Urban Law Journal Spring Symposium
Testing the Limits: Admissions Exams in Urban Public Schools

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Panel 1: Representation in Exam Schools

Robert Garda, Fanny Edith Winn Distinguished Professor of Law, Loyola University of New Orleans College of Law

Professor Robert Garda is the Fanny Edith Winn Distinguished Professor of Law at Loyola University of New Orleans College of Law. His legal scholarship covers a variety of topics including the rights of students with disabilities, affirmative action, integration in K-12 education, and legal issues surrounding charter schools. Professor Garda was the past national Chair of the Association of American Law Schools (AALS) Section on Education Law. He serves as a member of the Louisiana Advisory Committee to the U.S. Commission on Civil Rights and is the Chair of the Board of Directors for the Louisiana Mental Health Advocacy Services. He has worked on projects with the Louisiana Bar Foundation, Southern Poverty Law Center, Louisiana Appleseed, school districts and charter school organizations around the country. He also works with national and local public interest groups on education and disability issues and is a frequent commentator in the media on education issues.

Janel George, Associate Professor of Law, Georgetown University Law Center; Founding Director of the Racial Equity in Education Law and Policy Clinic

Janel George is an Associate Professor of Law at Georgetown University Law Center and the founding Director of the Racial Equity in Education Law and Policy Clinic. The Clinic engages law students in legislative lawyering work on behalf of clients to address issues of racial inequality in public education. Her work and scholarship focus on racial stratification and inequality in U.S. education and legislative and policy interventions to help address educational inequality. She has written about the resegregation of public schools, discriminatory school discipline practices, Critical Race Theory, and resource equity. As a civil rights attorney with the NAACP Legal Defense and Educational Fund, Inc. (LDF), she worked with several campaigns and coalitions to leverage legislative and policy advocacy to advance equal educational opportunity. She has served as Legislative Counsel in both the U.S. House of Representatives and the U.S. Senate, during which time her legislative portfolio included child welfare, civil rights, health care, and education issues.

Osamudia James, Professor, UNC School of Law

Osamudia James is a Professor at the UNC School of Law where her writing and teaching interests include education law, race and the law, administrative law, and torts. Professor James is the author of numerous articles, book chapters, and popular press commentary exploring the interaction of law and identity in the context of public education. Her work has appeared in the NYU Law Review, the Michigan Law Review, and the Minnesota Law Review, among others, as well as in the pages of the New York Times and Washington Post. In 2014, James was a co-recipient of the Derrick A. Bell, Jr. Award, a national award presented to a junior faculty member who makes an extraordinary contribution to legal education, the legal system, or social justice through activism, mentoring, teaching and scholarship. She was awarded the Hauser Golden Apple Teaching Award from Miami Law in 2017, and was selected as a University of Miami Public Voices Fellow in 2020.

Ian Rowe, Senior Fellow, American Enterprise Institute

Ian Rowe is a senior fellow at the American Enterprise Institute, where he focuses on education and upward mobility, family formation, and adoption. Mr. Rowe is also the cofounder of Vertex Partnership Academies, a new network of character-based International Baccalaureate high schools opening in the Bronx in 2022; the chairman of the board of Spence-Chapin, a nonprofit adoption services organization; and the cofounder of the National Summer School Initiative. He concurrently serves as a senior visiting fellow at the Woodson Center and a writer for the 1776 Unites Campaign. Mr. Rowe has been widely published in the popular press, including in the New York Post, The Wall
Street Journal, and the Washington Examiner. He is also the author of a forthcoming book tentatively titled “Agency” (Templeton Press), which seeks to inspire young people of all races to build strong families and become masters of their own destiny. Mr. Rowe has an MBA from Harvard Business School, where he was the first black editor-in-chief of The Harbus, the Harvard Business School newspaper; a BS in computer science engineering from Cornell University; and a diploma in electrical engineering from Brooklyn Technical High School (Brooklyn Tech), one of New York City’s elite public schools, which specializes in science, technology, and mathematics.

Panel 2: The Socioeconomics of Admission by Test

Ray Domanico, Senior Fellow; Director of Education Policy, Manhattan Institute
Ray Domanico is a senior fellow and director of education policy at the Manhattan Institute. His career has spanned the public and non-profit sectors, in research and advocacy roles. Most recently, Domanico was director of education research at New York City’s Independent Budget Office, where he led a team tasked with studying and reporting on the policies and progress of America’s largest public school system. Previously, he served as senior education advisor to IAF Metro NY where he worked with local leaders and educators to design and support a small group of new district high schools and charter elementary schools. Domanico began his career in research positions in the New York City school system, and he has taught graduate-level courses in educational research and policy analysis at Brooklyn College and at Baruch College. Domanico holds an MPP (master of public policy) from the University of California, Berkeley.

Chris M. Kwok, Board Director of the Asian American Bar Association of New York; Adjunct Faculty in Asian American Studies, CUNY Hunter
Chris M. Kwok majored in Government and minored in Asian American studies at Cornell University. He graduated from UCLA Law School, where he studied with the creators of Critical Race Theory and served on the staff of the Asian American Pacific Islander Law Journal. Mr. Kwok is currently Board Director of the Asian American Bar Association of New York and is a member of the Adjunct Faculty in Asian American Studies at CUNY Hunter. During law school, Chris worked for the Consent Decree Monitor for the San Francisco Unified School District, where he worked on civil rights issues related to education access, which included the Lowell High School admission controversy. Chris Kwok led community organizing around the SHSAT issue starting in 2013 and successfully maintained the admissions exam as the sole criteria for admission.

Tanya Katerí Hernández, Archibald R. Murray Professor of Law, Fordham University School of Law (moderator)
Tanya Katerí Hernández is the Archibald R. Murray Professor of Law at Fordham University School of Law, where she is an Associate Director of the Center on Race, Law, & Justice. Hernández is a Fulbright Scholar who holds an A.B. from Brown University and a J.D. from Yale University. Her fellowships include being a Law and Public Policy Affairs Fellow at Princeton University, and a Scholar in Residence at the Schomburg Center for Research in Black Culture. Professor Hernández is a Fellow of the American Bar Foundation, and the American Law Institute. Her books include Racial Subordination in Latin America: The Role of the State, Customary Law and the New Civil Rights Response (with Spanish & Portuguese editions), Brill Research Perspectives in Comparative Law: Racial Discrimination, Multiracials and Civil Rights: Mixed-Race Stories of Discrimination, and her forthcoming book Racial Innocence: Unmasking Latino Anti-Black Bias and the Struggle for Equality. (link to https://www.professortkh.com/)
Lucas Liu, President of Community Education Council 3 (CEC3); Co-President of Parent Leaders for Accelerated Curriculum and Education NYC (PLACE NYC)

Lucas Liu is the President of Community Education Council 3 (CEC3) and Co-President of Parent Leaders for Accelerated Curriculum and Education NYC (PLACE NYC). CECs are parent elected bodies that advocate for the students, families and schools in their district, similar to a school board but with less authority. CEC3 covers Manhattan's west side from 59th to 116th st, and Harlem north of Central Park up to approximately 124th Street. Lucas has been a volunteer education advocate for over 25 years, and was one of 11 parents who founded PLACE NYC in 2019, a parent led organization that advocates for quality rigorous education for all students, G&T programs and the SHSAT/SHS. Lucas started as a tutor for high school students at an alternative high school assisting night school students and immigrants and running a free SAT prep program for low-income Asian students. Lucas advocates for quality rigorous education starting in elementary school, accelerated education and dual language programs.

Dr. Raquel Muñiz, Assistant Professor of Law and Education Policy, Boston College

Dr. Raquel Muñiz is an assistant professor of law and education policy at Boston College. Her research examines oppressive power structures and the strategies to disrupt them in education. More specifically, she examines the ways in which white supremacy shows up at the intersection of law, policy, politics, and the culture of resistance. Her research has been funded by The Spencer Foundation and the AccessLex Institute & American Institutional Research Foundations, and her work has been cited in court cases, including in the Iowa Appeals Court and the DHS v. Regents of UC DACA case before the United States Supreme Court. She holds a J.D. and Ph.D. in Educational Theory and Policy from Penn State University and a B.A. in mathematics from Texas A&M International University where she graduated summa cum laude, first in her class. Her latest article which examines racialization in immigration law, is forthcoming in USC’s flagship law review, Southern California Law Review.

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Charles J. Russo, M. Div., J.D., Ed. D., is the Joseph Panzer Chair in Education in the School of Education and Health Sciences, Director of its Ph.D. Program, and Research Professor of Law in the School of Law at the University of Dayton. The 1998-99 President of the Education Law Association, 2002 recipient of its McGhehey (Achievement) Award, 2021 Distinguished Scholar Award from the American Educational Research Association’s Special Interest Group on Religion & Education, and 2021 Lifetime Achievement Award from the South African Education Law Association, he authored or co-authored more than 325 articles in peer-reviewed journals; authored, co-authored, edited, or co-edited 77 books, and has more than 1,200 publications. Russo has spoken extensively on issues in Education Law in thirty-four of the United States and thirty-one Nations.

Karuna Patel, Deputy Director, Feerick Center, Fordham Law School (moderator)

Karuna Patel is the Deputy Director of the Feerick Center. Karuna began her legal career at Mobilization for Justice (formerly MFY Legal Services, Inc.), a legal services organization where she started the Consumer Rights Project. She has worked at the New York City Department of Consumer Affairs leading a division focused on enforcing the City’s consumer protection laws and on educating consumers, and at the Center for Responsible Lending, where she represented consumers in all aspects of predatory lending impact litigation. Before joining the Law School, Karuna spent over five years at the Consumer Financial Protection Bureau (CFPB) working on a range of issues including mandatory arbitration in consumer contracts and consumer protections for remittances. Karuna is a Queens native and received her Bachelor of Arts in Economics from Columbia University and her law degree from New York University School of Law. Karuna clerked
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Panel 3: Defining and Measuring Merit in Urban Public
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Richard D. Kahlenberg is
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Kahlenberg's work on diversifying selective public schools
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equity (2001, SUNY Press); NeoVouchers: The Emergence
of Tuition Tax Credits for Private Schooling (2008, Rowman
& Littlefield); and Closing the Opportunity Gap: What
America Must Do to Give Every Child an Even Chance (2013,
Oxford Univ. Press, with Prudence Carter). Welner has
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Aaron Saiger, Professor of Law, Fordham University School of Law (moderator)

Aaron Saiger is Professor of Law at Fordham University School of Law, where he has taught since 2003, and where he was the Dean’s Distinguished Scholar from 2017-2018. His writing and teaching on education law focus on governance, curriculum, and technology. He also writes and teaches in the areas of administrative law and regulation, state and local government, legislation, and property. Saiger holds a AB from Harvard College, a JD from Columbia University, and a PhD from Princeton University. He clerked for Judge Douglas Ginsburg of the U.S. Court of Appeals for the District of Columbia Circuit, and for Justice Ruth Bader Ginsburg of the U.S. Supreme Court. His forthcoming book, Schoolhouse in the Cloud, will be published by the Oxford University Press.

Panel 4: Lessons from Higher Education for K-12 Admissions

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Jonathan D. Glater is a Professor of Law at the University of California, Berkeley School of Law. He was previously a Professor of Law at the University of California, Los Angeles School of Law, and prior to that at the University of California, Irvine School of Law. He is a co-author with Michael A. Olivas and Amy Gajda on the forthcoming, fifth edition of The Law and Higher Education: Cases and Materials on Colleges in Court. He has written extensively for law reviews on higher education opportunity, frequently exploring the implications of rising student indebtedness. With Dalié Jiménez, he helped establish the Student Loan Law Initiative, a partnership with the Student Borrower Protection Center dedicated to research on student debt. Professor Glater began law teaching at the University of California, Irvine School of Law, where he received the Distinguished Teaching Award in 2016. Before entering the legal academy, Professor Glater spent nearly a decade as a reporter at The New York Times, where he wrote hundreds of articles on the legal profession, legal education, criminal and civil cases in the news, as well as on higher education finance and student debt. Prior to joining the Times, he worked as an associate at the New York law firm Cleary, Gottlieb, Steen & Hamilton, and at the Buenos Aires, Argentina firm of Marval, O’Farrell, & Mairal. He holds a J.D. from Yale Law School, an M.A. in international relations from Yale University, and a B.A. in economics from Swarthmore College.

Chris Kieser, PLF’s Property Rights and Equality

Chris Kieser practices in PLF’s property rights and equality before the law practice groups. Chris represents coalitions of Asian-American parents challenging discriminatory admissions policies for selective K-12 schools in New York City; Montgomery County, Maryland; and Fairfax County, Virginia. He also represents a parent organization in Connecticut challenging a racial quota that prevents many Black and Hispanic students from enrolling at the state’s magnet schools. Chris has published law review articles in the William & Mary Environmental Law Review and the Federalist Society Review. His op-eds have appeared in numerous publications. Chris clerked for the Honorable Daniel A. Manion of the United States Court of Appeals for the Seventh Circuit and the Honorable Thomas D. Schroeder of the United States District Court for the Middle District of North Carolina. He holds a B.A., cum laude, from the University of Notre Dame, and graduated magna cum laude from Notre Dame Law School in 2013. At Notre Dame, he was an articles editor of the Notre Dame Law Review.
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Maimon Schwarzschild, Professor of Law, University of San Diego; Affiliated Professor, University of Haifa
Maimon Schwarzschild is professor of law at the University of San Diego and an affiliated professor at the University of Haifa. He is a member of the editorial board of the Journal of Law and Philosophy, and a member of the California State Advisory Committee of the US Commission on Civil Rights. He has been a visiting professor at the University of Paris/Sorbonne and the Hebrew University in Jerusalem. He is an English barrister and admitted to the New York Bar; as a barrister, he is an associate member of Landmark Chambers in London. He has published widely about constitutional and public issues; he is co-editor of a volume published by Encounter Books in 2021 entitled “A Dubious Expediency: How Race Preferences Damage Higher Education”.

Tracy Higgins, Professor of Law, Founder and Co-Director, Leitner Center for International Law and Justice, Fordham Law School (moderator)
Tracy Higgins is a Professor of Law at Fordham Law School and the founder and co-director of the Leitner Center for International Law and Justice, the human rights center at Fordham. Higgins received her B.A. in Economics at Princeton and her J.D. at Harvard Law School. She was previously the Visiting Professor at the University of Pennsylvania School of Law and the Women’s Law and Public Policy Fellow at Georgetown University Law Center. Higgins’ work has been published in numerous journals, including Fordham International Law Journal, Yale Journal of Law and Feminism, Columbia Journal of Gender and Law, and Harvard Law Review, among others. In 2011, Higgins co-edited The Future of African Customary Law. Since 1994 she has conducted human rights fieldwork in Afghanistan, Turkey, Hong Kong, Burma, Mexico, Ghana, Bolivia, Kenya, Romania, South Africa, and Malawi. Higgins is on the Board of Advisors at Woodrow Wilson School of Public and International Affairs at Princeton, a member of the Council on Foreign Relations, and a former member of the Lawyers’ Committee for Human Rights, Trial Observation Delegation to Turkey, and a Women’s Studies Delegation to South Africa.
April 2016

Searching for Equity Amid a System of Schools: The View from New Orleans

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SEARCHING FOR EQUITY AMID A SYSTEM OF SCHOOLS: THE VIEW FROM NEW ORLEANS

Robert Garda*

ABSTRACT

Hurricane Katrina leveled both the buildings and governance structure of the New Orleans school system. The system was transformed from one elected school board controlling nearly all the schools to a system of schools with sixty-three school districts operating within the city’s geographic boundaries that are run by forty-four independent school boards. There is not a more decentralized school governance structure in the United States. This Article discusses how this new system of schools is attempting to achieve equal educational opportunities for its most vulnerable and at-risk student populations: the poor, minorities, students with disabilities, and English Language Learners.

For the first seven years after Katrina, the system of schools operated with virtually no centralized planning or unified services, instead pushing all decision-making and service provision down to the autonomous schools. With little oversight, the schools became balkanized by race, class, and ability because of unequal access, retention, and service provision, and because certain schools are specialized for discrete student populations. It became apparent that centralizing certain services and unifying policies was essential to creating equal opportunities for vulnerable students, which slowly began occurring in 2012.

* Fanny Edith Winn Distinguished Professor, Loyola University of New Orleans College of Law. I appreciate the valuable feedback I received at the Cooper-Walsh Colloquium at Fordham Law School, particularly the insightful commentary from Professor Eloise Pasachoff. I would also like to thank Renita Thukral and Josh Densen for their input on earlier drafts of this Article. Finally, special thanks go to Blake Crohan and Drew Morock for their tireless research assistance.
Today, New Orleans education stands at a crossroads in deciding how to achieve equity for its vulnerable student populations. One route relies on centralizing services, planning, and oversight to ensure that every school provides an appropriate education to any type of student that walks through the schoolhouse door. This path embraces the version of inclusion equality set forth in Brown v. Board of Education: “separate educational facilities are inherently unequal.” The other route relies on the market driven reform underlying the charter movement to create specialized schools to fill the unmet demands of vulnerable populations. This route embraces an emerging view of equality—where separate can be equal, possibly even superior, if parents are empowered to maximize their child’s academic outcomes in specialized settings. This Article argues that New Orleans is headed down this latter route and identifies the lessons that can be learned from its evolution to a system of schools.

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**INTRODUCTION**

New Orleans has been the epicenter of education reform since Hurricane Katrina decimated the city and its schools in August of
In the storm’s aftermath, New Orleans schools were remade based on the education reforms of the day: charter schools, choice, and state takeover of failing schools. The Recovery School District (RSD), an arm of the state Department of Education, wrested control of over ninety percent of the schools from the Orleans Parish School Board (OPSB) and chartered these schools to private operators over the course of the next nine years. In the 2014–15 school year, the RSD became the first district in the United States to have one hundred percent charter schools. With seventy-four charter schools, sixty-seven private schools, and only six traditional schools run directly by an elected school board, New Orleans is “reinventing itself as a decentralized system of schools.”

The changes in New Orleans are called a “grand experiment in urban education for the nation” that could “shake the foundation of American education.” While the reforms are touted as a “roadmap” and a “model” for other cities to follow, and many are in fact

1. Walter Isaacson, The Greatest Educational Lab, TIME, Sept. 17, 2007, at 47; Patrik Jonsson, As New Orleans Restarts its Schools, Most are Now Charter Schools, CHRISTIAN SCI. MONITOR, Sept. 4, 2007, at 1 (positing that New Orleans is the “proving ground” for charter schools); Lesli A. Maxwell, City Years for Rebirth Among Ruin, EDUC. WK. (Aug. 14, 2007), http://www.edweek.org/ew/articles/2007/08/15/45nolaoverview.html (explaining that the efforts to rebuild New Orleans's education system is “one of the nation’s most important education stories”).


4. Layton, supra note 2.


6. Id.; Jeff Bryant, Look out, Chris Christie: The New War on Public Schools Just Might Be Defeated, SALON (June 3, 2014), http://www.salon.com/2014/06/03/look_out_chris_chrystie_the_new_war_on_public_schools_just_might_be_defeated/
emulating the reforms, the critical question is whether they are working.

In the modern-day accountability era, test scores and graduation rates are the primary measures by which to answer this question. Debate rages over whether the new system of schools in New Orleans has actually improved student academic gains. The state and charter proponents tout the growth rate of positive indicators for students and schools since Katrina, while opponents point to low benchmark performance, data showing there has been no growth, the


8. See, e.g., THE COWEN INST., NOLA BY THE NUMBERS: SCHOOL ENROLLMENT AND DEMOGRAPHICS FROM OCT. 2013, at 1 (2014) [hereinafter THE COWEN INST., NOLA BY THE NUMBERS] (showing that the number of students in D or F schools decreased from 23% in the 2012–2013 school year to 14% in the 2013–2014 school year); Peter Cook, When All Else Fails File a Civil Rights Complaint, PE+CO (July 8, 2014), http://peterccook.com/2014/07/08/when-all-else-fails/ (highlighting that student performance in New Orleans is improving at a much faster rate than in the rest of the state); Danielle Dreilinger, John White: New Orleans Charter Civil Rights Complaint ‘a Joke’, TIMES-PICAYUNE, May 15, 2014, http://www.nola.com/education/index.ssf/2014/05/john_white_new_orleans_charter.html [hereinafter Dreilinger, New Orleans Charter Civil Rights Complaint ‘a Joke’] (explaining that before Katrina, 35% of students attended nonfailing schools, and now that figure is at 92%); Danielle Dreilinger, New Orleans High School Exam Results, Graduation Rate Near State Average, TIMES-PICAYUNE, July 11, 2014, http://www.nola.com/education/index.ssf/2014/07/new_orleans_high_school_exam_r.html [hereinafter Dreilinger, New Orleans High School Exam Results] (reporting that student performance on end of course exams in New Orleans was approaching the state average); Kamenetz, supra note 3 (“[T]he city has posted the largest, fastest improvement in test scores ever produced in an urban public school system.”); Layton, supra note 2 (explaining that in 2007, only 23% of students tested at grade level in math, but in 2013 that percentage rose to 57%, and before Katrina the graduation rate was 54.4%, but in 2013 the graduation was 77.6%); OSBORNE, supra note 5 (noting that RSD schools have improved faster than any other schools in the state).

9. See, e.g., THE COWEN INST., 2014 REPORT, supra note 2, at 20 (noting that performance lags behind most other school districts); Harden, supra note 2 (pointing out that the average ACT score of students in RSD schools is not good enough to get into any Louisiana four year college, and is well below the state average; and noting that only four Louisiana school districts had a lower ACT average than the RSD).

10. See, e.g., Jeff Bryant, The Truth About the New Orleans School Reform Model, EDUC. OPPORTUNITY NETWORK (Aug. 6, 2014), http://educationopportunity
manipulation of state standards and data that create an illusion of improvement,\textsuperscript{11} and the plateauing of student and school academic gains.\textsuperscript{12} Both sides are correct: schools in New Orleans steadily improved after Katrina, but the district as a whole remains one of the lowest performing districts in one of the lowest performing states in the nation.\textsuperscript{13} Charter advocates emphasize the stronger performance

\textsuperscript{11} Beginning in the 2012–2013 school year, the Louisiana Department of Education changed the scale by which schools are given SPS scores. THE COWEN INST., 2014 REPORT, supra note 2, at 20. When the scale changed, there were fifty-five percent fewer F schools but also fewer A schools. \textit{Id}. The grades converged towards the middle of the pack. \textit{Id}. “[T]he main reason RSD has made such great strides in grade level performance is that from 2012 to 2013 the state changed the formula and scale for measuring school performance, which artificially inflated RSD’s score.” Bryant, supra note 10. Of thirty-seven RSD schools with complete information, twenty-six increased a letter grade due to change in the scoring system. \textit{Id}. If the same standards had applied, fifteen schools would have received a D instead of a C, five would have received an F instead of a D, and five would have received a C instead of a B. \textit{Id}. The district letter grade would have remained a D. \textit{Id}; see also Danielle Dreilinger, \textit{New Orleans’ Recovery System Changes Heighten Charter School Debate, NPR Reports}, TIMES-PICAYUNE, http://www.nola.com/education/index.ssf/2014/08/new_orleans_recovery_system_op.html (explaining that the growth in non-failing schools is partly because failed schools recently turned over to new operators are not included in the statistics); Harden, supra note 2 (contrasting the state’s praise of school performance in New Orleans with the blogosphere’s “carefully documented details of the state’s systemic and persistent manipulation—and illegal withholding—of public data”).


of students in charter schools than in traditional schools, while opponents claim that student demographic and school funding differences pre- and post-Katrina, and between charter and non-charter schools, make comparisons impossible. Again, there is an element of truth in each of these polar positions: a perfect apples-to-apples comparison is impossible, but the best available data indicates that charter schools are improving student performance in New Orleans. The schools are almost certainly better academically, but at what cost?

One of the most repeated “costs” of the new system of schools is that it does not respond to community and neighborhood needs. By divorcing school attendance from place of residence, New Orleans lost the neighborhood school that provided numerous support mechanisms to the surrounding community. In a city where the average student lives over three miles from school, and one in four travels over five miles, it is virtually impossible for the schools to be the community centers they were before the storm. Neighborhood schools were anchors binding small communities together; the charter schools that replaced them are not.

(explaining that while there is academic progress, scores still lag behind other public school systems).

14. From 2005 to 2011, New Orleans charter schools performed significantly better than traditional public school counterparts. CTR. FOR RESEARCH ON EDUC. OUTCOMES, CHARTER SCHOOL PERFORMANCE IN LOUISIANA 7 (2013).


Another “cost”—one that often gets overshadowed by the loud debate about outcome data and community loss—is equity. While the entire system may be improving, it is important to understand whether it is at the expense of marginalized, subordinated, and vulnerable students, schools, or neighborhoods. This Article focuses on equity when answering the question of whether the New Orleans system of schools is working.

New Orleans education stands at a crossroads in deciding how to achieve equity for its vulnerable student populations. Down the path to the right lies the market-driven reform that underlies the charter movement and reliance on specialized schools serving the unique needs of each student. This is the path New Orleans followed for seven years after the storm. Down the path to the left lie centralizing services, planning, and oversight to ensure that every school provides an appropriate education to any type of student that walks through every schoolhouse door. New Orleans has moved towards this route more recently, but political forces prevent the system from seeing the centralization path to the end. Or New Orleans could keep a foot in both approaches: some specialized schools but at least minimum services provided in every school with centralized oversight.

How equal education opportunity is defined is vital to determining which path New Orleans should ultimately choose. The traditional view of equality, rooted in the holding of Brown vs. Board of Education of Topeka—that separate is inherently unequal—compels assurance that students of all types can be served properly at every school. Achieving “inclusion equality” requires centralizing services for the most vulnerable students. Even the staunchest supporters of charter schools recognize that the “decentralized nature of public education in New Orleans creates potential barriers for the system to equitably serve the needs of all students.” But the emerging view of

Alliance to Eric J. Holder, Attorney Gen., United States 15 (May 13, 2014) [hereinafter Civil Rights Complaint], available at http://b.3cdn.net/advancement/24a04d1624216c28b1_4pm6y9ivo.pdf.

20. Our Public Education System Needs Transformation, Not ‘Reform’, NATION (Sept. 24, 2014), http://www.thenation.com/article/181742/our-public-education-system-needs-transformation-not-reform# (“Without education equity, we don’t have an educational system at all—we have a rigged rat race that starts in kindergarten.”); see also Eden B. Heilman, Stranger than Fiction: The Experiences of Students with Disabilities in the Post-Katrina New Orleans Education System, 59 LOY. L. REV. 355, 380 (2014) (“A true system of choice cannot be successful unless it includes and serves all students . . . .”).


22. THE COWEN INST., 2014 REPORT, supra note 2, at 3; see Scott Cowen, The New Orleans Experiment in School Reform: Lessons Learned, HUFFINGTON POST
equality in education is that separate can be equal if all students are performing better in specialized environments chosen freely by the parents. Under this “empowerment equality,” if vulnerable students perform better in specialized charter schools that are designed to serve them, and if overall student performance rises, then the system may be separate, but more equal. Whether the trajectory in New Orleans towards decentralization and specialization is “equitable” hinges on which version of equality is accepted.

This Article focuses on the barriers to achieving equity in a system of schools and the path New Orleans has chosen, and will likely pursue in the future, to overcome them. Part I describes the changes to the education system made after Katrina and the current education landscape from a governance perspective. Part II discusses the impact of decentralization on vulnerable populations—students with disabilities, English language learners, African-American students, and low-income students—and what New Orleans has done to address equity for these groups. Finally, Part III discusses how an all-charter system of specialized schools illuminates competing theories of equity in education. It argues that unless there is a concerted, collective effort to pursue inclusion equality—the equality envisioned in Brown—New Orleans will adopt the new “empowerment equality” perspective by default because it is an inherent and natural outgrowth of a decentralized system of schools.

I. THE EDUCATION LANDSCAPE OF NEW ORLEANS

A. The Evolution of a System of Schools

The path New Orleans followed to its current system of schools was uniquely shaped by natural disaster. Before Hurricane Katrina the OPSB looked like a typical urban district at the time: nearly all schools were directly operated by the centralized bureaucracy in the OPSB, there was a smattering of charter schools, and a few failing schools had been taken over by the state under accountability measures adopted to comply with the No Child Left Behind Act.23 The OPSB made decisions for all of its schools—ranging from hiring,  

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23 Before Katrina there were 117 OPSB schools, 5 RSD schools, and 2 independent charters under BESE. Danielle Dreilinger, New Orleans Public Schools Pre-Katrina and Now, by the Numbers, TIMES-PICAYUNE, Aug. 29, 2014, http://blog.nola.com/education_impact/print.html?entry=2014/08/new_orleans_public_scho ols_pre.html; see also Kiel, supra note 17, at 363–65.
to teacher placement, to curriculum, to purchasing—and the teacher’s union exerted considerable control.  

While the governance structure was ordinary, the system was extraordinary for all the wrong reasons. Before Katrina, New Orleans was one of the worst urban school districts in the nation, and most of its schools were “academically unacceptable” under state standards. The OPSB was plagued by corruption and financial mismanagement, with over $265 million in debt and a Federal Bureau of Investigation task force housed in the district office to root out graft. It was a school district in need of reform.

Hurricane Katrina flooded New Orleans on the second Monday of the 2005–06 school year. It caused the displacement of 64,000 students and $800 million in damage to public school buildings. Fewer than twenty of the 120 school buildings remained useable after the hurricane. Students, teachers, and administrators were all forced to evacuate, and the tax base supporting the schools was decimated.

Days after the storm, the OPSB placed thousands of its teachers on unpaid leave and fired them three months later. The state legislature moved quickly and amended its accountability laws to remove 102 of 117 schools from the control of OPSB and place them


29. Oliver, 156 So. 3d at 602–03.
in the hands of the RSD, an arm of the state Department of Education designed to take over failing schools. The RSD immediately began operating the transferred schools directly, but it always had the intention of transferring governance to charter school operators.

These critical decisions, made quickly after the storm, removed what many believed to be the two biggest obstacles, historically, to improving New Orleans’ schools: the OPSB and the teachers’ unions. The moves embodied the popular reforms across the country—state takeover of failing schools (stripping elected boards of power) and chartering schools (stripping teachers’ unions of power). But because of Katrina, it was done faster and more thoroughly in New Orleans than it had been done in any other city.

Since Katrina, the OPSB has managed the few schools it was left with—either directly running them or by charter oversight. The RSD also directly ran numerous schools but steadily chartered them out to private operators. The RSD was not prepared for the monumental task of operating schools in a decimated city, and the RSD direct run schools quickly became the worst schools in the city and the dumping ground for the students deemed most difficult to educate.

B. The System of Schools Today

Today there is a confusing patchwork of school governance in New Orleans. As of the 2014–15 school year, there are eighty-three public schools educating 44,686 students. Two bodies loosely govern these schools: the OPSB, and the Louisiana Board of Elementary and Secondary Education (BESE) through its administrative arm, the RSD.

30. Id.; Layton, supra note 2.
31. CARR, supra note 24, at 17; Layton, supra note 2; Civil Rights Complaint, supra note 19, at 10–11.
33. Id. at 68.
34. SIMS & ROSSMEIER, supra note 16, at 4–6.
35. Id. at 11.
36. CARR, supra note 24; OSBORNE, supra note 5, at 6.
38. Dreilinger, supra note 23.
As of the 2014–15 school year, the RSD no longer directly operates any schools.\textsuperscript{40} Rather, the RSD oversees fifty-six charter schools that enroll sixty-seven percent of the student population.\textsuperscript{41} These “Type 5” charter schools, or “RSD charters” as they are known in town, are pre-existing public schools transferred to the RSD as failing schools after Katrina and later chartered with BESE.\textsuperscript{42} These charter schools are prohibited from using admission requirements and are considered their own freestanding school districts, or, in technical jargon, local educational agencies (LEAs).\textsuperscript{43}

LEAs, typically school districts overseeing numerous schools, are the primary government units responsible for education under state and federal law. It is the LEA, not individual schools within the LEA, which bears final responsibility for compliance with most state and federal laws. The RSD charter schools that are their own one-school LEAs are treated the same under state and federal law, as are school districts that usually contain numerous schools, such as the OPSB.\textsuperscript{44}

BESE directly oversees four charter schools, educating four percent of the student population.\textsuperscript{45} These “Type 2” charter schools enroll students from across the state and are permitted to utilize admission requirements.\textsuperscript{46} Like RSD charters, these charter schools are also independent LEAs.\textsuperscript{47}

OPSB enrolls twenty-eight percent of the student population in six schools it directly runs and the fourteen charter schools it oversees.\textsuperscript{48} The OPSB direct-run schools are the only non-charter public schools in New Orleans. OPSB is the chartering and oversight agency for Type 1 (startup) and Type 3 (conversion) charter schools.\textsuperscript{49}

\begin{thebibliography}{99}
\bibitem{41} \textsc{The Cowen Inst.}, \textit{NOLA by the Numbers}, \textit{supra} note 8, at 2.
\bibitem{45} \textsc{The Cowen Inst.}, \textit{NOLA by the Numbers}, \textit{supra} note 8, at 2.
\bibitem{48} \textsc{The Cowen Inst.}, \textit{NOLA by the Numbers}, \textit{supra} note 8, at 2; Dreilinger, \textit{supra} note 23.
\end{thebibliography}
are consistent with the school’s role, scope and mission . . . .”\(^{50}\) These schools are not independent LEAs, but instead are part of the OPSB LEA.\(^{51}\)

New Orleans is far and away the most decentralized education governance system in the United States. There are six traditional direct-run schools and seventy-six charter schools. Of these seventy-six charter schools, sixty-two are LEAs. Put another way, there are sixty-three independent school districts (including the OPSB) within the city’s geographic boundaries. Forty-four different school boards operate these LEAs: the OPSB, BESE (through the RSD), twelve charter management organizations, and thirty charter boards overseeing only one school each.\(^{52}\)

Compounding this fractured system is the fact that the two entities with the best ability to plan centrally for the school system—the OPSB and the RSD—essentially hate one another.\(^{53}\) They often act more like competitors than governmental entities engaged in the common goal of educating students. They fight over school quality, control, facilities, and financing in meetings and the courts.\(^{54}\)

To charter and choice proponents, the New Orleans system of schools is a dream come true. Parents can choose any school in the city (almost) for their children, allowing the education market to weed out bad schools and support successful schools, thereby raising overall quality for all students. Teachers’ unions and large command-and-control bureaucracies are practically gone.\(^{55}\) To charter opponents, it could not be a worse nightmare. Democratic control and community have been thrown under the school bus, and the

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\(^{50}\) LA. REV. STAT. ANN. § 17:3991(B)(3) (2011).

\(^{51}\) LA. REV. STAT. ANN. § 17:3995(I). There is also one independent public school operated under the jurisdiction of the state legislature. THE COWEN INST., NOLA BY THE NUMBERS, supra note 8, at 2.

\(^{52}\) THE COWEN INST., 2014 REPORT, supra note 2, at 6 (explaining that more than half the charter schools in the city are run by Charter Management Organizations).


II. EQUITY IN THE NEW ORLEANS SYSTEM OF SCHOOLS

A decentralized, all-charter school system creates significant barriers to providing equity, especially to at-risk students such as English language learners, students with disabilities, poor students, and minorities. This Part will discuss the treatment of these marginalized groups, the barriers to achieving equality that inheres in a system of schools, and the steps that have been taken in New Orleans, both intentional and unintentional, to address equity.

A. Race and Class Equity

Race was an important subtext in the transformation of the New Orleans schools after Katrina. While the charter movement views itself as the new civil rights movement—bringing choice to families trapped in failing schools—post-Katrina events in New Orleans reveal why some view the movement as a plot to divest African-Americans of control of their schools. The process by which New Orleans transformed itself to a system of schools laid the foundation on which today’s allegations of discrimination are built.

The teaching force—mostly middle class African-American career teachers—was terminated after Katrina. These teachers alleged that instead of receiving the legally mandated “priority consideration” for hire in the RSD schools, the state contracted with Teach for America (TFA) to fill the positions, and TFA’ers displaced much of the old teaching force. The requirement that seventy-five percent of teachers in a charter school hold valid teaching certificates was repealed in 2012, further opening the door for an alternatively


certified teaching force.\textsuperscript{59} Today, only fifty-four percent of the teaching force is minority, and that number is declining.\textsuperscript{60} The replacement of the teaching force was seen as “an attack on the city’s black middle class, even if not intended as such.”\textsuperscript{61} School administrators, again mostly African-American pre-Katrina, were also replaced by non-local whites. The army of TFA’ers has become so entrenched that they increasingly “run the show” in New Orleans.\textsuperscript{62}

Even charter authorization decisions were taken out of the hands of the local school board, which were long controlled by African-Americans. Act 235, the key legislation allowing the RSD to take over the OPSB schools and begin the chartering process, prohibited districts declared in academic crisis, e.g. New Orleans, from issuing new charters.\textsuperscript{63} The Act also mandated that chartering decisions comply with Standards for Quality School Authorizing promulgated by the National Alliance of Charter School Authorizers (NACSA) and required authorizers to utilize independent evaluators such as NACSA.\textsuperscript{64} Chartering decisions appeared removed not only from New Orleanians, but from Louisianans as well. Later, changes were made to the charter-enabling statute that permitted the state to

\textsuperscript{59} LA. ADMIN. CODE tit. 61, § 2903 (2012); Buras, \textit{supra} note 56, at 309, 315.


