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## Risky Education

Osamudia James

University of North Carolina School of Law, [ojames@unc.edu](mailto:ojames@unc.edu)

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Publication: *George Washington Law Review*

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### Recommended Citation

James, Osamudia, "Risky Education" (2021). *Faculty Publications*. 521.  
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# Risky Education

Osamudia James\*

## ABSTRACT

*Inequality in American education is not only about race and class. Rather, it is also about risk: the systematic way in which parents and caregivers deal with the hazards and insecurities induced and introduced by the state's abdication of responsibility for public education, particularly against a backdrop of rising economic and social insecurity for Americans. Education risk can take several forms, including: (1) the risk of educational failure of one's own child; (2) the risk of school failure and closure; (3) the risk of racialized educational vulnerability; and (4) the risk of downward social mobility despite quality education. Three examples—school choice in New Orleans, selective school admissions in New York City, and gatekeeping to elite higher education on the East and West Coasts—illustrate how parents attempting to navigate these types of risk in education do so by shifting that risk to the most vulnerable among them, corrosively impacting both American education and American democracy. Mitigating education risk requires interventions that, at a minimum, tie the hands of some parents on the education “marketplace” while untying the hands of others. More robust solutions, however, include augmenting the role of the state so that it can mitigate risks in education by engaging structural obstacles to quality education—rather than insisting parents engage risk in their individual and isolated capacities—and adopting cultural and political narratives of shared education fates that acknowledge relations of interdependence. The state can then use these connections to manage and mitigate risk for all Americans.*

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\* Dean's Distinguished Scholar and Professor of Law, University of Miami School of Law. I am grateful to those who provided helpful comments and served as sharp interlocutors and readers at various stages of this Article, including LaToya Baldwin Clark, Charlton Copeland, Kerry Weir, Kamal A. James, Nancy Leong, and Shaun Ossei-Owusu. I am also thankful for the generous and thoughtful feedback I received during presentations to the faculty at UNC School of Law and Chicago-Kent College of Law. Finally, thank you to the editors at *The George Washington Law Review*, especially Alexis Hill and Patrick Burnett, for thoughtful feedback and edits.

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INTRODUCTION

Before their oldest child entered the third grade, Harold Bailey and his wife had already changed their sons’ schools twice in an attempt to avoid school failure.<sup>1</sup> In the 2014–2015 school year, their boys, aged six and eight, were enrolled in their third New Orleans school, Lagniappe Academies.<sup>2</sup> Lagniappe seemed like a particularly good choice for their youngest son, who had been diagnosed as autistic.<sup>3</sup> Bailey believed the school delivered the personalized attention and services his son’s diagnosis required.<sup>4</sup> In March 2015, however, Bailey was notified that Lagniappe would be closing down after the state uncovered violations of federal law guaranteeing an equal education to students with disabilities.<sup>5</sup> State officials would not be looking for a new charter operator because it did not believe it could find one on such short notice and because Lagniappe had been operating in trailers with no immediate plans for permanent space.<sup>6</sup> In New Orleans, there are no traditional school choices, so his sons could not just default to a school close to home.<sup>7</sup> Bailey and his wife would need to find a new charter school and re-enter the city’s labor-intensive char-

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1 Arianna Prothero, *When Choice Doesn’t Feel Like a Choice*, EDUCATIONWEEK (Aug. 19, 2015), <https://neworleans.edweek.org/parents-struggle-with-school-choice-system/> [https://perma.cc/98KZ-7ST9].

2 *Id.*  
 3 *Id.*  
 4 *Id.*  
 5 *Id.*  
 6 *Id.*  
 7 *Id.*

ter school application process late, with no guarantee that the same thing would not happen again in a year.<sup>8</sup>

Five years later, as the COVID-19 pandemic raged across the United States during summer 2020, school re-openings became increasingly uncertain. Despite mid-semester transitions to remote learning the previous spring, school districts remained optimistic about in-person re-openings in the fall.<sup>9</sup> As the fall approached, however, it became clear that failure to control the spread of the coronavirus would make school re-openings unsafe,<sup>10</sup> and school district leaders increasingly announced online education for the fall.<sup>11</sup> Continued remote learning in the fall only amplified concerns about student learning loss<sup>12</sup> as well as the impossible parental task of man-

<sup>8</sup> *Id.*

<sup>9</sup> See, e.g., Perry Stein, *Some D.C. Public Schools Students Could Resume In-Person Classes in Early August, if Health Conditions Allow*, WASH. POST (May 22, 2020, 2:12 PM), [https://www.washingtonpost.com/local/education/dc-schools-early-start-2020/2020/05/22/8f961ff6-9c31-11ea-a2b3-5c3f2d1586df\\_story.html](https://www.washingtonpost.com/local/education/dc-schools-early-start-2020/2020/05/22/8f961ff6-9c31-11ea-a2b3-5c3f2d1586df_story.html) [<https://perma.cc/624B-MPLL>]; Donna St. George, *Masks, Temperature Checks, Shorter Weeks: A State Plan Outlines How School Could Change in Maryland*, WASH. POST (May 7, 2020, 6:56 PM), [https://www.washingtonpost.com/local/education/masks-temperature-checks-shorter-weeks-a-state-plan-outlines-how-school-could-change-in-maryland/2020/05/07/c1ec2224-9057-11ea-9e23-6914ee410a5f\\_story.html](https://www.washingtonpost.com/local/education/masks-temperature-checks-shorter-weeks-a-state-plan-outlines-how-school-could-change-in-maryland/2020/05/07/c1ec2224-9057-11ea-9e23-6914ee410a5f_story.html) [<https://perma.cc/A2SB-FMDA>]; Fran Spielman & Nader Issa, *Chicago Mayor Determined to Open CPS Schools This Fall; Prützer Has 'Great Hope And Desire' to Do So*, CHI. SUN-TIMES (May 8, 2020, 5:32 PM CDT), <https://chicago.suntimes.com/education/2020/5/8/21252085/chicago-public-schools-reopen-fall-mayor-lori-lightfoot-2020-2021> [<https://perma.cc/24NC-ANKZ>].

<sup>10</sup> See Dana Goldstein & Eliza Shapiro, *Most Big School Districts Aren't Ready to Reopen. Here's Why.*, N.Y. TIMES (July 16, 2020), <https://www.nytimes.com/2020/07/14/us/coronavirus-schools-fall.html> [<https://perma.cc/5JM9-T7ZZ>] (noting that only two of the nation's ten largest school districts had achieved key benchmarks that would make it safe to return to schools).

<sup>11</sup> See, e.g., Howard Blume & Sonali Kohli, *L.A. Unified Will Not Reopen Campuses for Start of School Year Amid Coronavirus Spike*, L.A. TIMES (July 13, 2020, 7:31 PM PT), <https://www.latimes.com/california/story/2020-07-13/l-a-unified-will-not-reopen-campus-start-of-school-year> [<https://perma.cc/G3SH-BFJV>]; Colleen Wright, *Miami-Dade County Public Schools to Begin School Year Online Only and Later Aug. 31 Date*, MIAMI HERALD (Aug. 6, 2020, 1:33 PM), <https://www.miamiherald.com/news/local/education/article244544787.html> (last visited Mar. 12, 2020); Shawn Hubler & Dana Goldstein, *Los Angeles and San Diego Schools to Go Online-Only in the Fall*, N.Y. TIMES (July 24, 2020), <https://nyti.ms/2DEtLE9> [<https://perma.cc/Q5XG-ATP4>]; Vanessa McCray, *Atlanta Public Schools to Start Year With Virtual Learning*, ATLANTA J.-CONST. (July 10, 2020), <https://www.ajc.com/news/local-education/atlanta-public-schools-start-year-with-virtual-learning/aNaJsQVMxfowv9egYTTfPL/> [<https://perma.cc/C3EM-CRTP>]; Hannah Natanson, *Arlington Public Schools Switches to Remote Learning for Fall, Reversing Course*, WASH. POST (July 14, 2020, 10:45 PM), [https://www.washingtonpost.com/local/education/arlington-public-schools-switches-to-remote-learning-for-fall-reversing-course/2020/07/14/aabe4d3c-c605-11ea-a99f-3bbdfbf1af38\\_story.html](https://www.washingtonpost.com/local/education/arlington-public-schools-switches-to-remote-learning-for-fall-reversing-course/2020/07/14/aabe4d3c-c605-11ea-a99f-3bbdfbf1af38_story.html) [<https://perma.cc/WV7A-NVJK>].

<sup>12</sup> See, e.g., Dana Goldstein, *Research Shows Students Falling Months Behind During Virus Disruptions*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/05/us/coronavirus-education-lost-learning.html> [<https://perma.cc/TJN2-T5GS>] (“New research suggests that by September, most students will have fallen behind where they would have been if they had stayed in

aging student remote learning while working full-time.<sup>13</sup> Despite evidence that loss of learning due to remote learning would not impact wealthier white students as significantly as it would impact minority or low-income students,<sup>14</sup> parents of the wealthier white students responded with pandemic pods: homeschooling groups of three to ten who learn together in homes, taught by children's parents or a paid teacher.<sup>15</sup> Increasing in popularity, education pods are likely to have significant and negative consequences for equality in education, undermining equitable school finance;<sup>16</sup> intensifying school segregation;<sup>17</sup> and exacerbating classism, sexism, ableism, and racism.<sup>18</sup>

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classrooms, with some losing the equivalent of a full school year's worth of academic gains."); Megan Kuhfeld, James Soland, Beth Tarasawa, Angela Johnson, Erik Ruzek & Jing Liu, *Projecting the Potential Impacts of COVID-19 School Closures on Academic Achievement 2* (Annenberg, Brown Univ., EdWorkingPaper No. 20-226, 2020) (concluding that the average student could begin the fall 2020 academic year having lost as much as a third of the expected progress from the previous year in reading and half the expected progress in math).

<sup>13</sup> See Eliza Shapiro & Patrick McGeehan, *Big New Obstacle for Economic Recovery: Child Care Crisis*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/07/10/nyregion/nyc-school-daycare-reopening.html> [<https://perma.cc/WQP5-ESK4>].

<sup>14</sup> See, e.g., Goldstein, *supra* note 12 (citing research suggesting that due to school closures in March 2020 and late April 2020, student progress in math decreased by almost half in low-income schools and a third in middle-income schools, but not at all in high-income schools); EMMA DORN, BRYAN HANCOCK, JIMMY SARAKATSANNIS & ELLEN VIRULEG, MCKINSEY & CO., COVID-19 AND STUDENT LEARNING IN THE UNITED STATES: THE HURT COULD LAST A LIFETIME 5–6 (2020) <https://www.mckinsey.com/~media/McKinsey/Industries/Public%20and%20Social%20Sector/Our%20Insights/COVID-19%20and%20student%20learning%20in%20the%20United%20States%20The%20hurt%20could%20last%20a%20lifetime/COVID-19-and-student-learning-in-the-United-States-FINAL.pdf> [<https://perma.cc/V877-NG3R>] (concluding that while the average student could fall seven months behind academically due to pandemic closures, Black and Hispanic students could experience learning loss equivalent to approximately ten and nine months, respectively); see also Complaint for Injunctive and Declaratory Relief at 1–2, 51–54, *Cayla J. v. California*, No. sf-4360445 (Cal. Super. Ct. Nov. 30, 2020) (alleging that the state of California discriminated against low-income Black and Latino students in its transition to distance learning during the COVID-19 pandemic).

<sup>15</sup> Melinda Wenner Moyer, *Pods, Microschools and Tutors: Can Parents Solve the Education Crisis on Their Own?*, N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/2020/07/22/parenting/school-pods-coronavirus.html> [<https://perma.cc/23YB-BHSB>].

<sup>16</sup> *Id.* (citing a sociologist who explains that “dollars follow students,” meaning that budgets are directly reduced for each child no longer attending a public school (quoting Interview with Jessica Calarco, Ind. Univ.)).

<sup>17</sup> Clara Totenberg Green, Opinion, *The Latest in School Segregation: Private Pandemic ‘Pods,’* N.Y. TIMES (July 22, 2020) <https://www.nytimes.com/2020/07/22/opinion/pandemic-pods-schools.html> [<https://perma.cc/3P24-9S3W>] (explaining how pods “will exacerbate inequities, racial segregation and the opportunity gap within schools”).

<sup>18</sup> Rebekah Bastian, *How Educational Inequality in America Could Be Impacted by the Homeschooling Pod Frenzy*, FORBES (July 19, 2020, 7:47 PM), <https://www.forbes.com/sites/rebekahbastian/2020/07/19/how-educational-inequality-in-america-could-be-impacted-by-the-homeschooling-pod-frenzy/#30e5806672cb> [<https://perma.cc/BE5R-D2MK>].

Both stories—school closure and choice in New Orleans and education pods in pandemic America—are about race, class, and inequality. Both are also about educational risk in the American school system. Risk in the school system can take several forms. One form is the risk of educational failure of one’s own child. Although individual and family factors can contribute to that failure, factors outside of parental control and within the control of the state, like school safety and discipline, also inform that failure.<sup>19</sup> A second form of risk is that of school failure, which contemplates problems like inferior facilities, underqualified teachers, curricula unfit for preparing students for democratic citizenship or labor market productivity,<sup>20</sup> and school closure and consolidation and their rippling impacts.<sup>21</sup> A third form of risk is racialized educational vulnerability—the racial subordination

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<sup>19</sup> See, e.g., Kimberly L. Henry, *Who’s Skipping School: Characteristics of Truants in 8th and 10th Grade*, 77 J. SCH. HEALTH 29, 34 (2007) (finding that improving school engagement, school environment, and perceptions of safety at school, in addition to improving a student’s own academic performance and commitment to a rigorous program, may have beneficial effects on truancy).

<sup>20</sup> Detroit, Michigan, functions as a recent example of this failure. In April 2020, the U.S. Court of Appeals for the Sixth Circuit ruled that a number of students in Detroit public schools adequately pleaded that the state of Michigan had been so negligent in providing education that students had been “deprived of access to literacy” in violation of the Fourteenth Amendment. *Gary B. v. Whitmer*, 957 F.3d 616, 621 (6th Cir. 2020). Failures included rodent-infested schools, extreme classroom temperatures in the winter and summer, unqualified and absentee teachers, and inadequate and out-of-date curricular materials. *Id.* at 624–27. The students pleaded that these factors all worked together to deny “even a plausible chance to attain literacy.” *Id.* at 662.

<sup>21</sup> School closures and consolidations are problems that impact both urban and rural school settings, thus presenting a form of education risk that crosses racial lines in the United States (although dynamics informing school closure can nevertheless be racialized). See, e.g., Bree L. Dority & Eric C. Thompson, *Economic Issues in School District Consolidation in Nebraska*, 23 GREAT PLAINS RSCH. 145, 145–47, 156 (2013) (using rural and nonrural school districts in Nebraska as case studies for the uncertain impact of school consolidations on per-pupil spending, which itself does not quantify the impact of consolidation on the time costs to parents and students, the quality of education, and community vitality); Mara Casey Tieken & Trevor Ray Auldrige-Reveles, *Rethinking the School Closure Research: School Closure as Spatial Injustice*, 89 REV. EDUC. RSCH. 917, 938–39 (2019) (concluding that rural and urban school closures are unevenly distributed and disproportionately affect poor communities of color in ways that harm students and adults); Gary Paul Green, *School Consolidations and Community Development*, 23 GREAT PLAINS RSCH. 99, 99–100, 103–04 (2013) (analyzing the negative impact of school closures on quality of life, community engagement, and education quality in urban and rural areas alike); EVE L. EWING, *GHOSTS IN THE SCHOOLYARD* 7–14 (2018) (documenting the dynamics of systemic racism, racial inequality, and parent distrust that underlie school closures in Chicago Public Schools); John M. Amis & Paul M. Wright, *Introduction: The Antecedents and Mechanisms of School District Consolidation*, in *RACE, ECONOMICS, AND THE POLITICS OF EDUCATIONAL CHANGE* 1, 1–2 (John M. Amis & Paul M. Wright eds., 2018) (documenting how in response to the attempts of richer, more conservative, and whiter Shelby County Schools (“SCS”) to gain permanent independence from Memphis County Schools (“MCS”), MCS renounced their charter, thus forcing a consolidation with SCS to avoid separation).

and marginalization of minority students and families within the school system.<sup>22</sup> A fourth form of education risk, still, is the risk of downward social mobility despite one's education attainment which renders elite education thought to increase the chances of upward mobility highly valuable.<sup>23</sup>

Addressing and mediating these risks are within the state's control.<sup>24</sup> School discipline, teacher quality, curriculum, and school culture are dictated by policies school districts and state education agencies adopt. School segregation, both between and within schools, as well as the adoption of disciplinary and tracking policies that create racialized disparities are a function of state failure to successfully integrate schools or control for the effect of conscious and unconscious racial bias on school policy.<sup>25</sup> Increasing economic insecurity, even among the highly educated, is a function of broader political shifts that require individuals to bear the burden of sickness, unemployment, or old age with limited support from the state.<sup>26</sup>

The state, however, has abdicated a robust role in education management, largely abandoning the project of integration,<sup>27</sup> relying on school financing schemes that necessarily track race and class,<sup>28</sup> and

<sup>22</sup> See *infra* notes 139–42 and accompanying text (discussing how school choice has emerged as a form of segregation that fosters racial subordination).

<sup>23</sup> See *infra* Section II.C.

<sup>24</sup> Admittedly, the “state” as a focus on critique operates at multiple levels. School funding, for example, comes from local, state, and federal sources, while school choice policies addressed in this project operate primarily at state and local levels, albeit with varying forms of federal support. Risk assessment might differ depending on the level of state action being assessed and warrants more granular interrogation in future projects.

<sup>25</sup> See *infra* notes 141–47 and accompanying text.

<sup>26</sup> See *infra* Part I.

<sup>27</sup> According to one analysis of data from the National Center on Education Statistics, the number of segregated schools—defined as schools where white students comprise less than 40% of the student body—doubled between 1996 and 2016, while the percentage of children of color attending segregated schools increased from 59% to 66%. Will Stancil, *School Segregation is Not a Myth*, ATLANTIC (Mar. 14, 2018), <https://www.theatlantic.com/education/archive/2018/03/school-segregation-is-not-a-myth/555614/> [<https://perma.cc/M2V7-4LPD>]. The percentage of Black students attending segregated schools rose faster in that same period, growing from 59% to 71%. *Id.*; see also GARY ORFIELD, ERICA FRANKENBERG, JONGYEON EE & JOHN KUSCERA, THE C.R. PROJECT, *BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE 10* (2014) (concluding that Black students in the South are less likely to attend a school that is majority white than about fifty years ago); Alvin Chang, *The Data Proves That School Segregation Is Getting Worse*, VOX (Mar. 5, 2018, 1:50 PM), <https://www.vox.com/2018/3/5/17080218/school-segregation-getting-worse-data> [<https://perma.cc/27TW-JR4V>] (explaining that although students are about as racially distributed among school districts as they were a few decades ago, Black students are increasingly isolated in poor, segregated neighborhoods).

<sup>28</sup> Public school financing in the United States is tied to local tax bases, even as residential segregation persists. See generally *How Do School Funding Formulas Work?*, URB. INST. (Nov.

adopting market principles as a form of school reform.<sup>29</sup> Through these measures, responsibility for educational quality and outcomes has shifted to parents. Education risk, then, is about *the systematic way in which parents and caregivers deal with the hazards and insecurities induced and introduced by the state's abdication of responsibility for public education, particularly against the backdrop of rising economic and social insecurity for Americans.*<sup>30</sup>

For the first time in recent history, those entering the labor market in the United States today have only a 50% chance of doing economically better than their parents.<sup>31</sup> At a time when parents and caregivers are increasingly insecure regarding employment, retirement resources, and healthcare, the stakes of securing a quality education that can help ensure a stable and productive life have never felt higher. Parents are engaging those stakes by navigating education risk in ways that maximize outcomes for their own children, even at the expense of others. Using social capital, material resources, and political mobilization, parents preserve paths to superior or elite education, engaging in hoarding that crowds out the least powerful and most vulnerable students.<sup>32</sup> Putting it more provocatively: to be a good parent, one must increasingly be a bad citizen.

School law and policy work together to make this so. In its school jurisprudence, the Supreme Court has prioritized two commitments: choice and merit.<sup>33</sup> Choice honors the liberty of parents to make educational decisions concerning their children, free from excessive state

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29, 2017), <https://apps.urban.org/features/funding-formulas/> [<https://perma.cc/J67B-YG2G>] (outlining the primary ways by which states distribute educational funding through a combination of local property tax revenues and centralized state funding mechanisms). Facilitated by the American history of housing discrimination, federal and state redlining, and block-busting, minorities are more likely to live in racially isolated neighborhoods that concentrate poverty, see Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods: A Constitutional Insult*, 7 RACE & SOC. PROBS. 21, 22–26 (2015), which thus limit the tax bases from which school districts draw for funding.

<sup>29</sup> See *infra* Section I.B.1.

<sup>30</sup> This definition is inspired by the work of sociologist Ulrich Beck, who in analyzing modern Western societies defined risk as “a systematic way of dealing with hazards and insecurities induced and introduced by modernization itself.” ULRICH BECK, *RISK SOCIETY* 21 (Mark Ritter trans., Sage Publ’ns 1992) (1986).

<sup>31</sup> Raj Chetty, David Grusky, Maximilian Hell, Nathaniel Hendren, Robert Manduca & Jimmy Narang, *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, at 18 (Nat’l Bureau of Econ. Rsch, Working Paper No. 22910, 2016) <http://www.nber.org/papers/w22910> [<https://perma.cc/32AW-SMGM>].

<sup>32</sup> See *infra* Part II.

<sup>33</sup> See *infra* Section I.A.



interference.<sup>34</sup> Merit is the principle by which the valuable good of quality education, and elite education in particular, is to be distributed to students.<sup>35</sup> Missing, however, is a commitment to antisubordination, particularly as it concerns race.

Within the parameters drawn by the Court, policymakers promote initiatives that capitalize on liberty and merit, pushing school choice as school reform, promoting urban school policy that prioritizes the wealthy on the backs of the poor, and adopting admissions policies in K–12 and higher education that exclude people of color, or worse, pit them against each other.<sup>36</sup> In this space, parents are left to their own devices to fight for access to high-quality education for their children. That other children are disadvantaged or harmed by their actions is unfortunate but cannot be helped; to engage otherwise is to mismanage risk in ways that can impede a child's security and success in the United States. Ultimately, law and policy work together to mask the subordinating nature of parental decision making.

A properly functioning democracy distributes the losses of governance and policy more evenly across a society. A society that instead encourages parents to distribute those losses to groups that are most vulnerable, especially on the basis of race, is one that cannot claim to truly value either self-determination or self-governance in a democracy. Increasingly, the American education system is not only risky, but antidemocratic.<sup>37</sup>

The story of education risk is not unconnected to stories about risk in other spheres of American social life. The dominance of market principles in social welfare policy in conjunction with national mythology about independence and autonomy have made Americans increasingly insecure in multiple ways.<sup>38</sup> Discussion about risk in education, however, has heretofore focused mostly on the student loan crisis in higher education,<sup>39</sup> and the logic of markets and competition in education has focused primarily on school choice.<sup>40</sup>

This Article, then, broadens the parameters of analysis to not only consider risk as school choice in K–12 education, or risk as student debt in higher education, but also risk as school management and admissions policies that include the battle over access to elite institu-

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<sup>34</sup> See *infra* Section I.A.1.

<sup>35</sup> See *infra* Section I.A.2.

<sup>36</sup> See *infra* Section I.B.

<sup>37</sup> See *infra* Section II.D.

<sup>38</sup> JACOB S. HACKER, *THE GREAT RISK SHIFT*, at xiii–xvi (2d ed. 2019).

<sup>39</sup> See *infra* notes 105–15 and accompanying text.

<sup>40</sup> See *infra* Section I.B.1.

tions. Further, in moving past Black-white binaries, this Article complicates the nature of marginalization, highlighting the positions parents of color are prompted to stake within and between minoritized groups. Finally, by defining education risk and situating that risk in a larger discussion about law and social welfare policy, this Article makes a contribution to the literature on risk by considering not only how education risk destabilizes individual families, but how that risk changes the relationship of parents and students to *each other* such that American life and democracy are undermined.

Part I traces the law and policy that inform risky education. The Court's commitments to choice and merit undergird education policies that increase risk for parents while abandoning the state's proper role in the management of school quality. Risk as manifest in school choice, admissions, and management policies fit into a larger trend of increasing economic and social insecurity for Americans. Part II uses three examples—school choice in New Orleans, selective school admissions in New York City, and gatekeeping to elite higher education—to consider parent vulnerability to risky education in more detail and to illustrate how parents navigate the system by shifting risk amongst themselves—all to antidemocratic effect. Part III considers responses that might mitigate education risk, with or without an augmented state role in education.

## I. INSECURE PARENTS

In their introduction to *The Insecure American*, co-editors Hugh Gusterson and Catherine Besteman describe life shaped by neoliberalism as a “story of downward mobility and collapsing support systems . . . that haunts millions”<sup>41</sup> Under an aggressive and increasingly unregulated form of capitalism, economic insecurity has infiltrated American households. Since 1973, U.S. GDP and work productivity has increased by 160% and 80%, respectively.<sup>42</sup> Incomes for the majority of Americans during the same period, however, have stagnated or fallen, even as income at the top 1% has *grown* by 200%.<sup>43</sup> Further, a near-doubling of volatility in household income between the 1970s and early 2010s has created economic instability from which fewer and fewer families can recover.<sup>44</sup>

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<sup>41</sup> Catherine Besteman & Hugh Gusterson, *Introduction*, in *THE INSECURE AMERICAN* 1, 2 (Hugh Gusterson & Catherine Besteman eds., 2010).

<sup>42</sup> *Id.* at 4.

<sup>43</sup> *Id.*

<sup>44</sup> HACKER, *supra* note 38, at x–xi.

New Deal and Great Society protections once helped insure Americans against the risk of poverty in retirement, unemployment, and disability by spreading the costs of those risks across society.<sup>45</sup> Political and corporate leaders, however, have steadily been offloading responsibility for the risks of work, illness, or old age to individuals.<sup>46</sup> Instead of incentivizing and supporting risk sharing, leaders instead herald choice as individuals are left to self-insure themselves and their families.<sup>47</sup>

Retirement plans in the private sector, for example, are less likely to be traditional guaranteed pension plans and more likely to be individual account plans like 401(k)s.<sup>48</sup> And even in the public sector, access to defined-benefit pensions is steadily decreasing.<sup>49</sup> In the context of healthcare, although health premiums have gone up, the likelihood of being covered by insurance through work has gone down.<sup>50</sup> Rising family expenses, including housing, healthcare, and education, and flat earnings have threatened families' standard of living despite the movement of women into the workforce.<sup>51</sup> Indeed, scholars have documented the phenomenon of parents who overextend themselves in home purchasing in order to access good school districts, only to end up in bankruptcy on account of that decision.<sup>52</sup> In the wake of these changes, proposals to encourage workers and their families to self-insure proliferate in the form of health savings accounts, private college savings programs, and tax-subsidized retirement plans.<sup>53</sup>

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<sup>45</sup> Protections included “the G.I. Bill, tax deductions for mortgage payments, high levels of defense spending that juiced up the economy, cheap energy, employer-subsidized health insurance, unemployment insurance to protect against periods of economic turbulence, and Social Security and Medicare for old age.” Besteman & Gusterson, *supra* note 41, at 2.

