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Judging Schools: Courts and the Structures of American Education

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JUDGING SCHOOLS: COURTS AND THE STRUCTURES OF AMERICAN EDUCATION

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JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA (Oxford Univ. Press 2010). Pp. 400. Hardcover. $29.95. Paperback. $21.95.

Our nation's political debate over education reform is at a crossroads. After a decade of No Child Left Behind ("NCLB"), a new mood of division characterizes our current debates over education. On one side, partisans cheer films like *Waiting for Superman*, that which depict an educational establishment unwilling or unable to change selfish and interest-driven practices that harm children, particularly poor children. Taking up the banner of the Civil Rights Movement and seeing itself as the advocate of poor racial minorities, this wing of the debate contends that the current teaching corps is less a partner in reforming schools than an obstacle to overcome. Backing this view are major foundations, such as the Walton Family Foundation and the Broad Foundation, that, beyond their ambitions to reshape the current teaching pool, hope to instill "market-driven" discipline on schools, fostering competition and evaluating students, teachers, and schools through the lens of an accountability system based on standardized tests. Through an unrelenting focus on boosting test scores, they contend, students in poverty can overcome the conditions of their communities.

On the other side, many activists, scholars, and practitioners are rallying around educational historian and former policy-maker Diane Ravitch's new book *The Death and Life of the Great American School System*, a deeply personal account of her own changing views about education reform, and a vocal critique of testing, accountability, and market-based reforms in public education.[1] This side of the education reform debate increasingly claims that the testing and accountability movements are deadening tools that only punish schools and children, particularly in poor neighborhoods and communities, for conditions beyond their control. They contend that the punitive sanctions of NCLB accelerate a political abandonment of public education, and that its test-based accountability system cheats students out of a real education by narrowing the curriculum and fostering a mindless, teach-to-the-test pedagogy. The real solution to America's educational woes, they contend, lies not in slash-and-burn personnel policies

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1. DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM (2010).

or an increasingly rote attention to test-taking, but in sustained attention to the conditions of poverty and racial isolation that so grievously wound small children. To pretend that these injuries of poverty are healed through the dismissal of teachers and placing schools in "restructuring" is a cruel joke.

These two sides constitute the new front in the school wars, and their deep disagreement illustrates that the brief, broad consensus about what ails our nation's schools no longer exists. The mood of agreement that produced the ten-year-old NCLB has evaporated and, as a result, the challenge to simply renew or extend NCLB appears insurmountable in the current Congress.

What is remarkable about this debate over "what is to be done?" is the absence of the Supreme Court (and judges in general) from the broad mix of policy actors seeking to play a part in education reform. Long gone are the days when federal judges were at the forefront of American educational reform, their transformative visions central to every participant within the educational arena. Indeed, at one point in the arc of American constitutional jurisprudence, *Brown v. Board of Education*[2] held an electrifying, even revolutionary, thrill. Employed by a High Court determined to eliminate state-mandated segregation from Southern public institutions, *Brown*—as a symbol—stood for the transformative power of the Supreme Court and its capacity to unsettle, at least in our imaginations, what had been settled truth for generations: Southern Americans do not educate white children next to black children.

Today, the thrill is gone — to borrow a phrase from Steely Dan. The problems confronting schools appear to be more complex than simply who attends school with whom. The old debates over desegregation and integration are no longer part of our political conversations about how we might make schools better. Courts have, in large part, taken themselves out of the debate surrounding education reform. Part of that withdrawal has been due, no doubt, to the public's rejection of the Court's initial focus: integration. Americans of all kinds — Northern, Western, Eastern, and Southern, black and white — long ago demonstrated their frustration with court-ordered desegregation. The integrationist ideal — to the extent that it ever took root — is no longer espoused in either American schooling or American politics.

While courts, acting in concert with federal policy makers, did significantly mix the racial populations of America's schools, the Supreme Court's active abandonment of the project of integration in the early 1990s has led to increasing resegregation. In the absence of pressure from courts and policy makers, old patterns have returned: Through their housing and schooling choices, middle class white Americans have shown that they will, by and large, educate their children next to anyone except black children, particularly poor black children.