\textsuperscript{61} Carr, \textit{supra} note 24, at 121.

\textsuperscript{62} Id. at 245.


certify local charter authorizers other than elected school boards, further eroding the power of school boards.65

With the African-American controlled OPSB cut-out of the chartering process, and charter creation and oversight moved to other entities often controlled by high income whites, such as BESE, NACSA, or non-profits, it is easy to see how blacks felt entirely removed from controlling the education of their children. As noted by Sara Carr—the education reporter for the local paper who wrote a moving and insightful book about New Orleans education—control over the schools has passed from “a predominantly black middle class to a largely affluent white business class.”66

And there is concern that these new leaders are not responsive to community desires and that parents are disenfranchised.67 When the charter applications of highly regarded local black educators were turned down by the state, it only added fuel to the cries of discrimination.68 This disempowerment creates fertile ground for critics to view numerous practices as racially discriminatory, particularly when poor minorities are not proportionately enrolled in the best schools.

As in any school district across the country, there is a wide disparity in quality among the schools in New Orleans.69 There is also a large disparity in student demographics among the schools. National studies indicate that charter schools nationwide segregate by race, ethnicity, and socioeconomic status.70 This segregation exists in New Orleans, and it appears directly tied to school quality.71

66. CARR, supra note 24, at 66, 197–99; see also Civil Rights Complaint, supra note 19, at 4–5.
67. Buras, supra note 56, at 300; DeJarnatt, supra note 19; Dreilinger, supra note 18 (telling the story of a neighborhood school that is a case study in how “the complex, undemocratic state-run school system makes key decisions about what schools will grow in which neighborhoods—with the community’s desires literally tied for the lowest priority”); Layton, supra note 2; see also Civil Rights Complaint, supra note 19, at 14 (“Parents have been excluded from the decision-making process to close schools and have few ways to hold State officials accountable.”).
68. CARR, supra note 24, at 197–98.
Eighty-five percent of public school students in New Orleans are eligible for free and reduced lunch (FRL). This is the highest percentage of students in poverty in any major urban center in the country.\textsuperscript{72} These students are not distributed evenly across schools.\textsuperscript{73} The highest performing schools enroll the fewest FRL students. The RSD schools have a rate of 95\% FRL students, compared to a rate of 68\% for OPSB schools.\textsuperscript{74} The four BESE charter schools enroll an average of 56\% FRL students, and the fourteen OPSB charter schools (many of which are selective admissions) enroll an average of 61\% FRL students.\textsuperscript{75}

The racial compositions of schools are equally lopsided. The youth population in New Orleans is 73\% African-American, but because of the high rate of privately educated white students, the public school population is 85\% African-American.\textsuperscript{76} But only 63\% of students in the high performing OPSB charter schools are African-American, compared to a 96\% rate in RSD charters and 95\% rate in OPSB direct-run schools.\textsuperscript{77} There are only two public schools in the whole of New Orleans that are representative of the racial composition of New Orleans’ youth.\textsuperscript{78}

The impact this stratification has on academic outcomes can be viewed as grossly discriminatory or a huge success story, depending

\textsuperscript{71} See Buras, supra note 56, at 320–321.
\textsuperscript{72} The Cowen Inst., 2014 Report, supra note 2, at 11; Dreiling, supra note 23; Kamenetz, supra note 3.
\textsuperscript{73} Sims & Vaughan, supra note 13, at 1.
\textsuperscript{75} The Cowen Inst., 2014 Report, supra note 2, at 11; see also Carr, supra note 24; Letter from the Recovery School District to the Office of Civil Rights, supra note 74, at 1.
\textsuperscript{76} The Cowen Inst., 2014 Report, supra note 2, at 10; The Cowen Inst., NOLA by the Numbers, supra note 8, at 6; Kamenetz, supra note 3.
\textsuperscript{77} The Cowen Inst., NOLA by the Numbers, supra note 8, at 5; see Carr, supra note 24, at 280; Letter from the Recovery School District to the Office of Civil Rights, supra note 74, at 2.
\textsuperscript{78} The Cowen Inst., 2014 Report, supra note 2, at 29; The Cowen Inst., NOLA by the Numbers, supra note 8, at 6.
on how the data is parsed. On the one hand, black students have made the most gains of any subgroup in New Orleans.\textsuperscript{79} Before Katrina, only thirty-two percent of African-American students scored basic or above on state exams, which was well below the state average.\textsuperscript{80} Now, fifty-eight percent score basic or above, which exceeds the state average for African-Americans.\textsuperscript{81} In fact, black students in New Orleans are outperforming their counterparts in other parts of the state for the first time.\textsuperscript{82} And the percentage of black students, and poor students, that attend F-rated schools has plummeted since Katrina.\textsuperscript{83} The Center for Research on Education Outcomes, one of the leading research institutes in evaluating charter effectiveness, determined that charter schools in New Orleans had a positive impact for poor and African-American students.\textsuperscript{84}

On the other hand, there is little debate that higher income and white students disproportionately attend the best schools in New Orleans, while poor minorities almost exclusively attend the worst schools.\textsuperscript{85} The total public school enrollment in New Orleans is seven percent white,\textsuperscript{86} but the most successful public schools in New Orleans have a much higher percentage of white students. Of the seven highest rated schools, only one has more black students than the norm—the others are twenty-six to fifty-four percent white.\textsuperscript{87} At the

\textsuperscript{79} Osborne, supra note 5, at 8–9 (“Indeed, the gains made by black students are the most impressive . . . .”); Cook, supra note 8 (“[L]ow-income and minority students have been the prime beneficiaries of the improvements in New Orleans schools.”).
\textsuperscript{80} Dreilinger, supra note 23.
\textsuperscript{81} Id.
\textsuperscript{82} Carr, supra note 24, at 280; Letter from the Recovery School District to the Office of Civil Rights, supra note 74, at 1.
\textsuperscript{83} See School Performance Scores Released: 2013–14 Was a Stand Still Year, supra note 12.
\textsuperscript{84} CTR. FOR RESEARCH ON EDUC. OUTCOMES, CHARTER SCHOOL PERFORMANCE IN LOUISIANA 7 (2013); Letter from the Recovery School District to the Office of Civil Rights, supra note 74, at 4. The methodology and conclusions of the CREDO study have been questioned by other researchers. See, e.g., Layton, supra note 2; William J. Mathis & Andrew Maul, New Orleans Charter School Study: Comparing Incomparables, Repeated Errors, and Small Differences, NAT’L EDUC. POL’Y CENTER (Aug. 22, 2013), http://nepc.colorado.edu/newsletter/2013/08/review-credo-2013-nola (“But the evidence provided by the new CREDO study falls well short of Gov. Jindal’s ‘proof’ of the success of charter schools in either the city or the state.”).
\textsuperscript{85} Layton, supra note 2.
\textsuperscript{86} THE COWEN INST., 2014 REPORT, supra note 2, at 10.
\textsuperscript{87} Danielle Dreilinger, Civil Rights Complaint Alleges Unequal Treatment for New Orleans’ Black Public School Students, TIMES-PICAYUNE, May 15, 2014,
other end of the spectrum, only two of the numerous D, F, and turnaround-rated schools have any white students at all. Students in the higher-income, lower-minority OPSB schools are performing much better by all measures—ACT scores, graduation rates, end of course exams, LEAP tests, and college matriculation—than the RSD charter schools and OPSB direct-run schools. Critics of the New Orleans system of schools allege that this balkanization is due to schools choosing whom they educate, either by selecting which students to admit or removing students they do not want. But a third, and often-ignored, reason for this racial and socioeconomic stratification is parent choice. Each of these reasons is discussed next.

1. Access Equity

One of the biggest challenges since Katrina has been fair and equitable access to schools. Until 2012, parents had to apply directly to each separate school, and each school would control its own lottery, admissions, and wait-lists. This presented huge challenges to both parents and schools. The myriad of school options—RSD direct-run, OPSB direct-run, RSD charters, OPSB charters, BESE charters—overwhelmed parents because there was no central location at which to obtain information. Once informed about the schools,

http://www.nola.com/education/index.ssf/2014/05/civil_rights_complaint_alleges.html; see also Civil Rights Complaint, supra note 19, at 16–17.

88. Dreilinger, supra note 87.

89. Carr, supra note 24, at 57; The Cowen Inst., 2014 Report, supra note 2, at 20–22; Dreilinger, New Orleans High School Exam Results, supra note 8.


parents had to engage in “a tiring scavenger hunt,” on different admission dates, and fill out numerous applications with no guarantee of getting into any school at all, let alone any particular school. Many parents lacked the skills and the time to negotiate several different registration processes. Meaningful school choice during this period was reserved for well-informed, motivated parents with the time and resources to navigate the complex information gathering and registration process. Even the state acknowledges, “real choice did not exist” during this time. These enrollment barriers during the first seven years after Katrina played a major role in the balkanization of New Orleans schools.

Moreover, charter schools were often accused of massaging their student populations in a variety of ways during this period. Aggressive charters worked to get good students, held early lotteries, and counseled out families they did not want. These tactics were successful in a decentralized admission system with little oversight and almost no transparency. It is no surprise that inequities developed quickly under this free-for-all, eat-what-you kill system of


95. JAN RESSEGER, PUBLIC EDUCATION IN NEW ORLEANS IN THE AFTERMATH OF KATRINA (2007); Bratt et al., supra note 93, at 414.


98. Charter schools want to dictate student population. Harden, supra note 2.

99. OSBORNE, supra note 5, at 20; THE COWEN INST., 2014 REPORT, supra note 2, at 17.
School choice during this period often meant schools were choosing students, not vice-versa.

In order to make the system easier to navigate for parents and prevent any gaming of enrollment by schools, the RSD introduced OneApp for the 2012–13 school year. OneApp allows parents to apply to nearly every charter school in New Orleans by completing only one application for each child and to get information on each charter school in one centralized location. In the November before the upcoming school year, parents list on OneApp their top eight school choices, in order of preference for each child. The RSD runs a complex algorithm that attempts to place students at their top choices and notifies parents of the school selected for their child in April. If the parent is dissatisfied they can re-apply through a second and third round of OneApp. If a parent is still dissatisfied with a child’s placement, or is new to the system and has missed all OneApp deadlines, he or she can visit a resource center on a first-come, first-served basis to seek a placement. OneApp lists seventy schools available for the upcoming 2015–16 school year.

OneApp makes the iconic charter school lottery and waitlists a thing of the past in New Orleans. Students are simply placed at schools through the OneApp process. In the 2014–15 school year, 11,000 students filed through OneApp in the first two rounds. Eighty percent of students in these rounds received one of their top three choices. Overall, OneApp handled 43,000 students. Despite the

100. Osborne, supra note 5, at 20.
102. Dreilinger, Anger, Frustration as Hundreds of New Orleans Parents Turned Away from Public School Enrollment Center, supra note 94.
apparent success of OneApp in placing students to their top choices, the resource centers set up for parents unhappy with their selection were overwhelmed this summer with parents seeking to change schools.Over 5000 new or changed placements were made in July through the OneApp process.

While the centralization of enrollment through OneApp has solved many inequities arising from the old enrollment process, it has not fixed them all. The most obvious problem is that there are not enough high quality schools to meet the demand. There are 18,500 seats in schools rated A or B, but 45,000 students trying to get those seats, and the very top schools are far over-enrolled. The odds of getting into one of the highest performing schools are astronomically small. In the words of one parent activist, “[y]ou have a chance, not a choice.” Until the number of high quality schools increases, demand will necessarily continue to outstrip supply at these top schools.

Another continuing barrier to equal access is that not all schools participate in OneApp. The holdouts are the OPSB selective

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107. Dreilinger, OneApp Serves 5,000 Families in Summer Enrollment, supra note 105.

108. Kamenetz, supra note 3; see also THE COWEN INST., 2014 REPORT, supra note 2, at 29.

109. Dreilinger, OneApp Serves 5,000 Families in Summer Enrollment, supra note 105.

110. Lyndsey Layton, Are School Closings the ‘New Jim Crow’? Activists File Civil Rights Complaints, WASH. POST, May 13, 2014, http://www.washingtonpost.com/local/education/2014/05/13/1a0d3ae8-dab9-11e3-b745-87d39690c5c0_story.html; see also Kamenetz, supra note 3 (arguing that it is not so much parental choice as it is taking what is available).

111. In 2012, there were so many poorly performing schools that the RSD fell short on its attempt to comply with federal policy requiring school districts to offer high quality alternatives to children in failing schools. See Heather Miller, Parents Have Few Options When Moving Kids from Failing Public Schools, LENS (Mar. 19, 2013), http://thelensnola.org/2013/03/19/parents-have-few-options-when-moving-kids-from-failing-public-schools/.

112. See THE COWEN INST., 2014 REPORT, supra note 2, at 27; Dreilinger, Anger, Frustration as Hundreds of New Orleans Parents Turned Away from Public School Enrollment Center, supra note 94; Dreilinger, OneApp Lists More Than 130 New
admission schools, discussed below, and the BESE charters—sixteen schools in 2014 that will decrease to ten schools in 2015. Most of the New Orleans A- and B-ranked schools still require their own admission applications, deadlines, and procedures. Parents hoping to get their children into these schools need to engage in the time-consuming scavenger hunt for schools and applications, meaning “[o]nly parents with the means to go through multiple, individual admission processes have access to those schools.” Recognizing this problem, the Louisiana Department of Education is attempting to require all schools to participate in OneApp upon each charter’s renewal, though this may be as far as a decade away for some schools.

Schools utilizing selective admissions also hinder equitable access. Many of the OPSB schools—by far the best public schools in the city—were magnet schools before the storm; the state transformed them into charter schools that utilize selective admissions criteria, such as performance on standardized tests and grades. These schools have been a longstanding source of contention in New Orleans even before the storm. The controversy became more pronounced after Katrina because RSD charter schools are

113 See Sims & Rossmeier, supra note 16, at 16–17; see also The Cowen Inst., 2008 Report, supra note 60, at 15; The Cowen Inst., Five Years After Hurricane Katrina, supra note 58, at 21; Carr, School Choice is a Real Test for Parents in New Orleans, supra note 96; Carr, School Choice Series: Mother is Determined to Find Best Public Pre-K, supra note 96.

114 See Civil Rights Complaint, supra note 19, at 16; Cook, supra note 8; Letter from the Recovery School District to the Office of Civil Rights, supra note 74, at 5.

115 Letter from the Recovery School District to the Office of Civil Rights, supra note 74, at 5; see also Schneider, supra note 104.

116 The Cowen Inst., 2014 Report, supra note 2, at 4; Cook, supra note 8; see also LA. ADMIN. CODE tit. 28, § 2709(K) (2014) (making OneApp mandatory for type 2, 4, 5, and 1b charter schools only).


prohibited from utilizing selective academic admissions. But any chance that academic selective admission criteria would be abolished was put to rest in 2012 when the legislature grandfathered the practice of selective admission schools based on academic performance.

Equity concerns over access will persist as long as admission barriers prevent some students from even being eligible to apply to the highest performing schools. The perception of poor African-Americans is that selective admission schools are reserved for more advantaged children, and that perception appears correct. The mere existence of selective admission schools that have a much higher proportion of whites than other schools confirms racial stratification to many black New Orleanians. Even John White, the state Superintendent and staunch supporter of charter schools and the New Orleans system of schools, agrees that exempting selective admission schools from OneApp creates access inequity.

The use of neighborhood preferences also inhibits fair and open access. Charter schools are accused of controlling student demographics by including a preference in their admissions for students residing in the neighborhood. The OPSB schools have always been permitted to use neighborhood preferences and the legislature expressly permitted neighborhood preferences in RSD charter school admissions in 2010. Neighborhood preferences could certainly be used as a tool of inclusion rather than exclusion, but that has not been the case in New Orleans. According to a recent civil rights complaint filed with the Department of Justice and the


120. See LA. REV. STAT. ANN. tit. 17, § 3991; LA. ADMIN. CODE tit. 28, § 2705(B) (2014).

121. See Maxwell, supra note 1; Schneider, supra note 104.


123. Layton, supra note 2.

124. See THE COWEN INST., 2014 REPORT, supra note 2, at 18.

Department of Education, discussed in detail below, “[t]he two schools in New Orleans that give preference to students living in surrounding neighborhoods are located in mostly White, middle class communities.”

Finally, student demographics can be manipulated by giving students in school-run, fee-based preschools preference in kindergarten admissions. This practice ensures that a significant number of entering kindergarteners are middle- and high-income students. The use of preferences for students in the school’s pre-kindergarten program means there are fewer open seats in many kindergarten programs, and the odds of getting into a school after kindergarten become lower. The Louisiana Department of Education, recognizing the troubling aspects of this practice, changed its regulations to permit lottery exemptions for children in pre-kindergarten programs that were provided free of charge. It also permitted charter schools that charge tuition for their preschool program to seek approval from the charter authorizer to exempt these students from the lottery for admission to kindergarten. “In such a case, the [authorizer] shall require the charter school to set enrollment targets that ensure the charter school provides equity of access for at-risk applicants to its kindergarten classes.” Put simply, charter schools can still manipulate student demographics by using a


128. Dreilinger, OneApp Serves 5,000 Families in Summer Enrollment, supra note 105.

preference for their tuition paying preschool students, but the practice must be approved and is somewhat circumscribed.

These continuing barriers to equitable access led local and national organizations to file a complaint alleging discriminatory educational practices in violation of Titles IV and VI of the Civil Rights Act with the Department of Justice and the Office of Civil Rights in May of 2014. It contains two claims: (1) African-American students are subject to school closures at a much higher rate than white students; and (2) the state discriminates against African-American students by failing to provide adequate educational alternatives for students in recently closed schools. The allegation is essentially that the RSD closes traditional, direct-run schools that are almost one hundred percent African-American at much higher rates than similarly performing schools with high percentages of white students. It then discriminates, according to the Complaint, against the African-American students from the closed schools “by implementing a confusing and biased enrollment system and by blindly allowing charter and OPSB public schools to institute admissions criteria...that disproportionately affect and exclude African-American students.” The Complaint asked the Department of Justice (DOJ) to prevent the closing of the last five RSD direct-run schools and to put a moratorium on charter renewals, neither of which happened.

While the state considered the Complaint “a joke” and political maneuvering by teachers’ unions, the DOJ has opened an investigation, and the RSD has officially responded to the Complaint. It is highly unlikely that the DOJ will find any civil

130. See Civil Rights Complaint, supra note 19. Simultaneous complaints, with similar allegations, were filed in New Orleans, Chicago, and Newark—all school systems systematically closing schools and chartering them to private operators. See Dreilinger, New Orleans Charter Civil Rights Complaint ‘a Joke’, supra note 8.
132. Id. at 21–22.
133. Civil Rights Complaint, supra note 19, at 7; see also id. at 22–23.
rights violations in the school closing and OneApp process.\textsuperscript{137} A federal district court recently rejected similar claims of discrimination based on school closures in Washington, D.C.\textsuperscript{138} It held:

Few topics, understandably, incite our passions more than the education of our children. Toss into the mix the future of neighborhood institutions, whose familiarity and history may resonate deeply, and quite a volatile brew emerges. It is thus hardly surprising that assorted constituencies may possess varied opinions on the wisdom and necessity of the Plan and . . . strategy. Yet every adverse policy decision does not yield a constitutional claim. In this case, there is no evidence whatsoever of any intent to discriminate on the part of Defendants, who are actually transferring children out of weaker, more segregated, and under-enrolled schools. The remedy Plaintiffs seek—i.e., to remain in such schools—seems curious, given that these are the conditions most people typically endeavor to escape.\textsuperscript{139}

But the fact that the admissions process continues to produce skewed school demographics that are directly tied to school quality, combined with the racially charged history of post-Katrina school reform, means that allegations of access inequality will persist.

In sum, for seven years after Katrina, access to schools was a decentralized, uncoordinated, logistical nightmare for parents. This significantly contributed to the balkanization of the schools by race, socioeconomic status, and academic ability, because the most motivated and able parents were able to secure favorable placements for their children, leaving parents without resources or time for the dregs of the system. And with little to no oversight, charter schools were able to massage student enrollments through a variety of practices. It is no surprise that during this time fewer poor African-American parents believed their children were enrolled in their first choice schools than did white parents.\textsuperscript{140}

It was only in year eight, through a concerted and coordinated effort to centralize admissions through OneApp, that many of these problems were addressed, if not yet solved.\textsuperscript{141} Without this

\textsuperscript{137} OCR has resolved forty-two of seventy-six complaints alleging racially discriminatory changes but has required systemic changes in only one case. Dreilinger, \textit{U.S. Education Department Opens Civil Rights Investigation of New Orleans Public School Closures}, supra note 136.


\textsuperscript{139} Id. at 93.

\textsuperscript{140} See \textit{The Cowen Inst.}, 2008 \textit{Report}, supra note 60, at 15.

\textsuperscript{141} Louisiana law also permits charter schools with corporate sponsors to reserve half of their seats for the children of employees of the corporate sponsor. \textit{See} LA.
centralization, the schools would certainly be even more stratified by race, socioeconomic status, and ability. A critical lesson from New Orleans is that equal access demands a unified enrollment process overseen by a centralized authority. The system is far from perfect—circumscribing opportunities for students based on their place of residence, academic abilities, or capacity to pay for preschool can never achieve access equity or claim to be truly a free choice system[^142]—but it is a vast improvement over the previous decentralized system of enrollment.

2. Retention Equity

A common complaint against charter schools nationwide is that they utilize suspension and expulsion to push out students who are difficult to educate.[^143] Enrolling at-risk and difficult students with bad behavior is risky for charter schools, whose very survival depends on high test scores and graduation rates.[^144] One easy way to solve this problem is to cull these challenging students from their student bodies through suspension or expulsion. To this point, a nationwide study found that charter schools had overly harsh discipline policies.[^145] This is certainly true in New Orleans, where many charter schools have adopted strict behavior policies with drastic consequences.[^146] During


[^144]: See CARR, supra note 24, at 235.

[^145]: ANNENBERG INST. FOR SCH. REFORM, supra note 143, at 3.

the first seven years after Katrina, students were routinely expelled for minor offenses, such as uniform violations or carrying a cigarette lighter, and provided little to no due process.\textsuperscript{147} This led to a high attrition rate in New Orleans schools, as many schools suspended, expelled, or transferred tough students, though precise data was hard to collect because there was no centralized student tracking.\textsuperscript{148}

The problem became so acute that students staged sit-ins and protests at several schools, challenging their harsh suspension and expulsion practices.\textsuperscript{149} The dissatisfaction culminated in students, parents, and advocates filing a complaint with the Louisiana Department of Education, the Office of Civil Rights, and the Department of Justice in April of 2014, alleging that certain schools are “based on a harsh and punitive discipline culture . . . [that] endanger[s] the safety and welfare of students, violates students’ rights under state and federal laws [and] push[es] students out of school for minor infractions . . . .”\textsuperscript{150} Suspension rates in the named schools ranged from thirty-eight to sixty-eight percent.\textsuperscript{151} The state has placed on hold the investigation of the Complaint.\textsuperscript{152}

\begin{itemize}
\item See CARR, supra note 24, at 159–61, 189, 263; Dreilinger, New Orleans Schools Expel More Students, supra note 146; see also Civil Rights Complaint, supra note 19, at 17.
\item 151. Id at 4; see also Kamenetz, supra note 3.
\item 152. Dreilinger, State Investigation of N.O.’s Collegiate Academies Charters on Hold Pending Further Documentation, supra note 149.
\end{itemize}
The Complaint is an attack on the foundations of “no excuses” schools—behavior modification training and zero tolerance.\(^{153}\) The ready defense of schools is that they are entitled to determine which offenses should be punishable, and that if parents do not like it, they can choose a school with less strict codes of conduct.\(^{154}\) This exemplifies the current state of education in New Orleans—if you don’t like a particular practice, simply choose another school. The full range of schools exists, according to this theory, which permits parents who approve of tough discipline to select these schools and the parents who oppose harsh discipline to select other schools. Charter advocates take the position that parent choice, not school practice, is the primary form of accountability in a system of schools.\(^{155}\)

New Orleans has only partially embraced this ideology when it comes to suspension and expulsion. In 2012, the RSD created a centralized expulsion review board to prevent the alleged pushing out of unwanted students.\(^{156}\) All RSD schools and OPSB direct-run schools now utilize the same expulsion policies and procedures that are processed through the RSD Student Hearing Office.\(^{157}\) The RSD also created a unified list of expellable offenses that RSD charter schools must follow, thus ensuring that minor offenses would not lead to expulsion.\(^{158}\) All RSD schools and OPSB direct-run schools must utilize this policy, while OPSB charter schools are exempt from its guidelines.\(^{159}\) This was a rare instance of cooperation between the

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155. The complainants contemplated precisely this argument in their complaint, alleging that “[t]he students at these schools . . . are not really empowered to be able to change schools.” Carver Complaint, supra note 150, at 10.

156. See Kamenetz, supra note 3.

157. THE COWEN INST., 2014 REPORT, supra note 2, at 4. OPSB charter schools do not have to use the RSD Student Hearing Office. Id. at 5.


159. THE COWEN INST., 2014 REPORT, supra note 2, at 5.
RSD and the OPSB, and it shows the evolution of the RSD from granting complete autonomy to its charter schools to now retaining some centralized control over policies and practices.  

But the OPSB and the RSD still refuse to control all aspects of student retention, as there are no plans to centralize suspension policies and practices. The line is drawn between suspension and expulsion, according to the RSD, because expulsions affect the entire school system whereas suspensions do not, and charter schools need to retain autonomy over internal discipline. Of course suspensions can be long enough to have the same deleterious effect as expulsions for students. This is a real danger in a city that has an “absurd” rate of suspensions: one quarter of schools have suspended more than twenty percent of their students in a school year. The centralized expulsion system is not perfect, as schools still counsel-out difficult students, but “ever since the city started a centralized expulsion system last fall, more students are being formally expelled, rather than informally ejected.”

Despite the shortcomings, the centralization of expulsion policy and hearings is certainly better than leaving these decisions in the hands of autonomous school operators, and it is being mimicked by several cities with large charter school sectors.

The RSD and the OPSB also worked together to ensure a quality alternative placement while students were serving their expulsions. In a traditional school district made predominately of schools run directly by the school board with only a couple of charter schools, the direct-run schools often end up as the repositories for expelled students. This was certainly the case in New Orleans when the RSD was running schools directly between 2006 and 2013. The RSD direct-run schools became the dumping grounds for the unruly and

160. Dreilinger, New Orleans Schools Expel More Students, supra note 146; Vanacore, supra note 146.
161. Dreilinger, New Orleans Schools Expel More Students, supra note 146.
162. Id.
165. Dreilinger, New Orleans Schools Expel More Students, supra note 146.
166. Id.
difficult students that had been kicked out of charter schools.\textsuperscript{167} Knowing that there would be no more direct-run schools, the RSD and OPSB created the Crescent Leadership Academy—a special charter school that would cater to suspended and expelled students.\textsuperscript{168}

The solution to preventing schools from massaging enrollments through student retention policies was the same solution to achieving equitable access: centralization of services and unification of policies.\textsuperscript{169} And just as OneApp does not apply to all schools (OPSB) or all practices (selective admissions), the centralized expulsion hearings and unified expulsion rules do not apply to all schools or to any school’s suspensions.\textsuperscript{170} Unification and centralization in access and retention policies push up against political and autonomy barriers. The tension between centralization and specialization/autonomy is a recurring theme in the quest for retention equality in the New Orleans system of schools.

3. Choice

Much more is at work than just admission and retention policies leading to racially and socioeconomically skewed school enrollments. What is often ignored in this discussion is that many schools are designed for poor and minority students. For example, Knowledge is Power Program (KIPP) schools, of which there are ten in New Orleans, were founded on the belief that demographically challenging students could be educated in a segregated environment.\textsuperscript{171} These

\textsuperscript{167} See Osborne, supra note 5, at 5–6; Carr, supra note 24; see also Garda, supra note 32, at 78.


\textsuperscript{169} The state is also attempting to prevent unwarranted suspensions and expulsions through the chartering process. The charter-enabling statute was amended in 2010 to ensure that charter applicants include a “master plan for improving behavior and discipline” that incorporates restorative justice and positive behavior interventions. 2010 Act 756 (codified as amended at LA. REV. STAT. ANN. §§ 17:3981(4), 17:3982(A)(1)(a)(i), 17:3983(A)(3)(c), 17:3991(B)(14)) (requiring that each charter proposal be approved only if it includes “discipline practices and policies that incorporate positive behavior interventions and supports, restorative justice, and other research-based discipline practices and classroom management strategies . . . ”); see also La. Admin. Code tit. 126 §§ 306(A), 701(B) (2012).

\textsuperscript{170} Dreilinger, New Orleans Schools Expel More Students, supra note 146.

The New Orleans system of specialized schools allows parents to choose segregation, and many parents are making this choice.

In addition, the uncomfortable truth may be that the old proverb “birds of a feather flock together” is correct:

[Nationwide e]thnic self-segregation is evident among many charter school populations. These trends are not due to white flight from charters, but to white, black, Native American, and Latino parents who choose schools based more on their racial composition than on the relative academic quality of the charter school. Parents often seek charter schools with a majority of students from their own race, schools that often have lower test scores than the school their children exit.

Whites choose to remain in schools with a majority of whites—it is no surprise that minorities would choose to do the same.

The parents provide the demand while foundation funding ensures an adequate supply of specialized schools focused on the poor and minorities. The large influx of foundation money to New Orleans charter schools creates incentives to keep schools socioeconomically segregated because the foundations are reticent to give money to schools with significant populations of middle- and high-income students.

In the New Orleans school market, the supply of “no


excuses” schools is fostered by private donations, while the demand is primarily from black and low-income parents.\textsuperscript{182}

It is impossible to ignore that school design and parent choice play a large role in the racial and socioeconomic disparity among schools.\textsuperscript{183} The inherent nature of an all-choice system of schools permits, if not exacerbates, segregation because it “facilitate[s] parents’ ability to dissent not just in word but in action against integration.”\textsuperscript{184} As Professor Osamudia Jones puts it,

A turn to affinity charters or charter schools that are increasingly segregated may be the embrace of racial isolation as a virtue rather than a vice . . . . School choice plans only compound the de facto segregation that makes American public schools more segregated now than they were at the time of \textit{Brown v. Board of Education}.\textsuperscript{185}

**B. Equity for Students with Disabilities**

Charter schools nationwide are accused of not properly educating students with disabilities.\textsuperscript{186} They have long been blamed for denying admission to students with disabilities, “cherry-picking” students with mild disabilities, providing a one-size-fits-all program instead of a full continuum of placements, failing to follow proper disciplinary procedures, and failing to identify students as disabled.\textsuperscript{187} These accusations are particularly strong in New Orleans.\textsuperscript{188}

There are numerous stories of students with disabilities being denied admission to charter schools or being “counseled out”—

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\textsuperscript{182} See supra notes 176–78, 181.


\textsuperscript{184} Black, supra note 183, at 120; see also Nick Lewin, \textit{The No Child Left Behind Act of 2001: The Triumph of School Choice Over Racial Desegregation}, 12 \textit{Geo. J. on Poverty L. & Pol’y} 95, 113 (“Multiple studies indicate that unregulated public school choice threatens to actually increase segregation.”).

\textsuperscript{185} James, supra note 70, at 1117.

\textsuperscript{186} U.S. \textit{Gov’t Accountability Office, GAO-12-543, Charter Schools: Additional Federal Attention Needed to Help Protect Access for Students with Disabilities} 6–7, 11–13 (2012); \textit{Annenberg Inst. for Sch. Reform, supra note 143, at 7} (explaining that there is widespread use “of explicit or subtle barriers to enrollment” around the country); Robert A. Garda, Jr., \textit{Culture Clash: Special Education in Charter Schools}, 90 \textit{N.C. L. Rev.} 655, 681–93 (2012) [hereinafter Garda, \textit{Special Education in Charter Schools}].

\textsuperscript{187} \textit{Annenberg Inst. for Sch. Reform, supra note 143, at 7}; \textit{Mickelson et al., supra note 70}; Garda, \textit{Special Education in Charter Schools, supra note 186}, at 129.

convinced that the charter school could not serve their needs.\textsuperscript{189} These practices are clear violations of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act (Section 504), and the Individuals with Disabilities in Education Act (IDEA).\textsuperscript{190} The data corroborates the anecdotal evidence. In 2010, charter schools educated sixty percent of the public school students in New Orleans, but enrolled only thirty-eight percent of the students with autism, thirty-seven percent of the students with severe emotional disturbances, and twenty-three percent of the students with multiple disabilities.\textsuperscript{191} Most of the students with disabilities were in the RSD direct-run schools, which were the “schools of last resort” and worst performing schools in the city.\textsuperscript{192} Even with the elimination of RSD direct-run schools, special education enrollment across school types continues to vary widely. The student populations in the BESE and OPSB charter schools—the highest performers in the city—include only between three to five percent of special education students, well below the city average. Every school rated A by the state has below average special education enrollments.\textsuperscript{193} The RSD charter schools—most of which were formerly run directly by the RSD—enroll 9.4\% special education students, the same as the citywide average.\textsuperscript{194}

There are several explanations for why charter schools turn away students with disabilities. First is the pressure to produce results on standardized tests in order to maintain the charter. Accountability requirements create strong incentives to deny admission to these lower performing students.\textsuperscript{195} Second, the high costs of educating students with disabilities also provide a strong incentive to deny

\begin{itemize}
  \item \textsuperscript{189} Carr, supra note 24, at 139; Heilman, supra note 20, at 362–67; Garda, \textit{Special Education in Charter Schools}, supra note 186, at 683–84.
  \item \textsuperscript{191} Carr, supra note 24, at 130.
  \item \textsuperscript{192} Carr, supra note 24, at 139; Heilman, supra note 20, at 363–65.
  \item \textsuperscript{193} The Cowen Inst., \textit{2014 Report}, supra note 2, at 12.
  \item \textsuperscript{194} Osborne, supra note 5, at 10.
  \item \textsuperscript{195} Garda, \textit{Special Education in Charter Schools}, supra note 186, at 688–89.
\end{itemize}
admission. Students with disabilities put a large strain on the budgets of charter schools and can threaten their viability, particularly charter schools that are their own LEAs and thus lack economies of scale.\textsuperscript{196} In a traditional LEA—with numerous schools—paraprofessionals, psychologists, special education directors, and other necessary personnel can be used across many schools with the costs spread out evenly amongst them. In a system of schools where most charter schools are independent LEAs—essentially one-school school districts—it is too expensive to hire the necessary personnel to assist with what may amount to only a few students.\textsuperscript{197}

Finally, and maybe most importantly, special education often runs contrary to the mission and culture of charter schools. Many charter schools adopt a “hedgehog” approach to education: focus on one thing, and one thing only, in which to excel. As one school leader put it, the school should have a:

[S]ingle minded focus on student achievement. If the school tried to do too much—provide health care classes or parenting services, for example—it risked failure on its core mission . . . in the same way that the fox’s myriad plots are no match for the hedgehog’s obsession with a single strategy.\textsuperscript{198}

If the single-minded focus is college preparation, or academic achievement, a student with disabilities, particularly severe ones that require different services, may not fit in that mold. The school may feel that the student would not be well served and that accepting such students would divert its “hedgehog”-like, singular focus and degrade the quality of the program. The specialized nature of charter schools combined with the “hedgehog” strategy often leads to excluding students with disabilities.\textsuperscript{199}

Charter schools are also uniquely challenged to fulfill their obligation to locate, identify, and evaluate students with disabilities under the IDEA.\textsuperscript{200} This “child find” obligation compels LEAs to identify and evaluate all students within their jurisdiction, but Louisiana law defines “jurisdiction” for charter schools as “the boundary of the educational facility.”\textsuperscript{201} In an all-charter school system where schools are compelled to identify only students within

\begin{footnotes}
\item[196] Id. at 689, 695; Heilman, \textit{supra} note 20, at 360, 371.
\item[198] CARR, \textit{supra} note 24, at 41.
\item[199] Id. at 42; Garda, \textit{Special Education in Charter Schools, supra} note 186, at 689–90.
\item[201] LA. ADMIN. CODE tit. 28 § 1706 pt. XLIII, 230(A), (D)(4) (2013).
\end{footnotes}
their four walls, there is no mechanism in place to locate those disabled students outside the public school system as required by the IDEA. “Because there is no centralized entity or authority responsible for child find across the city, children who are homeless, migrant, or simply not enrolled in public schools are not being found and evaluated in accordance with federal law.”

Charter schools also struggle to provide appropriate related services and specialized instruction in violation of the IDEA. The treatment of students with mental health issues and behavioral problems is emblematic of the challenges in serving these students in a decentralized system. More children suffer from mental health issues in New Orleans than in any other part of the country. At the same time, the number of treatment facilities for these students has declined rapidly, and there is an extreme shortage of providers and facilities. The onus has fallen on the schools, more than ever, to either provide, or locate and pay for, proper treatment.