<sup>46</sup> See HACKER, *supra* note 38, at xiii–xvi.

<sup>47</sup> See *id.*

<sup>48</sup> See MONIQUE MORRISSEY, ECON. POL’Y INST., *THE STATE OF AMERICAN RETIREMENT: HOW 401(K)S HAVE FAILED MOST AMERICAN WORKERS 2* (2016).

<sup>49</sup> In 1979, 36% of recent high school graduates were covered by a pension plan. HACKER, *supra* note 38, at 66. By 2010, however, that figure had fallen to just over 16%. *Id.* College graduates fare only slightly better: between 1979 and 2010, their likelihood of receiving a pension fell from 51% to 46%. *Id.*

<sup>50</sup> In 1979, recent high school graduates had about a 60% chance of accessing a health plan through work. *Id.* By the time the Affordable Care Act passed in 2010, less than 23% of workers enjoyed the same. *Id.* Although college graduates fared better, they are still managing risk: between 1979 and 2010, the chances that a college graduate had of accessing healthcare through work fell from 78% to 61%. *Id.*

<sup>51</sup> *Id.* at 81, 87.

<sup>52</sup> See, e.g., ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP* 32–34 (2003) (documenting the housing costs middle-class parents incur in order to avoid failing schools).

<sup>53</sup> See HACKER, *supra* note 38, at 158–59 (“When people feel they’re on their own, they

Although education reform was a key component of Great Society initiatives,<sup>54</sup> education is not often included among the risks that dominate discourse about insecurity and neoliberalism. Education law and policy, however, have also followed a trend of increasing risk for individuals, shifting responsibility for education quality and outcomes to parents, who then manage that risk in ways that shift it from the most to the least secure individuals. As such, it is justifiably considered as part of an overall trend of rising insecurity for Americans.

Jacob S. Hacker argues that the “Great Risk Shift” has changed “Americans’ relationships to their government, their employers, and each other.”<sup>55</sup> Considering risk in education beyond student debt is an attempt to fully consider the latter. Broader in impact than just the student loan crisis, the risk that percolates in the American education system isolates parents in the context of school selection, enrollment, and management, and it results in increased anxiety and decreased stability across income and racial spectrums. The most powerful in the system, however, exercise privilege and means in ways that augment their capacity to self-insure while undercutting the capacity of the least powerful to do the same. The inadequately managed problem of risk in American education operates at two levels. At one level, risk is produced by ideology and norms informing education law. At a second level, the problem is one of education delivery and the school policy and management decisions that shape that delivery.

### A. *Risk in Education Law*

American law has consistently affirmed two values that facilitate the state’s abdication of education responsibility and the subsequent delegation of that responsibility to parents. A body of cases and laws that define the division of authority between the state and parents champions parental choice and control. A second set of cases decided in the context of college and university admissions affirms a commitment to recognizing merit in individuals. Parental responses to the

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are less likely to think that risk pooling is possible . . . and more likely to settle for policies that help with the individual management of economic risks, whether in the form of private accounts in Social Security or HSAs [(health savings accounts)] or new tax breaks for savings and investment.”).

<sup>54</sup> Two of President Johnson’s Great Society initiatives were Project Head Start, which sought to broaden access to early childhood education for low-income children, and the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.), which provided additional federal funding for low-income school districts. MARIS A. VINOVSIS, *THE BIRTH OF HEAD START* 60, 74, 79–80, 86 (2005).

<sup>55</sup> HACKER, *supra* note 38, at xiv.

hazards and insecurities that state abdication induces are responses to education risk.

### 1. Choice

In theory, state responsibility for equality of opportunity lies alongside parental responsibility for the same.<sup>56</sup> The Supreme Court in *Meyer v. Nebraska*,<sup>57</sup> for example, acknowledges the “natural duty” of parents to give their children an education “suitable to their station in life.”<sup>58</sup> Two years later, in *Pierce v. Society of Sisters*,<sup>59</sup> the Supreme Court struck down an Oregon statute requiring all children to attend public schools.<sup>60</sup> Despite the state’s assertion of an overriding interest in overseeing and controlling the education of children,<sup>61</sup> the Court concluded that children were not “mere creature[s] of the State” and recognized a parental liberty interest in directing the upbringing and education of their children.<sup>62</sup>

Subsequent cases moved in the opposite direction, reestablishing shared responsibility between parents and the state. In *Prince v. Massachusetts*,<sup>63</sup> the Court held in a child labor case that parental authority is not absolute.<sup>64</sup> Rather, the government retains broad authority to regulate the treatment of children and can infringe on parental authority if to do so would be in the best interests of the child.<sup>65</sup> Parents, the Court said, are not free to “make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”<sup>66</sup> Similarly, in *Wisconsin v. Yoder*,<sup>67</sup> even as the Court exempted Amish plaintiffs from compulsory school

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<sup>56</sup> Political scientist Amy Gutmann characterizes this shared authority as a manifestation of the democratic state—a state in which educational authority is shared between parents, citizens, and professional educators. AMY GUTMANN, *DEMOCRATIC EDUCATION* 41–42 (1987). Such a compromise recognizes the value of parental choice and control over education, even as it recognizes the value of political education in orienting children to a sharing of rights and responsibilities as a condition for citizenship in a democratic society. *See id.*

<sup>57</sup> 262 U.S. 390 (1923).

<sup>58</sup> *Id.* at 400.

<sup>59</sup> 268 U.S. 510 (1925).

<sup>60</sup> *Id.* at 529–31, 533–34, 536.

<sup>61</sup> *See id.* at 512.

<sup>62</sup> *Id.* at 534–35.

<sup>63</sup> 321 U.S. 158 (1944).

<sup>64</sup> *Id.* at 170.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> 406 U.S. 205 (1972).

attendance laws, the Court reaffirmed that compelling state interests could overcome the interest of parents in controlling education.<sup>68</sup>

Despite a shared authority in theory, in practice the state delegates control over children's education near exclusively to parents. At times, that delegation is expressed through punitive state action. Take, for example, address falsification—the attempt of some parents to gain access to improved educational opportunities at a school to which they are not assigned by falsifying their address. Increasing criminalization of these efforts enforces cultural borders between districts, emphasizing racialized beliefs about the merit and worth of those outside the district attempting to gain access.<sup>69</sup> Criminalization, however, also reinforces the delegation to parents of responsibility for access to, and quality of, education. Despite the state's shared investment in the education of children, the state acknowledges minimal responsibility for the inability of parents to access quality education in their own communities, and chooses instead to punish parents who try to work around it. Likewise, truancy laws that punish parents for failing to ensure student attendance reflect similar impulses, blaming parents for poor school attendance that can be caused by factors outside of parental control.<sup>70</sup> Blame for academic failure caused by structural failures is ultimately placed at the feet of individual parents.<sup>71</sup>

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<sup>68</sup> *Id.* at 233–36.

<sup>69</sup> LaToya Baldwin Clark, *Stealing Education*, 105 VA. L. REV. 397, 397–401 (2019).

<sup>70</sup> Beyond the contribution of important individual and family risk factors, truancy and absenteeism both suggest some degree of alienation from school. Julia Wilkins, *School Characteristics that Influence Student Attendance: Experiences of Students in a School Avoidance Program*, HIGH SCH. J., Feb./Mar. 2008, at 12, 16–21 (identifying four factors, including school climate, academic environment, discipline, and relationships with teachers, as factors influencing truancy); Henry, *supra* note 19, at 34 (finding that improving school engagement, school environment, and perceptions of safety at school, in addition to improving a student's own academic performance and commitment to a rigorous program, may have beneficial effects on truancy); Isabelle Archambault, Michel Janosz, Jean-Sébastien Fallu & Linda S. Pagani, *Student Engagement and Its Relationship with Early High School Dropout*, 32 J. ADOLESCENCE 651, 666 (2009) (noting that students are often sanctioned in response to impoliteness, truancy, and absenteeism, which further contributes to negative perceptions about investing in school).

<sup>71</sup> See, e.g., Richard Cohen, Opinion, 'Waiting for Superman' Ignores the Real Problem with Schools, WASH. POST (Sept. 24, 2010, 10:15 AM), [http://voices.washingtonpost.com/postpartisan/2010/09/waiting\\_for\\_superman\\_ignores\\_t.html](http://voices.washingtonpost.com/postpartisan/2010/09/waiting_for_superman_ignores_t.html) [<https://perma.cc/B4VY-PVT9>] (“[L]ack of money is not what ails this country’s schools, and neither is it the teachers’ unions. It is indifferent, lousy parents . . . .”); Debbie Schluskel, *Only Moronic “Parents” Are “Waiting for Superman,”* EDUC. WATCH INT’L (Oct. 11, 2010), <http://edwatch.blogspot.com/2010/10/only-moronic-parents-are-waiting-for.html?m=1> [<https://perma.cc/4A28-E94P>] (“[I]f your kid’s whole future depends on winning the lottery, you’re incompetent—a bad parent and you made the wrong choices that got you to this point.”).

Less obvious, delegation can also manifest in laws purportedly meant to secure individual rights. The Individuals with Disabilities Education Act (“IDEA”),<sup>72</sup> for example, successfully broadened access to public education for students with disabilities by requiring states to provide those students with a “free appropriate public education.”<sup>73</sup> At the same time, IDEA placed a significant burden on parents. Whereas IDEA’s requirement that schools include parents in creating the child’s Individualized Education Program (“IEP”)<sup>74</sup> is in the spirit of parent-state collaboration, IDEA also placed on parents a detailed and complex enforcement and implementation role.<sup>75</sup> This rights regime in special education rewards those parents with the most organizational savvy and social capital, one reason for the disproportionately high representation of Black children in special education’s most subjective and stigmatized disability categories.<sup>76</sup> It also signals, however, that parents are in charge and on their own. To effectively navigate the education system, they must operate as private attorneys with all the skills and resources such a role requires.

At other times still, delegation to parents is effectuated through initiatives meant to expand autonomy. School choice initiatives, for example, are justified as a way to expand parental control and guarantee opportunities for parents to escape unsatisfactory schools.<sup>77</sup> School choice, however, suggests that there are better and worse alternatives

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72 20 U.S.C. §§ 1400–1482.

73 *Id.* § 1400(d)(1)(A).

74 *See id.* § 1414(d).

75 In addition to inclusion in the assessment and evaluation process, under IDEA parents are “empowered” to: request a school district to pay for an independent evaluation (and pay for one privately if the school district opposed the request); provide input and articulate concerns when developing the IEP; file a due process complaint to obtain a hearing or an administrative complaint to obtain an investigation; enter mediation; and file a civil action in state or federal court and represent themselves. *Id.* §§ 1414(c)(1), 1415(b)(1), (i)(2); 34 C.F.R. §§ 300.151–300.153 (2020); Andrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017).

76 Black children are overrepresented in disability categories that are assessed more subjectively and are more stigmatized, like intellectually impaired or “emotionally disturbed,” but underrepresented in the less stigmatized disability categories, like deafness or blindness. *See* Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.–C.L. L. REV. 407, 416–17 (2001); Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1251–52. In contrast, middle-class white children are disproportionately represented in the greater resourced and less-stigmatized autism category. LaToya Baldwin Clark, *Beyond Bias: Cultural Capital in Anti-Discrimination Law*, 53 HARV. C.R.–C.L. L. REV. 381, 383 (2018).

77 *See infra* Section I.B.1.

among which to choose, and that parents who are not choosing will be left behind.

Even when the state purports to expand, rather than minimize, its engagement in education, the logic of parental control dominates. State takeovers of local school districts, for example, are meant to more centrally insert state government in education management when local control is said to have “failed.”<sup>78</sup> These sorts of takeovers, however, tend to favor market-oriented school reform solutions that maximize individualism and choice.<sup>79</sup> In Louisiana, this resulted in a statewide network of charter schools that required parents to choose the right school for their children<sup>80</sup>—a move that worked to absolve the state of responsibility for the underperformance of school districts.

Whether punitive or empowering, delegation to parents fits into a larger pattern of privatization through which private norm creation and decision making replace state governance in matters of the family.<sup>81</sup> And although parents may be in the best position to offer care and education for their children,<sup>82</sup> American parents are also acutely aware of their obligation to ensure their children “get ahead.” This sense of obligation is made all the more urgent given the country’s thin social safety net, increasing employment and economic insecurity, and decreasing likelihood that children in America will enjoy improved life outcomes relative to their parents.<sup>83</sup> Choice, and the delegation it prompts, amplifies risk.

## 2. Merit

Alongside choice operates a commitment to meritocracy—a dominant cultural belief that informs political, economic, and social functioning in the United States. In the context of selective admissions

<sup>78</sup> See DOMINGO MOREL, TAKEOVER: RACE, EDUCATION, AND AMERICAN DEMOCRACY 1–3 (2018).

<sup>79</sup> See *id.* at 132–35 (discussing the rise of the “conservative education logic” and how it has informed state takeovers of local school districts).

<sup>80</sup> *Id.* at 135–38 (detailing a “conservative education logic” that informed Louisiana’s state takeover of New Orleans schools in 2005).

<sup>81</sup> Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1444–46; see also Melissa Murray, *Family Law’s Doctrines*, 163 U. PA. L. REV. 2012–17 (2015) (arguing that inconsistent case law is made more coherent when understood as the state’s attempt to maintain the family’s role in privatizing dependency).

<sup>82</sup> See Courtney G. Joslin, *Family Support and Supporting Families*, 68 VAND. L. REV. EN BANC 153, 164–65 (2015) (arguing that, assuming caregivers have adequate support, a default rule in presumption of family care is not necessarily a bad thing because family members are often best positioned to offer care, people often prefer to be cared for by family members, and family care strengthens and stabilizes relationships).

<sup>83</sup> See *supra* notes 41–55 and accompanying text.



to schools and colleges, faith in a meritocracy is based on two related beliefs: (1) admissions criteria are objective, neutral, and can either adequately identify those deserving of university admission or accurately predict academic and career success; and (2) all students willing to work hard enough can achieve the targets set by admissions criteria.<sup>84</sup> Merit shifts the focus to individuals, and in doing so, absolves the state for education outcomes.

Scholars have deconstructed the meritocracy myth in the United States,<sup>85</sup> explaining that educational disparities are not driven solely by individual work ethic or talent.<sup>86</sup> Rather, structural obstacles on the basis of gender, race, class, immigration status, and a number of other identities lead to differences in resources and disparate access to educational goods and opportunities.<sup>87</sup> Indeed, in the context of higher education, even the standardized test scores that opponents of race-conscious admissions use to highlight the unfairness of these policies are highly correlated with race and wealth, rather than with individual merit.<sup>88</sup>

Nevertheless, the preservation of a purported meritocracy underlines much of the Court's higher education jurisprudence. *Regents of the University of California v. Bakke*,<sup>89</sup> for example, is well known for Justice Powell's opinion in which he concluded the state had a legitimate interest in diversity that could be served by considering race or ethnic origin as one of many factors in a competitive admissions process.<sup>90</sup> Nevertheless, a majority of the Court struck down the Univer-

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<sup>84</sup> Cf. Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 590 (2000) (describing the meritocracy myth in employment as resting on an assumption that employment discrimination is anomalous and that merit determines employment success); see also Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585, 586 (1996) (describing, in the context of gender, the myth as the assumption that female lawyers are close to achieving proportionate representation and that lingering disparities are due to individual choice or differing capabilities).

<sup>85</sup> See, e.g., Lawton, *supra* note 84, at 590–91 (addressing the meritocracy myth in employment discrimination); Rhode, *supra* note 84, at 586 (addressing the meritocracy myth in the context of gender and employment); Mark R. Rank, *Toward a New Understanding of American Poverty*, 20 WASH. U. J.L. & POL'Y 17, 20–26 (2006) (deconstructing the meritocracy myth in the context of poverty).

<sup>86</sup> See, e.g., STEPHEN J. McNAMEE & ROBERT K. MILLER, JR., *THE MERITOCRACY MYTH* 17–18 (2d. ed. 2009) (finding that the American education system “is tracked by social class and reproduces the class system”); Rank, *supra* note 85, at 20–26 (deconstructing the meritocracy myth in the context of poverty).

<sup>87</sup> See *supra* notes 27–28 and accompanying text.

<sup>88</sup> See *infra* notes 173–74 and accompanying text.

<sup>89</sup> 438 U.S. 265 (1978).

<sup>90</sup> *Id.* at 314–18 (opinion of Powell, J.).

sity of California Medical School's admissions policy on the basis of merit: the policy was unconstitutional because it used a quota system that prevented nonminorities from competing for seats reserved exclusively for minorities,<sup>91</sup> an unstated but powerful assumption that admissions should be granted to those who are most "meritorious." In affirming "individualized consideration," and rejecting quotas that reserved seats for minority students, Powell idealized a process that "weighed [qualifications] fairly and competitively."<sup>92</sup> The idea that differences in color should in no way be relevant to how the state treats people functioned as a critical baseline for analysis, subjecting the use of race in admission to a rebuttable presumption of illegitimacy going forward.<sup>93</sup>

When affirming Powell's diversity rationale in *Grutter v. Bollinger*,<sup>94</sup> the Court returned to merit as a normative frame for admissions in higher education. Writing for the majority, Justice O'Connor endorsed Powell's view of diversity as a compelling interest to justify the consideration of race in admissions, and also noted that the narrow use of race under review did not "unduly burden" nonminority students.<sup>95</sup> According to O'Connor, preferences in admissions implicated "serious problems of justice," potentially harming "innocent" persons competing for the benefit,<sup>96</sup> presumably on the basis of merit.<sup>97</sup> De-

<sup>91</sup> *Id.* at 271, 320 (majority opinion).

<sup>92</sup> *Id.* at 318 & n.52 (opinion of Powell, J.).

<sup>93</sup> However, this baseline was challenged even in *Bakke*, as the justices debated whether the Constitution must be "colorblind." *Id.* at 336, 355 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) ("[N]o decision of this Court has ever adopted the proposition that the Constitution must be colorblind. . . . The assertion of human equality is closely associated with the proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated. Nonetheless, the position that such factors must be 'constitutionally an irrelevance,' summed up by the shorthand phrase '[o]ur Constitution is color-blind,' has never been adopted by this Court as the proper meaning of the Equal Protection Clause." (second alteration in original) (citations omitted) (first quoting *Edwards v. California*, 314 U.S. 160, 185 (1941) (Jackson, J., concurring); and then quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))).

<sup>94</sup> 539 U.S. 306 (2003).

<sup>95</sup> *Id.* at 341.

<sup>96</sup> *Id.* (first quoting *Bakke*, 438 U.S. at 298 (opinion of Powell, J.); and then quoting *id.* at 308). The image of an "innocent" white plaintiff draws power from an implicit contrast with a person of color who is unfairly and guiltily benefitting from affirmative action. See Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 314–15 (1990). The contrast is buttressed by stereotypes regarding lazy minorities who cheat the system. See *id.*

<sup>97</sup> Indeed, challenges to affirmative action typically focus on the higher GPAs and standardized test scores of the white students denied admission in an attempt to suggest that if decisions were based on actual merit, plaintiffs would not have been rejected, nor minority students admitted. See, e.g., *Grutter*, 539 U.S. at 316–17 (white student with a 3.8 GPA and a 161 LSAT waitlisted then rejected from the University of Michigan Law School sued the university for

spite the suggestion from other justices that merit in admissions is “poisoned” by policies like legacy preferences,<sup>98</sup> O’Connor doubled down on the idea of a meritocracy in American educational institutions. The Court again affirmed merit nine years later in *Fisher v. University of Texas at Austin*<sup>99</sup> when a white student challenged the use of race in admissions as no longer necessary given other admissions policies in use.<sup>100</sup> The Court thus returned to a vision of colorblindness that it believed would facilitate a genuine meritocracy in higher education.<sup>101</sup>

Aspirational appeals to colorblindness only shift risk from the state to individuals. Although policies like race-conscious admission may still be legitimate for now, their use is circumscribed as the Court encourages a move toward a meritocracy devoid of references to race.<sup>102</sup> Self-determination, sufficient to overcome obstacles imposed on account of race, class, or gender, is what determines who does and does not deserve admission to selective institutions. Indeed, in the K–12 context, developing “grit” is increasingly identified as the solu-

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discrimination on the basis of race); *Bakke*, 438 U.S. at 276–78 (opinion of Powell, J.) (white student alleged discrimination when he was rejected from the University of California Davis School of Medicine when there were still slots open in the special admissions program and students with lower GPAs and MCAT scores were admitted under the special admissions program). Interestingly, however, experimental studies suggest that Whites are more likely to deemphasize the importance of “objective” factors like GPA or test scores as a sign of merit when Asian group threat is primed. See Frank L. Samson, *Multiple Group Threat and Malleable White Attitudes Toward Academic Merit*, 10 DU BOIS REV. 233, 246–47 (2013); Frank L. Samson, *Altering Public University Admission Standards to Preserve White Group Position in the United States: Results from a Laboratory Experiment*, 57 COMPAR. EDUC. REV. 369, 380–82 (2013).

<sup>98</sup> *Grutter*, 539 U.S. at 367–68 (Thomas, J., concurring in part and dissenting in part) (“The rallying cry that in the absence of racial discrimination in admissions there would be a true meritocracy ignores the fact that the entire process is poisoned by numerous exceptions to ‘merit.’”).

<sup>99</sup> 570 U.S. 297 (2013).

<sup>100</sup> *Id.* at 301–03.

<sup>101</sup> *Id.* at 307–08 (“Any racial classification must meet strict scrutiny, for when government decisions ‘touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.’” (emphasis added) (quoting *Bakke*, 438 U.S. at 299 (opinion of Powell, J.))).

<sup>102</sup> In fact, in affirming race-conscious admissions policies in pursuit of diversity, Justice O’Connor seemingly imposed a time limit of twenty-five years. *Grutter*, 539 U.S. at 343 (“It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” (citation omitted)).

tion to closing achievement gaps,<sup>103</sup> despite lingering racial segregation, economic isolation, inadequate healthcare, poor early childhood education, or food and housing insecurity. Rather, the most “meritorious” individuals, with minimal help from the state, are left to navigate those risks alone.

### B. *Risk in Education Policy*

Scaffolded by a doctrine which affirms individual choice and responsibility, current education policy shifts state responsibility for education quality and outcomes to parents and caregivers. Admittedly, education is not a guarantee of economic security, and is thus not a risk-free investment. Indeed, increasing disparities among workers with identical educational and experience levels explain more than half of the growth in economic inequality in the United States.<sup>104</sup> Nev-

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<sup>103</sup> See, e.g., ANGELA DUCKWORTH, GRIT: THE POWER OF PASSION AND PERSEVERANCE 15–34 (2016) (documenting the impact of grit in educational settings, among many other contexts); LAILA Y. SANGURAS, GRIT IN THE CLASSROOM 7–8 (2017) (developing a strategy for cultivating grit in students in the classroom and beyond); Laura Moser, *No, of Course You Can't Judge Schools on Students' "Grit." We're Still Trying*, SLATE (Mar. 28, 2016, 12:18 PM), <https://slate.com/human-interest/2016/03/angela-duckworth-who-pioneered-idea-of-grit-in-schools-thinks-schools-are-taking-grit-too-far.html> [<https://perma.cc/Y75W-9BN7>] (documenting the rise of grit and character assessment, as indicated by school district testing on the social-emotional skill and the attempts of the National Assessment of Educational Progress to assess how grit impacts learning). *But see* Ethan W. Ris, *Grit: A Short History of a Useful Concept*, 10 J. EDUC. CONTROVERSY 1, 1–2 (2015) (concluding that the assumption that grit is a salient concept for low-income students is a misconception, and grit theory offers little of value to disadvantaged students while romanticizing hardship); Marcus Credé, *What Shall We Do About Grit? A Critical Review of What We Know and What We Don't Know*, 47 EDUC. RESEARCHER 606, 606 (2018) (concluding that although enthusiastically received by educational practitioners, there is no support for the claim that grit is a particularly good predictor of success and performance in an educational setting); Christian B. Sundquist, *Beyond the Resiliency and 'Grit' Narrative in Legal Education: Race, Class, and Gender Considerations*, 50 J. MARSHALL L. REV. 271, 272 (2017) (expressing concerns over how the focus on grit in legal education could counteract efforts to address systemic challenges like the impact of poverty and identity-rooted biases on students).

<sup>104</sup> HACKER, *supra* note 38, at 66. People with the same amount of schooling increasingly have more disparate long-term outcomes than they used to, undercutting the idea of education as a sure bet for economic advancement. *Id.* Moreover, although secondary education “remains an economically wise investment,” as overall educational levels have increased, so has the value of post-secondary education; a postgraduate degree has “become the most important means for transmitting economic status to the next generation.” RICHARD V. REEVES, DREAM HOARDERS: HOW THE AMERICAN UPPER MIDDLE CLASS IS LEAVING EVERYONE ELSE IN THE DUST, WHY THAT IS A PROBLEM, AND WHAT TO DO ABOUT IT 55 (2017) (quoting economist Florencia Torche as explaining that “[i]ntergenerational reproduction declines among college graduates . . . but reemerges among advanced degree holders” (quoting Interview with Florencia Torche, Economist, New York Univ.)). Of course, much of the divergence in economic inequality is due to increasing volatility individual Americans are asked to manage in matters of healthcare access, job security, and wages. See HACKER, *supra* note 38, at 83.

ertheless, education policy amplifies education risk, undercutting the state's role in managing and distributing quality education and subjecting parents to the risk that abdication creates.

Risk in education is typically understood through the student debt crisis, a phenomenon defined by the fact that forty-five million borrowers collectively owe \$1.6 trillion in loans for education.<sup>105</sup> Between 1970 and 2013, as the number of students enrolled in college increased, the cash value of student loans rose by more than 1,300%.<sup>106</sup> In 1993, the share of individuals graduating from four-year public colleges with student loan debt was 25%; that figure increased to 63% in 2008.<sup>107</sup> Forty percent of graduates of four-year private colleges held student loan debt in 1993; that figure increased to 73% in 2008.<sup>108</sup> The impact of student debt can be particularly pronounced on minorities. Black families, for example, carry more debt than white families, a factor that contributes to a racial wealth gap; in fact, eliminating student loan debt among Black families would significantly close that gap.<sup>109</sup> After mortgages, student loan debt is the second highest category of consumer debt,<sup>110</sup> and student loan debt in total “exceeds all the unpaid balances on American credit cards.”<sup>111</sup>

Despite data suggesting that the crisis may not be as urgent as it seems,<sup>112</sup> student debt is characterized by researchers and journalists as part of a larger affordability crisis in the United States.<sup>113</sup> This crisis

<sup>105</sup> Zack Friedman, *Is There Really a Student Loan Crisis?*, FORBES (Dec. 19, 2019, 8:33 AM), <https://www.forbes.com/sites/zackfriedman/2019/12/19/is-there-really-a-student-loan-crisis/#338659b14025> [<https://perma.cc/47PH-Q5L7>].

