation" as did Judge Aurigemma's decision.[205] This development is intriguing, since a federal challenge to the use of race in assignment would leave the economic provisions standing.[206]

1115, 1173–74 (1997) (citing EDUC. IMPROVEMENT PANEL, REPORT TO THE GOVERNOR (1997)).

200. *See* Act of June 26, 1997, Pub. Act No. 97-290, 1997 Conn. Acts 1113, 1114, 1117–18 (Reg. Sess.); Jeff Archer, *New Chapters Written in Saga of Conn. Desegregation Case*, EDUC. WK., June 11, 1997, at 17; *Critics Say It Falls Short: First Steps To Meet* Sheff *Order Will Significantly Impact Schools, Local Govts.*, CONN. TOWN & CITY, July–Aug. 1997, at 7; Jeff Archer, *State Policy Update: Connecticut*, EDUC. WK. ON THE WEB, Jan. 8, 1998, http://counts.edweek.org/sreports/qc98/states/ct-s.htm (part of the Quality Counts '98 Special Report); Fred Musante, *Remedies Elusive in* Sheff *Case*, N.Y. TIMES, July 6, 1997, § 13, at 1.

201. Richard Weizel, *School Busing, City and Suburban*, N.Y. TIMES, Oct. 4, 1998, § 13, at 17.

202. Musante, *supra* note 200.

203. *See* Sheff v. O'Neill (*Sheff II*), 733 A.2d 925, 943 (Conn. Super. Ct. 1999); Jeff Archer, *Court Sides with Conn. in Latest* Sheff *Ruling*, EDUC. WK., Mar. 10, 1999, at 14.

204. *See* Interview with Marianne Lado, *supra* note 166, at 51.

205. *See Sheff II*, 733 A.2d at 927 (noting language of Public Act 97-290 that the "educational interests of the state" were amended to include the reduction of "racial, ethnic and economic isolation"); *see also id.* at 925 (characterizing the supreme court's decision in *Sheff* as holding that "racially, ethnically and economically isolated" schools were unconstitutional); *id* at 926 (emphasizing "the importance of remedying racial, ethnic and economic segregation in the schools").

206. Judge Aurigemma specifically noted that the use of racial quotas was probably unconstitutional under federal law. *Id.* at 930.

Plaintiffs preferred a plan put together by the Connecticut Center for School Change, a nonprofit group that proposed consolidating Hartford and twenty-one surrounding districts into one district.[207] The plan, called "The Unexamined Remedy," was floated in the summer of 1998.[208] Where Hartford's 23,791 students were overwhelmingly poor and 95% minority, the new unified district would consist of nearly 100,000 students, 62% white, 19% black, and 16% Hispanic, with subsidized meal rates ranging from 35% in the elementary schools to 17% in the high schools.[209] The backers argued for using "controlled choice" within the new district, pointing to Cambridge as an example, with all schools to fall within a 15% plus or minus range of the new district's ethnic balance.[210] The plan noted that the twenty-two communities were already part of a recognized "Hartford region" under legislation passed by the General Assembly, and that several districts in the South already are operating county-sized districts of the size contemplated by the merger.[211] Proponents of cross-district integration had long noted that many white, middle class schools are within one to two miles of the urban schools,[212] and polling found that Connecticut residents actually provided narrow support for the *Sheff* ruling, 47% to 41%.[213]

In January 2003, litigants reached a temporary settlement in the remedy phase of the case. At that time 10% of Hartford students attended "integrated"[214] schools through various programs.[215] The settlement called for a $45 million program to raise that share to 30%

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207. *See* Gordon A. Bruno & Kathryn A. McDermott, *Foreword* to CONN. CTR. FOR SCH. CHANGE, THE UNEXAMINED REMEDY: A FIRST DRAFT OF A PLAN TO CONSOLIDATE THE SCHOOL DISTRICTS OF HARTFORD AND 21 NEIGHBORING TOWNS INTO A HIGH QUALITY, RACIALLY INTEGRATED SCHOOL SYSTEM 3–4 (1998).

208. *Id.*

209. CONN. CTR. FOR SCH. CHANGE, *supra* note 207, at 24–26.

210. *Id.* at 14–18.

211. Bruno & McDermott, *supra* note 207, at 4; *see also* Jeff Archer, *Plan Would Join Hartford with Surrounding Districts*, EDUC. WK., July 8, 1998, at 8, *available at* http://www.teachermag.com/ew/vol-17/42hart.h17.

212. Johnson, *supra* note 162 (noting short distances).

213. Robert A. Frahm, *Residents As Divided As Court on* Sheff*: Courant-ISI Connecticut Poll*, HARTFORD COURANT, Aug. 16, 1996, at A1.