This is proving extremely difficult because students with severe behavioral and mental health problems are particularly expensive and difficult to educate. The prohibitive cost means some schools neglect mental health and counseling, and very few schools operate programs to address the needs of these students. The services once provided by a large multi-school LEA—the OPSB—now must be provided by single-school LEAs. The central office for social work and counseling services no longer exists, leaving each charter school as an island to provide these services. “New Orleans has become a case study in

202. Heilman, supra note 20, at 368.


205. See id.; Kamenetz, supra note 3; Williams, With Help of School Counseling, New Orleans Family Tackles Mental Health Disorders of Three Siblings, supra note 203.

206. See Carr, Children with Mental Illnesses, supra note 204; Williams, With Help of School Counseling, New Orleans Family Tackles Mental Health Disorders of Three Siblings, supra note 203.

207. See Carr, Children with Mental Illnesses, supra note 204.
how children and families are affected by rapid decentralization of public education and mental health systems.” It is no surprise that the Charter Management Organizations that run numerous schools, and can benefit from economies of scale, have been the first charter schools able to create programs for students with severe emotional and behavioral issues.

The treatment of students with disabilities has improved over time, but much still needs to be done. The problems of identification, exclusion, and service provision are the subject of a class action litigation filed by the Southern Poverty Law Center in 2010. The Complaint did not target individual charter schools, but instead faulted the state and the RSD for failing in their statutorily mandated oversight duties under the IDEA and Section 504. The Complaint was not so much a call for action by charter schools as it was a call for action by the state, the RSD, and the OPSB to create order out of the chaos resulting from a decentralized special education system.

The OPSB and the RSD recognized these problems and are pursuing two separate avenues to address them. The first is centralizing certain aspects of special education. In March of 2014, the OPSB and the RSD entered into a Cooperative Endeavor Agreement (CEA) to ensure shared responsibilities for programs targeted to high needs students, including students with disabilities. Under the CEA, the OPSB and the RSD agree to open citywide therapeutic programs by 2015-16 to address the shortage in the private sector and within schools. In addition, the CEA creates a citywide exceptional needs fund to help schools with the costs of

208. Id.
209. Williams, With Help of School Counseling, New Orleans Family Tackles Mental Health Disorders of Three Siblings, supra note 203.
210. Carr, supra note 24, at 142.
212. Complaint, supra note 211, at 17–19.
215. Id.; see Kamenetz, supra note 3; Williams, New Orleans Public Schools Have Seen Successes, Challenges in Past Year, New Report Says, supra note 13; Williams, With Help of School Counseling, New Orleans Family Tackles Mental Health Disorders of Three Siblings, supra note 203.
serving students with the highest needs. The CEA also divides up responsibility for certain legal obligations for which it was difficult to ascertain responsibility in a decentralized system of schools. The CEA clarifies that the OPSB will be responsible for “child find” for all students not within public schools, including preschools. The OPSB will provide special education services to preschool students, and the parties will work together to place preschool students identified as disabled. The OPSB also committed to providing all special education services to students in private schools. Finally, in the 2015-16 school year, the RSD will be piloting a project to ensure students receive out of school mental health services.

The importance of the CEA cannot be overstated—not only for the services it will provide to students with disabilities, but also for the ground-shaking paradigm shift it represents in New Orleans. For nine years after the storm, there was neither coordination nor oversight of special education services—an area of education that practically demands centralized planning and economies of scale. Instead, it was expected, or more likely hoped, that the market of school choice would fill any unmet demand. The recognition by the OPSB and the RSD that the unregulated system of schools would not step in to serve the needs of students with disabilities, and that oversight and centralization were necessary, was a major breakthrough in their relationship and a major break from the post-Katrina model.

But it is not a clean break. There is still hope that specialized schools designed to meet the demands of students with disabilities will spring out of the decentralized system. There are efforts to create entire schools for children with mental or behavioral health needs. The OPSB recently approved a charter application for a school that specializes in serving students with reading disabilities such as dyslexia, and another is being planned to serve students with emotional needs. This follows a nationwide trend of creating

218. Id.; see also THE COWEN INST., 2014 REPORT, supra note 2, at 5.
220. Id.; Garda, Special Education in Charter Schools, supra note 186, at 670–73, 694–710.
222. Carr, Children with Mental Illnesses, supra note 204.
specialized schools for students with disabilities. There are over one hundred charter schools across the country focused exclusively on special education students, and their popularity is growing.\textsuperscript{224} Parents often select the disability focused charter schools because their specialization results in better services to their children.

New Orleans has steadily improved access, retention, and service provision for students with disabilities in the last couple of years. It has done so by centralizing services for students who need it and plans on specializing schools for students who want it.

### C. Equity for English Language Learners

The growth in the number of English Language Learner (ELL) students is being felt in many charter schools nationwide because federal civil rights laws mandate that charter schools both identify ELLs and provide them with effective education.\textsuperscript{225} This challenge is on full display in New Orleans, where there has recently been a large influx of non-native English speakers, particularly of Central American and Vietnamese students. This puts tremendous strain on a charter school system ill-prepared to serve these students.\textsuperscript{226}

A recent survey by the Southern Poverty Law Center (SPLC) and VAYLA (Vietnamese American Young Leaders Association) found that the enrollment and registration practices of more than half of the

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\textsuperscript{224} Mickelson et al., supra note 70, at 14–16; Arianna Prothero, Special Education Charters Renew Inclusion Debate, EDUC. WK. (Sept. 16, 2014), http://www.edweek.org/ew/articles/2014/09/17/04specialneedscharters.h34.html.
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The lack of translated enrollment documents and services is also prevalent. The Vietnamese Young Leaders of New Orleans filed a complaint with the Department of Justice and the Office of Civil Rights against the RSD, the OPSB, and independent charter operators alleging that the failure of charter schools to provide interpretation and translation services, and important information in a language that could be understood by non-native speakers, violated Title VI of the Civil Rights Act by discriminating on the basis of national origin.

The parties reached a Resolution Agreement wherein the schools agreed to provide the requested document translation and translation services.

But translation services are the minimum legal requirement; schools are compelled to take “appropriate action” to educate ELL students, and that has proven to be a challenge. ELL students are the most unevenly distributed of the vulnerable student populations in New Orleans. During the 2011–12 school year, 45% of the schools in the system had no ELL students, 50% had between 1% and 10%, and four schools had an ELL population of 15% or higher. The likely reason for this vast disparity in numbers is because only a small number of schools have the capacity and programs to educate ELL students, and parents flock to those programs.

The concentration of ELL students into a limited number of schools will continue so long as ELL programs remain uncoordinated and decentralized. Much like special education, provision of ELL...
services is expensive and requires a high level of expertise that is difficult to achieve in a one-school LEA. ELL students stretch resources, and the added cost is not covered by federal or state money.\textsuperscript{235} This makes it difficult, if not impossible, to create an effective ELL program in a single school that serves a limited number of ELL students.\textsuperscript{236} Like special education, the schools with the best ELL programs are part of charter networks that can leverage their budgets and services across numerous schools.\textsuperscript{237} Because most schools lack such services,\textsuperscript{238} parents are understandably drawn to the schools with any programs, creating a vicious circle of concentration of ELL students into a limited number of schools.

Despite commentators recognizing the growing need for the shared services of an outside agency to offer ELL to students in the various charter schools, it is not occurring.\textsuperscript{239} No mention of ELL services exists in the CEA, and there is no indication that the OPSB and the RSD are willing to work together to ensure ELL services are provided in each school instead of only in select schools.

Rather, the opposite approach is being taken, and specialization, rather than centralization, seems to be the route currently being pursued to ensure equality for ELL students. OPSB recently approved a new charter school, Foundation Prep, to cater to the ELL needs of the immigrant population in New Orleans East.\textsuperscript{240} The school was approved, in part, because it met “the needs of the targeted community.”\textsuperscript{241} Unlike access, retention, and special education, where some centralization of planning and service

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\textsuperscript{236} See MURRAY, supra note 225, at 20; \textit{THE COWEN INST., 2014 REPORT}, supra note 2, at 11.


\textsuperscript{239} \textit{THE COWEN INST., 2014 REPORT}, supra note 2, at 11.


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coordination is occurring, ELL service provision, up to this point, has been left to the system of schools to address unmet demand.

III. THE IMPACT OF MOVING TO A SYSTEM OF SCHOOLS ON EQUITY

Achieving equality for vulnerable students after Katrina has been an ongoing struggle in New Orleans. Equal educational opportunity was practically non-existent for vulnerable students during the first seven years when there was virtually no equality of access and little to no oversight over retention, special education, or ELL policies. The decentralized and loosely monitored system of schools created a balkanized system, with the needs of vulnerable students often left unmet. Parent choice also played a role in the concentration of students by abilities, class, and race, though parent choice was, and continues to be, circumscribed.

The two most powerful educational entities in town—the OPSB and the RSD—did not centralize any services until 2012, when access was mostly unified through OneApp, and expulsions were unified through the expulsion review board and policy. In 2014, with execution of the CEA, services were centralized for special education services, but at the same time specialized schools for students with disabilities and ELLs were opened. New Orleans’s dual approach to ensuring equity—centralizing and unifying services for all schools on the one hand while encouraging specialized schools to meet unmet demands of vulnerable students on the other—brings to the fore a debate that has occurred in education reform for two decades: how to define educational equity.

A. Centralized Planning or the “Invisible Hand”

New Orleans is the first city to stand at the precipice of deciding how best to ensure equity in a virtually all-charter school system. One route relies on centralized planning, coordination, and resource sharing to ensure each school provides equal access and education to all types of students. This is the accepted version of equality employed by schools since the Supreme Court uttered its most important phrase in the twentieth century: “separate educational facilities are inherently unequal.”

Brown was about anti-subordination and inclusion.

This inclusion view of equality requires each school to serve students of all races and abilities.

243. See id.; James, supra note 70, at 1128.
Nearly every civil rights statute in the field of education is founded on this principle. Title VI of the Civil Rights Act of 1964 prohibits segregation “in the schools of the local educational agencies of any State.”244 The Equal Education Opportunity Act of 1974 prohibits “segregation by an educational agency of students on the basis of race, color, or national origin among or within schools . . . .”245 The IDEA allows “separate schooling . . . only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”246 The Americans With Disabilities Act and Section 504 of the Rehabilitation Act similarly require schools to educate students with disabilities in inclusive settings with general education students rather than in separate schools.247

The inclusion view of equality, which has endured for over sixty years, demands that every school attempt to educate every type of student regardless of ability, aptitude, behavior, race, or socioeconomic status. It requires massive coordination and economies of scale, especially to provide appropriate integrated services for ELLs, students with disabilities, and students that are particularly challenging.248

A few signs point to New Orleans pursuing inclusion equality through collective planning and centralized control: creation of OneApp, centralizing expulsions, and execution of the CEA. The RSD and the OPSB came to recognize the importance of cooperation


248. ANNENBERG INST. FOR SCH. REFORM, supra note 143, at 4; Cook, supra note 69.
and systemic planning to achieve equity and that the services for truants, special education students, and all at-risk youth were “scattershot, overlapping, or non-existent.” But it remains to be seen whether these are the first steps towards more centralization to ensure equality or merely a stop-gap measure until the system can create a thick “portfolio” of autonomous and specialized schools to meet the unique demands of each student in the system. Even though the RSD no longer directly operates any schools, and is instead focusing on oversight of its charter schools and managing centralized services in New Orleans, all signs point to the current centralization acting as a bridge to a more fully functioning decentralized system.

First, it is unlikely that one unified or even cooperative governance structure will exist in New Orleans for a very long time. The OPSB will not be granted its wish that all schools return to its control and the RSD cease operations in New Orleans. The OPSB asked the legislature to compel return of high performing RSD schools to its control but was rebuffed. Instead, the legislature gave each school a choice of whether to stay with the RSD or move to the OPSB, and even upon such a return, it would allow them to retain their LEA status. Only two schools have elected to return to OPSB control, and it is doubtful that many more will. In fact, there may be

251. The term “portfolio school district” is often used to describe the emerging model of educational governance that relies on numerous autonomous and independent operators to run schools rather than a centralized school board. Daniel Kiel, The Endangered School District: The Challenge and Promise of Redistributing Control of Public Education, 22 B.U. PUB. INT. L.J. 341, 346–52 (2013).
252. Dreilinger, Recovery School District Downsizes from 568 Employees to 92, supra note 40.
movement the other way—from OPSB control to state control—because, as of 2012, if OPSB charters do not like how they are treated by the OPSB they can petition to change to a charter under state control.256

Because of its failure to regain the schools via the legislature, the OPSB sought the help of the courts. This approach also failed, as the Louisiana Supreme Court rejected the OPSB’s lawsuit seeking return of all schools to its control in March of 2014.257 Despite the original intent of the RSD to be a stopgap measure to turn around schools and then return them to local control,258 it is now a permanent fixture in New Orleans.259

Because the RSD will not be displaced, cooperation between the OPSB and the RSD is necessary to achieve any centralized planning. Execution of the CEA is one step in this direction, but promising to do something and actually doing it are two very different things. Even after execution of the CEA, the OPSB and the RSD have fought more than cooperated.260 The two parties continue to battle

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13/more-charter-schools-now-eligible-to-join-orleans-parish-school-board-but-will-anyone-take-the-leap/ (stating that Charter school operators are wary “of becoming part of a dysfunctional local school system” plagued by a feuding school board); Williams, New Orleans Public Schools Have Seen Successes, Challenges in Past Year, New Report Says, supra note 13 (“There is little desire (by charter schools) to return to the system of governance that previously existed.”).

256. 2012 Act 2 (codified as amended at L A. REV. STAT. ANN. 17:3983(B)(2)).


258. DEBRA VAUGHAN ET AL., COWEN INST., TRANSFORMING PUBLIC EDUCATION IN NEW ORLEANS: THE RECOVERY SCHOOL DISTRICT 2003–2011 1, available at http://www.coweninstitute.com/wp-content/uploads/2011/12/History-of-the-RSD-Report-2011.pdf (“Intended as a mechanism for restructuring and reform, the RSD was never meant to be a permanent part of the public school governance landscape in New Orleans. Instead, the RSD was meant to take control of and turn around chronically failing schools for an initial period of five years. After that time, and assuming adequate school improvement, schools would be released from the jurisdiction of the RSD and returned to their local school board. Chartering schools became a strategy used by the RSD even before Katrina. In 2010, BESE approved a plan that allowed for the gradual transfer of some schools back to local control. As of 2011, the majority of schools in Orleans Parish are charter schools authorized by BESE under the auspices of the RSD, with the remainder being traditionally operated public schools directly run by the RSD and the OPSB and charter schools authorized by the OPSB.”); Bryant, supra note 10; Dreilinger, What’s the Point of the Recovery School District Now?, supra note 253.


over return of physical buildings from the RSD to the OPSB in spite of the CEA’s promised cooperation.261 The OPSB and the RSD still make decisions independent of one another, and ultimate unified governance seems unlikely, if not impossible.262

The second factor indicating that New Orleans is heading towards decentralization is that centralized services and unified planning run contrary to a fundamental underpinning of charter schools: site-level autonomy. The charter movement is founded upon freedom from regulations regarding budget, curriculum, and personnel.263 Autonomy and independence are the hallmarks of charter schools, and the charters in New Orleans have fought tooth and nail to retain them. If the RSD and the OPSB fail to cooperate moving into the future, the system of schools—those sixty-three LEAs and forty-four independent school boards—will certainly not seek service centralization or uniformity that infringe on autonomy. As stated by one of the most public and staunch charter supporters in New Orleans, Neerav Kingsland, “[t]he ultimate goal of the New Orleans public education system is not uniformity: it is diversity. And to misunderstand this is to misunderstand the fundamental design principle of our system.”264

Finally, it appears that the state legislature is expecting Charter Management Organizations, or CMOs, (non-profit organizations that operate multiple charter schools) to fill the centralized planning gap.265 CMOs educate over half the students in New Orleans.266 CMOs are not LEAs in the legal sense, but they often act like them in the practical sense, spreading costs and resources across the many schools they operate. The state has great confidence in CMOs, as seen by recent legislation making chartering easier for large CMOs with proven records of success.267 It is unknown if the state believes


262. Ayers, supra note 3; see THE COWEN INST., 2014 REPORT, supra note 2, at 4 (positing that long term shared governance seems unlikely).


264. Kingsland, supra note 178.

265. 2012 Act 2 (codified as amended at LA. REV. STAT. ANN. 17:3983(3)(d)).

266. THE COWEN INST., 2014 REPORT, supra note 2, at 8.

267. 2012 Act 2 (codified as amended at LA. REV. STAT. ANN. 17:3983(3)(d)) (permitting successful schools meeting automatic renewal guidelines to open operate
that CMO centralized planning and service provision for the schools they control act as an adequate substitute for system-wide services, but it seems to be leaning that direction.

With cross-district and cross-school cooperation unlikely, it appears New Orleans is relying exclusively on the invisible hand of the market education system to create equity for at-risk students. This model requires belief in outcome or empowerment equality rather than inclusion equality.

While empowerment equality cannot necessarily be called “new”—it is possible to read Brown as simply empowering African-Americans to choose schools that were previously cut-off to them instead of compelling integration—it did not gain traction until the 1990s with the advent of outcome accountability and charter schools. This concept of equality found its popular roots in the influential government report, A Nation at Risk, concluding that there was a “rising tide of [educational] mediocrity that threatens our very future as a Nation and a people.” The implied message was that twenty-five years of striving for inclusion equality since Brown had yielded bad schools and that desegregation was mutually exclusive with quality.

In the push for improved performance during the decades that followed—the accountability and choice era—equality was repurposed from inclusion to outcomes and parental empowerment. When parents choose and student outcomes improve, the argument goes, equality is achieved irrespective of the demographics of the schools. Inclusion equality essentially transformed into equal access to quality schools through choice, and many embrace choice and specialized educational environments as the new civil rights

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268. The free-market education theorists believe that the marketplace is the ideal way to allocate resources because each individual will be led by the invisible hand to the social maximum position. James, supra note 70, at 1093–95.


271. The implication is not true, as “the failures of integration have more to do with failures of implementation . . . than with the inherent failures of the concept of integration itself,” but the perception remains. James, supra note 70, at 1118.
movement.\textsuperscript{272} Separate but equal became separate and equal, propped up by increasing liberty through choice.\textsuperscript{273}

Many scholars argue that choice and equality cannot co-exist. Professor Osamudia James posits that “[i]f our goal is equality, then choice must be minimized,”\textsuperscript{274} while Professor Derek Black argues that the “individualized concept of education . . . lack[s] concern for equality[, and] inequality is a necessary ingredient to competition.”\textsuperscript{275} While it is true that inclusion equality and unmitigated school choice are likely mutually exclusive, market-based reforms certainly can advance empowerment equality. Even the staunchest opponents of choice recognize that “[i]n the abstract, choice can be an integral feature of law or policy that promotes equal rights and opportunities.”\textsuperscript{276}

New Orleans may become the manifestation of this new equality. Achieving inclusion equity requires planning and centralization, while

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  \item \textsuperscript{274} James, supra note 70, at 1128.

  \item \textsuperscript{275} Black, supra note 183, at 459.

  \item \textsuperscript{276} James, supra note 70, at 1133; see also Kiel, supra note 17, at 377 (noting that portfolio school districts are at high risk of creating separate and unequal schools).
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empowerment equality only requires entities to act in their own self-interest: parents choosing what is best for their children and schools specializing to meet their demands. This appears to be where New Orleans is headed—not by conscious choice but by default, an inherent outcome of the fractured governance in a system of schools. As Professor Julie Mead points out: “If you set up a system based on market principles that are designed to allow schools to serve particular interests, then we’re going to get pockets of interest.”

This is already occurring in New Orleans. There are a wide variety of schools catering to numerous different types of students from which parents can choose. In high school alone, parents can select from schools focused on foreign language fluency, exposure to college courses, college preparation, STEM (science, technology, engineering, and math) for traditionally underserved students, STEM for select students, military and maritime studies, creative arts, and technical skills, as well as alternative schools designed for over-age and academically behind students, and a school

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277. Prothero, supra note 224.
278. Sims & Vaughan, Beating the Odds, supra note 13, at 8. But see The Cowen Inst., 2014 Report, supra note 2, at 29 (“The quality and diversity of choices may be limited.”); Waller, supra note 223 (explaining that there has been a “proliferation of similar kinds of schools”).
286. See, e.g., ReNEW Accelerated High Sch., http://www.renewschools.org/apps/pages/index.jsp?uREC_ID=182758&type=d&pREC_ID=457304 (last visited Mar. 152, 2015) (“ReNEW Accelerated High School . . . aims to push our most academically behind students by accelerating their graduation and becoming college ready. The innovative program is one-of-a-kind in the city, providing our over-age, under-credited students the ability to accelerate their high school course work and earning a true High School Diploma.”); The NET Charter High Sch., http://thenetnola.org/ (last visited Mar. 15, 2015). The NET is an alternative
exclusively for expelled students. As noted above, there will soon be a school for dyslexic students and one for ELL students, and a proposed school will specialize in addressing students with emotional needs. There are even schools that promise diversity—not because they believe that separate is inherently unequal, but merely that parent-chosen integration is a superior education model. The education market continues to “recognize gaps in the city’s educational landscape and launch schools to meet these needs.”

Moreover, the state is encouraging specialization. The RSD is recruiting charter operators to fill unmet needs. The legislature is pushing for specialized charter operators as shown by their amendment to the charter-enabling statute in 2012 charging BESE with actively recruiting “chartering groups that offer a program of study or propose to offer a program of study that effectively addresses regional workforce needs, such as career and technical education, industry-based certifications, and vocational course work.” The charter accountability system was also changed to encourage specialized charter schools by allowing for “alternative evaluation” of charter schools serving “unique populations.”

Even when schools are not designed for specific student populations, the fact that few provide specialized services makes them popular for these types of students. For example, word spread about Esperanza Charter School’s ELL program, which has induced more

ungraded school designed to serve students who have dropped out, are over-age, have been expelled, or who struggle academically or behaviorally in a traditional high school setting. See Louisiana Making Changes to Programs for At-Risk Students, No DROPOUTS, http://www.nodropouts.org/blog/louisiana-making-changes-programs-risk-students?page=5 (last visited Mar. 15, 2015).


288. See Waller, supra note 223.


290. Jacobs, supra note 289. There is also a school focused on computer literacy. See Dreilinger, OneApp Lists More Than 130 New Programs, supra note 103.

291. See SIMS & VAUGHAN, BEATING THE ODDS, supra note 13, at 8.


293. L.A. ADMIN. CODE tit. 28, § 1103(B) (2014).
ELL students to apply. Any school that offers services for marginalized students can expect the same results. Whether a school is designed specifically for a student population or simply attracts particularized groups by providing services that do not exist elsewhere, the end result is concentrated student populations.

Of course, the current New Orleans schools are as far from achieving the new equality as the old New Orleans schools were from achieving inclusion equality. There is a full-throated debate about whether choice models improve student outcomes or narrow achievement gaps. Many believe school choice must be rejected because it will never achieve its promises. Others believe that inclusion equality also could not live up to its promises, and call for its abandonment.

To some, “[t]he proper question is whether market based choice reduces equality relative to our already racialized and unequal system based upon geographic choice.”

But in New Orleans, where the new system is still finding itself, the problem should be considered in the abstract. It is critical that the city decide if it wants empowerment equality or inclusion equality. Putting aside issues of implementation and assuming either model can achieve all that it promises, which should New Orleans strive to achieve? Inclusion equality promises diversity in schools; empowerment equality promises diversity of schools, but not within schools. Without a concerted effort to centralize services, the system will march automatically towards empowerment equality.

294. See Jacobs, supra note 289.
297. Saiger, supra note 142, at 53–54.
B. Lessons from New Orleans

In some respects, drawing lessons from New Orleans to apply in other cities is difficult because its path has been so unique. While most major urban cities are slowly transitioning from a unified school system into a system of schools, New Orleans was catapulted into decentralization and is easing into centralization.

Transferrable lessons are also hard to glean because, unlike every other school system, New Orleans is almost all charter schools. Traditional arguments about “opt-out” and inequality between charters and traditional schools simply do not exist in a system that has collectively opted-out of traditional governance. There are no traditional schools on which to rely to educate the most challenging students. Instead of dumping difficult to educate students into the traditional schools, as happened in New Orleans directly after the storm and as occurs in many other cities, the charter system in New Orleans is now compelled to deal with them. The debate in New Orleans, as opposed to the rest of the country, is not whether to have charter schools, or how many to have, but how to make them work equally for all.

It is easy to argue that New Orleans is proof that equity cannot be found among decentralization, especially for vulnerable and subordinated groups. The unrestrained system of schools for the first seven years after Katrina almost completely failed special education students, English language learners, the poor, and the powerless. But such a conclusion, indeed any conclusion, from this time is too facile because the system was rebuilt virtually from scratch. During this period the school system was still physically rebuilding from tragedy, and the students were emotionally rebuilding. While Katrina’s waters receded quickly, the schools swayed and rocked for years, only recently stabilizing. The turbulence ebbed as the “portfolio” of schools grew, students found permanent schools, schools found permanent homes, and the RSD settled in. Lessons transferrable to other cities are difficult to glean from this unique rebuilding era. But a few things are certain.

298. Many critiques of charter school and choice presume their coexistence with traditional school districts and are hard to translate when the system is almost entirely charter schools. See, e.g., Black, supra note 183; James, supra note 70.

First, the free market of schools does not operate like a free market in all respects. The reasons are many, but one critical reason displayed in New Orleans is that education consumers do not act rationally, or at least how economists expect them to act.\textsuperscript{300} Contrary to expectations, parents often keep their children in low-performing schools and do not initially select high-performing schools. The behavior has been shown in New York\textsuperscript{301} and is certainly the case in New Orleans.\textsuperscript{302} Very few schools in the city, no matter how consistently poor-performing, have closed due to insufficient students or funds.\textsuperscript{303} Because market forces do not send poorly performing schools out of business, the chartering authorities are the primary agents closing charter schools in New Orleans.\textsuperscript{304}

With the government, more than market demand, controlling school quality, it is imperative that the charter authorization process be rigorous and the threat of closure meaningful.\textsuperscript{305} While this may not be happening nationally, it appears to be occurring in New Orleans, as a large majority of charter applications are denied and a dozen charters have been shut down by the state.\textsuperscript{306} Before 2008,
there were no charter revocations because of the intense politicization of closure decisions.\textsuperscript{307} The revocation process was de-politicized in 2008, when the Louisiana Department of Education issued bright line renewal and revocation standards for the charters it oversaw. This change insulated authorizers from outside pressures when making controversial revocation and renewal decisions.\textsuperscript{308} Accordingly, crystal rules for charter revocation and renewal are a critical component of any choice system.

One important aspect of the free-market analogy remains true though: schools will specialize to meet unmet demands, and parents will often prefer specialized schools. An ELL school was created because there were insufficient ELL services offered in the existing schools. A special education school was created for the same reason. Future specialized schools will continue to crop up because of “market” forces and because the state is pushing for it. Parents may not be selecting schools as an economist would expect them to—based on school performance scores alone—but they are selecting them based on the “fit” between the school and the child.\textsuperscript{309} Left unchecked, specialized schools will flourish and many parents will select segregation.

A second clear lesson is that a nascent, unrestrained system of autonomous schools will leave hard to educate students behind. Once the education system became stable, the OPSB and RSD recognized that the loosely regulated system of schools produced winners and losers, which is unacceptable for public schooling. Some level of centralization and planning is necessary to ensure equity when a majority of the charter schools are independent LEAs.

In order to achieve this, the chartering authority must act in a planning and centralizing role, not merely an authorizing and oversight role, especially for authorizers of charter schools that are independent LEAs. Charter authorizers traditionally review applications, approve charter schools, and then get out of the way until it is time to determine if the charter should be renewed or renewed several charters for poor academic performance. Osborne, supra note 5, at 16–17; Danielle Dreilinger, \textit{30\% of New Orleans Schools Face Charter Renewal Decisions This Fall}, TIMES-PICAYUNE, Sept. 3, 2014, http://www.nola.com/education/index.ssf/2014/09/30_of_new_orleans_charter Scho.html [hereinafter Dreilinger, \textit{30\% of New Orleans Schools Face Charter Renewal Decisions This Fall}].

\textsuperscript{307} See Garda, supra note 32, at 93–95.

\textsuperscript{308} See La. Admin. Code tit. 28, §§ 1501, 1503, 1701, 1703 (2012); see also Dreilinger, \textit{30\% of New Orleans Schools Face Charter Renewal Decisions This Fall}, supra note 306.

\textsuperscript{309} See Saiger, supra note 136, at 56.
revoked. The National Alliance of Charter School Authorizers publishes what is considered the gold standard in authorizer practices, and none of these Essential Practices deal with provision of services or centralizing and planning for the system of schools. The RSD operated under this traditional standard for authorizers for the first seven years after Katrina, and gross inequities developed within the system. It is only once the RSD and BESE expanded their role beyond mere authorizer and evaluator that the necessary centralized planning and services could begin.

There is a nascent national trend for charters to partner with their authorizing school districts for resource sharing and planning, especially for special education. New Orleans is proof that such partnering is essential to ensure vulnerable populations are properly served. This is why the Annenberg Institute calls for a unified school plan and minimum academic, social, and educational opportunities that all taxpayer funded schools should provide in a system of charter schools to ensure proper provision of specialized services. The authorizer is the best-positioned entity to provide this unification.

Directly related, charter school autonomy must be circumscribed to allow the authorizer to control certain services centrally. I have argued elsewhere that charter schools should not be permitted to be independent LEAs for special education purposes. The same argument would apply for ELL services as well. Charter schools should be compelled to work with authorizers for provision of these key services that require economies of scale and high levels of expertise, at least until they prove they can provide these services independently. Charters should have to earn their autonomy when it comes to serving vulnerable groups, rather than being granted it and waiting to see if they fail.

A third important lesson—at least in districts where the state has taken over large swaths of schools—is that there must be either an exit strategy or a concrete division of responsibility between the state takeover district and the local school district. Having two powerful school districts in one geographic area has proven contentious and

confusing in New Orleans.\textsuperscript{314} Uncertainty over how long the RSD would be present and when, and under what circumstances, schools would be returned to the OPSB inhibited by any centralized planning. There was no centralized planning in New Orleans until 2012, when it became apparent that the RSD was a permanent fixture. Once the legislature would not compel the RSD to turn its schools back over to the OPSB, and no RSD charter would voluntarily submit to OPSB control, the OPSB realized the RSD was here to stay and that all the schools would inevitably become charter schools. Only once the new system found firm footing was there any meaningful systemic planning, and that is when the education of vulnerable populations began to improve. This problem could have been solved up front, with a specific and enumerated plan for return of schools to local control.

It is also important that the exit and return plans hinge on the performance of the school board as well as the performance of the schools. It defies common sense for a state to take a failing school from a district, turn it around to a high performing school, and then turn it back over to the district that mismanaged it in the first place. But this is precisely how most state takeover plans are conceived—as stopgap measures until the school is turned around. It is much wiser to focus on the quality of the school and the quality of the return district. This was proposed, and rejected, in New Orleans. Instead, the decision has been left up entirely to the RSD charters on whether to return to the OPSB, and even if they return, they retain their independent LEA status.\textsuperscript{315} Most in the city agree that the elected school board, rather than the state, should be in charge of the schools, but the RSD charters will not voluntarily return to the OPSB because they believe it is incompetent, divided, and contentious.\textsuperscript{316} If specific and concrete school district performance benchmarks were created, just as specific and concrete school performance benchmarks exist, the return decision could be taken out of the hands of charter schools, and there would be a finite term on the state takeover school district.

Finally, and maybe most importantly, the system as a whole must decide what type of equality it wants to pursue: inclusion equality, empowerment and outcome equality, or some mix of the two. Without deliberate planning, outcome equality becomes the default mode that inevitably grows out of decentralization. Pursuit of

\textsuperscript{314} See Garda, supra note 32, at 80–87.
\textsuperscript{315} See LA. REV. STAT. tit. 17, § 3973(2)(b)(vii) (2013); Garda, supra note 32, at 82–86.
\textsuperscript{316} See THE COWEN INST., 2014 REPORT, supra note 2, at 4.
inclusion equality requires more planning and a conscious desire to pursue. New Orleans never had the opportunity for such planning on the heels of Katrina and has still not engaged in meaningful, coherent dialogue on this critical question. Without it, New Orleans is unwittingly choosing the outcome and specialization route to equality.

CONCLUSION

The charter school system in New Orleans is permanent and enduring. Vested interests in the city, most importantly parents, strongly support choice and charter schools. The question in New Orleans is not whether to embrace or discard them, but how to ensure that they create equal educational opportunity within the system of schools.

The New Orleans system of schools lacks a uniform vision for achieving equity for its most challenging students. Without any single entity in control, there is no agreed-upon goal for where the system should stabilize. One endpoint is achieving equality through a thick market of schools serving the unique needs of individual students. While the city is very far from a system of high-quality, specialized schools serving the needs of all students, including vulnerable ones, it is unclear whether this is the vision of equality New Orleans is trying, or even wants, to achieve. But this is the method of achieving equality—concentrated and specialized—that New Orleans will fall into automatically because it happens by default, without planning, when parents and schools look after their own individual interests.

If New Orleans seeks to achieve inclusion equality, where each school can serve every type of student, much work needs to be done. The OPSB and the RSD must put aside their differences and work together to create uniform policies and centralized services. Charter schools must relinquish some of their cherished autonomy and accept that certain vulnerable students cannot be served properly in a single-school LEA. Coordination, cooperation, and unified vision must somehow be found in a decentralized system of schools.

317. Ninety percent of parents think choice is important, while sixty-six percent believe schools have improved, and seventy-eight percent support charter schools. Osborne, supra note 5, at 10; see also Stephanie Grace, The Daily Beast Congratulates Mitch Landrieu on School Reform, Gambit Wkly. (Dec. 18, 2012), http://www.bestofneworleans.com/blogofneworleans/archives/2012/12/17/the-daily-beast-congratulates-mitch-landrieu-on-school-reform (discussing how Mayor Landrieu champions charter schools).
Advancing Integration and Equity Through Magnet Schools

Janel George and Linda Darling-Hammond
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Executive Summary

The long-standing effort to desegregate schools in the United States has been fostered, in part, by the development of magnet schools, which were launched in the 1960s to offer appealing choices of educational programs that could attract an integrated population of families. Magnet schools are public elementary or secondary schools that seek to achieve voluntary desegregation through parental choice rather than through student assignment by offering specialized instruction and innovative academic offerings. They are often situated in urban centers, with the goal of drawing students from surrounding areas—like a magnet—to attend the school. Some magnet schools operate on a regional basis in order to address interdistrict desegregation.

This report draws upon research findings regarding the components found in magnet schools that are both diverse and educationally effective and outlines evidence-based policy recommendations that can inform federal, state, and local efforts to help to design, implement, and sustain effective magnet schools that can foster integrated learning and positive student outcomes.

Why Integration Matters

Well-established research outlines the benefits of school integration, including increased civic participation in a diverse global economy and increased likelihood of living in integrated neighborhoods and holding jobs in integrated workplaces as adults. Studies have found that the academic benefits of attending integrated schools include:

- higher achievement in math, science, language, and reading;
- school climates supportive of learning and studying;
- increased likelihood of graduating from high school and entering and graduating from college;
- higher income and educational attainment;
- increased access to highly qualified teachers and leaders who are less likely to transfer to other schools;
- enhanced classroom discussion; and
- more advanced social and historical thinking.

Students attending schools that are highly segregated by race and poverty—known as “hypersegregated” schools—are deprived of the benefits of integrated education. Most significantly, hypersegregated schools are characterized by resource inequities that translate into large proportions of inexperienced and underprepared educators and a lack of rigorous coursework, which have negative consequences for students’ academic outcomes as measured by performance on standardized achievement tests and high school graduation rates.

The Changing Face of School Segregation and Magnet Schools

Despite the evidence of the harm of segregated schools, research shows that schools are resegregating at alarming rates. One study found that during the quarter century since the high point of integration in 1988, the share of intensely segregated non-white schools (defined as those schools with fewer than 10% white students) more than tripled, increasing from 6% to 19% of all public schools. And another study found that white and Latino/a students are the most segregated subgroups of students.
A confluence of factors, including the drawing of district boundary lines, district secessions and annexations, and white flight, among other issues, have contributed to deepening contemporary segregation, most often between school districts.

**Limitations of Race-Conscious Approaches to Integration and Magnet Schools**

District demographic changes have been compounded by legal and political developments that have impacted voluntary desegregation programs, including magnet schools and their ability to foster school diversity. For example, legal challenges to race-conscious voluntary desegregation programs, including in the 2007 U.S. Supreme Court case of *Parents Involved in Community Schools v. Seattle School District No. 1*, created uncertainty about the extent to which student race could be considered in developing voluntary desegregation programs. As a result of the widespread uncertainty about ways to promote school diversity, many magnet schools and other desegregation programs departed from their original integrative missions.

Congressional prohibitions on the use of federal funds for transportation—an attempt to reduce busing in the 1970s—have also slowed desegregation. Further, changes to the federal Magnet Schools Assistance Program (MSAP), the primary source of federal funding for magnet schools, have impacted the ability of magnet schools to expand. The MSAP has shifted its selection criteria to consideration of other factors in addition to school diversity and has not added incentives to address the evolving nature of school segregation. In addition, funding of the MSAP has declined in real dollar terms and has not kept pace with the demand for magnet schools nationwide. These changes have negatively affected the expansion of magnet schools as well as magnet schools’ focus and goals.

