

# Schools, Race, and Money

James E. Ryan<sup>†</sup>

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<sup>†</sup> Associate Professor, University of Virginia School of Law. I would like to thank Michael Heise, John C. Jeffries, Jr., Mike Klarman, Daryl Levinson, Elizabeth Magill, and Elizabeth Scott for their helpful comments on earlier drafts. I would also like to thank the participants in the 1998 Constitutional Law Symposium, held at the University of Virginia School of Law, where I presented a version of this Article. Thanks as well to the Law School library staff for cheerful and expert assistance. Darcy Goddard, Toby Heytens, Mary Kane, and Sue Messenger provided outstanding research assistance. This Article is dedicated, in loving memory, to my father.

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In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities—one white, the other black—but it is a course, I predict, our people will ultimately regret.

—Justice Thurgood Marshall<sup>1</sup>

## I. INTRODUCTION

It seems unfashionable these days, if not atavistic, to talk seriously about ways to increase racial integration.<sup>2</sup> To be sure, one still encounters attempts to spark conversations about improving race relations and promoting integration, but a strong sense of fatigue seems to accompany such attempts.<sup>3</sup> A distinct trend in academic and popular commentary, from the left and the right, is to seek ways to move beyond racial integration as an issue. Conservative critics of racially based policies, especially desegregation and affirmative action, argue that such policies have achieved about as much as they ever will, and that whites and minorities would be better off if the government reentered a period of “benign neglect” regarding issues of race.<sup>4</sup> Critics on the left seem equally ready to abandon integration as a good idea gone bad, as they either promote or excuse racial separatism.<sup>5</sup> The Supreme Court has joined and at times led this trend by

1. *Milliken v. Bradley* (*Milliken I*), 418 U.S. 717, 814-15 (1974) (Marshall, J., dissenting).

2. See, e.g., DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 1 (1993) (observing that the term “segregation” disappeared from the public vocabulary in the 1970s and 1980s); James S. Kunen, *The End of Integration*, TIME, Apr. 29, 1996, at 39, 39-40; Glenn C. Loury, *Integration Has Had Its Day*, N.Y. TIMES, Apr. 23, 1997, at A23.

3. Consider, for example, the recent Presidential Commission on Race. The Commission met initially with some fanfare, quickly took on a tired feel, eventually released a report that apparently received little attention, and has since disbanded. See, e.g., Kevin Merida, *A Short Leash for Clinton’s Race Commission*, EMERGE, Jan. 31, 1998, at 24, available in 1998 WL 11360589; *Rhetoric on Race*, AUSTIN-AM. STATESMAN, Sept. 20, 1998, at J2; Richard Salvatierra, *If Race Commission Pushes Quotas, Who Needs It?*, TUCSON CITIZEN, Oct. 23, 1998, available in 1998 WL 13141687; George Wilson, *Playing with the Race Card*, 34 WASH. INFORMER, Apr. 27, 1998, at 13, available in 1998 WL 11470855.

4. See, e.g., STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1997); Loury, *supra* note 2. The phrase “benign neglect” appeared in a 1970 memorandum that Daniel Patrick Moynihan wrote to President Nixon, when Moynihan was serving as Assistant Secretary of Labor. Moynihan suggested that the federal government could adopt more of a hands-off policy toward the enforcement of civil rights laws because of the educational gains that African Americans had made. See Charles Sumner Stone, Jr., *Thucydides’ Law of History, or from Kerner, 1968 to Hacker, 1992*, 71 N.C. L. REV. 1711, 1719 (1993); James Dao, *At Career’s End, Moynihan Reflects on Life of Public Service*, TIMES UNION, Nov. 15, 1998, at F3.

5. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); ROY L. BROOKS, *INTEGRATION OR SEPARATION?: A STRATEGY FOR RACIAL*

ruling that policies benefiting African Americans are generally as impermissible as policies discriminating against them,<sup>6</sup> and by strongly implying that it is time for federal courts to get out of the business of school desegregation.<sup>7</sup>

School finance litigation fits nicely within this prevailing mood. The goal of school finance litigation, generally speaking, is to increase the amount and equalize the distribution of educational resources and, in so doing, to improve the academic opportunities and performance of students disadvantaged by existing finance schemes. Such litigation is not targeted to assist only minority students, but rather is designed to assist all "poor" students.<sup>8</sup> School finance litigation is thus often depicted both as a means of moving beyond race as the salient issue in education reform and as an effective way to achieve educational equity and adequacy for disadvantaged students from all racial and ethnic backgrounds.<sup>9</sup> Concomitantly, from its inception thirty years ago to the present, such litigation has been seen as either a supplement to or a substitute for desegregation litigation.<sup>10</sup>

EQUALITY (1996); Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation To Replicate the Disease?*, 78 CORNELL L. REV. 1 (1992); Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401 (1993). Bell's famous article, *Serving Two Masters*, 85 YALE L.J. 470 (1975), was one of the earliest calls to reexamine the goals and implementation of desegregation. See also Caroline Hendrie, *Pressure for Community Schools Grows as Court Oversight Wanes*, EDUC. WK., June 17, 1998, at 23 (quoting the president of the National Urban League affiliate as saying of the return to de facto neighborhood schools in Oklahoma City, "I don't have a big concern about the return to neighborhood schools. . . . For me, the real concern is that children get a good education wherever they go to school.").

6. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995); *Shaw v. Reno*, 509 U.S. 630, 642-43 (1993); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494-95 (1989); *id.* at 520 (Scalia, J., concurring); see also *Adarand*, 515 U.S. at 239 (Scalia, J., concurring) ("In my view, government can never have a 'compelling interest' in discriminating on the basis of race to 'make up' for past racial discrimination in the opposite direction."). Justice Thomas has gone so far as to suggest that affirmative action is as immoral as laws that intentionally discriminate against blacks. See *id.* at 240 (Thomas, J., concurring) ("I believe that there is a 'moral [and] constitutional equivalence' . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality." (quoting *id.* at 243 (Stevens, J., dissenting))).

7. See *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Board of Educ. v. Dowell*, 498 U.S. 237 (1991).

8. "Poor" is in quotation marks because school finance litigation typically seeks to obtain more resources for property-poor school districts rather than for poor students; although property-poor school districts are often populated by poor students, there is not a perfect correlation. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 57 (1973) (noting that "studies have indicated that the poorest families are not invariably clustered in the most impecunious school districts" (footnote omitted)).

9. For example, David Long, an attorney who has been involved in more than 10 school finance cases, suggested when interviewed that focusing on race in these cases would have been too limited and that the goals of school finance litigation were broader and more inclusive. Telephone Interview with David Long (May 12, 1998).

10. See James Gordon Ward, *Implementation and Monitoring of Judicial Mandates: An Interpretive Analysis*, in *THE IMPACTS OF LITIGATION AND LEGISLATION ON PUBLIC SCHOOL FINANCE* 225, 233 (Julie K. Underwood & Deborah A. Versteegen eds., 1990).

School finance litigation began in the late 1960s, at a time when civil rights advocates were growing disillusioned with the pace and progress of desegregation. Those involved in early school finance cases believed that such litigation could accomplish a goal—improving the educational opportunities available to poor and minority students—that desegregation was only fitfully attaining.<sup>11</sup> Similarly, those who are currently dissatisfied with desegregation—an ecumenical and ever-growing group composed of both liberals and conservatives, blacks and whites—believe that reform efforts should be directed solely at improving the education that minority students receive, regardless of whether those students are in integrated or segregated schools.<sup>12</sup> More and more, one hears calls from courts, advocates, and academics alike that desegregation is not the answer, that the NAACP may have erred in pushing for integration rather than for equalization of facilities and programs, and that poor, urban, minority schools would succeed if only reform *x*, *y*, or *z* were adopted.<sup>13</sup> Most of

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11. See RICHARD F. ELMORE & MILBREY WALLIN MCLAUGHLIN, *REFORM AND RETRENCHMENT: THE POLITICS OF CALIFORNIA SCHOOL FINANCE REFORM* 35 (1982) (describing the goals and motivation of early school finance advocates). Derrick Bell, for example, worked as an attorney on numerous desegregation cases before working on one of the earliest school finance cases, *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971). See ELMORE & MCLAUGHLIN, *supra*, at 35; see also Bell, *supra* note 5, at 472 n.5 (noting that Bell “was a staff attorney specializing in school desegregation cases with the NAACP Legal Defense Fund from 1960 to 1966”).

12. See, e.g., AMY STUART WELLS & ROBERT L. CRAIN, *STEPPING OVER THE COLOR LINE: AFRICAN-AMERICAN STUDENTS IN WHITE SUBURBAN SCHOOLS* 336 (1997). In their case study of the St. Louis desegregation plan, which sends thousands of minority students from the city to suburban schools, Wells and Crain report that “[t]ime and time again educators, policy makers, parents, students, and ‘people on the streets’ of metropolitan St. Louis told us that the millions of dollars the state pays to bring nearly 13,000 African-American students to suburban schools would be better spent ‘fixing up’ the city schools.” *Id.*; see also STEVE FARKAS & JEAN JOHNSON, *PUBLIC AGENDA, TIME TO MOVE ON: AFRICAN-AMERICAN AND WHITE PARENTS SET AN AGENDA FOR PUBLIC SCHOOLS* 10 (1998) (reporting results of a survey conducted by Public Agenda and the Public Education Network that indicated that African-American parents, by an 80% to 90% margin, “say the higher priority for the nation’s schools should be to raise academic standards and achievement rather than focus on achieving more diversity and integration”).

13. The three reforms that are currently in fashion and that overlap to a certain extent are standards-based reform (using curricular standards and assessments to regularize the curriculum and chart progress), whole-school or systemic reform (reorienting the structure of schools and classes), and site-based management (providing teachers, parents, and school administrators more authority over the operation of schools). See, e.g., JEAN ANYON, *GHETTO SCHOOLING: A POLITICAL ECONOMY OF URBAN EDUCATIONAL REFORM* 9-12 (1997) (describing the scope of current reforms and the history of earlier waves of reform); ALLAN ODDEN & CAROLYN BUSCH, *FINANCING SCHOOLS FOR HIGH PERFORMANCE: STRATEGIES FOR IMPROVING THE USE OF EDUCATIONAL RESOURCES* (1998); KENNETH K. WONG ET AL., U.S. DEP’T OF EDUC., *PROSPECTS: SPECIAL ANALYSES* (1996); James S. Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349 (1990); Olatokunbo S. Fashola & Robert E. Slavin, *Schoolwide Reform Models: What Works?*, 79 PHI DELTA KAPPAN 370 (1998) (describing various whole-school reform programs). The precursor to today’s reforms was the “effective schools” movement, which sought to identify the most essential traits—such as effective leadership and strong teacher preparation—of productive and successful schools. See, e.g., Stewart C. Purkey & Marshall S. Smith, *Effective Schools: A Review*, 83 ELEMENTARY SCH. J. 427 (1983).

these reforms require funding, often funding above and beyond current levels, which naturally increases the importance of school finance schemes.<sup>14</sup> School finance litigation, meanwhile, continues apace. Nearly twenty state supreme courts have declared their states' systems of school financing unconstitutional, with five of these decisions issued within the last two years.<sup>15</sup> Indeed, while desegregation is entering its twilight phase, school finance litigation shows no signs of abating.

It thus seems an appropriate time to consider school finance litigation and desegregation in tandem and to compare, before we turn our backs completely on desegregation, the relative benefits of school finance reform and desegregation. Surprisingly, such an examination has rarely occurred: Very little scholarly attention has been devoted to the relationship between school finance and desegregation or to the role that race plays in school finance reform.<sup>16</sup> This relative lack of attention is odd not only because each topic has separately received intense scrutiny, both academic and popular, but because the two reform efforts share a long, interwoven history as well as the overlapping goal of improving the educational opportunities and achievement of poor minority students.<sup>17</sup> They also share the failure to

14. See Michael A. Rebell, *Fiscal Equality in Education: Deconstructing the Reigning Myths and Facing Reality*, 21 N.Y.U. REV. L. & SOC. CHANGE 691, 697-98 (1995) (discussing the fairly high costs of a school reform strategy developed by James Comer).

15. For citation and discussion of these cases, see *infra* Section II.B.

16. Indeed, as I have explained elsewhere, an ostensible desegregation case, *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996), offers evidence relevant to school finance debates, insofar as it reveals that equalizing expenditures at relatively high levels may not significantly improve the educational achievement of poor minority students. See James E. Ryan, Sheff, *Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529 (1999). This case, however, has not figured in school finance scholarship. This is not to say that the relationship between desegregation and school finance, or the role that race plays in school finance reform, has gone completely unexamined, but the exceptions are quite limited and focused studies. See Kevin Brown, *The Legal Rhetorical Structure for the Conversion of Desegregation Lawsuits to Quality Education Lawsuits*, 42 EMORY L.J. 791 (1993); Deborah M. Kazal-Thresher, *Merging Educational Finance Reform and Desegregation Goals*, 1 EDUC. POL'Y ANALYSIS ARCHIVES 7 (June 6, 1993) <<http://olam.ed.asu.edu/epaa/v1n7.html>>; Douglas S. Reed, *The People v. The Court: School Finance Reform and the New Jersey Supreme Court*, 4 CORNELL J.L. & PUB. POL'Y 137 (1994); Douglas S. Reed, *Twenty-Five Years After Rodriguez: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 L. & SOC'Y REV. 175 (1998); Kent L. Tedin, *Self-Interest, Symbolic Values, and the Financial Equalization of the Public Schools*, 56 J. POL. 628 (1994). The Brown and Kazal-Thresher articles, moreover, suggest that attention should be shifted away from desegregation and toward financial reforms, which, as argued throughout this Article, seems the wrong direction in which to proceed. See Brown, *supra*, at 803-19; Kazal-Thresher, *supra*.

17. See ELMORE & MCLAUGHLIN, *supra* note 11, at 21-32 (describing early school finance reform goals); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975) (describing the NAACP's desegregation strategies and goals); RICHARD LEHNE, *THE QUEST FOR JUSTICE: THE POLITICS OF SCHOOL FINANCE REFORM* 9-22 (1978) (describing the early history of school finance litigation); MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987) (describing the NAACP's desegregation strategies and the exogenous factors that influenced those strategies); Paul L. Tractenberg, *A Tale of Two States: A Comparative Study of School Finance and Educational Reform in California and New Jersey* 20-27 (Dec. 5,

realize fully that goal and thus shoulder some of the responsibility for the continued existence of numerous schools in metropolitan areas that are both separate and unequal.<sup>18</sup> To understand why such schools exist in something of a pre-*Plessy* world, one must pay attention to both school finance litigation and school desegregation.<sup>19</sup>

This Article is part of a larger project that seeks to do just that: to pay attention to and explore the relationship between school finance litigation and school desegregation. I hope to show that one cannot fully understand the dynamics and limitations of school finance reform without considering the dynamics of race in general and school desegregation in particular.<sup>20</sup> Indeed, the central contention of this Article is that, far from moving beyond race, school finance reform has been and will continue to be hamstrung by the obstacles created by poor race relations and the Court's desegregation jurisprudence.<sup>21</sup>

Specifically, I describe how residential segregation and the limited reach of school desegregation have helped to create and maintain schools

1997) (unpublished manuscript, on file with *The Yale Law Journal*) (describing the goals of New Jersey and California school finance cases).

18. See Erwin Chemerinsky, *Lost Opportunity: The Burger Court and the Failure To Achieve Equal Educational Opportunity*, 45 MERCER L. REV. 999, 999 (1994) ("American schools are separate and unequal. . . . Forty years after *Brown v. Board of Education* proclaimed that separate can never be equal in public education, American schools are racially segregated and grossly unequal." (citation omitted)).

19. There is at least one additional reason why the lack of attention to the relationship between school finance and desegregation is curious, and why an examination of the two in tandem is worthwhile. The research findings regarding desegregation often reveal much about school finance reform, and vice versa, yet scholars from the two fields rarely seem to take advantage of each other's work. For example, an ongoing and heated debate among school finance scholars concerns the degree to which expenditures and achievement are related—or, more colloquially, whether "money matters." See *infra* text accompanying notes 174-94. Cases and research in the desegregation field, particularly regarding *Milliken II* relief, support the argument that significantly increasing expenditures will not necessarily increase achievement. Yet these cases and research are rarely if ever mentioned among school finance scholars. At the same time, desegregation research also suggests that integrating students of different socioeconomic backgrounds benefits poorer students academically and socially and is a worthwhile option to consider from an educational-policy perspective; this research, however, is difficult to find in school finance articles that seek to establish that money does not matter. One of my subsidiary aims in this Article is to begin to bridge the gap that has separated these academic endeavors and to utilize research from both fields in an attempt to sort out which reforms seem most promising and which most futile.

20. See James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. (forthcoming Nov. 1999) (arguing that minority school districts, especially those in urban areas, do not fare well in school finance litigation, and that race seems to play an influential role in court decisions and legislative reactions to those decisions); Ryan, *supra* note 16, at 546-60 (arguing that the underlying right recognized in state school finance cases could support a claim for racial and/or socioeconomic integration).

21. I use the broad term "race relations" to encompass private attitudes and actions as well as government discrimination, all of which, as will become apparent in the discussion of residential segregation, bear some causal responsibility for the creation and maintenance of racially isolated school districts. See *infra* Subsection III.B.1. There is obviously one caveat to this argument: Race is not going to play a role in school finance reform in states that have small minority populations.

that are isolated not simply by race but also by socioeconomic status. The effects of racial and socioeconomic isolation, this Article suggests, cannot be adequately addressed by school finance reform, because students in schools with high concentrations of poverty need more than increased funding to improve their achievement. Increasing expenditures in racially isolated schools, moreover, cannot replicate the social benefits of racially integrated schools. By helping to isolate not simply minority students, but poor minority students, race has played a critical role in creating and maintaining schools that appear to be beyond the reach of school finance reform.

To put the argument simply: Although it is possible that school finance reform could have been a helpful supplement to desegregation, it is a poor substitute. Despite the hopes of early school finance advocates, we should not expect school finance reform to solve the problems created by the failure to desegregate many urban schools. Indeed, this Article suggests not only that school finance reform has done little to improve the academic performance of students in predominantly minority districts, but also that it may be a costly distraction from the more productive policy of racial and socioeconomic integration.

The remainder of this Article proceeds in three parts. Part II offers a brief interpretive history of school desegregation and school finance litigation. One point of this history is to place in doctrinal context the discussion of the limits of school finance reform that follows. Another is to highlight the similarities between school desegregation and school finance litigation and to describe the parallel progression (or regression) in each set of cases. Specifically, the second Part demonstrates how both school finance and school desegregation cases began as efforts to secure equal educational opportunities for disadvantaged students through tying arrangements: Desegregation sought to tie the fate of black students to that of white students, and school finance equalization sought to tie the fate of poor districts to that of wealthier ones. This original goal and the tying strategy have largely been abandoned, and both desegregation and school finance litigation now seem to operate from the implicit premise that poor and predominantly minority schools will remain isolated. Instead of challenging the isolation of such schools, both desegregation and school finance litigation have become primarily concerned with securing “adequate” resources for such schools.

Part III argues that the focus on money, at least in racially isolated school districts, may be ill-advised. It explains how race relations in general and the limits of school desegregation in particular have created and sustained schools that are primarily composed of *poor* minority students. Part III then describes the costs of these racially and socioeconomically isolated schools. The first cost is purely financial: Because poor students

typically have greater needs, schools composed of poor students are costlier to run than schools composed of middle- and upper-income students. The second cost arises from peer influence: A growing body of research confirms that peers generally exert a strong influence on student performance and that students from lower socioeconomic backgrounds in particular suffer from being surrounded solely or primarily by students from similarly impoverished backgrounds. While the first cost of isolation can be ameliorated with increased funds, the second one cannot be. Part III accordingly suggests that the needs of racially and socioeconomically isolated schools may exceed the reach of school finance reform.

Part IV argues that alternatives to school finance litigation, which would aim to increase the racial and socioeconomic integration in metropolitan schools, should be (re)considered. Part IV begins by canvassing the still-growing body of evidence regarding racial and socioeconomic integration. I contend that this evidence indicates that integration is a more effective means of improving the academic achievement and “life chances” of poor minority students than is increasing expenditures in racially and socioeconomically isolated schools. Part IV then turns to a consideration of two options to increase integration: reorienting “school finance” cases and encouraging school choice, including the use of vouchers. I suggest that these two alternatives, while not guaranteed to succeed, are more promising than traditional school finance litigation for the simple reason that they attempt to address rather than elide the isolation and concentrated poverty that characterize minority schools.

One final introductory note is in order. The purpose of this Article is not to plead for mandatory integration. The Article does indeed contend that increasing racial and socioeconomic integration seems more effective than increasing expenditures in improving the academic performance and opportunities of poor minority students. But there is a crucial difference—one that this Article seeks to clarify—between effective policies and politically feasible ones. Mandatory integration is politically implausible at the moment because of significant popular opposition, among both white and black parents, to “forced” busing.<sup>22</sup> This popular opposition, however, is too often taken for proof that racial and socioeconomic integration are ineffective as a matter of educational policy. This Article attempts to demonstrate that the goal of integration remains a worthwhile one, particularly as compared to school finance equalization, even if the

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22. See, e.g., DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 199-201 (1995) (reporting poll data); FARKAS & JOHNSON, *supra* note 12, at 26-27 (reporting that only 22% of white parents favor busing as a way to achieve integrated schools, while 55% of black parents support it); GARY ORFIELD ET AL., DISMANTLING DESEGREGATION 73, 108 (1996) (reporting poll data).

traditional means of achieving integration (mandatory busing) is no longer a viable option. My hope is that such a demonstration will help focus attention on the appropriate question, which is not what goal should be substituted for integration but rather which method holds the most promise for achieving integration.

## II. FROM INTEGRATED AND EQUAL TO SEPARATE AND ADEQUATE: THE DIMINISHED GOALS OF DESEGREGATION AND SCHOOL FINANCE LITIGATION

School desegregation and school finance cases sprang from the similar goal of equalizing educational opportunities for poor and/or minority students. As Judge Robert L. Carter, among others, has explained, those who litigated *Brown v. Board of Education (Brown I)*<sup>23</sup> believed that dual school systems presented the key barrier to equal educational opportunities for African Americans.<sup>24</sup> Indeed, although the Supreme Court held in *Brown I* that separate was inherently unequal in the field of education, it was clear that separate was also unequal in fact, in terms of the resources and facilities devoted to educating minority children.<sup>25</sup> The goal of the desegregation strategy was thus not only to achieve integration for the sake of racial mixing but also to improve the educational opportunities of African-American students.<sup>26</sup>

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23. 347 U.S. 483 (1954).

24. See Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. LOUIS U. L.J. 885, 885 (1993) ("When we were arguing school segregation cases in 1952 and 1953 before the Supreme Court, we saw the dual school system as the key barrier to equal educational opportunity for African-Americans. With the 1954 declaration in *Brown v. Board of Education*, I believed the path was then clear for black children to receive an equal education. My confidence in the inevitability of this result now seems naive." (footnote omitted)); see also Wendy R. Brown, *School Desegregation Litigation: Crossroads or Dead End?*, 37 ST. LOUIS U. L.J. 923, 926-31 (1993) (describing the debate between Judge Carter, who supports more integration, and Professor Kevin Brown, who supports African-American immersion schools); James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1486 (1990) (describing plaintiffs' "assumptions about the advantages of interracial education").

25. See KLUGER, *supra* note 17, at 88, 122, 134 (describing the disparity in funding between white and black students in the South); ORFIELD ET AL., *supra* note 22, at 36-37 (same); Michael A. Middleton, *Brown v. Board: Revisited*, 20 S. ILL. U. L.J. 19, 32 (1995) (describing how black children received inferior education under segregated systems because of severe underfunding); cf. John J. Donohue III et al., *Social Action, Private Charity & Philanthropy: Understanding the Sources of Improvements in Black Schooling in Georgia, 1911-1960*, at 3-4 (Dec. 1997) (unpublished manuscript, on file with *The Yale Law Journal*) (describing how black schools made relative gains in school quality beginning in the 1930s in response to the threats of litigation and integration).