214. The settlement defined a school as integrated if a school is not thirty percentage points above the minority student average in Hartford and the surrounding twenty-one communities. KAHLENBERG, *supra* note 116, at 34. In 2005–06, the minority percentage was 43%, so a school at or below 73% minority is considered integrated. *See* Stan Simpson, *A Decade of Half Measures: 10 Years After a Hartford Mother and Son Forced City Schools To Integrate, Progress Has Dragged*, HARTFORD COURANT, July 23, 2006, at NE4 (Magazine), *available at* http://www.hartfordinfo.org/issues/documents/education/htfd_courant_072306.asp.

215. Kahlenberg, *supra* note 116, at 31.

by 2007.[216] The plan called for a doubling of the Open Choice programs, enabling 1,600 Hartford students to attend urban schools, and the construction of eight new magnet schools "accommodating 600 students each."[217] The agreement provided that the settlement would expire in 2007, at which point plaintiffs could push for integration beyond the 30% goal.[218] In August 2004, however, plaintiffs were back in court alleging that the State had failed to meet benchmarks in the January 2003 settlement.[219] In 2006, estimates stated that between 14% and 23.5% of Hartford students were attending integrated schools.[220] With the settlement due to expire in the summer of 2007, plaintiffs called for more aggressive action.[221]

2. A Loss in New York: *Paynter v. State*

In 1998, plaintiffs filed a *Sheff*-like case in Rochester, New York, directly challenging poverty concentrations and minority isolation in the city's schools as a denial of the right—articulated in *Campaign for Fiscal Equity, Inc. v. State*[222] ("*CFE*")—to a "sound basic education."[223] In *Paynter v. State*,[224] attorneys sued the State—on behalf of fifteen African-American schoolchildren—for drawing boundaries that resulted in high concentrations of school poverty.[225] The suit proposed that the New York State Education Commissioner " 'be required to develop a plan to ameliorate the effects of the concentration of poverty.' "[226] Noting the association between race and poverty, the complaint also included a charge that student assignments violate the disparate impact provisions of Title VI of the

216. *Id.* at 34.
217. *Id.*
218. *Id.* at 31–34.
219. EATON, *supra* note 150, at 334–35.
220. *See* Simpson, *supra* note 214 (citing Trinity College professor Jack Dougherty's estimate that 14% of Hartford students are in integrated schools, in contrast to the State of Connecticut's estimate of 23.5%).
221. Robert A. Frahm, Sheff *Backers Want Progress*, HARTFORD COURANT, Jan. 28, 2007, at B4, *available at* http://www.courant.com/news/education/hc-sheff0128.artjan28,0,6674491.story (noting that organizers have called for a lobbying effort to "step up progress towards the goals" of the settlement).
222. 655 N.E.2d 661 (N.Y. 1995).
223. *Id.* at 664.
224. 797 N.E.2d 1225 (N.Y. 2003).
225. *Id.* at 1227.
226. *See* Mary Ann Zehr, *Rochester Students File Class Action Against New York*, EDUC. WK., Oct. 14, 1998, at 17 (quoting Bryan Hetherington, attorney for the plaintiffs in *Paynter*).

Civil Rights Act of 1964.[227] But the primary, and more novel, thrust of the lawsuit was its socioeconomic emphasis. As local columnist Mark Hare noted, "[I]s easing the racial isolation the right goal? Not any more. The real issue today is poverty."[228]

In their complaint, the plaintiffs built their case around two central arguments. First, they argued the Rochester schools were not providing a "sound basic education," pointing to wide disparities in outcomes between Rochester and its suburban neighbors in Monroe County, New York, on a number of variables.[229] The dropout rate was five times higher in Rochester than in surrounding suburbs (7.0% vs. 1.4%); the retention rate (percentage of freshman class that graduates) was more than three times higher in suburban schools than in Rochester (84% vs. 27%), and the percentage of ninth-graders going on to college in four years was five times higher in the suburbs.[230] On New York Regents Examinations, Rochester passage rates were typically four times lower than in the suburbs, and the percentage of Regents diplomas conferred in suburban schools surrounding Rochester was ten times greater than in the city itself.[231] These results were, they suggested, "by any standard, inadequate."[232]

Second, the plaintiffs argued the inadequate outcomes were "due in large part, to the widely disparate concentration of poverty."[233] Noting that poverty concentrations were extreme in Rochester—the district had a 90% subsidized meal rate compared with a 16% rate in surrounding suburbs, a five-fold difference—they argued that poverty concentrations were harmful to academic achievement.[234] They cited,[235] among other things, the congressionally mandated study of Chapter 1 which found that "[s]chool poverty depresses the scores of all students in schools where at least half of the students are eligible