The issuance of federal guidance by the Obama administration in 2011 sought to provide clarity to states and districts about permissible voluntary integration strategies by outlining legally permissible, evidence-based school diversity strategies, including magnet schools. However, that guidance was rescinded by the Trump administration in 2018, depriving districts of useful information for advancing school desegregation.

In this context of deepening school segregation, it is important to examine the evidence on the conditions in which magnet schools can innovate, improve the quality of education, boost the achievement of students, and promote integrated learning environments.

**Components of Diverse Magnet Schools That Promote Positive Student Outcomes**

Because magnet schools vary so significantly in theme, pedagogy, design, and implementation, it can be difficult for researchers to draw generalized conclusions about their effectiveness. As described in detail in the report, many, but not all, studies show positive effects of magnet schools on student outcomes. For example, a recent synthesis of research on magnet school effectiveness found positive effects in most studies on student achievement, attendance, and graduation rates. “Whole school” magnets and those without selective admissions policies have been generally found to be more effective at integration that supports achievement gains.

Research shows that diverse magnet schools that support positive social and academic outcomes share some common features. These components can be categorized as “first door” components,
which help to bring students from different backgrounds to magnet schools, and “second door” components, which help to foster inclusive environments and promote shared success for students of color within diverse magnet schools, without tracking them into separate classes that depress their opportunities for success.

First door components include:

- incorporation of integration into school design, mission, structure, and goals;
- intentional and ongoing family outreach and engagement;
- implementation of inclusive enrollment practices; and
- provision of free transportation.

Second door components include:

- access to the magnet school curriculum that is culturally responsive and program elements for all students throughout the school;
- culturally responsive curriculum and instruction;
- staff who are prepared to teach students from different backgrounds and cultures in heterogeneous classrooms;
- ongoing professional development opportunities for staff; and
- nondiscriminatory, restorative discipline practices.

Magnet schools need support to effectively implement evidence-based components. The following recommendations outline approaches at the federal, state, and district/local levels that can be taken to create and foster diverse and effective magnet schools.

**Considerations to Help Create and Foster Diverse Magnet Schools**

Diverse magnet schools that incorporate these components can be created and fostered through policies at the federal, state, district, and school levels, including:

At the federal level:

1. **Reinstating federal guidance to states and localities about evidence-based approaches to support school diversity, including magnet schools.** The guidance was a valuable resource for states and districts interested in accessing best practices for advancing voluntary integration efforts. To ensure that states and districts have access to evidence-based best practices, the guidance should be updated before it is reissued so that it can include current research on magnet schools and other school integration efforts to help inform voluntary school diversity programs.

2. **Expanding federal investments in magnet schools and using them to leverage school diversity and student success.** The MSAP was funded at just $107 million in 2020, compared to $440 million provided to charter schools, which research shows are often more segregated. The federal government can increase investment in the MSAP and strengthen the program, including by expanding eligibility for the program and prioritizing applicants that embed evidence-based components, like family outreach, into their school design. Further, the federal government can create another grant program to support local voluntary desegregation programs.
At the state level:

3. **Expanding strategic state and local investments in magnet schools in ways that support school diversity.** States can provide targeted grant funding, similar to the federal MSAP, to districts to create and sustain magnet schools. States can also ensure that state law permits interdistrict transfers that facilitate opportunities for students from surrounding districts to attend magnet schools and allocate funding, as Connecticut has, to support and incentivize student transfers to achieve diversity.

At the district level:

4. **Supporting school-level strategies that promote both integration and student success.** Districts can support first door practices, or those practices that will help to ensure that a diverse group of students walks through the front door of a magnet school together, including:

   - supporting ongoing outreach to diverse families through multiple platforms;

   - supporting schools in implementation of open and inclusive enrollment practices, such as lotteries, interviews, and essays, to attract students of color, English learners, and students from low-income families along with white and more affluent families to magnet schools; and

   - making strategic decisions about school siting and feeder patterns to optimize diversity and accessibility.

At the school level:

5. **Schools can implement second door efforts** that ensure that students within magnet schools are supported in positive, culturally affirming, and inclusive environments, including:

   - focusing on whole school magnet programs, which have been found to better foster diversity than “in-school” programs in otherwise diverse schools, and, to support this approach, supporting and preparing magnet school teachers to deliver instruction aligned with the school theme that is embedded in the curriculum, including through the provision of professional development opportunities;

   - providing innovative and culturally responsive curriculum to all students; and

   - implementing nonexclusionary, restorative school discipline policies and social and emotional learning in schools and supporting educators through ongoing training on implicit bias and anti-racism to aid educators in addressing bias and understanding how it may manifest in the school and classroom.
Introduction

As the nation reckons with the large and growing racial inequalities in health, employment, and education exacerbated by the COVID-19 pandemic, it also confronts a history in which “separate but unequal” education was enshrined in law. Termed “slavery’s sequel” by scholar Carter G. Woodson, segregation—including the persistence of segregated education—continues to stain our democracy. Even decades after “separate but equal” was legally invalidated, racially segregated and unequal educational opportunities are still prevalent in the nation’s public schools, with students of color and students from low-income families disproportionately attending racially isolated and underfunded public schools. The past instructs how imperative it remains to meaningfully integrate our nation’s public schools and expand access to quality equal educational opportunities for all students. Not only do all students gain the academic and social benefits of integrated education, but the nation benefits from an informed and engaged citizenry.

This report examines how magnet schools—one important approach to achieving school integration—emerged among various efforts to combat segregation and how this approach can be strengthened in the years to come. Given the deepening resegregation of the nation’s schools, examining the emergence and efficacy of magnets is both timely and useful, as the nation cannot continue to risk the educational futures of children to segregated and unequal educational opportunities.

This report begins by highlighting the research on the harms of segregation and the benefits of school integration for all students, along with the consequences of the status quo of segregation for students’ short- and long-term educational outcomes and for our democracy. It then explores the federal government’s role in advancing, and at times stymying, the progress of school integration and the implications for magnet schools. It outlines the evidence on magnet school components that are fostering school diversity and positive academic and social outcomes for students. This evidence is instructive of what can be done to promote the implementation and maintenance of magnet schools that are effective at achieving their original desegregative purpose. Finally, drawing upon this evidence, it outlines policy recommendations at the federal, state, and local levels to help to design, implement, and sustain effective magnet schools that can help to foster integrated learning and positive student outcomes.

Why Integration Matters

The negative effects of segregation

Considerable evidence over many decades shows that students graduating from racially segregated, high-poverty schools have poor achievement and long-term life outcomes. A number of studies have found strong relationships between racial segregation and racial achievement gaps; indeed, the racial composition of a school has educational impacts for students even after accounting for socioeconomic status, particularly due to resource inequities characterizing racially isolated schools.2

In a case that challenged school desegregation efforts in Jefferson County, KY, and Seattle, WA, more than 550 scholars signed on to a social science report filed as an amicus brief, which
summarized extensive research showing the persisting inequalities of segregated minority schools. The scholars concluded that:

More often than not, segregated minority schools offer profoundly unequal educational opportunities. This inequality is manifested in many ways, including fewer qualified, experienced teachers, greater instability caused by rapid turnover of faculty, fewer educational resources, and limited exposure to peers who can positively influence academic learning. No doubt as a result of these disparities, measures of educational outcomes, such as scores on standardized achievement tests and high school graduation rates, are lower in schools with high percentages of nonwhite students.3

Data trends over time illustrate both the large reduction in the Black–white achievement gap during the era of desegregation and school finance reforms in the 1970s and early 1980s, when the gap decreased by more than 50%, and the large increase in the gap when desegregation efforts were ended during the 1980s. On the National Assessment of Educational Progress, Black 13-year-olds have gained only 4 points in reading since 1988, whereas white 13-year-olds have gained 9 points, leaving a gap that is nearly 30% larger today than it was 30 years ago.4 Further, a 2019 study of every district in the United States found that racial school segregation is strongly associated with the magnitude of achievement gaps in 3rd grade, and with the rate at which gaps grow from 3rd to 8th grade.5

The academic benefits of integrated education

A substantial body of research has found that racially integrated learning environments have positive impacts on academic achievement for students of all races.6 A synthesis of 4 decades of research demonstrates the academic benefits of attending diverse schools,7 including:

• higher achievement in math, science, language, and reading;
• school climates supportive of learning and studying;
• increased likelihood of graduating from high school and entering and graduating from college;
• higher income and educational attainment;
• increased access to highly qualified teachers and leaders who are less likely to transfer to other schools;
• enhanced classroom discussion; and
• more advanced social and historical thinking.

Another recent research synthesis found that Black student achievement is improved by less segregated schooling, particularly in the earlier grades.8 And for white students attending racially diverse schools, there is no negative impact on academic achievement. For example, in a large-scale study of the effects of court-ordered desegregation on students born between 1945 and 1970, economist Rucker Johnson found that graduation rates climbed by 2 percentage points for every year a Black student attended an integrated school.9 Black students exposed to court-ordered desegregation for 5 years experienced a 15% increase in wages, an 11 percentage point decline in annual poverty rates, and a 22 percentage point decline in the probability of adult incarceration.10
These gains are tied to the fact that schools under court supervision benefited from higher per-pupil spending and smaller student–teacher ratios, among other resources. Alongside the positive outcomes for Black students, court-ordered desegregation caused no harm for white students.

As Johnson’s study suggests, many of the benefits of desegregation occur as Black students gain access to additional school resources. Reinforcing this point, a national study of school finance reforms over 40 years found that, for students from low-income families who had 20% more spent on them over the 12 years of school, graduation rates increased by 23 percentage points, and their rates of adult poverty were so significantly reduced that the gap between them and their more affluent peers was eliminated.\(^\text{11}\)

Magnet schools are generally designed to offer programs that are particularly innovative and often more costly than those of non-magnet schools. These offerings are attractive to many families of color because their goal has been to attain access to quality educational opportunities. In this context, some magnet schools have offered a way to achieve quality resources along with advancing integration goals.

The social benefits of integrated education

While much research focuses on the benefits that accrue to students of color who attend diverse schools, research has also documented the benefits for white students who attend diverse schools. A meta-analysis of more than 500 studies of intergroup contact across many kinds of organizations found that increased intergroup contact can have positive impacts on all groups by reducing prejudice, negative attitudes, and stereotypes.\(^\text{12}\) Another analysis found that the intergroup contact theory operates in schools the same way it does in other environments, increasing positive relationships and friendships across racial lines.\(^\text{13}\)

Furthermore, research shows that students’ exposure to other students from different backgrounds and the new ideas and challenges that such exposure brings leads to improved critical thinking and problem-solving skills. Other benefits of attending diverse schools include increased civic participation in a diverse global economy and increased likelihood of living in integrated neighborhoods and holding jobs in integrated workplaces as adults.\(^\text{14}\)

It follows that students attending diverse magnet schools should also reap the academic and social benefits associated with attending diverse schools, and the evidence, as described below, indicates that this is largely true. However, not all magnet schools have been effective in promoting school diversity. As described in more detail, district demographics along with magnet school design, structure, and focus—particularly the centering of school integration in the school mission and the design for family outreach—matter for school diversity.
Magnet Schools’ Integrative Origins

While magnet schools can vary widely in design and structure, they were developed to fit the federal definition of “a public elementary school, public secondary school, public elementary education center, or public secondary education center that offers a special curriculum capable of attracting substantial numbers of students of different racial backgrounds.” The goal of magnet schools has been to achieve voluntary desegregation through parental choice rather than mandatory student assignment by offering unique and innovative specialized instruction and rigorous academic offerings designed to draw students to the school from various surrounding geographic areas.

One of the first official magnet schools is believed to be McCarver Elementary School in Tacoma, WA, which was established in 1968 as part of a controlled choice program designed to draw families to the school, which offered high-quality instruction and resources. The school still exists—although it has experienced some academic challenges—and serves approximately 420 students, from preschool through 5th grade, from diverse backgrounds. It was followed in 1969 by the William Monroe Trotter School in Boston (also focused on decreasing racial isolation) and others in Buffalo, NY; Houston; Minneapolis; and other major cities. These districts worked to spur integration through innovative offerings. Their distinctive offerings, featuring unique curriculum and teaching methods, continue to draw students to magnet schools located in urban areas. Facing less vocal opposition than race-based mandatory integration measures, magnet schools expanded in the 1960s and 1970s, as they were often identified as remedies in school desegregation cases.

Magnet schools have often been situated in urban districts with the goal of drawing white students into urban centers to attend them. This closely mirrors the federal definition. Magnet schools can also operate to draw students from segregated city school districts to better-resourced suburban districts in whiter, more affluent suburbs, as Boston’s Metco program and a regional choice program in Milwaukee (known as Chapter 220) have done. Enrollment at magnet schools is completely voluntary, but the ability of students to exercise the choice to attend magnet schools depends on a variety of factors, including whether the magnet school operates on a regional basis and offers transportation.

Research underscores a few distinguishing characteristics of magnet schools, including:

- a distinctive school curriculum organized around a specific special theme or method of instruction, such as a specific focus or themed curriculum centering on science, technology, engineering, and mathematics (STEM) or the arts, or a specific emphasis, such as language immersion or specific learning techniques;

- voluntary enrollment elected by students and their parents; and

- choice across neighborhood, and sometimes district, boundaries (magnet school students are often drawn from many attendance zones, unlike other schools to which students are drawn because of the school’s proximity).

Estimates of how many magnet schools are currently operating in the country depend, in part, on how one chooses to define a magnet school. While the definition outlined above is generally accepted, there are varying positions on whether to include in the definition of magnet schools those programs operating within schools (in-school programs) or whether only those magnet
programs embedded in the entire school (whole school magnets) should officially be considered magnet schools. Recent estimates of operating magnet schools range from 3,285 magnet schools (in 2014–15)\textsuperscript{24} to as many as 4,340 magnet schools, educating over 3.5 million students nationwide.\textsuperscript{25} The wide variation in estimates of magnet schools highlights the necessity for a widely agreed upon definition (particularly for policy and research purposes).

The integrative mission at the heart of the original magnet school concept differentiates magnet schools from other forms of school choice. However, due to a variety of legal and political developments—including demographic changes, absence of needed funding incentives to support integrated magnet schools, and limitations on mechanisms to accomplish desegregative goals—many magnet schools have departed from their integrative missions.\textsuperscript{26} However, the demand for magnet schools has remained consistent over the decades. Magnet schools have expanded to comprise the largest sector of choice in the United States.\textsuperscript{27}

These schools are needed more than ever today, given the resegregation of America’s school systems that has been growing ever worse since the 1980s and the emergence of a growing sector of hypersegregated schools that are under-resourced and serve high concentrations of children in poverty.
The Nation's Ongoing History of Segregated Education

The system of segregation that followed on the heels of slavery was legalized in Jim Crow laws and further enshrined in public jurisprudence in the 1896 case of *Plessy v. Ferguson*,28 which granted legal recognition to the “separate but equal” doctrine (also upheld in many places through statute, known as de jure segregation). Segregation was also adopted in practice, known as de facto segregation, and enforced through campaigns of racial violence. Over a century of legal challenges to racially segregated education culminated in 1954’s *Brown v. Board of Education*, in which the U.S. Supreme Court declared that “‘separate but equal’ has no place in public education.”29 But the remnants of this system—still deeply embedded in law, policy, and practice—persist in the form of public schools that are racially segregated and inequitably resourced.

School segregation past and present

*Brown* did not magically desegregate the nation’s schools. Following *Brown*, a variety of tactics, including school district boundary changes, secessions, annexations, and detachments, were used to circumvent desegregation. In the face of noncompliance with desegregation orders by states and districts, significant progress did not occur until the 1960s, when the Kennedy–Johnson administration mobilized all branches of the federal government—legislative, executive, and judiciary—to advance school integration. By the end of 1966, the Johnson administration “had terminated federal funds for thirty-two southern school districts based on their refusal to end racial segregation in schools.”30

Strengthened by passage of the Civil Rights Act of 1964, the Elementary and Secondary Education Act of 1965 (ESEA) and the Emergency School Aid Act of 1972 (ESAA) provided grants to districts that were working to desegregate their schools. They also allowed funds to be used to retrain teachers and develop more diverse and inclusive curricular materials.31 Federal enforcement efforts hastened the pace of school integration.

Federal aid to support magnet schools originated in an amendment to the ESAA. The integrative goals for magnet grantees were clear, as grantees were required to advance the ESAA’s statutory goals of reducing, eliminating, and preventing racial isolation and promoting equity. Also, because magnets were one program funded among other desegregation programs in the law, they were evaluated based on their effectiveness in desegregating schools. Therefore, ESAA-funded magnets were focused on desegregation and not focused on other educational objectives. This changed after the elimination of the ESAA and the creation of the stand-alone Magnet School Assistance Program in 1984 (which added objectives in addition to ones related to desegregation).

The ESAA program helped to expand magnet schools. In 1976, the first year that the ESAA provided funding for magnet schools, 14 school districts applied for funding. Four years later, over 100 districts submitted applications.32 Federal support played a significant role in the expansion of magnet schools. Between 1982 and 1992, the number of magnet schools more than doubled, to 2,453, and the number of students served in magnet programs more than tripled, to 1.2 million.33 By the turn of the century, there were more than 3,000 magnet schools with explicit desegregation standards educating about 2.5 million students.34

Desegregation was also supported by Title IV of the Civil Rights Act, which issued regulations and authorized the then–U.S. Department of Health, Education, and Welfare to investigate complaints
Racial achievement gaps declined substantially during the 1970s and early 1980s, showing that desegregation, in combination with school funding reforms, could promote improved educational outcomes. Indeed, from 1964 to 1969 and during the 1970s and 1980s, all three branches of the federal government worked collaboratively to advance desegregation. If the pace of reform had continued as it had during that time, the so-called achievement gap could have been fully closed by the beginning of the 21st century.\textsuperscript{39}

**The Federal Retreat and School Resegregation**

The 1969 election of President Richard Nixon signaled the initial retreat of the executive branch from staunch support of school integration efforts. Nixon advanced an anti-integration agenda that included ending administrative enforcement of desegregation mandates and changing the position of the Department of Justice from “proactive enforcement” of desegregation to “passive acceptance” of segregation\textsuperscript{40}.

The 1971 U.S. Supreme Court decision in *Swann v. Charlotte-Mecklenburg Board of Education* significantly hampered the efforts of Nixon and other anti-integrationists because it confirmed the federal judiciary’s equitable powers to act to remedy past school segregation, including through approval of local plans involving busing as a mechanism to achieve integration.\textsuperscript{41}

But Nixon, with the cooperation of the legislative branch, responded to *Swann* with prohibitions on use of federal funds to support transportation for school integration. Nixon supported the inclusion of anti-busing language in the reauthorization of the ESAA grant program for districts working to desegregate public schools, prohibiting use of funds for busing to “overcome racial imbalance.”\textsuperscript{42}

Opposition to busing was undergirded by racial animus, reflecting that deep racial divisions existed in Congress and throughout the country. Prohibition on federal funds for busing was further solidified through passage of an amendment, Section 426 of the 1974 General Education Provisions Act, barring use of federal funds for the transportation of students or teachers (or the purchase of equipment for such transportation) for school desegregation. This language was only recently removed in the fiscal year 2021 appropriations cycle.\textsuperscript{43}

Nixon also departed from federal court precedent on desegregation, and his U.S. Supreme Court appointees decided the first divided desegregation cases following the *Brown* ruling. The Court was
reluctant to remedy any segregation it deemed de facto or resulting from private choices and not enshrined in law in many subsequent cases. Among the most significant of these cases was 1974’s *Milliken v. Bradley,* in which the U.S. Supreme Court invalidated a school desegregation program that included busing for Detroit public schools and the surrounding majority-white suburbs. In Detroit, as in many other Northern cities, white flight resulted in many urban centers comprised mostly of Black people. As a result, measures like busing were introduced to transcend the residential segregation resulting from white flight. In holding that the white suburbs did not have to be included in the desegregation plan because they did not intentionally cause the segregation of Detroit’s public schools, the Court effectively permitted circumvention of school desegregation through white flight to surrounding suburbs. Essentially, the Court ruled that racially segregated schools that resulted from individual citizen residential choices did not amount to discriminatory state action.

The legal cover afforded to “white island districts” has allowed them to persist, while students in urban centers like Baltimore and Detroit attend schools as segregated as those of the pre-*Brown* era, characterized by high teacher turnover, limited curricular offerings, and crumbling facilities. Other divisive policies, such as discriminatory housing policies that fortified racially segregated neighborhoods and the drawing of district boundary lines in racially divisive ways, have contributed to the endurance of segregated schools.

Retrenchment of segregation was deepened further during the Reagan administration. The administration favored voluntary school desegregation remedies and opposed race-conscious or mandatory remedies, instead deferring to state and local control and reducing federal enforcement efforts. Funding for integration efforts, including magnet school funding, was struck a significant blow when the Reagan-backed Omnibus Budget Reconciliation Act of 1981 was passed, terminating funding for the ESAA. The elimination of the ESAA signaled federal disinvestment from supporting state and local school desegregation efforts.

However, funding for magnet schools was restored through the creation of the Magnet Schools Assistance Program (MSAP) as a stand-alone program in 1984 to support magnet schools as a strategy that districts could invoke to further desegregation aims with the imprimatur to expand parental choice in education. The MSAP provides federal funds to assist in the desegregation of public schools by supporting the elimination, reduction, and prevention of minority group isolation in elementary and secondary schools with substantial numbers of minority group students. The MSAP played a role in the initial expansion of magnet programs.

Once again, additional limits on how integration could be pursued were imposed during the George W. Bush administration. Upon taking office, the administration diverted the focus of the Department of Education’s Office for Civil Rights away from k–12 desegregation enforcement. This followed a series of legal challenges in the 1990s to magnet schools seeking to advance desegregation, including the Supreme Court case of *Missouri v. Jenkins,* in which the Court struck down a Kansas City interdistrict magnet plan, finding that the surrounding districts were not responsible for the district’s segregated schools. Following these decisions, the key mechanisms for diversifying magnet schools—specifically, intentional desegregation goals and accountability for meeting those goals—were undermined and civil rights policies were often abandoned.

Further, the Bush administration eliminated desegregation orders in nearly 200 districts, and without court oversight, segregation deepened. Efforts to voluntarily combat segregation were hampered by the 2007 case of *Parents Involved in Community Schools v. Seattle School District No. 1 (Parents Involved).*
Limitations on Race-Conscious Approaches to Integration

The Bush administration reversed the Department of Justice’s position in the 2007 case of *Parents Involved*, in which Bush’s Department of Justice argued in its brief that race should not be considered as a factor in voluntary programs designed to achieve racially integrated education.\(^{54}\) *Parents Involved* is distinct from other desegregation cases in that it concerned the extent to which race could be used in voluntary programs not under court order to remedy past discrimination. Court-ordered desegregation programs have wide latitude to use race in devising strategies to dismantle segregation, but the Jefferson County, KY, and Seattle programs challenged in the case were not under court order at the time they were challenged (although Jefferson County’s program began under a court order and continued on a voluntary basis). Voluntary programs do not have similar latitude, and *Parents Involved* fueled more uncertainty about this issue. The case was consequential for magnet schools, which can be used in both court-ordered and voluntary programs, as well as for other integration programs.

The Court recognized that reducing racial isolation and achieving racial diversity were compelling government interests, but it divided over the circumstances under which individual student race could be considered in making student assignments. The Court concluded that districts can consider student race broadly (without relying on individual student race in making student assignment decisions) in voluntary desegregation programs if they have a compelling interest for using student race and can adopt plans narrowly tailored to achieve that interest. The Court also noted that districts could adopt general race-neutral policies to encourage a diverse student body.\(^{55}\) Chief Justice John Roberts advocated for a colorblind approach to overcome racism.

Justice Anthony Kennedy emphasized that “the decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds.”\(^{56}\) He underscored that mechanisms may be used that do not lead to different treatment based on classifying individual students by race, including race-neutral and general policies to encourage diversity. Race-neutral approaches “allow school districts to be aware of or to consider the racial or ethnic outcomes in developing plans so long as no specific student is assigned to a school based on his or her individual student race.”\(^{57}\)

Policies that do not rely upon individual student race, Kennedy noted, are consistent with the Court’s reasoning. Kennedy outlined permissible approaches to fostering school integration, including strategic school siting decisions, drawing attendance zones with general recognition of neighborhood demographics, allocating resources for special programs, and targeting recruitment for diverse students and faculty. For example, a magnet school enrollment or student assignment policy that considers a student’s geographic location or socioeconomic status may be considered a race-neutral approach that is likely to result in fostering student diversity.

Kennedy outlined permissible approaches to fostering school integration, including strategic school siting decisions, drawing attendance zones with general recognition of neighborhood demographics, allocating resources for special programs, and targeting recruitment for diverse students and faculty.
However, widespread uncertainty followed the ruling—compounded by the issuance of a 2008 “Dear Colleague” letter by the Bush administration narrowly interpreting the ruling and failing to recognize the Supreme Court’s conclusion that districts have a compelling interest in promoting school integration and avoiding racial isolation. It also failed to acknowledge the evidence-based approaches to advance these interests—like magnet schools—outlined in Justice Kennedy’s concurrence. This guidance contributed to the lack of clarity about the extent to which (and even whether) race could be considered in making student assignment decisions to voluntarily achieve integration. As a result, many advocates “scrambled to devise and identify plans they believed would pass constitutional muster, knowing that failure to do so would effectively concede the end of desegregation in our nation’s schools.”

The confusion has impacted the ability of many schools, including magnet schools, to voluntarily adopt or maintain integration goals, despite the fact that Kennedy’s opinion made clear that the means for admitting students had to be race-neutral, but not the goal itself. Many have grappled with how magnet schools can meet their racial diversity goals through race-neutral means. For example, “In Connecticut … school officials who help manage the state’s magnet school program worry about losing funding if they are unable to maintain the required racial balance.”

In an effort to provide clarity on the decision to states and districts, the Obama administration issued guidance in 2011 outlining a range of evidence-based strategies for reducing racial isolation and fostering racial diversity, including the creation of magnet schools and other strategies consistent with Kennedy’s concurring opinion.

The Trump administration rescinded the Obama administration’s guidance on school diversity in July 2018 and replaced it with the post–Parents Involved Bush-era policy document referenced above. The Trump document stated, “The Department of Education strongly encourages the use of race-neutral methods for assigning students to elementary and secondary schools.” While guidance is nonbinding and does not have the effect of law, it often sends a message about an administration’s position on an issue and sometimes includes evidence-based strategies and resources, both of which can influence state and district policies and practices. The Trump administration’s rescission of the Obama guidance signaled a federal retreat, once again, from desegregation efforts. It compounded misunderstanding about the extent to which race can be considered in crafting school integration programs and policies, and it deprived states and districts of the valuable resource of evidence-based strategies for fostering diversity.

In the face of legal challenges and uncertainty, many magnet schools—along with other schools—have retreated from their original race-conscious integrative missions and proactive diversity efforts. This does not mean that the commitment to diversity does not exist, but rather that clarity on how to achieve it without running afoul of the law remains elusive. In response to legal challenges, shifting education priorities, and MSAP priorities, among other influences, some magnets have focused more on other factors, such as socioeconomic diversity, in addition to, or in lieu of, racial diversity. While socioeconomic status and other factors are important considerations, they are not interchangeable with the integrative purpose of magnet schools.
Segregation Today

As a result of these actions, about half as many Black students now attend integrated schools than was the case in the 1980s. One study found that, on average, a Black student attends a school in which two thirds of his or her classmates (64%) are from low-income families, compared to white and Asian students who, on average, attend schools in which classmates from low-income families comprise 57% and 59% of their peers, respectively. Since 1988, the high point of integration, the share of intensely segregated non-white schools (defined as those schools with only 0–10% white students) more than tripled, increasing from about 6% to 19% of all public schools. (See Figure 1.) A national study of districts and charters found that, nationwide, more than one third of all Black and Latino/a students attend schools that are more than 90% non-white.

Figure 1
Percentage of Intensely Segregated Schools, 1988–2013

Conversely, a large proportion of white students attended overwhelmingly racially isolated schools, with more than one third attending schools that are 90–100% white. White and Latino/a students are the most segregated subgroups of students, with white students attending, on average, a school in which 69% of the students are white, and Latino/a students attending a school in which 55% of the students are Latino/a. In fact, “segregation has been increasing steadily, creating a growing number of apartheid schools that serve almost exclusively students of color from low-income families.” For example, 74% of Black students attend majority non-white schools (50–100% minority), and 15% of Black students and 14% of Latino/a students attend “apartheid schools” in which white students make up 0% to 1% of the enrollment.
Further, a 2016 study found that a growing percentage of k–12 public schools in the nation are hypersegregated, with largely Black and Latino/a student populations and students from low-income families. This is significant, as another study reviewing 8 years of data from all U.S. public school districts found that racial segregation appears to undermine achievement, in part, because it concentrates minority students in high-poverty schools, which are, on average, less effective than lower-poverty schools. These high-poverty schools tend to be under-resourced. A 2018 study found that, nationally, the highest poverty districts in our country receive about $1,000 less per student than the lowest poverty districts. These funding gaps are even more significant when the additional educational needs of students from low-income families are considered, with the same study estimating that it costs a district 40% more to educate a student in poverty.

The disparities are even more stark when race is considered. A 2019 study found that districts serving mostly students of color spend on average $2,200 less per pupil than whiter and wealthier districts do. These resource inequities are undergirded by the lower property values prevalent in lower-wealth districts, where many students of color have been concentrated. Consequently, higher-wealth, predominantly white districts are able to garner more revenue for education, even when imposing lower tax rates, due to higher property values.

Even when states seek to equalize disparities by providing more funding to lower-wealth districts, it has been difficult to counteract the effects of long-standing patterns of segregation and resource inequities between districts to completely mitigate the disparities. This is why a primary goal of desegregation is not just about changing the racial composition of schools, but also about expanding access to quality resources. Or, as some scholars phrased it: “Sitting next to a white student does not guarantee better educational outcomes for students of color. Instead, the resources that are consistently linked to predominantly white and/or wealthy schools help foster real and serious educational advantages over minority segregated settings.”

Of course, changing demographics, including movement of families of color to the suburbs and white families returning to city centers, has impacted deeply entrenched residential segregation, but the relationship between metropolitan school segregation, interdistrict disparities, and residential segregation remains a significant one. Particularly because students are often assigned to schools in their local communities, neighborhood demographics can dictate school demographics. Research demonstrates that, as a result, racial composition differences across district boundary lines contribute more to segregation than differences within them.

District boundaries and increasing segregation between districts have made it more difficult for magnet schools to draw integrated populations, as many of them were designed to focus on segregation within a district rather than between districts. For example, when Prince George’s County, MD, attempted to launch a magnet program, because the district was composed mainly of
students of color, the district's magnet schools remained predominantly Black even though racial balance guidelines were implemented. This phenomenon is not isolated to Prince George's County, as many districts are racially isolated, as described earlier in this report.

Despite deepening school segregation and recognition of the mechanisms that fuel it, efforts to integrate schools continue to be met with opposition and even apathy, as scholars have observed: “The country has retreated from the belief that segregation itself is harmful, quietly settling for an education policy regime that accepts segregated schools as a given.”

Contemporary segregation has persisted. However, efforts have been waged to desegregate schools, and magnet schools have been a key part of this effort.
Magnet Schools Today

Magnet Schools in the Context of Contemporary Segregation

As discussed above, segregation among districts has material consequences, including racial isolation accompanied by resource inequities, with white and wealthier districts generating more per-pupil spending than districts composed mainly of students of color and students from lower-wealth families. In the resegregated context of today’s schools, regional interventions designed to transcend residential segregation are particularly important for promoting integrated education.

Although most magnet schools are established by school districts, others are founded on a regional basis. For example, Connecticut’s regional magnet schools have operated for about 20 years, with magnet school enrollment comprising about 8% of the state’s total district public school enrollment.\(^8\) Magnet schools in Connecticut emerged as a result of a significant state supreme court desegregation case, Sheff v. O’Neill,\(^8\) which invalidated the drawing of district boundary lines that had segregating effects on schools. The state turned to magnet schools as a way to address the court’s concern. Today, the state has about 95 magnet schools—including more than 50 interdistrict magnet schools, serving 44,495 students—\(^8\) in regions including metropolitan Hartford, New Haven, and Waterford. The state’s magnets have both supported desegregation and achieved positive results for students, with 7 of the state’s 19 Blue Ribbon public schools being magnet schools.\(^8\) (See “Interdistrict Magnets: A Snapshot of Hartford, CT,” below.)

Interdistrict Magnets: A Snapshot of Hartford, CT

Interdistrict programs, like the magnet program in the Hartford, CT, region that resulted from the Sheff litigation, have proven successful in drawing diverse students to magnet schools. The program encouraged two-way transfers between Hartford schools and those of surrounding districts. Families can now select from 44 magnet schools in addition to the Open Choice program (for 28 non-magnet districts) in the Greater Hartford region.\(^8\) Hartford’s program relies upon cooperation and coordination between the urban and suburban districts to help facilitate the transfer of students and sustain investments in the program.

Strategic investments have been key in helping to build and sustain the program, including investments of $1.4 billion in school construction over the first 10 years, per-pupil grants to receiving districts to help make the interdistrict transfers attractive and affordable, coverage of transportation costs for out-of-district pupils (up to a maximum of $2,000 per student), and provision of an additional $350,000 for marketing campaigns through its Regional School Choice Office.\(^8\) The community engagement investments are particularly robust and aid in placement of diverse students within the magnet schools. The program also engages in targeted marketing to help attract diverse students; a 2012–13 study showed that magnet school enrollments in the state were more equally distributed across racial subgroups than statewide enrollment.\(^8\)
And the program has demonstrated positive outcomes. A study of the program that focused on estimating the effects on achievement found that attending an interdistrict magnet high school had positive effects on both mathematics and reading achievement of central city Hartford students. The authors concluded that “interdistrict magnets are largely meeting their mission of providing learning environments that are both more diverse and more conducive to academic achievement than would otherwise be available to students in Connecticut’s central cities.” City magnet students reported more positive intergroup relations with less racial tension and more feelings of closeness to students of other races, with magnet students expressing stronger future multicultural interests. Other research also showed smaller achievement gaps between student racial subgroups compared to state averages.

A continuing challenge of Hartford’s popular magnet program is that funding has not enabled the program to expand to meet the demand for spots in the region’s 20 magnet schools. Additional investment would enable magnet schools like those in the Hartford region to better meet demand.

Omaha, NE, demonstrates another example of an open enrollment plan designed to address deeply entrenched housing segregation. After failed attempts to implement strategies to promote school diversity, an interdistrict desegregation program—the Learning Community—was launched. The regional governance system, the Learning Community Coordinating Council (LCCC), was tasked with supporting high-poverty schools. The program included three major changes for districts: regional governance, tax-base sharing and resource distribution, and a diversity plan. The program allowed for voluntary transfers to the 11 Learning Community school districts, prioritizing students who enhanced the program’s socioeconomic diversity for placement. The initial Open Enrollment plan funded districts to establish magnet schools or focus schools (which are themed schools similar to magnet schools that draw students from 11 school districts). This plan also funded transportation to increase diversity, enrolling thousands of students each year, demonstrating wide appeal for many parents. Three years of LCCC evaluations compared the performance of Open Enrollment students on 3rd- to 8th-grade reading and mathematics assessments to their resident counterparts. In low-poverty schools, Open Enrollment students who were eligible for free or reduced-price lunch scored dramatically higher than peers in high-poverty schools in both reading and mathematics in all tested grades. While the program has changed and continues to be impacted by state and local political considerations, there are some features of the program that direct resources into high-poverty and traditionally marginalized communities. The program has been cited as a successful approach that should be considered in diversity strategies, including mobility policies such as interdistrict magnet programs that enable movement across district boundary lines, as well as in-place investments.

The legal and political challenges that have impacted the regional programs in Connecticut and Nebraska illustrate the significance of context for integration efforts like magnet schools. In particular, the influence of the federal legislative, judicial, and executive branches has been significant for both progress and regress of school integration efforts. As described below, magnet schools have evolved in response to these legal and political influences and, in some cases, have deviated from their integrative origins. However, these legal and political influences need not mean that magnet schools remain detached from their original desegregative mission. Instead, these developments can provide a blueprint for how the federal government—in cooperation with state and local governments—can support integrative magnet schools and how magnet schools can reconnect with their missions.
Magnet Schools in the Context of Legal and Political Reversals

Magnet schools post—Parents Involved

While magnet schools had endured legal challenges preceding the Parents Involved ruling, the legal uncertainty surrounding the Parents Involved decision had a substantial impact on magnet schools and their historic race-conscious approach to fostering diversity. District recipients of magnet school funding reported federal administration reviews of their student assignment policies that were critical of magnet schools’ integration efforts using race as a criterion for admission.

These federal developments, coupled with other long-standing legal challenges, influenced the shift of many magnet schools’ objectives away from their integrative missions. As a result, many magnet school objectives focused on academic achievement or other outcomes, rather than on racial integration. Some of these objectives were first added after the Nation at Risk report in 1983. Other iterations of the MSAP, including those that followed the passage of the No Child Left Behind Act of 2001 (a version of the Elementary and Secondary Education Act), expanded grantee focus and obligations over the years—such as adding several components in addition to reducing racial isolation—and have gradually tempered the program’s original focus on magnet schools’ efficacy in desegregation.