26. See Robert L. Carter, *Reexamining Brown Twenty-Five Years Later: Looking Backward into the Future*, 14 HARV. C.R.-C.L. L. REV. 615, 617 (1979) ("[T]he basic postulate of our strategy and theory in *Brown* was that the elimination of enforced, segregated education would necessarily result in equal education."); Middleton, *supra* note 25, at 29; Martha L. Minow, *School Finance: Does Money Matter?*, 28 HARV. J. ON LEGIS. 395, 395-96 (1991) (describing the

Whereas school desegregation cases sought equality indirectly through integration, school finance cases directly attacked the apparent source of the inequality: the distribution of education resources. After the Supreme Court in *San Antonio Independent School District v. Rodriguez*<sup>27</sup> held that school funding inequities did not violate the U.S. Constitution, litigants directed their attention to state courts and raised claims under both equal protection and education provisions in state constitutions. Although the fora changed, as did the source of the right, the goal remained the same: to equalize per-pupil spending by dismantling school finance systems that relied heavily on local property taxes for funds.<sup>28</sup>

Both school desegregation and school finance litigation thus initially shared a similar strategy of binding the fate of poor and minority students to the fate of their advantaged and white peers. School desegregation would create physical ties by placing black students in white schools and vice versa, such that minority students would necessarily benefit from the desire of white parents and legislators to provide for their "own" children.<sup>29</sup> School finance reform would create financial ties by ensuring that property-poor and -wealthy districts had the same access to educational resources; to the extent that those with more resources wished to increase expenditures on their own schools, the financial ties created by school finance reform would require that access to resources in poorer schools be increased as well.<sup>30</sup> One can easily envision how school finance reform and desegregation could have worked well together to equalize the educational opportunities of poor and minority children by ensuring that the fate of disadvantaged students was tied to the fate of their more advantaged peers.

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predicate of early NAACP work as the principle that "green follows white: money for schooling follows the white students"); see also Liebman, *supra* note 13, at 396 (observing that scholars have argued that the decision was about enhanced educational opportunities as much as about integration).

27. 411 U.S. 1 (1973).

28. See, e.g., *Serrano v. Priest* (*Serrano I*), 487 P.2d 1241 (Cal. 1971); *Robinson v. Cahill* (*Robinson I*), 303 A.2d 273 (N.J. 1973).

29. The widespread use of tracking in desegregated schools, which served to segregate students by race within such schools, prevented this theory from being fully realized in practice. See, e.g., JEANNIE OAKES, *MULTIPLYING INEQUALITIES: THE EFFECTS OF RACE, SOCIAL CLASS, AND TRACKING ON OPPORTUNITIES TO LEARN MATHEMATICS AND SCIENCE* *passim* (1990) (finding that disproportionately high percentages of African-American and Latino students are assigned to low-ability math and science classes and that such classes are taught by less qualified teachers and receive fewer resources, such as laboratories and science equipment).

30. The early theory of school finance cases did not require exact equality in expenditure levels, but rather equality in access to resources, or fiscal neutrality. The principle of fiscal neutrality required that all school districts have access to the same amount of resources for financing their schools; the exact level of expenditures, however, would depend on tax rates imposed by the districts and thus could differ. See JOHN E. COONS ET AL., *PRIVATE WEALTH AND PUBLIC EDUCATION 201-02* (1970). Despite the fact that expenditure levels could differ, poor and wealthy districts would remain tied together financially under a scheme of fiscal neutrality insofar as both would have access to the same level of resources.

Things did not work out as planned. In fact, over the last twenty-five years, the ambitious aim of equalizing educational opportunities through integration and equalized spending has been largely abandoned, and desegregation and school finance cases have been significantly transformed. In many desegregation cases, the end goal changed from integration to reparation; indeed, a number of these cases have come to resemble isolated versions of school finance litigation. In school finance cases themselves, the goal of equalized spending is being displaced by the goal of adequacy; that is, litigants now generally are seeking recognition of the right to an “adequate” education and the funds to provide it.<sup>31</sup> Many school finance and school desegregation cases thus have become primarily concerned with obtaining sufficient funds to finance a basic level of education in the poorest and/or most racially isolated school districts. With this transformation, ties that might have bound urban and suburban schools—student integration or equalization of resources—have been severed. And although both sets of cases have served the immediate goal of increasing the resources available to schools isolated by race and poverty, they have also implicitly legitimized the segregation of such schools.

#### A. School Desegregation Cases

The desegregation cases have proceeded in roughly four phases. The first phase, of course, was the enunciation of the right in *Brown I* and the Court’s vague call for a remedy in *Brown II*.<sup>32</sup> The second phase involved the various remedial plans at issue in such cases as *Green*<sup>33</sup> and *Swann*<sup>34</sup> and the scope of a court’s remedial authority to achieve integration.<sup>35</sup> These

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31. See Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995); Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”*: From Equity to Adequacy, 68 TEMP. L. REV. 1151 (1995); William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597 (1994).

32. *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 301 (1955) (failing to establish a standard or timetable for desegregation and instead holding that desegregation should occur “with all deliberate speed” through plans developed in federal district courts).

33. *Green v. County Sch. Bd.*, 391 U.S. 430 (1968). In *Green*, the Court rejected freedom-of-choice plans, which gave students the option of transferring from black to white schools, on the ground that they placed the burden of desegregation on blacks, who were reluctant to transfer in the face of intimidation. It also held that segregated or dual school systems must be dismantled “root and branch” and that desegregation must be achieved with respect to facilities, staff, faculty, extracurricular activities, and transportation. *Id.* at 438.

34. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (striking down “racially neutral” student assignment plans that produced segregation by relying on existing residential patterns in the district, ruling that desegregation must be achieved in each district’s schools to the greatest extent possible, and approving busing as a means to accomplish this goal).

35. In addition to the cases cited above, see *Keyes v. School District No. 1*, 413 U.S. 189 (1973), which held that Denver must desegregate all city schools, and *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969), which declared that desegregation must occur “at once” and that districts must “operate now and hereafter only unitary schools.” *Id.* at 20.

remedies, at least until *Milliken I*,<sup>36</sup> focused primarily on the original goal of integrating the schools.

*Milliken I* fundamentally altered the nature of desegregation remedies and, together with *Milliken II*,<sup>37</sup> ushered in the third phase of desegregation litigation. Citing the importance of preserving local control of education, the Court in *Milliken I* struck down a desegregation plan that would have required integration among the predominantly black city schools of Detroit and the predominantly white schools in the suburbs. In holding that a court could not order an interdistrict remedy absent a showing of an interdistrict violation, the Court foreclosed the possibility of achieving real integration in Detroit and a host of other Northern and Western metropolitan areas where school districts were coterminous with municipal boundaries and urban areas were populated mostly by minorities. Without being able to draw on the heavily white student population in the suburbs, urban desegregation plans could not hope to achieve much integration, because of the simple fact that there were not enough white students to go around.<sup>38</sup>

Having foreclosed interdistrict relief in *Milliken I*, the Court in *Milliken II* approved a modified desegregation plan, affecting only schools within Detroit, which required that the state help fund remedial and compensatory education programs. If the schools were going to be separate as a result of *Milliken I*, *Milliken II* seemed to hold out the possibility that they might at least be equal.<sup>39</sup> Not surprisingly, after *Milliken I* and *Milliken II*, the focus in desegregation cases, at least in cases involving Northern and Western urban school districts, shifted away from integrative remedies.<sup>40</sup> Replacing that focus was a concern for the quality of education offered in the racially

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

37. *Milliken v. Bradley (Milliken II)*, 433 U.S. 267 (1977) (holding that a court could order a state to pay for educational programs to repair the harm caused by segregation).

38. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 312 (1994); ORFIELD ET AL., *supra* note 22, at 11; J. HARVIE WILKINSON III, FROM BROWN TO BAKKE 219-22 (1979).

39. It is interesting to note, given the five to four vote in *Milliken I* against the plaintiffs, that *Milliken II* was a unanimous decision in their favor.

40. See MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 535 (1992) ("A number of courts, relying on *Milliken II*, have ordered the state or other governmental units to share the costs of implementing and maintaining desegregation and compensatory education programs with the local school board."). A group of commentators associated with the Harvard Project on School Desegregation describes the changes following *Milliken I*:

Since 1977, school districts across the nation have used *Milliken II* provisions to install state-sponsored compensatory educational programs for minority students in racially isolated schools. . . . [T]he programs have played an increasingly prominent role in desegregation remedies since 1977. This is partly because the demographic patterns evident in Detroit in 1974 have become more pronounced. School districts in the nation's central cities and some older suburbs enroll large proportions of minority students, while surrounding suburbs remain predominantly white. As patterns of isolation persist, racial integration of the type envisioned in *Brown* has become increasingly difficult to achieve. This pattern has forced school officials and courts to rely on *Milliken II* programs to supplant rather than supplement true racial integration.

ORFIELD ET AL., *supra* note 22, at 154.

isolated school districts. Thus, in the third phase of desegregation cases, the goal of litigation was often to secure funding from the state to pay for remedial plans designed to improve the quality of facilities and instruction at racially isolated schools.<sup>41</sup> In other words, the goal was not equality through integration, but adequacy through remedial funding.<sup>42</sup>

In addition to the most (in)famous example of Kansas City,<sup>43</sup> a number of school districts have successfully sued state governments for funds to finance “desegregation” remedial decrees.<sup>44</sup> Yonkers<sup>45</sup> and Philadelphia<sup>46</sup> are the two most recent examples; others include school districts in

41. See *Assessing the Impact of Judicial Taxation on Local Communities: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 104th Cong., 1996 WL 538968 (1996) [hereinafter, *Assessing the Impact*] (statement of Alfred A. Lindseth). Lindseth, an attorney who has represented a number of school districts seeking unitary status, explained that local districts have resisted recognition of unitary status to continue receiving court-ordered funding. St. Louis and Kansas City, for example, have received a total of over \$2.5 billion so far to fund desegregation decrees; these districts currently spend \$8000 per pupil as compared to the state average of \$4500. Thus, school districts have become willing participants with plaintiffs in resisting unitary status. Lindseth suggests the same dynamic has occurred in other states, including Illinois and Georgia. See *id.*; see also ORFIELD ET AL., *supra* note 22, at 143-78.

42. Cf. ORFIELD ET AL., *supra* note 22, at 12 (reporting that a judge overseeing the monetary remedies in Detroit called *Milliken II* a “limited form of reparations”).

43. See *Missouri v. Jenkins*, 515 U.S. 70 (1995) (describing extensive programs ordered by the court and funded in part by the state, pursuant to a desegregation decree).

44. Not all such suits have been successful. In *School Board v. Baliles*, 829 F.2d 1308 (4th Cir. 1987), the court rejected the Richmond School Board’s attempt to secure funds from the state to finance compensatory and remedial programs. The case is nonetheless typical of the transformation wrought by the *Milliken* decisions. After the court of appeals held that the plaintiffs had failed to prove an interdistrict violation, the school board moved to realign itself with the plaintiffs and sued the state for money to fund remedial and compensatory programs. See *id.* at 1310. By the time the suit reached the court, however, the Richmond school system had been declared unitary, and thus the court held that the state was not responsible for funding the programs. See *id.* at 1314.

45. See *United States v. City of Yonkers*, 96 F.3d 600 (2d Cir. 1996). In Yonkers, the school board (along with the NAACP) successfully sued the state for money ostensibly intended to finance efforts to eliminate the vestiges of segregation. City leaders were delighted with the ruling because

they may finally get hundreds of millions of dollars to pay for new classrooms and more teachers for all students, not just those hurt by segregation. Mayor John D. Spencer has long argued that the city has been shortchanged to the tune of \$50 million a year by a state education formula that favors the suburbs and rural areas.

Joseph Berger, *A Shared Victory*, N.Y. TIMES, Sept. 26, 1996, at B6.

46. See *Pennsylvania Human Relations Comm’n v. School Dist.*, 681 A.2d 1366 (Pa. Commw. Ct. 1996) (ordering the state government to provide over \$45 million to fund a remedial order designed to improve educational opportunities for minority students in racially isolated schools); see also Michael A. Riccardi, *Lawyers Quickly Review Deseg Opinion: Both Sides Urge Supreme Court To Act Swiftly*, THE LEGAL INTELLIGENCER, Sept. 10, 1996, at 1 (“The most remarkable turn that school desegregation litigation has taken in its 24-year history may be that the court has shifted its focus from undoing segregated conditions to improving opportunity for students in racially-isolated schools, estimated at 100,000 children of the city’s 130,000 minority students.”).

Maryland,<sup>47</sup> Illinois,<sup>48</sup> Georgia,<sup>49</sup> Ohio,<sup>50</sup> and Arkansas.<sup>51</sup> As in *Milliken II* itself,<sup>52</sup> these cases often pitted unlikely allies against unusual foes, in that civil rights groups representing school children teamed up with the districts (against whom the initial desegregation case was brought) in an effort to extract money from unwilling state governments.<sup>53</sup> The remedies were at best tangentially related to achieving an integrated school system<sup>54</sup> and were often extended throughout the district to benefit schools never found to be among those that intentionally segregated students.<sup>55</sup> Plaintiffs and courts thus used these cases to achieve what school finance cases were

47. See Berger, *supra* note 45, at B6 (reporting that Prince George's County, Maryland, the 10th largest school district in the country, has been trying, as have other school districts, to get the state to pay for the costs of correcting what have become known as the "vestiges of segregation," which include the sizable gap between the performances of white and black students).

48. See *id.*

49. Curiously, DeKalb County, the school district at issue in *Freeman v. Pitts*, 503 U.S. 467 (1992), tried to obtain *Milliken II* funding while simultaneously trying to lift the district court's remedial decree. See Gary Orfield & David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 EMORY L.J. 759, 770 (1993).

50. See Reed v. Rhodes, 934 F. Supp. 1533, 1536 (N.D. Ohio 1996) (describing the 1978 desegregation decree regarding Cleveland public schools that, inter alia, required the "development of creative educational curriculums, including innovative reading and other programs designed to correct the effects of prior segregated schooling as is reasonably possible").

51. See Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., 716 F. Supp. 1162, 1190 (E.D. Ark. 1989), *rev'd in part*, 921 F.2d 1371 (8th Cir. 1990) (directing the district court to approve a settlement plan); see also ORFIELD ET AL., *supra* note 22, at 156-57 (discussing the use of *Milliken II* programs at "Incentive Schools" that were part of a larger desegregation strategy).

52. See *Milliken II*, 433 U.S. at 292-95 (Powell, J., concurring in judgment). Justice Powell, in arguing that the writ should be dismissed as improvidently granted, described the transformation of the litigation from one that pitted student and parent plaintiffs against the school board into one that featured the school board and plaintiffs teaming up against the state. The plaintiffs and school boards, Powell observed, "antagonistic for years, have now joined forces apparently for the purpose of extracting funds from the state treasury." *Id.* at 293. Indeed, Powell noted, the school board "enthusiastically supports the entire desegregation decree even though the decree intrudes deeply on the Board's own decisionmaking powers." *Id.*

53. See, e.g., Missouri v. Jenkins, 515 U.S. 70, 79 (1995) (noting that the Kansas City, Missouri School District (KCMSD) "has pursued a 'friendly adversary' relationship with plaintiffs [and] has continued to propose ever more expensive programs"); United States v. City of Yonkers, 96 F.3d 600, 603 (2nd Cir. 1996) (describing how the NAACP teamed with the Yonkers Board of Education in suing the state); Pennsylvania Human Relations Comm'n v. School Dist., 681 A.2d 1366 (Pa. Commw. Ct. 1996) (describing how the school district and student-parent plaintiffs sued the city and state); Berger, *supra* note 45, at B6 (noting that officials of Yonkers and the city's civil rights leaders "won a shared victory over an entity they have gradually come to see as a common foe: the State of New York").

54. See, e.g., *Milliken II*, 433 U.S. at 275-91 (approving remedial programs that targeted reading, teacher training, testing procedures, and counseling and career guidance).

55. See, e.g., *Jenkins*, 515 U.S. at 75 (describing a remedial order that required "a wide range of quality education programs for all students attending the KCMSD," including full-day kindergarten; expanded summer school; tutoring; an early childhood development program; and a state-funded "effective schools" program that extended not only to the 25 racially identifiable schools but also to the 43 other schools within the KCMSD); Pennsylvania Human Relations Comm'n, 681 A.2d at 1385 (rejecting the argument that a remedial order had to be limited to racially isolated schools and could not extend to the entire district). *Jenkins* may curtail the ability of courts to order district-wide relief, as it authorizes courts to order relief only for academic deficiencies that are traceable to segregation and forbids the use of remedial decrees to promote the desegregative attractiveness of an urban school district. See *Jenkins*, 515 U.S. at 94, 101-02.

designed to achieve: a redistribution of funds from the state to poor and dilapidated schools.

In fact, an eyebrow-raising correlation exists, in that desegregation decrees have been used most extensively and successfully in securing funds in states where school finance cases either have not been brought or were unsuccessful. In Michigan,<sup>56</sup> Missouri,<sup>57</sup> New York,<sup>58</sup> Maryland,<sup>59</sup> and Pennsylvania,<sup>60</sup> where *Milliken II* relief has been used extensively to fund compensatory and remedial education programs in racially isolated school districts, the school finance systems have never been successfully challenged. Whether intentionally or not, at least some federal courts have used school desegregation decrees to circumvent the limitations imposed by *Rodriguez* or similar state-court decisions rejecting school finance challenges.<sup>61</sup> At the same time, in those states where *Milliken II* remedies have preceded school finance litigation, such remedies have made many urban school districts poor candidates for inclusion in school finance reform, for they have boosted those districts' per-pupil expenditures above the statewide average, sometimes substantially.<sup>62</sup>

56. See *East Jackson Pub. Sch. v. State*, 348 N.W.2d 303 (Mich. Ct. App. 1984) (holding that education is not a fundamental right under Michigan's constitution and that the obligation to provide a free public education does amount to an obligation to provide equal funding for each student). Michigan's school finance litigation has a mysterious history in that the state supreme court in 1972 held that education was a fundamental right and that the financing scheme had failed to advance a compelling state interest. See *Milliken v. Green*, 203 N.W.2d 457 (Mich. 1972). The Michigan court subsequently ordered a rehearing. In the interim, the United States Supreme Court decided *Rodriguez*, and the Michigan court's composition changed. In 1973, the Michigan court, without opinion, vacated its opinion in *Milliken v. Green*. See *Milliken v. Green*, 212 N.W.2d 711 (Mich. 1973). Two justices wrote concurring opinions holding that education was not a fundamental right. See *id.* at 717-18 (Kavanagh & Levin, JJ., concurring).

57. Litigation is pending in Missouri. See G. Alan Hickrod et al., *The Effect of Constitutional Litigation on Education Finance: A Preliminary Analysis*, 18 J. EDUC. FIN. 180, 187 (1992); Rebell, *supra* note 14, at 693 n.6.

58. See *Board of Educ. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982) (upholding a financing scheme against equal protection and education clause arguments despite acknowledging significant inequalities in funding; applying a rational basis review and concluding that the education clause is not a mandate for equality but only a guarantee of a basic education). Litigation is currently pending in New York, alleging that New York fails to provide a sound, basic education to children in New York City public schools. See *Campaign for Fiscal Equity v. State*, 655 N.E.2d 661 (N.Y. 1995) (holding that such allegations constitute a valid cause of action and also that claims under Title VI were valid).

59. See *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983) (concluding that the education clause, requiring thorough and efficient education, does not require equal spending, and that the financing scheme survives a rational basis test).

60. See *Danson v. Casey*, 399 A.2d 360 (Pa. 1979) (concluding that the education clause, which requires provision of a thorough and efficient education, does not require equalized spending per pupil).

61. See Theodore M. Shaw, *Missouri v. Jenkins: Are We Really a Desegregated Society?*, 61 *FORDHAM L. REV.* 57, 60 (1992) (noting that school districts that once intentionally segregated students "have become plaintiffs in school desegregation cases, seeking *Milliken II* relief against the state in an attempt to circumvent the limitations imposed by the Supreme Court in *San Antonio Independent School District v. Rodriguez* and other cases").

62. See Ryan, *supra* note 20.

As court-ordered desegregation enters its twilight phase, money remains the primary issue. Through the trio of *Dowell*, *Freeman*, and *Jenkins*, the Supreme Court, by establishing guidelines as to when a district can be declared “unitary” and released from court supervision, has not so gently urged district courts to begin the process of dismantling desegregation decrees.<sup>63</sup> District courts have responded by approving termination agreements reached by school districts, the state, and civil rights plaintiffs. These agreements typically call for the dismantling of desegregation plans and thus a potential return to de facto segregated neighborhood schools, in exchange for a large, one-time payment from the state to the relevant school districts.<sup>64</sup> For example, school districts in Prince George’s County, Cleveland, Kansas City, Nashville, Dayton, and Memphis have all agreed to terminate mandatory desegregation plans in exchange for large payments from the state.<sup>65</sup>

As discussed in more detail below, although *Milliken II* cases have led to short-term increases in funding, they generally have not succeeded in boosting academic achievement. Although the empirical research regarding *Milliken II* cases is somewhat sparse, it does not appear that such relief has had much impact on student performance, in part because receiving school districts have made little systemic effort to ensure that the money is used efficiently and to enhance student performance.<sup>66</sup> Kansas City is the prototypical example. Despite spending close to \$1.5 billion in seven years, the district failed to show much academic improvement among its students, in part because the money was spent primarily on “physical goodies” such as planetariums, greenhouses, and swimming pools.<sup>67</sup> Given the lack of

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63. See *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Board of Educ. v. Dowell*, 498 U.S. 237 (1991).

64. See Bradley W. Joondeph, *A Second Redemption?*, 56 WASH. & LEE L. REV. 169, 169 n.1 (1999) (noting cases in which federal courts returned control to local officials); see also Kerry A. White, *Boston Weighs Return to Neighborhood Schools*, EDUC. WK., July 8, 1998, at 3 (describing a proposal to return to a neighborhood school system in Boston).

65. See Caroline Hendrie, *Falling Stars*, EDUC. WK., Feb. 25, 1998, at 34; Caroline Hendrie, *In Indianapolis, Nashville, a New Era Dawns*, EDUC. WK., July 8, 1998, at 8 [hereinafter Hendrie, *In Indianapolis*] (describing how a combined city-county council agreed to provide \$206.8 million to a Nashville school district in exchange for ending a busing plan that began as a result of a 1955 lawsuit); Caroline Hendrie, *Judge Decides State Funds for Desegregation To End in K.C.*, EDUC. WK., Apr. 2, 1997, at 1; Caroline Hendrie, *Judge Ends Desegregation Case in Cleveland*, EDUC. WK., Apr. 8, 1998, at 3; Caroline Hendrie, *Md. District Asks Court To End Busing*, EDUC. WK., Aug. 7, 1996, at 7; Peter Schmidt, *Desegregation Costs Put Ga., Ohio Officials at Odds with Districts*, EDUC. WK., Mar. 18, 1992, at 20. One interesting exception to this trend is Indianapolis, which reached a settlement to end interdistrict busing in which local housing officials, the state, and the U.S. Department of Justice agreed to take a series of steps aimed at increasing the number of low-income and minority families that can find housing in the suburbs. See Hendrie, *In Indianapolis, supra*, at 9. In an unusual twist, the suburban districts, which were receiving inner-city students (and the additional state funding that accompanied them), have been vigorously opposing the termination of the desegregation decree. See *id.*

66. See ORFIELD ET AL., *supra* note 22, at 243, 254-61.

67. *Id.*

evidence that *Milliken II* funding has improved academic achievement, it is unlikely that states freed from court supervision will continue to fund *Milliken II* districts at the levels required by desegregation decrees.<sup>68</sup>

### B. *School Finance Cases*

On the school finance side, commentators divide the litigation into three phases (or "waves," as they are called in the literature).<sup>69</sup> The first phase involved federal- and state-court challenges to education-financing systems based on the Federal Equal Protection Clause. This phase was short-lived, beginning with a successful challenge in 1971 to California's financing scheme in *Serrano v. Priest*<sup>70</sup> and ending two years later with the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*.<sup>71</sup>

The second phase began shortly after *Rodriguez* (indeed, thirteen days later), when the New Jersey Supreme Court in *Robinson v. Cahill*<sup>72</sup> declared the education-financing scheme in New Jersey unconstitutional on the ground that it violated the state constitution's "thorough and efficient education" clause. (The court hinted that the scheme might also violate the state constitution's equal protection guarantee, but it has never resolved the question in over twenty years of litigation.) The cases in this phase focused on the education and equal protection clauses in state constitutions and generally sought equalized funding per pupil.<sup>73</sup> Court results in the second

68. See *id.* at 262; WELLS & CRAIN, *supra* note 12, at 336 (reporting that the removal of the court order in the St. Louis desegregation case "would no doubt be the beginning of the end of extra state resources to the city schools" and that, at most, "the St. Louis school board will be bought off by the state with a set amount of money in return for agreeing to end the interdistrict program"); Shaw, *supra* note 61, at 59 ("Whatever accomplishments flowed from the court-ordered remedy may only be of passing significance depending upon when and how the school district and the state are released from court supervision.").