227. Class Action Complaint at 2, Paynter v. State, 797 N.E.2d 1225 (N.Y. 2003) (No. 99-724) (on file with the North Carolina Law Review) [hereinafter *Paynter* Complaint]. This complaint is the original complaint filed by the plaintiffs in *Paynter* against the State of New York. The plaintiffs later filed an amended complaint to add neighboring school districts as defendants in response to an order by the New York Supreme Court, Appellate Division, Fourth Department that local Monroe County school districts were necessary parties to the suit. *See* Paynter v. State, 704 N.Y.S.2d 763, 763–64 (App. Div. 2000).

228. *See* Mark Hare, *Is Racial Isolation the Key Problem in City Schools?*, ROCHESTER DEMOCRAT & CHRON., Nov. 15, 1998, at B1.

229. *Paynter* Complaint, *supra* note 227, at 1, 19.

230. *Id.* at 22–23, 29.

231. *Id.* at 24–26.

232. *Id.* at 1.

233. *Id.*

234. *Id.* at 30.

235. *Paynter* Complaint, *supra* note 227, at 31

for subsidized lunch, and seriously depresses the scores when more than 75 percent of students live in low-income households."[236] The plaintiffs noted that the same study found poor students in low-poverty schools "performed significantly better."[237]

The plaintiffs argued that high-poverty schools provide negative learning environments for a number of reasons. For one thing, "[t]he concentration of at-risk children in schools and classrooms overwhelms the normal teaching process."[238] To receive a sound basic education, plaintiffs contended, requires "a core group of middle class students and parents in the schools."[239] For another, they cited a 1998 New York State Education Department study noting that high-poverty schools tended to have less funding and teachers with less impressive credentials.[240] By identifying the class as "all children in the Rochester City School District who must attend" high-poverty schools, they emphasized that whether a student is from a middle class or poor family, attending a high-poverty school is a disadvantage.[241]

Plaintiffs noted that the assignment of students was not based on laws of nature and that the concentrations were rather the result of the State's "system of school residency requirements."[242] All fifteen plaintiffs lived in the City of Rochester.[243] If plaintiffs wanted to attend suburban schools, they would have to pay nonresident tuition under state law.[244] Finally, they argued for a remedy that addressed these concentrations directly. Plaintiffs called not for extra funding but for an injunction in which Rochester students were provided education in an environment "not marked by high concentrations of poverty."[245]

Unlike the plaintiffs in *Sheff*, the plaintiffs in *Paynter* never had a chance to argue their case on the merits in court. In June 2003, the state's highest court, the New York Court of Appeals, in a five-to-one decision, affirmed a motion to dismiss the claim without letting it go to trial, saying the plaintiffs had failed to state a claim under the state

236. PUMA ET AL., *supra* note 23, at 12.
237. *Paynter* Complaint, *supra* note 227, at 32.
238. *Id.* at 30–31.
239. *Id.* at 8.
240. *Id.* at 41.
241. *Id.* at 17.
242. *Id.* at 42.
243. *Id.* at 2–4.
244. *Id.* at 42.
245. *Id.* at 44.

constitution's education article.[246] The court held that the State could not be held responsible for the demographic makeup of school districts because doing so "would mean either making it responsible for where people choose to live, or holding that it must periodically redraw school district lines, negating the preferences of the residents."[247] The court also worried about diminishing "local control and participation."[248]

Judge George Bundy Smith wrote a lengthy dissent in the case.[249] Judge Smith argued the education article was not limited to providing adequate financial resources.[250] If the concentration of poor and minority students "will necessarily result in schools that do not offer the opportunity of a sound basic education, even with adequate funding, then the State should remedy that problem."[251] He also rejected the majority's argument about local control, noting that "[t]he Constitution does not place the responsibility of providing a sound education on local school districts, or towns, or cities. It places that responsibility squarely on the State."[252] He argued that "[t]here is nothing sacrosanct about district lines," noting the decline in New York state from 11,000 school districts in 1894 to 700 in modern times.[253] He could have noted, but did not, that for low-income parents, the court's emphasis on respecting parents "preferences" regarding where to live neglected the fact that not everyone can "choose" to live in a middle class neighborhood with good public schools.

On the very same day that the court handed down its decision in *Paynter*, it ruled in favor of plaintiffs seeking adequacy of resources in *CFE*. The decision in *CFE* was rightly hailed as a great victory for low-income children, but the decision in *Paynter* suggested New York would follow in the path of much of the rest of the country: trying to make "separate but equal" work as well as possible.