The MSAP’s selection criteria have shifted to include factors beyond fostering interaction among students of different social, economic, ethnic, and racial backgrounds and improving the racial balance of students in magnet schools. The Secretary of Education reviews applicants to determine (among other things) how applicants will carry out a high-quality educational program that will substantially strengthen students’ reading skills; their knowledge of mathematics, science, history, geography, English, foreign languages, art, and music; or their vocational, technological, and professional skills.

Currently, the program and its requirements are outlined in Title IV of the Elementary and Secondary Education Act (ESEA). The most recent iteration of the law, the Every Student Succeeds Act (ESSA), made a few changes to the MSAP, including:

- extending the grant term from 3 years to up to 5 years;
- increasing the cumulative grant award from $12 million to $15 million for each grantee;
- permitting grantees to use funds for transportation as long as the funds are sustainable past the grant period and a significant portion is not used for student transportation; and
- prioritizing the creation and replication of evidence-based magnet programs and magnet schools that seek to reduce, eliminate, or prevent minority group isolation by taking into account socioeconomic diversity.

The program has not added incentives to address school segregation’s evolving nature. For example, the program could include incentives for districts to implement interdistrict approaches. The MSAP could replicate incentives included in legislation recently reintroduced in the House of Representatives, the Strength in Diversity Act, which would provide federal funding to
support voluntary local integration efforts, such as interdistrict programs. The MSAP’s current shortcomings not only limit the focus of grantees on furthering desegregation, but also undermine the program’s overall effectiveness in fulfilling its original purpose.

Limited funding has also restricted the ability of the program to fulfill its purposes. Over the past 30 years, the federal MSAP has granted $3 billion to districts to create or significantly revise magnet schools. In real dollar terms, this represents a decrease in funding over time. Throughout these years, the small allocation for magnet schools has been far less than the demand from the field for start-up and expansion funds. In 1984, the MSAP was funded at $75 million. Current funding for the program is $109 million, which is less than a quarter of current funding for charter schools, which have been shown to be more segregative. The National Coalition on School Diversity distributed a letter to Congress for the fiscal year 2022 appropriations cycle requesting that the program be funded “at least” at $500 million. The current funding represents a relatively small amount of federal support given the important role magnet schools can play in creating more integrated education settings.
Key Findings: Diversity and Student Outcomes in Magnet Schools

Given the wide-ranging expectations for magnet schools to innovate, to improve the quality of education, to boost the achievement of students, and to desegregate learning environments, it is important to examine what we know about the conditions under which a variety of these goals have been achieved.

Considerations for Magnet School Diversity: “Whole School” Magnets and District Demographics

Research shows that magnet schools can effectively foster school diversity and positive outcomes, but magnet school design and implementation matter for success. Specifically, research demonstrates those magnet schools that most effectively foster school diversity share key features, including the incorporation of integration into school design, mission, structure, focus, and goals; intentional and ongoing family outreach and engagement; implementation of inclusive enrollment practices; and provision of free transportation.

In addition, whole school magnets in which all students in the school participate in the magnet program can be more diverse than in-school magnet programs. This does not mean that in-school magnet programs cannot be diverse or that some do not strive to be. But data show that tracking can occur in these programs, particularly when schools are designed to recruit white students by offering an in-school magnet program, while non-magnet students in the school are served in different programs. Not surprisingly, this approach can result in a situation in which students within the magnet programs are predominantly white, while those in the traditional programs are taught separately, although there may be some elective classes such as band, art, or physical education that enroll a more diverse group of students. This practice of tracking students into magnet programs is consistent with the widespread practice of tracking in public schools, in which white students are tracked into higher-level courses and Black students and other students of color are relegated to lower-level courses. This practice deepens segregation and the unequal allocation of curricula and teaching resources within schools.

One example of this challenge is found in Montgomery County Public Schools (MCPS) in Maryland. Like many other districts, MCPS developed magnet programs in the 1970s to maintain diversity and avoid racial isolation, but it later adopted competitive criteria for some of the magnet programs, identifying them as limited to “gifted and talented” students based on standardized test
scores. This practice negatively impacted diversity within the magnet programs. Consequently, a study found significant racial and socioeconomic disparities, with low numbers of students of color and students from low-income families being accepted and enrolled in academically selective programs in the district. Further, the study found that even with the placement of selective programs—like magnet programs—within otherwise diverse schools, “in the absence of targeted mechanisms to integrate the program participants and non-participants, ... [the magnet initiative] created conditions of within-school separation.” This phenomenon is not isolated to MCPS; similar outcomes have emerged from several other districts. The district has since implemented changes to its selective entrance practices, shifting from an application-based process that was largely parent driven to universal screening, which means that more students have been screened for admission than in prior years. School officials note that the selection process is “name blind” and “race blind,” but these enrollment changes have garnered backlash, including litigation on behalf of Asian American students that alleges that changes to the programs’ enrollment process have disadvantaged Asian students by reducing their representation in the programs. Like many other districts, the MCPS example demonstrates that changes to enrollment practices can be difficult to implement. The concluding section of this paper offers some considerations for district leaders and policymakers as they approach the implementation and maintenance of diverse and effective magnet schools.

Another important consideration is magnet school geographic context, including existing district demographics, which can impact school diversity. For example, a study examining data from the 8th-grade wave of the Early Childhood Longitudinal Study found that, while magnet schools did not lead to increased stratification of students of color, levels of integration were similar to those in traditional public schools, after controlling for district racial composition. This finding could be interpreted to mean that magnets did not increase integration; however, it could also be interpreted to mean that magnets—if created in racially isolated neighborhoods within larger city or county districts, as is often the case—increase the diversity of schools in their neighborhoods to the levels found in the district as a whole.

A study of Prince George’s County, MD, which attempted to implement a magnet school program whose school demographics reflected the racial composition of the school system, illustrates the challenges of district demographics in many communities. Because, due to white flight, the district was composed primarily of students of color, students often ended up assigned to racially homogenous schools even in the context of a magnet school program. This example demonstrates that it is important to consider the district racial composition when creating a magnet school program, particularly because an increasing share of racial and ethnic segregation in American public schools occurs between, not within, school districts. For a district that has become more racially isolated over time, like Prince George’s County, an interdistrict approach that draws students from several surrounding districts, as described more fully in the next section, may be a more viable option to achieve diversity.

Some design features in the Prince George’s County initiative did reduce segregation. The study found that magnet schools were more integrated at the classroom level (particularly for honors and mathematics classes) than was generally the case in other schools, with increased classroom-level diversity noted between white and Latino/a students. At the same time, it concluded that, while Black students were not disadvantaged in magnet schools compared to traditional public schools,
their access to these higher-level courses did not increase to the same extent, and it urged more focus on extending diversity to the classroom level for Black students.\textsuperscript{116}

These contextual considerations are consistent with other research noting that magnet school design, mission, structure, focus, and goals have profound implications for magnet school effectiveness in fostering and sustaining school diversity.

**Magnet Schools and Student Social and Academic Outcomes**

Because magnet schools vary so significantly in theme, pedagogy, design, and implementation, it can be difficult for researchers to draw generalized conclusions about their effectiveness. As we describe in this section, many, but not all, studies show positive effects of magnet schools on student outcomes. A recent synthesis of research on magnet school effectiveness found positive effects in most studies on student achievement, attendance, and graduation rates, particularly for secondary magnet schools and for those that admit students by lottery. Positive results were found across large-scale national studies, studies of statewide programs, and local analyses using rigorous comparison group designs.\textsuperscript{117} Researchers noted that it is unsurprising to find diverse conclusions in studies of the effects of magnet schools on student achievement, given the different themes, student populations, designs, and implementation contexts in which they operate.

Consistent with the findings of this meta-analysis, research shows particularly positive effects at higher grade levels. After controlling for a variety of student-level factors, a study tracking the outcomes of 48,561 Los Angeles Unified School District high school students found that the district’s magnet program students graduated at much higher rates than non-magnet students: 73% of students attending a magnet high school graduated, compared to 43% of students not attending a magnet high school.\textsuperscript{118}

Similarly, a study of Hartford’s interdistrict magnet high schools found high percentages of students meeting or exceeding goals on state achievement exams and reporting positive academic attitudes and behaviors.\textsuperscript{119} The study concluded that the state’s magnet high schools provide academic environments that support student learning. According to the Capitol Region Education Council (CREC), Black and Latino/a students who attended CREC Magnet Schools outperformed their peers across the state in both math and reading on the Connecticut Mastery Test (CMT) and Connecticut Academic Performance Test, with “76.4% of black Hartford resident students attending a CREC Magnet School [achieving] proficiency in reading on the CMT, compared to 64.5% of black students statewide.”\textsuperscript{120}

Another study of Connecticut magnet high schools found that magnet students were also exposed to academic climates and peer support that fostered higher educational expectations.\textsuperscript{121} A national study found that both student achievement levels and rates of gain in achievement were higher in
magnet schools than in regular public high schools or private schools for similar students. One survey also found higher rates of teacher retention in integrated magnet schools, which also has positive effects for student outcomes.

The most available measure of academic achievement in these studies is primarily the limited assessments of mathematics and language. Yet many magnet schools offer innovative educational experiences outside of the traditional curriculum focused on mathematics and language—including themes like aeronautics—that would be even more appropriate outcomes for evaluating their programs. A study found that students attending magnet schools reported more positive peer influences of adults in their schools regarding college expectations, better intergroup relations, and less racial isolation, compared to student reports from traditional city or suburban schools studied. Students also reported experiencing strong norms supporting peer achievement.

The few studies that found little or no effect of magnet schools on student academic outcomes were often examining schools or programs with selective enrollment. As a result, after controlling for students' initial ability, the studies concluded that the magnet program did not show a positive additional influence on achievement. By contrast, a study of San Diego magnet school students found that acceptance via lottery into a nonselective magnet school was linked to positive gains in mathematics achievement for students extending 2 and 3 years into the program.

Two studies controlling for the self-selection bias that may operate in schools of choice found no significant differences in student achievement between magnet high schools and comprehensive public high schools serving similar students. Selection bias and the extent to which it may impact magnet school student outcomes (just as it may impact student outcomes in other schools) presents an area for further study and analysis.

It is important to understand what differentiates successful magnets from less successful schools and programs. A recent meta-analysis of research on the effectiveness of 24 magnet schools located in 5 districts across 4 states in promoting positive student outcomes explored these differentials in student outcomes. The study used a set of rigorous statistical strategies to construct comparison groups of matching students for each school within its district. In addition to finding widely variable outcomes across schools, the study also documented that the variation in school effects was explained by factors influencing program implementation and support. In particular, programs that had high fidelity of implementation and that were able to access strong support from magnet resource teachers had much stronger outcomes than those that struggled to implement their plans and to gain the instructional support they needed. In the cases in which schools struggled to get resource teacher support, Black students suffered the most, reinforcing the need for educator training to serve diverse students well.

As mentioned previously, magnet schools differ significantly in design, implementation, and student population, which makes comparisons complicated. The next section examines components of magnet schools that research has identified as important for supporting both their integrative purposes and their ability to support students' learning successfully.
Components of Effective Magnet Schools

As noted above, research shows that when magnet schools receive assistance from their districts, they tend to be well implemented and to support student learning more effectively. One study categorized these components as “first door” components—features that help draw diverse families to magnet schools—and “second door” components—those that foster inclusiveness and that help retain students within diverse magnet schools. These features are described in further detail below.

First door components

Integration embedded into school design, mission, structure, focus, and goals: Magnet schools with integrative missions incorporated into their school design, structure, and goals have been found to be more diverse than magnet schools that fail to intentionally incorporate diversity into school design, structure, and goals. This is important, as a survey of hundreds of magnet school leaders found the highest percentages of one-race magnet schools were those that did not have desegregation goals. This is exemplified in several prominent districts that retreated from their race-conscious integration goals, including Buffalo, NY; Charlotte, NC; and San Francisco, CA, and experienced declining school integration as a result. Another example is Boston Latin School, an exam school, which in 1995 boasted that one out of every three students was Black or Latino/a. But after legal challenges resulted in the removal of racial/ethnic goals from the school’s enrollment criteria and in changes to the enrollment process (including abandoning set-asides for students of color), that ratio fell to one out of every six students being Black or Latino/a in 2005.

Like other schools, magnet schools have been impacted by the changing demographic and legal landscape. The first federal report on magnet schools receiving federal funds through the MSAP (districts under court-ordered desegregation), released in 1983, found that more than 60% of magnet schools studied were “fully desegregated,” with the sample reporting substantial progress on diversity. But following release of many districts from federal court oversight, that progress was reversed. The 1996 report found only 42% of the MSAP programs were operating under desegregation goals, and the 2003 study reported 57% of magnet programs making progress in desegregation, attributing rising rates of segregation to pressure to implement race-neutral approaches to diversity.

Since then, as many more districts have become majority minority, it has become difficult to diversify schools using within-district strategies for that reason as well, making interdistrict strategies more important.

It is important for magnet schools to incorporate diversity in school design, mission, structure, focus, and goals and for states and districts to design programs in ways that can accomplish this diversity using both across- and within-district approaches. It is also important to implement accountability mechanisms, such as regular evaluation and recommitment to diversity, to prevent straying from the core, historic magnet goal of integration. This may mean targeted recruitment strategies both within and, often, across districts (e.g., outreach and transportation), as well as drawing diverse students via lotteries for student assignment and developing strong academic and social supports for keeping students enrolled.

Family outreach and engagement: Magnet schools cannot foster diversity unless diverse families are aware of their existence and are able to gain access through streamlined application
processes, including support in completing the application, and readily available transportation. Research finds that conducting outreach and disseminating information to a wide range of families is a critical component of recruiting diverse students. One study found that schools with outreach to prospective students were more likely to have experienced increasing integration over the last decade, while one quarter of those without special outreach were substantially segregated schools.

Magnet schools that employ ongoing targeted outreach to diverse families have been found to be more successful in fostering and sustaining school diversity. A 2008 study analyzing the survey results of several hundred magnet school leaders found that magnet schools with targeted outreach to prospective students were more likely to have experienced increasing integration for the preceding decade, while one quarter of those without special outreach were one-race schools. Such outreach is most effective when conducted through multiple platforms, such as social media, print, television, and radio. These outreach efforts are also most effective when accompanied by application assistance. Having a streamlined, easy-to-manage application process is important, as is having transportation plans that make accessing the school a feasible option for families outside the immediate neighborhood.

**Inclusive enrollment practices:** Evidence demonstrates that magnet schools with inclusive enrollment and student assignment practices, like lotteries, promote desegregation and equity more effectively than those with competitive enrollment practices. While the federally funded MSAP includes a preference for recipients to use inclusive enrollment approaches, many magnet schools do not implement inclusive practices, and they are not incentivized to do so.

Data from a survey of several hundred magnet school leaders found that competitive enrollment practices, like tests or grade point averages, are associated with less integrated magnet schools. For example, Maryland’s Montgomery County—as mentioned previously—experienced racial disparities inside schools as a result of highly competitive test-based enrollment policies for its magnet programs. Heavy reliance upon teacher recommendations, which may at times be biased, may sometimes also deter diverse enrollment in magnet schools. The survey also revealed that magnet schools relying upon grade point averages for student assignments comprised the largest share of schools that were experiencing decreasing integration. Buffalo, NY, one of the earliest innovators of magnet school programs, experienced increased segregation when competitive enrollment practices, like cognitive skills tests and end-of-grade tests, were instituted in its magnet schools.

In adopting more inclusive enrollment policy practices, many schools must confront biases about the intellectual abilities of Black students and other students of color historically excluded from some magnet schools. These biases also include beliefs that diversifying schools will cause achievement to plummet (which is refuted by the research outlined herein on the benefits of diversity for all students). Confronting this kind of bias is exemplified in the recent effort of a Black student in Virginia who pleaded with her school board to encourage the adoption of a lottery system to bolster enrollment of Black and Latino/a students at her STEM-themed magnet high school. The school board ultimately rejected the adoption of a lottery but eliminated the entrance exam and $100 application fee.

Research shows that inclusive enrollment and student assignment practices, like lotteries, interviews, and essays, are more likely to attract students of color, English learners, and students from low-income families. And weighted lotteries, such as those that consider neighborhood racial
composition, can be employed to attract diverse students. What is much more difficult for many schools and districts is combating entrenched bias and resistance to implementing more inclusive approaches that will foster school diversity or to seeing admissions with limited slots as a “win-lose” proposition.

A consideration for changes that increase access to magnet schools is additional support for expanding the number of magnet schools with successful programs so as to make the admissions processes less competitive (as outlined in the policy recommendations section of this report). Changes can be accompanied by additional support needed for magnet schools to be able to meet increased demand.

**Provision of transportation:** The provision of free transportation is another critical component of diversifying magnet schools. Without free and accessible transportation, magnet schools may only be realistic for those families with the resources and flexibility to provide their children with transportation. Provision of transportation is particularly important for interdistrict magnet schools that may draw students from neighboring districts to attend schools. A 2008 study of magnet school leaders found that magnet schools that provided free transportation were less likely to be racially isolated than those that did not. An earlier study of Midwestern districts found that, for parents of color, the availability of transportation was an important consideration in choosing a magnet school. This is often the case due to inaccessible or unreliable public transportation, even though many magnet schools are located in urban centers.

In addition, changing demographics coupled with the intentional drawing of district lines along racial lines have contributed to some districts becoming racially homogenous, underscoring the importance of allowing for policies designed to bridge district boundary lines. Therefore, interdistrict magnet programs are vital for reducing racial isolation.

**Second door components**

In addition to these first door components, second door features are also important, such as fostering inclusiveness and success within the school once a diverse student body is achieved. Examples of second door components include the following:

**Curriculum:** Innovative school curricula attract diverse students and families to magnet schools. A primary second door feature is a strong curriculum in which the magnet school theme is embedded. Particularly for diverse magnet schools, a curriculum that incorporates cultural diversity and is responsive to the unique cultural experiences and contexts that students may bring to the school is important to promote inclusiveness.

**Staff:** Another important second door feature is a competent, diverse, and stable magnet school teaching staff. In addition to the evidence that a well-prepared, stable teaching force boosts student achievement, especially for those historically furthest from opportunity, the growing evidence on the benefits of diverse educators, including for helping improve student academic performance and attainment for all students, is strong. Research shows that staff from a variety of backgrounds are better able to connect with students and support different learning styles. These staff are also better able to communicate with families of different backgrounds, to offer leadership reflecting the importance of positive cross-racial relationships, and to serve as role models for students. And for Black students, evidence shows that having same-race teachers can positively impact long-term
educational achievement and outcomes. Scholars suggest a variety of reasons for these positive educational experiences, including role-model effects, higher expectations, the ability to offset stereotype threat for students of color, cultural awareness, instructional supports, and advocacy for students. Particularly for diverse magnet schools, a diverse teacher workforce is important to support full school diversity and promote positive student outcomes.

**Professional development opportunities:** Another second door effort is the implementation of ongoing professional development for magnet school educators on embedding the magnet school theme into curriculum and instruction, teaching in diverse classrooms, and fostering culturally responsive learning environments to help create conditions of inclusiveness within magnet schools. Such training should be long term so that educators continue to improve and new additions to the faculty gain the benefit of these learning experiences.

**Culturally responsive learning environments:** Another second door effort is the fostering of culturally responsive learning environments within magnet schools. Research shows that students learn by building upon their prior knowledge, including their cultural and community context, and making connections between that context and what they are learning. In diverse magnet schools, it is important for educators to help students make connections between their cultural context and community and the material they are learning. In addition, students’ ability to learn also depends on the presence of strong, positive relationships between and among teachers and students in identity-safe learning environments that eliminate the stereotype threats that undermine achievement for many students. These so-called “stereotype threats” occur when students encounter bias about one or more groups with which they identify. Educators in diverse magnet schools can help to address bias through participating in ongoing training. They can also work to foster strong, genuine, and trusting relationships with students. Lastly, when educators receive training on how to deliver culturally responsive instruction, they are better prepared to connect to students’ lived experiences and acknowledge students’ cultural assets. Such learning environments also help students to build their own voices and learn about each other’s cultural backgrounds, thereby enhancing learning opportunities for all students.

**Nondiscriminatory and restorative discipline practices:** Another important second door feature is the implementation of nondiscriminatory discipline practices that are focused on supporting student inclusion. Discriminatory discipline practices, like dress codes that prohibit natural hairstyles or so-called zero-tolerance policies that impose suspensions or expulsions (often for minor offenses), have been found to disproportionately impact students of color, resulting in the loss of valuable instruction time and undermining their educational outcomes. In particular, Black students and other students of color are disproportionately suspended or expelled compared to their white peers. Discriminatory discipline practices emerged during the height of school segregation and have been used to push students of color out of the classroom and, often, into the juvenile justice system. Ensuring that magnet schools apply discipline in a nondiscriminatory manner is vital for ensuring that they can maintain diversity.

Incorporation of these components found in diverse magnet schools is significant in the current political and social context, as magnet schools can become vulnerable to resegregation if school structures and supports like free transportation, desegregation goals, and targeted ongoing outreach are abandoned in favor of less-inclusive and less-supportive policies. These components ensure that students can reap the well-documented academic and social benefits of school diversity that effective magnet schools offer.
Magnet schools need support to effectively implement the evidence-based components described above. Some districts have found that one way to help foster this support is through the creation of magnet school resource teacher positions. These resource teachers provide expertise, support, and guidance to magnet school staff to aid in magnet program theme implementation, particularly in curriculum and in the planning and development of professional development activities. For example, one study found that “fidelity of implementation and the breadth of support provided by magnet school resource teachers influenced magnet school effectiveness.” It also found that “differences in school effect estimates between magnet schools were not due to chance, and that there is evidence that differences in program implementation could account for the heterogeneity in effects across school sites.” States and districts can provide magnet schools with resources, such as funding for magnet school resource teachers, needed to create and sustain high-quality and diverse schools. Other assistance to aid in implementation, such as the provision of technical assistance and support, is described in detail in the recommendations section.
Policy Strategies to Support Diverse and Effective Magnet Schools

There are a number of policy opportunities at the federal, state, and local levels to support desegregation through the use of diverse and effective magnet schools. Recommendations for taking advantage of these opportunities include:

1. Reinstate federal guidance to states and localities about how to support school diversity.

2. Expand federal investments in magnet schools and use them to leverage school diversity and student success.

3. Expand strategic state and local investments in magnet schools in ways that support school diversity.

4. Support school-level strategies that promote both integration and student success.

Recommendation #1: Reinstate federal guidance to states and localities about how to support school diversity.

To guide efforts at desegregation, it is critically important for the federal government, informed by recent evidence, to update and reissue the joint diversity guidance issued by the U.S. Department of Education and Department of Justice under the Obama administration. The guidance issued by the Obama administration outlining evidence-based approaches for advancing voluntary school integration efforts was rescinded by the Trump administration in July 2018. The guidance provided a useful interpretation of the Parents Involved ruling, including additional clarity regarding the extent that race can be used in policies and the kinds of voluntary programs that could be implemented. The guidance noted that districts should first consider race-neutral approaches that do not rely on individual student race and then consider generalized race-based approaches, such as neighborhood demographics. The guidance also provided recommendations for fostering diversity consistent with the law, including how to make strategic school siting decisions and how to design diverse magnet schools.

The guidance was a valuable resource for states and districts interested in accessing best practices for advancing voluntary integration efforts. To ensure that states and districts have access to evidence-based best practices, before it is reissued the guidance should be updated to include current research on magnet schools and other school integration efforts to help inform voluntary school diversity programs.

For example, since research underscores the importance of transportation for magnet schools to reduce racial isolation, the guidance can outline ways that states and districts can access funds to support within- and across-district magnet school transportation. And because advocacy efforts resulted in the removal of the prohibition on use of federal funds to aid in school transportation from the annual federal appropriations bills and from Section 426 of the General Education Provisions Act, these funds can now be accessed by non-MSAP programs, and MSAP grantees can be provided with increased flexibility, as well as guidance, about targeting the use of funds for transportation.
In addition, the guidance can outline support that the Department of Education’s Office for Civil Rights provides to states and districts to aid in program implementation and help ensure compliance with civil rights laws. Following passage of the Civil Rights Act of 1964, the federal government provided technical assistance to states and districts to aid in implementation of desegregation programs and help ensure compliance with the law. This technical assistance can include outreach activities, such as on-site consultations, conference participation, training classes, workshops, and community meetings. In addition, the Department of Education can provide technical assistance in the form of helping districts to design and evaluate programs, advising districts about crafting enrollment strategies, and helping districts to develop strategies to support families as they apply for enrollment.

**Recommendation #2: Expand federal investments in magnet schools and use them to leverage diversity and school success.**

Federal investments are vital for support of voluntary state and district school diversity efforts like magnet schools. Particularly as states and districts face budget constraints, federal support enables diversity efforts to be sustained and increased.

- One important approach is to **better fund the Magnet Schools Assistance Program (MSAP)**, which has been seriously under-resourced and unable to respond to the demand from the field. Funded at $107 million in 2020, the program estimated it would award seven to nine grants (of no more than $15 million to each project) over the 5-year project period. This program provides a very modest level of support compared to the thousands of magnet schools in the country. Raising the funding level to at least $450 million would allow an investment in magnet schools that is comparable to federal investment in charter schools.

- The federal government can also **expand the MSAP to enable more districts to receive funds**. Currently, districts or consortia of districts that are eligible for MSAP funds are those that are either under a final court desegregation order or are implementing a voluntary or mandatory desegregation plan approved by the Secretary of Education as adequate under Title VI of the Civil Rights Act of 1964. To help reach a greater number of districts interested in implementing or sustaining diverse magnet schools, eligibility for MSAP funds should be expanded to include those districts that are not under court desegregation orders or desegregation plans approved under Title VI. This is particularly important as many federal and state courts have been lifting school desegregation orders, leaving districts that want to pursue integration with fewer resources to do so.

- An initiative to **allow states to apply for the MSAP or other school diversity funding** could serve to encourage more cooperative state and local school integration work. Such a program could support interdistrict programs, like the program in Hartford and other districts in Connecticut, or otherwise provide funding that could support strategies like family outreach and engagement. Funds could also support components like transportation and recruitment, training, and ongoing professional development of educators to teach in diverse magnet schools.
• Revisions to incorporate evidence-based components within funding priorities for the MSAP could require applicants to demonstrate how they plan to incorporate the evidence-based components of effective magnet schools outlined in this report, such as centering of integration in school design, mission, structure, focus, and goals; family outreach and engagement; inclusive enrollment practices; and provision of free transportation in their programs. Commitment to implementing the evidence-based components found in diverse magnet programs could be considered as part of applicant eligibility requirements. Requesting that applicants outline their initial plans for how they intend to allocate funds to promote the evidence-based components (e.g., targeting funds toward family outreach) can help to ensure that applicants think through these components and intentionally design their programs to foster diversity. In addition, the Department of Education can provide ongoing technical assistance once funds are awarded to help districts and schools finalize and implement their plans.

Recommendation #3: Expand strategic state and local investments in magnet schools in ways that support school diversity.

• States can leverage federal funding provided under ESSA Titles I and IV to support magnet schools and other school integration efforts. Under ESSA, the MSAP is funded under Title IV. Districts that are under a court-ordered or federally approved voluntary desegregation plan are eligible to apply for federal support under the MSAP. In addition, ESSA allows for 7% of Title I funding to be set aside to support evidence-based interventions for lower-performing schools serving high numbers of students from low-income families. Given the strong evidence summarized in this report on the effectiveness of diverse magnet schools in promoting positive outcomes for students, magnet schools should qualify as an evidence-based approach for school improvement funds under ESSA, especially for racially and socioeconomically isolated schools. This source of federal funds enables states to implement programs to advance voluntary integration. For example, New York state launched a Socioeconomic Integration Pilot Program drawing upon Title I funds to support districts in further developing interventions to support school integration.165

• States can also provide targeted grant funding to districts to create and sustain magnet schools. A state program can replicate the MSAP and/or fund specific components like family outreach and transportation, such as that provided by the state to magnet schools in Omaha, NE. States can also provide funding for magnet school evaluation and oversight to aid districts and schools in implementing, sustaining, and adjusting diversity goals. Regular and consistent evaluation of progress in meeting diversity goals is important, as research shows that without regular evaluation and recommitment to diversity, magnets can stray from their historic integration purpose.166 Analysis of administrative data coupled with surveys of students, faculty, and parents can shed light on the effectiveness of outreach as well as program efforts and help identify areas for improved communication and outreach, along with curriculum and professional development opportunities. State and district leaders can also provide ongoing technical assistance to schools regarding strategies for evaluating and improving programs.
• States and districts can **ensure that magnet school programs are designed to center school integration** within the school design, mission, structure, focus, and goals. A survey of hundreds of magnet school leaders found that schools that were racially isolated often did not have diversity goals, and district or school recruitment, transportation, and assignment policies may not have been designed to support such goals. This may include developing a statement of principles defining the state, district, and school commitment to diversity and outlining strategies to achieve it—even absent the ability to use race as a factor in admissions—including taking into consideration factors like student neighborhood or socioeconomic status in student assignment decisions. Districts can also make strategic school siting decisions, engage in recruitment to attract diverse students to the school, and re-evaluate diversity goals and progress in meeting those goals on a consistent basis. In addition, as we have described, interdistrict programs, like Connecticut’s magnet program, are often needed to facilitate diversity since segregation often occurs between districts. State policymakers should modify state laws as needed to permit interdistrict transfers that facilitate the ability of students from surrounding districts to attend magnet schools and allocate funding, as Connecticut has, to support and incentivize student transfers to achieve diversity.

**Recommendation #4: Support school-level strategies that promote both integration and student success.**

To help promote diverse and effective magnet schools, additional recommendations are grouped under first door efforts, or those policies that will help to ensure that a diverse group of students walk through the front door of a magnet school together, and second door efforts that ensure that students within magnet schools are supported in positive, culturally affirming, and inclusive environments. These efforts can help to sustain diversity and inclusiveness within magnet schools.

**Support first door features that promote diverse magnet schools**

• At the district and school levels, **ensure that diverse families are aware of magnet schools and the application process.** Schools with outreach to prospective students were found to be more likely to have experienced increasing integration over the last decade, while many of those without special outreach were one-race schools. Districts and schools can conduct outreach to diverse families through a variety of platforms (such as social media, print, television, and radio) in multiple languages and can target funding and assistance to help schools do the same. Sustained outreach through multiple means (online, in person, flyers, word of mouth through local community organizations, etc.) can help to identify and support diverse families in learning about magnet schools. Even with an innovative and attractive theme, a magnet school cannot attract diverse students if diverse families do not learn about the opportunity. This is especially important to attract families to magnet schools that draw students from surrounding districts—families who may not know about a magnet school and are unaware of their student’s eligibility to attend. These outreach efforts are most effective when there is a streamlined, easy-to-manage application process accompanied by application assistance. And schools can be intentional about ensuring that diverse family voices are incorporated into activities and decision-making once students are enrolled.
• **Implement open and inclusive enrollment practices** to help ensure that diverse families enroll in magnet schools. Research shows that magnet schools with inclusive—rather than competitive—enrollment practices, like lotteries, better promote desegregation and equity. Research also shows that inclusive enrollment practices, like lotteries, interviews, and essays, are more likely to attract students of color, English learners, and students from low-income families. And weighted lotteries, such as those that consider neighborhood racial composition, can be employed to attract diverse students. Districts can support magnet schools in implementing inclusive enrollment practices to ensure that more students have the opportunity to attend magnet schools. Districts can prohibit magnet schools from implementing selective or exclusionary enrollment practices, and states can restrict special funding to those that are inclusive.

• **Make strategic decisions about school siting and feeder patterns** to optimize diversity and accessibility. Districts with larger proportions of students of color will encounter challenges in achieving diversity. Strategies for ensuring school diversity, such as consideration of neighborhood demographics and location relative to other neighborhoods and the availability of transportation, should be at the forefront of school siting and feeder decisions. Such strategies can include placing a magnet school near the border of a city and suburban school system or near the border of an inner suburb with a non-white population and an outer-ring suburb with a predominantly white population. It may also be important to consider current and changing demographics that may be impacted by gentrification. Research has found wide variation in the degree and nature of integration across magnet districts based both on districts’ existing demographics and how well-structured magnet school student assignment processes are designed.

**Support second door features that enable inclusive, well-supported learning experiences**

• **Focus on “whole school” magnet programs.** Whole school magnet programs are found to better foster diversity than in-school programs in otherwise diverse schools. States and districts can be intentional about supporting creation of whole school magnet programs that involve all students in the magnet programming, rather than instituting separate tracks and programs within the school. Ensuring that all students can participate in the whole school program fosters inclusiveness. The magnet school theme should be embedded within the curriculum throughout the entire school. To support this approach, magnet school teachers should be prepared to deliver instruction aligned with the school theme. Magnet school teachers should also be provided with the resources needed, including ongoing professional development opportunities, to support diverse learning environments and the mission of the school across all curricular programs. This support may include designating magnet resource teachers who can be prepared to help work with teachers and school leaders to embed the theme into curriculum and foster inclusive classrooms, as well as onboard new staff about the school’s theme and approach to learning.

• **Provide innovative and culturally responsive curriculum to all students.** Research shows that students learn by building upon their prior knowledge and making connections between the material they are learning and their own culture and community. In diverse magnet schools, it is important for educators to help students make connections between their cultural context and community and the materials they are learning. Magnet school
teachers can incorporate evidence-based strategies, such as including stories and content about diverse cultures into curriculum and encouraging students to study multiple points of view, to help foster inclusiveness, student engagement, and achievement. For example, magnet schools serving Hmong students in the Minneapolis–St. Paul area incorporate Hmong culture and language in the curriculum of dual language immersion schools. Teachers should be prepared and supported to foster culturally responsive learning environments that center student voice and help students connect what they are learning in school with their lives.

- **Implement nonexclusionary and restorative school discipline policies.** Discriminatory discipline practices, like dress codes that prohibit natural hairstyles or so-called zero-tolerance policies that impose suspensions or expulsions (often for minor offenses), disproportionately impact students of color, resulting in the loss of valuable instruction time and undermining their educational outcomes. Implementation of inclusive school discipline practices that are educative and restorative, rather than exclusionary, is important for ensuring that diverse students develop a strong community and sense of belonging and do not lose valuable instruction time or otherwise suffer the consequences of exclusionary school discipline practices. Magnet schools should be supported to implement inclusive approaches to school discipline found to foster inclusive environments, like restorative practices, social and emotional learning, and mental health services and supports. States and districts can also support schools in providing ongoing training on implicit bias and anti-racism to support educators in addressing bias and understanding how it may manifest in the school and classroom.

In addition to focusing their program guidelines and funding priorities on these strategies for success, states and districts can develop communities of practice to support and share best practices across schools to aid in implementing and maintaining these second door efforts.
Conclusion

Given the profound consequences associated with segregated education and the re-entrenchment of segregation in too many of the nation’s public schools, well-designed magnet schools that incorporate components outlined in this report present a compelling evidence-based option for promoting school diversity and positive student outcomes. Magnet schools certainly cannot remedy school segregation on their own; they are only one component of necessary broader systemic and structural changes needed to mitigate contemporary forms of segregation. The work to achieve integration is long term, as the efforts to re-entrench racial segregation are persistent, but magnet schools provide a viable strategy for advancing school integration and improving the nation’s schools. Evidence shows that these schools present an approach that is consistent with legal interpretations of permissible approaches to supporting school diversity, as recognized in Justice Kennedy’s concurrence in the Parents Involved in Community Schools v. Seattle School District No. 1 case. These approaches can promote stronger social and academic outcomes.

Reversing the resegregation that betrays Brown v. Board of Education’s promise of equal access to educational opportunities will require sustained and cooperative action at the federal, state, and local levels. But the historical context outlined in this report demonstrates that it has been done before and can be done again. This coordinated action includes leveraging funding sources to invest in diversity efforts and re-evaluating and changing course when necessary to ensure that more students have access to diverse and equitable educational opportunities. We cannot risk complacency as the current trends of resegregation deepen. Depriving students of the numerous benefits of integrated educational experiences impacts their personal and social development and threatens the ability of the nation to produce adults equipped to participate in a diverse global economy. The educational future of many of our nation’s students depends upon acting affirmatively to achieve integration. As one researcher observed, “The students magnet schools serve, and the American education system as a whole, are all the better for this approach.”174
Endnotes


15. 20 U.S.C. Section 7231(a). Definition.


29. In reaching its ruling, the Court simultaneously struck down the “separate but equal” doctrine and also acknowledged the psychological harm that racially segregated schools inflicted upon Black children, as well as white children, as underscored in social science research submitted to the Court. Brown v. Board of Education, 347 U.S. 483 (1954).


41. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). In analyzing a plan to desegregate Charlotte-Mecklenburg Public Schools—in which the approximately 14,000 Black students attended schools whose student population was more than 99% Black—the U.S. Supreme Court unanimously ruled that federal courts had broad and flexible equitable powers to remedy past discrimination.


47. The program also funds projects that assist in the achievement of systemic reforms and provide all students the opportunity to meet challenging academic content and student academic achievement standards. See: What is the Magnet Schools Assistance Program, 34 C.F.R. 280.1.