69. See, e.g., Enrich, *supra* note 31, at 121-42 (describing the progression of school finance litigation); Heise, *supra* note 31, at 1152-53 (describing three waves of school finance litigation); Thro, *supra* note 31, at 598 n.4 (claiming to have invented the classification); Julie K. Underwood & William E. Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J.L. & PUB. POL'Y 517, 520-35 (1991) (describing school finance litigation theories).

70. *Serrano I*, 487 P.2d 1241 (Cal. 1971) (finding that wealth is a suspect classification and education a fundamental right and striking down a property-based funding scheme on state and federal equal protection grounds).

71. 411 U.S. 1 (1973) (holding that education is not a fundamental right and upholding an unequal school finance scheme under rational basis review).

72. *Robinson I*, 303 A.2d 273 (N.J. 1973).

73. See, e.g., Dupree v. Alma Sch. Dist., 651 S.W.2d 90 (Ark. 1983) (holding that the financing scheme in question violates the state equal protection provision); *Serrano v. Priest (Serrano II)*, 557 P.2d 929 (Cal. 1976) (rejecting the legislative response to *Serrano I* on the ground that it did not provide sufficient assurance of equalization, and holding that the legislative scheme had to ensure that funding would vary no more than \$100 per pupil); *Horton v. Meskill (Horton I)*, 376 A.2d 359 (Conn. 1977) (holding that the state equal protection clause requires substantial equality in funding education); *Washakie County Sch. Dist. v. Herschler*, 606 P.2d 310

phase were mixed: Of the twenty challenges resolved by state supreme courts, thirteen were rejected<sup>74</sup> and seven were successful.<sup>75</sup> Even where plaintiffs secured court victories, state courts were often vague and deferential when it came to ordering remedies,<sup>76</sup> and legislatures were often

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(Wyo. 1980) (holding that the state finance scheme was in violation of the state equal protection clause, on the ground that education is a fundamental right and wealth a suspect classification).

74. Challenges were rejected in the following states: Arizona, *see Shofstall v. Hollins*, 515 P.2d 590 (Ariz. 1973) (rejecting an equal protection challenge to a financing scheme, despite finding education to be a fundamental right); Colorado, *see Lujan v. Board of Educ.*, 649 P.2d 1005 (Colo. 1982) (holding that education is not a fundamental right under federal or state constitutions and that the state education clause does not require uniform expenditure levels); Georgia, *see McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981) (upholding a state financing scheme, concluding that the "adequate education" clause requires more than minimum education but that the legislature must determine the content of an adequate education); Idaho, *see Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975) (upholding a finance scheme against state equal protection and education clause challenges); Maryland, *see Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983) (rejecting a challenge based on the state equal protection and education clauses and holding that the education clause does not require equal funding); New York, *see Board of Educ. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982) (upholding a finance scheme on the ground that the education clause is not a mandate of equality and that education is not a fundamental right); North Carolina, *see Britt v. North Carolina Bd. of Educ.*, 357 S.E.2d 432 (N.C. Ct. App. 1987) (upholding a finance scheme on the ground that the "general and uniform" education clause guarantees only equal access to school and that the "equal opportunity" provision bars only racial segregation), *dismissed on appeal*, 361 S.E.2d 71 (N.C. 1987); Ohio, *see Board of Educ. v. Walter*, 390 N.E.2d 813 (Ohio 1979) (rejecting challenges based on state equal protection and education clauses on the grounds that the legislature has discretion in educational matters and that the court will not interfere with such discretion where education appears adequate); Oklahoma, *see Fair Sch. Fin. Council v. State*, 746 P.2d 1135 (Okla. 1987) (rejecting a challenge based on state equal protection and education clauses and holding that the education clause does not require equal funding); Oregon, *see Olsen v. State*, 554 P.2d 139 (Or. 1976) (holding that the state constitution requires the provision of only minimum educational opportunities); Pennsylvania, *see Danson v. Casey*, 399 A.2d 360 (Pa. 1979) (rejecting a challenge based on state equal protection and "thorough and efficient education" clauses); South Carolina, *see Richland County v. Campbell*, 364 S.E.2d 470 (S.C. 1988) (rejecting an equalization challenge based on the state's education and equal protection clauses); and Washington, *see Northshore Sch. Dist. No. 417 v. Kinnear*, 530 P.2d 178 (Wash. 1974) (rejecting an equalization challenge based on the state's education and equal protection provisions and concluding that the adequacy claim was not supported by evidence), *overruled by Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978).

75. Successful challenges were brought in the following states: Arkansas, *see Dupree*, 651 S.W.2d at 90; California, *see Serrano I*, 487 P.2d at 1241; *Serrano II*, 557 P.2d at 929; Connecticut, *see Horton I*, 376 A.2d at 359; New Jersey, *see Robinson I*, 303 A.2d at 273; Washington, *see Seattle Sch. Dist. No. 1*, 585 P.2d at 71 (overruling *Kinnear* and invalidating a school finance scheme on the ground that the education clause requires the provision of a basic education and requires the state legislature to define the scope of a basic education and provide necessary funds); West Virginia, *see Pauley v. Bailey*, 324 S.E.2d 128 (W. Va. 1984) (ordering the implementation of a master plan but holding that educational standards set by a state board of education were insufficiently specific to satisfy the constitutional mandate); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979) (holding that a school financing scheme must be adequate and equal, based on the "thorough and efficient" education clause and the equal protection clause, and remanding for development of standards); and Wyoming, *see Herschler*, 606 P.2d at 310 (invalidating a school finance scheme on the ground that it failed to provide substantially equal funding).

76. *See* George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543, 544 (1994) (observing that "state supreme courts show [a] pattern of expansive declarations of right and duty coupled with an insistence that solutions must come from the legislative rather than the judicial branch").

evasive or recalcitrant in response.<sup>77</sup> New Jersey is a prime example, where the legislature and the court, shortly after the first *Robinson* decision, began a cat-and-mouse game regarding funding schemes and compliance with court decrees that has continued through nine state supreme court decisions and continues today.<sup>78</sup> The same drawn-out process has transpired in Texas, prompting Mark Yudof, former Dean of the University of Texas School of Law, to observe that school finance reform “is like a Russian novel: it’s long, tedious, and everybody dies in the end.”<sup>79</sup>

The third and current phase of school finance litigation began in 1989, when plaintiffs won significant court victories in Kentucky<sup>80</sup> and Montana.<sup>81</sup> Although the third wave cases, as they are called, are not as monolithic as commentators suggest,<sup>82</sup> they are for the most part characterized by a strict focus on state education clauses and an emphasis on adequacy rather than equity. The claim made, in other words, is not that each student is entitled to equal funding, but rather that all students are entitled to an “adequate” education and the funds necessary to provide it.<sup>83</sup>

The shift in focus from equality to adequacy is in some cases a matter of choice or strategy, and in other cases it is a matter of necessity, as litigants who have already lost on an equality claim return to court for a

77. See *Rebell*, *supra* note 14, at 693. As *Rebell* notes.

[F]ew of the plaintiff victories have resulted in reforms that have demonstrably ameliorated the inequities. Although inter-district disparities have been reduced in some states, adverse results have followed many court interventions, and overall, the record is disappointing. In some states, court orders have been virtually ignored; in others, the courts have felt compelled repeatedly to strike down legislative responses which were inadequate or unconstitutional or both.

*Id.* at 693-94 (citations omitted); see also Lewis B. Kaden, *Courts and Legislatures in a Federal System: The Case of School Finance*, 11 HOFSTRA L. REV. 1205, 1255-59 (1983) (advocating greater judicial involvement in the remedial phase of school finance litigation); Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 468 (1996) (arguing that “successful litigation has more often been the product, not the cause, of a political consensus that the schools need fundamental change” and that “[w]ithout such consensus, a state court has limited ability to confront state political institutions”); Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1072 (1991) (arguing that “legislative inertia and unwarranted judicial deference to the political branches in the remedial phase hinder the school finance plaintiff’s prospects for securing a constitutional remedy”).

78. See *Ryan*, *supra* note 20 (discussing the history of the New Jersey litigation).

79. Mark G. Yudof, *School Finance Reform in Texas: The Edgewood Saga*, 28 HARV. J. ON LEGIS. 499, 499 (1991).

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

81. See *Helena Elementary Sch. Dist. v. State*, 769 P.2d 684 (Mont. 1989).

82. The cases in Montana, Tennessee, Texas, and Vermont, for example, relied on equality theories rather than adequacy theories. See *id.* at 684; *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993); *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391 (Tex. 1989); *Brigham v. State*, 692 A.2d 384 (Vt. 1997).

83. See *Thro*, *supra* note 31, at 603 (observing that in the third wave of cases, “instead of emphasizing equality of expenditures, the plaintiffs [typically] have argued that all children are entitled to an education of at least a certain quality and that more money is necessary to bring the worst school districts up to the minimum level mandated by the state education clause”); see also Heise, *supra* note 31, at 1153 (stating that “the third wave illustrates the replacement of traditional ‘equity’ court decisions with ‘adequacy’ decisions”).

second or third time. The results in the so-called third wave have also been mixed, although the win-loss ratio, at eleven wins<sup>84</sup> and eleven losses,<sup>85</sup> is better than that of the second phase.<sup>86</sup>

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84. Successful challenges have been brought in Alabama, *see* Opinion of the Justices, 624 So. 2d 107 (Ala. 1993) (directing the state senate to follow the trial court order, which called for a new finance scheme); Arizona, *see* Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 814 (Ariz. 1994) (invalidating the system of funding school facilities after finding that the funding scheme caused "gross disparities"); Kentucky, *see* Rose, 790 S.W.2d at 215 (invalidating the "whole gamut" of the state's education system, including its financing structure, on the grounds that it violated equality and quality requirements derived from the state constitution's education clause); Massachusetts, *see* McDuffy v. Secretary of Executive Office of Educ. 615 N.E.2d 516, 524 (Mass. 1993) (holding that a property-tax-based financing scheme violated the state education clause requiring the state to "cherish" the public schools); Montana, *see* Helena Elementary, 769 P.2d at 690 (holding that substantial funding disparities meant that "the State has failed to provide a system of quality public education granting to each student the equality of educational opportunity guaranteed under" the Montana Constitution); New Hampshire, *see* Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997) (holding that the state violated its constitutional duty to guarantee adequate education and funding); New Jersey, *see* Abbott v. Burke (Abbott II) 575 A.2d 359 (N.J. 1990) (holding that the revised funding scheme still violated the state education clause); Ohio, *see* DeRolph v. State, 677 N.E.2d 733 (Ohio 1997) (holding that the state's public school financing system violated the state constitutional requirement of a thorough and efficient state school system); Tennessee, *see* Tennessee Small Sch. Sys., 851 S.W.2d at 139 (holding that a state finance scheme, which resulted in funding disparities and was justified only by local control of education, violated the state equal protection clause); Texas, *see* Edgewood I, 777 S.W.2d at 398 (holding that the finance scheme violated the state's "efficient system" education clause, which the court interpreted to require substantially equal access to education funding); Vermont, *see* Brigham, 692 A.2d at 384 (holding that the financing scheme violated the state constitution's education and common benefits clauses, which require the provision of substantial equality of educational opportunity throughout the state).

85. Challenges were rejected by the following state supreme courts: Florida, *see* Coalition for Adequacy and Fairness in Sch. Funding v. Chiles, 680 So. 2d 400 (Fla. 1996) (rejecting the claim that the state failed to provide an adequate system of public schools); Illinois, *see* Lewis E. v. Spagnolo, 710 N.E.2d 798 (Ill. 1999) (holding that the state education clause does not guarantee a minimally adequate education); Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996) (rejecting challenges based on state education and equal protections clauses); Maine, *see* School Admin. Dist. No. 1 v. Commissioner, Dep't of Educ., 659 A.2d 854 (Me. 1995) (holding that funding disparities bore a rational relationship to a legitimate government interest); Minnesota, *see* Skeen v. State, 505 N.W.2d 299 (Minn. 1993) (rejecting a challenge to a financing scheme based on state equal protection and education clauses); Nebraska, *see* Gould v. Orr, 506 N.W.2d 349 (Neb. 1993) (dismissing claims that spending disparities violated state constitutional rights on the ground that the plaintiffs failed to allege that disparities caused educational inadequacies); North Dakota, *see* Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247 (N.D. 1994) (finding that a school finance scheme failed to further the constitutional requirement of equal educational opportunity, but upholding the scheme because the court lacked the supermajority required to strike down legislation); Oregon, *see* Coalition for Equitable Sch. Funding v. State, 811 P.2d 116 (Or. 1991) (rejecting challenges based on state constitutional provisions on the ground that the constitution presupposes the use of local revenues to fund schools); Rhode Island, *see* City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995) (holding that a system for financing public schools did not violate the state constitution's equal protection and education clauses); Virginia, *see* Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994) (upholding a finance scheme against a challenge based on the state education clauses after finding that education is a fundamental right but that the constitution does not require equal funding or equal educational opportunity); Wisconsin, *see* Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989) (rejecting a challenge based on the state equal protection and education clauses and holding that education is a fundamental right but that equal funding is not).

86. Again, however, it is important to recognize that four of the victories came in cases based on equality, rather than adequacy, theories. *See* Helena Elementary, 769 P.2d at 684; Tennessee

Interestingly, whereas most commentators sympathetic to the cause of integration have lamented the Court's decision in *Milliken I* and tend to agree that the use of *Milliken II* remedies is a poor substitute for integration,<sup>87</sup> school finance commentators generally have embraced the shift to adequacy. In two recent articles, for example, Professors Michael Heise and Peter Enrich both predict that adequacy will remain the touchstone for future education cases, and they both argue that adequacy is a more promising goal than equality in education finance reform litigation. Their argument in favor of adequacy is essentially pragmatic: Heise and Enrich contend that adequacy may simply prove to be more achievable than equality, because it is less complicated a notion, more normatively appealing, and does not conflict with the principle of local control. Adequacy is also less costly, according to Professor Enrich, "especially for the elites who derive the greatest benefits from the existing inequalities, because adequacy does not threaten their ability to retain a superior position."<sup>88</sup>

Whether adequacy suits will prove to be more lucrative than equality suits for poor districts is an open question.<sup>89</sup> The success of such suits rests on a number of contingencies, none of which will be easy to satisfy, including the establishment of standards or goals that are sufficiently high to be meaningful; some understanding on the part of the legislature and the courts regarding the inputs necessary to achieve the established standards;

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*Small Sch. Sys.*, 851 S.W.2d at 139; *Edgewood I*, 777 S.W.2d at 391; *Brigham*, 692 A.2d at 384. These victories suggest that the shift in theories may not in itself be responsible for the higher success rate in "third wave" cases.

87. See, e.g., Shaw, *supra* note 61, at 58-60.

88. Enrich, *supra* note 31, at 180.

89. The arguments put forth by Enrich and Heise, for example, are by no means incontrovertible. As alluded to above, Enrich and Heise contend that adequacy is a more promising goal for a number of reasons: It is less complex than equality and has a comparatively greater appeal to norms of fairness and opportunity; it is less threatening and more consistent with local control; there is a more explicit textual source for such a right; adequacy coheres with the standards movement; and it appeals to urban districts that already receive relatively high levels of funding. See *id.* at 166-70; Heise, *supra* note 31, at 1174-76. To respond briefly: Determining what is an adequate education seems no less complex (and perhaps is more so) than determining what is an equal education. At the same time, it is difficult to understand why adequacy is more normatively appealing than equality. Adequacy may indeed be less threatening to other school districts and more consistent with local control, but this seems an odd defense—intentional segregation may also be less threatening and more consistent with local control. The textual source argument seems false, if only because the language of most state education clauses is quite vague. I would suggest that it is harder to find adequacy in "thorough and efficient," "general and uniform," and "cherish" clauses than it is to find a principle of equality in the combination of education and equal protection clauses. The best arguments marshaled by Enrich and Heise seem to be that adequacy coheres with the standards movement and has the potential to provide more money to urban districts, many of which already spend above statewide averages. But equalizing funding is not inconsistent with the standards movement, and there is no guarantee that the right to an adequate education will lead to more money for urban districts. Indeed, to the extent that it is difficult to prove the relationship between money and student achievement, state funds to urban districts that continually perform poorly may actually be in jeopardy under an adequacy standard.

and a guarantee of enough funding to ensure that all students have a realistic chance of achieving the determined goals.<sup>90</sup> Although these contingencies would be difficult to meet even if strong and sincere efforts were made, there is reason to question whether such efforts will be forthcoming.

This question arises from the fact that adequacy cases, like *Milliken II* cases, do not rely on any kind of tying relationship between and among school districts. It has long been observed that the best way to ensure fair treatment of a minority group is to align that group with the majority in such a way that the majority cannot help or hurt itself without doing the same to the minority group.<sup>91</sup> As mentioned previously, this principle underlay early desegregation and school finance cases. In both sets of cases, however, ties that would bind districts have been weakened, and the trend in both sets of cases has been to allow the boundaries of districts to remain unchanged and urban districts to remain isolated by race and poverty. Severing these ties takes away a powerful incentive of wealthier, suburban districts to assure that poorer districts receive fair and adequate treatment.

In the desegregation context, it is already becoming apparent that when court supervision ends, *Milliken II* funding is significantly diminished or eliminated. It is difficult to envision a different outcome for adequacy cases. Although the right to an adequate education is not temporally limited as are *Milliken II* remedies, the fact that poorer districts must continually rely on the courts for protection has already been demonstrated in states like New Jersey, Texas, and Arizona. Continued court reliance is necessary largely because school finance cases have done nothing to alter the structure or boundaries of districts and have rarely tied the financial fates of districts together. It seems plausible that court supervision over school finance systems will wane, and once that occurs, it is unclear what motivation legislatures will have to continue funding at levels previously ordered by courts. As will be suggested below, this seems especially true with regard to urban districts, for which additional funds have yet to translate into significant improvements.

In sum, school desegregation and school finance litigation have converged around money. That poor and minority schools will remain separate from white and wealthier schools appears to be taken as a given, and, if anything, is reinforced by the fact that advocates are fighting not

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90. See Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 58-59 (1969).

91. See, e.g., *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (“The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.”) (Jackson, J., concurring); see also THE FEDERALIST NO. 10 (James Madison); Liebman, *supra* note 13, at 362; Michelman, *supra* note 90, at 53-54.

over integration but resources. Faith has been placed, by necessity in some cases and by choice in others, in the power of resources to improve the educational opportunities of children attending racially and socioeconomically isolated schools. There are reasons, however, for questioning that faith, and it is to those reasons that this Article turns.

### III. THE CREATION AND CONSEQUENCES OF GHETTO SCHOOLS

The schools and school districts that have been shaped by race and racial politics and that may be beyond the reach of school finance reform are mostly urban. Roughly two-thirds of black students attend elementary and secondary school in central-city districts. These central-city schools, in turn, are populated primarily by minority students—both African-American and Hispanic.<sup>92</sup> In this Part of the Article, after describing the characteristics of urban schools in some more detail, I explore the creation and current pathologies plaguing such schools. I explain how residential segregation and the Court's desegregation jurisprudence, which themselves are at least partially the product of poor race relations, have combined to create urban schools that are isolated by race and poverty. Such schools are more expensive to run and, at the same time, suffer from problems that money seems unable to solve. In this way, race has played a pivotal role in creating schools whose problems seem irremediable by school finance reform and increased expenditures.

#### A. *Urban Schools: The Numbers*

Four general characteristics set urban schools apart from their suburban counterparts: student composition, student poverty, student performance, and dropout rates. Urban public schools are attended primarily by African-American and Hispanic students. In 1990-1991, for example, only 25% of the students enrolled in the largest forty-seven urban districts were white

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92. See MASSEY & DENTON, *supra* note 2, at 62 (reporting that over half of all blacks in the United States live within 30 large metropolitan areas); George C. Galster, *Polarization, Place, and Race*, 71 N.C. L. REV. 1421, 1439 (1993) ("Nationally, two-thirds of African-American students and nearly half of other minority students attend primary and secondary schools in central-city districts, whereas less than a quarter of white students do so."); Gary Orfield et al., *Deepening Segregation in American Public Schools* 11 (Apr. 5, 1997) (unpublished paper prepared by the Harvard Project on School Desegregation) (on file with *The Yale Law Journal*) (reporting that 67.1% of black students are in schools whose enrollment is less than 50% white, and that 33.6% of black students are in schools whose enrollment is less than 10% white—that is, one-third of all black students attend schools whose student bodies are 90% to 100% minority). As is already apparent, this Article focuses on African-American and white students rather than students from all ethnic groups. While recognizing that the student population is more diverse than this portrays, and that the burgeoning Hispanic student population faces many of the same obstacles as do black students, I limit my focus because of the unique history of white-black race relations in this country and because of the greater amount of evidence regarding African-American students.

(nationwide, whites made up 70.7% of student enrollment); 42.1% were African-American; and 26.5% were Hispanic.<sup>93</sup> The enrollment figures for some cities are even starker. In 1995, 100% of the students in East St. Louis, Illinois, and Compton, California, were minority, as were 96% of the students in Washington, D.C., and Camden; 94% in Hartford, New Orleans, and San Antonio; 93% in Los Angeles, Oakland, Atlanta, and Paterson; 92% in Richmond; 91% in Newark and Jersey City; and 83% of the over one million students in the New York City public school system.<sup>94</sup> Urban schools educate two-thirds of all African-American students, nearly half of other minority students, but less than a quarter of white students.<sup>95</sup> For black students, then, much more than for white students, educational opportunities “are intimately connected to inner-city districts in the largest metropolitan areas.”<sup>96</sup>

These educational opportunities are shaped by the second factor that sets urban schools apart from their suburban counterparts: Students in urban districts are disproportionately poor. Over half of the students in the largest urban districts were eligible for a free or reduced lunch in 1990-1991, which is the primary measure of student poverty and the one used to determine Title I eligibility.<sup>97</sup> The schools that have the highest minority enrollment also have the highest incidence of student poverty: In 87% of schools that are over 90% minority (African-American and Hispanic), over half of the students come from families living in poverty.<sup>98</sup> The figures from specific cities provide a more tangible glimpse into the depths of urban poverty. As of 1995, 90% of the students in Compton and 80% of the students in San Antonio were poor enough to be eligible for free lunch. In Bridgeport, Atlanta, New Orleans, St. Louis, Camden, Jersey City, Newark, and Paterson, over 70% of the students were so eligible, as were over 60% of the students in Los Angeles, Oakland, Washington, D.C., Baltimore, Detroit, Kansas City (Missouri), Jackson, Buffalo, Dayton, Providence, and Dallas.<sup>99</sup> Seen from the perspective of neighborhoods, the view is equally startling. The U.S. Census Bureau defines “extreme poverty areas” as

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93. See COUNCIL OF GREAT CITY SCH., NATIONAL URBAN EDUCATION GOALS: BASELINE INDICATORS, 1990-91, at xi (1992) [hereinafter NATIONAL URBAN EDUCATION GOALS]; see also ORFIELD ET AL., *supra* note 22, at 61-63. To cite another, slightly outdated figure: As of 1986, the 25 largest urban school systems educated 27% of the country's African-American students but only 3% of the white students. See Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825, 842 (1996).

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

95. See Galster, *supra* note 92, at 1439.

96. *Id.*

97. See NATIONAL URBAN EDUCATION GOALS, *supra* note 93, at xi. Title I is a federal program ostensibly designed to provide monetary assistance to poor students and poor schools. See 20 U.S.C. §§ 6301-6514 (1994).