3. A Settlement in Minnesota: *NAACP v. State*

In 1995, lawyers for the LDF in Minneapolis filed suit challenging de facto economic and racial segregation of Minneapolis

246. Paynter v. State, 797 N.E.2d 1225, 1231 (N.Y. 2003).
247. *Id.* at 1230.
248. *Id.*
249. *Id.* at 1231 (Smith, J., dissenting).
250. *Id.*
251. *Id.* at 1248.
252. *Id.*
253. *Id.* at 1249.

schools and the surrounding suburbs as a violation of the State's duty—as recognized in *Skeen v. State*[254]—to provide an adequate education.[255] Plaintiffs argued that de facto "racial and economic" segregation violated the state constitution's equal protection and education clauses[256] and sought a remedy integrating Minneapolis schools with those in surrounding suburbs.[257] While Minneapolis schools had been under desegregation orders since 1972, the federal decision did not reach suburban schools.[258] Likewise, while Minnesota has one of the nation's most liberal interdistrict transfer laws, jurisdictions are permitted to exclude out-of-district pupils for reasons of space, and students need to pay their own transportation costs.[259]

As a result, Minneapolis schools became increasingly populated by students of color and students who were poor. By 1997–98, plaintiffs noted, 68% of Minneapolis students were students of color and 66% were eligible for free or reduced-price lunch, compared with a statewide population that is 14% minority and 26% eligible for subsidized meals.[260] In suburbs of Edina and Minnetonka, the minority population was 5% and the free and reduced-meal rate 3%.[261]

The plaintiffs argued that a "racially and socioeconomically integrated environment" is one component of a "constitutionally

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254. 505 N.W.2d 299 (Minn. 1993).

255. Class Action Complaint at 2, Minneapolis Branch of the NAACP v. State, No. 95-014800 (Minn. Dist. Ct. Sept. 19, 1995) (on file with the North Carolina Law Review) [hereinafter *NAACP* Complaint]; *See* john powell, *Segregation and Educational Inadequacy in Twin Cities Public Schools*, 17 HAMLINE J. PUB. L. & POL'Y 337, 381–84 (citing *Skeen*, 505 N.W.2d at 313, 315).

256. *NAACP* Complaint, *supra* note 255, at 1.

257. *Id.* at 1–2. For discussions of the Minneapolis case, see Duchesne Paul Drew, *Minneapolis NAACP Sues State*, STAR TRIB. (Minneapolis), Sept. 20, 1995, at 1A; Anne O'Connor, *Issue of Desegregation Reaches Far Beyond Walls of Classroom*, STAR TRIB. (Minneapolis), May 15, 1998, at A19; Joanna Richardson, *Suit Seeks Minn. Backing of Desegregation Plan*, EDUC. WK., Oct. 4, 1995, at 12.

258. *See* powell, *supra* note 255, at 381–82 (discussing the minimal impact of *Booker v. Special School District No. 1*, 359 F. Supp. 799 (D. Minn. 1972), on desegregation in Minneapolis). As in most school desegregation cases, the Minneapolis case was limited to Minneapolis schools, because the at-fault party was the school district—not the State.

259. *See* Interdistrict Desegregation or Integration Transportation Aid, MINN. STAT. ANN. § 124D.87 (West 2000).

260. NAACP v. State and Xiong v. State Settlement Proposal at 2–3, Feb. 19, 1999 (on file with the North Carolina Law Review) [hereinafter Minnesota Settlement Proposal]; *see also* powell, *supra* note 255, at 387–88 (providing a statistical breakdown of segregation in Minneapolis).

261. Plaintiffs' Answers to Defendants' Interrogatories at 2, NAACP v. State, No. 95-014800 (Minn. Dist. Ct. Sept. 30, 1998) (on file with the North Carolina Law Review).

adequate education."[262] In support of this notion, the NAACP pointed to state data showing that in 1998, "[l]ow income students who attend suburban schools [were] also twice as likely to have high achievement levels as low-income students attending school in Minneapolis."[263] The plaintiffs further cited extensive national data suggesting that the achievement gap between whites and students of color decreases and the performance, graduation rates, chances of life success, and participation in social and economic life of students of color all improve in desegregated schools.[264]

The plaintiffs argued that race and class have independent effects, with class being the primary of the two. In the companion case of *Xiong v. State*,[265] filed in 1998, the plaintiffs stated in their complaint: "Concentrated poverty, as exists in parts of the City of Minneapolis, when carried into the public schools, directly results in lower student achievement, wholly without regard to considerations of race. Racial segregation, on top of socioeconomic segregation, further exacerbates these problems and worsens educational outcomes."[266] In April 1998, the plaintiffs publicized a document indicating that school officials knew that a plan for "community schools"—more resources for segregated schools—would not work, citing a San Francisco study finding that disadvantaged students do better when attending middle class schools with fewer resources than when attending high-poverty schools with more.[267]

In March 2000, the parties settled the suit, reaching an agreement on a four-year experiment beginning in the fall of 2001 to encourage greater socioeconomic integration of schools in a number of ways.[268]

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262. Minnesota Settlement Proposal, *supra* note 260, at 1.