50. Missouri v. Jenkins, 495 U.S. 33 (1990). Other challenges include those against Boston Latin and Lowell High Schools, which have experienced resegregation since the decisions were issued in the 1990s; see: Frankenberg, E., Siegel-Hawley, G., & Orfield, G. (2008). The forgotten choice? Rethinking magnet schools in a changing landscape. The Civil Rights Project/Proyecto Derechos Civiles.


73. “More often than not, segregated minority schools offer profoundly unequal educational opportunities. This inequality is manifested in many ways, including fewer qualified, experienced teachers, greater instability caused by rapid turnover of faculty, fewer educational resources ...” Brief of 553 Social Scientists as Amici Curiae Supporting Respondents, Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007).


95. In particular, while not prohibiting integration approaches like magnet schools, the “2007 Parents Involved decision … created additional obstacles to using race to produce integrated magnet schools under many cities’ existing voluntary integration policies.” Siegel-Hawley, G., & Frankenberg, E. (2013). “Designing Choice: Magnet School Structures and Racial Diversity” in Orfield, G., Frankenberg, E., & Associates. (Eds.) Educational Delusions: Why Choice Can Deepen Inequality and How to Make Schools Fair (pp. 107–127). University of California Press; and a third “Dear Colleague” letter issued by the Bush administration more directly impacted magnet schools. The letter noted that the “administration’s school choice policies were not to be constrained by any racial considerations (targeting, presumably, only those race-conscious policies that seek to avoid any racial isolation that may be created or exacerbated by the choice to transfer).” Le, C. Q. (2010). Racially integrated education and the role of the federal government. North Carolina Law Review, 88(3), 725–785. http://scholarship.law.unc.edu/nclr/vol88/iss3/5.

96. “School district recipients of magnet school funding reported that OCR officials initiated reviews demanding that they justify any consideration of race in their student assignment policies, even though the primary statutory purpose of the federal magnet school program is to promote racial and ethnic integration.” Le, C. Q. (2010). Racially integrated education and the role of the federal government. North Carolina Law Review, 88(3), 725–785. http://scholarship.law.unc.edu/nclr/vol88/iss3/3.


98. 34 C.F.R. § 280.31 (2016).

99. 34 C.F.R. § 280.31 (2016).


102. “While some charters strive for and achieve racial integration, most studies have found that charters tend to increase racial isolation.” Cookson, P. W., Jr., Darling-Hammond, L., Rothman, R., & Shields, P. M. (2018). The tapestry of American public education: How can we create a system of schools worth choosing for all? Learning Policy Institute.


105. “There are numerous evaluations of local school magnet plans that suggest a very complex set of conclusions regarding the utility of magnet schools in achieving racial desegregation. This is expected; districts vary largely in terms of the nature of their magnet school plans (such as types and numbers of options), transportation availability, and overall district enrollment patterns.” Goldring, E., & Smrekar, C. (2000). Magnet schools and the pursuit of racial balance. Education and Urban Society, 33(1), 20.


108. “Tracking is the process whereby students are divided into categories so that they can be assigned in groups to various kinds of classes.” Oakes, J. (2005). *Keeping Track: How Schools Structure Inequality*. Yale University Press.


112. For example, “magnet schools that had ‘higher overall proportions of minority students initially and/or were experiencing higher rates of growth in minority enrollment levels were less likely to meet their [diversity] objectives.’” Goldring, E., & Smrekar, C. (2000). Magnet schools and the pursuit of racial balance. *Education and Urban Society, 33*(1), 17–35.


130. A diverse and equitable magnet school must focus on first door efforts to ensure that a diverse group of students walk through the front door of a school together, as well as second door efforts that facilitate equal status contact among a racially diverse group of students walking through classroom doors together. Ayscue, J., Levy, R., Siegel-Hawley, G., & Woodward, B. (2017). *Choices worth making: Creating, sustaining, and expanding diverse magnet schools*. The Civil Rights Project/Proyecto Derechos Civiles.


142. 34 C.F.R. § 75.210 (2014).


147. For the class of 2025, the school will now adopt a holistic review of “students whose applications demonstrate enhanced merit,” including through grade point average, a portrait sheet where they will be asked to demonstrate Portrait of a Graduate attributes and 21st century skills, a problem-solving essay, and experience factors. Leayman, E. (2020, December 18). School board adopts new Thomas Jefferson admissions policy. *Patch*. https://patch.com/virginia/greateralexandria/school-board-adopts-new-thomas-jefferson-high-admissions-policy.


157. For example, “African American female students comprised 8% of students enrolled and 14% of students who received an out-of-school suspension. By contrast, white female students comprised 24% of students enrolled and 8% of students who received an out-of-school suspension.” Cardichon, J., & Darling-Hammond, L. (2019). Protecting students’ civil rights: The federal role in school discipline. Learning Policy Institute.


164. “No funds appropriated for any applicable program may be used for the transportation of students or teachers (or the purchase of equipment for such transportation) to overcome a racial imbalance in any school or school system or to carry out a plan of racial desegregation, except for funds appropriated for the Impact Aid program authorized by Title VIII of the ESEA.” 20 U.S.C. § 1221. This prohibition was passed as an amendment to the 1974 General Education Provisions Act, barring use of federal funds for the “transportation of students or teachers (or the purchase of equipment for such transportation) to overcome racial imbalance” in a school or a school system or to “carry out a plan of racial desegregation.” 20 U.S.C. § 1228; Education and Labor Committee, U.S. House of Representatives. (2020, December 22). Education leaders celebrate repeal of last provision in federal law banning use of federal funds for desegregation [Press release]. https://edlabor.house.gov/media/press-releases/education-leaders-celebrate-repeal-of-last-provision-in-federal-law-banning-use-of-federal-funds-for-desegregation-


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The Learning Policy Institute conducts and communicates independent, high-quality research to improve education policy and practice. Working with policymakers, researchers, educators, community groups, and others, the Institute seeks to advance evidence-based policies that support empowering and equitable learning for each and every child. Nonprofit and nonpartisan, the Institute connects policymakers and stakeholders at the local, state, and federal levels with the evidence, ideas, and actions needed to strengthen the education system from preschool through college and career readiness.
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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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. In the 2014–2015 school year, their boys, aged six and eight, were enrolled in their third New Orleans school, Lagniappe Academies. Lagniappe seemed like a particularly good choice for their youngest son, who had been diagnosed as autistic. Bailey believed the school delivered the personalized attention and services his son’s diagnosis required. 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. 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. In New Orleans, there are no traditional school choices, so his sons could not just default to a school close to home. Bailey and his wife would need to find a new charter school and re-enter the city’s labor-intensive char-
ter school application process late, with no guarantee that the same thing would not happen again in a year.\(^8\)

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.\(^9\) As the fall approached, however, it became clear that failure to control the spread of the coronavirus would make school re-openings unsafe,\(^10\) and school district leaders increasingly announced online education for the fall.\(^11\) Continued remote learning in the fall only amplified concerns about student learning loss\(^12\) as well as the impossible parental task of man-

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\(^10\) 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. 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, 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. Increasing in popularity, education pods are likely to have significant and negative consequences for equality in education, undermining equitable school finance; intensifying school segregation; and exacerbating classism, sexism, ableism, and racism.

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).


16 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.)).


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. 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, and school closure and consolidation and their rippling impacts. A third form of risk is racialized educational vulnerability—the racial subordination

19 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).

20 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.

21 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 Tiekon & Trevor Ray Auldridge-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.\textsuperscript{22} 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.\textsuperscript{23}

Addressing and mediating these risks are within the state’s control.\textsuperscript{24} 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.\textsuperscript{25} 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.\textsuperscript{26}

The state, however, has abdicated a robust role in education management, largely abandoning the project of integration,\textsuperscript{27} relying on school financing schemes that necessarily track race and class,\textsuperscript{28} and

\textsuperscript{22} See infra notes 139–42 and accompanying text (discussing how school choice has emerged as a form of segregation that fosters racial subordination).

\textsuperscript{23} See infra Section II.C.

\textsuperscript{24} 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.

\textsuperscript{25} See infra notes 141–47 and accompanying text.

\textsuperscript{26} See infra Part I.

\textsuperscript{27} 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).

\textsuperscript{28} 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. 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.

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. 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. 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. Choice honors the liberty of parents to make educational decisions concerning their children, free from excessive state

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29 See infra Section I.B.1.

30 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).


32 See infra Part II.

33 See infra Section I.A.
interference. Merit is the principle by which the valuable good of quality education, and elite education in particular, is to be distributed to students. 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. 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.

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. Discussion about risk in education, however, has heretofore focused mostly on the student loan crisis in higher education, and the logic of markets and competition in education has focused primarily on school choice.

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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34 See infra Section I.A.1.
35 See infra Section I.A.2.
36 See infra Section I.B.
37 See infra Section II.D.
39 See infra notes 105–15 and accompanying text.
40 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”41 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.42 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%.43 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.44

41 Catherine Besteman & Hugh Gusterson, Introduction, in The Insecure American 1, 2 (Hugh Gusterson & Catherine Besteman eds., 2010).
42 Id. at 4.
43 Id.
44 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.45 Political and corporate leaders, however, have steadily been offloading responsibility for the risks of work, illness, or old age to individuals.46 Instead of incentivizing and supporting risk sharing, leaders instead herald choice as individuals are left to self-insure themselves and their families.47

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.48 And even in the public sector, access to defined-benefit pensions is steadily decreasing.49 In the context of healthcare, although health premiums have gone up, the likelihood of being covered by insurance through work has gone down.50 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.51 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.52 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.53

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45 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.
46 See Hacker, supra note 38, at xiii–xvi.
47 See id.
49 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.
50 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.
51 Id. at 81, 87.
53 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, 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.” 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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55 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. The Supreme Court in Meyer v. Nebraska, for example, acknowledges the “natural duty” of parents to give their children an education “suitable to their station in life.” Two years later, in Pierce v. Society of Sisters, the Supreme Court struck down an Oregon statute requiring all children to attend public schools. Despite the state’s assertion of an overriding interest in overseeing and controlling the education of children, 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.

Subsequent cases moved in the opposite direction, reestablishing shared responsibility between parents and the state. In Prince v. Massachusetts, the Court held in a child labor case that parental authority is not absolute. 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. 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.” Similarly, in Wisconsin v. Yoder, even as the Court exempted Amish plaintiffs from compulsory school attendance, it did so recognizing the value of political education in orienting children to a sharing of rights and responsibilities as a condition for citizenship in a democratic society.

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56 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.

57 262 U.S. 390 (1923).
58 Id. at 400.
59 268 U.S. 510 (1925).
60 Id. at 529–31, 533–34, 536.
61 See id. at 512.
62 Id. at 534–35.
64 Id. at 170.
65 Id.
66 Id.
attendance laws, the Court reaffirmed that compelling state interests could overcome the interest of parents in controlling education.68 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.69 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.70 Blame for academic failure caused by structural failures is ultimately placed at the feet of individual parents.71

68 Id. at 233–36.
70 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-Sebastien 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).
Less obvious, delegation can also manifest in laws purportedly meant to secure individual rights. The Individuals with Disabilities Education Act (“IDEA”), 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.” 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”) is in the spirit of parent-state collaboration, IDEA also placed on parents a detailed and complex enforcement and implementation role. 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. 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. School choice, however, suggests that there are better and worse alternatives

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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); Endrew 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.” These sorts of takeovers, however, tend to favor market-oriented school reform solutions that maximize individualism and choice.78 In Louisiana, this resulted in a statewide network of charter schools that required parents to choose the right school for their children—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.81 And although parents may be in the best position to offer care and education for their children, 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. 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

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79 See id. at 132–35 (discussing the rise of the “conservative education logic” and how it has informed state takeovers of local school districts).
80 Id. at 135–38 (detailing a “conservative education logic” that informed Louisiana’s state takeover of New Orleans schools in 2005).
81 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. 1985, 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).
82 See Courtney G. Joslin, Family Support and Supporting Families, 68 VAND. L. REV. 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).
83 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. 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, explaining that educational disparities are not driven solely by individual work ethic or talent. 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. 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.

Nevertheless, the preservation of a purported meritocracy underlines much of the Court’s higher education jurisprudence. Regents of the University of California v. Bakke, 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. Nevertheless, a majority of the Court struck down the Univer-

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84 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).

85 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).

86 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).

87 See supra notes 27–28 and accompanying text.

88 See infra notes 173–74 and accompanying text.


90 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,91 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.”92 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.93

When affirming Powell’s diversity rationale in Grutter v. Bollinger,94 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.95 According to O’Connor, preferences in admissions implicated “serious problems of justice,” potentially harming “innocent” persons competing for the benefit,96 presumably on the basis of merit.97 De-

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91 Id. at 271, 320 (majority opinion).
92 Id. at 318 & n.52 (opinion of Powell, J.).
93 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))).
95 Id. at 341.
96 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.
97 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, 98 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 Austin99 when a white student challenged the use of race in admissions as no longer necessary given other admissions policies in use.100 The Court thus returned to a vision of colorblindness that it believed would facilitate a genuine meritocracy in higher education.101

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.102 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-
tion to closing achievement gaps,\textsuperscript{103} 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.\textsuperscript{104} Neve-

\begin{flushright}
\textsuperscript{103} See, e.g., Angela Duckworth, \textit{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, \textit{Grit in the Classroom} 7–8 (2017) (developing a strategy for cultivating grit in students in the classroom and beyond); Laura Moser, \textit{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, \textit{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, \textit{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, \textit{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).

\textsuperscript{104} 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. \textit{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, \textit{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. \textsuperscript{R}
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.105 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%.106 In 1993, the share of individuals graduating from four-year public colleges with student loan debt was 25%; that figure increased to 63% in 2008.107 Forty percent of graduates of four-year private colleges held student loan debt in 1993; that figure increased to 73% in 2008.108 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.109 After mortgages, student loan debt is the second highest category of consumer debt,110 and student loan debt in total “exceeds all the unpaid balances on American credit cards.”111

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


106 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).

107 HACKER, supra note 38, at 67.

108 Id.


110 Friedman, supra note 105.

111 HACKER, supra note 38, at 67.

112 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).

113 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.\footnote{114 See id.} 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.\footnote{115 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, V OX (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-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).} A second dominant framing for education risk is the debate regarding for-profit colleges.\footnote{116 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).} Supporters of the institutions tout them as promising entities that respond to a niche student market neglected by nonprofit colleges and universities.\footnote{117 See id. at 46.} 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.\footnote{118 See id.} 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\footnote{119 Id. at 69–70, 72.}—factors that have, at times, led to increased regulation.\footnote{120 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, 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.\textsuperscript{121} Today, choice continues to inform education reform. Policymakers and advocates herald school choice, typically in the form of voucher programs and charter schools,\textsuperscript{122} as a key component of school reform, often with bipartisan support.\textsuperscript{123} The No Child Left Behind (“NCLB”) Act of 2001\textsuperscript{124} and

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\item 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).
\item 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).
\item See Richard D. Kahlenberg, All Together Now: Creating Middle-Class
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the Race to The Top ("RTTT") fund, two recent federal initiatives to reform education, centered on school choice initiatives, subjecting public schools to the market principles that inform school choice ideology. NCLB, for example, subjected schools that failed to make "adequate yearly progress" to state control and potentially to reconstitution as a charter school, while RTTT distributed funding to school districts based, in part, on how well they "ensur[ed] successful conditions for high-performing charters." Although political favor for charter schools has begun to erode, charter schools enjoyed robust growth in the first two decades of this century and are firmly established in many school systems, particularly in urban areas.
“School choice” exerts a significant pull on parents subject to its rhetoric, even in the absence of improved education outcomes.\(^{132}\) 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.\(^{133}\) 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.\(^{134}\) A heightened awareness of danger and the potential for managing it in a “risk soci-

\(^{131}\) 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. SCHL CHOICE 463, 463–64 (2019).

\(^{132}\) 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, Chunning 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.*


\(^{134}\) 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).
erty” 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.” 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.

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, 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. 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. 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. Ultimately, white parents use race as a heuristic for quality.

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).


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.\textsuperscript{142}

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.\textsuperscript{143} 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.\textsuperscript{144}

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,\textsuperscript{145} curricula devoid of the contributions of people of color,\textsuperscript{146} and racial disparities in discipline that reserves the best educational opportunities and resources for one’s child(ren), while excluding others from the same opportunities. \textit{Id.} at 996.


\textsuperscript{143} See \textit{supra} notes 27–28.


\textsuperscript{145} See infra text accompanying notes 176–78; Jason A. Grissom & Christopher Redding, \textit{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).

\textsuperscript{146} See, e.g., Ama Mazama, \textit{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., \textit{Diverse City, White Curriculum: The Exclusion of People of Color From Ed-
pline. 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.

Parents of color who are able, then, use school choice to avoid negatively racialized experiences, turning to charter schools in the hopes that their independence will yield more positive educational experiences. These parents enroll their children in charter schools at higher rates than white parents, and the number of affinity schools focused on centering and celebrating minoritized identities grew as school choice became a centerpiece of public-school reform.
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.\textsuperscript{154}

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.\textsuperscript{155} 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.\textsuperscript{156} 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.\textsuperscript{157}

\textsuperscript{154} See, e.g., Jordan Fabian & Josh Wingrove, \textit{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, \textit{Private School Vouchers: Legal Challenges and Civil Rights Protections} 8–9 (UCLA C.R. Project, Working Paper, 2018).


\textsuperscript{156} See Mahala Dyer Stewart, \textit{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, \textit{MORNING BY MORNINGS: 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, \textit{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).

\textsuperscript{157} See, e.g., \textit{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. 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 and transportation challenges.

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,” 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. Rather, it is an attempt to manage risk manifesting as racial subordination.

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 residually based enrollment systems).


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. 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. And, ultimately, research is clear that income gains from attending highly selective institutions are highest for students from disadvantaged backgrounds.

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, the anxiety admissions can inspire is significant, even prompting campaigns to “rethink” the college admissions process. Anxiety is further compounded by

165 See id. at 26–27, 30–31.
166 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).
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,169 and charter schools.170 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.171

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.172 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.173 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.174

169 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).
170 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).
171 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”).
173 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.
174 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, 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. 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. In contrast, Black children are underrepresented in the less stigmatized and more objectively assessed disability categories like deafness or blindness.

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176 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.”).

177 Id. at 416–17; Glennon, supra note 76, at 1251–52.

178 Losen & Welner, supra note 76, at 416.
Despite the inequities academic tracking can aggravate, white parents often actively pursue the practice.\textsuperscript{179} Perhaps more important, they also often block policy meant to address tracking disparities, like the removal of academic eligibility criteria for advanced classes.\textsuperscript{180} 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.”\textsuperscript{181} 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.\textsuperscript{182} 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.\textsuperscript{183}

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.\textsuperscript{184} 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

\textsuperscript{179} See Sattin-Bajaj & Roda, supra note 134, at 993–95.
\textsuperscript{180} See id. at 995.
\textsuperscript{181} Id. at 994.
\textsuperscript{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).
\textsuperscript{183} Id. at 4–5.
\textsuperscript{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.\textsuperscript{185} 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.\textsuperscript{186}

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.\textsuperscript{187} 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.\textsuperscript{188} 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.”\textsuperscript{189} Under the leadership of Governor Kathleen Blanco, the New Orleans public school system was fully converted into a series of charter

\textsuperscript{185} LINN POSEY-MADDUX, WHEN MIDDLE-CLASS PARENTS CHOOSE URBAN SCHOOLS, 91–115 (2014) (documenting the race and class dynamics of parent leadership at gentrifying urban schools).

\textsuperscript{186} See id. at 7, 117–43 (documenting how an urban school became increasingly white and middle-class as a result of “diversity by choice”).

\textsuperscript{187} 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).

\textsuperscript{188} 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].

\textsuperscript{189} 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. The U.S. Department of Education granted these charters schools $20.9 million. In the end, each student was allotted almost $1,400 annually.

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, a decrease in the number of students attending failing schools, a decrease in performance gaps between city students and the state average, an increase in college enrollment, a fair and transparent school choice application process, and a decrease in student expulsions. Outside researchers find more modest, but similarly positive, results.

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

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190 Parvis, supra note 187, at 288–92.
193 LA. DEPT. OF EDUC., supra note 188. The graduation rate increased from 54% pre-Katrina to 72.8% in 2017. Id.
194 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.
195 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.
196 The college enrollment rate increased from 37% in 2005 to 61% in 2017, higher than the statewide average of 58%. Id.
197 OneApp is the city’s centralized student enrollment system. Id.
198 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.
changes had been implemented at higher preexisting levels of achievement.\footnote{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://perma.cc/W7VQ-RADM] (drawing on research regarding post-Katrina education reforms in New Orleans).} 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.\footnote{201 Alan Berube & Natalie Holmes, \textit{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].} Gains, then, are potentially attributable to this shift. Finally, absent increased and robust student funding, academic gains likely would have been smaller.\footnote{202 Interview with Douglas N. Harris, \textit{supra} note 200, at 3.} 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.”\footnote{203 BRUCE D. BAKER, NETWORK FOR PUB. EDUC., \textit{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].} 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.\footnote{204 Id.}

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.”\footnote{205 ANDREA GABOR, \textit{AFTER THE EDUCATION WARS} 198 (2018).} Other researchers note that by 2007, most of the city’s charter schools had barriers to entry, including selective admissions criteria and enrollment caps.\footnote{206 See Kristen L. Buras, \textit{Race, Charter Schools, and Conspicuous Capitalism: On the Spatial Politics of Whiteness as Property (and the Unconscionable Assault on Black New Orleans)}, 81 HARV. EDUC. REV. 296, 318 (2011).} Type 5\footnote{207 \textit{Id.}} charter schools,
which made up the bulk of the school system as of 2015, were not allowed to impose admissions criteria. 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.

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. 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. 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.]” 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.”

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. 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. Further, OneApp uses a centralized com-

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.216 Nor do the city’s highest-performing schools even participate in the city-wide enrollment system.217 Instead, they require a second application process for parents that drains time and money, and benefits the most savvy.218 Limited access to computers,219 combined with little instruction on how to navigate the process,220 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 2019.221 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.”222 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.223 Further, according to a 2016 study, 50.5% of Black children in New Orleans are under the poverty line.224 In 2015, more than 80% of students in New Orleans public schools came from low-income families.225


216 Parvis, supra note 187, at 297–98.
217 Prothero, supra note 1.
218 See id.
220 See Prothero, supra note 1.
222 RACIAL WEALTH DIVIDE INITIATIVE, CFED, THE RACIAL WEALTH DIVIDE IN NEW ORLEANS 3 (2016).
223 Id.
225 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.\textsuperscript{226} 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.\textsuperscript{227} In the RSD, however, as of 2016, 93% of students were Black, 84% were eligible for lunch programs, and 92% were considered economically disadvantaged.\textsuperscript{228}

In contrast, most of the city’s white students were concentrated in the higher-performing Orleans Parish School Board charter or traditional schools.\textsuperscript{229} 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.\textsuperscript{230} By using a separate admissions process and set of application requirements,\textsuperscript{231} they provided superior academic opportunities while catering to middle-class white students.\textsuperscript{232}

\textsuperscript{226} Parvis, supra note 187, at 289.


\textsuperscript{228} Liss, supra note 224, at 25.

\textsuperscript{229} PERRY ET AL., supra note 227, at 2–3.

\textsuperscript{230} See id. at 10.

\textsuperscript{231} 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/1ZVnj19uGUUVY9h6rYuDjmyub6DxBr9c6Q4kz4Cajq88U/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.

\textsuperscript{232} 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-WCOZ], 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. 233

In June 2018, control of the New Orleans school district was transferred back to Orleans Parish School Board. 234 Louisiana evidently declared the transition to an all-charter system a success. 235 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.” 236

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 237 to a mere 10%. 238 In 2019, only seven of the 895 seats available at Stuyvesant High School, the most selective of the schools, went to Black students. 239

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

233 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://perma.cc/D7YM-DX66].[1]

234 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_51e63a4-832f-5a27-bbb5-97430938404a.html [https://perma.cc/N9TW-X3SQ].[1]

235 See id.[1]

236 Strauss & Burris, supra note 192.[1]


238 Id.[1]


240 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.\textsuperscript{241} Under the new plan, Black and Latino enrollment would increase almost fivefold.\textsuperscript{242} At the same time, white enrollment in New York City’s selective schools would stay about the same, while Asian\textsuperscript{243} enrollment in the schools would

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\textit{Under the Mayor’s Plan for Admissions to the City’s Specialized High Schools} 2 (2019).
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\textsuperscript{241} Id. at 1.

\textsuperscript{242} Black and Latino enrollment would increase from 10% to 45% at the schools. See id. at 4.

\textsuperscript{243} 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 underscores 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, \textit{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, \textit{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, \textit{Introduction: Asian/Americans and Crime: A Critical Overview}, in \textit{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, \textit{Advancing the Asian American and Pacific Islander Data Quality Campaign: Data Disaggregation Practice and Policy}, 24 \textit{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, \textit{The “Asian” Category in MCAS Achievement Gap Tracking: Time for A Change}, 21 \textit{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, \textit{The Success Frame and Achievement Paradox: The Costs and Consequences for Asian Americans}, 6 \textit{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, \textit{Model Minority Stereotype, Psychological Distress, Substance Use Among Asian-American Young Adults}, 146 \textit{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, \textit{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-ZALJ] (trac-
decrease by almost half. Alongside only muted support, the proposed change was met with significant resistance, including from Chinese American policymakers and parents in the city.

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. School quality is variable. Four-year graduate rates range from below 30% to almost 100%. 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. 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
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 Kambhampati, 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.

244 See N.Y.C. INDEP. BUDGET OFF., supra note 240, at 5.

245 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/9HXJ-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].


247 Sattin-Bajaj & Roda, supra note 134, at 999.

248 Id. at 1000.

249 Id.
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schools. 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.

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, 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.

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. She further noted, “This cliché of, ‘If you’re not at the table, you’re on the menu’ really felt like it rang true.”

Given historical and ongoing marginalization of Asian Americans in New York City, selective school admission represented
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.258 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.259 Kenneth Chiu, chairman of the New York City Asian-American Democratic Club, called the policy “discriminatory,”260 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.’”261


258 Chang, supra note 246.

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


261 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.\textsuperscript{262} 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.\textsuperscript{263} The Coalition for Asian American Children and Families supported plans to eliminate the test in favor of an admissions system that considers multiple factors.\textsuperscript{264} Nevertheless, after a series of high-profile protests and an effective lobbying campaign, the proposal ultimately failed.\textsuperscript{265}

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.\textsuperscript{266} Asian students made up 16% of all students in the system, but 62% of students in specialized schools.\textsuperscript{267} In contrast, Black students made up 26% of all students, but only 4% of specialized school enrollment, while Hispanic

\textsuperscript{262} See, e.g., Alana Mohamed, Brenda Lee, HoYing Fan, Janet Tang, Jason Wu, Jeffrey Ng, Nayim Islam, Tricia Chan & William Cheung, Opinion, \textit{Asian Americans Should Embrace Reform of Specialized High School Admissions}, \textsc{C}RAI\textsc{S}’\textsc{N}Y\textsc{S} B\textsc{U}S. (July 25, 2018, 12:00 AM), https://www.craainsnewyork.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”).

\textsuperscript{263} Press Release, Coal. for Asian Am. Children and Fams., APA Community Organizations’ Response to Proposed Changes to the NYC SHSAT Process (July 30, 2018).

\textsuperscript{264} Christina Veiga, \textit{Some Asian American Groups Have Backed the SHSAT, but This One Says the Exam Should Go}, \textsc{Chalkbeat} N.Y. (Nov. 14, 2018, 5:19 PM), https://ny.chalkbeat.org/2018/11/14/201106165/some-asian-american-groups-have-backed-the-shsat-but-this-one-says-the-exam-should-go [https://perma.cc/6GZ3-QNRD].

\textsuperscript{265} Shapiro & Wang, \textit{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, \textit{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/1GOHqLvAhAekzu3uRxIziL6kys7Q2enQwxxlZl0pWPko/edit [https://perma.cc/9UX6-DZ3R].

\textsuperscript{266} Shapiro & Lai, \textit{supra} note 237.

\textsuperscript{267} \textit{Id.}
students, who constitute 41% of the city’s students, represented only 6% of selective school enrollment.\textsuperscript{268}

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.\textsuperscript{269} During the same time period, Whites made up 30% of the school population but 54% of specialized school enrollment.\textsuperscript{270} 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.\textsuperscript{271} 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.\textsuperscript{272} 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.\textsuperscript{273} 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.\textsuperscript{274} In contrast, Black and Hispanic students often report altogether little or no

\textsuperscript{268} Id.
\textsuperscript{269} Id.
\textsuperscript{270} Id.
\textsuperscript{271} Id.
\textsuperscript{272} 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.
\textsuperscript{273} Id.
\textsuperscript{274} 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.\textsuperscript{275}

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.”\textsuperscript{276} 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.”\textsuperscript{277}

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 handouts 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.\textsuperscript{278} 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


\textsuperscript{277} 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)).

\textsuperscript{278} 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.”

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. 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. 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. 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

279 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”).

280 Shapiro & Lai, supra note 237.

281 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.

school assignment.\textsuperscript{283} 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.\textsuperscript{284} 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,\textsuperscript{285} the suit takes another swing at affirmative action policies.\textsuperscript{286} This time, the allegation is that Harvard University unfairly discriminated against Asian Americans, not Whites, when engaging in race-conscious admissions.\textsuperscript{287}

\textsuperscript{283} See Shapiro, supra note 250.


\textsuperscript{285} Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013).


\textsuperscript{287} 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
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. Also endorsed by the University of California Board of Regents, and the Asian Pacific Islander American Public Affairs Association, 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.

Despite a string of high-profile endorsements, 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. 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.

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296 Eric Ting, "They Lost Partly Because of that Ad’: How No on Prop. 16 Organizers Knew the Measure Would Fail," SF GATE (Dec. 2, 2020, 4:00 AM), https://www.sfgate.com/politics/article/Proposition-16-California-affirmative-action-why-15763791.php [https://perma.cc/Z92A-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).


298 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\textsuperscript{299} and to organize rallies in support of Blum’s lawsuit in 2018.\textsuperscript{300} 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.\textsuperscript{301} Although a more affluent and educated group than the New York City parents,\textsuperscript{302} these Californian parents were also worried about how affirmative action would negatively impact educational opportunities for their children.\textsuperscript{303} 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?”\textsuperscript{304}

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%.\textsuperscript{305} Although election post-mortems are ongoing, stark division among Cali-


\textsuperscript{300} Kang, \textit{supra} note 276.

\textsuperscript{301} Chang, \textit{supra} note 299.


\textsuperscript{304} Chang, \textit{supra} note 299 (second alteration in original) (quoting Interview by Alvin Chang, Vox, with Yukong Zhao, President, Asian Am. Coal. For Educ.).

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fornia’s Asian Americans regarding race-conscious admissions policies and their impact on Asian representation is cited as one factor to consider.306 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.”307

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.”308 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.309

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,310 the Court explained that schools “educat[e] the young for citizenship,” a key component of democracy.311 In New Jersey v.


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

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

310 319 U.S. 624 (1943).

311 See id. at 637.
T.L.O., 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.” The Court in *Brown v. Board of Education* recognized that education “is the very foundation of good citizenship” and “a principal instrument in awakening the child to cultural values.” And in *San Antonio Independent School District v. Rodriguez*, 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.

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. Thus, public schools are sites of intense social, political, and legal conflict, reflecting larger national debates about democratic values and norms. From defining what the state owes students in matters of punishment and privacy, to freedom of expression and equal

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133  Id. at 373 (Stevens, J., concurring in part and dissenting in part).
135  Id. at 493.
137  Id. at 35–36.
138  See Hochschild & Scovronick, supra note 150, at 1–2.
140  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).
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protection, schools are crucibles for contestation and resolution in democracy. 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.”

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. Minoritized communities, in particular, have long used engagement with schools as an outlet for political expression and participation. School-level politics, for example, are the conduit through which minoritized communities have challenged state-sanctioned discrimination, often to nationwide consequence. In Black and Latino communities, the road to mayoralty and city council often begins with school board service.

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321 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).

322 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).

323 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).

324 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”).


326 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).

327 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).

328 See id. at 5–6.

329 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; improves the likelihood that students will attend college, work, and live in desegregated settings; and prompts critical thinking.

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. 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. 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.

As American political scientist Danielle Allen explains, democracy does not achieve the common good by assuring...

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330 See Catherine L. Horn & Michal Kurlaender, C.R. Project Harvard Univ., The End of Keyes—Re segregation 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).

331 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).


335 Id. at 28–29.
the same benefits to everyone. 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.”

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. Race functions as an obstacle to self-determination, erecting barriers to the equal distribution of resources and opportunities that allow for self-determination. 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 and risky education.

336 Id. at 29.
337 Id.
339 See id. at 15.
340 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. 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, to the National Defense Education Act of 1958 which increased education funding at all levels, to the Great Society investments in education, 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. 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. Other

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341 See Reeves, supra note 104, at 73–74.
345 See supra note 54 and accompanying text.
346 Sattin-Bajaj & Roda, supra note 134, at 999–1002.
347 Id. at 1016–17.
parents, still, are able to benefit from enrollment counselors already embedded in their schools.\footnote{See id. at 1020.}

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.\footnote{See id. at 1021–22.} 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.\footnote{See id. at 1002, 1020–21.} 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.\footnote{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).} Alternatively, parents can be removed as gatekeepers by either testing all students across the board,\footnote{See Sattin-Bajaj & Roda, supra note 134, at 1025 (citing as an example of such policy in Broward County public schools).} or simply providing gifted or advanced pedagogy and curriculum to all students in more integrated classroom settings.\footnote{See, e.g., Fong & Faude, supra note 159, at 257–58 (finding that timeline-based lotteries...geographically based enrollment systems).} 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.\footnote{See, e.g., 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”).}

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.\footnote{See also Denice & 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).} In response to reports that students of color are less likely to even know about competitive school admission
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.356

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.357 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.358 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.359 In such a model, lawyers and policymakers work to stimulate critical consciousness, voice, and agency among subordinated groups such that they might liberate themselves.360

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

356 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).

357 HACKER, supra note 38, at 175; REEVES, supra note 104, at 135–36.

358 See Geiser, supra note 174, at 17.


360 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,” 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”) fund362 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.363 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.364 Central to NCLB, in particular, was the disaggregation of testing data by several categories, including race,
ethnicity, economic disadvantage, and limited English proficiency. 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 promised given the unequal distribution of experienced teachers by race and nominal integration that masks racialized tracking. 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. Much of the regulation of NCLB targeted Title I schools and threatened state takeover and charter conversion if schools failed to make adequate yearly progress. RTTT more explicitly blamed poor school culture

365 Ryan, supra note 127, at 940.
367 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).
370 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).
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along with poor teaching and school management for low academic performances, ignoring disparities in school funding, racial segregation, and economic isolation.371

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.372

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.


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, and Swann v. Charlotte-Mecklenburg Board of Education responded to norms of white supremacy that shaped the school system. De jure school segregation in the United States was meant to separate Whites from Blacks in response to the purported inferiority of the latter, 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.

375 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).
376 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.”).
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*, 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. In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court curtailed state attempts to voluntarily address race and risk in the school system. 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. 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. Moreover, the Court placed strict limitations on the consideration of race in admissions in an effort to preserve “merit” in the process.

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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379 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).
381 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).
382 Brown-Nagin, supra note 319, at 1458–61.
384 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.”385 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.386 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.387 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.388 One might

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385 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. THEORIES 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).


387 Id.

388 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 & Auldridge-Reeves, *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 SCHL. 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.389

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.390 Similarly, the ease with which parents can abandon struggling school districts, avoiding initiatives meant to promote racial equality391 and taking the primary sources of funding with them,392 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.393 Unfettered liberty at the cost of equality also violates a commitment to fairness in self-

389 See Shapiro, supra note 250.
390 See supra Sections I.B.1, II.D.
391 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).
392 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).
393 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.394 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,395 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


Whites. 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.

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.

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397 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.”).

398 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 is 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-0099bddd74ed_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/7J5S-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. 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. These experiences can shape orientation to educational inequality and perceptions of risk in the United States. Dynamics of racial triangulation only further complicate coalition building.

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.


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, 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.

403 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].
Ian V. Rowe – Is It Time to Replace Race with Class in Affirmative Action?

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As our country is engaged in a national reckoning that has increased focus on the role that race plays in public education, it is ironic that there is a real possibility that race may soon be eliminated as a factor in school admissions, at least in higher education.

The following chart has been making its way across the Internet, highlighting differences in admissions rates at Harvard University:

2. Harvard’s Preferences for Underrepresented Minorities

Harvard’s admissions data revealed astonishing racial disparities in admission rates among similarly qualified applicants. SFFA’s expert testified that applicants with the same “academic index” (a metric created by Harvard based on test scores and GPA) had widely different admission rates by race.