98. See Orfield et al., *supra* note 92, at 19.

99. See Jerald & Curran, *supra* note 94, at 64-65.

neighborhoods where at least 40% of the residents are below the poverty line.<sup>100</sup> Only 5% of the children in the United States live in such neighborhoods. Yet in East St. Louis, 58% of the city's children live in extreme poverty neighborhoods; in Camden, 50%; in New Orleans and Detroit, 41%; and in Hartford, Atlanta, and Dayton, 30%.<sup>101</sup>

The third factor that sets urban schools apart is closely related to the second: Urban school students generally do not perform as well on standardized tests as students in either rural or suburban schools, and black students in particular do not perform as well as white students.<sup>102</sup> Given the strong connection between socioeconomic status and academic performance, this fact is not surprising. But the sheer deficiency of urban student performance is nonetheless shocking. According to a recent report in *Education Week*, “[m]ost 4th graders who live in U.S. cities can’t read and understand a simple children’s book, and most 8th graders can’t use arithmetic to solve a practical problem.”<sup>103</sup> More than half of fourth- and eighth-grade students attending urban schools do not even reach the most basic proficiency level on national tests in such subjects as reading, math, and science, which means that they likely cannot do grade-level work.<sup>104</sup> In schools where a majority of the students are poor, the percentage of students who do not perform at even the basic level on national tests rises to at least two-thirds.<sup>105</sup> In non-urban schools, by contrast, the figure is nearly the opposite: Two-thirds of the students score at least at the basic level on national tests.<sup>106</sup>

Finally, dropout rates for urban schools are dramatically higher than they are for non-urban schools. Dropout rates in all large, central-city school districts significantly exceed the national average of 11%.<sup>107</sup> Among the nation’s forty-seven largest school districts, the average dropout rate is

100. *Concentrated Poverty*, EDUC. WK., Jan. 8, 1998, at 14.

101. See Jerald & Curran, *supra* note 94, at 62-63.

102. See, e.g., Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: An Introduction*, in THE BLACK-WHITE TEST SCORE GAP 1, 1 (Christopher Jencks & Meredith Phillips eds., 1998) (reporting that “the typical American black still scores below 75 per cent of American whites on most standardized tests” and “below more than 85 per cent of whites” on some standardized tests (footnotes omitted)).

103. Lynn Olson & Craig D. Jerald, *The Achievement Gap*, EDUC. WK., Jan. 8, 1998, at 10.

104. See *id.* The figures are from the National Assessment of Educational Progress (NAEP), a federal testing program given to a randomized sample of students throughout the country. The NAEP is generally thought to provide the best and most reliable data for state-by-state comparisons of student performance. See *id.* at 12.

105. See *id.* at 10.

106. See *id.* at 12. When individual states are examined, the gap between urban and non-urban schools can be quite dramatic: In Maryland, for example, only 9% of urban eighth-grade students scored at the “basic” level or higher on the NAEP in mathematics, compared to 63% of the students in non-urban districts; in New Jersey, 73% of fourth-grade students perform at least at the basic level in reading on the NAEP, whereas only 27% of those in urban districts do. See *id.* at 11. These examples are by no means exhaustive. For a table of the largest gaps between urban and non-urban districts, which lists the gaps in reading, math, and science in nine states, see *id.*

107. See Galster, *supra* note 92, at 1423.

nearly twice the national average.<sup>108</sup> Again, a sharper focus on particular states and cities reveals the depth of the problem. In New Jersey, for example, dropout rates in urban high schools were as high as 31.2% in 1995-1996 and have in the last ten years reached as high as 47%.<sup>109</sup> In the St. Louis public school system, 400 more African-American students dropped out of high school during 1990-1991 than graduated.<sup>110</sup> Other large inner-city districts report similarly high numbers,<sup>111</sup> and when broken down into particular schools and neighborhoods, the numbers become astonishing. In Chicago, for example, the dropout rate for children who begin their education in certain elementary schools has climbed in recent years to as high as 86%.<sup>112</sup>

### B. *Creating Ghetto Schools: Residential Segregation and Milliken I*

Today's urban schools are not the product of accident, unadulterated preference, or simple economics. Rather, urban schools have been largely shaped by two complementary forces: residential segregation and the Court's decision in *Milliken I*. Residential segregation and particularly the exodus of middle-class whites from central cities have served not only to isolate African-American students, but also to concentrate the effects of poverty in densely populated urban neighborhoods and thus in the public schools in those neighborhoods. *Milliken I* essentially immunized suburban schools from the reach of desegregation plans, thereby cutting off access to wealthier school systems and providing a "safe" haven for middle-class families seeking to exit urban schools. These factors are discussed in turn.

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108. See NATIONAL URBAN EDUCATION GOALS, *supra* note 93, at xvi.

109. See *Abbott v. Burke (Abbott IV)*, 693 A.2d 417, 433 n.22 (N.J. 1997) (citing *Abbott II*, 575 A.2d 359 (N.J. 1990)); see also PHILIP BURCH, THE DROPOUT PROBLEM IN NEW JERSEY'S BIG URBAN SCHOOLS: EDUCATIONAL INEQUALITY AND GOVERNMENTAL INACTION at ix (1992) (noting that "there are really two school systems in New Jersey—one consisting of most suburban and rural districts, which have relatively low dropout rates and few major academic problems; the other consisting of a much smaller number of big, needy urban districts, many of which have [four-year] dropout rates of from 40 to 60 percent"); EDUCATION LAW CTR., WIPING OUT DISADVANTAGES 3 (1996) [hereinafter WIPING OUT DISADVANTAGES] (stating that poorer, urban high schools in New Jersey have dropout rates of 40% to 50%).

110. See WELLS & CRAIN, *supra* note 12, at 337.

111. See Jerald & Curran, *supra* note 94, at 66-67. Sometimes urban districts will under-report dropout rates for political or financial reasons. It is thus difficult to obtain truly accurate rates and fair to assume that the reported numbers will not overestimate the dropout rates and will occasionally underestimate those rates. For a discussion of the difficulties in obtaining a precise dropout figure for New York City Schools, see JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 112-13 (1991).

112. See KOZOL, *supra* note 111, at 58.

### 1. Residential Segregation

The long and complicated history of residential segregation has been explored elsewhere and need not be recounted in detail here.<sup>113</sup> To understand the limitations of school finance reform, however, it is necessary to describe briefly the current extent, historical explanations, and continuing consequences of residential segregation.<sup>114</sup>

The most important demographic factor affecting urban schools, which dwarfs all others, is the intense residential segregation among blacks and whites in metropolitan areas. This segregation began at the turn of this century as Southern blacks migrated to Northern cities; it became substantial in the 1940s, grew entrenched in the decades that followed, and remains remarkably high today.<sup>115</sup> Because most public school students are assigned to schools in the neighborhoods—or at least in the municipalities—in which they reside, residential segregation typically means school segregation. And residential segregation abounds.

Indeed, extensive residential segregation exists in nearly every metropolitan area in the country. A common gauge of segregation is the dissimilarity index, which measures the percentage of persons who would have to move in order for neighborhoods to reflect the proportion of blacks in a given geographic area.<sup>116</sup> The higher the index, the more intense the segregation. In 1990, the average dissimilarity index for Northern cities was 77.8%; for Southern cities it was 66.5%.<sup>117</sup> Although these averages are down a few percentage points from the 1970 figures, they are still higher than any level ever recorded for any other racial or ethnic group.<sup>118</sup> In sixteen large cities, moreover, blacks live under what Massey and Denton call “hypersegregated” conditions: They live in large contiguous settlements of densely inhabited neighborhoods that are clustered around the centers of cities.<sup>119</sup> In these cities—which include Atlanta, Baltimore,

113. See generally ARMOR, *supra* note 22, at 117-53; KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985); MASSEY & DENTON, *supra* note 2; MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* (1997); GREGORY R. WEIHER, *THE FRACTURED METROPOLIS: POLITICAL FRAGMENTATION AND METROPOLITAN SEGREGATION* (1991).

114. See generally Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479 (1995) (reviewing MASSEY & DENTON, *supra* note 2, and discussing the extent, causes, and consequences of segregation).

115. See ARMOR, *supra* note 22, at 127; JACKSON, *supra* note 113, at 190-230, 289-90, 300-01; MASSEY & DENTON, *supra* note 2, at 19-82, 221-22; Roisman, *supra* note 114, at 481.

116. See ARMOR, *supra* note 22, at 127-28; MASSEY & DENTON, *supra* note 2, at 63.

117. See MASSEY & DENTON, *supra* note 2, at 222 tbl.8.1.

118. See *id.* at 66-67; see also *id.* at 2 (“No group in the history of the United States has ever experienced the sustained high level of residential segregation that has been imposed on blacks in large American cities for the past fifty years.”).

119. See *id.* at 74-78.

Chicago, Dallas, Detroit, Los Angeles, Milwaukee, New York, Newark, Philadelphia, and St. Louis, and which together house one-third of all African Americans—blacks are not likely to see whites in their own neighborhoods, the ones adjacent to theirs, or the ones adjacent to those; in short, they are likely to have little direct contact with the rest of American society.<sup>120</sup> Finally, just as no other group has historically experienced the same isolation as have blacks, no other contemporary group, including poor Hispanics, even approaches the level of isolation currently experienced by African Americans.<sup>121</sup>

Significantly, the residential segregation that exists in metropolitan areas does not typically occur within the same towns or municipalities, but rather occurs between municipalities.<sup>122</sup> Residential segregation most often and most dramatically tracks the line between city and suburb. In the last forty years, whites have left the cities for the suburbs in droves, leaving behind cities increasingly dominated by minorities, primarily blacks and Hispanics. By the end of the 1970s, the pattern of a black urban core surrounded by a ring of white suburbs had become common, and it has persisted.<sup>123</sup> As of 1990, for example, in six of the eight largest cities in the country (all with populations over one million) minorities made up over half of the population; the same is true in eight of the fourteen cities with

120. *See id.* at 75, 77. As Massey and Denton note: "Ironically, within a large, diverse, and highly mobile post-industrial society such as the United States, blacks living in the heart of the ghetto are among the most isolated people on earth." *Id.* at 77.

121. *See id.* The overall lack of change in integration levels does mask some important variations. Since 1970, there have been significant declines in black segregation in some small and mid-sized metropolitan areas in the South and West, particularly those with relatively small black populations, while segregation has continued unabated in larger metropolitan communities, particularly those in the Northeast and Midwest. *See id.* at 109-10. Even in the limited context of large metropolitan areas, there are differences between the South and North: In the 1980s, six of the 12 Southern metropolitan areas with the largest black populations experienced modest declines in segregation, while very little change occurred in Northern metropolitan areas. *See id.* at 221-22 & tbl.8.1. When these statistics are taken together, then, it appears that integration is more likely to occur in Southern metropolitan areas, especially in areas that have small black populations. *See id.* at 110, 223; *see also* Reynolds Farley & William H. Frey, *Changes in the Segregation of Whites from Blacks During the 1980s: Small Steps Toward a More Integrated Society*, 59 AM. SOC. REV. 23, 38-40 (1994). For a collection of sources and a discussion of competing explanations for these trends, *see* Roisman, *supra* note 114, at 484-87.

122. This fact is significant in part because a large chunk (usually close to 50%) of school funds comes from local property taxes, and thus residential segregation within the same town would have less impact on school finance than does the existing residential segregation between poorer and wealthier towns. *See* Robert C. Johnstone & Jessica L. Sandham, *States Increasingly Flexing Their Policy Muscle*, EDUC. WK., Apr. 14, 1999, at 1.

123. *See* Thomas F. Pettigrew, *Racial Change and Social Policy*, 441 ANNALS OF AM. ACAD. POL. SCI. 114, 122 (1979). Pettigrew found that, as of 1974, blacks were twice as likely as whites in metropolitan areas to live inside the core city rather than in the suburbs. As he stated then, in an observation that is still relevant and accurate: "This doubled proportion of blacks in central cities is the basic fact underlying the spatial maldistribution of the races; and it is the largest single reason for the vast residential separation of black and white citizens in America today." *Id.* at 122; *see also* MASSEY & DENTON, *supra* note 2, at 67-74 (discussing trends in suburbanization and segregation since 1970).

populations between 500,000 and one million.<sup>124</sup> Indeed, racial segregation between cities and suburbs is so great that social scientists find that “it is no longer appropriate to measure segregation within cities alone.”<sup>125</sup>

Although middle-class blacks have also left the city in the last couple of decades, the rate of black suburbanization does not come close to that of whites, and the percentage of blacks in suburbs as opposed to central cities is tiny.<sup>126</sup> As of 1990, for example, African Americans constituted only 8.7% of suburban residents in twelve of the largest metropolitan areas in the country, including New York, Los Angeles, Chicago, Philadelphia, Detroit, St. Louis, and Boston.<sup>127</sup> Even within the suburbs, there is a good deal of residential segregation, with blacks living primarily in older suburbs closest to urban areas and in well-defined sections of more distant suburbs.<sup>128</sup>

While there is hardly room to debate the extent of residential segregation, there are ample grounds for disagreement regarding the historical and continuing causes of that segregation. There is consensus, however, that four factors have played a role: public discrimination, private discrimination, preferences, and income (or socioeconomic status). More precisely, there is consensus that residential segregation has been encouraged by public and private discrimination against blacks; that current residential segregation can be partially but not completely explained by preferences; and that current residential segregation can be partially but not completely explained by economic differences between whites and blacks.<sup>129</sup> Beyond this basic consensus, a fair bit of disagreement persists as to how these various causal threads have interacted and which ones have been or continue to be the most influential.<sup>130</sup>

Rather than attempt to disentangle this causal web, which is probably impossible in any event, it is sufficient for the purposes of this Article to note that all of the various explanations regarding the creation and maintenance of residential segregation, save one, point to race relations as a crucial factor.<sup>131</sup> Public discrimination and private discrimination, of course,

124. See ANYON, *supra* note 13, at 4.

125. MASSEY & DENTON, *supra* note 2, at 61.

126. See *id.* at 67-74.

127. See ANYON, *supra* note 13, at 4.

128. See MASSEY & DENTON, *supra* note 2, at 69-70; see also John Charles Boger, *Race and the American City: The Kerner Commission in Retrospect—An Introduction*, 71 N.C. L. REV. 1289, 1310-13 (1993) (noting that in many suburbs, most black households are located in majority-black areas).

129. See ARMOR, *supra* note 22, at 117-53; JACKSON, *supra* note 113, at 283-305; MASSEY & DENTON, *supra* note 2, at 83-114.

130. Compare, e.g., MASSEY & DENTON, *supra* note 2, at 88-96 (arguing that preferences play a small role in African-American segregation), with ARMOR, *supra* note 22, at 141 (arguing that preferences play a large role).

131. That race is the key factor in residential segregation is also persuasively demonstrated by the differing levels of segregation for Caribbean Hispanics, a group that consists mainly of Puerto Ricans and Cubans but also includes Dominicans and Panamanians. Caribbean Hispanics

operate on the basis of race. Preferences for living within a single racial group also operate on the basis of race and on the basis of perceived differences and prior history between blacks and whites. The only factor that does not operate directly on the basis of race is economics or socioeconomics, but the available empirical evidence indicates that income level and socioeconomic status explain only a small portion of the existing residential segregation.<sup>132</sup> That race relations remain a paramount and direct cause of residential segregation carries important implications for school finance litigation and school desegregation, to which I will turn below. Before addressing those implications, however, some attention must be paid to the impact that residential segregation has had on African-American urban communities.

The primary consequence of the residential segregation of African Americans in urban communities has been the concentration of poverty and the deleterious conditions that tend to accompany it. As William Julius Wilson and other scholars have noted, the restructuring of urban economies in the 1970s resulted in the loss of manufacturing and industrial jobs in cities and their replacement with lower-paying service-sector jobs.<sup>133</sup> Combined with rising inflation, this urban restructuring drove up already high rates of black poverty, and this poverty was concentrated because of extremely high levels of residential segregation. The movement of middle-class blacks out of inner cities aggravated these endemic economic changes,

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share a similar cultural background but display a wide variety of racial characteristics and identities. Some consider themselves white, some black, and others of mixed race. Massey and Denton examined segregation levels among Hispanics in 10 metropolitan areas and calculated those levels for three racial groups: white Hispanics, mixed-race Hispanics, and black Hispanics. They found that white Hispanics were the least segregated, black Hispanics the most segregated, and that mixed-race Hispanics fell in between, just as one would expect if race were the salient factor in residential segregation. See MASSEY & DENTON, *supra* note 2, at 113-14.

132. See George C. Galster & W. Mark Keeney, *Race, Residence, Discrimination, and Economic Opportunity: Modeling the Nexus of Urban Racial Phenomena*, 24 URB. AFF. Q. 87, 92-93 (1988) (discussing the scholarly literature and concluding that "the evidence shows that in most cases only a small fraction of the observed extent of racial segregation can be explained on 'class' grounds"). That income levels cannot completely explain residential segregation is apparent from the fact that blacks in metropolitan areas are highly segregated from whites, no matter what their income. In Northern metropolitan areas, for example, blacks earning less than \$2500 in 1980 were only slightly more segregated than blacks earning more than \$50,000. See *id.* at 92-93. For Hispanics and Asians, by contrast, not only are overall segregation levels lower, but those levels fall noticeably as income levels rise. Similar patterns are revealed when segregation levels are correlated by job and education. Blacks are highly segregated at all socioeconomic levels, while Hispanics and Asians become less segregated as socioeconomic levels rise. See MASSEY & DENTON, *supra* note 2, at 84-87. And, again, even when blacks do move to the suburbs, there is evidence that they live in majority-black areas. See Boger, *supra* note 128, at 1310-13.

133. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* 20-62 (1987); see also John D. Kasarda, *Urban Industrial Transition and the Underclass*, 501 ANNALS AM. ACAD. POL. & SOC. SCI. 26, 28-33 (1989).

although the extent and significance of this migration are the subject of continuing debate.<sup>134</sup>

Concentrated poverty, in turn, is often associated with ancillary ills, such as the withdrawal of commercial and retail institutions, decaying neighborhoods, high crime, high levels of drug use, welfare dependency, high rates of joblessness, unwed childbearing, and the development of an "oppositional" culture that devalues work and marriage and generally inverts middle-class values.<sup>135</sup> There is, to be sure, a raging debate as to whether concentrated poverty is solely or even primarily responsible for the conditions of social decay in black neighborhoods.<sup>136</sup> But it is obvious that, whatever the causal connection, residential segregation has served to concentrate these deleterious conditions in black neighborhoods and has created an environment for black children wherein "drug use, joblessness, welfare dependency, teenage childbearing, and unwed parenthood . . . are not only common but the norm."<sup>137</sup> The concentration of poverty, the conditions of social decay, and especially the emergence of an oppositional culture all have a profoundly negative effect on the public schools in African-American neighborhoods, as I shall explain below.

## 2. Milliken I

The second piece of the urban school puzzle is *Milliken I*,<sup>138</sup> in which the Court held, as described above, that an interdistrict desegregation remedy could not be ordered without proof of an interdistrict violation. This holding made it extremely difficult for desegregation plans to extend beyond the reach of central cities and to include suburban schools, at least in the North and West where school districts are typically coterminous with

134. Compare MASSEY & DENTON, *supra* note 2, at 240 n.28, 116-18, 144-45 (arguing that evidence of black middle-class out-migration is inconclusive and that such migration did not affect concentrated poverty in inner-city neighborhoods), with WILSON, *supra* note 133, at 49-62 (arguing that concentrated poverty arose in the inner cities because middle-class blacks left in the 1970s); see also Roisman, *supra* note 114, at 500-06. Moreover, Boger explains that, while a significant number of blacks did move to the suburbs between 1968 and 1993,

the moves of African-American suburbanites most often led them not to "white" or racially integrated suburbs, but instead to older, near-city suburbs where residents are predominantly black or that quickly undergo racial transition to majority-black status after racial integration begins. Thus, suburban blacks in 1993 typically find themselves, as in yesterday's cities, residentially segregated from the white majority.

Boger, *supra* note 128, at 1312-13.

135. See MASSEY & DENTON, *supra* note 2, at 130-147, 165-185; see also JENNIFER L. HOCHSCHILD, *THE NEW AMERICAN DILEMMA* 65, 172 (1984); WILSON, *supra* note 133, at 49, 55-62; Johnson, *supra* note 5, at 1411-12; Roisman, *supra* note 114, at 499-500.

136. See, e.g., MASSEY & DENTON, *supra* note 2, at 3-9 and sources cited therein; John O. Calmoie, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair,"* 143 U. PA. L. REV. 1233, 1246-49 (1995).

137. MASSEY & DENTON, *supra* note 2, at 13.

138. See *Milliken I*, 418 U.S. at 717.

municipal boundaries. (In the South, school districts often encompass entire counties and thus include both central cities and their suburbs.)<sup>139</sup> Although a significant number of Northern and Western cities intentionally segregated students and thus were ordered to desegregate, *Milliken I* typically precluded extending desegregation remedies to suburban districts.<sup>140</sup>

The consequences of this limitation cannot be gainsaid, and, indeed, it does not seem an exaggeration to identify *Milliken I* as second only in importance to *Brown I* among the Court's school desegregation decisions.<sup>141</sup> As a result of *Milliken I*, and in light of existing patterns of residential segregation, desegregation plans confined to urban areas could not achieve significant levels of integration because, as mentioned earlier, there simply were not enough white students left in most urban school systems.<sup>142</sup> The white students that remained, moreover, were typically poor themselves and often attended inadequate schools. Busing students within the city thus often meant transporting poor white and poor black students from shoddy, single-race schools to shoddy, integrated schools. Boston is a revealing example, where poor black students from Roxbury were bused to South Boston High, which was previously attended primarily by poor, white, Irish Catholics.<sup>143</sup>

Limiting desegregation remedies in this way only heightened opposition and a sense of unfairness among the whites forced to

139. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 9-10 (1971) (describing a Southern school district that encompassed both the city and the surrounding county).

140. See ORFIELD ET AL., *supra* note 22, at 30 ("Milliken meant that there would be no remedy for unconstitutional segregation in much of metropolitan America."); Chemerinsky, *supra* note 18, at 1010-11. Since *Milliken I*, only four courts have ordered interdistrict desegregation remedies: Indianapolis, see *United States v. Board of Sch. Comm'rs*, 637 F.2d 1101 (7th Cir. 1980); Little Rock, see *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 778 F.2d 404 (8th Cir. 1985); Louisville, see *Newburg Area Council v. Board of Educ.*, 510 F.2d 1358 (6th Cir. 1974); and Wilmington, Delaware, see *Evans v. Buchanan*, 582 F.2d 750 (3d Cir. 1978). *But see* *Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752 (3d Cir. 1996) (declaring Wilmington schools unitary). A federal court in St. Louis approved a settlement involving voluntary interdistrict busing. See *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir. 1984). For a fascinating account of the St. Louis desegregation plan, see WELLS & CRAIN, *supra* note 12.

141. J. Harvie Wilkinson, for one, called the case of "signal" importance and suggested that the Justices could reasonably have feared that "*Milliken* . . . might one day be regarded as this century's *Plessy v. Ferguson*." WILKINSON, *supra* note 38, at 218, 228; see also ORFIELD ET AL., *supra* note 22, at 10 (arguing that "[t]he impetus of *Brown* and the civil rights movement for desegregating American schools hit a stone wall with the 1974 *Milliken v. Bradley* decision"); *id.* at 33 (arguing that "*Milliken* and the recent desegregation decisions of the 1990s echo some of *Plessy*'s basic themes and employ arguments paralleling some of those used to justify an end to Reconstruction-era civil rights law").

142. Detroit is a perfect example. See *Milliken II*, 433 U.S. at 271-72 & n.3 (discussing the racial composition of the Detroit school district); see also Orfield, *supra* note 93, at 842 (noting that in 1986, 25 of the largest school systems contained 30% of the nation's Latino students, 27% of African-American students, and only 3% of white students).