263. John G. Shulman & Jeanne-Marie Almonor, State Admits That Integration Improves Student Achievement 2 (Mar. 1999) (unpublished report prepared for mediation, on file with the North Carolina Law Review).

264. John G. Shulman & Jeanne-Marie Almonor, The *Truth* About Desegregation, Segregation, and "Community" Schools 1–4 (Sept. 1998) (unpublished manuscript, on file with the North Carolina Law Review); *see also* powell, *supra* note 255, at 386, 390–91, 397–99; Interview with john a. powell, Professor of Law, formerly at the Univ. of Minn. Law Sch. and currently at Ohio State Univ., Moritz Coll. of Law, in Minneapolis, Minn. (Dec. 19, 1997) (transcript on file with the North Carolina Law Review).

265. No. 98-2816 (Minn. Dist. Ct. 1998).

266. Class Action Complaint at 11, Xiong v. State, No. 98-2816 (Minn. Dist. Ct. Feb. 23, 1998) (on file with the North Carolina Law Review).

267. Press Release, Shulman, Walcott & Shulman, P.A., Minneapolis and Suburban School Officials Conspire To Provide Inadequate, Segregated "Community Schools" (Apr. 30, 1998) (on file with the North Carolina Law Review) (referencing minutes of April 29, 1993, meeting of school officials); *see also* D. Eric Harmon, *Smoking Gun?* INSIGHT, May 4, 1998, at 1.

268. *See* Settlement Agreement, *supra* note 144, exhibit B.

Building on the state's interdistrict transfer law, the State agreed to make transportation available for low-income students (up to $500 per year) to attend suburban schools.[269] Eight suburbs agreed to set aside a total of at least 500 seats for low-income city students each year.[270] Within Minneapolis, magnet schools that were wealthier than the city average were required to set aside up to 20% of kindergarten seats for low-income students and up to 50% of seats that open up in grades one through five.[271] The agreement came on top of an earlier commitment from the state legislature to build a K–12 Minneapolis magnet school to draw from eight surrounding suburban districts and an interdistrict school in suburban Roseville, open to students from North St. Paul and St. Paul.[272]

The program, though small, has been seen as a success. The Choice Is Yours program, which grew out of the settlement, has allowed 2,000 low-income Minneapolis students to attend suburban schools over a four-year period.[273] An evaluation report prepared for the Minnesota Department of Education by ASPEN Associates concluded that "suburban choice students made significantly greater gains in reading than the comparable non-participants," with annual gains translating into reading scores that averaged twenty-three percentile points higher than gains of nonparticipants.[274] The gains for math translated into a twenty-five percentile point advantage.[275] Recently, the legislature voted to continue the program even after the four-year settlement expired.[276]

B. Replication of Sheff *Through Education Law in Other States*

The ruling in *Sheff* and the settlement in *NAACP* and *Xiong* hold great potential for replication in other states. Although some

269. Press Release, Carol R. Johnson, Superintendent, Minneapolis Public Schools, Commentary on the Recent *NAACP vs. State of Minnesota* Settlement Agreement (Mar. 22, 2000), http://www3.mpls.k12.mn.us/news/news_release/naacp4.shtml.

270. *See* Settlement Agreement, *supra* note 144, exhibit B; Norman Draper, *Schools Group OKs NAACP Settlement*, STAR TRIB. (Minneapolis), Mar. 24, 2000, at B1.

271. Johnson, *supra* note 269.

272. Ann Bradley, *Minnesota: State Test Results Highlight Once-Hidden Performance Gaps in Urban Districts and Light a Smoldering Fuse*, EDUC. WK. ON THE WEB, Jan. 8, 1998, http://counts.edweek.org/sreports/qc98/states/mn-n.htm. (part of the Quality Counts '98 Special Report).

273. ASPEN ASSOCIATES, MINNESOTA VOLUNTARY PUBLIC SCHOOL CHOICE 2005–2006: EVALUATION REPORT 1 (2007), *available at* http://education.state.mn.us/mde/groups/Communications/documents/Report/030720.pdf.

274. *Id.* at 37.

275. *Id.* at 38.