<table>
<thead>
<tr>
<th>Academic Decile</th>
<th>White</th>
<th>Asian American</th>
<th>African American</th>
<th>Hispanic</th>
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<tr>
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<td>12.7%</td>
<td>54.1%</td>
<td>31.3%</td>
<td>14.6%</td>
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<tr>
<td>9</td>
<td>10.8%</td>
<td>7.6%</td>
<td>54.6%</td>
<td>26.2%</td>
<td>10.4%</td>
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<tr>
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<td>7.5%</td>
<td>5.1%</td>
<td>44.5%</td>
<td>22.9%</td>
<td>8.2%</td>
</tr>
<tr>
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<td>4.8%</td>
<td>4.0%</td>
<td>41.1%</td>
<td>17.3%</td>
<td>6.6%</td>
</tr>
<tr>
<td>6</td>
<td>4.2%</td>
<td>2.5%</td>
<td>29.7%</td>
<td>13.7%</td>
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<tr>
<td>5</td>
<td>2.6%</td>
<td>1.9%</td>
<td>22.4%</td>
<td>9.1%</td>
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<tr>
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<td>1.8%</td>
<td>0.9%</td>
<td>12.8%</td>
<td>5.5%</td>
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<td>3</td>
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<td>0.6%</td>
<td>5.2%</td>
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</tbody>
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App.179-80; JA.6008-09. For example, an Asian American in the fourth-lowest decile has virtually no chance of being admitted to Harvard (0.9%); but an African American in that decile has a higher chance of admission (12.8%) than an Asian American in the top decile (12.7%).
This data was compiled by Students for Fair Admissions, a nonprofit membership group of more than 20,000 students, parents, and others who believe that racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional. Their mission is to “support and participate in litigation that will restore the original principles of our nation’s civil rights movement.” According to SFFA, “a student’s race and ethnicity should not be factors that either harm or help that student to gain admission to a competitive university.”

Based on the racial disparities in admissions rates by race, Students for Fair Admissions is pursuing a case against Harvard University alleging racial discrimination against Asian applicants in undergraduate admissions.

It is important to note that race-based affirmative action in higher education was first affirmed in 1978 with the Regents of the University of California v. Bakke, 438 U.S. 265 decision. That decision upheld a university’s right to allow race to be one of several factors in university admissions, but found the use of specific racial quotas unconstitutional.

Twenty-five years later, in 2003, the Supreme Court upheld the University of Michigan’s law school decision to deny admission to Barbara Grutter, a white Michigan student, who had applied with academic credentials sufficiently worthy to earn her admission. However, Ms. Grutter was denied entry, partially due to the Law School’s open practice to provide admissions preference to certain minority groups to ensure a certain racial makeup of students could be achieved.

In a 5-4 opinion, the Court held that the Equal Protection Clause in the Constitution did “not prohibit the law school’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.” Even though she had ruled in the affirmative, Justice Sandra O’Connor noted that it had been 25 years since the precedent-setting Bakke case, and that 25 years hence, race-based affirmative action should no longer be needed.

In her majority opinion, O’Connor wrote that “race-conscious admissions policies must be limited in time,” adding that the “Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”

It is noteworthy that O’Connor’s prediction would set 2028 as the year in which race-based affirmative action would come to an end. But that timeline might be accelerated. Students for Fair Admissions has filed a petition for certiorari to the U.S. Supreme Court to end race-based admissions at Harvard and all colleges and universities. Students for Fair Admissions has a very strong case that Harvard is violating Title VI of the Civil Rights Act of 1964 which prohibits discrimination on the basis of race, color or national origin by any program or activity receiving federal funds. Fundamentally, the charge is that Harvard is preferring African-American and Hispanic students and in effect penalizing Asian-American and white student applicants through its weighting of race in its selection process.

Moreover, according to SFFA, Harvard admits more than twice as many non-economically disadvantaged African-American applicants than economically disadvantaged African-American applicants.
In his book *The Remedy: Class, Race and Affirmative Action*, Richard Kahlenberg argues that it is time to replace race with class preferences and highlights that “while it is true that a disproportionate number of ethnic and racial minorities are also members of the lowest socioeconomic class, the main barriers they face are due to poverty rather than race.” In his analysis, Kahlenberg “examines how the rationale for affirmative action has moved inexorably away from its original commitment to remedy past discrimination and instead has become a means to achieve racial diversity, even if that means giving preference to upper-middle-class blacks over poor whites.”

According to the *Northwestern Law Review*, the SFFA case “is one of the most notable recent equal protection challenges to be advanced almost exclusively on the basis of statistical evidence...and could well end [race-based] affirmative action in higher education and beyond if it winds up at the Supreme Court.”

So while we are all temporarily mesmerized by whether critical race theory exists in K-12 education, the US Supreme Court may soon make it so racial preferences in college admissions – pitting one race against another – no longer exists. And if all of this is replaced by class-based preferences, then that would mean greater opportunities for low-income kids of all races to have more access to higher education, and thus greater access to the American Dream.

2 Replies

Posted on Jul 16, 2021 @ 12:34pm

2 thoughts on “Ian V. Rowe – Is It Time to Replace Race with Class in Affirmative Action?”

L. Michelle Johnson  
July 16, 2021 at 12:48 pm

I have no problem with class, region, and school-based privileges. It can't simply be class. High school programs need to be rated. Students coming from under-resourced schools should get a privilege. Oh, and there isn't a plethora of wealthy black kids taking white and Asian kids spots in top schools. That is a myth.

Dennis  
July 16, 2021 at 5:37 pm

L. Michelle Johnson's point that “it is a myth” needs to be examined. The article suggests that 2/3 of the African-American students are well-off. Is this true? A person can be anti-racism, but somehow reserving places for...
wealthy minorities seems to be a strange thing to fight for – IF it's TRUE.

“New boss, same as the old boss” doesn’t sound a worthy goal, unless this is a goal of the elites, which it may be. Powerful stay powerful.
Executive Summary

Between 1994 and 2014, New York City engaged in a historic overhaul of its publicly funded high schools. This included the opening of charter high schools (made possible by a 1999 state law) and the creation of new, smaller district high schools that would, in time, replace many of the city’s large, traditional, comprehensive, and vocational high schools. The reforms started during Giuliani’s mayoral administration and accelerated in 2002 when the Bloomberg administration began methodically reviewing the performance of all its schools and closing those that consistently demonstrated poor performance.

Despite independent research showing that the changes led to positive student outcomes, Bill de Blasio brought these efforts to a close when he became mayor in 2014. Now there is a new mayor in town.

This report describes the performance of all city public high schools, district and charter, as of 2018–19—comparing them in groups determined by their size, academic selectivity, and origin—and discusses the implications of their performance for the future. Incoming mayor Eric Adams and his administration will soon have the opportunity to rethink how New York’s high schools might be reorganized or modified to serve the needs of students with differing achievement levels at the end of middle school: those ready for highly advanced work and those who enter high school clearly unlikely to attain college readiness.
Key Findings:

- Three hundred and fifty-nine new public high schools that were opened between 1994 and 2014 are operating today under the Department of Education’s control, along with 56 publicly funded but independently operated charter high schools. Combined, these schools were serving more than 173,000 students by 2019, 59% of the total public high school student body.

- Rigorous independent research of some of the schools that began in the Bloomberg era found that they had a positive impact on their students, compared with the schools that they replaced. Current data show that, on average, the nonselective small schools created in the years under study are getting their students to progress through the grades, earn passing scores on the necessary Regents exams, and graduate on time about 83% of the time. This is a great achievement over the outcomes of the previous high school system.

- One particular group, the Performance Standards Consortium schools, has a different way of teaching and learning. They dispense, for the most part, with standardized testing and offer an alternative vision of student and school assessment. Their success in getting graduates into college—and the success of their students once they are in college—gets much less attention than they deserve.

- Charter schools came later to the high school sector and remain somewhat of a work in progress. Still, their students’ exam scores are impressive, as are the rates of their graduates getting in to college. These schools are clearly better than what existed in the past in the communities that these schools serve.

- Overall, the city’s high schools continue to grapple with the very real achievement disparities among students from various demographic and socioeconomic backgrounds. Still, the transformation of the high school sector between 1994 and 2014 seems to have raised the floor of achievement and has created many more opportunities in communities whose students were once relegated to very low-performing high schools.
Introduction

To understand the challenges, as well as the possibilities, for improvement of New York City's high schools, it is useful to look backward, albeit briefly, at the evolution of American secondary education. In the late 19th century, high schools were mostly private institutions for children of the elite, meant only for the best students who were destined for entrance into the nation's equally elite college system.

In the early 20th century, the educational landscape was transformed by the spread of publicly funded high schools for the masses. All adolescents of a certain age would be offered a seat—but there was no expectation that all students would graduate or that all graduates would attend college. Instead, a high school diploma was understood to be, for most students, a “terminal” degree—a preparation for entering the workplace or “homemaking.” High schools had to adapt to this change by developing nonacademic lessons and activities to hold the interest of the non-college-bound majority of their students.

In the years after World War II, the postsecondary landscape was transformed yet again. The balance between college preparatory and terminal programs flipped, with the emphasis now placed on preparing most (but not all) students for college.

New York City, along with other urban areas, faced great challenges as a result of this second transformation. The mass suburbanization of the postwar decades meant that many families in the rising middle class left the city's high schools, leaving institutions that were tasked with preparing most of their increasingly poor and nonacademically inclined youngsters for college. By the 1970s and 1980s, many of the city's large public high schools had become, in the words of some, “dropout factories.” The citywide graduation rate was below 50% and resistant to change. In some high schools, the graduation rate was below 20%.

With the evidence of failure obvious, debates arose about how to improve high schools. These debates revolved around pedagogy. Progressive educators argued in favor of a broader conception of educational content and against the notion that teaching should deliver a set curriculum to all students. Outside the system, educational traditionalists also had their say, urging a back-to-basics approach. Liberals and conservatives both railed against the unrelenting levels of student failure. Meanwhile, work rules shielded principals from any responsibility for school performance. Tenure, once granted, guaranteed that they would remain at the helm of a particular school unless they violated laws or engaged in gross misconduct. Combined with the similar protections for tenured teachers, these rules almost ensured that the process of high schooling would go on year in and year out without any regard to student outcomes.

1994–2014: Change on a Large Scale

By the 1990s, New York City's high school graduation numbers had made it clear to many that something dramatic needed to be done. The pressure for change, as well as various designs for new approaches to secondary education, emerged from school-level educators inside the system and community members outside.
The city’s schools had long included dedicated teachers who chafed under the strict bureaucratic dictates of the hierarchical school system. The educators who considered themselves progressive in pedagogical terms applied the term “constructivist” to their approach. It placed the classroom teacher in the role of facilitator of the student’s learning rather than the transmitter of educational content and knowledge. Students would be encouraged and expected to pursue their own path to the subject matter, think critically about it, and arrive at knowledge through this process. “Instead of having the students relying on someone else’s information and accepting it as truth,” as one resource for teachers put it, “the students should be exposed to data, primary sources, and the ability to interact with other students so that they can learn from the incorporation of their experiences.”

In the 1980s and early 1990s, the New York City Board of Education allowed the creation of some high schools that followed the constructivist approach; these largely served special populations—second-chance schools for students who had fallen severely behind or who were returning to school after dropping out, as well as a new International High School for recent immigrants. One school district, East Harlem’s District 4, also supported Deborah Meier, the MacArthur Award–winning educator who founded Central Park East elementary school. That elementary school eventually grew to include a middle and high school, all using the constructivist approach. These schools became a proving ground for young teachers who believed in this philosophy. As many traditional high schools in the system seemed stuck at low levels of performance, these educators clamored for more opportunities to show that their approach could succeed where the traditional system had not.

Outside the school system, community groups pushed for changes to improve the high failure rate in many of the city’s high schools. Pastors and community leaders associated with the East Brooklyn Congregations, affiliated with the Industrial Areas Foundation (IAF), spent several years pushing for the reform of Thomas Jefferson and Bushwick, two local, and failing, high schools. Disappointed with the system’s inability to improve them, they eventually proposed two new small high schools as alternatives. The East Brooklyn Congregations group eventually partnered with a team of educators then at the Manhattan Institute on the design of the new schools. A similar effort was undertaken by the IAF affiliate in the South Bronx, South Bronx Churches (which partnered with a different organization).

On February 26, 1992, two students, Ian Moore and Tyrone Sinkler, were tragically shot and killed inside Thomas Jefferson High School only an hour before a scheduled visit by Mayor David Dinkins. Shortly after the funerals, the NYC schools chancellor agreed to sit down with East Brooklyn Congregations’ leaders to discuss their plan for new schools. That effort eventually grew to include the school proposed by South Bronx Churches and schools proposed by several other groups. They were aided by a $25 million grant from the Annenberg Foundation to an organization now known as New Visions, as part of the $500 million Annenberg Challenge to improve America’s schools. After the planning and identification of buildings to house the new schools, a group of new high schools opened in 1996. Today, 39 high schools that opened in 1996 remain in operation.

After those openings, 25 small high schools (also in operation today) opened in 1999 and an additional 22 opened in 2001, with a handful opening in the other years between 1996 and 2001. Unlike the city’s large high schools, where attendance typically exceeded 1,500, these schools had student bodies in the 500–700 range. They were also schools of choice—students had to apply for admission. The Gates Foundation funded an initiative that started in the Morris High School building in the South Bronx in 2001–02. That effort took off in earnest when it expanded across the city after the election of Mayor Bloomberg and the appointment of Joel Klein as schools chancellor.
Beginning in 2003, the city opened an average of 27 new district-administered small high schools a year for six straight years. New school openings continued until they were ended by Mayor de Blasio in 2014; by then, an additional 72 small public high schools had opened—a total of 231 over 11 years.  

New York City High Schools Today

As of the 2018–19 school year, there were several different types of high schools in the city (table 1). Arranged by analytic group, they include:

- **Legacy High Schools.** These are neighborhood, vocational, or magnet schools that existed before 1994, survived the closures during the 2000s and early 2010s, and are still open. There are 56 of these schools, and they average 1,859 students each. Some of them serve select populations, rather than students from a geographic zone. One, Townsend Harris, attracts a student body similar to that of Bronx Science or Stuyvesant, although it does not use the Specialized High School Admissions Test (SHSAT) for admission.

- **Traditional SHSAT Schools.** Stuyvesant, Bronx Science, Brooklyn Tech, and LaGuardia are required by state law to admit students based on the results of SHSAT—or auditions, in the case of LaGuardia, an institution devoted to music, art, and the performing arts. The average enrollment in these schools is 3,757.

- **Post-1994 SHSAT Schools.** Under Bloomberg, the city opened five additional high schools that admit students based on SHSAT. They average 676 students.

- **Post-1994 Small High Schools.** These 319 schools average 407 students each; 83 were created before the Bloomberg administration. These institutions are also called “Small Schools of Choice” (SSC) because of their size and because their admissions were based on an application process, not the students’ home addresses.

- **Post-1994 Large High Schools.** The city opened 10 new high schools attended by an average of 1,171 students. They were not created in response to a local school failure. Generally, they were placed in newly constructed buildings meant to increase capacity and alleviate overcrowding in particular neighborhoods. A few of these larger schools grew from small high schools. Given their average student body, we include them in this group.

- **Performance Standards Consortium Schools.** In 1998, a number of schools that substituted performance assessments instead of the state’s standard exams formed the New York Performance Standards Consortium. There are 38 consortium high schools that educate some 30,000 students in New York City, Rochester, and Ithaca. New York City’s 27 consortium schools average 425 students each and use a state-approved alternative student assessment system that substitutes project work and portfolio assessment for some of the Regents exams required in all other schools for graduation. Students attending consortium schools submit extensively researched written reports that they must also present before external evaluators. They also need to “complete graduation-level written tasks and oral presentations, known as PBATS (performance-based assessment tasks), including an analytic essay on literature, a social studies research paper, an extended or original science experiment, and problem-solving at higher levels of mathematics.” Importantly, the schools themselves are evaluated by DOE superintendents. Consortium schools are also studied by outside researchers.
The Transformation of Public High Schools in New York City

- **Charter High Schools.** These schools operate under individual charters granted by the New York State Board of Regents or the Board of Trustees of the State University of New York. They are publicly funded on a per-pupil basis and are not administered by the city’s Department of Education. Their charters are subject to periodic review and renewal or revocation by their authorizing body. There are 65 charter high schools in the data, and they average 319 students each.

As of the 2018–19 school year, there were 294,855 students enrolled in 486 publicly funded district or charter high schools in New York City. Only 60 were in operation before 1994—the four traditional SHSAT schools and 56 comprehensive high schools that survived the large-scale closure of low-performing high schools between 2001 and 2014.

**TABLE 1**

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
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<tbody>
<tr>
<td>Before 1994</td>
<td>56</td>
<td>4</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>60</td>
<td>119,148</td>
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<tr>
<td>1994–2001</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>83</td>
<td>3</td>
<td>16</td>
<td>4</td>
<td>107</td>
<td>52,274</td>
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<td>2002–14</td>
<td>0</td>
<td>0</td>
<td>4</td>
<td>234</td>
<td>7</td>
<td>11</td>
<td>52</td>
<td>308</td>
<td>121,285</td>
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<td>2015–17</td>
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<td>3</td>
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<td>Total</td>
<td>56</td>
<td>4</td>
<td>5</td>
<td>319</td>
<td>10</td>
<td>27</td>
<td>65</td>
<td>486</td>
<td>294,855</td>
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<tr>
<td>Average Enrollment 2018–19</td>
<td>1,859</td>
<td>3,757</td>
<td>681</td>
<td>402</td>
<td>1,171</td>
<td>425</td>
<td>319</td>
<td>607</td>
<td></td>
</tr>
</tbody>
</table>

Source: Author’s analysis of New York City Dept. of Education data in the “Demographic Snapshot and School Directory (LCGMS)” systems

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**Student Characteristics by School Group**

While there is variation among the schools in each analytic group, clear patterns exist across the groups. Both groups of schools that use SHSAT for admission enroll students with the highest level of eighth-grade scores on the state English language arts (ELA) and mathematics exams (table 2). Their students also tend to be from less poor families, include far fewer students with special needs or in temporary housing, and are more likely to be Asian and white than students in the other schools.
The large high schools created since 1994 have the third-highest eighth-grade test scores for entering students after the two SHSAT groups. Demographic profiles suggest that, on average, there is less concentration of lower SES (socioeconomic status) students than in the other groups of schools. This is largely explained by location; six of the post-1994 large high schools are in less poor areas of Brooklyn and Queens, and two are in Manhattan’s more affluent District 2.

The legacy high schools serve respectable numbers of English language learners, students with disabilities, and students from lower-income families. They have higher percentages of Asian and white students than the city averages and lower percentages of black and Hispanic students. The average eighth-grade scores of students entering the legacy high schools are slightly higher than in the new small schools, charter schools, and consortium schools.

Students with greater social and academic needs predominate in the post-1994 small schools, charter schools, and consortium schools. These groups of schools all have a higher percentage of students with disabilities than the city average. The consortium schools serve a much greater percentage of English language learners than charter schools and a greater percentage than the post-1994 small schools, on average. In all three groups, the percentage of students from lower-income families is above 75%. Consortium schools and newer small schools serve a greater percentage of students who are overage and under-credited than do charter schools. In charter schools, 93% of the students are black or Hispanic; in the small high schools, that figure is 80% and, in the consortium, just above 76%. Charter schools enroll students with average eighth-grade scores higher than in the other two groups.

**TABLE 2**

Student Characteristics by Analytical Group: 2018–19 School Year

<table>
<thead>
<tr>
<th>Demographic</th>
<th>Legacy High Schools</th>
<th>Traditional SHSAT Schools</th>
<th>Post-1994 SHSAT Schools</th>
<th>Post-1994 Small Schools</th>
<th>Post-1994 Large Schools</th>
<th>Performance Standards Consortium Schools</th>
<th>Charter Schools</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>English Language Learners</td>
<td>11.1%</td>
<td>0.0%</td>
<td>0.0%</td>
<td>14.3%</td>
<td>5.7%</td>
<td>18.9%</td>
<td>5.5%</td>
<td>11.5%</td>
</tr>
<tr>
<td>Students with Disabilities</td>
<td>16.9%</td>
<td>1.6%</td>
<td>2.1%</td>
<td>19.3%</td>
<td>16.3%</td>
<td>18.2%</td>
<td>18.0%</td>
<td>17.1%</td>
</tr>
<tr>
<td>Self-Contained (special needs)</td>
<td>4.3%</td>
<td>0.0%</td>
<td>0.0%</td>
<td>1.4%</td>
<td>1.7%</td>
<td>1.0%</td>
<td>1.5%</td>
<td>2.3%</td>
</tr>
<tr>
<td>Economic Need Index</td>
<td>68.3%</td>
<td>42.7%</td>
<td>40.7%</td>
<td>76.2%</td>
<td>62.0%</td>
<td>73.5%</td>
<td>75.5%</td>
<td>70.6%</td>
</tr>
<tr>
<td>Overage/Under-Credited</td>
<td>5.4%</td>
<td>0.2%</td>
<td>0.4%</td>
<td>8.5%</td>
<td>2.8%</td>
<td>8.3%</td>
<td>5.5%</td>
<td>6.5%</td>
</tr>
<tr>
<td>Residing in Temporary Housing</td>
<td>8.0%</td>
<td>2.3%</td>
<td>2.4%</td>
<td>13.1%</td>
<td>5.4%</td>
<td>13.1%</td>
<td>8.5%</td>
<td>10.0%</td>
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<tr>
<td>Family Eligible for Public Assistance</td>
<td>57.4%</td>
<td>31.9%</td>
<td>29.7%</td>
<td>65.0%</td>
<td>52.2%</td>
<td>61.3%</td>
<td>63.5%</td>
<td>59.5%</td>
</tr>
<tr>
<td>Asian</td>
<td>24.2%</td>
<td>56.7%</td>
<td>49.4%</td>
<td>9.0%</td>
<td>19.6%</td>
<td>7.2%</td>
<td>1.7%</td>
<td>17.1%</td>
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<tr>
<td>Black</td>
<td>19.2%</td>
<td>4.8%</td>
<td>4.9%</td>
<td>33.3%</td>
<td>12.9%</td>
<td>23.9%</td>
<td>47.0%</td>
<td>26.3%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>34.6%</td>
<td>8.2%</td>
<td>7.7%</td>
<td>46.7%</td>
<td>44.7%</td>
<td>52.5%</td>
<td>46.1%</td>
<td>40.1%</td>
</tr>
<tr>
<td>White</td>
<td>19.6%</td>
<td>26.6%</td>
<td>32.6%</td>
<td>8.5%</td>
<td>19.8%</td>
<td>13.0%</td>
<td>2.3%</td>
<td>13.8%</td>
</tr>
<tr>
<td>Average State English Language Arts Exam Score</td>
<td>3.01</td>
<td>4.06</td>
<td>4.05</td>
<td>2.81</td>
<td>3.14</td>
<td>2.82</td>
<td>2.94</td>
<td>2.98</td>
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<tr>
<td>Average State Math Exam Score</td>
<td>2.98</td>
<td>4.26</td>
<td>4.27</td>
<td>2.67</td>
<td>3.12</td>
<td>2.72</td>
<td>2.93</td>
<td>2.91</td>
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</tbody>
</table>

Source: Author’s analysis of New York City Dept. of Education data in the “High School Quality Review” system
2018–19 Student Outcomes: New Small High Schools

Many of the small high schools created since 2001 have been subjected to methodologically rigorous evaluations and analyses by MDRC, the Research Alliance for New York City Public Schools (located at New York University's Steinhardt School of Culture, Education, and Human Development), and the New York City Independent Budget Office (IBO).

These organizations considered the impact of closing low-performing large high schools and replacing them with small high schools on two distinct groups: students who would have attended the large schools that were closed had they not been closed (MDRC), and students who attended large high schools as they were phased out (Research Alliance and IBO). Though the reports differed in their focus and methods, all results are generally positive, finding a positive effect on the initiative to close low-performing high schools and replace them with newly developed small high schools. The most positive effects were found by MDRC and the Research Alliance for those students who were diverted from the closing schools to the newly created small schools. The MDRC study of the impact on students in those closing schools themselves found little impact, positive or negative, and the IBO study found slightly negative effects on some students.

The MDRC studies looked at more than 100 new small high schools, using the naturally occurring lotteries that were part of the application process. Of a sample exceeding 21,000 students who entered a lottery, those who won a seat and enrolled “were 9.5 percentage points more likely to graduate from high school than those who lost a lottery and did not enroll.” According to the study, the increased likelihood of graduation applied to “students of all backgrounds—low-income students, students who performed below grade level in eighth grade, English-language learners, and students receiving special education services.” Seven cohorts of rising ninth-graders experienced better outcomes than they would have had they lost the lottery, the study explained, even as it noted that the graduation rates in the schools attended by losers of the lottery were also improving.

Another MDRC study tracked students from these small high schools into college and found that their graduates were more likely to enroll in college and to stay in college than they would have had they lost the lottery and attended other high schools. MDRC are tracked a third cohort of small high schools and found evidence of success: increased student graduation rates, including students of color, despite rising graduation rates in other city high school groups.

The Research Alliance considered the impact of closing large high schools on students who remained in them as they were being phased out. This study answered the important question of whether the documented benefits experienced by students who were diverted from these schools came at the cost of harming the final cohorts of students in the large schools. They found that this was not the case: the closures had little impact, positive or negative, on the academic outcomes of students who remained in schools as they were phased out.

IBO compared the outcome for students in three large high schools that were phased out in the later 2000s. The results were mixed. IBO found that for students at high schools “slated for closing in 2006–07, the probability of graduating on time was not significantly different than for students in the comparison group. For students in the 2008–09 set of closing high schools we tracked, there was a negative effect on graduating on time.” For students in both cohorts, “the likelihood of earning a local diploma instead of the more rigorous Regents diploma was
higher among those in closing schools than for their peers at other low-performing schools.”
It also noted: “Students in the 2006–2007 cohort of closing schools tended to graduate ‘college-ready’ at lower rates than their peers at other low-performing schools.”

2018–19 Student Outcomes: Performance Standards Consortium

In 2015, the consortium began a pilot program with the City University of New York (CUNY) to admit its students who graduated high school but whose SAT scores were too low to be admitted to a four-year CUNY program. In a 2020 study, researchers at the nonprofit Learning Policy Institute found that students admitted to CUNY through the pilot program “achieve higher first-semester college GPAs, earn more initial credits, and persist in college after the first year at higher rates than peers from other New York City schools, who, on average, have higher SAT scores.”

Student and School Performance in 2019

The engagement of students in school, as reflected in their attendance patterns, aligns with the distribution of student needs and challenges across the high school groups. Students in both groups of SHSAT schools have high attendance rates (96%) and low rates (9%–12%) of chronic absenteeism (a student who attends less than 90% of the time is considered chronically absent) (TABLE 3). The post-1994 large high schools are next best, with an average attendance of 90.8% and chronic absenteeism of 24.8%; attendance in the legacy high schools is just slightly lower. The other three groups serve the more challenging youngsters, though charter schools have higher attendance rates than the new small schools and the consortium schools.

These patterns hold for the measure of success of credit accumulation in the first year of high school, with one exception. Charter students have the lowest rate of all the groups, with only 64% of students accumulating 10+ credits in the first year. This may suggest tougher grading standards accompanied by a stiffer grade-retention policy in charter schools.

From the dismal performance of the 1970s and 1980s, the city’s overall graduation rate today has surpassed 80%. The four-year graduation rates are nearly 100% in SHSAT schools, 90.8% in the newer large high schools, 87.5% in the charters, and nearly 83% in the newer small schools and legacy schools. Six-year rates aren’t that much greater, except in charter high schools, where an additional 6.5% of students graduate.

Achievement scores on the five subject-area state Regents exams (expressed on a 100-point scale) are sobering in all schools except SHSAT schools, where they range from 88 to 95. In the legacy high schools, the averages range from the high 60s to mid-70s (65 is the passing score). They are slightly lower in the new small high schools and higher in the newer large high schools. Average Regents scores in the charter high schools are similar to the district schools. Students in the consortium schools take only two Regents exams (under their state waiver); their average scores in English and algebra are similar to those of the district schools serving similar populations.
Overall, for the types of students they serve, the newer small high schools, charters, and consortium schools are doing well at getting high school students to graduate, compared with the previous 50% norm—but their achievement levels reflect the academic challenges that their students bring to high school. Still, this is a statement about averages; there is variability across all the groups in the data.

### Table 3

<table>
<thead>
<tr>
<th></th>
<th>Legacy High Schools</th>
<th>Traditional SHSAT Schools</th>
<th>Post-1994 SHSAT Schools</th>
<th>Post-1994 Small Schools</th>
<th>Post-1994 Large Schools</th>
<th>Performance Consortium Schools</th>
<th>Charter Schools</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Attendance</strong></td>
<td>89.3%</td>
<td>95.9%</td>
<td>95.6%</td>
<td>87.0%</td>
<td>90.8%</td>
<td>87.5%</td>
<td>90.9%</td>
<td>88.8%</td>
</tr>
<tr>
<td><strong>Chronic Absence</strong></td>
<td>26.9%</td>
<td>8.9%</td>
<td>12.2%</td>
<td>35.4%</td>
<td>24.8%</td>
<td>34.3%</td>
<td>24.6%</td>
<td>29.7%</td>
</tr>
<tr>
<td><strong>10+ Credits in Year 1</strong></td>
<td>84.6%</td>
<td>98.3%</td>
<td>99.4%</td>
<td>85.6%</td>
<td>90.4%</td>
<td>89.0%</td>
<td>64.0%</td>
<td>84.6%</td>
</tr>
<tr>
<td><strong>4-Year Graduation Rate</strong></td>
<td>82.7%</td>
<td>98.3%</td>
<td>99.4%</td>
<td>82.9%</td>
<td>90.7%</td>
<td>83.8%</td>
<td>87.2%</td>
<td>84.4%</td>
</tr>
<tr>
<td><strong>6-Year Graduation Rate</strong></td>
<td>84.5%</td>
<td>99.4%</td>
<td>99.9%</td>
<td>84.7%</td>
<td>93.1%</td>
<td>84.7%</td>
<td>93.7%</td>
<td>86.3%</td>
</tr>
<tr>
<td><strong>English Regents: Average Score</strong></td>
<td>76.6</td>
<td>93.7</td>
<td>93.5</td>
<td>72.0</td>
<td>80.6</td>
<td>73.0</td>
<td>73.1</td>
<td>75.1</td>
</tr>
<tr>
<td><strong>Algebra I Regents: Average Score</strong></td>
<td>67.6</td>
<td>88.8</td>
<td>89.2</td>
<td>64.6</td>
<td>67.9</td>
<td>64.5</td>
<td>67.2</td>
<td>66.2</td>
</tr>
<tr>
<td><strong>Global History Regents: Average Score</strong></td>
<td>71.8</td>
<td>88.0</td>
<td>88.7</td>
<td>68.2</td>
<td>74.6</td>
<td>Waived</td>
<td>69.1</td>
<td>71.0</td>
</tr>
<tr>
<td><strong>U.S. History Regents: Average Score</strong></td>
<td>74.7</td>
<td>94.5</td>
<td>93.8</td>
<td>69.0</td>
<td>78.6</td>
<td>Waived</td>
<td>71.2</td>
<td>73.1</td>
</tr>
<tr>
<td><strong>Living Environment Regents: Average Score</strong></td>
<td>69.0</td>
<td>92.0</td>
<td>91.3</td>
<td>65.5</td>
<td>71.4</td>
<td>Waived</td>
<td>68.8</td>
<td>68.1</td>
</tr>
</tbody>
</table>

Source: Author's analysis of New York City Dept. of Education data in the “High School Quality Review” system

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### Student Outcomes: SAT Scores and College Enrollment

In 2018-19, the average SAT combined score of high school students across all publicly funded high schools in New York City—district, and charter—was 1014 (Table 4), below the national average of 1059. Average scores of students in the two groups of SHSAT schools are at the 95th percentile nationwide. Average SAT scores for the newer large high schools are at the 49th percentile and the 43rd percentile in the legacy schools. The other groups of schools are lower: charters are at the 34th percentile; new small and consortium schools are both at the 31st percentile. Each group of schools sends at least 60% of its graduates to college, with SHSAT schools leading the way, at 94.7% (traditional SHSAT) and 91.8% (post-1994). These schools are also, on average, most likely to send their graduates to a private college in New York State or a college out of state. The post-1994 large schools (78.7%) and charters (73.1%) also have high rates of their graduates enrolling in college. The other high school groups (new small, consortium, and legacy) are all in the 65%-68% range.
Once again, these results roughly coincide with the pre-high school achievement levels of the students who attend the schools in each group. SHSAT schools admit elite students by design, and their SAT scores and college admissions rates reflect that. Schools in the performance consortium argue that they produce graduates who succeed in college despite lower SAT scores, and they have research to back that up. The post-1994 large high schools have respectable SAT scores and college-enrollment rates, and the post-1994 small schools serve a more challenging population and send a good number on to college. Charter schools also point their students to college and succeed in getting almost three-quarters of their graduates enrolled.

### TABLE 4

**SAT Scores and Postsecondary Enrollment by School Group: 2018–19**

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Students Taking SAT</td>
<td>21,580</td>
<td>3,542</td>
<td>776</td>
<td>26,294</td>
<td>2,474</td>
<td>2,408</td>
<td>1,946</td>
<td>59,020</td>
</tr>
<tr>
<td>SAT Reading and Writing Average Score</td>
<td>504</td>
<td>682</td>
<td>690</td>
<td>476</td>
<td>518</td>
<td>480</td>
<td>484</td>
<td>503</td>
</tr>
<tr>
<td>SAT Math Average Score</td>
<td>516</td>
<td>729</td>
<td>734</td>
<td>473</td>
<td>531</td>
<td>467</td>
<td>484</td>
<td>510</td>
</tr>
<tr>
<td>Postsecondary Enrollment Cohort Size</td>
<td>25,822</td>
<td>3,474</td>
<td>815</td>
<td>31,270</td>
<td>2,763</td>
<td>2,788</td>
<td>3,461</td>
<td>70,393</td>
</tr>
<tr>
<td>Enrollment 6 Months After High School Graduation</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CUNY 2-Year</td>
<td>21.8%</td>
<td>1.7%</td>
<td>1.6%</td>
<td>21.4%</td>
<td>21.3%</td>
<td>21.3%</td>
<td>16.9%</td>
<td>20.1%</td>
</tr>
<tr>
<td>CUNY 4-Year</td>
<td>22.4%</td>
<td>17.3%</td>
<td>21.2%</td>
<td>15.4%</td>
<td>29.5%</td>
<td>9.8%</td>
<td>14.4%</td>
<td>18.4%</td>
</tr>
<tr>
<td>New York State Public</td>
<td>8.7%</td>
<td>22.5%</td>
<td>18.0%</td>
<td>11.4%</td>
<td>11.2%</td>
<td>11.8%</td>
<td>20.2%</td>
<td>11.5%</td>
</tr>
<tr>
<td>New York State Private</td>
<td>8.1%</td>
<td>23.9%</td>
<td>21.0%</td>
<td>8.6%</td>
<td>11.5%</td>
<td>9.5%</td>
<td>11.2%</td>
<td>9.6%</td>
</tr>
<tr>
<td>Out-of-State College</td>
<td>3.8%</td>
<td>29.3%</td>
<td>29.7%</td>
<td>5.1%</td>
<td>4.3%</td>
<td>10.4%</td>
<td>9.5%</td>
<td>6.5%</td>
</tr>
<tr>
<td>Postsecondary Other</td>
<td>1.2%</td>
<td>0.0%</td>
<td>0.0%</td>
<td>1.6%</td>
<td>0.6%</td>
<td>4.8%</td>
<td>0.8%</td>
<td>1.4%</td>
</tr>
<tr>
<td>Public Service</td>
<td>0.2%</td>
<td>0.1%</td>
<td>0.2%</td>
<td>0.2%</td>
<td>0.3%</td>
<td>0.4%</td>
<td>0.0%</td>
<td>0.2%</td>
</tr>
<tr>
<td>Vocational Program</td>
<td>0.2%</td>
<td>0.0%</td>
<td>0.0%</td>
<td>0.1%</td>
<td>0.2%</td>
<td>0.2%</td>
<td>0.0%</td>
<td>0.1%</td>
</tr>
</tbody>
</table>

Source: Author's analysis of New York City Dept. of Education data in the “High School Quality Review” system

The city’s DOE applies a rigorous methodology to its data on high school performance to develop a student achievement score for each of its high schools and many of the city’s charter schools. This is part of its overall school “Quality Review” process. In the past, these scores, and others, were used to produce a single-letter grade of A, B, C, D, or F for each school. Under Bloomberg, schools that received an F grade or Ds in consecutive years were considered for closure. De Blasio ended the school closure process as well as the computation of single-letter school grades, preferring to apply separate numerical grades in each of six areas.

The ongoing value of DOE’s achievement score is that it accounts for differences across schools in terms of student characteristics and pre-high school achievement levels. It allows for comparison of high school performance on a level playing field. All the schools that use
SHSAT for student admission exceeded their DOE achievement targets in the 2018–19 school year; this is no surprise (table 5). A total of 91% of the students in the post-1994 large high schools attend schools that either meet or exceed their achievement target. There is one low-performing school in this group. Among the other groups, the consortium schools stand out. They admit the students with the lowest performance levels on the state's eighth-grade exams; their English and algebra Regents’ scores are low; yet their students earn admission to college. But when DOE accounts for those low eighth-grade scores and other measures of students’ previous achievement, it finds that the consortium high schools do better than other schools with similar populations. Thus, 88% of the students in these schools are meeting or exceeding DOE’s achievement expectations. 18 Only 43 of the city’s 65 charter high schools receive DOE achievement ratings. They do slightly better on this measure than the city’s post-1994 small high schools. The city’s legacy high schools lag behind the others; only 66% of the students in these schools are in schools that meet or exceed achievement targets.