<sup>106</sup> See Sandy Baum, *The Evolution of Student Debt in the United States*, in STUDENT LOANS AND THE DYNAMICS OF DEBT 11, 16 tbl.2.3 (Brad Hershbein & Kevin Hollenbeck, eds. 2015) (providing data on annual federal student loan borrowing which indicates an increase in cash value of 1,341% between 1970 and 2013).

<sup>107</sup> HACKER, *supra* note 38, at 67.

<sup>108</sup> *Id.*

<sup>109</sup> Hillary Hoffower & Allana Akhtar, *11 Mind-Blowing Facts that Show Just How Dire the Student-Loan Crisis in America Is*, BUS. INSIDER (Oct. 11, 2019, 11:17 AM), <https://www.businessinsider.com/student-loan-debt-crisis-college-cost-mind-blowing-facts-2019-7> [<https://perma.cc/3M3R-SMZL>].

<sup>110</sup> Friedman, *supra* note 105.

<sup>111</sup> HACKER, *supra* note 38, at 67.

<sup>112</sup> Friedman, *supra* note 105 (explaining that despite high volume, only 8% of borrowers have more than \$100,000 in student loan debt, half of all debt is for graduate education, students who owe less than \$5,000 default most often, and most college students graduate with little if any debt). *But see* HACKER, *supra* note 38, at 174–75 (arguing that findings that few default on their student loans are misleading because they are only based on three years of tracking borrowers, and that as of 2017, 16% of borrowers default within five years, with almost as many severely delinquent or not making payments at all).

<sup>113</sup> See Hoffower & Akhtar, *supra* note 109.

is responsible, along with the Great Recession, for delaying the ability of millennials to get married, buy a home, or begin a family.<sup>114</sup> Proposals to address the cost of college, ranging from forgiveness programs, to universal free college, to greater state subsidization, dominate policy discussion and political debate.<sup>115</sup>

A second dominant framing for education risk is the debate regarding for-profit colleges.<sup>116</sup> Supporters of the institutions tout them as promising entities that respond to a niche student market neglected by nonprofit colleges and universities.<sup>117</sup> Opponents, however, criticize them as driven by a profit motive that will produce casualties disproportionately borne by first-generation, minority, poor- and working-class, and veteran students.<sup>118</sup> And unfortunately, these concerns have materialized. In addition to having been subjected to unethical recruiting and marketing practices, graduates of for-profit colleges enjoy weaker economic returns on their education, borrow at significantly higher rates than students of public and private nonprofit institutions, and have disproportionately high rates of student loan defaults<sup>119</sup>—factors that have, at times, led to increased regulation.<sup>120</sup>

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<sup>114</sup> See *id.*

<sup>115</sup> See, e.g., Sahil Kapur, *Elizabeth Warren Proposes Scrapping Student-Loan Debt for Millions*, BLOOMBERG (Apr. 22, 2019, 10:51 AM), <https://www.bloomberg.com/news/articles/2019-04-22/warren-proposes-scrapping-student-debt-for-millions-in-2020-plan> [<https://perma.cc/2UHV-DZ3W>] (describing a \$1.25 trillion plan to forgive existing loan debt for an estimated 42 million borrowers and provide universal access to free college); Tara Golshan, *Bernie Sanders's Free College Proposal Just Got a Whole Lot Bigger*, VOX (June 23, 2019, 10:28 PM), <https://www.vox.com/policy-and-politics/2019/6/23/18714615/bernie-sanders-free-college-for-all-2020-student-loan-debt> [<https://perma.cc/G6XG-EN8Z>] (describing a plan to forgive all student loan debt in the United States and provide federal funding to eliminate undergraduate tuition and fees at state universities, tribal universities, and historically Black colleges and universities).

<sup>116</sup> For-profit colleges are post-secondary educational institutions that explicitly seek to profit from the educational services they provide and include independent, for-profit vocational programs and for-profit colleges and universities, which dominate the field. See Osamudia R. James, *Predatory Ed: The Conflict Between Public Good and For-Profit Higher Education*, 38 J. COLL. & U.L. 45, 49 (2011).

<sup>117</sup> See *id.* at 46.

<sup>118</sup> See *id.*

<sup>119</sup> *Id.* at 69–70, 72.

<sup>120</sup> In response to high default rates and industry abuses in the 1980s and early 1990s, Congress adopted the 90/10 rule, which prohibited proprietary institutions from deriving more than 90% of its revenues from federal grants and loans, and the 50/50 rule, which prohibited proprietary institutions from offering more than 50% of their courses as online or correspondence. Melanie Hirsch, *What's in a Name? The Definition of an Institution of Higher Education and Its Effect on For-Profit Postsecondary Schools*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 817, 819–20, 827–29 (2006); WILLIAM G. TIERNEY & GUILBERT C. HENTSCHKE, *NEW PLAYERS, DIFFERENT GAME: UNDERSTANDING THE RISE OF FOR-PROFIT COLLEGES AND UNIVERSITIES* 177 (2007). In 2010, a series of hearings held by the Senate Committee on Health, Education, Labor, and Pen-

Education risk, however, is broader than student loan debt or predatory practices in the for-profit industry. Rather, education risk is also embedded in commonly accepted, although no less perilous, policies, including school choice initiatives, school admissions strategies, and day-to-day school marketing and management. Consideration of these policies appropriately widens the lens on education risk, revealing the ways that parents navigate insecurity and instability in the American school system.

### 1. School Choice

Early cases like *Pierce* and *Yoder* established the right of parents to direct their children's education.<sup>121</sup> Today, choice continues to inform education reform. Policymakers and advocates herald school choice, typically in the form of voucher programs and charter schools,<sup>122</sup> as a key component of school reform, often with bipartisan support.<sup>123</sup> The No Child Left Behind ("NCLB") Act of 2001<sup>124</sup> and

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sions focused on for-profit higher education, with members vowing to crack down on "bad actors" in the industry. James, *supra* note 116, at 89; Kelly Field, *Senate Hearing on For-Profits to Feature Video of Government Undercover Investigation*, CHRON. HIGHER EDUC. (July 29, 2010), <https://www.chronicle.com/article/senate-hearing-on-for-profits-to-feature-video-of-government-undercover-investigation/> [<https://perma.cc/K83G-XDE2>]. Focus on the industry during this period led to proposed rules in 2011 that were meant to curb the latest surge in abuse practices in the sector. James, *supra* note 116, at 89. Despite reports in 2019 suggesting that abusive practices were again on the rise in the industry, see Michelle Chen, *For-Profit Colleges Are Dodging Regulation by Becoming . . . 'Nonprofits'?*, NATION (Mar. 18, 2019), <https://www.thenation.com/article/archive/higher-education-corporate-colleges/> [<https://perma.cc/3TFM-9UKS>], education secretary Betsy DeVos repealed the Obama-era "gainful employment rule," which withheld federal aid to schools that failed to actually prepare students for the job market. Erica L. Green, *DeVos Repeals Obama-Era Rule Cracking Down on For-Profit Colleges*, N.Y. TIMES (June 28, 2019), <https://www.nytimes.com/2019/06/28/us/politics/betsy-devos-for-profit-colleges.html> [<https://perma.cc/MG23-HXDM>].

<sup>121</sup> See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (holding that parents have a liberty interest in directing the upbringing and education of their children, and striking down an Oregon statute that mandated children to attend public schools); *Wisconsin v. Yoder*, 406 U.S. 205, 207, 233–36 (1972) (holding that although compelling state interests could overcome the individual interests of the Amish in controlling their children's educations, plaintiffs were ultimately exempted from the final two years of compulsory school attendance mandated in Wisconsin); see also Linda L. Schlueter, *Parental Rights in the Twenty-First Century: Parents as Full Partners in Education*, 32 ST. MARY'S L.J. 611, 617–19 (2001) (discussing caselaw establishing the parental right to direct their children's education).

<sup>122</sup> School choice initiatives can be characterized as "market choice" or "public choice." "Market choice" refers to the use of vouchers for private, charter, or alternative public schools in an attempt to shape the education marketplace, while "public choice" refers to school choice programs existing solely within the public school system. Henry M. Levin, *The Theory of Choice Applied to Education*, in 1 CHOICE AND CONTROL IN AMERICAN EDUCATION 247, 247, 255–66 (William H. Clune & John F. Witte eds., 1990).

<sup>123</sup> See RICHARD D. KAHLBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS

the Race to The Top (“RTTT”) fund,<sup>125</sup> two recent federal initiatives to reform education, centered on school choice initiatives, subjecting public schools to the market principles that inform school choice ideology.<sup>126</sup> NCLB, for example, subjected schools that failed to make “adequate yearly progress” to state control and potentially to reconstitution as a charter school,<sup>127</sup> while RTTT distributed funding to school districts based, in part, on how well they “ensur[ed] successful conditions for high-performing charters.”<sup>128</sup> Although political favor for charter schools has begun to erode,<sup>129</sup> charter schools enjoyed robust growth in the first two decades of this century and are firmly established in many school systems,<sup>130</sup> particularly in urban areas.<sup>131</sup>

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SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 148–49 (2001); TERRY M. MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICA’S PUBLIC SCHOOLS 327–29 (2011) (describing Republican and Democratic support for voucher programs).

124 Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.), *repealed by* Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified as amended in scattered sections of 20 U.S.C.).

125 See *Race to the Top Fund*, U.S. DEP’T OF EDUC. (June 6, 2016), <https://www2.ed.gov/programs/racetothetop/index.html> [<https://perma.cc/85B8-M6ML>].

126 School choice contemplates an education market where the capacity of parents to “shop around” not only allows for greater educational customization but also spurs competition that motivates school improvement. See MOE, *supra* note 123, at 327–28. A market mindset, however, transforms education from a collaborative endeavor to one where teachers are salespersons and students and parents are customers, thus alienating individuals who come together in schools from each other. See SAMUEL E. ABRAMS, *EDUCATION AND THE COMMERCIAL MINDSET* 10–14 (2016). This understanding of education undercuts public schooling as an exercise in citizenship and democracy and undermines a commitment to antisubordination.

127 James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 942–43 (2004).

128 U.S. DEP’T OF EDUC., *RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY* 2–3 (2009), <https://www2.ed.gov/programs/racetothetop/executive-summary.pdf> [<https://perma.cc/D2KS-F9JH>].

129 See, e.g., Erica L. Green, *Charter Schools in Surprise Political Fight as Trump and Democrats Turn Away*, N.Y. TIMES (Feb. 25, 2020), <https://www.nytimes.com/2020/02/25/us/politics/charter-schools-trump-devos-democrats.html> [<https://perma.cc/SV9Y-PC4T>] (documenting growing Democratic disenchantment with charter schools as the Trump administration shifted its education emphasis and support to private schooling); Erica L. Green & Eliza Shapiro, *Minority Voters Chafe as Democratic Candidates Abandon Charter Schools*, N.Y. TIMES (Nov. 27, 2019), <https://www.nytimes.com/2019/11/26/nyregion/charter-schools-democrats.html> [<https://perma.cc/AP2C-W26T>] (documenting frustration among Black and Latino parents in response to the Democratic Party’s move away from support for charter schools).

130 From 1993 to 2009, the number of charter schools grew between 10% and 15% annually. Jeanne Allen, *Understanding Charter School Growth*, HERITAGE FOUND. (July 20, 2017), <https://www.heritage.org/2017-index-culture-and-opportunity/understanding-charter-school-growth> [<https://perma.cc/7FBF-RK6X>]. From 2000 to 2017, charter school enrollment increased by 2.7 million students. *The Condition of Education: Public Charter School Enrollment*, NAT’L CTR. FOR EDUC. STAT., (May 2020), [https://nces.ed.gov/programs/coe/indicator\\_cgb.asp](https://nces.ed.gov/programs/coe/indicator_cgb.asp) [<https://perma.cc/8E59-LUNG>].



“School choice” exerts a significant pull on parents subject to its rhetoric, even in the absence of improved education outcomes.<sup>132</sup> Education functions as currency in systems of social stratification. As a form of cultural capital, it motivates parents to seek a quality education in order to maximize a child’s life chances.<sup>133</sup> That motivation, however, exists alongside angst; a large body of literature documents high levels of anxiety—particularly among middle-class parents—about their attempts to protect their children from danger, ensure academic achievement, and select the “right” school.<sup>134</sup> A heightened awareness of danger and the potential for managing it in a “risk soci-

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<sup>131</sup> As increasingly documented by researchers, the efficacy of school choice in rural areas is overlooked, with existing research suggesting that penetration of charter schools into rural America is relatively low in part because school choice as a form of school reform is most responsive to urban populations and concerns. See M. Danish Shakeel & Robert Maranto, *Left Behind? School Choice in Rural Communities*, 13 J. SCH. CHOICE 463, 463–64 (2019).

<sup>132</sup> Overall, school choice and charter schools have not been conclusively shown to improve school quality. Although some charter networks significantly improve student achievement, others harm student learning. See JAMES L. WOODWORTH, MARGARET E. RAYMOND, CHUNPING HAN, YOHANNES NEGASSI, W. PAYTON RICHARDSON & WILL SNOW, CTR. FOR RSCH. ON EDUC. OUTCOMES, CHARTER MANAGEMENT ORGANIZATIONS 2017, at 71–93 (2017). Moreover, studies which attempt to isolate the impact of charter schools on the achievement of all students in a region produce mixed results. Matt Barnum, *Do Charter Schools “Lift All Boats”? Here’s What the Latest Research Tells Us*, CHALKBEAT (Oct. 2, 2019, 4:15 PM), <https://www.chalkbeat.org/2019/10/2/21108944/do-charter-schools-lift-all-boats-here-s-what-the-latest-research-tells-us> [https://perma.cc/Z5HS-H9CN]. Although charters in cities serving mostly Black and Hispanic students tend to do better, it is unclear how much these outcomes are impacted by increased philanthropy or the migration of higher performing students to places with more charter schools. *Id.*

<sup>133</sup> See David Sikkink & Michael O. Emerson, *School Choice and Racial Segregation in US Schools: The Role of Parents’ Education*, 31 ETHNIC & RACIAL STUD. 267, 270–71 (2008). To the extent that social mobility is offered as a justification for public provision of education, it potentially ceases to serve a democratic purpose and instead serves private striving in a stratified society. Erika K. Wilson, *Blurred Lines: Public School Reforms and the Privatization of Public Education*, 51 WASH. U. J.L. & POL’Y 189, 224–25 (2016).

<sup>134</sup> See, e.g., MARGARET K. NELSON, PARENTING OUT OF CONTROL 5–14 (2010) (documenting both the efforts of parents to maintain class distinctions, as well as the vulnerability of parents to modern technology which makes constant parenting possible, as sources of parental anxiety); Rachel Pain, *Paranoid Parenting? Rematerializing Risk and Fear for Children*, 7 SOC. & CULTURAL GEOGRAPHY 221, 221–22 (2006) (finding that “paranoid parenting,” or fear for children, can “sometimes be seen to have a material basis”); Frank Furedi, *Paranoid Parenting*, GUARDIAN (Apr. 26, 2001, 8:25 PM), <https://www.theguardian.com/education/2001/apr/26/highereducation.socialsciences> [https://perma.cc/9MS8-SFFX] (documenting the strong social pressures placed on parents to adopt a precautionary approach to child-rearing); Carolyn Sattin-Bajaj & Allison Roda, *Opportunity Hoarding in School Choice Contexts: The Role of Policy Design in Promoting Middle-Class Parents’ Exclusionary Behaviors*, 34 EDUC. POL’Y 992, 1004–05 (2020) (finding that parents expressed high levels of anxiety about school placements, which prompted them to engage in opportunity-hoarding activities despite the financial and time investment school choice processes demanded of them).

ety”<sup>135</sup> works alongside neoliberal policies and norms that emphasize choice and individual responsibility. In this context, where life outcomes are understood to necessarily rest on individual decisions, parents are concerned about economic competition, the absence of a social safety net, and opportunities for their children’s “advancement.”<sup>136</sup> School choice both doubles down on this dynamic by asking parents to ensure future success through present school selection and prompts perceptions of scarcity in quality primary and secondary schools, even among populations that enjoy greater access to high performing schools.<sup>137</sup>

Unsurprisingly, the most privileged parents navigate this risk in ways that infringe on the security and equality interests of others. Although competition and varied options are expected to produce rational choices,<sup>138</sup> parents who engage in a school choice market do not necessarily make those decisions informed by what would be academically best for their children. Research suggests instead that white parents prefer predominantly white schools to predominantly Black schools even when other factors germane to education quality, like resources, are equal.<sup>139</sup> Other studies show that as much as 75% of the variation in school choice preferences can be explained by the percentage of Black students in the schools.<sup>140</sup> White middle-class families, moreover, are also particularly adept at using school choice policies as a way to enroll in selective charters schools or specialized programs, often hoarding these resources in ways that limit access for others.<sup>141</sup> Ultimately, white parents use race as a heuristic for quality,

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135 Maia Cucchiara, “*Are We Doing Damage?*” *Choosing an Urban Public School in an Era of Parental Anxiety*, 44 *ANTHROPOLOGY & EDUC. Q.* 75, 76 (2013) (citing to literature on an intensified awareness of dangers and efforts to avoid those dangers, both external (e.g., flood or famine) and manufactured (climate change or terrorism)).

136 The effect is particularly pronounced for middle-class parents. See ANNETTE LAREAU, *UNEQUAL CHILDHOODS* 1–8 (2003).

137 See Sattin-Bajaj & Roda, *supra* note 134, at 1005–09 (documenting anxiety regarding supply and scarcity among white parents subject to New York City’s school choice process).

138 The capacity for exercising “rational” choice is defined by law and economics scholars as “choosing the best means to the chooser’s ends.” Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 *STAN. L. REV.* 1551, 1551 (1998).

139 See Chase M. Billingham & Matthew O. Hunt, *School Racial Composition and Parental Choice: New Evidence on the Preferences of White Parents in the United States*, 89 *SOCIO. EDUC.* 99, 108–10 (2016).

140 Salvatore Saporito & Annette Lareau, *School Selection as a Process: The Multiple Dimensions of Race in Framing Educational Choice*, 46 *SOC. PROBS.* 418, 424 (1999); see also Susan L. DeJarnatt, *School Choice and the (Ir)rational Parent*, 15 *GEO. J. ON POVERTY L. & POL’Y* 1, 17–19 (2008) (detailing various studies showing the impact of a school’s racial composition on parents’ school choice decisions).

141 Sattin-Bajaj & Roda, *supra* note 134, at 995–99. “Opportunity hoarding” describes be-

insulating themselves from risk by selecting white schools, and thus perpetuating segregation that intensifies risk for nonwhite students.<sup>142</sup>

Nor are white parents alone in exercising power in school choice markets. Parents of color also attempt to exercise power on school choice markets, although often for different reasons. Racial segregation in the United States has exacted harsh penalties on children of color, and Black children in particular. Black and Latino students are more likely to live in racially isolated neighborhoods that concentrate poverty and thus limit the tax base for school financing.<sup>143</sup> A 2019 study found that nonwhite school districts received \$23 billion less in funding than white schools, and that nonwhite school districts spent \$2,226 less per student than did white districts.<sup>144</sup>

The social costs, moreover, of integrated schools for students of color are high, and they include second-generation segregation through gifted and special education programming,<sup>145</sup> curricula devoid of the contributions of people of color,<sup>146</sup> and racial disparities in disci-

havior that reserves the best educational opportunities and resources for one's child(ren), while excluding others from the same opportunities. *Id.* at 996.

<sup>142</sup> See Tim Walker, *Racial Isolation of Charter School Students Exacerbating Resegregation*, NEA TODAY (May 4, 2018), <https://www.nea.org/advocating-for-change/new-from-nea/racial-isolation-charter-school-students-exacerbating> [<https://perma.cc/P3CT-EU5T>] (reporting that charter schools are among the most racially segregated in the nation); ERICA FRANKENBERG, GENEVIEVE SIEGEL-HAWLEY & JIA WANG, THE C.R. PROJECT, CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS 1 (2010); Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1104–05 (2014); Shelley McDonough Kimelberg & Chase M. Billingham, *Attitudes Toward Diversity and the School Choice Process: Middle-Class Parents in a Segregated Urban Public School District*, 48 URB. EDUC. 198, 210–11 (2012) (finding through a case study in Boston that the process by which white parents select schools may contribute to an increase in racial segregation across districts).

<sup>143</sup> See *supra* notes 27–28.

<sup>144</sup> EDBUILD, \$23 BILLION 4, 6 (2019), <https://edbuild.org/content/23-billion/full-report.pdf> [<https://perma.cc/HNL6-TYKU>].

<sup>145</sup> See *infra* text accompanying notes 176–78; Jason A. Grissom & Christopher Redding, *Discretion and Disproportionality: Explaining the Underrepresentation of High-Achieving Students of Color in Gifted Programs*, AERA OPEN, Jan.–Mar. 2016, at 1, 8–10, 14–15 (finding that Black students with high standardized test scores are less likely to be assigned to gifted programs in math and reading than their white peers, even when controlling for health, socioeconomic status, and classroom and school characteristics, a problem stemming from the discretion of white teachers).

<sup>146</sup> See, e.g., Ama Mazama, *Racism in Schools Is Pushing More Black Families to Homeschool Their Children*, WASH. POST (Apr. 10, 2015, 6:01 AM), <https://www.washingtonpost.com/posteverything/wp/2015/04/10/racism-in-schools-is-pushing-more-black-families-to-homeschool-their-children/> [<https://perma.cc/L9QW-DEWZ>] (citing Eurocentric curriculum as one reason Black parents are increasingly choosing to homeschool their children); NYC COAL. FOR EDUC. JUS., DIVERSE CITY, WHITE CURRICULUM: THE EXCLUSION OF PEOPLE OF COLOR FROM EN-

pline.<sup>147</sup> According to some researchers, the impact on Black children has been particularly devastating in terms of self-esteem, motivation, the conceptualization of heroes or role models, and performance in the classroom.<sup>148</sup>

Parents of color who are able, then, use school choice to avoid negatively racialized experiences,<sup>149</sup> turning to charter schools in the hopes that their independence<sup>150</sup> will yield more positive educational experiences.<sup>151</sup> These parents enroll their children in charter schools at higher rates than white parents,<sup>152</sup> and the number of affinity schools focused on centering and celebrating minoritized identities grew as school choice became a centerpiece of public-school reform.<sup>153</sup>

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GLISH LANGUAGE ARTS IN NYC SCHOOLS 2 (2020) (documenting the lack of representation in New York City's school curricula).

<sup>147</sup> Black students are overrepresented in public school suspensions and corporal punishment, and schools are more likely to implement extremely punitive discipline and zero-tolerance policies and less likely to use mild discipline and restorative justice techniques as the percentage of Black students increases. See Kelly Welch & Allison Ann Payne, *Racial Threat and Punitive School Discipline*, 57 SOC. PROBS. 25, 28, 35–40 (2010).

<sup>148</sup> Doris Y. Wilkinson, *Integration Dilemmas in a Racist Culture*, SOC'Y, Mar./Apr. 1996, at 27, 27–28 (comparing the education of Black America during the Jim Crow era with that of the post-*Brown v. Board of Education* era).

<sup>149</sup> See KARYN R. LACY, *BLUE-CHIP BLACK: RACE, CLASS, AND STATUS IN THE NEW BLACK MIDDLE CLASS* 177–79, 187–88, 210–18 (2007).

<sup>150</sup> Although receiving public funding, charter schools are freed from many regulations governing traditional public schools and thus are freer to choose students, pick staff, and design curricula. JENNIFER L. HOCHSCHILD & NATHAN SCOVRONICK, *THE AMERICAN DREAM AND THE PUBLIC SCHOOLS* 109 (2003). In return for this independence, they are expected to achieve specific goals and other conditions of their charter. *Id.*

<sup>151</sup> Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375, 2379–81 (1997) (documenting the particular appeal of charter schools for Black parents); Nina Shokraii, *Free at Last: Black America Signs Up for School Choice*, POL'Y REV., Nov.–Dec. 1996, at 20, 22–25 (documenting the growing appeal among Black families in the late 1990s for school choice policies in Ohio, Wisconsin, Florida, California, Michigan, Texas, Illinois, and New York); Eliza Shapiro, *'I Love My Skin!' Why Black Parents Are Turning to Afrocentric Schools*, N.Y. TIMES (Jan. 8, 2019), <https://www.nytimes.com/2019/01/08/nyregion/afrocentric-schools-segregation-brooklyn.html> [<https://perma.cc/E7D5-5M2L>] (documenting the choice of Black parents in New York City to enroll in Afrocentric schools).

<sup>152</sup> Although half of all public school students are white, only 36% of charter school students are white. CTR. FOR RSCH. ON EDUC. OUTCOMES, *NATIONAL CHARTER SCHOOL STUDY 2013*, at 16 (2013). In contrast, Black students make up 16% of public school students but 29% of charter school students; Hispanic students make up 23% of public school students but 27% of charter school students. *Id.*

<sup>153</sup> See, e.g., Eric Rofes & Lisa M. Stulberg, *Introduction*, in *THE EMANCIPATORY PROMISE OF CHARTER SCHOOLS* 1, 4 (Eric Rofes & Lisa M. Stulberg eds. 2004) (documenting ethnocentric charter schools centering Hawaiian, Native American, and Black cultural and political thought); Monique Langhorne, *The African American Community: Circumventing the Compulsory Education System*, BEVERLY HILLS BAR ASS'N J., Summer/Fall 2000, at 12, 21–22 (documenting the aggressive rise in Black church schools and academics between the mid-1980s and

Voucher programs enabling children of color to attend parochial schools are also part of this landscape, sometimes even pitched by politicians as a civil rights issue in its capacity to enable Black and brown parents to escape failing schools.<sup>154</sup>

A less formal version of school choice among minoritized parents is simply the move away from vulnerability and toward privilege. In her work on middle-class Black families, for example, Mary Pattillo documents their use of family resources to provide access to private schools.<sup>155</sup> Other researchers have found that in contrast to white middle-class families that homeschool in an attempt to individualize academic programs, racial hierarchy and their children's experiences of racial discrimination drive Black middle-class families' decision to homeschool.<sup>156</sup> Other research document the social distancing in which middle-class Black parents sometimes engage, which can include moving away from lower-class neighborhoods and the schools located therein.<sup>157</sup>

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late 1990s); Milton L. Flynt, *The New Generation of Civil Rights Advocacy: The Charter School Movement in African American Communities in the South*, 4 S. REGION BLACK L. STUDENTS ASS'N L.J. 100, 106–08 (2010) (describing charter schools with a race-conscious purpose, mission, and curricula).