143. See HOCHSCHILD, *supra* note 135, at 55; J. ANTHONY LUCAS, *COMMON GROUND* 17 (1985).

participate.<sup>144</sup> The limitation also provided a perfect incentive for continued white flight from central cities. Much has been written regarding the link between desegregation and white flight, with little agreement on the precise impact that the former has had on the latter.<sup>145</sup> There is ample evidence to support the argument that desegregation plans themselves often added to existing patterns of white flight.<sup>146</sup> But there is also evidence demonstrating that white suburban flight is an independent phenomenon and has occurred in cities, such as New York and Atlanta, whose schools have never undergone desegregation.<sup>147</sup> What seems plain, however, is that *Milliken I*, combined with earlier decisions requiring busing within city districts, unintentionally encouraged white flight with both carrot and stick.<sup>148</sup> As Professor Jeffries has explained, busing within the cities displaced white students from their neighborhood schools and thus gave middle-class whites a reason to leave; refusal to include the suburbs in busing plans, in turn, protected white suburbs and thus gave middle-class whites a place to go.<sup>149</sup>

Empirical evidence bears out this hypothesis. Cities that have undergone city-only desegregation plans generally have also experienced greater degrees of white flight than have cities involved in a metropolitan-wide desegregation plan.<sup>150</sup> Although the evidence concerning the precise

144. See HOCHSCHILD, *supra* note 135, at 57, 69; WILKINSON, *supra* note 38, at 193-215.

145. See, e.g., ARMOR, *supra* note 22, at 174-80; CHRISTINE H. ROSSELL, *THE CARROT OR THE STICK* 65-71 (1990).

146. See, e.g., ARMOR, *supra* note 22, at 174-94. Armor concludes from the evidence that school desegregation contributes to white flight and that the flight can be quite large for some school systems, especially those systems that are larger, have higher minority concentrations, and have suburban or private school systems that can serve as alternatives for those who flee a desegregation plan or for new residents who want to avoid one.

*Id.* at 180. County-wide plans, by contrast, which encompass both city and suburb, are usually associated with much less white flight. See *infra* notes 150-153 and accompanying text; see also ORFIELD ET AL., *supra* note 22, at 316-17 (noting that two of the largest county-wide districts with mandatory desegregation plans, Charlotte and Raleigh, North Carolina, have had a rising proportion of white students in recent years and also have been growing rapidly in the 1990s).

147. See School Desegregation: A Social Science Statement, in Brief of the NAACP, DeKalb County, Georgia in support of respondents Pitts et al., at 6a-7a, *Freeman v. Pitts*, 503 U.S. 467 (1992) (No 89-1290) [hereinafter *Social Science Statement*]; ARMOR, *supra* note 22, at 72, 209; HOCHSCHILD, *supra* note 135, at 60, 61; ORFIELD ET AL., *supra* note 22, at 94-95 (discussing, inter alia, the fact that Atlanta never bused but nonetheless became nearly nine-tenths black).

148. See JEFFRIES, *supra* note 38, at 318; see also ORFIELD ET AL., *supra* note 22, at 96 (noting that the least stable desegregation plans are "those that involve mandatory desegregation in heavily minority central cities surrounded by unaffected white suburbs," which is "precisely the kind of plan the courts were requiring because of the limitation in the *Milliken I* decision").

149. See JEFFRIES, *supra* note 38, at 318.

150. See, e.g., FINIG WELCH & AUDREY LIGHT, U.S. COMM'N ON CIVIL RIGHTS, *NEW EVIDENCE ON SCHOOL DESEGREGATION* 40 (1987). In the only study of desegregation funded by the federal government during the Reagan years, a team of researchers examining the 125 largest school districts found that desegregation plans halved the percentage of black students in all minority schools during a period when housing segregation increased. The study also found that

degree of comparative white flight varies, one study indicates that city school districts lose up to twice the number of white students that countywide districts lose when desegregation plans are implemented.<sup>151</sup> The reasons are not hard to fathom: The more extensive the desegregation plan, the harder and more costly it becomes to escape. Moving to the suburbs will not enable parents to avoid a metropolitan-wide desegregation plan, and moving beyond the suburbs is often impractical for employment reasons. Private schools thus become the only alternative, but these are relatively costly and have traditionally drained far fewer white students from urban public schools than has suburbanization.<sup>152</sup>

From an educational standpoint, the more significant consequence of the limitations imposed by *Milliken I* has to do with class rather than race. Closing off the suburbs meant that city schools would be dominated by

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more geographically extensive remedies had greater impact, without concomitant increases in white flight. See HOCHSCHILD, *supra* note 135, at 64; ORFIELD ET AL., *supra* note 22, at 316 (“[T]he proportion of white students remains much more stable in a number of districts with countywide city-suburban mandatory desegregation.”); WELLS & CRAIN, *supra* note 12, at 71; Orfield, *supra* note 93, at 831. But see Christine H. Rossell, *An Analysis of the Court Decisions in Sheff v. O’Neill and Possible Remedies for Racial Isolation*, 29 CONN. L. REV. 1187, 1208-17 (1997) (disputing the significance of the city-versus-metropolitan distinction and arguing that the key distinction is between mandatory and voluntary plans). Although Rossell concedes that mandatory desegregation plans over a large geographic area show nearly 10% less white flight over time than do similar plans covering smaller geographic areas, she argues that data tend to support the position that voluntary desegregation plans produce the least white flight and that mandatory desegregation plans—whether city-only or metropolitan—produce the most. See *id.* at 1212, 1214; see also Christine H. Rossell & David J. Armor, *The Effectiveness of School Desegregation Plans, 1968-1991*, 24 AM. POL. Q. 267 (1996). Although Rossell’s point that the voluntary-mandatory distinction is crucial is well taken, it is significant that she and David Armor, the two leading critics of mandatory desegregation, agree that city-only plans lead to greater white flight than do metropolitan plans.

151. See Christine H. Rossell & Willis D. Hawley, *Understanding White Flight and Doing Something About It*, in EFFECTIVE SCHOOL DESEGREGATION 157, 166 (Willis D. Hawley ed., 1981). Rossell’s position regarding the relationship between desegregation and white flight has changed through the years, from arguing that school desegregation is not a significant cause of white flight to concluding that it is. See ARMOR, *supra* note 22, at 176. Her position regarding the significance of metropolitan-versus-city-only plans also appears to have changed. Again, the important point to draw from the shifting positions and conflicting studies is that, despite debate about the degree of difference, there appears to be consensus that metropolitan plans do in fact result in less white flight than do city-only plans.

152. See ORFIELD ET AL., *supra* note 22, at 61-63; see also Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 61 n.115 (1998) (noting that there has been no major shift overall of whites to private schools). This is not to deny that there has been white flight to private schools. Although obtaining precise or comprehensive figures is difficult, white flight to private schools has certainly occurred (and continues to occur), as demonstrated by the discrepancy between the percentage of whites or white children living in certain urban areas and the percentage of white students in urban schools. In Boston, for example, 60% of the population is white, but only 15% of the public school students are white; in New Orleans, the population is 35% white, while the student enrollment in public schools is only 6% white. Again, however, white flight to private schools has been small in comparison to white flight to the suburbs, both because white flight to the suburbs has left relatively few whites in cities and because private schools (obviously) cost money. In Mississippi, for example, a large number of white families have moved from Jackson to predominantly white suburbs, while relatively few have left Jackson public schools for private ones. See *State by State*, EDUC. WK., Jan. 8, 1998, at 88.

poor children, while suburban schools would be dominated by middle-class children.<sup>153</sup> As explained in the next Section, the consequences of isolating schools filled primarily with impoverished children have been disastrous.

### C. *The Costs of Isolation*

Because minority students are disproportionately poor, racial isolation and socioeconomic isolation (or isolation by class) typically go hand in hand, and race and class clearly interact in the creation and pathology of urban schools. But it is important to identify the distinct role that each plays. Race relations, and more specifically residential segregation and the limits of school desegregation, are primarily responsible for creating urban schools that are racially isolated. To be sure, racial isolation itself carries costs insofar as it plays a role in perpetuating racial segregation in adulthood. But it is class—or, to be precise, the concentration of poverty—that is largely responsible for the obstacles that urban schools face.<sup>154</sup> In other words, although there are discrete costs associated with racial isolation, the socioeconomic composition rather than the racial composition of urban schools appears to present the most significant hurdle facing education reformers.

As explained in this Section, the concentration of poverty within urban schools has significant consequences for school financing and educational achievement, for several reasons. First, students from impoverished backgrounds have greater needs and thus cost more to educate. Schools filled with impoverished students, therefore, generally will be costlier to run than schools filled with middle- and upper-income students. Second, the difficulties created by concentrated poverty in schools may not be best addressed, and are perhaps irremediable, by increased expenditures. There are theoretical reasons and empirical evidence to support this hypothesis. Third, the fact that the schools themselves are located in poor neighborhoods seems to exert a deleterious influence on the administration of the school districts and to create a dynamic in which the schools are seen as jobs programs as much as academic institutions.<sup>155</sup> The maladministration of schools makes implementing reforms and spending money wisely more difficult, which ironically both casts doubt on the accuracy of the argument that money does not matter (because it is hard to know if money matters when it is not spent properly) and gives great political and popular strength to the same argument (because many urban

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153. See ORFIELD ET AL., *supra* note 22, at 54; Chemerinsky, *supra* note 18, at 1011-12.

154. Cf. ORFIELD ET AL., *supra* note 22, at 57; see also ARMOR, *supra* note 22, at 83-86 (concluding from empirical study that the “socioeconomic status of black families in the Hartford area, not school segregation, is largely responsible for differences in academic performance”).

155. See *infra* Subsection III.C.3.

schools provide glaring examples of the apparent inefficacy of increased expenditures).

### 1. *Monetary Costs*

Students from lower socioeconomic backgrounds come to school with greater needs than their more advantaged peers. Such students suffer more from malnutrition and poor health care; lack of parental involvement and a nurturing, stimulating home environment; frequent changes of residence; and exposure to violence and drug use.<sup>156</sup> As the New Jersey Supreme Court explained in one of its school finance decisions, "With concentrated poverty in the inner-city comes drug abuse, crime, hunger, poor health, illness, and unstable family situations. Violence also creates a significant barrier to quality education in city schools where often just getting children safely to school is considered an accomplishment."<sup>157</sup> As a result of these obstacles, "[m]any poor children start school with an approximately two-year disadvantage compared to many suburban youngsters. This two-year disadvantage often increases when urban students move through the educational system without receiving special attention."<sup>158</sup>

Greater needs require greater resources: Disadvantaged students simply cost more to educate, requiring additional educational programs and non-academic services such as health care and counseling.<sup>159</sup> It follows that schools with large concentrations of impoverished students will face the greatest educational costs, even before factoring in such additional services as security or counseling, and even without considering the different prices for educational goods and services in cities as opposed to suburbs or rural areas.<sup>160</sup> A number of state school finance systems recognize this fact and

156. See ORFIELD ET AL., *supra* note 22, at 54.

157. *Abbott IV*, 693 A.2d 417, 433 (N.J. 1997). In *Abbott II*, the court concluded that the needs of students in high poverty districts exceeded those of suburban students. See *Abbott II*, 575 A.2d 359, 400 (N.J. 1990). "Those needs," the court observed, "go beyond educational needs, they include food, clothing and shelter, and extend to lack of close family and community ties and support, and lack of helpful role models. They include the needs that arise from a life led in an environment of violence, poverty, and despair." *Id.* Congress, too, has recognized as much. In its statement of policy and purpose with regard to Title I, a federal program that devotes resources to high-poverty schools, Congress reported that "[c]onditions outside the classroom such as hunger, unsafe living conditions, homelessness, unemployment, violence, inadequate health care, child abuse, and drug and alcohol abuse can adversely affect children's academic achievement and must be addressed through the coordination of services, such as health and social services." 20 U.S.C. § 6301(c)(2) (1994).

158. *Abbott IV*, 693 A.2d at 434 (quoting findings of the administrative law judge); see also CARNEGIE CORP. OF N.Y., *YEARS OF PROMISE: A COMPREHENSIVE LEARNING STRATEGY FOR AMERICA'S CHILDREN* (1996).

159. See ANYON, *supra* note 13, at 6-7 ("The large percentages of [urban] students needing special services or programs strain city school budgets, in some cases accounting for up to one quarter of expenses." (citation omitted)).

160. See *Abbott IV*, 693 A.2d at 434 (citing *Abbott II*, 575 A.2d at 359).

provide additional funding to high poverty schools.<sup>161</sup> Title I of the original Elementary and Secondary Education Act, the largest federal investment in education, is explicitly premised on this recognition and ostensibly provides money to schools based on the percentage of disadvantaged students enrolled.<sup>162</sup> And at least one state supreme court, in a school finance decision, has made special provision for meeting disadvantaged students' needs.<sup>163</sup>

Given the strong connection between race and socioeconomics, the first cost of racial isolation is in dollars and cents.<sup>164</sup> Racially isolated schools face higher costs than do racially mixed schools. They will thus often typically require a greater-than-average amount per pupil to provide an education that is comparable to the education provided in schools not saddled with concentrated poverty.

## 2. *Nonmonetary Costs and the Limited Efficacy of Increased Expenditures*

The second cost of racially isolated schools is more complex, and it is not one that money seems capable of addressing. The cost stems from the influence of peers and from the "oppositional culture" mentioned above. It is intuitive to any parent, as well as to those who remember their own experience in elementary and secondary school, that a student's peers will exert a strong influence on the student's attitude toward and behavior in school. Intuition in this instance coincides with social science evidence, which demonstrates not only that a student's peers affect behavior, but that they also affect academic achievement. James Coleman's famous, mammoth, and controversial 1966 report, entitled *Equality of Educational Opportunity*, is best remembered for asserting that an individual student's

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161. The school finance schemes in Connecticut, Idaho, Indianapolis, Mississippi, Nebraska, New Jersey, and Washington, among others, devote additional state aid to districts based on the number of low-income students in those districts. See *State by State*, *supra* note 152, at 118, 141, 188, 195, 204, 263.

162. The Title I program was most recently reauthorized in the Improving America's Schools Act of 1994, Pub. L. No. 103-382, tit. I, §101, 108 Stat. 3519 (codified at 20 U.S.C. § 6301 (1994)). In its statement of purpose and policy, Congress recognized that "the most urgent need for educational improvement is in schools with high concentrations of children from low-income families." *Id.* § 6301(b)-(c).

163. See *Abbott v. Burke (Abbott V)*, 710 A.2d 450, 473-74 (N.J. 1998); *Abbott II*, 693 A.2d at 433-37.

164. See ORFIELD ET AL., *supra* note 22, at 55. Orfield notes that schools that are predominantly minority are 14 times more likely to have high concentrations of impoverished students than are schools that are mostly white. As of 1991, there were 5047 schools that were 90% to 100% African-American and/or Hispanic. Of these, 57% were high-poverty schools, meaning that over half of the students in these schools were poor. See *id.* By contrast, 96% of predominantly white schools have a majority of students from middle-income families. See *id.*

socioeconomic status is the greatest determinant of school success.<sup>165</sup> Less remembered but equally important was the finding that the socioeconomic status of a student's peers also exerts a significant influence on academic performance. More precisely, Coleman found that "student body characteristics" account for "an impressive percent of variance" in student achievement, and that the influence appears greatest on students from disadvantaged backgrounds.<sup>166</sup> Numerous studies since the Coleman report have reached similar conclusions, and there now exists a well-developed body of research that indicates that achievement levels depend not only on a student's own socioeconomic status but also on the status of his or her peers.<sup>167</sup>

Coalescing with the general studies regarding the importance of one's peers are studies regarding the effects of oppositional black culture on educational achievement among black children. As discussed briefly earlier, anthropologists and social scientists have identified a distinct culture in many poor, black neighborhoods that is defined primarily by its opposition to conventional middle-class "white" values. Anthropologists theorize that subordinated minorities, such as black Americans, "develop a sense of collective identity . . . in opposition to the social identity of white Americans because of the way white Americans treat them in economic, political, social, and psychological domains, including white exclusion of

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165. See JAMES S. COLEMAN ET AL., U.S. DEP'T OF HEALTH, EDUC., & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966). Coleman and his colleagues prepared the report under the auspices of the U.S. Office of Education (the precursor to the current Department of Education), which in turn had been directed by § 402 of the 1964 Civil Rights Act to "conduct a survey . . . concerning the lack of availability of equal educational opportunities." *Id.* at iii. At the time, the project was one of the largest ever undertaken in history; it gathered and analyzed information regarding 570,000 pupils, 60,000 teachers, and 4000 school facilities. See *id.* at 557. Additional studies support Coleman's findings regarding the importance of socioeconomic status for student achievement, including, for example, SHELLEY DRAZEN, STUDENT ACHIEVEMENT AND FAMILY AND COMMUNITY POVERTY: TWENTY YEARS OF EDUCATION REFORM (1992); KIM KRUSE, THE EFFECTS OF A LOW SOCIOECONOMIC ENVIRONMENT ON A STUDENT'S ACADEMIC ACHIEVEMENT (1996); and Geoffrey F. Schultz, *Socioeconomic Advantage and Achievement Motivation: Important Mediators of Academic Performance in Minority Children in Urban Schools*, 25 URB. REV. 221 (1993).

166. COLEMAN ET AL., *supra* note 165, at 304.

167. See, e.g., JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS 125-29 (1990) (finding that the socioeconomic status of a school exerts a statistically significant influence on achievement, though it is less influential than student ability, school organization, and parents' socioeconomic status); KRUSE, *supra* note 165; LAWRENCE STEINBERG, BEYOND THE CLASSROOM: WHY SCHOOL REFORM FAILED AND WHAT PARENTS NEED TO DO (1996); Galster, *supra* note 92, at 1439-40 (observing that racial and economic segregation among schools "place greater limits on the educational achievement and attainment of poor children from African-American and Hispanic families because these children have less contact with children from nonpoor families"); James S. Liebman, *Voice, Not Choice*, 101 YALE L.J. 259, 267 n.40 (1991) (reviewing CHUBB & MOE, *supra*, and citing additional evidence of the significance of peers on student achievement); Schultz, *supra* note 165. See generally LINDA DACHA, EFFECTS OF COMMUNITY AND FAMILY BACKGROUND ON ACHIEVEMENT 32, 41 (1981) (finding that variations in neighborhood quality are partially responsible for differences in educational achievement and attainment both within and between racial groups).

these groups from true assimilation.”<sup>168</sup> Once established, the theory continues, this oppositional culture becomes difficult to overcome because it is closely tied to the minority’s sense of collective identity and security. “[I]ndividuals who try to behave like white Americans or try to cross cultural boundaries or to ‘act white’ in *forbidden domains* [including schools] face opposition from their peers and probably from other members of the minority community.”<sup>169</sup> Thus,

[i]f whites speak Standard American English, succeed in school, work hard at routine jobs, marry, and support their children, then to be “black” requires one to speak Black English, do poorly in school, denigrate conventional employment, shun marriage, and raise children outside of marriage. To do otherwise would be to “act white.”<sup>170</sup>

This oppositional culture is not confined to the streets, but exerts an influence within schools as well.

Anthropologists John Ogbu and Signithia Fordham have done the most extensive and well-known work in this small but growing field, and they have found that children in ghetto schools face tremendous peer pressure in school to avoid academic success and the accompanying stigma of “acting white.”<sup>171</sup> Not surprisingly, the pressure to avoid success is most intense

168. Signithia Fordham & John U. Ogbu, *Black Students’ School Success: Coping with the Burden of ‘Acting White,’* 18 URB. REV. 176, 181 (1986).

169. *Id.* at 182.

170. MASSEY & DENTON, *supra* note 2, at 168.

171. See Fordham & Ogbu, *supra* note 168, at 191. Fordham and Ogbu conducted a study of black students at a public high school in Washington, D.C. Among the attitudes and behaviors black students identified as “acting white” and thus as taboo were speaking standard English, working hard to get good grades or actually getting good grades, spending a lot of time in the library studying, being on time, doing volunteer work, going camping or hiking, going to a museum or a symphony, and listening to classical music. See *id.* at 186. Although Fordham and Ogbu suggested that black students will avoid the burden of “acting white” in desegregated settings as well, see *id.* at 199-200, more recent evidence from the St. Louis schools suggests that the type of school may affect the degree of resistance to or avoidance of success, see WELLS & CRAIN, *supra* note 12, at 172-73 (citing R.W. LISSITZ, ASSESSMENT OF STUDENT PERFORMANCE AND ATTITUDE YEAR IV—1994: ST. LOUIS METROPOLITAN AREA COURT ORDERED DESEGREGATION EFFORT (1994)). Wells and Crain report the results of a survey in which black students attending all-black city schools, rather than integrated magnet or suburban schools, were most likely to agree that students who seem smart and do well will be disliked by their peers. See *id.*

Fordham and Ogbu’s conclusions have been challenged by Philip J. Cook and Jens Ludwig, who argue, based on data from a national sample of 10th graders, that the alleged burden of “acting white” is exaggerated and not supported by evidence regarding graduation rates, attendance rates, and time spent on homework. See Phillip J. Cook & Jens Ludwig, *The Burden of ‘Acting White’: Do Black Adolescents Disparage Academic Achievement?*, in THE BLACK-WHITE TEST SCORE GAP, *supra* note 102, at 375, 390. Ronald Ferguson, in turn, has questioned Cook and Ludwig’s argument by suggesting that the data they use to measure black oppositional culture are not the most indicative of adolescent norms—that is, black students may act in ways that indicate an alienation from school, such as refusing to participate in class, which are not captured in the data regarding attendance, homework, and graduation, upon which Cook and

during adolescence, and Ogbu and Fordham report that young black students intensely fear being labeled “Oreos” or “Uncle Toms” for performing well in school or even speaking standard English. They further report that students intentionally fail some courses or try to avoid getting A’s in order to avoid a denigrating label and rejection by their peers.<sup>172</sup> Given the lower expectations on the part of students and teachers alike that already exist in most poor urban schools, the pressure not to succeed must mean that many students do not even attempt to master the basic skills that would enable them to become functionally literate.<sup>173</sup>

To the extent that a student’s peers and the culture of a school exert demonstrable influence on student achievement, simply increasing expenditures in schools populated by poor students will not necessarily affect achievement. The stronger the influence of peers on performance, the less likely it is that money will make much of a difference—and the more likely it is that changing the composition of the school *will* make a difference. Unfortunately, but not surprisingly, no experiments exist in which this specific hypothesis has been tested to determine whether negative peer influences, at some point, could be overcome by increased expenditures. There is, however, some empirical evidence that suggests that even substantial increases in school expenditures have little effect on student achievement when the student composition remains predominantly poor. And there is even more evidence, discussed in Part IV, to suggest that students from lower socioeconomic backgrounds improve their academic performance when they transfer to schools with students from more advantaged backgrounds.

The evidence regarding the inefficacy of increased expenditures comes in two types: anecdotal and statistical. The best-known anecdote regarding the inefficacy of increased funding comes from the Kansas City, Missouri School District.<sup>174</sup> The district court ordered the funding as part of a

Ludwig relied. See Ronald F. Ferguson, *Comment*, in *THE BLACK-WHITE TEST SCORE GAP*, *supra* note 102, at 375, 394.

172. See Fordham & Ogbu, *supra* note 168, at 187-98; see also Signithia Fordham, *Racelessness as a Factor in Black Students’ School Success: Pragmatic Strategy or Pyrrhic Victory?*, 58 HARV. EDUC. REV. 54 (1988) (arguing that some black students develop a strategy of “racelessness” to resolve conflicts between academic achievement and racial group identification).

173. See, e.g., ANYON, *supra* note 13, at 7 (citing research demonstrating “that instruction in inner city schools is often based on cognitively low-level, unchallenging, rote material”); James E. Rosenbaum et al., *White Suburban Schools’ Responses to Low-Income Black Children: Sources of Successes and Problems*, 20 URB. REV. 28, 30-32 (1988) (concluding, from interviews of parents whose children transferred from city to suburban schools, that suburban Chicago schools have higher standards and demand more from students than do city schools).

174. For extensive discussion of the relevant court decisions and their impact in the KCMSD, see ORFIELD ET AL., *supra* note 22, at 241-63; see also *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Missouri v. Jenkins*, 495 U.S. 33 (1990).

desegregation remedy fashioned on the basis and authority of *Milliken II*.<sup>175</sup> The plaintiffs originally sought a metropolitan-wide remedy but were denied their requested relief on the basis of *Milliken I*.<sup>176</sup> Having been denied relief that would very likely have been cheaper and more effective,<sup>177</sup> they were granted a bonanza of funds: Between 1987 and 1995, more than \$1.5 billion was devoted to KCMUSD. The court required the state to pay a bit more than half of this amount.