The hard fact is that Northeast and Midwest schools are *more* segregated now than they were in 1968, when the Supreme Court imposed on schools an affirmative duty to integrate. The South, while it showed significant progress in integration well into the 1980s, now has the racial patterns in its schools that existed at the time of the Martin

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

Luther King, Jr. assassination.[3] Compounding the (re)growing racial isolation of Black and Latino students is increasing poverty among all children, with racially resegregated districts also enrolling a disproportionate share of poor students.[4]

It was in this context of a generation of resegregation that a Richmond, Virginia African-American student asked his elders bluntly at a public forum, "Why didn't Richmond ever desegregate?" This question frames the opening of James E. Ryan's *Five Miles Away, A World Apart: One City, Two Schools and the Story of Educational Opportunity in Modern America.*[5] The answer to this student's question underscores another hard fact: Richmond, and many cities like it, *did* desegregate, but saw only a temporary disruption of prevailing patterns. The hopeful moralism of *Brown* was eroded by the steady exodus of middle class whites from central cities to suburbs, creating a new reality of modestly integrated suburban public school systems juxtaposed against perpetually struggling inner-city school districts increasingly isolated by poverty and race. Today, *Brown* stands more as a myth of constitutional regeneration that we teach to fourth graders than as a testament to either the Supreme Court's influence or the creative capacity of social movements.

The dulling of Brown's transformative power came, at first, from the Supreme Court itself: For fourteen years the Court failed to provide guidance, instruction, or even hints to federal district court judges and local school officials grappling with the largest social innovation in American educational history. Instead, the Supreme Court assumed a sphynx-like silence, offering only a paen to judicial supremacy in its 1957 Little Rock case, *Cooper v. Aaron.*[6] Not until 1968, after Black Americans pushed, prodded, and provoked a Second Reconstruction, after years of bus boycotts, lunch-counter sit-ins, Freedom Rides, the March on Washington, the 1964 Civil Rights Act, the 1965 Voting Rights Act, the assassinations of Kennedy, King, and Malcom X, and just twelve weeks before Chicago exploded in police violence at the Democratic Convention, did the Supreme Court get serious about desegregation.

Thus in 1968, in *Green v. New Kent County*,[7] the Supreme Court told Southern school districts that they had an obligation to not only desegregate, but to actively undo the labels of "black school" and "white school." These school districts, in short, had an obligation to ensure that no school was known primarily by the color of the students who attended it. Within a few short years, that obligation would be applied to Northern and Western school districts as well. However, the obligation to integrate, which prior to *Green* had never been articulated by the Supreme Court, came just as American cities were undergoing a vast demographic transformation. White flight from central cities —

3. Chungmei Lee & Gary Orfield, *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies*, THE CIVIL RIGHTS PROJECT 11, 28 (Aug. 2007), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf.

4. *Id.* at 20.

5. JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA (2011).

6. Cooper v. Aaron, 358 U.S. 1 (1958).

7. Green v. County Sch. Bd., 391 U.S. 430 (1968).

partially due to school desegregation, but also part of a broader economic and political suburbanization of American life — changed profoundly the task that courts had imposed on school districts. The racial bifurcation of American metropoles into "chocolate city" and "vanilla suburbs"[8] meant that the court-mandated obligation to integrate now stretched across urban and surburban school districts, punching the political hot buttons of both race and class. The integration challenge was now, in the wake of *Green* and the 1971 case of *Swann v. Charlotte-Mecklenburg County Schools*, a metropolitan-wide task that included multiple school districts and generally involved busing.