154 See, e.g., Jordan Fabian & Josh Wingrove, *Trump Calls Private School Vouchers Biggest Civil Rights Issue*, BLOOMBERG (June 16, 2020, 2:51 PM), <https://www.bloomberg.com/news/articles/2020-06-16/trump-calls-private-school-vouchers-biggest-civil-rights-issue> [https://perma.cc/9RPD-A78P] (discussing how President Trump saw providing school vouchers to children as becoming the most important civil rights measure in the nation). Contrary to the civil rights rhetoric in which voucher proponents shroud their advocacy, researchers have concluded that most civil rights protections that students enjoy when attending public schools do not follow them to private schools, including even the most basic protections against discrimination. Kevin G. Welner & Preston C. Green, *Private School Vouchers: Legal Challenges and Civil Rights Protections* 8–9 (UCLA C.R. Project, Working Paper, 2018).

155 MARY PATTILLO, *BLACK PICKET FENCES: PRIVILEGE AND PERIL AMONG THE BLACK MIDDLE CLASS* 99, 101, 103, 210 (2d ed. 2013); see also LACY, *supra* note 149, at 143–44, 187, 210–11 (documenting Black families in suburban Washington, D.C. who send their children to private schools).

156 See Mahala Dyer Stewart, *Pushed or Pulled Out? The Racialization of School Choice in Black and White Mothers' (Home) Schooling Decisions for Their Children*, 6 SOCIO. RACE & ETHNICITY 254, 265 (2020); see also PAULA PENN-NABRIT, *MORNING BY MORNING: HOW WE HOME-SCHOOLED OUR AFRICAN-AMERICAN SONS TO THE IVY LEAGUE* 3–4 (2003) (“As much as we work at being free and conscious people of color, independent actors rather than reactors, the truth is we began home schooling as a reaction to something some white people did to us.”); Mazama, *supra* note 146 (citing Eurocentric curriculum, teacher attitudes, harmful racial stereotypes, and harsh school punishments as reasons that Black parents are increasingly choosing to homeschool their children).

157 See, e.g., LACY, *supra* note 149, at 177–79 (discussing the concerns of Black parents in more affluent suburbs of ensuring their children do not engage with lower-class Black children).

To be sure, the choices of poor, working class, and minority families in education markets are limited by structural conditions that limit access to neighborhoods, schools, and political participation.<sup>158</sup> Still, working-class parents or parents of color with enough cultural capital and navigational savvy do use school choice markets to their advantage. Parents assigned to under-resourced and isolated schools attempt to opt into better schools available, provided they can navigate enrollment obstacles<sup>159</sup> and transportation challenges.<sup>160</sup>

Choice rhetoric exploits parental desire to maintain or improve their social standing by suggesting that academic achievement is solely a product of parental decisions. We should be even more concerned about this problem because parents of color are caught in a double bind. Fearing that their children will be “treated like black children,”<sup>161</sup> parents of color exercise options that pass off risk to the even more vulnerable. Given the general preference of American parents for neighborhood schools, it is difficult to conclude that these moves are the result of genuine choice and self-determination.<sup>162</sup> Rather, it is an attempt to manage risk manifesting as racial subordination.<sup>163</sup>

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158 See James, *supra* note 142, at 1104 (arguing that municipal zoning policies and limitations of multi-family units reflect bias that operates to exclude particular groups from access to local charter schools).

159 See, e.g., Kelley Fong & Sarah Faude, *Timing is Everything: Late Registration and Stratified Access to School Choice*, 91 SOCIO. EDUC. 242, 250, 257–58 (2018) (finding that timeline-based lotteries disproportionately impacted Black families, and concluding that bureaucratic structures may disproportionately impact the most disadvantaged families).

160 See, e.g., Patrick Denice & Betheny Gross, *Choice, Preferences, and Constraints: Evidence from Public School Applications in Denver*, 89 SOCIO. EDUC. 300, 316 (2016) (finding that school choice policies do little to solve problems of stratification and segregation associated with residentially based enrollment systems).

161 See Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353, 1371–73 (2005).

162 See, e.g., Mary Pattillo, *Everyday Politics of School Choice in the Black Community*, 12 DU BOIS REV. 41, 42 (2015) (concluding that poor and working-class Black parents in Chicago experience school choice as “limited and weak empowerment, limited individual agency, and no control”); Federico R. Waitoller & Gia Super, *School Choice or the Politics of Desperation? Black and Latinx Parents of Students with Dis/Abilities Selecting Charter Schools in Chicago*, EDUC. POL’Y ANALYSIS ARCHIVES, June 5, 2017, at 1, 16–18 (arguing that Black and Latinx parents of students with disabilities are engaging school choice through a “politics of desperation” driven by the neoliberal restructuring of urban education).

163 I thank Professor Shaun Ossei-Owusu for thoughtful exchanges about how enrollment in historically Black colleges and universities or Afrocentric charter schools can be less about desperation and more about self-love and affirmation of identity. Although I agree that these sorts of decisions are not always about a push out of the system, accurately assessing the balance of push and pull is nearly impossible in a school system where the baseline is informed by anti-Blackness.

## 2. School Admissions

Less dominant in discourse regarding education risks is a focus on the challenges of school admissions. The academic achievement and improved life outcomes that the most selective institutions, in particular, can produce is an antidote to risk—a significant reason why parents and students pursue access.

Evidence on the benefits of admission to elite institutions is mixed. Some research suggest, for example, that more selective colleges and universities, as measured by the average SAT score of enrolled students, do not produce graduates who earn more than other students who attended less selective institutions.<sup>164</sup> At the same time, some aspects of institutional selectivity are related to subsequent economic success, even after controlling for student ability. For example, students who attend colleges with higher average tuition costs tend to earn higher incomes later on, likely because those schools offer their students more resources.<sup>165</sup> And, ultimately, research is clear that income gains from attending highly selective institutions are highest for students from disadvantaged backgrounds.<sup>166</sup>

Given the potential long-term benefits, access to selective institutions is perceived as valuable. Especially given the recent decrease in acceptance rates at the most selective schools,<sup>167</sup> the anxiety admissions can inspire is significant, even prompting campaigns to “rethink” the college admissions process.<sup>168</sup> Anxiety is further compounded by

<sup>164</sup> See, e.g., Stacy Berg Dale & Alan B. Krueger, *Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables* 30 (Nat'l Bureau Educ. Rsch., Working Paper No. 7322, 1999).

<sup>165</sup> See *id.* at 26–27, 30–31.

<sup>166</sup> See *id.* at 31; Suqin Ge, Elliott Isaac & Amalia Miller, *Elite Schools and Opting In: Effects of College Selectivity on Career and Family Outcomes* 31, 34 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25315, 2018) (finding that attending a more selective school increases women's likelihood of achieving an advanced degree by 5% and overall earnings by 14%); Raj Chetty, John N. Friedman, Emmanuel Saez, Nicholas Turner & Danny Yagan, *Mobility Report Cards: The Role of Colleges in Intergenerational Mobility* 1–2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23618, 2017) (finding a correlation between elite school enrollment and the probability that lower-income students enrolled at those schools will reach the top of the earnings distribution).

<sup>167</sup> See Abby Jackson, *The Drop in Ivy League Acceptance Rates in the Past Decade Is Shocking*, BUS. INSIDER (May 18, 2015, 7:30 PM), <https://www.businessinsider.com/the-acceptance-rate-into-the-ivy-league-is-plummeting-2015-5> [<https://perma.cc/83JX-6FLP>] (documenting acceptance rate declines among Ivy League institutions).

<sup>168</sup> See MAKING CARING COMMON PROJECT, HARVARD GRADUATE SCH. OF EDUC., TURNING THE TIDE: INSPIRING CONCERN FOR OTHERS AND THE COMMON GOOD THROUGH COLLEGE ADMISSIONS (2016); see also *Mission Statement*, EDUC. CONSERVANCY, [www.educationconservancy.org/aboutus.html](http://www.educationconservancy.org/aboutus.html) [<https://perma.cc/Q9RE-QYRZ>] (established to “calm[] the frenzy and hype that plague contemporary college admissions”).

the testing regimes meant to predict the capacity of students to succeed. In the K–12 context, this manifests as entrance exams to competitive public, magnet,<sup>169</sup> and charter schools.<sup>170</sup> In higher education, standardized tests like the SAT and ACT dominate the admissions process, often dictating eligibility not just for admission, but for crucial scholarship monies that can offset the risk of debt.<sup>171</sup>

Despite the high stakes, test preparation for neither competitive K–12 schools nor college admission is uniformly provided at American public schools. A 2012 study by the Brookings Institution concluded that forty-five states spent a collective \$669 million in direct annual spending on standardized testing regimes, which include test preparation.<sup>172</sup> In contrast, the U.S. private test-preparation industry is enormous, offering students with financial means a way to improve test scores that can increase the odds of admission. In 2015, parents spent an estimated \$13.1 billion on test preparation, which includes exam preparation, tutoring, and counseling.<sup>173</sup> Due, in part, to the capacity of wealthier parents to pay for test preparation, the standardized tests that operate as a potential barrier to entry have been critiqued as correlating closer with wealth than predicting for academic success and operating as a continuing driver in racial disparities in admissions.<sup>174</sup>

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<sup>169</sup> Magnet schools offer specialized school curriculum based on a particular subject matter, theme, or distinctive teaching methodology, with the goal of attracting students from across a geographic region, away from neighborhood or private schools. EDUCATIONAL POLICY AND THE LAW 414 (Mark G. Yudof et al. eds., 4th ed. 2002).

<sup>170</sup> See *infra* Section II.A (describing competitive testing process for New Orleans charter schools); *infra* Section II.B (describing entrance exam for competitive public and magnet high schools in New York City).

<sup>171</sup> See Shawn Hubler, *University of California Will End Use of SAT and ACT in Admissions*, N.Y. TIMES (May 24, 2020), <https://www.nytimes.com/2020/05/21/us/university-california-sat-act.html> [<https://perma.cc/CZQ8-ULF3>] (discussing how the University of California system’s governing board will run a pilot program for two years whereby its universities will use “standardized tests only to award scholarships, determine course placement and assess out-of-state students”).

<sup>172</sup> MATTHEW M. CHINGOS, BROWN CTR. ON EDUC. POL’Y AT THE BROOKINGS INST., STRENGTH IN NUMBERS: STATE SPENDING ON K–12 ASSESSMENT SYSTEMS 1, 8–10 (2012), [https://www.brookings.edu/wp-content/uploads/2016/06/11\\_assessment\\_chingos\\_final\\_new.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/11_assessment_chingos_final_new.pdf) [<https://perma.cc/D77J-V5P5>].

<sup>173</sup> ANYA KAMENETZ, THE TEST: WHY OUR SCHOOLS ARE OBSESSED WITH STANDARDIZED TESTING—BUT YOU DON’T HAVE TO BE 19 (2015). The industry itself is also lucrative, with the global private tutoring market said to be worth \$78.2 billion in 2015. *Id.*

<sup>174</sup> See, e.g., Letter from Mark Rosenbaum et al. to the Regents of the Univ. of California 1–2 (Oct. 29, 2019), <https://www.documentcloud.org/documents/6531854-SAT-Demand-Letter-to-UC-20191029.html> [<https://perma.cc/Y7FC-ZST9>] (“[T]he use of the SAT and ACT ‘exacerbates the inequities for underrepresented students, given that performance on these tests is highly correlated with race and parental income, and is not the best predictor for college suc-



Nobody is guaranteed school admission, and private test preparation does not change that. What families are doing, however, is using resources to mitigate the risk of long-term economic and social instability through enrollment in selective institutions of higher education. Despite an increase in the number of colleges and universities declaring the tests optional for admission,<sup>175</sup> standardized testing, and the hurdle they present to parents attempting to navigate educational risk, are unlikely to disappear anytime soon.

### 3. *School Management*

School management policies can impose additional risks in education to the extent that those policies are conduits for race and class marginalization in the school system. Specifically, middle-class and white parents' preferences are privileged in school policies such that vagaries of the system disproportionately impact vulnerable parents and are accepted as the cost of doing education business.

Take, for example, tracking in purportedly integrated schools. Black children are more likely to be identified for special education programming and less likely to be identified for gifted or honors programming, even after controlling for factors like poverty.<sup>176</sup> Further, within special education, Black children are overrepresented in the subjective disability categories, like “emotionally disturbed,” that are assessed more subjectively and are more stigmatized.<sup>177</sup> In contrast, Black children are underrepresented in the less stigmatized and more objectively assessed disability categories like deafness or blindness.<sup>178</sup>

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cess.” (quoting Veto Message from Governor Gavin Newsom to Members of the California Assembly (Oct. 12, 2019), <https://www.gov.ca.gov/wp-content/uploads/2019/10/AB-751-Veto-Message.pdf> [<https://perma.cc/767H-5T96>]); Saul Geiser, *Norm-Referenced Tests and Race-Blind Admissions: The Case for Eliminating the SAT and ACT at the University of California* 1–6 (Ctr. for Stud. in Higher Educ., Univ. of Cal., Berkeley, Research & Occasional Paper Series: CSHE.15.17, 2017) (concluding that scores on nationally normed tests like the SAT and ACT highly correlate with the socioeconomic background of the student and that the growing correlation between race and test scores over the last twenty-five years reflects the growing segregation of Black and Latino students in California schools).

<sup>175</sup> See, e.g., Cecilia Capuzzi Simon, *The Test-Optional Surge*, N.Y. TIMES (Oct. 28, 2015), [https://www.nytimes.com/2015/11/01/education/edlife/the-test-optional-surge.html?partner=Bloomberg\[9/27/2020](https://www.nytimes.com/2015/11/01/education/edlife/the-test-optional-surge.html?partner=Bloomberg[9/27/2020) [<https://perma.cc/Q99Y-8D4L>] (discussing the rise in the number of colleges and universities no longer mandating standardized testing for admissions); Hubler, *supra* note 171 (discussing the University of California’s decision to phase out use of standardized testing in admissions decisions).

<sup>176</sup> Losen & Welner, *supra* note 76, at 407, 415–16 (“[S]pecial education is far too often a vehicle for the segregation and degradation of minority children.”).

<sup>177</sup> *Id.* at 416–17; Glennon, *supra* note 76, at 1251–52.

<sup>178</sup> Losen & Welner, *supra* note 76, at 416.

Despite the inequities academic tracking can aggravate, white parents often actively pursue the practice.<sup>179</sup> Perhaps more important, they also often block policy meant to address tracking disparities, like the removal of academic eligibility criteria for advanced classes.<sup>180</sup> Although willing to attend integrated schools, their preference for maintaining white classrooms and exclusive educational opportunity (their own form of risk management) is appeased, thus ensuring that nominally integrated schools are not so in practice.

Or, consider the recent wave of predominantly white middle-class parents moving back into urban centers with the intention of using the public school system. These parents sometimes even “band together and coordinate school selections to create a ‘critical mass’ of middle-class families in urban schools.”<sup>181</sup> School leaders, eager for parents who increase the tax base, are capable of fundraising to cover educational costs, and bring social capital that translates into political influence, market their schools to attract and retain these residents, and adopt schooling policies that prioritize their preferences.<sup>182</sup> The School District of Philadelphia, for example, created a new academic zone in Center City Philadelphia, increased resources for the schools there, and gave affluent students admissions preference to the most desirable elementary schools in the zone.<sup>183</sup>

Once in the schools, however, these prioritized parents use their capital to primarily benefit their own children, informally surveilling teachers and hoarding resources that less privileged families need.<sup>184</sup> Even in instances where prioritized parents use capital to develop or sustain broad academic and extracurricular programming, the increased professionalization of parent volunteering prioritizes special skills and changes norms in ways that privilege white and middle-class

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179 See Sattin-Bajaj & Roda, *supra* note 134, at 993–95.

180 See *id.* at 995.

181 *Id.* at 994.

182 See, e.g., MAIA BLOOMFIELD CUCCHIARA, *MARKETING SCHOOLS, MARKETING CITIES* 1–5 (2013) (using Philadelphia’s Center City Schools Initiative as a case study in the use of schools to lure middle-class families at the expense of lower-class families).

183 *Id.* at 4–5.

184 See, e.g., Elizabeth McGhee Hassrick & Barbara Schneider, *Parent Surveillance in Schools: A Question of Social Class*, 115 AM. J. EDUC. 195, 217–22 (2009) (documenting informal teacher surveillance conducted by middle-class parents but denied to poor and working-class parents); R. L’HEUREUX LEWIS-MCCOY, *INEQUALITY IN THE PROMISED LAND* 10 (2014) (arguing that, in addition to class and race, opportunity hoarding by affluent, white parents made educational resources inaccessible to the families that most needed them); Sattin-Bajaj & Roda, *supra* note 134, at 993–95, 1016 (finding that white, middle-to-upper class parents use financial status, race, and social networks to secure educational advantage at the expense of less economically advantaged families, and that this behavior is facilitated by school choice policies).

parents.<sup>185</sup> This pattern reinforces a model in which parents are positioned as the primary drivers of school improvement and student achievement, bearing all the risk that failure entails. It also amplifies risk for lower-class and minority students and parents who are potentially pushed out of improving schools in favor of whiter, wealthier families who use resources to navigate and dominate admissions.<sup>186</sup>

## II. RISKY EDUCATION

Three examples—school choice in New Orleans, opposition to changes in New York City specialized public schools’ admissions process, and pushback to reinstating affirmative action in higher education—illustrate aspects of risky education, providing particular insight into the toxic mix of race and risk in the education system. Risky education also has profound consequences for American democracy.

### A. *School Choice in New Orleans*

In August of 2005, Hurricane Katrina battered the southeast Louisiana coastline, ravaging New Orleans. Among the responses to the storm’s destruction was a comprehensive change to the city’s school system, which had been considered a troubled district for years.<sup>187</sup> Prior to Katrina, a Recovery School District (“RSD”) governance and advisory board already monitored Louisiana schools that failed to meet state standards, including five schools in New Orleans.<sup>188</sup> Following Katrina and the displacement of 65,000 New Orleans students, the state enabled the RSD to take over most schools in the Orleans Parish district in order to “turnaround [sic] low-performing schools.”<sup>189</sup> Under the leadership of Governor Kathleen Blanco, the New Orleans public school system was fully converted into a series of charter

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<sup>185</sup> LINN POSEY-MADDOX, *WHEN MIDDLE-CLASS PARENTS CHOOSE URBAN SCHOOLS*, 91–115 (2014) (documenting the race and class dynamics of parent leadership at gentrifying urban schools).

<sup>186</sup> *See id.* at 7, 117–43 (documenting how an urban school became increasingly white and middle-class as a result of “diversity by choice”).

<sup>187</sup> In 2004, according to Louisiana Department of Education guidelines, two-thirds of New Orleans schools were labeled “academically unacceptable,” and 96% of students in high school were found to have below basic English proficiency. Elizabeth A. Parvis, Note, *When Choice Is the Only Option: The New Orleans All-Charter School System and the Inequality It Breeds*, 47 COLUM. HUM. RTS. L. REV. 280, 286 (2015).

<sup>188</sup> *See id.* at 287–88; LA. DEP’T OF EDUC., *LOUISIANA BELIEVES: RECOVERY SCHOOL DISTRICT*, <https://www.louisianabelieves.com/docs/default-source/recovery-school-district/rsd-defined.pdf> [<https://perma.cc/CFG4-2BL7>].

<sup>189</sup> LA. DEP’T OF EDUC., *supra* note 188; *Rebuilding and Transforming New Orleans Public Schools*, BOS. CONSULTING GRP., <https://www.bcg.com/industries/education/rebuilding-transforming-new-orleans-schools> [<https://perma.cc/9G8P-ETLB>].

schools that would be funded by the state, operated by individual charter holders, and accountable to the RSD.<sup>190</sup> The U.S. Department of Education granted these charters schools \$20.9 million.<sup>191</sup> In the end, each student was allotted almost \$1,400 annually.<sup>192</sup>

According to the Louisiana Board of Elementary and Secondary Education, widespread school choice initiatives in New Orleans were responsible for “unprecedented growth in student achievement,” including an increase in graduation rates,<sup>193</sup> a decrease in the number of students attending failing schools,<sup>194</sup> a decrease in performance gaps between city students and the state average,<sup>195</sup> an increase in college enrollment,<sup>196</sup> a fair and transparent school choice application process,<sup>197</sup> and a decrease in student expulsions.<sup>198</sup> Outside researchers find more modest, but similarly positive, results.<sup>199</sup>

That uniformly rosy assessment is vulnerable to challenge. For one, it is not clear that improvements in academic outcomes are due to the takeover or charter-school conversions. Because the district had been extremely low-performing, improvements in response to any major change were expected, and not likely to be as dramatic than if the

<sup>190</sup> Parvis, *supra* note 187, at 288–92.

<sup>191</sup> Robert Garda, *The Politics of Education Reform: Lessons from New Orleans*, 40 J.L. & EDUC. 57, 67 (2011).

<sup>192</sup> Valerie Strauss & Carol Burris, *The Real Story of New Orleans and Its Charter Schools*, WASH. POST (Sept. 4, 2018, 3:08 PM), <https://www.washingtonpost.com/education/2018/09/04/real-story-new-orleans-its-charter-schools/> [<https://perma.cc/5DBP-6ES6>].

<sup>193</sup> LA. DEP’T OF EDUC., *supra* note 188. The graduation rate increased from 54% pre-Katrina to 72.8% in 2017. *Id.*

<sup>194</sup> In 2005, 37% of students attended a nonfailing school. *Id.* As of the 2017–2018 school year, 88% of students attended nonfailing schools, and 61% of students attended a school receiving an A, B, or C grade. *Id.*

<sup>195</sup> In 2005, one-third of New Orleans elementary and middle school students scored at the level of basic or above on state assessments. *Id.* By 2017, that percentage increased to 53% and reduced the performance gap from 24% in 2005 to 9% in 2017. *Id.*

<sup>196</sup> The college enrollment rate increased from 37% in 2005 to 61% in 2017, higher than the statewide average of 58%. *Id.*

<sup>197</sup> OneApp is the city’s centralized student enrollment system. *Id.*

<sup>198</sup> The rate of expulsion to an alternate learning setting fell to 0.32%, “one of the lowest expulsion rates for an urban area nationwide.” *Id.*

<sup>199</sup> See, e.g., DOUGLAS N. HARRIS & MATTHEW F. LARSEN, EDUC. RSCH. ALL. FOR NEW ORLEANS, WHAT EFFECT DID THE NEW ORLEANS SCHOOL REFORMS HAVE ON STUDENT ACHIEVEMENT, HIGH SCHOOL GRADUATION, AND COLLEGE OUTCOMES? 1 (2018), <https://educationresearchalliancenaola.org/files/publications/071518-Harris-Larsen-What-Effect-Did-the-New-Orleans-School-Reforms-Have-on-Student-Achievement-High-School-Graduation-and-College-Outcomes.pdf> [<https://perma.cc/PY57-H5W5>] (finding that “reforms increased student achievement by 11–16 percentiles,” “high school graduation rate by 3–9 percentage points,” “college entry rate by 8–15 percentage points,” “college persistence rate by 4–7 percentage points,” and “college graduation rate by 3–5 percentage points”).

changes had been implemented at higher preexisting levels of achievement.<sup>200</sup> Shifting student demographics may have also played a role. According to researchers who studied the academic gains, “the share of the city’s poor residents living in neighborhoods of extreme poverty dropped from 39 percent in 2000 to 30 percent in 2009–13,” just as concentrated poverty rose dramatically in many other major American cities.<sup>201</sup> Gains, then, are potentially attributable to this shift. Finally, absent increased and robust student funding, academic gains likely would have been smaller.<sup>202</sup> In fact, the dramatic increases in per-pupil spending were only possible because “instructional staffing expenses were held artificially low due to the influx of a relatively inexperienced teacher workforce, and changes to pensions and other benefits.”<sup>203</sup> It is unlikely that these expense reductions will be sustainable over time, leaving students and parents vulnerable to funding decreases in the future that may again depress outcomes.<sup>204</sup>

Moreover, even among arguable success, education risk in New Orleans is still shouldered primarily by students and their families. Professor Andrea Gabor, for example, described New Orleans’s RSD as fostering intense competition whereby charter operators are “hoping to outperform the market for test scores, chasing a limited supply of philanthropic dollars.”<sup>205</sup> Other researchers note that by 2007, most of the city’s charter schools had barriers to entry, including selective admissions criteria and enrollment caps.<sup>206</sup> Type 5<sup>207</sup> charter schools,

200 Interview by Nat’l Educ. Pol’y Ctr. with Douglas N. Harris, Nat’l Educ. Pol’y Fellow 3 (Aug. 14, 2018), [https://nepc.colorado.edu/sites/default/files/publications/Newsletter%20-%20NOLA\\_2.pdf](https://nepc.colorado.edu/sites/default/files/publications/Newsletter%20-%20NOLA_2.pdf) [<https://perma.cc/W7VQ-RADM>] (drawing on research regarding post-Katrina education reforms in New Orleans).

201 Alan Berube & Natalie Holmes, *Concentrated Poverty in New Orleans 10 Years After Katrina*, BROOKINGS INST.: THE AVENUE (Aug. 27, 2015), <https://www.brookings.edu/blog/the-avenue/2015/08/27/concentrated-poverty-in-new-orleans-10-years-after-katrina/> [<https://perma.cc/K3F4-UPSP>]. *But see* Douglas Harris & Matthew Larsen, *What “Really” Happened in New Orleans: A Response*, NAT’L EDUC. POL’Y CTR. 1–3 (Nov. 6, 2018), [https://nepc.colorado.edu/sites/default/files/publications/Harris%20response\\_0.pdf](https://nepc.colorado.edu/sites/default/files/publications/Harris%20response_0.pdf) (making distinctions between rates of poverty, rates of extreme poverty, rates of concentrations of poverty, and rates of residential poverty, and arguing that critics’ focus on the latter in challenging the positive impacts of reform is not justified).

202 Interview with Douglas N. Harris, *supra* note 200, at 3.

203 BRUCE D. BAKER, NETWORK FOR PUB. EDUC., *WHAT SHOULD WE REALLY LEARN FROM NEW ORLEANS AFTER THE STORM?* 9 (2018), <https://npe.wpengine.com/wp-content/uploads/2019/01/BBBakerDoc.pdf> [<https://perma.cc/T458-L6SR>].