KCMUSD spent the money converting all of the schools in the district into magnet schools. District officials hoped that creating excellent schools would lure white students from the suburbs and avoid creating a two-tiered system in which additional resources would be devoted only to magnet schools while traditional schools were left to founder.<sup>178</sup> The showcase was the \$32 million Central High School, which had been transformed into the "Classical Greek and Computers" magnet. The school was equipped with a gymnastics room, a wrestling facility, an indoor swimming pool (called, naturally, the natatorium), and a fully equipped robotics laboratory. On staff were not only traditional teachers and administrators, but also a full-time weight trainer, a diving instructor, a gymnastics coach, and a fencing instructor. Central High was not alone in devoting its funds to seemingly extravagant items: Elsewhere in the district, different schools featured a planetarium, a dust-free diesel mechanic's room, a working farm, and a Model UN room.<sup>179</sup>

The increased funding has resulted in per-pupil expenditures in KCMUSD that are close to twice the statewide average; in 1992, KCMUSD spent \$7819 per pupil while the statewide average was \$3972.<sup>180</sup> The results of the increased funding, however, have been modest at best. Students in all grades appear to have improved their performance in absolute terms on national tests, but on statewide tests their performance has not improved relative to their peers in other school districts throughout the state.<sup>181</sup>

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175. See *Milliken II*, 433 U.S. 267 (1977) (holding that courts could order the funding of remedial and compensatory education programs as part of a desegregation decree).

176. See *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986); see also *id.* at 695, 698 (Lay, C.J., dissenting) (arguing that the district court's decision rested upon a "misunderstanding of *Milliken I*" and that the district court had "erected an improper proof burden for the plaintiffs to overcome").

177. District Judge Clark, who ordered the monetary remedies, later admitted that it would have been "much easier to integrate the Kansas City schools" if he had kept the suburban districts in, and that including the suburban districts would have obviated the need for "a lot of the capital improvements." ORFIELD ET AL., *supra* note 22, at 247 (quoting Judge Clark).

178. See *id.* at 248 (quoting an interview with Arthur Benson, plaintiffs' attorney in *Jenkins v. Missouri*).

179. See *Jenkins*, 495 U.S. at 77 (Kennedy, J., concurring); ORFIELD ET AL., *supra* note 22, at 241.

180. See ORFIELD ET AL., *supra* note 22, at 252.

181. See *id.* at 256-61.

A similar, if less dramatic, story can be told of Connecticut. As a result of a school finance decision that found that all students had the right to a substantially equal education, the Hartford School District has been funded for the last several years at a level higher than surrounding suburban districts.<sup>182</sup> Despite this relatively high level of funding, Hartford, whose student body is overwhelmingly minority and poor, still posted test scores that were markedly lower than those in the suburban districts.<sup>183</sup> This lack of improvement spurred the *Sheff* suit, in which plaintiffs claimed that a substantially equal education includes not only equal funding but also an integrated student body.<sup>184</sup>

Hartford and Kansas City are not alone. Case studies of districts receiving *Milliken II* aid have concluded that despite increased funding, *Milliken II* districts have not demonstrated much improvement in academic achievement.<sup>185</sup> A recent study of the effects of the New Jersey litigation similarly suggests that gains to students in urban minority districts have been quite limited.<sup>186</sup>

This largely anecdotal evidence is supported by broader statistical analyses of the relationship between expenditures and achievement. There is ongoing debate in the social science and education-policy world regarding this relationship—regarding, in other words, the degree to which money “matters.” James Coleman’s 1966 report began this debate by asserting that expenditure levels had a negligible impact on achievement.<sup>187</sup> Since that time, a number of researchers, Eric Hanushek chief among them, have concurred in Coleman’s analysis and have concluded that there is no systematic relationship between school expenditures and achievement.<sup>188</sup>

Of course, one potential explanation for the apparent lack of relationship between spending and achievement is that money is not being

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182. See *Sheff v. O’Neill*, 678 A.2d 1267, 1273 (Conn. 1996). The level of funding, it bears noting, also greatly exceeds the national average. In 1993, for example, Hartford spent over \$8000 per pupil; the national average was \$5500.

183. See *id.* at 1272-74. For discussion of this case, see Ryan, *supra* note 16.

184. See *Sheff*, 678 A.2d, at 1271-72.

185. See ORFIELD ET AL., *supra* note 22, at 256-61.

186. See Tractenberg, *supra* note 17, at 91-97 (describing the performance of urban minority students on standardized tests).

187. See COLEMAN ET AL., *supra* note 165.

188. See, e.g., MICHAEL J. PUMA ET AL., PROSPECTS: FINAL REPORT ON STUDENT OUTCOMES (1997); Eric A. Hanushek, *When School Finance “Reform” May Not be Good Policy*, 28 HARV. J. ON LEGIS. 423, 427-30 (1991). The Prospects Report concerned schools receiving Title I aid, which is designed to boost the achievement of disadvantaged students. The report concluded that participants in the Title I program continued to score lower on standardized tests than nonparticipants; that is, Title I did not close the gap that exists between low- and high-achieving students. Other studies found that particular Title I programs were quite effective, suggesting that Title I funds can make a difference if spent wisely. See David J. Hoff, *Tracking Title I*, EDUC. WK., Oct. 22, 1997, at 16 (discussing a 1993 RAND Corporation study concluding that many Title I programs produce “outstanding results”). If the focus is only on disadvantaged students, moreover, one study suggests that disadvantaged students who participate in Title I programs tend to perform better on tests than those who do not participate. See *id.*

spent effectively.<sup>189</sup> This point is made by researchers who disagree with Hanushek and suggest that money spent wisely does matter. Professor Ronald Ferguson, for example, has concluded that money spent on hiring teachers with strong academic backgrounds, and specifically, strong reading skills, is wisely spent, as there is a demonstrable relationship between strong teachers and student achievement.<sup>190</sup> In addition, a recent and important experiment conducted in Tennessee indicates that reducing class sizes has a positive effect on achievement, especially on the achievement of disadvantaged students.<sup>191</sup> Finally, there is some evidence, albeit mixed, that suggests that money devoted to certain systemic reforms does translate into increased academic achievement.<sup>192</sup>

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189. This is the claim made by Alison Morantz with regard to *Milliken II* funds. See ORFIELD ET AL., *supra* note 22, at 253-54. This same claim is made by Title I researchers. See, e.g., Robert E. Slavin, *How Title I Can (Still) Save America's Children*, EDUC. WK., May 21, 1997, at 54 (suggesting that Title I funds should be spent on whole-school reforms, such as the author's own "Success For All" program).

190. See Ronald F. Ferguson, *Can Schools Narrow the Black-White Test Score Gap?*, in THE BLACK-WHITE TEST SCORE GAP, *supra* note 102, at 318, 365-66 (concluding that preschool education, strong teachers, and smaller class sizes all have positive effects on academic achievement); Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465, 488-89 (1991) [hereinafter Ferguson, *Paying for Public Education*]; Jencks & Phillips, *supra* note 102, at 44 (advocating cutting class size and screening out teachers with poor academic skills as effective and realistic policies); see also MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE* 138-45 (1997) (discussing empirical studies that suggest that particular interventions and expenditures—for example, hiring more talented teachers, adopting whole school reform, and reducing class size—are effective in boosting achievement); Adam Gamoran, *Resource Allocation and the Effects of Schooling: A Sociological Perspective*, in MICROLEVEL SCHOOL FINANCE: ISSUES AND IMPLICATIONS FOR POLICY 207, 211-13 (David Monk & Julie Underwood eds., 1988) (arguing that teachers affect achievement outcomes and that they are affected by resource allocations); Larry V. Hedges et al., *Does Money Matter?: Meta-Analysis of Studies of the Effect of Differential School Inputs on Student Outcomes*, 23 EDUC. RESEARCHER 5 (1992) (criticizing the Hanushek review and finding, after reviewing data from all available studies, that school spending had a positive and statistically significant effect on achievement).

191. See David Grissmer et al., *Why Did the Black-White Score Gap Narrow in the 1970s and 1980s?*, in THE BLACK-WHITE TEST SCORE GAP, *supra* note 102, at 182, 214.

192. Most of the evidence relates to a particular systemic or whole-school reform, known as "Success for All." This program was designed by Robert Slavin and his colleagues at Johns Hopkins. Key components of the program include extended reading periods, small ability-grouped classes for reading, one-on-one tutoring for students having difficulty in reading, and family support services designed to increase parents' participation in their children's education. Although there are similar "whole-school" reforms that seek to reorient the educational practices of entire schools rather than simply provide remedial instruction for students most in need, see, e.g., Fashola & Slavin, *supra* note 13, at 372-78 (describing various programs). Success for All is the most widely implemented and apparently the most promising, see, e.g., Lynn Olson, *Will Success Spoil Success for All?*, EDUC. WK., Feb. 4, 1998, at 42.

Assessments of the program have been contradictory, as suggested in the text. Robert Slavin, obviously not a disinterested party, argues that longitudinal research indicates that Success For All has educationally significant effects in the districts in which it has been implemented. See Fashola & Slavin, *supra* note 13. Others question these findings and argue that the results are much more modest than Slavin claims. See, e.g., Herbert J. Walberg & Rebecca C. Greenberg, *The Diogenes Factor*, EDUC. WK., Apr. 8, 1998, at 52 (questioning the accuracy of Slavin's claims and describing an independent study that found that in Baltimore, where the program originated, the

The debate over the extent to which “money matters” will not likely be resolved soon and certainly not in this Article. It is sufficient for now to make two observations. First, notwithstanding some promising statistical evidence from a broad sampling of different types of schools, it is fairly clear that increased expenditures in racially isolated and high-poverty schools have not yet led to significant improvements in student achievement.<sup>193</sup> Second, the studies support the intuitive position that money spent poorly will not translate into academic gains, while money spent wisely may indeed accomplish some academic improvement—although just how much gain one can reasonably expect is far from clear.<sup>194</sup> In short, the evidence indicates that increasing expenditures in racially and socioeconomically isolated schools has not in the past been a very effective strategy for assisting students; whether it will be in the future is at best debatable and depends on whether the resources are spent wisely.

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average Success for All student failed to reach grade-level performance by the end of the third grade).

Granting for the moment that Slavin’s claims are accurate, it is important to recognize the baseline by which Slavin measures progress. He measures the effect of Success for All by comparing the performance of students in the program with students from “similar” schools, meaning schools with children from similar socioeconomic backgrounds, who are not in the program. Selecting this baseline in itself reveals just how limited the nature of reform is expected to be in high-poverty schools, and it suggests that even the most promising and ambitious whole-school reform does not claim that it will create high-poverty schools that achieve at the levels of middle-class suburban schools. The idea that it would be futile to compare urban and suburban schools because the former will never reach the level of the latter is evident in other assessment programs. See, e.g., *Abbott II*, 575 A.2d 359, 384-86 (N.J. 1990) (discussing and critiquing New Jersey’s assessment program).

193. In addition to the evidence regarding Hartford, Kansas City, and other *Milliken II* districts, see PUMA ET AL., *supra* note 188 (describing performance in Title I schools); and Tractenberg, *supra* note 17 (describing performance in New Jersey’s urban school districts).

194. In addition to Ferguson’s article and the evidence regarding whole-school reforms, there have been other attempts to identify the programs that have proven the most successful in boosting achievement. See, e.g., COMMITTEE ON EDUC. & LABOR, 102D CONG., *SHORTCHANGING CHILDREN: THE IMPACT OF FISCAL INEQUALITY ON THE EDUCATION OF STUDENTS AT RISK* (Comm. Print 1991) (authored by William L. Taylor and Dianne M Piche). These programs include early childhood education, full-day kindergarten, small classes (especially for reading) in the earliest grades, and school-based health and social services. See KELMAN & LESTER, *supra* note 190, at 138-45; WIPING OUT DISADVANTAGES, *supra* note 109.

On the other side of the coin, it is instructive to consider the results where states have taken over districts, ostensibly on the ground that those districts were being mismanaged. Those results are, in a word, underwhelming. In New Jersey, for example, performance levels in Paterson and Newark have changed little in the several years since the state took over the districts. See Jessica L. Sandham, *Despite Takeover Laws, States Moving Cautiously on Interventions*, EDUC. WK., Apr. 14, 1999, at 21. This disappointing showing by schools taken over by the state does not prove, of course, that money spent wisely will be ineffective—because it is not clear that the state is spending money wisely—but it does reveal that the obstacles facing high-poverty urban schools are not amenable to quick fixes.

### 3. *Obstacles to Effective Spending*

These observations raise the obvious question: What is the likelihood that increased resources will be used effectively in high-poverty urban districts? Given their past performance and the current structural obstacles facing these districts, the answer is discouraging. It is certainly true that urban educators and administrators face daunting problems, but it is also undeniable that a number of those educators and administrators have made some unwise and counterproductive decisions on how to spend funds, run their schools, and teach their students.

Part of the problem arises from the location and atmosphere of poor urban schools. They are often located in unsafe neighborhoods and experience levels of violence that exceed those of their suburban counterparts. This makes attracting the best teachers and administrators difficult because, all else being equal, teachers and administrators tend to choose schools that have pleasant and supportive environments.<sup>195</sup> Given that salaries in suburban schools are often close to or exceed salaries in urban schools, it is not surprising that teachers and administrators who can choose their places of employment typically select suburban schools.<sup>196</sup>

Compounding this recruitment and retention difficulty are the obstacles to reform created by the racial isolation and poverty in the communities in which urban schools are located.<sup>197</sup> In a recent case study of the Newark public school system, for example, Jean Anyon describes how intense poverty and racial isolation have helped to create a school system in which political patronage, rather than merit, is often responsible for the appointment of administrators. The Newark school system is one, Anyon reports, where the low social status and lack of political power among parents have created a lack of accountability among teachers and staff; where teachers and administrators are often abusive to students; and where teachers and administrators "appeared to be resigned to the failure of reform efforts" in the schools.<sup>198</sup>

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195. See LINDA DARLING-HAMMOND, *THE RIGHT TO LEARN: A BLUEPRINT FOR CREATING SCHOOLS THAT WORK* 261-92 (1997); Ferguson, *Paying for Public Education*, *supra* note 190, at 480-81.

196. See Ferguson, *Paying for Public Education*, *supra* note 190, at 489-90.

197. On the inefficacy of past reform efforts to improve city schools, see, for example, KOZOL, *supra* note 111, at 4; DONNA E. MUNCEY & PATRICK J. MCQUILLAN, *REFORM AND RESISTANCE IN SCHOOLS AND CLASSROOMS: AN ETHNOGRAPHIC VIEW OF THE COALITION OF ESSENTIAL SCHOOLS* (1996); DAVID TYACK & LARRY CUBAN, *TINKERING TOWARD UTOPIA: A CENTURY OF PUBLIC SCHOOL REFORM* (1995); and Robert Rothman, *Obstacle Course: Barriers to Change Thwart Reformers at Every Twist and Turn*, *EDUC. WK.*, Feb. 10, 1993, at 9.

198. ANYON, *supra* note 13, at 3-38, 157-62. As a result of her study, Anyon has become convinced that "poverty and racial isolation have often trivialized efforts . . . to teach, to learn, and to bring about change," *id.* at xiv, and she argues that educational reform efforts "must also include efforts to restore economic and political opportunities to inner city residents," *id.* at xvi.

Another case study of the St. Louis school system, undertaken by Amy Stuart Wells and Robert L. Crain, concluded that “over the past thirty years the St. Louis school board has taken better care of many of its employees than it has of the children whose life chances depend on the board’s ability to lead.”<sup>199</sup> As Crain and Wells explain, dedicated urban educators in such a system “become outliers in a field of low expectations [and] many are eventually swallowed up by the inertia.”<sup>200</sup> They also point out that in poor cities such as St. Louis, “most of the decent-paying jobs for African Americans are in the public school system,” and, not surprisingly, “patronage and less-than-qualified employees” follow.<sup>201</sup> Studies of schools in Kansas City and Washington, D.C., have reached the same conclusion.<sup>202</sup>

That schools are seen as jobs programs in poor neighborhoods undoubtedly skews decisionmaking. In particular, one would expect that in such schools it would be difficult to adopt policy reforms that, regardless of their benefit to students, would decrease personnel or otherwise threaten job security. As a consequence, even if money spent wisely could significantly improve inner-city schools, there appear at the moment to be serious structural obstacles to efficient spending.

#### D. *A Reprise*

The conclusions one can reach based on the social science research are necessarily somewhat tentative, given the lack of incontrovertible proof and the surfeit of conflicting studies. The limitations of existing research notwithstanding, there are some lessons to be drawn from the evidence. To begin, race relations appear to be a crucial factor in perpetuating residential segregation. In turn, residential segregation—given school districting rules that typically assign children to neighborhood schools and the limitations on desegregation remedies imposed by *Milliken I*—is primarily responsible for current school segregation. Existing school segregation is not simply manifested along racial lines, but also, given the disproportionately high

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199. WELLS & CRAIN, *supra* note 12, at 130.

200. *Id.* at 131.

201. *Id.*

202. See Gerald W. Bracey, *A Lesson in Throwing Money*, 79 PHI DELTA KAPPAN 789, 789 (1998) (Kansas City); Michael Powell, *No Accounting for Some Workers in D.C. Schools*, WASH. POST, Sept. 15, 1996, at A1; Valerie Strauss, *D.C. Schools Hired People with Records*, WASH. POST, Apr. 13, 1995, at B1; see also Beth Reinhardt, *Racial Issues Cloud State Takeovers*, EDUC. WK., Jan. 14, 1998, at 1. For example, Williard H. Murray, an African-American Democrat who represented Compton, California, for eight years until he retired in 1996, believes that school boards in some poor minority communities have become centers of patronage because they are one of the only large employers in town. As a result, Murray suggests, “the focus becomes political, not educational.” Reinhardt, *supra*, at 1.

levels of poverty among the African-American population, along socioeconomic lines.

Racially isolated schools, because they are also schools of concentrated poverty, are more expensive to run than are majority-white schools, and thus minority schools will generally require more than equal funding to be placed on an equal footing with racially mixed or white schools. At the same time, predominantly minority schools suffer from obstacles, largely created by peer influence, that do not seem remediable by increasing expenditures. Finally, even if we accept that more money, spent well, can make a significant impact in predominantly minority schools, there is evidence to suggest that such money has not been spent well in the past and that, without changing the structure or organization of urban school districts, it may be unrealistic to expect that it will be spent wisely in the future.

All of which is to say that race plays an important, if not paramount, role in keeping certain school districts beyond the reach of school finance reform. It is also to say that, to the extent that race relations are responsible for the concentration of poor minority students in urban public schools, education policies that hold some promise of improving race relations may be more effective in the long run than policies that intentionally or unintentionally avoid the issue. School finance reform seems to fall squarely in the latter category because it operates from a premise that accepts rather than challenges the fact that most urban schools are isolated by race and poverty. Insofar as it is the very fact of isolation that must be overcome in order to improve substantially the opportunities of students attending urban schools, alternatives (or at least additions) to school finance litigation deserve to be considered—or, as the next Part suggests, reconsidered.

#### IV. LOOKING BACK, LOOKING FORWARD

An alternative or supplement to school finance reform worthy of (re)consideration is integration, along both racial and socioeconomic lines. As mentioned at the outset, school finance litigation was initially seen as something of a substitute for, or a complement to, desegregation. Currently, as between these two approaches to improving the educational opportunities for poor and minority students, school finance litigation is clearly predominant. I have already suggested why reliance on school finance reform may be unwise for minority districts. This Part argues that integration, at least when it occurs along both racial and socioeconomic lines, provides more demonstrable benefits for poor minority students than does simply increasing expenditures in urban districts. Specifically, I suggest that the short-run *academic* benefits of socioeconomic integration

appear to be greater than the benefits of increased expenditures, and that the long-run *social* benefits of racial integration seem difficult to replicate by increasing expenditures in segregated schools.

After canvassing the social science evidence regarding the benefits of desegregation, I suggest two possible approaches to increasing racial and socioeconomic integration that I believe are worth exploring. One is to reorient school finance cases in an effort to seek racial and socioeconomic integration instead of, or in addition to, greater equalization of resources. The other is to leverage political support for school choice and use it to shape school choice in ways that will increase integration—for example, by ensuring that suburban public schools participate in choice plans. While neither strategy is a sure bet, both at least focus on the right problem—namely, the isolation of poor minority students.

### A. *The Comparative Benefits of Integration*

#### 1. *Academic Achievement*

Urban schools are hamstrung, as explained earlier, by the concentrated poverty among their students. If increasing expenditures in predominantly poor schools is not particularly efficacious in overcoming the obstacles created by concentrated poverty, one obvious alternative is to break up the concentration of poor students and allow them the opportunity to attend higher-socioeconomic-status schools. The response to the difficulties presented by concentrated poverty, in other words, should be to encourage socioeconomic integration.<sup>203</sup>

Some court-ordered desegregation plans have accomplished precisely this goal, and there is a good deal of evidence to suggest that integrating students from different socioeconomic backgrounds leads to significant educational benefits for poorer students. The amount and consistency of this evidence are quite surprising and often ignored in broader debates about the costs and benefits of desegregation. The popular view of desegregation is that it only occasionally helps boost academic achievement among minority students and only occasionally improves race relations. That view is true but incomplete, insofar as it ignores the evidence regarding the benefits of socioeconomic integration.

Research consistently shows that introducing students from low socioeconomic backgrounds into higher-socioeconomic-status schools has a

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203. It is important to recognize that, given the link between race and poverty, socioeconomic integration in most metropolitan areas would also entail racial integration. Thus, just as race and class intersect in the creation and maintenance of the pathological conditions that afflict many urban schools, so too do they intersect in affecting the efficacy and political plausibility of socioeconomic integration.

positive impact, often quite significant, on the poor students.<sup>204</sup> James Coleman, again, was one of the first to recognize this effect, concluding in his report that "the environment provided by the student body . . . has its greatest effect on those from educationally deficient backgrounds."<sup>205</sup> Subsequent studies have reached similar conclusions. James Rosenbaum, for example, compared students whose families were assigned to public housing in suburban areas through Chicago's *Gautreaux* program with those students whose families remained behind in public schools in Chicago's ghettos. He found that the students who transferred to suburban schools were more likely to be in college preparatory classes, less likely to drop out, and more likely to attend college than those who were left behind in ghetto schools.<sup>206</sup>

Crain and Wells, in their case study of the St. Louis desegregation program, found similar results. Under the St. Louis program, 13,000 minority students from the city attend suburban schools. City schools have received additional resources, both for traditional and magnet schools. Crain and Wells compared the educational progress and outcomes of the students who attended suburban schools to those of the students who remained in St. Louis city schools. They found that the black students who transferred to suburban schools initially tested at a lower level than black students in the city magnet schools, but at a slightly higher level than black students who remained in traditional city schools. The suburban transfer students, however, consistently improved their performance and by the tenth grade were performing at higher levels than black students in all city schools, including the magnets.<sup>207</sup> The suburban transfer students also

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204. The impact of such integration on wealthier students is not entirely clear from the studies discussed in the text above. Studies regarding racial desegregation and its impact on the academic achievement of white students consistently conclude that "[w]hite children fail to suffer any learning disadvantage from desegregation." Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597, 603 (James A. Banks, ed. 1995) (internal quotations omitted). Since at least some of the white children involved in desegregation plans are of a higher socioeconomic status than the black children involved, the findings with regard to racial desegregation are of some relevance to socioeconomic integration as well. A plausible inference from the studies, moreover, is that at a certain point—where the poorer students became a majority or substantial minority of the student population—the effects of integration would be detrimental to wealthier students. Clearly, however, the impact of socioeconomic integration on wealthier students could benefit from more direct study than it has received.

205. COLEMAN ET AL., *supra* note 165, at 304.

206. See James E. Rosenbaum, *Black Pioneers—Do Their Moves to the Suburbs Increase Economic Opportunity for Mothers and Children?*, 2 HOUSING POL'Y DEBATE 1179, 1198 (1991).