It was at this juncture, according to Ryan, that the Supreme Court — newly reconfigured by four Nixon appointees — made a fateful compromise with *Brown*. Drawing a line in the sand at school district boundaries, the Supreme Court blocked school integration that stretched across district lines. With the rhetoric of local control in full cry, the Burger Court ruled in a 5-4 decision that only an inter-district constitutional violation could justify an inter-district remedy, as was being mandated by Federal District Court Judge Stephen Roth in *Milliken v. Bradley*.[9] Absent a conspiracy among surburban and urban districts to maintain black and white schools, a judge could not order a remedy that stretched across the boundaries of both — despite the strong and growing evidence that a complex mix of public policies and private actions created metropolitan racial segregation, particularly within housing markets.

According to Ryan, the Supreme Court was following a line first advanced by President Richard Nixon two years earlier. That compromise emerged from conflicts over busing and the prospects of inter-district integration efforts. It boiled down to a simple political calculus: "[S]ave the cities, but spare the suburbs."[10] Ryan contends that Nixon, in a nationally televised speech on school desegregation, "offered a basic roadmap for education policy that we are still following today."[11] At that crucial juncture, Nixon proposed that the federal government embark on a national effort to improve central city schools, but do so without jeopardizing the educational performance of suburban schools, and without jeopardizing the political support for public education within those suburbs. The danger confronting suburban schools at this time was that inter-district desegregation was opening the door to wholesale metropolitan-wide consolidation of school districts, a merger along fiscal, racial, and political lines that would have held enormous consequences for both urban and suburban schools. Nixon's proposition was, in effect, a buy-off.

Ryan's argument is that Nixon's proposed deal and the Supreme Court's insistence on that deal in *Milliken v. Bradley* has formed the template for not only how the United States regulates the racial composition of schools, but virtually all types of school reform — from desegregation to school financing, from vouchers and charters to accountability

8. The phrases come from a famous Parliament/Funkadelic album, but also an important article by Reynolds Farley, et al. PARLIAMENT, CHOCOLATE CITY (Casablanca 1975); Reynolds Farley, et al., *"Chocolate City, Vanilla Suburbs:" Will the Trend toward Racially Separate Communities Continue?*, 7 SOC. SCI. RES. 319 (1978).

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

10. RYAN, *supra* note 5, at 5.

11. *Id.*

and NCLB. As Ryan writes, "providing some type of aid to urban students while maintaining the sanctity of suburban schools is the defining feature of modern education law and policy."[12]

The effort to improve central city schools, claims Ryan, stems from a basic political impulse — of politicians and judges alike — to keep suburban schools isolated from the ills of urban schools. The logic is simple: If urban schools for minorities can be made better, they will not make claims against suburban schools, thereby keeping the suburbs safe from both racial desegregation and the redistribution of local property tax revenues. In effect, Ryan contends that although the Supreme Court, and courts in general, are no longer the primary drivers of the debate over education reform, the decisions from the early and mid 1970s, limiting desegregation and the redistribution of local property taxes, have established the framework in which all subsequent political and policy arguments about education are cast. These previous court decisions established a structure of public education that limits the effects of all subsequent reform.

Ryan makes his argument in the course of reviewing volumes of both legal decisions and social science research on educational outcomes and policy making. Using the geographic proximity between two high schools in the Richmond, Virginia metropolitan area as a rhetorical device, Ryan contrasts Freeman High School in suburban Henrico County with Thomas Jefferson High School (known as Tee-Jay), located within the city limits of Richmond. Although the title promises an account of students' educational experiences within schools, the book provides more of an "archeological" investigation of the relationship between court decisions and the institutional contexts of school districts, digging deep to show the judicial connections between these disparate, but geographically close schools. Ryan provides us with an excellent synthesis of the current constitutional landscape that shapes educational policies and the empirical effects of those policies on the educational outcomes of children, particularly those who are poor and segregated in predominantly minority schools. It is an exceptionally helpful and clear articulation of the constitutional, legal, and political foundations of our current educational system. Far too often, the academic attention paid to the Supreme Court's educational cases is limited to the lens of *Brown v. Board of Education*. Ryan makes a compelling argument that subsequent cases have a far more direct impact on our current educational landscape than *Brown*. His thorough treatment of both the later integration cases and school finance litigation — at both the federal and state levels — illustrates the ways that school district boundaries and racial and class inequities combine to present new policy problems unforeseeable at the time of *Brown*. Although others have advanced some of these arguments, Ryan's development of the case is particularly comprehensive.