276. *See* ASPEN ASSOCIATES, *supra* note 273, at 1.

commentators dismissed the relevance of *Sheff*, given its partial reliance on Connecticut's unusual antisegregation clause, the logic of *Sheff* rests primarily on the equal educational opportunity principle first used by the state supreme court in finding a constitutional right to more equitable spending.[277] As the University of Virginia's James Ryan notes, the *Sheff* majority cited Connecticut's antisegregation provision because it could, not because it needed to.[278] The reference to the segregation clause may have largely been a political attempt to avoid the appearance of relying on social science evidence about the effects of segregation.[279] But logically, the affirmative right to an equitable or adequate education is all that was necessary to support the decision.[280]

A similar right to equity or adequacy across school district lines has been found in twenty-five other states, where spending inequities have been held to violate state constitutions.[281] In all of the school financing cases, courts were willing to dismiss the arguments that spending patterns were a form of de facto discrimination (since economic inequity is not of the State's making).[282] They set aside *local autonomy* arguments and placed the responsibility for providing equal and/or adequate education on the State itself.[283] These are crucial precedents, rebutting arguments against a *Sheff*-like case attacking concentrations of poverty.

On the remedy side, ordering a degree of economic integration is, of course, more complicated than ordering a shifting of finances, so it cannot be assumed that courts will follow a natural progression from equal spending to economically balanced schools. One of the major limiting principles of judicial power requires that the remedy involve clearly administrable judicial standards. But it is important to note that many states have already moved beyond equity in finance in recent years to require "adequacy" in education—providing the education necessary to assure that students will achieve a minimum

277. *See* Horton v. Meskill, 376 A.2d 359, 374–75 (Conn. 1977).

278. Ryan, *supra* note 158, at 549–50.

279. *Id.* at 550.

280. *Id.* at 546–54.

281. Nat'l Access Network, *supra* note 138.

282. *See, e.g.*, Serrano v. Priest, 487 P.2d 1241, 1254 (Cal. 1971) (disagreeing with the contention that a public school financing system involved, at most, de facto discrimination).

283. *See, e.g.*, DeRolph v. State, 677 N.E.2d 733, 745 (Ohio 1997) ("The responsibility for maintaining a thorough and efficient school system falls upon the state. When a district falls short of the constitutional requirement that the system be thorough and efficient, it is the state's obligation to rectify it.").

passing level of competency. The new adequacy cases—which have prevailed in twenty states since 1989[284]—already involve more judicial intervention than equity cases for three reasons.

First, as William Clune notes, where the old equity cases looked at *inputs*, mostly in terms of financial resources, the adequacy theory seeks a minimally adequate *output*, in terms of academic achievement.[285] Whereas equity is indifferent to *how* money is spent, adequacy requires that it be spent in a way to produce achievement. In a leading case from Kentucky, *Rose v. Council for Better Education, Inc.*,[286] the state supreme court held, in very specific and substantive terms, that the constitution required that each child must be provided with

> at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[287]

In *Abbott v. Burke*,[288] the New Jersey Supreme Court held that the legal requirement was not "a constitutional mandate governing expenditures per pupil, equal or otherwise, but a requirement of a

284. Nat'l Access Network, *supra* note 138. The twenty states in which plaintiffs prevailed are Alaska, Arizona, Arkansas, Idaho, Kansas, Kentucky, Maryland, Massachusetts, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, South Carolina, Texas, Vermont, and Wyoming. *Id.*

285. William H. Clune, *Educational Adequacy: A Theory and Its Remedies*, 28 U. MICH. J.L. REFORM 481, 485 (1995).

286. 790 S.W.2d 186 (Ky. 1989).

287. *Id.* at 212.

288. 575 A.2d 359 (N.J. 1990).

specific substantive level of education."[289] In these cases, courts have already gotten into the messy substance of education.

Second, where equity required symmetry of spending, adequacy may often recognize that poorer districts require more resources, so judges must enter the complicated educational debate over how much more must be spent on the poor to bring them to an adequate level of education.[290] Third, adequacy cases set a minimum threshold, preventing states from leveling down to an equality that leaves all districts with inadequate levels of spending.[291] Again, this safeguard requires that courts make determinations about the level of expenditure required to produce a substantive level of education. Because adequacy looks at the substance of education—not mere spending—it has paved the way nicely for the socioeconomic integration argument. The fact that courts have been willing to get into the nitty gritty of what is required for an adequate education—beyond simple rules about equity in spending—suggests that socioeconomic integration does not represent a new remedial frontier.