204 *Id.*

205 ANDREA GABOR, *AFTER THE EDUCATION WARS* 198 (2018).

206 See Kristen L. Buras, *Race, Charter Schools, and Conscious Capitalism: On the Spatial Politics of Whiteness as Property (and the Unconscionable Assault on Black New Orleans)*, 81 HARV. EDUC. REV. 296, 318 (2011).

which made up the bulk of the school system as of 2015, were not allowed to impose admissions criteria.<sup>208</sup> Although they were presumably more accessible to students and families, none of the Type 5 schools were rated as performing at an “A” level by the state in the 2014–2015 school year.<sup>209</sup>

Given an official master facilities plan that made decisions on which schools would remain open, undergo renovation, see new construction, or close, parents took on further risk at the mercy of shifting and uncertain school options.<sup>210</sup> Working-class communities of color, in particular, were denied meaningful participation in the decision making, leaving the RSD to make closure and construction decisions without taking full account of the role of class, race, and state policy in how certain neighborhoods were reconstructed, or even the role that planning itself plays in shaping communities along lines of race and class.<sup>211</sup> As one community member remarked: “What it has gotten to is the fact that if we close down all of the high schools, and you know your children have nowhere to go to school, then you’ll leave. They’ve tried everything that they can to get people out [of this city.]”<sup>212</sup> As further described by Gabor, the children subject to these closures play a “Darwinian game of musical chairs—with the weakest kids left out when the music stops and failing schools close, or when they are counseled out of schools that can’t, or won’t, deal with their problems.”<sup>213</sup>

Even the assignment process is one of risk and multiple unknowns. For example, OneApp, the system the city uses for student applications, does not guarantee students a slot in the school closest to their home.<sup>214</sup> Rather, families request a list of schools in order of preference, based on research and visits they may or may not be able to conduct on their own.<sup>215</sup> Further, OneApp uses a centralized com-

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207 Five types of charter schools exist in Louisiana. *Louisiana Charter Schools At-a-Glance*, LA. DEP’T OF EDUC.: LA. BELIEVES, <https://www.louisianabelieves.com/schools/charter-schools> [<https://perma.cc/WCP4-6NWQ>]. Type 5 charter schools are overseen by the Recovery School District. *Id.* For the 2019–2020 academic year, there were five remaining Type 5 charter schools in the RSD. *Id.*

208 Parvis, *supra* note 187, at 298.

209 Parvis, *supra* note 187, at 298.

210 See Buras, *supra* note 206, at 318.

211 See *id.* at 319–20.

212 *Id.* at 320.

213 GABOR, *supra* note 204, at 198; see also Prothero, *supra* note 1 (documenting the experience of a family when their child’s first choice school was unexpectedly shutdown for violations of federal special education guarantees).

214 See Prothero, *supra* note 1.

215 *Id.* (explaining that school research and visits are “easier for families with a two-parent household and flexible work hours”). *But see* Della Hasselle, *What’s New with New Orleans*

puter system to make school assignments but does not provide parents with information about seat availability, leading parents to unwittingly select schools unlikely to have available spots.<sup>216</sup> Nor do the city's highest-performing schools even participate in the city-wide enrollment system.<sup>217</sup> Instead, they require a second application process for parents that drains time and money, and benefits the most savvy.<sup>218</sup> Limited access to computers,<sup>219</sup> combined with little instruction on how to navigate the process,<sup>220</sup> only compounds parental anxiety.

That risk is so embedded in the school's choice system is a problem. That Black people in the city take on a disproportionate share of that risk is doubly problematic. New Orleans is approximately 60% Black and 30% white as of July 2019.<sup>221</sup> Like many American cities, race tracks wealth: median income among Black households is about \$25,000, compared to about \$64,000 for white households, and "there are six times as many African American households living in income poverty than White households."<sup>222</sup> African American workers are three times more likely than white workers to be unemployed, and 71% of Black households lack savings to live above the poverty level for three months in the event of income disruption.<sup>223</sup> Further, according to a 2016 study, 50.5% of Black children in New Orleans are under the poverty line.<sup>224</sup> In 2015, more than 80% of students in New Orleans public schools came from low-income families.<sup>225</sup>

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*OneApp? More Schools Opening, Changes to Priority, More*, NOLA.COM (Nov. 17, 2018, 6:35 PM), [https://www.nola.com/article\\_9d6af530-91ce-5d75-a7c3-e799ac3216b9.html](https://www.nola.com/article_9d6af530-91ce-5d75-a7c3-e799ac3216b9.html) [<https://perma.cc/DVF3-2BXG>] (announcing that in the 2019–2020 academic year, 25% of open school seats would be reserved for students living within a half-mile of qualifying schools).

<sup>216</sup> Parvis, *supra* note 187, at 297–98.

<sup>217</sup> Prothero, *supra* note 1.

<sup>218</sup> *See id.*

<sup>219</sup> *See* David Hammer, *1 In 5 Orleans Public School Students Learning from Home Don't Have Access to Internet*, 4WWL (May 12, 2020, 4:58 PM CDT), <https://www.wvltv.com/article/news/investigations/1-in-5-orleans-public-school-students-learning-from-home-dont-have-access-to-internet/289-59e5922d-d040-4679-9b39-ab178aa357b4> [<https://perma.cc/Q7BD-G9KE>].

<sup>220</sup> *See* Prothero, *supra* note 1.

<sup>221</sup> *Quick Facts: New Orleans City, Louisiana*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/neworleanscitylouisiana> [<https://perma.cc/2CQJ-2LJ6>].

<sup>222</sup> RACIAL WEALTH DIVIDE INITIATIVE, CFED, *THE RACIAL WEALTH DIVIDE IN NEW ORLEANS* 3 (2016).

<sup>223</sup> *Id.*

<sup>224</sup> Alix Liss, *A Failure in Social Responsibility: Preserving Privilege and Educational Injustice in New Orleans* 24–25 (Apr. 2016) (thesis submitted in partial fulfillment of the requirements for the degree of Bachelor of Arts with departmental honors in sociology, Wesleyan University), <https://digitalcollections.wesleyan.edu/object/ir-1368> [<https://perma.cc/ZJY3-LVU5>].

<sup>225</sup> Prothero, *supra* note 1.

School choice neither counters these disparities nor fully engages the risk of inequality in the New Orleans school system. When RSD stepped in to manage public schools in the city, it exempted thirteen high-performing schools that remained with the Orleans Parish School Board.<sup>226</sup> As of late 2015, 87% of students educated in New Orleans' public schools were Black; 77% of students participated in free- and reduced-lunch programs in the 2004–2005 school year; and 84% were considered economically disadvantaged as of 2014.<sup>227</sup> In the RSD, however, as of 2016, 93% of students were Black, 84% were eligible for lunch programs, and 92% were considered economically disadvantaged.<sup>228</sup>

In contrast, most of the city's white students were concentrated in the higher-performing Orleans Parish School Board charter or traditional schools.<sup>229</sup> Many higher-performing schools were exempted from participation in OneApp, which is to say they were insulated from enrolling more vulnerable students and in doing so hoarded quality education for their own students.<sup>230</sup> By using a separate admissions process and set of application requirements,<sup>231</sup> they provided superior academic opportunities while catering to middle-class white students.<sup>232</sup> In the 2013–2014 school year, only eight of the eighty-plus

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<sup>226</sup> Parvis, *supra* note 187, at 289.

<sup>227</sup> ANDRE PERRY, DOUGLAS N. HARRIS, CHRISTIAN BUERGER & VICKI MACK, *THE TRANSFORMATION OF NEW ORLEANS PUBLIC SCHOOLS: ADDRESSING SYSTEM-LEVEL PROBLEMS WITHOUT A SYSTEM 3* (2015).

<sup>228</sup> Liss, *supra* note 224, at 25.

<sup>229</sup> PERRY ET AL., *supra* note 227, at 2–3.

<sup>230</sup> *See id.* at 10.

<sup>231</sup> Lusher Charter School, for example, administers a reading and math test, and also considers an arts profile and application, as well as parent involvement as measured by parent attendance at a curriculum meeting at which late arrivals are not permitted entry. *See LUSHER CHARTER SCH., LUSHER CHARTER SCHOOL ADMISSIONS POLICIES AND PROCEDURES 1*, <https://docs.google.com/document/d/1ZVnj19uGUVY9h6rYuDJmyub6DxB9c6Q4kz4Caj-q88U/edit> [<https://perma.cc/KTN5-YHYZ>]. “[Q]ualified children of Tulane University-affiliated parents” are also given preference in admissions. *Id.* at 7. At Benjamin Franklin High School, students must take an entrance examination and maintain a minimum GPA with no failing grades. *Admissions Criteria*, BEN FRANKLIN HIGH SCH., <https://www.bfhsla.org/admissions> [<https://perma.cc/DQN7-B22M>]. By 2021, however, all schools, including selective-admissions schools, will be required to use OneApp when their charters are renewed. Liss, *supra* note 224, at 51.

<sup>232</sup> Two of the highest achieving and selective schools in the city are Lusher Charter School and Benjamin Franklin High School. *See Prothero, supra* note 1, At Lusher, 57% of students are white, and 26% are Black; low-income students make up just 16% of students. *Lusher Charter School*, GREATSCHOOLS.ORG, <https://www.greatschools.org/louisiana/new-orleans/910-Lusher-Charter-School> [<https://perma.cc/D4AU-WCQZ>]. At Benjamin Franklin High School, 38% of students are white, and 30% of students are Black; 24% of students are low-income. *Benjamin Franklin High School*, GREATSCHOOLS.ORG, <https://www.greatschools.org/louisiana/new-orleans/880-Benjamin-Franklin-High-School/> [<https://perma.cc/BF89-5JAB>].



schools in New Orleans received “A” ratings, and most of them operated under the whiter Orleans Parish School Board district; the RSD schools had no A-rated schools.<sup>233</sup>

In June 2018, control of the New Orleans school district was transferred back to Orleans Parish School Board.<sup>234</sup> Louisiana evidently declared the transition to an all-charter system a success.<sup>235</sup> The 2018 Louisiana Educational Assessment Program, however, “found that only 26 percent in the Orleans Parish-Recovery School District had achieved ‘mastery’ or above, less than the 34 percent state average.”<sup>236</sup>

### B. *Selective School Admissions in New York City*

If school choice in New Orleans illustrates how risk is passed on from the state to parents, and then from white parents to nonwhite parents, then selective school enrollment in New York City illustrates how the nature of risk forces minority groups to manage it among themselves.

In a city where Black and Hispanic students make up nearly 70% of the school system, Black and Hispanic student admission to New York City’s eight specialized high schools has steadily plummeted over the last forty years<sup>237</sup> to a mere 10%.<sup>238</sup> In 2019, only seven of the 895 seats available at Stuyvesant High School, the most selective of the schools, went to Black students.<sup>239</sup>

In response, Mayor Bill de Blasio proposed eliminating the schools’ entrance exams.<sup>240</sup> Instead, the city would offer admission

<sup>233</sup> Jessica Williams, *10 Years Later, I’m Not Sure Where to Send My Child to School*, NOLA.COM (July 18, 2019, 1:54 PM), [https://www.nola.com/news/education/article\\_873ab2c3-ff64-58cf-b051-24ded96a9b2f.html](https://www.nola.com/news/education/article_873ab2c3-ff64-58cf-b051-24ded96a9b2f.html) [<https://perma.cc/D7YM-DX66>].

<sup>234</sup> Jessica Williams, *As of Sunday, All New Orleans Public Schools Are Once Again Under a Single Board*, NOLA.COM (June 30, 2018, 7:00 PM), [https://www.nola.com/news/education/article\\_51fe63a4-832f-5a27-bbb5-97430938404a.html](https://www.nola.com/news/education/article_51fe63a4-832f-5a27-bbb5-97430938404a.html) [<https://perma.cc/N9TW-X3SQ>].

<sup>235</sup> *See id.*

<sup>236</sup> Strauss & Burris, *supra* note 192.

<sup>237</sup> Between 1976 and 2017, Black and Hispanic enrollment at Stuyvesant High School, Brooklyn Technical High School, and Bronx High School of Science went from 14% to 4%, 50% to 14%, and 23% to 9%, respectively. Eliza Shapiro & K.K. Rebecca Lai, *How New York’s Elite Public Schools Lost Their Black and Hispanic Students*, N.Y. TIMES (June 3, 2019), <https://www.nytimes.com/interactive/2019/06/03/nyregion/nyc-public-schools-black-hispanic-students.html> [<https://perma.cc/F9PL-BVH7>].

<sup>238</sup> *Id.*

<sup>239</sup> Eliza Shapiro & Vivian Wang, *Amid Racial Divisions, Mayor’s Plan to Scrap Elite School Exam Fails*, N.Y. TIMES (June 24, 2019), <https://www.nytimes.com/2019/06/24/nyregion/specialized-schools-nyc-deblasio.html> [<https://perma.cc/4XJ9-RML3>].

<sup>240</sup> N.Y.C. INDEP. BUDGET OFF., ADMISSIONS OVERHAUL: SIMULATING THE OUTCOME

based on factors like whether students were in the top 7% of their school and top 25% of students citywide.<sup>241</sup> Under the new plan, Black and Latino enrollment would increase almost fivefold.<sup>242</sup> At the same time, white enrollment in New York City's selective schools would stay about the same, while Asian<sup>243</sup> enrollment in the schools would

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UNDER THE MAYOR'S PLAN FOR ADMISSIONS TO THE CITY'S SPECIALIZED HIGH SCHOOLS 2 (2019).

<sup>241</sup> *Id.* at 1.

<sup>242</sup> Black and Latino enrollment would increase from 10% to 45% at the schools. *See id.* at 4.

<sup>243</sup> The collapsing of multiple groups under the category of "Asian" makes invisible the varied ethnic identities, political positions, and histories of Asian Americans. It also allows relative success by some groups to obscure the political and economic challenges of other groups. This dynamic feeds into a model minority myth that undercuts needed interventions for some Asian subgroups, while potentially negatively impacting students subject to this "benign" stereotype. For more on this phenomenon, see ELLEN D. WU, *THE COLOR OF SUCCESS: ASIAN AMERICANS AND THE ORIGINS OF THE MODEL MINORITY* 1–10 (2014) (tracing the emergence of the model minority stereotype as a way to justify acceptance of Asian Americans as legitimate citizens while continuing to perceive them as indelible outsiders); STACEY J. LEE, *UNRAVELING THE "MODEL MINORITY" STEREOTYPE* 13–16 (2d ed. 2009) (documenting the educational experiences of Korean, Chinese, and Hmong youth to counter presumptions of similarity); Daisy Ball & Nicholas Daniel Hartlep, *Introduction: Asian/Americans and Crime: A Critical Overview*, in *ASIAN/AMERICANS, EDUCATION, AND CRIME* 1, 3–21 (Daisy Ball & Nicholas Daniel Hartlep eds., 2017) (using analysis in the context of education, race, media, and the criminal justice system to show how the model minority characterization masks the victimization and violence Asian Americans experience in the twenty-first century); Bach-Mai Dolly Nguyen, Mike Hoa Nguyen & Tu-Lien Kim Nguyen, *Advancing the Asian American and Pacific Islander Data Quality Campaign: Data Disaggregation Practice and Policy*, 24 *ASIAN AM. POL'Y REV.* 55, 56 (2013–14) (explaining that Asian American and Pacific Islander ("AAPI") student populations consist of "at least forty-eight ethnic groups that differ greatly in cultural backgrounds, historical experiences, and socioeconomic and educational circumstances," and studying the positive impact of disaggregated data on improving student outcomes for AAPI student populations); Philip Lee, *The "Asian" Category in MCAS Achievement Gap Tracking: Time for A Change*, 21 *ASIAN AM. POL'Y REV.* 19, 24 (2010–11) (arguing that the aggregation of many subgroups into one general "Asian" category perpetuates the myth of Asian Americans as a model minority while downplaying academic achievement gaps that exist for certain Asian American subgroups); Jennifer Lee & Min Zhou, *The Success Frame and Achievement Paradox: The Costs and Consequences for Asian Americans*, 6 *RACE SOC. PROBS.* 38, 47–48 (2014) (finding that although "success frame[s]" can help poor and working-class children overcome disadvantages, unintended consequences include the sense of failure and exclusion among those who do not meet its exacting tenets); and Derek Iwamoto, C.W. Lejuez, Erica Hamilton & Margaux Grivel, *Model Minority Stereotype, Psychological Distress, Substance Use Among Asian-American Young Adults*, 146 *DRUG & ALCOHOL DEPENDENCE* e146, e146 (2015) (finding that model minority stereotypes "had an indirect effect on alcohol-related problems and illicit drug use through psychological distress and heavy episodic drinking"). Whenever possible, this Article aims to be as specific as possible about the subgroups to which analysis refers, keeping in mind that the term Asian American can be understood as reflecting a political identity. Caitlin Yoshiko Kandil, *After 50 Years of 'Asian American,' Advocates Say the Term Is 'More Essential Than Ever,'* NBC NEWS (May 31, 2018, 8:34 AM), <https://www.nbcnews.com/news/asian-america/after-50-years-asian-american-advocates-say-term-more-essential-n875601> [<https://perma.cc/6D8N-Z4LJ>] (trac-

decrease by *almost half*.<sup>244</sup> Alongside only muted support,<sup>245</sup> the proposed change was met with significant resistance, including from Chinese American policymakers and parents in the city.<sup>246</sup>

Opposition to the changes was as warranted as it might have been expected. New York City's public school system is the third most segregated school district in the United States, with both white students attending schools with a larger proportion of white students and fewer students who qualify for free or reduced lunch than they would in their neighborhood schools.<sup>247</sup> School quality is variable. Four-year graduate rates range from below 30% to almost 100%.<sup>248</sup> The highest performing schools in the city are located in affluent parts of Manhattan, Brooklyn, and Queens, while lower-performing schools are located in more impoverished areas like the Bronx.<sup>249</sup> The city maintains admissions barriers for the higher-performing schools across the system, screening more children for admission than any other school district in the country and feeding racial segregation in the city's

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ing the origin of the term as inspired by the Black Power Movement and deployed to unite Japanese, Chinese, and Filipino American students on college campuses); Anna Purna Kambhampaty, *In 1968, These Activists Coined the Term 'Asian American'—and Helped Shape Decades of Advocacy*, TIME (May 22, 2020, 12:00 PM), <https://time.com/5837805/asian-american-history/> [<https://perma.cc/W33E-3K7X>] (detailing the development of the term “Asian American” as a response to both the integration of Asian American subgroups and undifferentiated discrimination leveled at all Asian subgroups). This Article uses “Asian” to refer to a specific racial group, particularly in relation to other racial groups in the United States, and the term “Asian American” to refer specifically to people raced as Asian in the United States.

<sup>244</sup> See N.Y.C. INDEP. BUDGET OFF., *supra* note 240, at 5.

<sup>245</sup> Shapiro & Wang, *supra* note 239 (reporting that no rallies were held in support of the proposal, almost no lobbyists pushed it, few politicians were willing to publicly back the proposal, and de Blasio secured the support of the New York Legislature's Black, Puerto Rican, Hispanic and Asian Caucus only after “considerable effort”). The plan did, however, overlap with broader activism, particularly by students, to integrate New York Schools. See, e.g., Christina Veiga, *Turning Up the Pressure for Integration, NYC Students Plan Citywide School Boycott*, CHALKBEAT (Feb. 5, 2020, 6:30 PM), <https://ny.chalkbeat.org/2020/2/5/21178556/turning-up-the-pressure-for-integration-nyc-students-plan-citywide-school-boycott> [<https://perma.cc/QHJ6-9XM6>]; Taylor Swaak, *After 7 School Integration Strikes, NYC Students Get Rare Public Meeting with Ed Department Officials, Asking 'How Much Longer Will We Have to Wait?'*, THE 74, (Feb. 3, 2020), <https://www.the74million.org/article/after-7-school-integration-strikes-nyc-students-get-rare-public-meeting-with-ed-department-officials-asking-how-much-longer-will-we-have-to-wait/> [<https://perma.cc/V4S3-FS5S>]; INTEGRATENYC, <https://www.integratenyc.org> [<https://perma.cc/H595-DE7W>].

<sup>246</sup> Clio Chang, *Whose Side Are Asian-Americans On?*, NEW REPUBLIC, (Sept. 24, 2018), <https://newrepublic.com/article/151328/whose-side-asian-americans-on> [<https://perma.cc/9Y2X-7D9S>] (reporting that a primarily Chinese American contingent rallied against de Blasio's plan).

<sup>247</sup> Sattin-Bajaj & Roda, *supra* note 134, at 999.

<sup>248</sup> *Id.* at 1000.

<sup>249</sup> *Id.*

schools.<sup>250</sup> Against this backdrop, the positive effect of graduation from New York City's selective schools cannot be ignored. Graduation from one of New York City's specialized schools significantly undercuts intergenerational poverty: poorer students transition into the middle or upper-middle class, and middle-class students often earn more than their parents.<sup>251</sup>

Even after accounting for differences in educational attainment, Asian Americans in New York City experience the highest poverty rates among the city's racial groups,<sup>252</sup> rendering admission to the specialized schools a particularly valuable opportunity. Nevertheless, despite their relative vulnerability and the significant impact admissions can have on the enrollment of Asian students, the mayor's office did not account for the concerns of the Asian American community while developing the proposal. School integration advocate Shino Tanikawa, for example, noted that de Blasio's office failed to consult with Asian American community groups before their proposal went public.<sup>253</sup> Grace Meng, an Asian congresswoman from Queens and a graduate of one of the schools who was not invited to the proposal's public unveiling, affirmed that the sweeping admissions changes were done in the absence of consultation or conversation with Asian Americans.<sup>254</sup> She further noted, "This cliché of, 'If you're not at the table, you're on the menu' really felt like it rang true."<sup>255</sup>

Given historical<sup>256</sup> and ongoing<sup>257</sup> marginalization of Asian Americans in New York City, selective school admission represented

<sup>250</sup> Eliza Shapiro, *A School Admissions Process That Caused Segregation Fell Apart in Weeks*, N.Y. TIMES (Dec. 18, 2020), <https://www.nytimes.com/2020/06/11/nyregion/coronavirus-nyc-schools-admissions.html> [<https://perma.cc/MRB2-LCV6>]; Winnie Hu & Elizabeth A. Harris, *A Shadow System Feeds Segregation in New York City Schools*, N.Y. TIMES (June 17, 2018), <https://www.nytimes.com/2018/06/17/nyregion/public-schools-screening-admission.html> [<https://perma.cc/2WS9-CEBY>].

<sup>251</sup> Syed Ali & Margaret M. Chin, *What's Going on with New York's Elite Public High Schools?*, ATLANTIC (June 14, 2018), <https://www.theatlantic.com/education/archive/2018/06/new-york-high-schools-stuyvesant-brooklyn-bronx/562772/> [<https://perma.cc/D5A2-6VSK>].

<sup>252</sup> MAYOR'S OFF. OF OPERATIONS, CITY OF NEW YORK, SOCIAL INDICATORS REPORT 154, 156 (2016). A 2018 study of Asian poverty in New York City found that as many as nine in ten Asian households in poverty lacked affordable housing, and 25% of those eligible to work did not have health insurance. ASIAN AM. FED'N, HIDDEN IN PLAIN SIGHT: ASIAN POVERTY IN NEW YORK CITY 7 (2018).

<sup>253</sup> Chang, *supra* note 246.

<sup>254</sup> David W. Chen, *'A Huge Blind Spot': Why New York Asians Feel Overlooked*, N.Y. TIMES (July 4, 2018), <https://www.nytimes.com/2018/07/04/nyregion/asians-overlooked-specialized-schools.html> [<https://perma.cc/HKW9-H3EC>].

<sup>255</sup> *Id.* (quoting Interview with Grace Meng, U.S. Rep. (D-Queens)).

<sup>256</sup> For more on the political and economic shifts in the New York immigrant Chinese community in response to discrimination and exclusion between the first and second half of the

an opportunity that parents in an environment of risky education are compelled to pursue and protect if they can. Knowing that a path to economic security would be significantly curtailed, Chinese American parents took a particularly visible role in mobilization against the proposal.<sup>258</sup> Activists staged a series of protests opposing the plan to eliminate the entrance exams, and one Chinese American activist likened the mayor's proposal to Chinese exclusion laws of the 1800s.<sup>259</sup> Kenneth Chiu, chairman of the New York City Asian-American Democratic Club, called the policy "discriminatory,"<sup>260</sup> and accused de Blasio of targeting Chinese Americans: "He never had this problem when Stuyvesant was all white. He never had this problem when Stuyvesant was all Jewish. All of a sudden, they see one too many Chinese and they say, 'Hey, it isn't right.'"<sup>261</sup>

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twentieth century, see generally XINYANG WANG, *SURVIVING THE CITY: THE CHINESE IMMIGRANT EXPERIENCE IN NEW YORK CITY, 1890–1970* (2001). See also JOHN KUO WEI TCHEN, *NEW YORK BEFORE CHINATOWN: ORIENTALISM AND THE SHAPING OF AMERICAN CULTURE, 1776–1882* xix–xxiv (1999) (tracing the evolution of anti-Chinese racial discourse in New York City before the 1880s).

<sup>257</sup> Due in large part to racist and xenophobic suggestions by President Trump and others that China is responsible for originating the COVID-19 pandemic of 2020, verbal and physical attacks against Asian Americans, including Chinese Americans, have been on the rise. See Sabrina Tavernise & Richard A. Opiel Jr., *Spit On, Yelled At, Attacked: Chinese-Americans Fear for Their Safety*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html> [<https://perma.cc/JR78-SZLX>]; RUSSELL JEUNG, SARAH GOWING & KARA TAKASAKI, *NEWS ACCOUNTS OF COVID-19 DISCRIMINATION 2/9–3/7/20*, at 1 (finding a 50% increase in the number of news articles related to coronavirus and anti-Asian discrimination between February 9 and March 7, 2020); Neil G. Ruiz, Juliana Menasce Horowitz & Christine Tamir, *Many Black and Asian Americans Say They Have Experienced Discrimination amid the COVID-19 Outbreak*, PEW RSCH. CTR. (July 1, 2020), <https://www.pewresearch.org/social-trends/2020/07/01/many-black-and-asian-americans-say-they-have-experienced-discrimination-amid-the-covid-19-outbreak/> [<https://perma.cc/WG2W-967A>] (finding that 58% of English-speaking Asian American adults said expressions of racist or insensitive views about Asians were becoming more common since the start of the pandemic); Jia Lynn Yang, *When Asian-Americans Have to Prove We Belong*, N.Y. TIMES (Apr. 10, 2020), <https://www.nytimes.com/2020/04/10/sunday-review/coronavirus-asian-racism.html> [<https://perma.cc/A8FE-FM2U>] (situating the anti-Asian racism unleashed by the pandemic in a broader history of anti-Asian political and cultural sentiment); see also Frank H. Wu, *Peter Thiel and Steve Bannon Fuel a New Yellow Peril over Google and China*, GUARDIAN (July 17, 2019, 1:00 PM), <https://www.theguardian.com/world/2019/jul/17/google-peter-thiel-yellow-peril-racism-tech> [<https://perma.cc/4R7K-J6PZ>] (situating "Yellow Peril" in Silicon Valley in a larger American history of anti-Asian paranoia).

<sup>258</sup> Chang, *supra* note 246.

<sup>259</sup> Shapiro & Wang, *supra* note 239 (citing Interview with Wai Wah Chin, President, Chinese Am. Citizens All. of Greater New York).