Indeed, its very thoroughness is, in some ways, its signal flaw. Ryan's argument is simple and direct: The combination of *Milliken* and *San Antonio Indep. Sch. Dist. v. Rodriguez*[13] have established durable constitutional barriers that politically and economically isolate poor and minority central city districts from their suburban

12. *Id.* at 6.

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

neighbors. Furthermore, that isolation, more than any other factor,explains both the woeful state of American education and the nature of proposed reforms. The argument is essentially (albeit implicitly) structural and institutional: the legal and Constitutional landscape determines both the development of educational policies and their characteristics. I am very sympathetic to this form of argument. As a scholar who examines the politics that courts generate and who was trained within a new institutionalist guise, I feel a strong temptation to cheer Ryan on. However, I also work within the field of education policy, and there is a nagging suspicion that Ryan's account, as well documented and crafted as it is, underestimates the ideological and normative elements of educational policy making, elements that inject passion, emotion, and conviction into the political debate, for good or for ill.

Take, as an example, Ryan's account of the standards and testing movement, which he details in Chapter Seven. His policy critique of the limitations of standards and testing is generally accurate and echoes those made by Ravitch and others: tests are poor measures of learning; they create numerous perverse incentives, particularly under NCLB; they are wildly inconsistent across states because definitions of "proficiency" differ wildly; they create false illusions of progress because standards are set too low; the incentives to use tests for purposes for which they are not designed are very high, and so on. Despite this detailed policy critique, Ryan offers no account of the rise of the standards and accountability movements or of their immense popularity. They are perhaps the most important education policies adopted over the past generation, yet there is little discussion in Ryan's book of their origins or *why* they have — in the face of numerous demonstrations of their limitations — enjoyed a reputation as the salvation of American education.

Indeed, when Ryan writes, "The case for relying on sanctions to boost achievement [a cornerstone tenet of the accountability movement] thus rests on intuition — and perhaps ideology — as much as anything else,"[14] he is implicitly stating that ideology ought not govern our educational policy choices. The power of ideology in education politics is enormous and it has shaped —in conjunction with the constitutional and institutional settings of education — the development and implementation of our educational policies for generations. The structural and legal framework that Ryan develops in *Five Miles Away*, however, has little capacity to examine how the ideological and normative roots of education policy affect its development and implementation. That analytical gap is particularly problematic when courts themselves are also subject to those same ideological forces, and when the decisions of courts influence the ways that normative commitments and ideological attachments inform our policy options and decision making.

How we *feel* about schools, as citizens, as parents, and as students, taps into a rich array of commitments and values that we hold about communities and localism. Moreover, what the adults of a community want the children inside of those schools to experience as part of their learning is simultaneously the product of deeply personal and deeply contested sets of values. Often, those values may have little to do with the geo-

14. RYAN, *supra* note 5, at 249.

political boundaries that make up our fragmented educational polity. For example, many districts in the South, particularly in Florida, are metropolitan-wide districts, and because of that geographic breadth are subject to potentially greater degrees of racial and economic mixing among their students. In many ways, these metropolitan-wide districts pose a useful test for Ryan's thesis. Florida, however, has been among the leading policy proponents of both standards-based accountability and vouchers. According to Ryan's thesis, the institutional contexts of Florida's school districts should have diminished the "Save the cities, but Spare the Suburbs" mentality. Yet, the ideological attachment to both vouchers and standards-based accountability mechanisms are, arguably, as prominent in Florida as in other parts of the nation.