In at least one important respect, socioeconomic integration is *more modest* than what some state supreme courts have already required in adequacy cases. In *Abbott*, the New Jersey court questioned to what extent a thorough and efficient education requires the schools "to account for and attempt to remedy the problems students bring with them to the schools[:] . . . problems created not by the schools but by society."[292] Answering its own question, the court found that providing a "thorough and efficient" education for poorer students demands that schools recognize that the needs of those students exceed those of more affluent students.[293] Socioeconomic integration does not compensate for poverty per se; it simply ensures that in assigning students to schools, the State does not compound the

289. *Id.* at 368.

290. Clune, *supra* note 285, at 481–82, 488; *see also* R. Craig Wood, *Adequacy Issues in Recent Education Finance Litigation*, *in* DEVELOPMENTS IN SCHOOL FINANCE: FISCAL PROCEEDINGS FROM THE ANNUAL NCES STATE DATA CONFERENCE, JULY 28–30, 1993, at 27, 31, 35 (William J. Fowler, Jr. ed., 1995), *available at* http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/24/cc/62.pdf (concluding that "courts will arbitrate the distribution of scarce resources and define adequacy for society").

291. *See, e.g.*, Wood, *supra* note 290, at 32 (discussing how the formula intended to achieve an equal distribution of state education funds can result in "an equality of poverty").

292. *Abbott*, 575 A.2d at 375.

293. *Id.*

problems of the poor by concentrating them in certain schools, the effect of which is to make education more difficult.

C. *Replication of* Sheff *Through Housing Law*

In addition to education spending cases, a number of state courts have interpreted state constitutions to require affirmative remedies of de facto economic segregation in the related field of housing.[294] States have struck down zoning laws that have the effect of excluding the poor, and have required municipalities to provide their fair share of low- and moderate-income housing. Since courts are generally more reluctant to interfere with housing than education, the housing decisions provide important precedents in the drive for economic school integration.

The leading case in this area is the New Jersey Supreme Court's 1975 decision in *Southern Burlington County NAACP v. Township of Mount Laurel*.[295] There, the court unanimously held that zoning laws which have the effect of excluding poor people violate the New Jersey Constitution, and that localities have an affirmative obligation to provide their "fair share" of moderate- and low-income housing.[296] A municipality could, of course, zone areas for residential, commercial, single and multifamily units within its boundaries, but it could not exclude housing for low- and moderate-income people altogether.[297] Communities would not be required to take in enormous numbers of low-income families—the purpose of the zoning laws was "to create pleasant, well-balanced communities, not to recreate slums in new locations"—but communities were required to take their fair share of low-income housing projects.[298] Significantly, *Mount Laurel*, which has been called "the *Roe v. Wade* of fair housing, the *Brown v. Board of Education* of exclusionary zoning,"[299] surmounted the two obstacles faced by federal constitutional claims involving school desegregation: the requirement that segregation involve race and that it be state sponsored.

First, the case reached beyond race to class. Though the plaintiffs originally brought the case against Mount Laurel for excluding "black and Hispanic" poor people, the New Jersey

294. *See infra* note 308 and accompanying text.
295. 336 A.2d 713 (N.J. 1975).
296. *Id.* at 733.
297. *Id.* at 731–33.
298. *Id.* at 745.
299. DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA 3 (1995).

Supreme Court chose to take on the larger issue of economic class and framed the case "from the wider viewpoint," that the zoning policies which banned trailer homes and limited multi-bedroom apartments excluded families of all races who had modest "income and resources."[300] Second, *Mount Laurel* held that there was no requirement that the zoning policies intentionally exclude poor people; if the effect was exclusion, that effect was sufficient to trigger higher judicial scrutiny.[301] The remedy—like the remedy in *Sheff*—obliterates district lines and says there are wider community obligations that transcend narrow political jurisdictions.[302] Accordingly, the implications of the decision are permanent, not temporary.[303]

If New Jersey was willing to find a constitutional violation involving de facto economic segregation in *housing*, it is surely ripe for an argument involving de facto economic segregation of *schools*. Courts have generally subjected state action involving schools to closer scrutiny than state action involving such interests as housing and nutrition.[304] *Mount Laurel*, as Harvard law professor Charles Haar noted, was "more ambitious" than *Brown* since it "regulates the use of the very space where humans must live not just where they may go to school."[305] Applying *Mount Laurel* to economic school integration is, in some senses, a more modest application of the housing precedent. Indeed, the *Mount Laurel* court took some pains to tie housing to education, noting that one reason municipalities use exclusive zoning is to keep out poor families who would raise the cost of education but contribute little to the tax base.[306] On the education spending side, New Jersey's *Abbott* case is among the leading decisions holding that a state constitution's provision for education requires more equitable per pupil expenditures.[307] A plaintiff

300. *Mount Laurel*, 336 A.2d at 717; *see also* CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES 23 (1996) (explaining Justice Hall's desire to "set a broader precedent" by avoiding the issue of race).