<sup>260</sup> Elizabeth A. Harris & Winnie Hu, *Asian Groups See Bias in Plan to Diversify New York's Elite Schools*, N.Y. TIMES (June 5, 2018) (quoting Interview with Kenneth Chiu, Chairman, New York City Asian-Am. Democratic Club), <https://www.nytimes.com/2018/06/05/nyregion/carranza-specialized-schools-admission-asians.html> [<https://perma.cc/732A-EDDQ>].

<sup>261</sup> Lindsey Christ, *Parents, Alumni Slam Proposal to Change Admissions for NYC Special-*

Opposition was not uniform. Some Asian American school alumni, for example, argued for admissions reform to the schools.<sup>262</sup> Similarly, a coalition of Asian Pacific American nonprofits in New York City called on the mayor's office to reexamine admissions policies in the context of larger interrogation of inequalities by class, race, and immigration status in the city.<sup>263</sup> The Coalition for Asian American Children and Families supported plans to eliminate the test in favor of an admissions system that considers multiple factors.<sup>264</sup> Nevertheless, after a series of high-profile protests and an effective lobbying campaign, the proposal ultimately failed.<sup>265</sup>

Pushback to the changes from Chinese American parents exists against a backdrop of risk and race that both complicates parental attempts to navigate risk and highlights the failures of the state. In 2019, white students made up 15% of all students in New York City schools, but 24% of specialized school students.<sup>266</sup> Asian students made up 16% of all students in the system, but 62% of students in specialized schools.<sup>267</sup> In contrast, Black students made up 26% of all students, but only 4% of specialized school enrollment, while Hispanic

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*ized High Schools*, SPECTRUM NEWS NY1 (June 4, 2018, 8:40 PM) (quoting Interview with Kenneth Chiu, Chairman, New York City Asian-Am. Democratic Club), <https://www.ny1.com/nyc/all-boroughs/news/2018/06/05/nyc-parents-alumni-asian-american-groups-slam-bill-de-blasio-push-to-scrap-shsat> [https://perma.cc/Z6H2-6HG4].

<sup>262</sup> See, e.g., Alana Mohamed, Brenda Lee, HoYing Fan, Janet Tang, Jason Wu, Jeffrey Ng, Nayim Islam, Tricia Chan & William Cheung, Opinion, *Asian Americans Should Embrace Reform of Specialized High School Admissions*, CRAIN'S N.Y. BUS. (July 25, 2018, 12:00 AM), <https://www.crainsnewyork.com/article/20180725/OPINION/180729955/asian-americans-should-embrace-reform-of-specialized-high-school-admissions> [https://perma.cc/VLP7-L3P3] (consisting of an open letter from Asian American alumni of specialized high schools "call[ing] on fellow Asian Americans to stand in solidarity with the city's black and Latinx communities to create a more just and integrated school system for all of our children").

<sup>263</sup> Press Release, Coal. for Asian Am. Children and Fams., APA Community Organizations' Response to Proposed Changes to the NYC SHSAT Process (July 30, 2018).

<sup>264</sup> Christina Veiga, *Some Asian American Groups Have Backed the SHSAT, but This One Says the Exam Should Go*, CHALKBEAT N.Y. (Nov. 14, 2018, 5:19 PM), <https://ny.chalkbeat.org/2018/11/14/21106165/some-asian-american-groups-have-backed-the-shsat-but-this-one-says-the-exam-should-go> [https://perma.cc/6GZ3-QNRD].

<sup>265</sup> Shapiro & Wang, *supra* note 239. Although initial support for the plan was muted, as protests against police brutality became widespread in the spring and summer of 2020, support for eliminating the admissions test renewed. For example, hundreds of Department of Education employees who were mostly people of color called on the city's school chancellor to end all admissions screening. Shapiro, *supra* note 250; Open Letter from Coal. of N.Y.C. Dep't of Educ. Emps. to Richard A. Carranza, Chancellor, N.Y.C. Dep't of Educ., <https://docs.google.com/document/d/1GOHqLvHAekzu3uRxIziLf6kys7Q2enQwxxlZIpWPKOI/edit> [https://perma.cc/9UX6-DZ3R].

<sup>266</sup> Shapiro & Lai, *supra* note 237.

<sup>267</sup> *Id.*

students, who constitute 41% of the city's students, represented only 6% of selective school enrollment.<sup>268</sup>

Blacks and Hispanics, however, were not always so underrepresented, or Asians so overrepresented. Rather, in the 1970s, Asians made up 3% of the school population and 13% of specialized school enrollment, Blacks 38% of the school population and 24% of specialized school enrollment, and Hispanics 29% of the school population and 9% of specialized school enrollment.<sup>269</sup> During the same time period, Whites made up 30% of the school population but 54% of specialized school enrollment.<sup>270</sup> Although the numbers still reflected significant disparities in access, Black and Hispanic students were better represented than they are today.

A confluence of factors resulted in significant change. The city experienced an eightfold increase in the number of Asian-born immigrant residents between 1970 and 2011, a change that is reflected in increased specialized school enrollment.<sup>271</sup> Further, during the early 1990s, the city eliminated the honors program which served as a pipeline for Black and brown children into the specialized schools.<sup>272</sup> School choice—the jockeying of parents to enroll in “good” schools and avoid the “bad” schools to which they might be zoned—became the new version of tracking as the honor programming route to admission closed.<sup>273</sup> During the same period, early and formal preparation for the entrance exam increased with particular intensity, likely propelled in many Asian American communities by racialized success frames that work with formal and informal networks to promote knowledge of the tests and the opportunities they unlock.<sup>274</sup> In contrast, Black and Hispanic students often report altogether little or no

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<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> See *supra* text accompanying notes 176–79. Although educational tracking can entrench racial segregation, see *supra* notes 170–79 and accompanying text, the New York City honors program had the benefit of finding and preparing students with the capacity to test well and thus gain admission to the schools. Ali & Chin, *supra* note 251.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*; Shapiro & Lai, *supra* note 237. Researchers have considered how comprehensive and pervasive knowledge about access to elite education can be, even in poor and working-class Asian communities. Two scholars argue that a racialized “success frame,” coupled with tangible resources accessible through formal and informal ethnic networks for supporting the frame, promotes this sort of achievement in Chinese and Vietnamese immigrant communities in Metropolitan Los Angeles. Lee & Zhou, *supra* note 243, at 39. These findings challenge the essentialist cultural explanations of educational attainment in Asian American communities. *Id.* at 38–39.

knowledge of the entrance exams, a reality for which New York has done little to account.<sup>275</sup>

Parents, however, have no means of addressing structural disparities in the school system, and are ultimately responsible for ensuring their children “get ahead.” Informed by broader political commitment to choice and meritocracy, protestors deployed narratives about the virtues of the American dream and the burden of race-conscious initiatives for those who “work hard.”<sup>276</sup> Some activists noted that plans to eliminate the tests were unfair to “hard-working students . . . willing to give up basketball . . . and video games” to “stay home and study.”<sup>277</sup>

Rhetoric regarding Asian American students’ merit played into model minority myths that cast Asians as particularly industrious and apolitical, relative to lazier Blacks and Latinos who mobilize for hand-outs instead of hard work. This rhetoric also played into the racial triangulation of Asians relative to Whites and other minoritized groups in the United States.<sup>278</sup> As explained by political scientist Claire Jean Kim, Asian Americans are located in the field of racial positions with reference to Blacks and Whites by means of two processes: (1) “relative valorization” whereby Whites valorize Asians

<sup>275</sup> See Eliza Shapiro, *How the Few Black and Hispanic Students at Stuyvesant High School Feel*, N.Y. TIMES (Mar. 22, 2019), <https://www.nytimes.com/2019/03/22/nyregion/stuyvesant-high-school-black-students.html> [<https://perma.cc/VW8L-VWB5>]. Test preparation in Asian communities is one reason, although not the only reason, why growth in immigrant Asian communities is reflected in increased selective school enrollment. See Ali & Chin, *supra* note 251.

<sup>276</sup> See, e.g., Jay Caspian Kang, *Where Does Affirmative Action Leave Asian-Americans?*, N.Y. TIMES MAG. (Oct. 1, 2019), <https://www.nytimes.com/2019/08/28/magazine/affirmative-action-asian-american-harvard.html> [<https://perma.cc/3JVC-HAD9>] (interviewing a parent who protested admissions changes to New York’s specialized high schools meant to cultivate racial diversity, supported the recent affirmative action lawsuit against Harvard, and admitted to voting for Donald Trump in the 2016 election because “liberals do not care about Asian-Americans.”).

<sup>277</sup> Shapiro & Wang, *supra* note 239 (quoting Bernard Chow, Speech Against New York City Mayor Bill de Blasio’s Plan to Scrap the Entrance Exam for New York City Specialized Schools at a Queens Town Hall Meeting (Apr. 2019)).

<sup>278</sup> Early cases before the Supreme Court involved Asian Americans’ claims to Whiteness, and although judicial decisions in the cases often featured inconsistent legal reasoning, outcomes consistently placed Asians outside of Whiteness. See, e.g., *Ozawa v. United States*, 260 U.S. 178, 184–85, 197–98 (1922) (holding that despite Japanese plaintiff’s claims that his skin was whiter than that of Caucasians, and that naturalization laws were only meant to distinguish Blacks from others, Ozawa was ineligible to naturalize because he was “clearly of a race which is not Caucasian”); *United States v. Thind*, 261 U.S. 204, 215 (1923) (holding that despite plaintiff’s argument that scientific treatises technically classified him as Caucasian, Thind’s physical traits as a Hindu man were not commonly recognized to be white); *Lum v. Rice*, 275 U.S. 78, 80–81, 87 (1927) (holding that despite Chinese plaintiff’s claims of closer cultural proximity to Whites than to “colored” students, Chinese people were not white and therefore “colored”).



relative to Blacks “in order to dominate both groups, but especially the latter;” and (2) “civic ostracism” whereby Whites construct Asians “as immutably foreign and unassimilable with Whites . . . in order to ostracize them from the body politic and civic membership.”<sup>279</sup>

In New York, racial triangulation obscured differential access for groups—including among minoritized groups—to the city’s elite schools. Asians’ status as unassimilable left them excluded from consultation during policy development meant to address racial inequality, even though Asian Americans have and continue to experience economic and racial marginalization in New York City; indeed, a significant portion of Asian American students who make up the majority of specialized school enrollment are poor.<sup>280</sup> At the same time, relative valorization of Asians relative to Blacks and Hispanics was used to justify their overrepresentation, and informed accusations about “lowering standards,” leveled even by members of minority groups.<sup>281</sup> Triangulation masked the historical and current overrepresentation of white students in the schools, an overrepresentation that was not targeted for change in the mayor’s proposal.<sup>282</sup> Most important, triangulation obscured the failure of the state in addressing ongoing racial segregation and economic isolation in the city such that positive academic outcomes are, in significant part, determined by

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<sup>279</sup> Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC’Y 105, 107 (1999). Although the focus is on Chinese Americans in this Article, Kim has applied this theory to other Asian subgroups, including Koreans in New York. See CLAIRE JEAN KIM, BITTER FRUIT: THE POLITICS OF BLACK-KOREAN CONFLICT IN NEW YORK CITY 45 (2000). Other political scientists theorize that Asian positioning shifts depending on the particular axes of subordination by which minoritized groups are measured. By one account, for example, Asian Americans are considered relatively superior to African Americans and Latinos, but inferior relative to Whites or African Americans on the basis of “foreignness.” Linda X. Zou & Sapna Cheryan, *Two Axes of Subordination: A New Model of Racial Position*, 112 J. PERSONALITY & SOC. PSYCH. 696, 697–98 (2017) (arguing that racial and ethnic minority groups are disadvantaged along two distinct dimensions of inferiority and cultural foreignness, such that “Whites are treated and perceived as superior and American; African Americans as inferior and relatively American compared to Latinos and Asian Americans; Latinos as inferior and foreign; and Asian Americans as foreign and relatively superior compared to African Americans and Latinos”).

<sup>280</sup> Shapiro & Lai, *supra* note 237.

<sup>281</sup> Richard Parsons, a prominent advisor to two New York City mayors and one of the nation’s foremost Black business leaders, argued that greater diversity cannot be achieved at the cost of “simply . . . lowering standards.” Eliza Shapiro, *Big Money Enters Debate Over Race and Admissions at Stuyvesant*, N.Y. TIMES (Apr. 27, 2019) (quoting Richard Parsons, Former Chairman, Citigroup, Statement in Support of the Education Equity Campaign), <https://www.nytimes.com/2019/04/27/nyregion/specialized-high-schools-lobbying.html> [https://perma.cc/22LE-3E8K]. Moreover, about forty Black and Hispanic parents traveled to Albany to lobby against the mayor’s proposal to eliminate the entrance exam. See Shapiro & Wang, *supra* note 239.

<sup>282</sup> See N.Y.C. INDEP. BUDGET OFF., *supra* note 240, at 1.

school assignment.<sup>283</sup> Evident in New York City's selective school enrollment, risk is transferred from the state to parents, from white parents to nonwhite parents, and from one minoritized parent group to another. Ultimately, the best opportunities for student success are necessarily dependent on the capacity of parents to successfully navigate risk in New York City's educational system.

### C. *Standardized Testing and Affirmative Action in Higher Education*

Risk and racial triangulation similarly inform battles about affirmative action in higher education. In 2014, Students for Fair Admissions filed suit against Harvard University, alleging that the school's admissions policy set quotas on Asian American students accepted to the University, thereby holding them to a higher standard than applicants of other races.<sup>284</sup> Coordinated by Edward Blum, the anti-affirmative action activist whose previous suit against affirmative action at the University of Texas made it to the U.S. Supreme Court,<sup>285</sup> the suit takes another swing at affirmative action policies.<sup>286</sup> This time, the allegation is that Harvard University unfairly discriminated against Asian Americans, not Whites, when engaging in race-conscious admissions.<sup>287</sup>

<sup>283</sup> See Shapiro, *supra* note 250.

<sup>284</sup> See Complaint at 1, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-CV-14176), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *petition for cert. filed* No. 20-1199 (U.S. Feb. 25, 2021); Anemona Hartocollis, *What's at Stake in the Harvard Lawsuit? Decades of Debate Over Race in Admissions*, N.Y. TIMES (Oct. 13, 2018), <https://www.nytimes.com/2018/10/13/us/harvard-affirmative-action-asian-students.html> [<https://perma.cc/8TX3-9P7K>]. A federal judge upheld Harvard's program in 2019, finding that race was not a negative in the policy, and only a plus that exerted only a modest advantage in admissions. See *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 198–99; Anemona Hartocollis, *Harvard Does Not Discriminate Against Asian-Americans in Admissions, Judge Rules*, N.Y. TIMES (Nov. 5, 2019), <https://www.nytimes.com/2019/10/01/us/harvard-admissions-lawsuit.html> [<https://perma.cc/763S-CJMG>]. Further, any discrimination against Asian applicants was unintended and warranted only training for admissions staff. See *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 201–05. Ultimately, race-neutral alternatives to race-conscious admissions policies at Harvard were unwarranted and Harvard's admissions policies were allowed to continue. *Id.* at 199–201 The case has been appealed to the U.S. Supreme Court. See *Petition for a Writ of Certiorari, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 19-2005 (U.S. Feb. 25, 2021).

<sup>285</sup> *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013).

<sup>286</sup> See Hartocollis, *What's at Stake in the Harvard Lawsuit? Decades of Debate Over Race in Admissions*, *supra* note 284; Hartocollis, *Harvard Does Not Discriminate Against Asian-Americans in Admissions, Judge Rules*, *supra* note 284.

<sup>287</sup> For analysis of Blum's tactical use of Asian Americans in this lawsuit, and an argument that Asian Americans generally benefit from affirmative action and that framing opposition to affirmative action as concern for Asian Americans serves the interest of mostly-white affirmative

At the same time, opposition to race-conscious admissions policies is again mobilizing on the West Coast. Through a 1996 ballot initiative, California adopted Proposition 209 (“Prop 209”).<sup>288</sup> By a margin of 54% to 46% of almost nine million votes cast, the initiative amended the state constitution to prohibit race- and gender-based affirmative action policies by state agencies, including state colleges and universities.<sup>289</sup> After Prop 209, student enrollment among non-Asian minority groups, particularly at elite schools, dropped precipitously, and has yet to rebound.<sup>290</sup> In June 2020, lawmakers advanced a constitutional amendment to strip language from the state constitution prohibiting the consideration of race and sex in public education, employment, and contracting.<sup>291</sup> Assembly Constitutional Amendment

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action opponents, see Nancy Leong, *The Misuse of Asian Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISCOURSE 90, 91–92 (2016). Putting aside Blum’s tactical use of Asian American plaintiffs, this case is the latest in a long history of questions and justified concerns regarding the treatment of Asian Americans in affirmative action policies. In the mid-1980s, for example, several complaints filed with the Office of Civil Rights at the U.S. Department of Education alleged discrimination against Asian Americans in college admission processes, resulting in an investigation of several schools, including Harvard and UCLA. Kang, *supra* note 276. In 1984, Brown University concluded a lengthy internal interview finding that Asian Americans had been treated unfairly in their admissions process. *Id.*

<sup>288</sup> Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 230 (1997).

<sup>289</sup> *Id.* at 188, 195–96, 201–02, 201 n.49, 230; see CAL. CONST. art. I, § 31 (created by Prop 209).

<sup>290</sup> WILLIAM C. KIDDER & PATRICIA GÁNDARA, TWO DECADES AFTER THE AFFIRMATIVE ACTION BAN: EVALUATING THE UNIVERSITY OF CALIFORNIA’S RACE-NEUTRAL EFFORTS 15–22 (2015), [http://www.ets.org/Media/Research/pdf/kidder\\_paper.pdf](http://www.ets.org/Media/Research/pdf/kidder_paper.pdf) [<https://perma.cc/PQQ8-N9WB>]. The University of California Board of Regents, however, recently voted to gradually eliminate the use of standardized tests in college admissions in an attempt to combat the problem of low minority admission and enrollment in the system. Nick Anderson, *University of California Takes Huge Step Toward Dropping SAT and ACT from Admissions*, WASH. POST (May 21, 2020, 7:57 PM), <https://www.washingtonpost.com/education/2020/05/21/sats-university-california-system/> [<https://perma.cc/LLY9-HMR9>].

<sup>291</sup> A.C.A. 5, 2019–2020 Reg. Sess. (Cal. 2019), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200ACA5](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200ACA5) [<https://perma.cc/U4WU-5XKR>]. Affirmative action proponents have attempted to roll back Prop 209 in the past. In 2014, legislators introduced California Senate Constitutional Amendment No. 5 (“SCA-5”), a ballot initiative that would have eliminated the state ban on the use of race in recruitment, admissions, or retention among California’s public universities. See S.C.A. 5, 2013–2014 Reg. Sess. (Cal. 2013), [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SCA5](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SCA5) [<https://perma.cc/TED8-5BBB>]; Press Release, Cal. State Senator Dr. Ed Hernandez, O.D., Senate Dist. 24, Senator Hernandez Advances Constitutional Amendment for Equal Opportunity in Education (Aug. 20, 2013), <https://web.archive.org/web/20140302143337/http://sd24.senate.ca.gov/news/2013-08-20-senator-hernandez-advances-constitutional-amendment-equal-opportunity-education> [<https://perma.cc/FMC3-QFH2>]. Despite studies suggesting that as many as 80% of California’s Asian Americans supported affirmative action, a series of opposing editorials and arguments in Chinese American newspapers and talk radio stations mounted an ultimately successful campaign against the effort. Frank Shyong, *Affirmative Action Amendment Divides State’s Asian Ameri-*

No. 5 (“ACA-5”) was endorsed by members of the California Legislative Black Caucus and the Opportunity for All Coalition, who framed ACA-5 as a civil rights issue.<sup>292</sup> Also endorsed by the University of California Board of Regents,<sup>293</sup> and the Asian Pacific Islander American Public Affairs Association,<sup>294</sup> ACA-5 appeared on the November 2020 ballot as Proposition 16 (“Prop 16”), giving voters an opportunity to overturn Prop 209 by a simple majority.<sup>295</sup>

Despite a string of high-profile endorsements,<sup>296</sup> parental activism nevertheless animated opposition to ACA-5. In a turn of events that echoes opposition to New York City’s plans to broaden access to specialized high schools, several primarily Chinese American groups mobilized against ACA-5, coalescing mostly around the issue of college admissions.<sup>297</sup> The president of the Silicon Valley Chinese Association Foundation expressed concern that eliminating Prop 209 will lead to a quota system that will result in fewer admissions for Asian American students to the state’s colleges and universities.<sup>298</sup>

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*cans*, L.A. TIMES (May 18, 2014, 5:31 PM PT), <https://www.latimes.com/local/la-me-asian-divisions-20140519-story.html> [<https://perma.cc/9C6U-539H>]. The bill was compared to the Chinese Exclusion Act of 1892, and on social media dubbed the “Skin Color Act” and the “Yellow Peril Act.” *Id.* Although passed by the California Senate in 2014, the bill was ultimately withdrawn after a backlash that took politicians in support of the bill by surprise. Josie Huang, *SCA 5: A Political Coming-of-Age Story for Chinese-Americans*, 89.3 KPCC (Mar. 21, 2014), <https://www.scp.org/blogs/multiamerican/2014/03/21/16152/sca-5-chinese-americans-immigrants-asian-americans/> [<https://perma.cc/4SVF-TLK8>].

<sup>292</sup> Ebony Monet, *Black Lawmakers Make Case for Affirmative Action in California*, SACRAMENTO OBSERVER (May 5, 2020), <https://sacobserver.com/2020/05/black-lawmakers-make-case-for-affirmative-action-in-california/> [<https://perma.cc/AXJ3-JTWL>].

<sup>293</sup> Press Release, Univ. of Cal. Off. of the President, UC Board of Regents Unanimously Endorses ACA 5, Repeal of Prop. 209 (June 15, 2020), <https://www.universityofcalifornia.edu/press-room/uc-board-regents-endorses-aca-5-repeal-prop-209> [<https://perma.cc/V6WP-6KQX>].

<sup>294</sup> APAPA Supports ACA-5 and Higher Education for All, ASIAN PAC. ISLANDER AM. PUB. AFFS. ASS’N (June 17, 2020, 6:25 PM), <https://www.apapa.org/apapa-supports-aca-5-and-higher-education-for-all/> [<https://perma.cc/U9GK-MVYZ>].

<sup>295</sup> Dustin Gardiner, *California Voters: Here Are the 12 Measures on the November Ballot*, S.F. CHRON. (July 3, 2020, 4:54 PM), <https://www.sfchronicle.com/politics/article/California-voters-Here-are-the-12-initiatives-on-15383728.php> [<https://perma.cc/SAD7-E8MX>].

<sup>296</sup> Eric Ting, *‘They Lost Partly Because of that Ad’: How No on Prop. 16 Organizers Knew the Measure Would Fail*, SFGATE (Dec. 2, 2020, 4:00 AM), <https://www.sfgate.com/politics/article/Proposition-16-California-affirmative-action-why-15763791.php> [<https://perma.cc/Z924-A5AX>] (reporting that in addition to outspending the “no” side sixteen-to-one on advertising, Prop 16 garnered endorsements from then-vice presidential candidate Kamala Harris, California Governor Gavin Newsom, every major California newspaper editorial board, and athletic teams like the Golden State Warriors and the San Francisco 49ers).

<sup>297</sup> Alexei Koseff, *California Effort to Restore Affirmative Action Divides Asian Americans*, S.F. CHRON. (June 24, 2020, 4:00 AM), <https://www.sfchronicle.com/politics/article/California-effort-to-restore-affirmative-action-15361618.php> [<https://perma.cc/L87U-BF76>].

<sup>298</sup> *Id.*

Similarly, the Asian American Coalition for Education, led by a Chinese American activist, worked alongside Blum to file a Department of Justice complaint against Harvard in 2015<sup>299</sup> and to organize rallies in support of Blum's lawsuit in 2018.<sup>300</sup> The president of the Coalition, Yukong Zhao, filed a civil rights complaint on his son's behalf, whom he believes was discriminated against by at least two Ivy League schools.<sup>301</sup> Although a more affluent and educated group than the New York City parents,<sup>302</sup> these Californian parents were also worried about how affirmative action would negatively impact educational opportunities for their children.<sup>303</sup> In explaining his opposition to affirmative action, Zhao explained, "[Asian Americans are] hardworking, we never ask for any government favors . . . . But you blame us as overrepresented. We contribute to society. . . . Why are Asian Americans being punished?"<sup>304</sup>

Like selective school enrollment in New York, parents perceive access to elite higher education as essential to ensuring student success. Moreover, attempts to preserve paths to that success are again couched in the language of merit. Uninterrogated is why parents perceive long-term stability as so dependent on elite education, how it can be that standardized tests can so efficiently block Black and Latino access to the institutions, or how activism by one set of parents will necessarily shift education risk to another set. Ultimately, the state's failure to ensure equal education access to elite institutions is obscured, leaving parents to navigate education risk as best they can.

On November 3, 2020, Prop 16 was defeated, 57% to 43%.<sup>305</sup> Although election post-mortems are ongoing, stark division among Cali-

<sup>299</sup> Alvin Chang, *Asians Are Being Used to Make the Case Against Affirmative Action. Again.*, VOX (Aug. 30, 2018, 1:19 PM), <https://www.vox.com/2018/3/28/17031460/affirmative-action-asian-discrimination-admissions> [<https://perma.cc/7JA9-MUPK>].

<sup>300</sup> Kang, *supra* note 276.

<sup>301</sup> Chang, *supra* note 299.

<sup>302</sup> See Alia Wong, *The App at the Heart of the Movement to End Affirmative Action*, ATLANTIC (Nov. 20, 2018), <https://www.theatlantic.com/education/archive/2018/11/asian-americans-wechat-war-affirmative-action/576328/> [<https://perma.cc/2G79-WHBH>].

<sup>303</sup> See, e.g., John Eligon, *They Left China to Chase the American Dream. Now They're Fighting Affirmative Action*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/us/chinese-americans-affirmative-action-admissions.html> [<https://perma.cc/SE8A-Y3D2>] (profiling parents who articulate a specific concern about the impact of SCA-5 on the college choices of their children).

<sup>304</sup> Chang, *supra* note 299 (second alteration in original) (quoting Interview by Alvin Chang, Vox, with Yukong Zhao, President, Asian Am. Coal. For Educ.).