207. See WELLS & CRAIN, *supra* note 12, at 148. That transfer students start out at lower levels of achievement than magnet school students is especially important insofar as it suggests self-selection cannot fully explain why suburban transfer students outperform their city counterparts. The problem of self-selection and its effect on the accuracy of studies regarding student performance is a recurring one and difficult to avoid; it plagues, for example, studies that tend to show that poor minority children perform better in Catholic than in public schools. See,

graduated at twice the rate of students in St. Louis city schools (although the overall rate, fifty percent, is still remarkably low), and among all those who did graduate, the transfer students were more likely to attend college. Indeed, the college attendance rate of suburban transfer students, at sixty-eight percent of those who graduated, was almost three times the national average for black high school graduates.<sup>208</sup>

Another study focused on San Francisco contains similar findings.<sup>209</sup> Prepared at the request of a federal district court judge examining various desegregation plans, the study found that students from low socioeconomic backgrounds posted significant gains in achievement when they transferred to schools with more advantaged and higher-achieving students. This improvement occurred, it bears observing, despite the fact that the transfer schools received no increase in funding for additional programs as a result of accepting transfer students. By contrast, students who remained in city schools populated primarily by low-income students generally showed no academic gains despite substantial increases in funding.<sup>210</sup>

These case studies are bolstered by studies examining larger samples of students. Rita Mahard and Robert Crain, for example, reviewed the results of ninety-three separate studies on the effect of desegregation on student achievement.<sup>211</sup> Mahard and Crain found that, even controlling for ability and socioeconomic status, desegregation consistently had positive, though moderate, effects on black student achievement.<sup>212</sup> Perhaps more importantly, they also found that desegregation plans that encompassed both cities and suburbs resulted in the greatest academic gains for African-

*e.g.*, CENTER FOR THE FUTURE OF CHILDREN, APPENDIX C: CATHOLIC SCHOOLS SERVING DISADVANTAGED STUDENTS, *THE FUTURE OF CHILDREN*, Winter 1997, at 140, 141 (reviewing the literature on superior academic performance and the self-selection hypothesis); *see also* ARMOR, *supra* note 22, at 108-11 (questioning the significance of the results of Project Concern, which allowed Hartford students to attend suburban schools, on the ground that self-selection may explain why students who remained in the program posted better academic results and were more likely to attend college than students who either remained in Hartford schools or dropped out of the program); Robert L. Crain & Rita E. Mahard, *School Racial Composition and Black College Attendance and Achievement in Test Performance*, 51 *SOC. OF EDUC.* 81 (1978) (discussing the mixed evidence for a self-selection hypothesis in assessing the effect of attending a predominantly white school on black students' performance).

208. *See* WELLS & CRAIN, *supra* note 12, at 198-99.

209. *See* Orfield & Thronson, *supra* note 49, at 783 (citing GARY ORFIELD ET AL., *DESEGREGATION AND EDUCATIONAL CHANGE IN SAN FRANCISCO: FINDINGS AND RECOMMENDATIONS ON CONSENT DECREE IMPLEMENTATION* (1992) (report submitted to federal district court)). Orfield and Thronson note that academic improvements were realized when schools were totally reorganized—where, for example, the principal and the faculty were replaced with a new staff—which “suggest[s] that extremely far reaching changes would be needed to achieve in isolated schools the benefits that could be found in high achieving middle-class schools.” *Id.*

210. *See* Orfield & Thronson, *supra* note 49, at 783.

211. *See* Rita E. Mahard & Robert L. Crain, *Research on Minority Achievement in Desegregated Schools*, in *THE CONSEQUENCES OF SCHOOL DESEGREGATION* 103 (Christine R. Rossell & Willis D. Hawley eds., 1983).

212. *See id.* at 111.

American students. They concluded that racial integration is most effective when it also results in socioeconomic integration.<sup>213</sup>

Research also indicates that socioeconomic integration affects behavior in ways that indirectly improve achievement. A study by Susan Mayer, for example, found that even after controlling for socioeconomic status and family background, tenth-grade students in affluent high schools were less likely to drop out than those who attended poor schools, and that tenth-grade girls in wealthier schools were less likely to have a child than their counterparts in poor schools.<sup>214</sup> Her study also found that white students in predominantly black schools were more likely to drop out and have a child than whites in predominantly white schools.<sup>215</sup>

In sum, the research indicates that “one of the most effective ways to improve children’s cognitive skills is to put them in an environment with other children who want to acquire cognitive skills and whose families support such learning.”<sup>216</sup> More precisely, and perhaps more importantly, the research also consistently shows that “[c]hildren of low socioeconomic status appear[] to benefit significantly from exposure to more affluent and more highly motivated peers.”<sup>217</sup>

Advocates of desegregation have always been wary, justifiably, of implying that black students need to attend school with white students in order to improve their education, and critics of desegregation, particularly from the far left, often attempt to ascribe such a motivation to those promoting desegregation.<sup>218</sup> While black students need not sit next to white

213. *See id.* at 118.

214. *See* Susan E. Mayer, *How Much Does a High School’s Racial and Socioeconomic Mix Affect Graduation and Teenage Fertility Rates?*, in *THE URBAN UNDERCLASS* 321, 327 (Christopher Jencks & Paul E. Peterson eds., 1991) (presenting data showing “that students who attend high-SES schools are less likely to drop out and less likely to have a child than students of the same race and socioeconomic background who attend lower-SES schools”).

215. *See id.* at 334; *see also* WELLS & CRAIN, *supra* note 12, at 340 (noting that “much of the research now suggests that African-American students who attend desegregated schools are less likely to drop out of school, get pregnant, or get into trouble with the law than those from segregated schools”).

216. Richard J. Murnane, *Evidence, Analysis, and Unanswered Questions*, 51 *HARV. EDUC. REV.* 483, 486 (1981).

217. YUDOF ET AL., *supra* note 40, at 597. Significantly, David Armor, who is largely pessimistic about the academic benefits of desegregation, does not directly dispute the evidence regarding the effect of socioeconomic integration. In *Forced Justice*, he finesses the question and unfortunately never confronts it directly. He asserts, for example, that “sometimes achievement is higher in desegregated schools and sometimes it is lower, but in most cases the differences in achievement between desegregated and segregated schools are small *once socioeconomic differences are taken into account.*” ARMOR, *supra* note 22, at 113 (emphasis added). Although Armor unfortunately does not elaborate, the italicized caveat suggests that socioeconomic differences among schools are consistent with large achievement differences.

218. *See, e.g.*, Brown, *supra* note 5, at 6, 68-69; Brown, *supra* note 16, at 816-17 (arguing that the Supreme Court justified desegregation “as a means to remedy the cognitive, psychological, educational, and emotional harm inflicted by segregation on African-Americans; which is to say, it is a means to remedy a perceived deficit condition of African-Americans,” and, more directly, that the Supreme Court orders to desegregate rested on a “notion of African-

ones in order to learn, the social science evidence strongly suggests that a poor student will benefit from sitting in a classroom of middle-class students.<sup>219</sup> Because of the racial dimensions of poverty, a by-product of racial integration is often (or certainly can be) socioeconomic integration. To the extent there is truth to the “oppositional culture” thesis, moreover, it may be especially productive to break up schools dominated by poor minority students that reside in urban ghettos and integrate those students into schools with more advantaged peers. This is not meant to imply any inherent inferiority of black students but rather to confront the substantiated fact that poor black students have benefited from integration in middle-class schools, most of which happen to be primarily white. If one is honestly to assess integration as an educational strategy, and to compare it to alternatives like increased funding for single-race or predominantly minority schools, this evidence must be addressed despite its ability to cause discomfort.

## 2. Long-Term Benefits

A fairly recent and still-growing body of research consistently shows strong long-term benefits of desegregation. This evidence has largely been ignored in policy and court debates. As Wells and Crain explain, the research regarding the long-term effects of desegregation was preceded by studies that examined only the short-term impact of desegregation, typically measured by performance on standardized test scores, and this older research showed mixed results.<sup>220</sup> The relative recency of the new evidence, combined with the mixed evidence regarding the short-term effects of desegregation, may explain why the more recent evidence has been largely ignored in policy and court debates: By the time studies examining the

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American inferiority”). The critics do not always come from the left. *See, e.g., Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring).

219. *See supra* notes 205-218 and accompanying text.

220. *See WELLS & CRAIN, supra* note 12, at 340. These studies also suffered from methodological shortcomings that render a significant number of them unreliable. *See Schofield, supra* note 204. As Schofield explains, most studies did not take into account the degree of classroom segregation within desegregated schools (through the use of tracking and ability grouping, enrollment in special education classes, or simply self-separation), which obviously makes it difficult to assess the extent to which students in these studies actually experienced interracial contact. *See id.* at 598. Second, desegregation programs varied a great deal in how they were implemented (and still do), and these variations influenced the effect of the program on the students; yet most studies, particularly large-scale ones that examined a wide range of schools, did not pay attention to these variations. *See id.* Third, because of pressure to complete their work quickly, and because of a dearth of funds, most researchers conducted cross-sectional studies that compared a group of students in a desegregated school with a group in a segregated school over a relatively short time period—sometimes a single academic year. *See id.* Finally, desegregation studies, regardless of type, will often suffer from self-selection problems at both the school and individual level. As Schofield explains, the schools or families that agreed to participate in a desegregation study likely differed in relevant ways from those that refused. *See id.*

long-term benefits of desegregation were published, desegregation had been deemed a failure in many places.<sup>221</sup> The premature conclusion that desegregation is futile or counterproductive appears not only myopic from an academic perspective, but practically quite unfortunate when one recalls that an original goal of school desegregation was to break the cycle of poverty and racial isolation that has traditionally burdened blacks.<sup>222</sup>

The research is now showing, just as desegregation plans are being dismantled, that racial integration is fairly successful in meeting that goal and in improving the "life chances" of minority students. Empirical evidence indicates that blacks who graduate from desegregated schools are more likely than those who graduate from segregated schools to attend both two- and four-year colleges.<sup>223</sup> There is also some evidence that they are more likely, while in college, to receive higher grades.<sup>224</sup> And they are more likely to graduate from college and go on to earn higher incomes than minority students who graduate from segregated schools.<sup>225</sup>

Attending a desegregated school also appears to improve students' chances for greater integration in later life, both in employment and in housing. Researchers in the field have found evidence to support what they have dubbed the "perpetuation theory," a theory that consists chiefly of the intuitive notion that minorities who have not experienced desegregation will themselves perpetuate racial segregation.<sup>226</sup> Research indicates, for

221. See WELLS & CRAIN, *supra* note 12, at 339-40.

222. See TUSHNET, *supra* note 17, at 6, 26-28; Carter, *supra* note 24, at 885.

223. See, e.g., ROBERT L. CRAIN ET AL., RAND CORP. REPORT NO. R-3243-NIE, FINDING NICHES: DESEGREGATED STUDENTS SIXTEEN YEARS LATER 24, 51 (1985); Jomills Braddock & James McPartland, *The Social and Academic Consequences of School Desegregation*, EQUITY & CHOICE, Feb. 1988, at 5, 8-9. See generally Liebman, *supra* note 24, at 1624-30 (discussing empirical evidence).

224. The research on this point is rather thin, but not contradictory, as far as I can tell. See Crain & Mahard, *supra* note 207, at 98-99.

225. See CRAIN ET AL., *supra* note 223, at 11-12, 51 (finding that black males who attended desegregated public schools were 1.5 to 2 times as likely to complete college as those who attended segregated public schools); Liebman, *supra* note 24, at 1626 & n.681 (collecting sources indicating that blacks who attend desegregated schools "appear to receive higher average salaries as adults" than do blacks who attend segregated schools); see also Schofield, *supra* note 204, at 607 (reviewing studies and concluding that, although the evidence is sparse and influenced by region and gender, "attendance at desegregated schools appears to have some positive impact on the kind of jobs African Americans get as well as on the amount and type of college education they undertake"). Professor Liebman presents the evidence in its strongest light:

[I]mproving achievement test scores is the *least* clear of desegregation's beneficial consequences. More certain is desegregation's positive impact on dropout, teenage pregnancy, and delinquency rates; on the likelihood that blacks will attend and succeed at college (particularly four-year colleges), secure employment in predominantly white job settings, and live in integrated neighborhoods as adults; and on the salary levels blacks attain in the labor market.

Liebman, *supra* note 13, at 356-57. See generally Joondeph, *supra* note 64, at 191-94 (reviewing empirical evidence regarding the effects of desegregation on academic achievement, unemployment opportunities, and social relations).

226. Jomills Braddock and James McPartland did some of the earliest theoretical and empirical work on the subject. See Jomills H. Braddock II, *The Perpetuation of Segregation*

example, that African Americans who have not regularly experienced desegregated settings tend to overestimate the hostility that will greet them in integrated settings and to underestimate their ability to cope in integrated settings; they also tend to lack access, knowledge, and informal ties that would lead them to integrated work or housing environments.<sup>227</sup> As a result, African Americans tend to make choices in later life, such as where to live or work, that perpetuate their physical segregation from whites, a condition amply demonstrated by the figures on residential segregation discussed above.

There is some evidence that school desegregation interrupts this self-perpetuating cycle. It appears from studies conducted on this topic that students—both black and white—who graduate from desegregated schools are more likely to live in integrated neighborhoods and work in integrated environments as adults.<sup>228</sup> They are also more likely to have interracial friendships and to have children who attend desegregated schools.<sup>229</sup> As Braddock and McPartland report, studies have shown without exception that “desegregation of schools leads to desegregation in later life—in college, in social situations, and on the job.”<sup>230</sup> Even David Armor, one of

*Across Levels of Education: A Behavioral Assessment of the Contact-Hypothesis*, 53 SOC. OF EDUC. 178 (1980); Jomills Henry Braddock & James M. McPartland, *Assessing School Desegregation Effects: New Directions in Research*, in RESEARCH IN SOCIOLOGY OF EDUCATION AND SOCIALIZATION 259, 272 (Alan C. Kerckhoff & Ronald G. Corwin eds., 1982). Not surprisingly, the same tendency appears to exist among whites. See, e.g., Schofield, *supra* note 204, at 610.

227. See Braddock, *supra* note 226, at 181; Mark Granovetter, *The Micro-Structure of School Desegregation*, in SCHOOL DESEGREGATION RESEARCH: NEW DIRECTIONS: INSTITUTIONAL ANALYSIS 81, 102-03 (Jeffrey Prager et al. eds., 1986) (demonstrating the importance of acquaintances and classmates—or “weak ties”—in the transmission of employment information and in creating employment opportunities); see also WELLS & CRAIN, *supra* note 12, at 340-42; Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531 (1994).

228. See, e.g., WELLS & CRAIN, *supra* note 12, at 551; Braddock, *supra* note 226, at 185; Liebman, *supra* note 24, at 1627 (collecting sources); Liebman, *supra* note 13, at 357 n.40.

229. See, e.g., ROBERT CRAIN ET AL., A LONGITUDINAL STUDY OF A METROPOLITAN VOLUNTARY SCHOOL DESEGREGATION PLAN 51 (1984) (finding that black students assigned to integrated suburban schools rather than segregated schools were less likely to drop out of high school or college, feel discriminated against in college, have a child before 18, or get into trouble with the police, and that they were more likely to live in integrated neighborhoods and have white friends); Braddock & McPartland, *supra* note 223, at 8-10, 63; see also *Social Science Statement*, *supra* note 147, at 13a & n.22 (collecting additional sources); Joondeph, *supra* note 64, at 194 n.178 (collecting sources). But see ARMOR, *supra* note 22, at 108-11 (arguing that the Crain study is inconclusive because many students left suburban Hartford schools to return to urban schools).

230. Jomills Braddock et al., *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, 66 PHI DELTA KAPPAN 259, 260 (1984); see also CRAIN ET AL., *supra* note 223, at 24, 51; Willis D. Hawley & Mark A. Smylie, *The Contribution of School Desegregation to Academic Achievement and Racial Integration*, in ELIMINATING RACISM: PROFILES IN CONTROVERSY 281, 290 (Phyllis A. Katz & Dalmis A. Taylor eds., 1988) (arguing that school desegregation integrates more effectively than fair housing or fair employment programs); H.N. Hirsch, *The Threnody of Liberalism: Constitutional Liberty and the Renewal of Community*, 14 POL. THEORY 423, 443 n.96 (1986) (citing empirical literature documenting that exposure to previously excluded persons, over time, will lead to acceptance and inclusion).

the staunchest academic critics of mandatory desegregation plans, concedes that “the research on long-term outcomes offers the strongest argument for desegregated schools,” acknowledging that “[s]ome national studies show that minority students who attended desegregated schools are more likely to live and work in desegregated environments as adults.”<sup>231</sup> And Janet Schofield observes in the most recent major review of desegregation studies that the few studies that “bear on this point . . . suggest that in the long run desegregation may help break a cycle of racial isolation in which both minority- and majority-group members avoid each other even though this limits their educational, occupational, social, and residential choices.”<sup>232</sup>

These findings gain additional salience in light of the evidence, discussed above, regarding the obstacles to social and economic mobility created by residential segregation. Oddly, school desegregation is rarely identified as a potentially productive approach to overcoming residential segregation and racial isolation. For example, Massey and Denton, like William Julius Wilson before and after them, present a powerful case for the proposition that residential segregation cuts off minorities from the opportunities and networks of white middle-class society, while simultaneously concentrating the deleterious conditions that accompany intense poverty.<sup>233</sup> Massey and Denton even go so far as to propose several specific policy reforms, all of which involve tinkering with fair housing laws, but none of which concerns school desegregation.<sup>234</sup>

Similarly, there is a burgeoning literature on “metropolitanism” that focuses on the costs of fracturing metropolitan areas into central cities and surrounding suburbs.<sup>235</sup> Contributors to this literature typically envision the

231. ARMOR, *supra* note 22, at 113. Armor nonetheless notes that caution is in order in interpreting the studies because it is unclear whether school desegregation or preferences are responsible for the results. As he notes, the studies do not distinguish between students who attended schools that were desegregated as a result of residential desegregation and those that were desegregated as a result of school desegregation; for the former, it is plausible to conclude that the results shown in the studies “might simply be a family preference for desegregated environments being passed on from one generation to the next.” *Id.* Although Armor is correct to point out this weakness in the studies, given the intense degree of residential segregation and the fact (acknowledged by Armor) that school districts with desegregation plans experienced more integration than those without, it is highly unlikely that the results can be explained solely or even primarily by residential integration and passed-on preferences.

232. Schofield, *supra* note 204, at 610.

233. See MASSEY & DENTON, *supra* note 2; WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR (1996).

234. See MASSEY & DENTON, *supra* note 2, at 229-236. Similarly, Professor Roisman criticizes Massey and Denton’s recommendations for not going far enough to address the systemic and structural problems identified by their analysis, and she offers additional reforms designed to be more comprehensive and aggressive. See Roisman, *supra* note 114, at 512-25. Like Massey and Denton, however, Professor Roisman fails to consider school desegregation as part of her otherwise more comprehensive proposal.

235. See, e.g., DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA (1995); NEAL B. PEIRCE, CITISTATES (1993); DAVID RUSK, CITIES WITHOUT SUBURBS (1993); WEIHER, *supra* note 113; Frug, *supra* note 152.

reorganization of local governments, either through the creation of metropolitan-wide governments<sup>236</sup> or through the creation of inter-city negotiating sessions where cities and suburbs would bargain over the costs of providing services like police and fire protection and public schools.<sup>237</sup> Noticeably absent from this literature are feasible and specific suggestions as to how one might persuade or even force the suburbs—and their representatives in the state legislature—either to dissolve completely or to engage in a bargaining process that seems primarily designed to redistribute funds from the suburbs to the cities and to open up suburban schools to urban students.<sup>238</sup>

More precisely, as Professor Zelinsky pointed out in a review of three recent works in the field, the shared vision of many of these commentators “is of local government without local politics—or at least without local politics as we know it today.”<sup>239</sup> Those favoring the alteration of existing land-use policies have had little success in the past, in the courts or the legislature, in convincing the American public to integrate its suburbs.<sup>240</sup> Zelinsky is persuasive in asserting that “until the battle for public opinion is won, it is unlikely that any structural innovation, like the establishment of metropolitan government or litigation-based remedies, will achieve by fiat what cannot be accomplished by politics.”<sup>241</sup> The issue thus seems to be not the structure of municipal government, but “the preferences of the American people.”<sup>242</sup>

236. See, e.g., PEIRCE, *supra* note 235, at x-xi; RUSK, *supra* note 235, at 10-35.

237. See Frug, *supra* note 152, at 42-45; see also Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1104-07 (1996) (suggesting that cities in metropolitan areas should negotiate with neighboring localities in order to build communities and address the area's problems).

238. See, e.g., Frug, *supra* note 152, at 58. Professor Frug offers a proposal that rejects the current school-districting rules and “installs in their place a system that makes both educational resources and students the responsibility of the region as a whole.” *Id.* Regardless of one's sympathy for or antipathy toward Professor Frug's end goal, it is difficult to discern just how that goal will be reached, especially given his explicit rejection of reliance “on government orders and court mandates.” *Id.*

239. Edward A. Zelinsky, *Metropolitanism, Progressivism, and Race*, 98 COLUM. L. REV. 665, 667 (1998) (reviewing KIRP ET AL., *supra* note 235; PEIRCE, *supra* note 235; RUSK, *supra* note 235).

240. The Mount Laurel litigation, the subject of KIRP ET AL., *supra* note 235, is the most famous attempt to use the courts to force suburbs to include low-income housing opportunities. See *Hills Dev. Co. v. Township of Bernards*, 510 A.2d 621 (N.J. 1986); *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983); *Southern Burlington NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975). As Kirp and his co-authors describe, although the New Jersey Supreme Court was originally quite aggressive in attempting to force suburban towns to provide low- and moderate-income housing, it eventually retreated and upheld fair housing legislation that grants suburban towns a number of ways to avoid their supposed obligation to zone for low-income housing. See KIRP ET AL., *supra* note 235, at 90, 137, 157, 159; see also Zelinsky, *supra* note 239, at 687-88 (describing the Mount Laurel litigation and its aftermath and noting that the most revealing fact from the Kirp study may be that there is no low-income housing in Mount Laurel today).

241. Zelinsky, *supra* note 239, at 667.

242. *Id.* at 668.

To the extent that Zelinsky is correct, the long-term benefits of school desegregation deserve to be considered in approaches to increasing metropolitan integration. Whether residential segregation is caused by socioeconomics, preferences, discrimination, or a combination of all three, the long-term studies of school desegregation suggest that it may be a productive if slow-going response. School integration appears to increase the “life chances” of minorities and their prospect of attaining higher socioeconomic status, which should reduce the role that socioeconomics plays in causing residential segregation. School integration also appears to make minority students (and their white counterparts) more comfortable in integrated settings, which undoubtedly reshapes preferences and likely assists in diminishing discrimination. Indeed, school integration and residential integration have the potential for creating a self-perpetuating cycle of integration rather than segregation.<sup>243</sup> To be sure, the process may be long, and school integration is unlikely to be a panacea for residential segregation.<sup>244</sup> But school integration seems to be a more realistic prospect than simply hoping that cities—without doing anything in particular—can persuade suburbs to open their borders.

I suggested above that the academic benefits of integration flow largely along class lines and that mixing students of different economic

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243. See, e.g., Schofield, *supra* note 204, at 610 (reviewing studies and opinion surveys indicating that desegregated school experiences can alter attitudes of whites and blacks toward members of the other group, and indicating in particular that “[w]hites in desegregated schools frequently show a decrease in their often initially high levels of fear and avoidance of African Americans, and an increasing willingness and ability to work with them”). For discussion of literature suggesting that experiences shape preferences and specifically that “[p]rivate preferences often do adjust to limitations in current practices and opportunities,” see Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2420 (1994). See also Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 758-61 (1991) (same).

244. Some evidence indicates that increased levels of school integration lead to decreased amounts of residential segregation and that metropolitan-wide desegregation plans reduce housing segregation in the metropolitan area more than city-only plans. See Diana Pearce, *Breaking Down Barriers: New Evidence on the Impact of Metropolitan School Desegregation on Housing Patterns*, Report to the National Institute of Education, Washington, D.C. (Nov. 1980) (pairing seven cities, and finding that cities involved in metropolitan-wide desegregation plans experience more housing desegregation than those involved in city-only plans); Diana Pearce et al., *Lessons Not Lost: The Effect of School Desegregation on the Rate of Residential Segregation in Large Central Cities*, Paper Presented to the Center for National Policy Review, Washington, D.C. (1984) (examining the 25 largest cities with black populations over 100,000 in 1980 and finding a substantial correlation between a reduction in school segregation and a reduction in central-city housing segregation). These two studies have been criticized on methodological grounds by Armor and Rossell. See ARMOR, *supra* note 22, at 149-51; Christine H. Rossell, *Does School Desegregation Policy Stimulate Residential Integration? A Critique of the Research*, 21 URB. EDUC. 403, 404-15 (1987). Armor, for example, points out that the more recent study only computes the dissimilarity index for black versus nonblack and thus does not calculate the impact of increased numbers of Hispanics and Asians in central cities. See ARMOR, *supra* note 22, at 149. He also observes that examining only the segregation indices for central cities ignores white flight to the suburbs, see *id.* at 149-50, although the 1980 Pearce study seems to meet that criticism by showing that metropolitan-wide desegregation plans are associated with greater housing desegregation than city-only plans.

backgrounds appears to be more influential on academic achievement than simply mixing students of different races. Over the long run, however, there appear to be benefits from integration that flow along racial lines and are of singular importance to African-American students. African-American students, much more often than poor students of other races and ethnic backgrounds, are trapped in an intergenerational cycle of isolation and poverty.<sup>245</sup> School integration seems to offer the promise of breaking this cycle in a way that has not been documented with regard to other reform efforts, such as increased school expenditures. In addition, social integration in schools has the potential to increase racial understanding and tolerance, which school finance reform cannot address and which would obviously benefit white as well as black students. This is not to say, of course, that racial integration will always be successful. But when it is successful, racial integration appears to offer important benefits that are not easily replicated by other policies, including school finance reform.<sup>246</sup>

### B. *Two Strategies for Increasing Integration*

To those who are persuaded that continued segregation in schools by race and income creates obstacles that money will not overcome, and that seeking ways to increase racial and socioeconomic integration is an important endeavor, the question obviously becomes: What can be done? I suggest two possible approaches that are not intended to exhaust the field. The first is to reorient school “finance” cases to seek racial and socioeconomic integration as a remedy for the deprivation of a constitutionally guaranteed adequate or equal education. The second is to take advantage of the current popularity of school choice and to make a concerted effort to structure school choice programs in ways that will best ensure that disadvantaged students benefit from choice plans.