Similarly, the recent developments in Wake County, North Carolina make us question the extent to which broad geographic school districts can, in and of themselves, knit together communities with the common sense of purpose that Ryan sees as central to effective education reform. As Ryan notes briefly in his conclusion, Wake County, after undergoing a successful racial integration that produced a "unitary" school system, adopted a program of income-based busing in order to avoid increasing concentrations of students in poverty within county schools. The goal was to ensure that no school's enrollment of poor students was above forty percent. After being in effect for nearly ten years, in Spring 2010, the Wake County Board of Education voted 4-3 to repeal the socio-economic busing, setting off bitter and divisive battles within the community. These developments highlight the extent to which ideological and normative contests over home, community, and school can unsettle long-standing integrationist practices, even within metropolitan-wide school districts. Under Ryan's analysis, these are places in which school district boundaries should diminish parochialism or the incentives for zero-sum race and class-based educational policies. Ryan's neglect of the ideological and normative dimensions of education policy-making in places like Wake County, North Carolina undermines his central claim.

However, Ryan's focus on the structural landscape of educational politics does more than limit his explanatory power. It turns his focus away from addressing important questions that arise from his rich legal and constitutional analysis, questions that pit our self-professed commitment to public education against its woeful reality. To wit: why do Americans continue to claim to value educational opportunity when our current state of affairs so clearly shows us that it does not exist for millions of students? That is, what explains the persistence of the myth of education as the great equalizer, despite such profound evidence to the contrary? A recent analysis of the 2009 Organisation for Economic Co-operation and Development's ("OECD")' Program of International Student Assessment (PISA) shows that the socio-economic background of the average U.S. student has a greater influence on his or her test scores than the socio-economic background of students in most OECD countries.[15] In other words, schools in the average OECD country do *more* to combat the effects of class disadvantage in test

15. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PROGRAMME FOR INTERNATIONAL STUDENT ASSESSMENT 2009 RESULTS 83-99 (2009), *available at* http://browse.oecdbookshop.org/oecd/pdfs/free/9810081e.pdf (last visited Oct. 12, 2011).

outcomes than schools in the the United States. To put it yet another way, academic performance in our educational system (as measured by the PISA test) is more linked to class than it is in *most* European countries. We are not the land of equal educational opportunity as we often claim to be; in fact, our educational system entrenches class disadvantage at higher than average rates. Yet we persist in seeing education in the United States as the great equalizer. It would seem important to ask "why?" What ideological legitimation is the *notion* of equal educational opportunity performing within our system of fragmented and unequal school districts, particularly given the demonstrable *absence* of equal educational opportunity? Ryan's focus on the development and persistence of that school district fragmentation; however, limits his ability to examine these broader normative and ideological issues.

Once we open the door to the normative implications of our institutional structures, the questions multiply like mushrooms. For example, given the increasing role of the federal government in public education, it seems important to explore whether schools, and school governance, continue to be the product of local democratic processes, particularly since the urban-suburban divide so fundamentally organizes students and resources? That is, to what extent does our ideal of local democratic governance in education comport with the reality of federally required testing and accountability? Relatedly, if in the age of NCLB, there is an increasingly narrow margin in which local schools may innovate and deviate from U.S. Department of Education mandates, why do Americans — suburbanites in particular — feel that localism is still of value and present in American schooling? Furthermore, why do they persist in funding local schools at such generous levels if they have so little control over the direction of those funds, given federal mandates?

To undertake these questions, of course, is to write another book and it is the dirtiest trick in the book reviewer's bag of tricks to criticize an author for not having written the book a reviewer wants him to write. Ryan's scholarship is impeccable and his writing is clear and engaging. But the book raises so many questions that it seems important to address them outside the confines of Ryan's own argument. Indeed, it is a testament to the quality of Ryan's book that it raises such fundamental questions about the status of public education in American social and political life. *Five Miles Away, A World Apart* is a book that needs to be widely read and understood, not only because it so cogently lays out the institutional foundations of educational inequality in the United States, but also because it will serve as a firm foundation for further empirical and normative studies of both the origins and consequences of our existing systems of educating our children.