<sup>305</sup> See David Lauter, *Failure to Bridge Divides of Age, Race Doomed Affirmative Action Proposition*, L.A. TIMES (Nov. 24, 2020, 5:00 AM), <https://www.latimes.com/politics/story/2020-11-24/age-race-divides-doomed-affirmative-action-proposition> [<https://perma.cc/FJ96-CUGF>];

fornia's Asian Americans regarding race-conscious admissions policies and their impact on Asian representation is cited as one factor to consider.<sup>306</sup> Responding to the state's rejection of Prop 16, Zhao remarked, "Asian Americans will fight fiercely and defeat your racist policies wherever and whenever tried."<sup>307</sup>

#### D. "Democratic" Education at Risk

Risky education has implications not just for how education is experienced by parents and families, but for how American education functions in American democracy. The centrality of education to American democracy is deeply embedded in American history, culture, and policy. The writings of the Founding Fathers, for example, presented education as a public good to be distributed in service of citizenship and governance. Benjamin Franklin highlighted the extent to which governments made education a focus so that men would be "qualified to [s]erve the Publick with Honour to themselves, and to their Country."<sup>308</sup> Similarly, signatory to the Declaration of Independence, Benjamin Rush, justified the establishment of universities with congressional funding as necessary so that students would be prepared to maintain a republic government.<sup>309</sup>

Landmark education cases before the Supreme Court have emphasized the importance of education for equal citizenship in democratic practice. In *West Virginia State Board of Education v. Barnette*,<sup>310</sup> the Court explained that schools "educat[e] the young for citizenship," a key component of democracy.<sup>311</sup> In *New Jersey v.*

Charles Lane, Opinion, *California May Have Foreshadowed the End of Affirmative Action*, WASH. POST (Nov. 12, 2020, 6:09 PM), [https://www.washingtonpost.com/opinions/california-may-have-foreshadowed-the-end-of-affirmative-action/2020/11/12/f503bf1c-24f6-11eb-a688-5298ad5d580a\\_story.html](https://www.washingtonpost.com/opinions/california-may-have-foreshadowed-the-end-of-affirmative-action/2020/11/12/f503bf1c-24f6-11eb-a688-5298ad5d580a_story.html) [https://perma.cc/CV92-MDDU].

<sup>306</sup> See Eric Hoover, *Failure of California's Prop. 16 Underscores Complexity of Affirmative-Action Debate*, CHRON. HIGHER EDUC. (Nov. 4, 2020), <https://www.chronicle.com/article/failure-of-californias-prop-16-underscores-complexity-of-affirmative-action-debate> [https://perma.cc/ETW8-ZZSC].

<sup>307</sup> Scott Jaschik, *Why Did Prop 16 Fail?*, INSIDE HIGHER ED (Nov. 9, 2020), <https://www.insidehighered.com/admissions/article/2020/11/09/experts-discuss-failure-californias-proposition-16> [https://perma.cc/GVK2-TM79] (quoting Interview with Yukong Zhao, President, Asian Am. Coal. For Educ.) (reporting that fighting for Asian American support was an integral component of the campaign against Prop 16).

<sup>308</sup> BENJAMIN FRANKLIN, PROPOSALS RELATING TO THE EDUCATION OF YOUNG IN PENNSYLVANIA 5 (1749).

<sup>309</sup> See Benjamin Rush, Address to the People of the United States (Jan. 1787), as reprinted in JUDITH AREEN, HIGHER EDUCATION AND THE LAW 32 (2009).

<sup>310</sup> 319 U.S. 624 (1943).

<sup>311</sup> See *id.* at 637.

*T.L.O.*,<sup>312</sup> Justice Stevens noted that “[s]chools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry.”<sup>313</sup> The Court in *Brown v. Board of Education*<sup>314</sup> recognized that education “is the very foundation of good citizenship” and “a principal instrument in awakening the child to cultural values.”<sup>315</sup> And in *San Antonio Independent School District v. Rodriguez*,<sup>316</sup> a case in which the Court ultimately declined to formally declare public education a fundamental right, the Court nevertheless noted that education is foundational to democracy and citizenship in the form of voting:

Exercise of the franchise . . . cannot be divorced from the educational foundation of the voter. The electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.<sup>317</sup>

Scholars today still consider education to provide the content for deliberative democracy. Americans, too, see education as the place where children will reach their full potential *and* become good citizens who will maintain national values and democratic institutions.<sup>318</sup> Thus, public schools are sites of intense social, political, and legal conflict, reflecting larger national debates about democratic values and norms.<sup>319</sup> From defining what the state owes students in matters of punishment<sup>320</sup> and privacy,<sup>321</sup> to freedom of expression<sup>322</sup> and equal

<sup>312</sup> 469 U.S. 325 (1985).

<sup>313</sup> *Id.* at 373 (Stevens, J., concurring in part and dissenting in part).

<sup>314</sup> 347 U.S. 483 (1954).

<sup>315</sup> *Id.* at 493.

<sup>316</sup> 411 U.S. 1 (1973).

<sup>317</sup> *Id.* at 35–36.

<sup>318</sup> See HOCHSCHILD & SCOVRONICK, *supra* note 150, at 1–2.

<sup>319</sup> See, e.g., DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* 3–4 (1995) (highlighting the “riots, bus burnings, and school boycotts” in response to integration that received national attention in past decades, and noting that school integration remains an unresolved dilemma in the United States); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1513–14 (2005) (describing protests organized by political coalitions formed in response to affirmative action challenges); James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2052–55 (2002) (detailing opposition to busing policies adopted to facilitate integration, including Nixon’s antibusing statements while on the campaign trail, unprecedented antibusing protests in middle-class communities, and proposed legislation to prohibit cross-district busing).

<sup>320</sup> See, e.g., *Goss v. Lopez*, 419 U.S. 565, 584 (1975) (holding that public schools must conduct a hearing before suspending students); *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (holding that the Eighth Amendment’s prohibition on cruel and unusual punishment did not apply to corporal punishment as a disciplinary measure in public schools).

protection,<sup>323</sup> schools are crucibles for contestation and resolution in democracy.<sup>324</sup> Indeed, in 1960, Justice Potter Stewart wrote in an opinion that “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”<sup>325</sup>

Less lofty, but no less important, public schools are a site of regular engagement within a community, often functioning as a screen onto which people project their desires, hopes, and dreams for themselves and each other.<sup>326</sup> Minoritized communities, in particular, have long used engagement with schools as an outlet for political expression and participation.<sup>327</sup> School-level politics, for example, are the conduit through which minoritized communities have challenged state-sanctioned discrimination, often to nationwide consequence.<sup>328</sup> In Black and Latino communities, the road to mayoralty and city council often begins with school board service.<sup>329</sup>

<sup>321</sup> See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 333, 340–41 (1985) (holding that the Constitution’s prohibition on unreasonable searches and seizures applies to searches conducted by school officials but does not require officials to have probable cause or obtain a warrant prior to searching).

<sup>322</sup> See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 509 (1969) (holding that the First Amendment prohibits public schools from punishing students for expression absent evidence that rules against such expression were necessary to avoid substantial interference with discipline or the rights of others); *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (holding that the First Amendment does not prohibit educators from suppressing speech reasonably viewed as promoting illegal drug use).

<sup>323</sup> See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 726, 732 (2007) (striking down school assignment plans because the plans’ use of race was neither “narrowly tailored,” nor did it serve a “compelling state interest” under equal protection analysis).

<sup>324</sup> See JUSTIN DRIVER, *THE SCHOOLHOUSE GATE* 9, 24–25 (2018) (canvassing Supreme Court decisions regarding free speech, religion, punishment, policing, and equal protection and arguing that one cannot understand American public education without appreciating how Supreme Court doctrine “involving students’ constitutional rights shape[s] the everyday realities of schools across the country”).

<sup>325</sup> *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

<sup>326</sup> Sociologist Eve Ewing argues that fights about school are never just about school, but are rather about stability in an unstable world, agency in the face of powerlessness, and the enactment of dreams and visions for one’s own children. EWING, *supra* note 21, at 47; see also Lawrence, *supra* note 161, at 1376–78 (arguing that public education both defines and creates community); Green, *supra* note 21, at 100–01 (addressing the critical role schools play in community development and the negative impact school closures have on property values, social capital, and community identity).

<sup>327</sup> MOREL, *supra* note 78, at 5, 38–39 (documenting the high levels of parental and community engagement in Central Falls, Rhode Island public schools, and asserting that racialized communities in the United States have historically relied on education politics as a way to enter the public sphere).

<sup>328</sup> See *id.* at 5–6.

<sup>329</sup> *Id.*



Finally, the impact of race on notions of democratic citizenship has developed with particular force in the context of education. Diversity, for example, has long been justified, in part, by its democratic impact, with studies suggesting that racial diversity in educational settings increases interracial sociability and friendship;<sup>330</sup> improves the likelihood that students will attend college, work, and live in desegregated settings;<sup>331</sup> and prompts critical thinking.<sup>332</sup>

Despite the centrality of education in American democracy, state abdication for education quality and subsequent risk-shifting produces winners and losers in an antidemocratic fashion. One way of conceptualizing a healthy democracy is to consider the experience of individuals in that democracy. Sociologist Erik Olin Wright argues that two values fundamental to the American ethos—individual freedom and democracy—share the same underlying value of self-determination.<sup>333</sup> And so, a healthy democracy would be one in which the state provides opportunity and support for individuals to pursue life outcomes. Democracy also necessarily involves shared decision making—the consent of the governed to state action intended to both facilitate self-determination and promote the public good.

Collective action in a democracy will inevitably produce communal decisions that will benefit some citizens at the expense of others, even when the entire community benefits overall.<sup>334</sup> The stability of a democracy, therefore, also depends on the sacrifices of those who benefit less, or even incur costs, but nonetheless acquiesce to those communal decisions.<sup>335</sup> As American political scientist Danielle Allen explains, democracy does not achieve the common good by assuring

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<sup>330</sup> See CATHERINE L. HORN & MICHAL KURLAENDER, C.R. PROJECT HARVARD UNIV., *THE END OF KEYES—RESEGREGATION TRENDS AND ACHIEVEMENT IN DENVER PUBLIC SCHOOLS* 5 (2006) (observing that students who attend diverse schools report greater levels of comfort with other racial groups, and that “White students in integrated settings exhibit more racial tolerance and less fear of their Black peers”); Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 745 (1998) (citing studies that find integrated schools are more likely to produce interracial sociability and friendship).

<sup>331</sup> Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791, 797 (2005) (citing studies finding that Black and white students who graduate from integrated schools are more likely to live and work in integrated settings later in life).

<sup>332</sup> Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513, 1548 (2003) (citing research finding that diverse classrooms thwart automaticity and promote critical thinking).

<sup>333</sup> Erik Olin Wright, *Transforming Capitalism Through Real Utopias*, 78 AM. SOCIO. REV. 1, 5 (2013).

<sup>334</sup> DANIELLE S. ALLEN, *TALKING TO STRANGERS: ANXIETIES OF CITIZENSHIP SINCE Brown v. Board of Education* 28 (2004).

<sup>335</sup> *Id.* at 28–29.

the same benefits to everyone.<sup>336</sup> Rather, democracy is a “political practice by which the diverse negative effects of collective political action, and even of just decisions, can be distributed equally, and constantly redistributed over time, on the basis of consensual interactions.”<sup>337</sup>

Unfortunately, race and risk work together to unequally distribute the negative effects of political action—or political inaction—in education. School choice, enrollment, and management all work to ensure that the same group of parents bear the costs of education risk. White and wealthier parents manage risk by using resources to monopolize the best schools, even if it means excluding their minority counterparts. The state caters to the most powerful parents in an attempt to maximize school resources, but without a commitment to broader system overhaul. Less powerful parents, often from minority communities, are left to shift risk among themselves to varying degrees of success.

These dynamics often play out in a system that is considered legitimate because it prioritizes individual liberty and merit, or even adopts policy through democratic processes. When a school system marginalizes on the basis of race, however, it highlights not only a failure to fulfill the promise of the American ethos, but also structural imperfections that imperil any commitment to liberty or merit.<sup>338</sup> Race functions as an obstacle to self-determination, erecting barriers to the equal distribution of resources and opportunities that allow for self-determination.<sup>339</sup> Race also undercuts any commitment to meritocracy when it places obstacles in front of some students while serving as an accelerator for others. As those barriers further estrange people of color from full citizenship, they are denied access to shared governance as equals. As a result, they are consistently and disproportionately vulnerable to the negative externalities of democratic deliberation<sup>340</sup> and risky education.

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<sup>336</sup> *Id.* at 29.

<sup>337</sup> *Id.*

<sup>338</sup> See LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY* 14 (2003).

<sup>339</sup> See *id.* at 15.

<sup>340</sup> Indeed, a substantial body of literature supports the proposition that negative externalities of decision making are purposefully targeted towards minoritized communities so that others might better reap the benefits, see, e.g., Vann R. Newkirk II, *Trump's EPA Concludes Environmental Racism Is Real*, *ATLANTIC* (Feb. 28, 2018), <https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/> [<https://perma.cc/6UB3-5DJ4>], and the purposeful exclusion of people of color from New Deal reforms in order to get the buy-in of southern Whites, see LAUREN REBECCA SKLAROFF, *BLACK CULTURE AND THE NEW DEAL* 1 (2009).

### III. MITIGATING EDUCATION RISK

Rising inequality only intensifies the incentives of middle-class parents to secure their children's futures.<sup>341</sup> And if intergenerational mobility is on the decrease, affluent parents, confident that their children will not need policy initiatives meant to support the disadvantaged, will be less likely to support those policies. Responses, then, to antidemocratic risky education will require state interventions that either (un)tie hands or tie fates.

More robust engagement is not without precedent. Indeed, from the establishment of land grant universities,<sup>342</sup> to the National Defense Education Act of 1958<sup>343</sup> which increased education funding at all levels,<sup>344</sup> to the Great Society investments in education,<sup>345</sup> the state has in the past stepped up to level inequalities and broaden education access. In an era of risky education, an augmented state role is again required to more broadly distribute risk, if not more robustly assume responsibility for education quality.

#### A. (Un)Tying Hands

If a system that requires parents to bear inordinate education risk is the system with which Americans are stuck, politicians and school leaders must at least adopt policy that prevents some parents from further shifting risk, while helping other parents better mitigate risk. At a minimum, the state can still play a role in regulating the competitive education markets they have created.

In their study of opportunity hoarding in the context of New York City's school choice process, researchers Carolyn Sattin-Bajaj and Allison Roda identify school assignment policies that privilege particular parents and facilitate their gaming of the system.<sup>346</sup> For example, parents sometimes invest up to hundreds of hours researching schools and placement policies; others hire educational consultants, at fees of hundreds of dollars per hour, to do the work for them.<sup>347</sup> Other

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<sup>341</sup> See REEVES, *supra* note 104, at 73–74.

<sup>342</sup> See *Land-Grant University FAQ*, ASS'N PUB. & LAND-GRANT UNIVS., <https://www.aplu.org/about-us/history-of-aplu/what-is-a-land-grant-university/> [<https://perma.cc/24NH-8QB3>].

<sup>343</sup> Pub. L. No. 85-864, 72 Stat. 1580 (codified as amended in scattered sections of 20 U.S.C.).

<sup>344</sup> See S. REP. NO. 85-2242, at 1–2 (1958).

<sup>345</sup> See *supra* note 54 and accompanying text.

<sup>346</sup> Sattin-Bajaj & Roda, *supra* note 134, at 999–1002.

<sup>347</sup> *Id.* at 1016–17.

parents, still, are able to benefit from enrollment counselors already embedded in their schools.<sup>348</sup>

Parents with greater financial flexibility are able to exploit a priority system in admissions, using wealth to simply move into areas that confer enrollment priority for quality schools in the neighborhood.<sup>349</sup> Financial flexibility also permits parents to invest in private test preparation to ensure competitive test scores, often taking and retaking tests until satisfied with the score.<sup>350</sup> These behaviors crowd out parents who lack the resources in money or time to work the system in similar ways.

Although understandably animated by education risk, the hands of these parents can be tied. School districts, for example, can adopt more holistic approaches to identifying students for gifted or advanced placement, which has the additional benefit of increasing the likelihood that students of color will be so identified.<sup>351</sup> Alternatively, parents can be removed as gatekeepers by either testing all students across the board,<sup>352</sup> or simply providing gifted or advanced pedagogy and curriculum to *all* students in more integrated classroom settings.<sup>353</sup> Similarly, weighted lotteries that invert priority can also tie hands in the K–12 context: instead of assigning priority status to students living in neighborhoods near wealthy schools, priority status might instead be assigned to low-income students living in less affluent areas.<sup>354</sup>

The hands of parents less able to successfully navigate risk should be untied. School personnel who can support and prepare parents for navigating school selection should be placed in *all* schools. Districts should reconsider bureaucratic structures that disproportionately impact disadvantaged families.<sup>355</sup> In response to reports that students of color are less likely to even know about competitive school admission

<sup>348</sup> See *id.* at 1020.

<sup>349</sup> See *id.* at 1021–22.

<sup>350</sup> See *id.* at 1002, 1020–21.

<sup>351</sup> See, e.g., JAMES H. BORLAND, NAT'L RSCH. CTR. ON THE GIFTED & TALENTED, ISSUES AND PRACTICES IN THE IDENTIFICATION AND EDUCATION OF GIFTED STUDENTS FROM UNDER-REPRESENTED GROUPS 20–21 (2004) (suggesting that gifted identification processes become more equitable and sensitive to diverse expressions of giftedness).

<sup>352</sup> See Sattin-Bajaj & Roda, *supra* note 134, at 1025 (citing as an example of such policy in Broward County public schools).

<sup>353</sup> BORLAND, *supra* note 351, at 18–19 (proposing the development of curriculum that is focused “less [on] who is ‘truly gifted’ and more [on] making curriculum and instruction truly differentiated for all students”).

<sup>354</sup> Sattin-Bajaj & Roda, *supra* note 134, at 1027; see also Denise & Gross, *supra* note 160, at 315–17 (2016) (finding that school choice policies do little to address the stratification and segregation associated with geographically based enrollment systems).

<sup>355</sup> See, e.g., Fong & Faude, *supra* note 159, at 257–58 (finding that timeline-based lotteries

processes, even low-performing schools should promote admission to the programs and identify students with the capacity to prepare for admission. Test preparation should be a standard curricular offering at all schools in districts that maintain selective admissions.<sup>356</sup>

Higher education would benefit from some of the same interventions. Initiatives like income-contingent loan repayment plans, through which loans would be forgivable after a reasonable repayment period, would provide students some measure of insurance if their educational investment does not produce rising wages.<sup>357</sup> Free universal college naturally significantly reduces or eliminates that form of risk altogether.

The elimination of standardized testing in the admissions process does some of the work of untying hands in higher education, making college admission less dependent on the financial resources of parents and students, and more likely to be informed by a more holistic assessment of students' academic work and capacity for future success.<sup>358</sup> In the absence of test elimination, the adoption of test preparation courses as a standard part of the curriculum across American public schools is a way to eliminate parents as gatekeepers and unburden poor and minority parents.

These solutions are aimed at not only regulating a competitive education market. Rather, they are also aimed at empowering some parents to better transact in that market while decreasing the need for access to an insider education network as a form of risk mediation. A more aggressive framing might contemplate the facilitation of more racial and ethnic networks on which minoritized students and families might capitalize. And in this sense, these empowerment goals echo poverty law advocacy which promotes the power and agency of poor people to work for their own social and economic improvement.<sup>359</sup> In such a model, lawyers and policymakers work to stimulate critical consciousness, voice, and agency among subordinated groups such that they might liberate themselves.<sup>360</sup>

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disproportionately impacted Black families, and concluding that bureaucratic structures may disproportionately impact the most disadvantaged families).

<sup>356</sup> *But see* Shapiro, *supra* note 281 (noting that attempts to establish additional specialized schools, expand test preparation, or augment student testing have failed in previous pilots or simply encourage more private test preparation).

<sup>357</sup> HACKER, *supra* note 38, at 175; REEVES, *supra* note 104, at 135–36.

<sup>358</sup> *See* Geiser, *supra* note 174, at 17.

<sup>359</sup> *See* Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 443–44 (2001).

<sup>360</sup> *See, e.g.,* Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic*

Self-empowerment literature, however, has been rightly critiqued as insufficiently attentive to the structural sources of inequality and marginalization. Just as local empowerment iterations of community economic development “[do] nothing to seriously challenge the structural determinants of poverty,”<sup>361</sup> micro-education strategies that focus on individual capacity to navigate risk will not fundamentally reorient the nature of education risk. Nor do they promote the sort of coalition building or state investment that actually mitigates risk across the board for everyone in the school system.

### B. *Tying States*

To the extent that tying hands implicitly demands greater state engagement, examples of prior attempts to better regulate education provide opportunities to consider the potential of these initiatives. At the federal level, The No Child Left Behind (“NCLB”) Act of 2001 and the Race to The Top (“RTTT”) fund<sup>362</sup> reasserted state and federal accountability for quality education, while also attempting to tie the fates of more and less privileged students. NCLB set guidelines and requirements for teacher qualification, annual testing, and annual yearly progress for public schools.<sup>363</sup> RTTT used an incentive system, awarding grants to districts that adopted standards and assessment to prepare students, built data systems to measure student growth and improve instruction, and recruited and retained the most effective teachers and principals.<sup>364</sup> Central to NCLB, in particular, was the disaggregation of testing data by several categories, including race,

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*Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 664–65 (1987–88) (arguing that poverty lawyers need to embrace a theory of “integrated theory empowerment” to empower their clients to directly fight against the forces underlying poverty rather than just further ingraining “indigent isolation and passivity”); Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947, 949–51 (1992) (arguing in favor of “rebellious lawyering” and explaining that it “constitutes a justifiable, justice-based allocation of resources away from clients’ short-term needs and in favor of a community’s long-term needs”); GERALD P. LOPEZ, *REBELLIOUS LAWYERING* 1–10 (1992) (outlining the critical need for lawyers to understand and work with the communities they wish to serve).

<sup>361</sup> Cummings, *supra* note 359, at 447–56 (canvassing literature to illustrate that market-based community economic development insufficiently redresses poverty, “[d]epoliticizes [a]ntipoverty [a]dvocacy,” and “[p]rivileges [l]ocal [i]ncrementalism [o]ver [b]road [s]tructural [r]eform”).

<sup>362</sup> See *supra* notes 124–28 and accompanying text.

<sup>363</sup> Under NCLB, annual testing was required in grades three through eight in reading and math, with at least one more test administered in grades ten to twelve; students were also required to be tested in science at least three times between grades three and twelve and test scores were used to measure for “adequate yearly progress.” Ryan, *supra* note 127, at 939–41.

<sup>364</sup> See U.S. DEP’T OF EDUC., *supra* note 128, at 2.

ethnicity, economic disadvantage, and limited English proficiency.<sup>365</sup> Schools that failed to make progress among low-income or minority groups could thus no longer hide lower subgroup academic underperformance behind overall positive performance.

Incentives to better support teachers and attempts to disaggregate data have promise given the unequal distribution of experienced teachers by race<sup>366</sup> and nominal integration that masks racialized tracking.<sup>367</sup> Nevertheless, both sets of federal reform legislation operated through a punitive lens anchored in a deficit orientation toward the children and school districts it purported to serve.<sup>368</sup> Much of the regulation of NCLB targeted Title I schools<sup>369</sup> and threatened state takeover and charter conversion if schools failed to make adequate yearly progress.<sup>370</sup> RTTT more explicitly blamed poor school culture

<sup>365</sup> Ryan, *supra* note 127, at 940.

<sup>366</sup> Majority-minority schools are disproportionately assigned novice teachers with fewer credentials. C.E. ESCH, C.M. CHANG-ROSS, R. GUHA, D.C. HUMPHREY, P.M. SHIELDS, J.D. TIFANY-MORALES, M.E. WECHSLER & K.R. WOODWORTH, CTR. FOR THE FUTURE OF TEACHING & LEARNING, *TEACHING AND CALIFORNIA'S FUTURE: THE STATUS OF THE TEACHING PROFESSION 2005*, at 70 (2005) (finding that in 2004–2005, 20% of California's teachers serving majority-minority populations were unprepared or novice, compared to only 11% of California's teachers serving schools with few or no minority students); JOHN WIRT, SUSAN CHOY, PATRICK ROONEY, STEPHEN PROVASNIK, ANINDITA SEN & RICHARD TOBIN, NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., *NCES 2004-077, THE CONDITION OF EDUCATION 2004*, at 73 (2004) (reporting that high schools with at least 75% minority students employed two times as many uncertified or out-of-field teachers in English and science than wealthier schools).

<sup>367</sup> See *supra* notes 176–80 and accompanying text; see also Mickelson, *supra* note 332, at 1525–31 (2003) (documenting the phenomenon of second-generation segregation within purportedly integrated schools).

<sup>368</sup> See Charles R. Lawrence III, *Who Is the Child Left Behind?: The Racial Meaning of the New School Reform*, 39 *SUFFOLK U. L. REV.* 699, 716 (2006) (arguing that NCLB is informed by cultural-deficit theories and pessimism about teachers, schools, and children). For an explanation that the debunked deficit theory continues to inform contemporary educational thought and practice, see Richard R. Valencia & Daniel G. Solórzano, *Contemporary Deficit Thinking, in THE EVOLUTION OF DEFICIT THINKING: EDUCATIONAL THOUGHT AND PRACTICE* 160, 160 (Richard R. Valencia ed., 1997).

<sup>369</sup> Title I schools are those with high numbers or percentages of children from low-income families; these schools receive federal financial assistance. *Improving Basic Programs Operated by Local Educational Agencies (Title I, Part A)*, U.S. DEP'T OF EDUC. (OCT. 24, 2018), <https://www2.ed.gov/programs/titleiparta/index.html> [<https://perma.cc/C5ZM-E92D>]. All Title I schools were required to hire “highly qualified” teachers for all subjects and veteran teachers were required to demonstrate that they are “highly qualified.” No Child Left Behind (NCLB) Act of 2001, § 1119(a)(2)–(3), Pub. L. No. 107-110, 115 Stat. 1425, 1505 (codified as amended 20 U.S.C. § 6319), *repealed by* Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified as amended in scattered sections of 20 U.S.C.). Beyond Title I schools, teachers of “core academic subjects” had to be “highly qualified.” *Id.* § 1119(a)(2)(A).

<sup>370</sup> After two consecutive years of failing to meet adequate yearly progress standards, students were allowed to choose another public school within the same district; after five consecutive years, schools were taken over by the state. *Id.* § 1116(b)(3)–(5), (7)–(8).

along with poor teaching and school management for low academic performances, ignoring disparities in school funding, racial segregation, and economic isolation.<sup>371</sup>

Reforms like this do not fully engage the work of addressing the structural obstacles to quality education for all students. Nor does this version of engagement account for any of the burden-shifting and risk with which parents are saddled; in fact, it does just the opposite, creating escape valves of school choice should this version of regulation be ineffective. In the case of NCLB and RTTT, “ineffective” did not even fully contemplate actual improved academic outcomes. Rather, federal retreat from the initiatives was fueled, in large part, by dissatisfaction among wealthier districts with the standardized testing the regimes incentivized.<sup>372</sup>

Successful state engagement would instead prioritize policies that more adequately return education management to the state and broadly spread remaining risk among parents. They include the end of school choice initiatives in favor of economic and racial integration among all schools, the elimination of school funding systems based on local taxes in favor of equalized state funding, and the elimination or drastic reduction of private school enrollment in the United States. These solutions demand the state robustly assert its role in guaranteeing quality education, removing structural obstacles to closing achievement gaps and ensuring that parents cannot so easily shift any remaining risk to others or exit the public school system altogether. Market interventions that instead prompt competition on which parents may capitalize will not be enough.