301. *Mount Laurel*, 336 A.2d at 725 n.10; *see also* HAAR, *supra* note 300, at 24–25 (stating Justice Hall's contention that discriminatory impact, rather than intent, was the relevant factor).

302. *See Mount Laurel*, 336 A.2d at 723, 727 (stating that a local jurisdiction may not act "solely in its own selfish and parochial interest and in effect build[] a wall around itself," and instead must consider "values which transcend municipal lines").

303. *See* HAAR, *supra* note 300, at 46.

304. *See, e.g.*, Lindsey v. Normet, 405 U.S. 56, 74 (1972) (refusing to recognize a constitutional right to adequate housing).

305. HAAR, *supra* note 300, at 10.

306. *Mount Laurel*, 336 A.2d at 723, 729.

307. *See* Abbott v. Burke, 575 A.2d 359, 408 (N.J. 1990).

merging the theories of *Mount Laurel* and *Abbott* to argue for economic desegregation of schools might well prevail in New Jersey. A number of other states have followed *Mount Laurel* in looking at economic desegregation of housing, including New Hampshire, Pennsylvania, New York, California, Washington, Massachusetts, and Michigan.[308]

Mount Laurel, like *Sheff*, proved somewhat disappointing in the remedy phase, so some courts have dismissed its ultimate significance.[309] But while the *Mount Laurel* decision has not reached its full potential, it had, by the mid-1990s, provided an estimated 250,000 low-income people with access to suburban jobs, schools, and quality of life.[310]

CONCLUSION

After years of trying to make "separate but equal" schools for rich and poor work, a small but growing number of districts are pursuing conscious strategies of socioeconomic school integration.[311] These forty districts across the United States could be joined by many others if NCLB is modified to allow greater use of transfers to encourage integration across district lines, and if the U.S. Supreme Court curtails the ability of districts to use race in student assignment, prompting districts to use income as a race-neutral alternative.

Ultimately, though, state courts may play an important role in this debate. Some twenty-six state constitutions have been read to require an equal educational opportunity or an "adequate" education.[312] These victories are important but also limited because

308. *See* Brian W. Blaeser et al., *Advocating Affordable Housing in New Hampshire: The Amicus Curiae Brief of the American Planning Association in* Wayne Britton v. Town of Chester, 40 WASH. U. J. URB. & CONTEMP. L. 3, 23–28 (1991).

309. *See, e.g.*, Britton v. Chester, 595 A.2d 492, 497 (N.H. 1991) (declining to adopt the *Mount Laurel* remedy rule); Heritage Bldg. Group, Inc. v. Plumstead Twp. Bd. of Supervisors, 833 A.2d 1205, 1212 (Pa. Commw. Ct. 2003) (declining to follow broad expansion of zoning methods provided in *Mount Laurel*).

310. *See* Nancy Waring, *Putting a Stop to Exclusionary Zoning*, HARVARD L. BULL., Summer 1996, at 31, 32 (an interview with Charles Haar). Between 1975 and 1986, twenty-two *Mount Laurel* suits were settled. HAAR, *supra* note 300, at 89. Haar notes that 15,400 units were built in New Jersey suburbs which would not have been built but for the court decision; and between 1987 and 1992, 54,000 additional low- and moderate-income units were permissible under zoning revisions compelled by *Mount Laurel*. *Id.* at 131; *see also* Blaeser et al., *supra* note 308, at 24 (citing a 1989 *Rutgers Law Review* study that *Mount Laurel* has worked well, and that between 1983 and 1988, 22,000 affordable housing units were built or planned as a result of the decision).

311. *See supra* note 26 and accompanying text.

312. *See supra* note 138 and accompanying text.

they do not bring full equality of educational opportunity. The next frontier is to extend adequacy to address the fountainhead of educational inequality in the United States: the separation of income and more affluent students. A meaningful solution requires a state-based legal strategy that combines the best elements of *Brown v. Board of Education* and *San Antonio Independent School District v. Rodriguez*: in raising the educational achievement of students, integration matters more than per pupil expenditure, and economic class matters more than race.

The *Sheff* case remains an important model, the closest America has come to recognizing the ideal of the "common school," where children of all backgrounds come together and learn on an equal footing. Although the remedy has thus far proved disappointing, even in victory, the lesson of the great litigation for equal opportunity—from *Brown v. Board of Education* to *Abbott v. Burke*—is that while it may take decades to enforce good decisions, they can in the long run improve the opportunity of millions of American schoolchildren in significant, if imperfect, ways.