#### 1. *Creating a Fourth Wave of School Finance Litigation*

School finance cases, not surprisingly, have concentrated primarily on money. In the first two waves of school finance litigation, plaintiffs and courts focused on equal protection and education clauses in arguing or concluding that students possess a right to equal educational opportunities. In the third wave, the focus has generally narrowed to education clauses,

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245. See MASSEY & DENTON, *supra* note 2, at 130-47.

246. The success of racial integration in altering life chances and improving race relations depends, of course, on how the integration plan is implemented. See, e.g., *Social Science Statement*, *supra* note 147, at 14a-21a.

and the right asserted is typically one to an adequate education.<sup>247</sup> Despite a change in legal theories, the remedy sought in school finance cases has remained more or less the same over time: to increase spending in the plaintiff districts and all others similarly situated. There is no reason, however, why the rights recognized in these cases must be defined solely in monetary terms, nor why the remedy for their violation must be limited to funding.

As I have explained at length elsewhere, the key to discovering alternative approaches lies in the fact that the right to an adequate or equal education is an affirmative right. These rights obligate the state to provide a constitutionally sufficient education to all students.<sup>248</sup> If courts are going to enforce such a right, as a significant number of state courts are currently doing, they necessarily must articulate or embrace some definition of an equal or an adequate education. Up until now, courts have embraced the plaintiffs' definition of the constitutional right and have generally equated sufficient funding with a constitutional school system. Providing adequate or equal funding may be one way for a state to fulfill its affirmative duty, but it is surely not the only way.

Indeed, the evidence regarding the inefficacy of increased expenditures suggests that providing additional resources may not even be a particularly effective way for the state to remedy unequal or inadequate schooling. Given the research canvassed above, a more effective approach may entail ensuring that poorer students have access to more advantaged peers. Thus, instead of arguing for equalized or adequate resources, school "finance" plaintiffs should consider arguing for socioeconomic or racial integration, or both. Relying on the social science evidence that demonstrates the short- and long-term benefits of socioeconomic and racial integration, plaintiffs should be able to formulate an argument that racial and socioeconomic integration are necessary components of a student's constitutional right to an equal or adequate education.<sup>249</sup>

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247. As mentioned above, the classification of school finance cases into waves vastly oversimplifies the cases, both by eliding decisions, like New Jersey's or Kentucky's, that straddle the equality/adequacy approach and by ignoring the fact that the chronological progression has not been without exceptions. For example, one of the most recent school finance decisions, from Vermont, explicitly recognized the right to an equal education. *See* *Brigham v. State*, 692 A.2d 384 (Vt. 1997). For my purposes here, however, the wave categorization is sufficient to distinguish different approaches to school finance cases, and, especially, to distinguish the approach I suggest from earlier ones. In a nutshell, the first three waves, while resting on different legal theories, have all sought remedies focusing on the distribution of resources. The fourth wave that I propose would focus on the distribution of students.

248. *See* Ryan, *supra* note 16, at 546-47.

249. For an extended discussion of how these claims could be formulated, as well as possible objections to them, see *id.* at 553-60. One potentially insuperable obstacle to a state court decision ordering racial integration should be noted here. It is possible that the Supreme Court would hold unconstitutional voluntary efforts by states to increase racial integration. *See id.* at 559-60. At the

This is precisely the argument that the plaintiffs made in *Sheff*. The Connecticut Supreme Court ruled in favor of the plaintiffs, but the court rested its decision on a segregation clause in the state constitution and held that the clause bars de facto school segregation. Because only two other states—Hawaii and New Jersey—have such clauses, the general consensus seems to be that the Connecticut case will and must remain unique.<sup>250</sup> But it need not remain so, for the simple reason that the affirmative right to an adequate or equal education is broad enough to encompass racial and socioeconomic integration. To be sure, the social science evidence regarding the educational benefits of racial and socioeconomic integration is not unequivocal, but neither is the evidence regarding the benefits of increased expenditures. In fact, the evidence regarding the former is much stronger. If courts have been willing to conclude that adequate or equal resources have a sufficient connection to the quality of education a student receives and thus to order increased funding as a remedy in school finance cases, there is little logical reason to disregard the evidence establishing the connection between the type of students in a school and the quality of education that takes place there.

Logical arguments, of course, do not necessarily win cases. To some, this suggestion may seem naïve or even dangerous, insofar as it raises the specter of forced integration. I do not harbor the illusion that courts would rush to embrace this theory, and I recognize at the outset that it could succeed only in states (eighteen so far) whose courts are willing to recognize a constitutional right to an equal or adequate education. I also do not expect that courts would be willing to enforce mandatory busing, nor do I think that plaintiffs would be wise to request such relief.

But eighteen state supreme courts have already demonstrated a commitment to enforcing the right to an equal or adequate education and to requiring that educational resources within states be redistributed. In addition, alternative remedies, such as the creation of magnet schools to draw suburban students into urban districts and the creation of interdistrict choice plans, could achieve a fair degree of racial and socioeconomic integration without the coercive and politically unpalatable effects of forced busing.<sup>251</sup> Given the demonstrated willingness of a significant number of state courts to force their respective legislatures to redistribute their resources, despite the controversy generated by such decisions, it does not seem entirely implausible to think that a state court might be willing to order states to create incentives for increased integration. In fact, it seems a sufficiently plausible outcome that school finance advocates, frustrated with

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moment, the constitutionality of using race voluntarily (that is, not as a part of a remedy for prior segregation) in assigning elementary and secondary students is an open question. *See id.*

250. *See id.* at 546.

251. *See ARMOR, supra* note 22, at 226-31; *ORFIELD ET AL., supra* note 22, at 194, 354-55.

the results of “successful” school finance litigation, should consider this approach.

## 2. *Shaping School Choice*

Another option to consider is school choice. School choice is surely the most hotly debated topic in school reform at the moment. It is also increasingly popular, and support for school choice in general has grown beyond a core constituency of free-market conservatives and religious groups. While many civil rights groups, including the NAACP Legal Defense Fund, remain opposed to school choice, polls indicate that a majority of African-American parents support it, as do a number of prominent African-American leaders.<sup>252</sup>

Until this point, the debate about school choice has typically revolved around the advisability of adopting voucher programs for private schools. Proponents and foes have argued as to whether such programs would violate federal and state constitutional provisions prohibiting the establishment of religion; whether they would improve all schools through the introduction of competition or would merely siphon off the best students and leave some schools worse off than they are now; and whether such programs would increase or ameliorate the existing stratification by race and income found in schools in most metropolitan areas.<sup>253</sup> Although

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252. See James Brooke, *Minorities Flock to Cause of Vouchers for Schools*, N.Y. TIMES, Dec. 27, 1997, at A1 (reporting survey results indicating that 72% of black parents polled supported school vouchers while the general public split 48% to 48%). At the same time, the NAACP has joined with People for the American Way to oppose vouchers. See Kweisi Mfume & Carole Shields, *A Partnership for Public Education* (visited Feb. 22, 1999) <<http://www.everychildcounts.org/page0.shtml>>.

253. For concise but thorough discussions of the various arguments for and against school choice, see Michael Heise, *Assessing the Efficacy of School Desegregation*, 46 SYRACUSE L. REV. 1093, 1104-09 (1996); Stephen D. Sugarman, *Using Private Schools To Promote Public Values: The Redesign of Urban Education*, 1991 U. CHI. LEGAL F. 171; see also Diane Ravitch, *Somebody's Children: Educational Opportunities for All*, in NEW SCHOOLS FOR A NEW CENTURY 251 (Diane Ravitch & Joseph P. Viteritti eds., 1997). One of the most important issues, of course, is whether vouchers for religious schools run afoul of religion clauses in state and federal constitutions. As of this writing, five state supreme courts and one federal appeals court have ruled on school choice programs that allow vouchers or tax credits to be used for covering or subsidizing the costs of religious schools. The courts have split in their results. Three state supreme courts have ruled that vouchers or tax credits can be applied to tuition at private religious schools without violating state or federal religion clauses. See *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (ruling that providing tax credits to subsidize tuition at private religious schools does not violate the religion clauses of the state or federal constitutions); *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999) (ruling that allowing vouchers to be used at private religious schools does not violate the religion clauses of the state or federal constitutions); *Jackson v. Benson*, 578 N.W. 2d 602 (Wis. 1998) (same), *cert. denied*, 119 S. Ct. 466 (1998). Two state supreme courts and a federal court of appeals have reached the contrary conclusion. See *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999) (holding that allowing parents to use vouchers at religious schools would violate the Establishment Clause of the federal Constitution); *Bagley v. Raymond Sch. Dep't.*, 728 A.2d

the participants often speak with absolute certainty about the impact of vouchers, much of this debate is necessarily theoretical, as there are relatively few existing voucher programs and there are countless ways to structure such programs. Much of the debate also ignores other types of choice programs, including public-school choice and charter schools, which at the moment are more in use than voucher programs and which present different possibilities and challenges than do private-school vouchers.

Rather than canvas all of the issues raised by various choice proposals, which is beyond the scope of this Article, I would like to make three points in favor of considering choice programs—both public and private—as a means of improving the educational opportunities for disadvantaged students, especially disadvantaged minority students. The first is one of practical necessity: The lack of choice for students from poor neighborhoods means that those students will be attending neighborhood schools that are filled predominantly with impoverished students. Unless and until there is greater residential integration, which does not seem to be happening with much rapidity,<sup>254</sup> the only hope for achieving greater racial and socioeconomic integration within schools is to allow students in neighborhoods isolated by race and income to attend diverse private schools<sup>255</sup> or public schools outside of their neighborhoods.<sup>256</sup> Similarly, it

127, 136-46 (Me. 1999) (same); *Chittenden Town Sch. Dist. v. Department of Educ.*, No. 97-275, 1999 WL 378244 (Vt. June 11, 1999) (same).

The United States Supreme Court has yet to rule on the issue, although it is likely that it will do so in the near future, given the split among courts and the importance of the question. Commentators are divided in their predictions of how the Court will resolve the issue, but there seems to be more support for the prediction that the Court will uphold the use of vouchers at religious schools. *See, e.g.*, LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-10, at 1223 (2d ed. 1988) (suggesting that the Court's recent Establishment Clause decisions indicate that "the Court would uphold an educational voucher scheme that would permit parents to decide which schools, public or private, their children should attend"); Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CAL. L. REV. 5, 13 (1987) (same); Michael W. McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 U. CHI. LEGAL F. 123, 143-47 (same); Joseph Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 661 (1998) (same). *But see* David Futterman, *School Choice and the Religion Clauses: The Law and Politics of Public Aid to Private Parochial Schools*, 81 GEO. L.J. 711, 732 (1993) (concluding that using tuition vouchers at religious schools is fundamentally at odds with the Establishment Clause); Harlan A. Loeb & Debbie N. Kaminer, *God, Money and Schools: Voucher Programs Impugn the Separation of Church and State*, 30 J. MARSHALL L. REV. 1, 37 (1996) (same). How the Court resolves the issue is quite important for the future of voucher programs, both because most private schools (80%) are sectarian and because Catholic schools are the only private schools that have demonstrated consistently an ability to produce strong results among disadvantaged students for a relatively low tuition. *See* CENTER FOR THE FUTURE OF CHILDREN, *supra* note 207, at 140.

254. *See* Farley & Frey, *supra* note 121, at 39.

255. By "diverse" I simply mean private schools that are not composed primarily of poor minority students.

256. I am certainly not the first to recognize this point. Paul Gewirtz, in an article in which he otherwise opposed the use of school choice as a substitute for mandatory desegregation, recognized that interdistrict choice may be the only way to achieve interracial contact in many

seems unlikely that many suburbanites who cannot afford private schools will move back to cities if their children must attend poor-performing city schools. Magnet schools have shown some ability to attract suburban students to city schools,<sup>257</sup> and it is reasonable to expect that vouchers for private schools would attract even more. In short, if one believes that urban schools are unlikely to overcome the obstacles created by concentrated poverty and racial isolation, the only alternative is to break apart those schools and allow students the opportunity to go elsewhere.<sup>258</sup>

The second point is that whether choice programs work to the benefit or detriment of disadvantaged students will depend entirely upon how they are structured. Much of the conversation about school choice is short on details and long on predictions about how choice in general is either a "panacea" for or an unmitigated threat to education in the United States.<sup>259</sup> Debating choice in the abstract, however, is about as productive as a single person with no current prospects for marriage debating whether marriage would improve his or her life. In school choice, as in marriage, the details will make all the difference. A voucher program, for example, that is limited to low-income students, provides each student \$6500 and covers full transportation costs, requires participating schools to accept students by lottery, aggressively disseminates information about schools to parents and assists them in choosing schools, ensures that public schools that lose students retain sufficient resources to provide an adequate education, and requires suburban schools to accept students if space allows will surely have a decent chance of improving the educational opportunities of students currently attending inner-city schools. By contrast, a plan that provides all students a \$1000 voucher that can be used only at urban private schools,

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metropolitan areas. See Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 778-79 (1986).

257. See WELLS & CRAIN, *supra* note 12, at 146; Rossell & Armor, *supra* note 150, at 296-99.

258. Allowing school choice does not guarantee, of course, that all parents will choose better schools or schools outside of their own neighborhoods. Allowing school choice, however, will surely result in some parents' choosing different and better schools for their children, as the choice programs in St. Louis and East Harlem demonstrate. See generally CHUBB & MOE, *supra* note 167, at 212-15 (discussing the East Harlem intra-district school choice plan); WELLS & CRAIN, *supra* note 12, at 180-218 (discussing black city students who choose to attend suburban schools). In addition, efforts can be made to provide information to parents regarding the choices available, as occurs in East Harlem and Cambridge. See CHUBB & MOE, *supra* note 167, at 210-15. Finally, efforts can also be made to provide incentives to encourage parents to choose integrated schools. See, e.g., ARMOR, *supra* note 22, at 228-31. Armor proposes what he calls an "equity-choice" plan, which would entail devoting additional resources to city schools to convert them into magnet schools, allowing parents to choose any school within a largely defined geographical area and giving priority and transportation subsidies to transfers that improve the racial balance at the sending or receiving schools. See *id.*

259. Compare CHUBB & MOE, *supra* note 167, at 217 (arguing that "reformers would do well to entertain the notion that choice is a panacea"), with Mfume & Shields, *supra* note 252 (arguing that vouchers will pose an enormous threat to public education), and Liebman, *supra* note 167, at 277-93 (same).

does not provide for transportation, provides little assistance and information to parents, and allows schools to use whatever criteria they choose to select students will probably not do much to help disadvantaged students and may cause some harm, insofar as the vouchers would mostly siphon off families that could afford to supplement them and that are savvy and motivated enough to select a good private school.

In short, both sides in the school choice debate are surely exaggerating when they claim that the mere adoption of a choice plan, regardless of its content, will benefit or harm students. My immediate concern, however, is with the opponents of school choice, and my argument is simply that it is incorrect to assume that no school choice plan could improve the opportunities available to a substantial number of disadvantaged students. If my first point is correct, and introducing some element of choice is necessary to improve the opportunities available to students in failing schools, then those interested in assisting disadvantaged students would do well to descend from the ethereal realm of school choice generalizations and to start considering and debating what a choice plan should look like.

The third point is related to the second: The growing popularity of school choice, combined with the fact that the specific details of choice plans remain to be formulated, provides an excellent opportunity to shape the content of such plans. A good portion of the opposition to school choice undoubtedly stems from the belief that choice plans, regardless of their theoretical potential to assist disadvantaged students, will be structured in a way that will help middle-class students escape failing public schools while leaving disadvantaged students to wallow in either the same schools or equally poor private schools.<sup>260</sup> The current political climate, however, seems conducive to producing bargains that will help ensure that disadvantaged students are not ignored in choice plans. Those who support school choice for economic, ideological, or religious reasons do not seem sufficiently numerous to secure its adoption; they need allies, who will obviously be in a position to influence how the plans are designed.

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260. The fear that choice programs will skim off the best students (or students with the most motivated parents) and leave urban schools filled only with the most disadvantaged students looms large in the opposition to school choice. See, e.g., Liebman, *supra* note 167, at 292. Some existing choice programs, including the current voucher plans in Milwaukee and Cleveland, respond to this fear by limiting vouchers to low-income students and by continuing to provide public schools a portion of the funding that exiting students would have brought into those schools. Another possible backstop is the education clauses that have formed the basis for school finance challenges; these clauses could be used (at least in states that have recognized the right to an equal or adequate education) to challenge choice programs that do not ensure that all schools remain at least adequate. See Note, *The Limits of Choice: School Choice Reform and State Constitutional Guarantees of Educational Quality*, 109 HARV. L. REV. 2002 (1996) (arguing that education clauses in state constitutions require the states adopting school choice programs to ensure that all students continue to receive an adequate education). Finally, it is worth considering the possibility that those “left behind” in public schools could actually benefit if the school population and class sizes decrease.

The examples of the only (relatively) large-scale, publicly-funded voucher programs, in Milwaukee and Cleveland, support this hypothesis. In both cities, the voucher programs are limited to low-income students attending inner-city public schools. The reason that these limited programs were adopted, rather than programs that applied outside of urban schools or to all students within urban schools, has to be that political support was sufficient to secure only the limited program. The support of advocates for poor urban students, in turn, appears to have been a critical factor in the creation and adoption of the programs.<sup>261</sup>

Advocates for disadvantaged students, particularly minority students, clearly have reason to be skeptical, if not cynical, about reliance on the political process.<sup>262</sup> But this skepticism should not blind them to opportunities within that process when they arise, particularly when the alternatives are as bleak and unpromising as they appear to be for poor minority students. Taking my three points together, therefore, I would urge those interested in improving the educational opportunities for disadvantaged students to focus on the elements of choice plans that are likely to be most beneficial to those students and to attempt to strike bargains with other groups that support school choice to ensure that those elements are included. Factors that deserve attention surely include, but are not limited to, the amount of the voucher, the mandatory inclusion of suburban public schools as recipients of students, transportation costs, the dissemination of information to parents, assurance that public schools that lose students still have sufficient resources to provide an adequate education, and admissions criteria for public or private schools.<sup>263</sup> All of these facets of school choice will have to be addressed in any choice plan adopted, and if I am right in observing that advocates of disadvantaged

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261. See Emily Van Dunk, *Exploring the Market for School Choice*, EDUC. WK., Sept. 16, 1998, at 39 (describing a coalition of pro-voucher conservatives and African Americans in Milwaukee and Cleveland).

262. This is particularly true with regard to school choice, given its historical connection to attempts by Southern states to avoid desegregation. See, e.g., *Green v. County Sch. Bd.*, 391 U.S. 430 (1968); see also Molly Townes O'Brien, *Private School Vouchers and the Realities of Racial Politics*, 64 TEMP. L. REV. 359, 374-92 (1997) (tracing the political and legal history of the voucher movement and the use of vouchers by Southern legislatures to avoid integration).

263. Of special importance is the inclusion of public suburban schools in choice programs and the provision of some transportation aid. Interdistrict choice plans exist in a number of states, but typically they allow schools to opt out and refuse to accept transfer students. They also often fail to cover transportation costs. See Constance Hawke, *The "Choice" for Urban School Districts: Open Enrollment or Desegregation*, 115 EDUC. LAW. REP. 609, 610 n.6 (1997); Angela G. Smith, *Public School Choice and Open Enrollment: Implications for Education, Desegregation, and Equity*, 74 NEB. L. REV. 255, 273-74 (1995). Massachusetts is a perfect example: Transportation costs are not provided and participation by school districts is voluntary. According to one report, only 25% of all the districts in the state participate in the plan, and none of the suburban districts surrounding Boston participates. See Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 172 (1996) (citing ABIGAIL THERNSTROM, *SCHOOL CHOICE IN MASSACHUSETTS* 67 (1991)).

students seem to be in a strong bargaining position with regard to school choice, these facets can be shaped in a way that will work to the benefit of those students.<sup>264</sup>

## V. CONCLUSION

This Article seeks to buck an historical trend. Education law, policy, and commentary are clearly moving away from integration as a direct goal in education reform and are embracing various methods to improve the resources available and the education provided in racially and socioeconomically isolated schools. I contend that it is too early to abandon concerted efforts to achieve greater integration and to relegate integration to merely a potential by-product of alternative reforms. I also suggest specifically that, as between integration and school finance reform, if one were rationally to choose a strategy for assisting poor minority students, the evidence discussed in this Article points clearly in the direction of integration.<sup>265</sup> School finance reform litigation has not proven, as its advocates had hoped, to be an adequate substitute for school desegregation. Simply put, the evidence suggests that increasing expenditures does not have the same educational punch as integration.

To be sure, there are a number of strong reasons why school finances should be equalized, basic fairness and decency to innocent children not least among them. And those who have pursued this goal appear by all lights to be acting out of a sincere and admirable desire to assist disadvantaged students. Nonetheless, it strikes me as possible that school finance litigation is not simply a poor substitute for desegregation, but also a costly distraction. To the extent that the central problem facing urban minority districts is their racial and economic isolation, school finance reform takes attention and effort away from addressing that problem and creates battles over the funding of those districts. Even if those battles are successful, the districts will remain isolated. Indeed, by defining the problem as one of inadequate funding, school finance advocates may be

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264. For a good example of how school choice plans can be structured in a way that assists disadvantaged students, see JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* 190-211 (1978); and JOHN E. COONS & STEPHEN D. SUGARMAN, *SCHOLARSHIPS FOR CHILDREN* (1992). Coons and Sugarman, it bears mentioning, were early school finance advocates and together with William Clune wrote a classic early work advocating fiscal neutrality (that is, equal funding for equal tax effort) as the principle around which school finance systems should be organized. See COONS ET AL., *supra* note 30, at 201-42.

265. Advocates in Connecticut recognized as much, and this explains why they pursued the *Sheff* case despite earlier school finance litigation that had been successful in increasing expenditures in Hartford. See Ryan, *supra* note 16, at 536-38.

unwittingly legitimizing the de facto segregation of districts by race and income.<sup>266</sup>

What I have left largely unexplored in this Article is the question of political will, namely, whether a sufficient number of suburban parents and legislators can be persuaded to allow urban minority students to share their schools or to share private or public urban schools, and whether an equally sufficient number of minority parents can be persuaded to send their children to integrated suburban or urban schools. My speculation is that they can be, if the case is made correctly and sufficient attention is paid to how integration would occur. To think otherwise is to believe that a majority of parents and legislators have no interest in integration and would oppose any attempt to achieve it, a supposition contradicted by opinion polls and by specific examples of voluntary desegregation programs. In order to make a persuasive case, school finance and school desegregation scholars and advocates must begin to work together, and they must examine much more thoroughly the evidence gathered in both fields of research. School finance advocates in particular must acknowledge that, at least in states with substantial minority populations, litigation over school funding may be a costly distraction from the more pressing problem of racial and socioeconomic isolation. To be sure, persuading parents and legislators to work toward greater integration will be something of a battle, but it at least appears to be the right battle to fight.

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266. Cf. KOZOL, *supra* note 111, at 209-10; Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 948 (1998); Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 715 (1992) ("Rather than sparking continued struggle for change, [*Brown*] has served to deaden political debate and to legitimize the status quo.").