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<sup>371</sup> See Arne Duncan, U.S. Sec’y of Educ., Remarks at the National Alliance for Public Charter Schools Conference: Turning Around the Bottom 5 Percent (June 22, 2009), <https://www2.ed.gov/news/speeches/2009/06/06222009.html> [<https://perma.cc/45NQ-RP6G>].

<sup>372</sup> See, e.g., Lydia Saad, *No Child Left Behind Rated More Negatively Than Positively*, GALLUP (Aug. 20, 2012), <https://news.gallup.com/poll/156800/no-child-left-behind-rated-negatively-positively.aspx> [<https://perma.cc/EUK6-69LB>] (finding that middle- and upper-income Americans’ views on NCLB were “more negative than positive”); Libby Nelson, *Obama’s Flip-Flop on Standardized Tests, Explained*, VOX (Oct. 29, 2015, 3:00 PM), <https://www.vox.com/2015/10/29/9638652/standardized-tests-obama-duncan> [<https://perma.cc/LK4U-ASSZ>] (finding that opposition to testing incentivized under NCLB and Common Core was more intense among wealthier districts, a dynamic partly responsible for the Obama Administrations’ shift in tone from dismissive to apologetic); Valerie Strauss, *Arne Duncan: ‘White Suburban Moms’ Upset that Common Core Shows Their Kids Aren’t ‘Brilliant,’* WASH. POST (Nov. 16, 2013, 6:11 PM), <https://www.washingtonpost.com/news/answer-sheet/wp/2013/11/16/arne-duncan-white-surburban-moms-upset-that-common-core-shows-their-kids-arent-brilliant/> [<https://perma.cc/H5AV-5L94>]; Laura McKenna, *Suburbia and Its Common Core Conspiracy Theories*, ATLANTIC (Feb. 12, 2015), <https://www.theatlantic.com/education/archive/2015/02/suburbia-and-its-common-core-conspiracy-theories/385424/> [<https://perma.cc/7CVL-KNFR>].



Doctrine also has a role to play here. Missing in jurisprudence regarding education is an antisubordination commitment. Cases like *Brown*, *Green v. County School Board*,<sup>373</sup> and *Swann v. Charlotte-Mecklenburg Board of Education*<sup>374</sup> responded to norms of white supremacy that shaped the school system.<sup>375</sup> De jure school segregation in the United States was meant to separate Whites from Blacks in response to the purported inferiority of the latter,<sup>376</sup> with white schools thus becoming symbols of the superiority of the former. Having focused almost exclusively on the psychological harm that segregation inflicts on Black students, however, the Court has not interrogated commitments to racial purity or white supremacy, and its silence helps maintain racial hierarchies.<sup>377</sup>

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<sup>373</sup> 391 U.S. 430 (1968).

<sup>374</sup> 402 U.S. 1 (1971).

<sup>375</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (discussing how racial segregation in schools inherently generates feelings of inferiority among racial minorities); *Green*, 391 U.S. at 435–38 (defining the meaning of a “unitary” school system under *Brown*); *Swann*, 402 U.S. at 22–25, 29–31 (identifying mathematical ratios reflecting the racial composition of entire school systems as a “useful starting point,” and sanctioning bussing).

<sup>376</sup> See Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 439 (“*Brown* held that segregated schools were unconstitutional primarily because of the message segregation conveys—the message that black children are an untouchable caste, unfit to be educated with white children.”).

<sup>377</sup> See Osamudia James, *Superior Status: Relational Obstacles to Racial Justice and LGBTQ Equality* 31–40 (Dec. 16, 2020) (unpublished manuscript) (on file with *The George Washington Law Review*). Status hierarchies are informed by cultural beliefs that underly the hierarchies. See Cecilia L. Ridgeway & Shelley J. Correll, *Consensus and the Creation of Status Beliefs*, 85 SOC. FORCES 431, 431 (2006). In order to function, status requires that stereotypes and beliefs about groups are consensual such that everyone shares them as cultural knowledge. Cecilia L. Ridgeway, *Why Status Matters for Inequality*, 79 AM. SOCIO. REV. 1, 5 (2014). Key to dismantling racial hierarchy is the undermining of consensuality. CECILIA L. RIDGEWAY, *STATUS: WHY IS IT EVERYWHERE? WHY DOES IT MATTER?* 24 (2019). Nor did the end of de jure segregation automatically result in the integration of American schools. Southern recalcitrance to integration orders ultimately gave way in 1964 under the threat of denied federal funding for those school systems engaged in discriminatory practices. See 42 U.S.C. § 2000d. Under the Supreme Court’s direction, southern schools became more desegregated than schools in any other region in the country by the early 1970s. See Nikole Hannah-Jones, *Lack of Order: The Erosion of a Once-Great Force for Integration*, PROPUBLICA (May 1, 2014, 1:11 PM), <https://www.propublica.org/article/lack-of-order-the-erosion-of-a-once-great-force-for-integration> [<https://perma.cc/GHM2-U86G>]; *Green*, 391 U.S. at 435–38; *Swann*, 402 U.S. at 22–25, 29–31. Court-facilitated desegregation however, was short lived. Three Supreme Court cases in the early 1990s, including *Board of Education v. Dowell*, 498 U.S. 237 (1991), *Freeman v. Pitts*, 503 U.S. 467 (1992), and *Missouri v. Jenkins*, 515 U.S. 70 (1995), signaled the end of federal oversight of desegregation and integration. See *Dowell*, 498 U.S. at 240, 248 (holding that a “clear showing of grievous wrong evoked by new and unforeseen conditions” is too high a standard for dissolution of a school desegregation decree, as they “are not intended to operate in perpetuity” (quoting *Dowell v. Bd. of Educ.*, 890 F.2d 1483, 1490 (10th Cir. 1989), *rev’d*, 498 U.S. 237)); *Freeman*, 503 U.S. at 471 (“A district court need not retain active control over every aspect of school

Subsequent cases are further defined by the absence of antisubordination commitments even as the Court reaffirmed individual liberty. By refusing to impose an interdistrict integration order in *Miliken v. Bradley*,<sup>378</sup> the Court affirmed and protected the liberty interests of more powerful and wealthy white parents while ignoring the constrained liberty interests of poorer families of color.<sup>379</sup> In *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>380</sup> the Court curtailed state attempts to voluntarily address race and risk in the school system.<sup>381</sup> And although *Grutter* is typically heralded as a “win” in education policy for preserving affirmative action in college admissions, the Court ignored intervenors’ arguments that affirmative action should be justified on remedial grounds in response to historical and contemporary practices of racial exclusion in higher education.<sup>382</sup> Instead, the Court adopted a corporatized version of diversity, affirming the benefits of cross-racial dialogue in classrooms and the ultimate citizenship, job, and military preparation that training provided.<sup>383</sup> Moreover, the Court placed strict limitations on the consideration of race in admissions in an effort to preserve “merit” in the process.<sup>384</sup>

These cases advance commitments to liberty and choice in education. They protect the centrality of merit in school admissions. They were decided through legitimate judicial processes, and some supporters might even consider them just. Nevertheless, in the absence of an

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administration until a school district has demonstrated unitary status in all facets of its system.”); *Jenkins*, 515 U.S. at 101–03 (requiring the district court to apply *Freeman* to reassessing the Kansas City School District desegregation decree). The rate of segregation in American schools has steadily increased since then. ORFIELD ET AL., *supra* note 27, at 10 (concluding that Black students in the South are less likely to attend a school that is majority white than they were about fifty years ago); Chang, *supra* note 27 (explaining that although the United States is racially distributing students about as well as the country did a few decades ago, the most vulnerable students are increasingly isolated).

<sup>378</sup> 418 U.S. 717 (1974).

<sup>379</sup> *Id.* at 742–47. An interdistrict integration order was the only way to remedy the state-sanctioned segregation that had undermined Detroit schools and prompted white flight from the city. *See id.* at 781–85 (Marshall, J., dissenting).

<sup>380</sup> 551 U.S. 701 (2007).

<sup>381</sup> In *Parents Involved in Community Schools*, the Court struck down controlled choice plans adopted to facilitate integration for their use of race, declined to affirm the pursuit of racial diversity as a compelling interest justifying the use of race, and refused to distinguish between benign and invidious uses of race. *See id.* at 709–11, 720–25, 733–35; *id.* at 741–42 (plurality opinion).

<sup>382</sup> Brown-Nagin, *supra* note 319, at 1458–61.

<sup>383</sup> *See Grutter v. Bollinger*, 539 U.S. 306, 330–33 (2003).

<sup>384</sup> *See id.* at 341–43.

antisubordination norm, these cases entrench racialized education risk and demand reconsideration as one component of education reform.

### C. *The Challenge of Tying Fates*

The most robust version of state engagement in addressing educational inequality, which would include limiting parent exit, adopts a “shared fate” approach to education reform. Political scientist Melissa Williams defines “shared fate” as the acknowledgement that citizens are in webs of relationships with other human beings in ways that “profoundly shape our lives.”<sup>385</sup> Whether or not we consciously or voluntarily choose to be so connected, our actions have an impact on other human beings, and theirs on us.<sup>386</sup> Shared fate is not defined through an ethical community bound by values or moral commitments but rather by relations of interdependence, and it can be more or less legitimate based on the extent to which interdependence and interconnection are perceived as justified by those subject to it.<sup>387</sup> Much like how insurance links individuals such that resources can be pooled to manage risk, a shared-fate approach to education links the academic success of the most privileged to the success of the least.

Coalitional responses to education crises can potentially seed a shared-fate approach to education. Although the experience of education in rural and urban districts, for example, is distinct, they both face similar financial, infrastructure, and staffing problems.<sup>388</sup> One might

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<sup>385</sup> Melissa S. Williams, *Citizenship As Identity, Citizenship As Shared Fate, and the Functions of Multicultural Education*, in *CITIZENSHIP AND EDUCATION IN LIBERAL-DEMOCRATIC SOCIETIES* 229–30 (Kevin McDonough & Walter Feinberg eds., 2003); see also Sigal Ben-Porath, *Citizenship as Shared Fate: Education for Membership in a Diverse Democracy*, 62 *EDUC. THEORY* 381, 381 (2012) (defining shared fate as a form of citizenship education “that develops a significant shared dimension while respecting deep differences within a political community”); Cong Lin & Liz Jackson, *From Shared Fate to Shared Fates: An Approach for Civil Education*, 38 *STUD. PHIL. & EDUC.* 537, 544–45 (2019) (advocating for “recasting the concept of a singular ‘shared fate’ to plural ‘shared fates’” to provide a more inclusive platform that acknowledges multiple fates of multiple stakeholders).

<sup>386</sup> WILLIAMS, *supra* note 385, at 229–30.

<sup>387</sup> *Id.*

<sup>388</sup> For more on the shared challenges facing rural and urban school districts, see generally Dority & Thompson, *supra* note 21 (documenting the limited gains from, and the social and economic costs of, school closures in rural and nonrural school districts in Nebraska); Tieken & Aldridge-Reveles, *supra* note 21, at 938–39 (documenting the negative impact of school closures on rural and urban communities); Green, *supra* note 21 at 100–01 (documenting the negative impact of school closures on surrounding urban and rural communities); and KATHLEEN HAYES, NAT’L COMPREHENSIVE CTR. FOR TCHR. QUALITY, *KEY ISSUE: RECRUITING TEACHERS FOR URBAN AND RURAL SCHOOLS* (2009) (outlining strategies for addressing the twin teacher hiring challenges facing urban and rural school districts). *Cf.* MEGAN LAVALLEY, NAT’L SCH. BDS. ASS’N, CTR. FOR PUB. EDUC., *OUT OF THE LOOP* (2018) (documenting the challenges, even

envision, then, the sort of coalition that forces states to respond more robustly to urgent structural challenges that subject both rural and urban districts to educational instability. Similarly, the renewed push for the end of admissions screening in New York City, prompted by sustained protest against police brutality and systemic racism, illustrates how crisply crises can present the stakes of education risk and mobilize alliances with the potential to prompt change.<sup>389</sup>

Alternately, key policy changes would go a long way toward adopting a shared-fate approach to American education. School choice, for example, with its focus on individual options and school market competition, does not contemplate a world in which parents consider the impact of their choices on the educational outcomes of others in their community.<sup>390</sup> Similarly, the ease with which parents can abandon struggling school districts, avoiding initiatives meant to promote racial equality<sup>391</sup> and taking the primary sources of funding with them,<sup>392</sup> undercuts notions of shared fate.

Cultivating this approach to education naturally raises questions about the tension between liberty and equality and the proper balance of both in a democracy. Unfettered liberty at the cost of equality not only overvalues parental liberty while undervaluing the proper role of the state in properly educating children, but it also undermines even democratic commitments like self-determination.<sup>393</sup> Unfettered liberty at the cost of equality also violates a commitment to fairness in self-

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those requiring distinct solutions, that rural districts have in common with urban districts including poverty, achievement gaps, and teacher recruitment and retention).

<sup>389</sup> See Shapiro, *supra* note 250.

<sup>390</sup> See *supra* Sections I.B.1, II.D.

<sup>391</sup> See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 722–23, 744–45 (1974) (prohibiting an interdistrict integration order absent an interdistrict equal protection violation). An interdistrict integration order, however, would have been the only way to effectively remedy the state-sanctioned segregation that had undermined Detroit schools and encouraged white flight to the suburbs in the first place. See *id.* at 781–85 (Marshall, J., dissenting).

<sup>392</sup> Because school districts in the United States are funded by local property taxes, a district's ability to fund its schools is typically determined by the wealth of its residents, with obvious disadvantage to poor localities. See KERN ALEXANDER & RICHARD G. SALMON, *PUBLIC SCHOOL FINANCE* 18–19 (1995). Although state equalization formulas are sometimes adopted to supplement funding for poorer school districts, these efforts typically only guarantee a minimum financing floor. See *How Do School Funding Formulas Work?*, *supra* note 28. State constitutional tax caps can further impede the ability of poor districts to increase taxes in order to maximize funding. See ALEXANDER & SALMON, *supra*, at 18. The fiscal strength of wealthier districts is often understood as a legitimate advantage and maintained through the failure of legislatures to adopt robust equalization policies, as well as through the patrolling of district boundaries through the criminalization of enrollment address fraud. See *id.* at 146–48; Clark, *supra* note 69, at 397–401 (documenting the criminalization of residency fraud in school enrollment).

<sup>393</sup> See James, *supra* note 142, at 1102–03, 1127–28.

governance and shared decisionmaking, ultimately destabilizing democracy.

In contrast, a “shared-fate” approach would tie parent hands and demand more robust state responsibility for quality education in recognition of interdependence. It also legitimizes the terms of those connections by ensuring that parents cannot unfairly shift risk to each other. In doing so, a more democratic approach to education can develop. In this conception of education, to be a good parent is to *also* be a good citizen. In this conception of education, good parenting may mean cultivating a stronger democracy, one in which education risk is mitigated by proper state engagement, and any remaining risk is distributed more evenly. In this conception of education, doctrine that privatizes parents’ education decisions is rendered illegitimate to the extent that it absolves parents from the care, concern, and investment that should inform public education in a democracy.

It would be naïve, however, to believe that such a shift in perspective could be so easily adopted given how deeply parents are socialized to navigate and shift risk on behalf of their children. Accustomed to a monopoly on quality education, white parents are not likely to easily give up that monopoly without a fight, as illustrated by the strident opposition of some New York City parents to even limited attempts to integrate schools.<sup>394</sup> Nor are we culturally or politically open to such suggestions. Despite the realization, for example, that possible discrimination against Asian Americans in the college admission process inures to the benefit of Whites,<sup>395</sup> debate regarding race-conscious admissions still focuses on the potentially unmeritorious admission of Blacks and Latinos, or the overrepresentation of Asians. Discourse rarely contemplates decreases in the admission of

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<sup>394</sup> In 2018, white parents opposed school enrollment plans that would help racially integrate the city’s public schools, with some advocating instead for additional resources for their children’s racially isolated peers. Lindsey Christ, *Student Diversity Push Upsets Some Parents at UWS School*, SPECTRUM NEWS NY1 (Apr. 25, 2018, 8:54 AM), <https://www.ny1.com/nyc/all-boroughs/news/2018/04/25/push-to-boost-middle-school-diversity-upsets-some-uws-parents-#> [<https://perma.cc/5LUX-AXEA>]. Two years before that, a series of meetings about integration attempts turned hostile as parents accused officials of lying, referred to majority-minority schools as “cess-pool[s],” and even cried while pleading with the city to abandon changes to enrollment plans. Eliza Shapiro, *New Upper West Side School Integration Plans Reignite an Old Fight*, POLITICO (Oct. 25, 2016, 5:44 AM), <https://www.politico.com/states/new-york/city-hall/story/2016/10/upper-west-side-school-integration-fight-goes-back-50-years-106679> [<https://perma.cc/D3XM-FL7S>].

<sup>395</sup> “Negative action” refers to the “unfavorable treatment based on race, using the treatment of Whites as a basis for comparison.” Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin’s Defense of Affirmative Action*, 31 HARV. C.R.–C.L. L. REV. 1, 3–6 (1996). In 1996, Professor Jerry Kang framed admissions ceilings on Asian Americans as a case of negative action. *See id.*

Whites.<sup>396</sup> The point is not that decreases to white enrollment are necessarily the right answer but that minimizing the advantage of Whites in the admission process, particularly relative to minoritized applicants, is neither culturally nor politically legible as a potential solution.<sup>397</sup>

Broad-based support for changes, moreover, may be difficult to build or maintain, even within groups most vulnerable to risky education. Although Asian Americans, for example, consistently support race-conscious remedies like affirmative action, support among Chinese Americans has declined dramatically over the last decade.<sup>398</sup>

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<sup>396</sup> Jonathan P. Feingold, *SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus*, 107 CAL. L. REV. 707, 724 (2019) (documenting continued debate about the advantages Blacks and Latinos receive under affirmative action despite the plaintiff's own claims in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 397 F. Supp. 3d 126 (D. Mass. 2019) that Harvard intentionally penalizes Asian American applicants in favor of white applicants).

<sup>397</sup> More generally, social scientists find that the racialization of policy will undermine its likelihood of success. David O. Sears & P.J. Henry, *The Origins of Symbolic Racism*, 85 J. PERSONALITY & SOC. PSYCH. 259, 273 (2003) (discussing how policies that benefit the Black community, like tax breaks for job creation and welfare programming, that are not directly race-targeted, ultimately become racialized); Maria Krysan, *Prejudice, Politics, and Public Opinion: Understanding the Sources of Racial Policy Attitudes*, 26 ANN. REV. SOCIO. 135, 160 (2000) ("Economic-based policies that become associated in the public's mind with race will face many of the same obstacles . . . as those that are explicitly racial.").

<sup>398</sup> Declining support among Chinese Americans, the United States' largest Asian American ethnic group, is almost single-handedly responsible for a slight decline in the popularity of affirmative action among Asian Americans more generally. Wong, *supra* note 302. Facilitated by social media and networking sites serving first-generation Chinese Americans that focus heavily on affirmative action, census data, and unauthorized immigration, *see id.*, the departure of members of Chinese American communities from more liberal coalitions are increasingly seen not only on issues of education but also on the issues of data disaggregation, sanctuary cities, and policing. *See, e.g.*, Hansi Lo Wang, 'Racist Bill'? Chinese Immigrants Protest Effort To Collect More Asian-American Data, NPR (Aug. 5, 2017, 6:42 PM), <https://www.npr.org/2017/08/05/541844705/protests-against-the-push-to-disaggragate-asian-american-data> [<https://perma.cc/9WS4-YJS2>]; Bill Turque, *These First-Generation Chinese Americans Are Vigorously Opposing Sanctuary Laws*, WASH. POST (Mar. 20, 2017), [https://www.washingtonpost.com/local/md-politics/these-first-generation-chinese-americans-are-loudly-opposing-sanctuary-laws/2017/03/17/92728e94-09db-11e7-93dc-00f9bdd74ed1\\_story.html](https://www.washingtonpost.com/local/md-politics/these-first-generation-chinese-americans-are-loudly-opposing-sanctuary-laws/2017/03/17/92728e94-09db-11e7-93dc-00f9bdd74ed1_story.html) [<https://perma.cc/M4UB-KZBS>] (discussing how first-generation Chinese Americans mobilized in Maryland to oppose sanctuary city laws, arguing that "[n]obody should be above the law" (quoting Interview with Hongling Zhou)); Eligon, *supra* note 303 (documenting the failure of a Maryland sanctuary city measure after Chinese activists protested it); Hansi Lo Wang, 'Awoken' by N.Y. Cop Shooting, Asian-American Activists Chart Way Forward, NPR (Apr. 23, 2016, 7:30 PM), <https://www.npr.org/sections/codeswitch/2016/04/23/475369524/awoken-by-n-y-cop-shooting-asian-american-activists-chart-way-forward> [<https://perma.cc/7J55-RXWU>] (documenting tensions between Chinese American protestors and Black Lives Matter activists over the conviction and sentencing of Peter Liang, a New York City police officer who was found guilty of manslaughter and official misconduct after he fired a bullet on patrol that killed Akai Gurley, a Black father); Hansi Lo Wang, *N.Y. Police Shooting Case Divides City's Asian-Americans*, NPR (May 14, 2015, 3:34 AM), <https://>

Fractures in support for risk-mediating policies are driven by factors like age, wealth, and personal experience. Younger Chinese Americans, for example, are more likely to support affirmative action than their parents' generation, perhaps by virtue of deeper familiarity with American political history.<sup>399</sup> At the same time, some of the most vocal opposition to affirmative action policies have come from first-generation Chinese Americans who were highly educated in China and enjoy greater economic security in the United States.<sup>400</sup> These experiences can shape orientation to educational inequality and perceptions of risk in the United States.<sup>401</sup> Dynamics of racial triangulation only further complicate coalition building.<sup>402</sup>

None of these questions are easily resolved by superficial appeals to “diversity.” The difficulty of reconciling disparate and sometimes conflicting realities is an obstacle to developing notions of shared fates and serves as a reminder that the challenges are more complicated

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[www.npr.org/sections/codeswitch/2015/05/14/406444625/n-y-police-shooting-case-divides-city-asian-americans](http://www.npr.org/sections/codeswitch/2015/05/14/406444625/n-y-police-shooting-case-divides-city-asian-americans) [https://perma.cc/UN3L-VTD9]. Additionally, in 2016, the Asian American Coalition for Education was involved in opposition to a California bill, Assembly Bill 1726, A.B. 1726, 2015–2016 Reg. Sess. (Cal. 2016), supported by the Asian & Pacific Islander American Health Forum, the Southeast Asia Resource Action Center, the California Pan-Ethnic Health Network, and Empowering Pacific Islander Communities to disaggregate healthcare and higher education data such that ethnicity-specific inequities can be revealed and addressed. *See, e.g.*, Chris Fuchs, *California Data Disaggregation Bill Sparks Debate in Asian-American Community*, NBC NEWS (Aug. 26, 2016, 12:47 PM), <https://www.nbcnews.com/news/asian-america/california-data-disaggregation-bill-sparks-debate-asian-american-community-n638286> [https://perma.cc/3PHU-LDXM] (describing how a variety of organizations rallied in support of the bill); Kimberly Chen, *Governor Brown Signs AB 1726 (Bonta) into Law*, CAL. PAN-ETHNIC HEALTH NETWORK (Sept. 28, 2016), <https://cpehn.org/about-us/blog/governor-brown-signs-ab-1726-bonta-law/> [https://perma.cc/L9MM-FKXP]. Although Assembly Bill 1726 (“The AHEAD Act”) was ultimately signed into law, Fuchs, *supra*, the Coalition’s opposition mirrored opposition to SCA-5. *See, e.g.*, Statement from Janice Luszczak, President, Japanese Am. Citizens League, Sacramento Chapter, to Sen. Bob Huff (June 29, 2016), <http://reappropriate.co/wp-content/uploads/2016/08/Huff-letter.pdf> [https://perma.cc/YC5W-LJSX] (referencing California State Senator Bob Huff’s claims that data disaggregation enabled Chinese exclusion and Japanese incarceration).

<sup>399</sup> OiYan Poon & Janelle Wong, *The Generational Divide on Affirmative Action*, INSIDE HIGHER ED (Feb. 25, 2019), <https://www.insidehighered.com/admissions/views/2019/02/25/views-chinese-americans-affirmative-action-vary-age-opinion> [https://perma.cc/S9PV-53MA].

<sup>400</sup> Wong, *supra* note 302.

<sup>401</sup> *See id.*

<sup>402</sup> Some researchers predict, for example, that solidarity may be easier to achieve between minority groups that share a position along racial triangulation dimensions of inferiority and foreignness, and thus have similar experiences with prejudice, than between groups that are positioned separately among both dimensions. *See* Zou & Cheryan, *supra* note 279, at 699. Thus, Latinos and Asian Americans, both positioned as foreign, may achieve solidarity easier than African Americans and Asian Americans, who are positioned in opposition to each other along dimensions of foreignness and inferiority. *See id.*

than the Black-white binary along which subordination is often analyzed in the United States. Ultimately, coalitions that support progressive policy in American education may be fraying, if they ever existed. Long-term coalition-building strategies, broadly implemented civics education curricula with a focus on justice,<sup>403</sup> and nuanced responses to race, risk, and inequality in American education will be needed if we are to effectively tie fates in ways that live up to the democratic potential of American public schools.

### CONCLUSION

Doctrinal and policy developments in education facilitate parental decision making in ways that affirm choice or meritocracy, but they ultimately force parents to bear the costs of risky education. That risk is further shifted from the most-powerful to the least-powerful parents in ways that mirror broader patterns of economic and social insecurity, track existing patterns of racial subordination, and destabilize education as a democratic institution. Although steps can be taken to help individual parents mitigate risk, solutions that more evenly distribute risk while establishing a more robust role for the state in ensuring equality in education should be the ultimate goal.

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<sup>403</sup> Some nonprofits already invest in the sort of civic education that can help facilitate the development of a “shared fate” approach to education policy. A core goal of the McCormick Foundation, for example, is to invest in leadership development that leads to inclusive and representative policy and public institutions. *Focus Areas*, ROBERT R. MCCORMICK FOUND., <https://donate.mccormickfoundation.org/democracy/focus-areas#institutions> [<https://perma.cc/A2LV-NJHR>]. Similarly, iCivics maintains a commitment to teaching about institutional racism in civic education. *Our Commitment to Teaching About Racism in Civic Education*, iCIVICS (June 3, 2020), <https://www.icivics.org/news/blog-post/our-commitment-teaching-about-racism-civic-education> [<https://perma.cc/C2P7-W7CR>]. Street Law works to educate people about law and government such that they might be able to improve their lives and society more generally. *About Us*, ST. LAW, INC., <https://www.streetlaw.org/who-we-are/offices> [<https://perma.cc/J75Y-CT3F>].