To round out this complicated story, schools other than SHSAT schools are found in both the top and bottom ranks of the city’s high schools. Eighty-nine of the post-1994 small schools are below their achievement targets, but 229 of these schools are meeting or exceeding their targets, some at high levels. Twenty-one legacy schools and nine charters are falling below their targets but 35 and 34 of these schools are meeting or exceeding their targets.

TABLE 5

<table>
<thead>
<tr>
<th>DOE Ratings: Schools Meeting Achievement Targets, 2018–19 School Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legacy High Schools</td>
</tr>
<tr>
<td>---------------------</td>
</tr>
<tr>
<td>Total Number of Students</td>
</tr>
<tr>
<td>In Schools: Meeting or Exceeding Their Achievement Target</td>
</tr>
<tr>
<td>Percentage of Students in These Schools Who Meet or Exceed Their Target</td>
</tr>
<tr>
<td>Number of Schools with an Achievement Rating</td>
</tr>
<tr>
<td>Meeting or Exceeding Achievement Target</td>
</tr>
<tr>
<td>Approaching or Not Meeting Their Achievement Target</td>
</tr>
</tbody>
</table>

Source: Author’s analysis of New York City Dept. of Education data in the “High School Quality Review” system

Discussion and Implications

For much of the second half of the 20th century, public high schools in New York City fought a losing battle, caught between rising public expectations about the goals of high school and social conditions that were either deteriorating or not improving in ways needed for schools to
meet those expectations. Tensions were exacerbated as families whose expectations and social capital aligned with college-preparatory education moved to suburban districts or sought refuge either in the city’s more selective high schools or the dwindling number of effective large comprehensive high schools in the less poor areas of the city.

Two things happened between the mid-1990s and 2014 that had a tremendous impact on the city’s public high schools. First, dedicated teachers and frustrated community leaders and groups effectively pushed the city’s then Board of Education to open the development of new and different high schools. This effort became the system’s norm in 2002, when direct mayoral control replaced governance through a Board of Education appointed by six elected officials. In 1999, moreover, a new state law allowed for the creation of charter schools outside the control of the city’s school system. Growth and accountability became the norm, replacing the stability or stasis of the previous regime.

The performance of the new high schools of the 2018–19 school year is interesting and mixed, with clear relationships between the academic status of students upon entry to high school and the eventual performance of those schools on outcome measures. Variations across individual schools within the analytic groups used in this report exist, but they are not the focus of this paper (these variations can be followed by examining the publicly available school-quality report data on the city’s DOE website).

Unsurprisingly, the selective schools that screen entrants based solely on SHSAT scores outperform all others, on average. Their exemplary performance should strongly inform the ongoing debate about their admissions standards. A few of the legacy and post-1994 large high schools also benefit from other forms of academic screening and produce high results. The main motivation for the aggressive creation of new high schools beginning in the mid-1990s was the large numbers of traditional high schools with low and stagnant graduation rates. So was the early success of many of these schools, documented by rigorous independent evaluators in the past, still visible in the current performance data?

The answer will disappoint anyone who expects miracles, but people with their feet on the ground should see clear and positive takeaways and guideposts for future action.

- The largest group of new high schools—the post-1994 small high schools of choice—were meant as an alternative for the large high schools with low and stagnant graduation rates. Their success was documented by MDRC, Research Alliance, and IBO studies. Current data show that, on average, these small schools are getting their students to progress through the grades, earn passing scores on the necessary Regents exams, and graduate on time about 83% of the time. That’s a big difference from the previous status quo.

- The Performance Standards Consortium schools get much less attention than they deserve. They have a different way of teaching and learning, dispense for the most part with standardized testing, and offer an alternative vision of student and school assessment. The success of these schools in getting graduates into college—and the success of their students once they are in college—is admirable.

- Charter schools came later to the high school sector, and they remain somewhat of a work in progress. Still, their students’ exam scores are impressive, as are the rates of their graduates getting in to college. Both are clearly better than what existed in the past in the communities that these schools serve.

- Overall, the link between student achievement in middle school, demographics, and high school outcomes appears weakened but not broken. Students who enter public high schools with low achievement levels struggle to attain the college readiness that is expected of them
by so many policy advocates and thinkers. Yet the high school graduates in the city’s poorest neighborhoods are not that different from the national norm. Across all demographic groups, the latest national data show that fewer than 40% of high school graduates complete either an associate’s degree within four years of high school graduation or a bachelor’s degree within six years.19

New York City’s high schools fell behind the rest of the country as public secondary schools attempted to change from a terminal system for the masses to one that served a growing percentage of college preparatory students while also providing a meaningful terminal system for the rest. The failure of the city’s high school system spurred a vigorous rethinking of high school organization and practices that, for a while, became a model for the rest of the country.

Nevertheless, the new system failed to acknowledge the growing pressure for all high schools to become exclusively college preparatory. The desire for that outcome—universal college preparedness—remains strong among the dreamers and many in the education reform and think-tank worlds. It does not mesh with the reality of the low achievement levels of many early adolescents as they enter high schools that are tasked with preparing them for college.

The future leadership of New York City’s schools can offer America a new vision for secondary education. The goals? Most students are successfully prepared for college without the need for remediation, and large numbers of other students get a meaningful high school diploma that signifies readiness to enter the workforce immediately in an entry-level job, attached to reasonable expectations of further formal training and career advancement. Students in the broad middle of the achievement scale can be successfully educated in the general, college-preparatory curriculum—and students at the higher and lower bands of achievement can be offered effective education in schools designed to allow them to reach their full potential, whether that be the Ivy League or the workforce. For these goals to become a reality, the State Board of Regents needs to reform some of its own previous decisions mandating that all high school diplomas reflect college-ready standards of achievement, and the state education department will have to expedite the approval of new forms of credentials signaling work preparedness.

Recommendations for Mayor Adams’s Administration

• Commit to a careful assessment of high school performance, and consider the closure of the lowest-performing high schools along with the dynamic creation of new opportunities for students in either new district-run or charter high schools. This last goal will depend upon the state legislature undoing the unnecessary cap on the number of charter schools allowed in the city, and the mayor should push the legislature to do so.

• Signal support for the recognition of workforce preparation as a valid alternative to college readiness for high school diplomas.

• Create new schools that reflect what is currently known about the needs of students and the experience of the previous round of school creation. Specifically, the appropriate size of new high schools should be considered. Under the Bloomberg administration, new high schools were generally capped at fewer than 500 students each. While having some merit, this limited the range of courses that could be offered in individual schools. Up to a point, larger enrollments might allow greater course offerings while maintaining the personal nature and closer contact between students and teachers enjoyed in smaller schools.
• Signal support for the work of the Performance Standards Consortium and efforts to expand this initiative in consultation with the organization’s leaders.

• Whatever standards are in place, the schools chancellor, with the mayor’s support, should ensure that schools award diplomas that meaningfully reflect the completion of necessary work. Isolated abuses will always occur in a large system, but principals must hear a clear and consistent message about the integrity of high school diplomas.

**Recommendations for the State Board of Regents**

• Discontinue its insistence that there be only one type of high school diploma. In the past, high school diplomas of different types were issued and recognized. The requirements for a “local diploma” were set by each school district in the state; they represented successful completion of high school but did not necessarily imply college preparation. Regents diplomas signaled college preparation and required a full sequence of Regents-level courses and successful completion of the exams tied to those courses; today, this system is used to issue “Advanced” Regents diplomas.

• But the requirement that all students successfully pass either five Regents exams or four plus an alternative approved credential should be removed. Many students barely pass these exams, and credible questions have been raised about watering down standards to allow some to pass. In place of these exams, the Regents should direct the state education department to more aggressively and quickly approve alternative pathways through which students can demonstrate readiness for the workforce with specific, industry-recognized credentials for specific types of work or similar competencies in the creative arts.

• Consider the success of consortium schools, and consult with the leadership of this group about ways to effectively expand the number of schools using this approach in New York City and the rest of the state.

• Urge the legislature to remove the cap on new charter schools in New York City.
Endnotes


6 A critical aspect of the Bronx effort in 2001–02 allowed the city to move forward on a larger scale; Bronx High School Deputy Superintendent Eric Nadelstern had designed and implemented a comprehensive process for prospective school designers (educators and community leaders) to be trained before submitting their proposals and a process for independent reviewers to evaluate those proposals and recommend which should go forward. When Klein decided to rapidly expand this effort to the other boroughs, he put Nadelstern in charge of the effort and used his process in all boroughs.

7 There were actually more created, but the available data include only schools still in existence in the 2019–20 school year. A number of new small high schools failed and were closed as their failure became evident.


9 Note that this report considers only high schools in operation in 2019–20. Other new high schools were created between 1994 and 2014 that were subsequently closed.


11 Rebecca Unterman, “Headed to College: The Effects of New York City’s Small High Schools of Choice on Postsecondary Enrollment,” mdrd.org, October 2014.


14 “Phased Out: As the City Closed Low-Performing Schools, How Did Their Students Fare?” New York City Independent Budget Office, January 2016.

In addition to passing the required Regents exams, students need to earn 44 credits in order to graduate high school. Passing a full-year course counts as two credits, and a single-semester course counts as one. Full requirements are explained in NYC Dept. of Education, "Graduation Requirements."


DOE sets expectations or goals for each school by comparing it with a peer group of schools that serve similar populations. The actual goal and score for a school are determined by a combination of its absolute performance as well as its performance relative to its peer group.

Author's calculation using data from National Center for Educational Statistics on College Enrollment of High School Graduates and College Completion Rates Within 150% of Normal Program Completion Time.
The Inscrutable SHSAT

Chris M. Kwok†

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INTRODUCTION

New York City mayoral candidate Bill de Blasio, during his 2013 campaign, ran on a platform to eliminate the Specialized High School Admissions Test (SHSAT), which the 1971 New York state law, colloquially called Hecht-Calandra, requires.1 This law mandated that an entrance exam be the sole criteria for admission to the then existing science and math-focused high schools: Stuyvesant, Bronx Science, and Brooklyn Tech.2 The debate over the SHSAT has raged hot and cold for decades.3 In the latest

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2. These “big three” schools are the original exam schools, along with LaGuardia High School, which admitted on the basis of portfolio or audition. In 2005, five additional high schools were added as schools admitted on the basis of the SHSAT. Alina Adams, Adams: Michael Bloomberg Made Sweeping Changes in NYC Schools as Mayor, What Might He Do as President?, THE 74 (Dec. 9, 2010), https://www.the74million.org/article/adams-michael-bloomberg-made-sweeping-changes-in-nyc-schools-as-mayor-what-might-he-do-as-president [https://perma.cc/UB3G-BPNX].
3. See, e.g., Heather Mac Donald, How Gotham’s Elite High Schools Escaped the Leveller’s Ax,
round, NAACP Legal Defense Fund raised the issue in 2012 by filing a US Department of Education complaint, alleging that the SHSAT disparately impacted African American and Latinx students and violated Title VI of the Civil Rights Act of 1964.4 Filed during Mayor Michael Bloomberg’s last term, Bloomberg dismissed the complaint and stated that there was nothing fairer than an objective exam. Indeed, during his mayoralty, he added five additional SHSAT schools.5

In 2018, the overall New York City (NYC) school population was 40.5 percent Latinx, 26 percent African American, 16.1 percent Asian, and 15 percent white.6 For the 2018–19 school year, Stuyvesant’s population was 2.8 percent Latinx, 0.7 percent African American, 73.9 percent Asian Pacific Islander, 18.5 percent white, and 3.6 percent multiracial.7

Only 4.9 percent of all NYC high school students attend a high school that uses the SHSAT to determine entrance.8 However, these schools receive a disproportionate amount of press attention. They have long been celebrated as the best the system has to offer, with nine Nobel laureates and science-competition dominations as their claims to fame.9 Stuyvesant High School is one of the top feeder high schools to Harvard University, competing toe-to-toe with wealthier private schools. In recent decades, the startlingly low number of African American and Latinx students at these schools have engendered a clarion call for reform. These schools loom large in the public imagination and figure prominently in the debate about education and equity in NYC and beyond. In his first term, Mayor de Blasio did nothing to eliminate the SHSAT. Once reelected, he faced intense criticism from his political base for his inaction on the SHSAT, which spurred him to act.10

City J. (1999).


9. Mac Donald, supra note 3.

10. Shapiro, supra note 1.
Section I of this Article will address how Mayor de Blasio excluded the Asian American community in his proposal to eliminate the SHSAT and the backlash that emerged. This backlash ultimately derailed the proposed plan but left the invisibility issue fully in force. Section II considers explanations other than racial discrimination for the racial composition of the specialized high schools. Finally, Section III concludes with an analysis of Asian American placement within the American racial framework.

I. MAYOR DE BLASIO AND THE INVISIBILITY OF THE ASIAN AMERICAN COMMUNITY

A. Mayor de Blasio did not seek Asian American community buy-in and the backlash to proposed reforms

On Saturday, June 2, 2018, Mayor de Blasio announced his plan to eliminate the SHSAT via an op-ed piece entitled, “Our Specialized schools have a diversity problem. Let’s fix it.” A Sunday rally in a Brooklyn school followed this op-ed, and a vote by the New York State Assembly education sub-committee a mere three days later. During the kickoff rally, Mayor de Blasio cast the specialized high schools as “not looking like New York City.” His Sunday rollout took place on a stage with nary a single Asian American on the podium. He used civil rights language to frame his endeavor as a crusade against the evils of segregation. Quoting UCLA’s Civil Rights report calling NYC public schools among “the most segregated” in the country, he cast those who would oppose his plan as opponents of “justice and progress.”

The large percentage of Asian American students in the schools, and their decrease as a result of the proposed changes, suggested to the Asian American community that they should be included in any refashioning of the


admissions process. Worse yet was being made the “problem” that stood in the way of progress. But the Mayor sought no input from the Asian American community. A progressive Mayor assumed to be a political ally left out the Asian American community.17 The Mayor’s office hastily convened two meetings with Asian American community organizations and activists.18 Organizations attending the meeting included the Coalition for Asian American Children and Families (CACF), Asian Americans for Equality (AAFE), the Asian American Federation (AAF), Chinese-American Planning Council (CPC), and APEX for Youth.

Though CACF shared the policy goal of eliminating the SHSAT, it was also critical of the Mayor’s political process that excluded Asian American voices.19 CACF was not the only Asian American progressive voice that expressed a sense of betrayal by being left out of the planning process.20 The Asian American community, believing that the proposed plan to limit the number of students from each middle school was specifically engineered to decrease Asian American enrollment, erupted in multiple protests in opposition to the proposed bill.21

Mayor de Blasio miscalculated politically and engendered a wave of protest. He never publicly addressed why he did not include the Asian American community and faced accusations that he deliberately excluded them.22 In the op-ed that announced the SHSAT reform kickoff, he made an appeal to “look the parent of a Latino or black child in the eye and tell them their precious daughter or son has an equal chance to get into one of their city’s best high schools.”23 De Blasio went on to boast about the anticipated progress: “the percentage of black and Latino students receiving offers will

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18. See supra note 11.
23. De Blasio, supra note 11.
almost double, to around 16 percent from around 9 percent."\(^{24}\) These efforts were to “correct historic injustices,” which presumably did not include any historic injustices affecting Asian Americans.\(^{25}\) During his press conference, de Blasio spoke about Asian Americans only in response to reporter questions.\(^{26}\) In his silence, de Blasio showed that his racial justice lens exclusively focused on African Americans and Latinxs. Asian Americans, if they were to occupy any space, were to function as stand-ins for whites.

Education Chancellor Richard Carranza further magnified de Blasio’s mistakes with his intemperate remarks. In response to a question about complaints from Asian Americans about being excluded from the planning process, Carranza responded: “I don’t buy into the narrative that any one ethnic group owns admissions to these schools,”\(^{27}\) This statement was wildly off base, equating the Asian American demand for inclusion with an assertion of ownership of the admissions process. Given a chance to walk back these remarks, Carranza doubled down: “If you choose to be offended as an Asian resident of New York City, that’s a choice you make,” he said, ‘If you choose to not be offended, that’s a choice you make.”\(^{28}\) Just three months earlier, Carranza retweeted a story with the headline: “Wealthy white Manhattan parents angrily rant against plan to bring more black kids to their schools.”\(^{29}\) After just three days of angry reactions from white parents, Carranza offered an apology.\(^{30}\) In contrast, Carranza has never apologized for his remarks regarding complaints by Asian Americans in the same context. As such, Carranza’s racially divisive rhetoric can be considered as tacitly approved by his boss, Mayor de Blasio.

Mayor de Blasio’s political rollout was an unmitigated disaster, exacerbated by Chancellor Carrazana’s public statements. It took de Blasio months to publicly express his regrets on his exclusion of the Asian American community.\(^{31}\) Though progressive Asian American community

\(^{24}\) Id.


\(^{26}\) NYC Mayor’s Office, supra note 13.


\(^{28}\) Chen, supra note 14.


groups agreed with the Mayor’s goals of SHSAT elimination, the exclusionary and racially divisive political messaging dampened their enthusiasm and delayed their full-throated support for the Mayor’s plan.\footnote{See COALITION FOR ASIAN AM. CHILD. & FAMS., supra note 19.}

\textbf{B. Mayor de Blasio’s Use of Asians Americans as a Wedge and Misappropriation of the Civil Rights Movement}


An avowed progressive, Mayor de Blasio demonstrated that the
political left can utilize wedge politics, perhaps unwittingly, in an attempt to achieve political goals. In Asian American studies, it is axiomatic that divide and conquer wedge politics like the model minority formulation are a weapon of conservative interests. However, the model minority not only works as a wedge when it operates from the right, but also here, where it functions from the left in a subtle manner. Instead of dividing Asian Americans from African Americans, it included Asian Americans with, or as, whites. Operatively, different sides of the same coin. When the wedge operates from both ends of the political spectrum, this insures the political invisibility of Asian Americans. Asian American progressives, because they are on board with progressive anti-racist efforts generally, are willing to give a pass to wedge politics from the left. The subtlety of the left wedge operates as a quiet veil. Blinded by this veil, Mayor de Blasio could not and did not see Asian Americans as part of the “people of color” coalition. Presented with their large numbers at the specialized high schools, he saw their “overrepresentation” in the specialized high schools as a problem to be solved. An example of the veil: Mayor de Blasio decried that the Bronx Science student body only had 14 percent of its students from the Bronx. Left unsaid was that over 50 percent of Bronx Science students come from Queens, often enduring a two hour or more total commute to and from school. These are different sides of the same coin: Asian American enclaves in Northern Queens face some of the most crowded high schools in NYC and have self-solved the problem for decades by attending specialized


44. NYC Mayor’s Office, supra note 13.

high schools in the Bronx and Manhattan.\textsuperscript{46} In doing so, students who lived in the Bronx were pushed out from Bronx Science. In his distorted view of the Asian American community, Mayor de Blasio believes that the rise of test prep privileges well-resourced families.\textsuperscript{47}

Mayor de Blasio’s exclusion of the Asian American community undercut potential progressive Asian American allies, who found it difficult initially to defend his racially divisive political rhetoric. This delayed their entry into the public debate and cleared room for a vigorous Asian American opposition to Mayor de Blasio’s plans. Moreover, he crafted and messaged the plan as if Asian Americans were invisible and their interests did not count. Though the statistics factually show these schools are full of poor immigrants, Mayor de Blasio nonetheless believes these schools to be centers of privilege. He lectured Asian Americans—without ever directly addressing the community by name.

II. AN ALTERNATIVE EXPLANATION FOR RACIAL DEMOGRAPHICS AT THE SPECIALIZED HIGH SCHOOLS

The low numbers of African American and Latinx students at the specialized high schools are taken as conclusive evidence of discrimination.\textsuperscript{48} There is no doubt that the legacy of slavery, Jim Crow, and institutional racism are still alive and well in the NYC school system (and beyond) and that this legacy plays a role in the low numbers of African Americans. I support the principle embedded in Mayor de Blasio’s desire to correct historical injustices. How we go about doing so—and who we include as we fashion these remedies—is where my view separates from those of Mayor de Blasio. I submit that the maturation of previously unavailable educational options for African American and Latinx students have created new pathways leading to private high schools and away from specialized high schools. Many have also chosen charter school options. In other words, there actually might be some silver lining in the bad news.

A. The Rise of Prep for Prep, Charter Schools, and School Choice Contribute to the Decline of African American and Latinx Students in Specialized High Schools

The Hecht-Calandra Act of 1971\textsuperscript{49} has been criticized as an attempt to

\textsuperscript{46} Handler, \textit{supra} note 43.
\textsuperscript{49} Mac Donald, \textit{supra} note 3.
preempt efforts to impose affirmative action-type programs at schools. But Hecht-Calandra codified an entrance exam that had been in place since the 1930s. It also codified the Discovery program, an affirmative action-type program based on socioeconomic status that had been operating since the 1960s. But if the legislative goal was to keep African American and Latinx students out, it was not particularly effective for at least two decades. There was a time when African American and Latinx populations were more numerous at the specialized high schools. The apex of the African American student population at Stuyvesant High School was in 1975, when they made up 12 percent of the school’s enrollment, or 303 of the school’s 2,536 students. In 1980, there were 212 African American students; in 1990, 147; in 2000, 109; and in 2005, sixty-six. At Brooklyn Tech, African American student enrollment actually rose from 38 percent in 1976 to 51 percent in 1982. Starting in the early 1990s, however, African American and Latinx enrollment at specialized high schools began a precipitous decline, and in 2016 the combined numbers stood at 4 percent at Stuyvesant, 9 percent at Bronx Science, and 13 percent at Brooklyn Tech. What happened to the African American and Latinx students?

I submit the possibility that the rise of Prep for Prep contributed to the decline of African American and Latinx student populations at the specialized high schools. Prep for Prep, established in 1978, identifies students of color and prepares them for enrollment in private “preparatory” schools or Northeast boarding schools, taking them out of the NYC public


54. Id.

55. N.Y. ST. DEP’T OF EDUC., supra note 6.


Parents apply for Prep for Prep. Once admitted to the program, students enter into a fourteen-month prep program that includes two summer sessions and classes on Wednesdays and Saturdays during the school year. Of the Prep for Prep alumni, 50 percent are African American, 34 percent are Latinx, and 9 percent are Asian American. With a student cohort of 100 in 1981, 500 in 1988, and 830 in 2001, Prep for Prep has become a viable pathway to attend private schools. With recruiting in the 5th, 6th, and 7th grades, this aggressive recruitment detours large numbers of high-achieving African American and Latino students from the New York public school system and into private schools.

Commentators have been dismissive of this explanation, but I believe the facts do not support their numbers and conclusion. For example, the New York Times states that Prep for Prep recruits about 200 students per year, but the Prep for Prep website clearly states that it currently enrolls 700 students per year. In 1991, the total African American student population at Stuyvesant was 147, or an average of thirty-six students per class year. In 2005, the African American student population was sixty-six total, or approximately seventeen students per class year. In 1992, Prep for Prep enrolled 100 students and by 2001, it enrolled 830 students.

Furthermore, Prep for Prep is but one of several similar programs that select students into private, or so-called independent schools. While Prep for Prep is specific to the NYC metropolitan area, other programs also recruit in NYC: A Better Chance (ABC), Oliver Scholars, and TEAK Fellowship. Though these programs are open to all minority students, the focus is on African American and Latinx students: ABC is 67 percent African American, 16 percent Latinx and 7 percent Asian American.
programs began in the modern Civil Rights era and took several decades to refine programming and ramp up recruitment. Suffice to say, academically talented African American and Latinx students have been the focus of intense recruitment to private schools, and away from the specialized high schools. Top scoring African American students choose other options for high school, which include screened and charter high schools.

The expansion of educational options continued in 1999, when the first NYC charter school opened. Charter schools are public schools that are privately run and funded by both public and private money. Ostensibly open to all students, they are run outside the traditional school district. By the 2019–20 school year, charter schools enrolled 126,400 students, or 11 percent of the entire NYC K-12 student population. In 2019–20, the NYC charter school population was 52 percent African American, 39 percent Latinx, 5 percent white, and 4 percent other, taking approximately 115,000 African American and Latinx out of the traditional NYC public school system. One in every five African American public school students in NYC attends a charter school. Why have charter schools been so sought after? Indicators of success for charter schools are their state English and math standardized test results. African American and Latinx charter school students continued to outscore their NYC Department of Education (DOE) district peers in the 2017–18 school year. Most notably, in the 2018 math state test results, only 8.65 percent of African American students, combining grades 3 through 8, in the NYC district scored at Level 4, the advanced proficiency level, as compared to 32.32 percent of African American students in charter schools.


75. Id.


77. N.Y. CITY CHARTER SCH. CTR., supra note 74, at 1.

78. Id. Black student achievement for grades three to eight is 58.6% in charters compared to 25.4% in district for math and 57.0% in charters compared to 34.0% in district for English. Hispanic student achievement for grades three to eight is 56.9% in charters compared to 30.3% in district for math and 54.5% in charters compared to 36.0% in district for English. Id.

79. N.Y. CITY CHARTER SCH. CTR., CHARTERS CLOSE THE ACHIEVEMENT GAP, NYC CHARTERS CONTINUE TO LEAD (2018), http://www.nycharterschools.org/blog/charters-close-achievement-gap-
NYC charter schools admit on the basis of a lottery system, with sibling and geographic preferences. Charter schools are located in neighborhoods where there is a great demand for them. For the 2019 school year, Charter schools received 81,300 applications for 33,000 charter school seats. With these figures, it is clear that a significant segment of the African American and Latinx community has left the traditional public school system. Students in low-performing schools do not have access to advanced coursework and have to deal with less-prepared teachers, lower expectations, and more behavioral issues. Charter schools offer longer class days, curriculum flexibility, and extra enrichment such as test prep. To keep students within their specific charter school network, some charter high schools have begun granting automatic admission to students who attended an affiliated middle-school.

From 2002 to 2013, Mayor Michael Bloomberg governed with the philosophy of school choice. In an effort to combat geographically-determined “zoneds” schools that would lock poor children into their neighborhood schools, he abandoned the practice of “zoneds” high schools by virtue of residence. Instead, students would apply to any twelve high schools and attend one of them. During Mayor Bloomberg’s school choice policy era, screened schools saw a dramatic expansion—in 2002, only 15.8 percent of school programs screened students for academics, but by 2009, that share had increased to 28.4 percent. In 2003, Mayor Bloomberg began the policy of closing failing high schools and opening smaller high schools.

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nyc-charters-continue-lead [https://perma.cc/3PSZ-CFC8] (showing combined data for students in grades 3 to 8).
81. Alex Zimmerman, Nearly 100 Percent of KIPP’s Students in New York City Are Black or Hispanic. Now it Wants to Open an Integrated School, CHALKBEAT (Dec. 12, 2018), https://chalkbeat.org/posts/ny/2018/12/12/nearly-100-percent-of-kipps-students-in-new-york-city-are-black-or-hispanic-now-it-wants-to-open-an-integrated-school [https://perma.cc/SB8J-MKDB].
82. N.Y. CITY CHARTER SCH. CTR., supra note 74, at 1.
85. Linge, supra note 80.
86. Mary Kay Linge, These are NYC’s Charter High Schools, N.Y. POST (Sept. 17, 2016), https://nypost.com/2016/09/17/these-are-nycs-top-charter-schools [https://perma.cc/E7M6-QF7N].
87. Disare, supra note 84.
89. Id.
90. Disare, supra note 84.
thus, screened high schools began to multiply. So-called regular high schools continued to exist, and one could apply to them and attend.

Screened schools like Beacon High School were reshaped by the school choice boom and served as a new elite high school for those in the know. At Beacon High School, admission was based on a student portfolio, an interview, and grades. With an emphasis away from standardized tests and towards project-based work, the school was highly sought after, and its students skewed towards a white, wealthy, and politically-savvy population. In 2015–16, Beacon demographics were 53 percent white, 22 percent Latinx, 14 percent African American, and 8 percent Asian. At Beacon, only 20 percent of the students qualified for free lunch, far lower than the 32 percent at Stuyvesant and 35 percent at Bronx Science. Then-City Councilman de Blasio’s daughter and then-Governor David Paterson’s children all graduated from Beacon High School.

In their Atlantic piece, Professors Margaret Chin and Syed Ali made the point that the screened schools that used multiple criteria for admission like grades, standardized test scores, and interviews were also problematic in their racial compositions. Although these schools had greater African American and Latinx students, they were still primarily white and Asian. By any measure, whites were “overrepresented” in the screened high schools in the same way Asian Americans were “overrepresented” at the specialized high schools. Approximately 17.9 percent of the total high school population in NYC were admitted into high school through a screened process. Screened schools represented a far larger percentage of total high

94. Id.
96. Id.
97. Gonzalez, supra note 93.
99. Id.
100. See id.
101. LEWIS & BURD-SHARPS, supra note 8, at 1.
school students than the 4.9 percent based on SHSAT scores, and no state law prevented immediate change to admissions in these schools. However, it matters that Asian American “overrepresentation” drew policymakers’ attention and presented itself as a problem that needed fixing. Mayor de Blasio saw whites and Asian Americans as occupying the same racial space, but he chose to first go after what he perceived as Asian American privilege. This is problematic because Asian Americans are not white, nor do they have the same political or social power as whites do in NYC.

Together, these education trends offer an alternative explanation, apart from racial discrimination, for the decline of African American and Latinx students in the specialized high schools. Prep for Prep enrollment gained significant momentum in the late 1990s, and other similar programs recruited African Americans and Latinx out of public schools. African American enrollment in private schools fulfilled one of the civil rights goals of integration of previously white private schools. Charter schools took off in the early aughts, with geographic location primarily in African American and Latinx neighborhoods. High-needs neighborhoods, such as Harlem, Bedford-Stuyvesant, and the South Bronx, have up to nearly half of students attending charter schools. Charter schools’ academic success, with their almost exclusively African American and Latinx population, fulfilled one of the goals of the Black Power movement. It uniquely demonstrated that Black students did not need to be around white students in order to be academically successful. These two trends in particular attracted large numbers of African Americans and Latinx out of the system and might explain why only 25 percent of African Americans and Latinx who are offered a SHSAT seat accept the offer. Almost 55 percent of Asian seventh-graders who scored Level 4 on either math or English standardized tests attend specialized high schools, while only about 16 percent of such African American or Latinx

102. Screened High Schools admission in NYC each use different factors to screen kids for admissions, including but not limited to geographical considerations, interviews, portfolio, grades, and standardized test scores. Ali & Chin, supra note 98; Disare, supra note 84.
103. Ali & Chin, supra note 98.
seventh-graders attend a specialized school.\textsuperscript{108}

School choice produced an explosion of screened high schools, which admitted students based on different criteria.\textsuperscript{109} Screened schools like Beacon High School attracted disproportionately white and upper-middle-class parents who might have otherwise considered attending a specialized high school.\textsuperscript{110} African American, Latinx, and white students who previously focused on specialized high schools now moved towards other educational options. Academically gifted African American and Latinx students who did not take advantage of these trends were poorly served by the system, as Gifted & Talented programs were being dismantled.\textsuperscript{111} At the same time, Asian American students deepened their focus on attending the specialized high schools.

\textbf{B. Immigration Trends and Asian Cultural Practices Contributed to an Increase of Asian Americans in Specialized High Schools}

Civil Rights era reforms to US immigration laws in 1965 eliminated racist immigration quotas, dramatically increasing immigration from East and South Asia.\textsuperscript{112} In the SHSAT, these immigrant parents encountered a culturally resonant practice: the entrance exam.\textsuperscript{113} The exam led to schools that were “prestigious” and had brand name value, especially for an immigrant family that had just landed in New York City.\textsuperscript{114}

The influx of Asian immigration brought over the culture of test preparation from Asia, where it originated in China from the development of the civil service imperial examination system.\textsuperscript{115} The system of an objective exam leading to a specific job result created a social system leading to


\textsuperscript{109} See Disare, supra note 84; Ali & Chin, supra note 98.


\textsuperscript{113} See \textit{generally} BENJAMIN A. ELMAN, \textit{CIVIL EXAMINATIONS AND MERITOCRACY IN LATE IMPERIAL CHINA} (2013).


specific cultural patterns and practices.\textsuperscript{116} To varying degrees, Korea, Vietnam,\textsuperscript{117} and Japan also adopted this model.\textsuperscript{116} Families would prepare their children for the exam by sending them to government run schools.\textsuperscript{119} Independent academies, which we would call test prep centers today, also emerged to educate and prepare students for the exam.\textsuperscript{120} Test takers who failed to pass could take the examination until they did pass, and thus could spend significant portions of their lives preparing for the exam.\textsuperscript{121} This cultural practice is still present in the Asian American student population at Stuyvesant—in fact, data shows Asian American students start studying earlier than almost all other groups.\textsuperscript{122}

In the middle of the nineteenth century, the British East India Company adopted the exam model from China and created the civil service examination system in India and England.\textsuperscript{123} From England, this idea of objective exams leading to civil service jobs spread to the NYC government, where it was adopted in the early twentieth century to combat the corrupt patronage system.\textsuperscript{124} Unlike in Asia, the testing regime in the West became deeply intertwined with ideas of hereditary intelligence and racism, which held that intelligence was innate and fell along racial lines.\textsuperscript{125} If being white made you naturally intelligent, there was no need to prepare for an exam. Thus, an intensive test preparation culture did not develop around the exam in the West.

When Asian immigrants moved to NYC, the concept of an objective exam leading to entrance to the most prestigious high schools made perfect sense to them because they were encountering aspects of their own cultural legacy. Test prep centers sprung up in Asian immigrant neighborhoods. The rise of test preparation for the SHSAT is a direct result of the post-1965 immigration wave.\textsuperscript{126} Very few of the exam takers test prepped before the 1980s, but after the 1990s, test prep became a significant part of the SHSAT

\textsuperscript{117} See generally John Kleinen, Facing the Future, Reviving the Past: A Study of Special Change in a Northern Vietnamese Village (1999).
\textsuperscript{118} See Elman, supra note 113, at 23.
\textsuperscript{120} See, e.g., Chaffee, supra note 116, at 89; Yin, supra note 114.
\textsuperscript{121} See generally Thomas H.C. Lee, Government Education and Examinations in Sung China (1985).
\textsuperscript{125} See, e.g., Lewis M. Terman, The Measure of Intelligence 91–92 (Ellwood P. Cubberley ed., 1916).
\textsuperscript{126} Yin, supra note 114.
Thus, a prep culture around the SHSAT exam began to coalesce for the first time, starting in the 1980s and gathering force in the 1990s. This was a dramatic shift, and one with important consequences. For generations, NYC students never prepped extensively for the SHSAT because that was not the dominant American approach to exams.

Because of the historical legacy of the imperial examination system, Asian cultural views of the test did not frame it as a measure of natural intelligence but rather as a measure of how much academic effort an individual was willing to commit. Asian immigrants were less tainted by the Western history of innate intelligence. Make no mistake, test prep courses are not the exclusive province of the well-resourced privileged class. The federal guidelines would classify 47 percent of Stuyvesant students as poor, which would qualify them for free or reduced lunches.

Critics of the SHSAT sought a target to attack and focused on critiquing test prep. They see test prepping as behavior that confers an unfair advantage. The prevailing belief was that if the students were truly intelligent, they would not need to prep at all. What they miss is that test prep is a signal that one does not believe in racist theories of innate intelligence. Instead, one believes that preparation, hard work, and practice are keys to success.

The demographic increase in Asian Americans and the rise of test prep culture in the 1980s began to crowd out other racial groups at the specialized high schools. Asian American students are also more likely to seek and accept an offer to attend a specialized high school. Almost 55 percent of Asian seventh-graders who scored Level 4 on either math or ELA tests in the 2012–13 school year attended a SHSAT school. Comparatively, only about 16 percent of the same African American or Latinx seventh-graders attend a specialized school. Only 25 percent of African American and Latinx students who are offered a SHSAT seat accept the offer. Immigrant parents make the choice to direct their limited resources towards educational enrichment, which includes test prep. It is beyond the pale that parents are attacked for choosing to direct their scarce resources in a manner they think is most productive for their children. One should ask why the SHSAT critics

131. Cory & Mader, supra note 108.
132. Id.
133. Hemphill, supra note 107.
134. Yin, supra note 114.
have never attacked Prep for Prep students and the intensive prep they go through.

Like Coca Cola and Harvard, Stuyvesant had history, value, and deep meaning for immigrants who were not in the loop about the latest education trends for high schools in NYC. The Asian immigrant populations in Northern Queens and South Brooklyn had few charter school options. For example, Queens has the second fewest charter schools, and the thirty-one charter schools in Queens exist primarily in African American and Latinx neighborhoods. New immigrants could not quickly assess the quality of “new” screened schools like Beacon. Screened school options require significant social capital in order to traverse their complicated admissions process. Immigrant parents are unlikely to possess the social capital necessary to assist their kids to do well on admissions criteria like the in-person interview, which was part of the Beacon High School admissions process until 2018. Instead, immigrant parents relied on name recognition and a familiar admissions process: studying for an exam to get into Stuyvesant.

III. ASIAN AMERICANS AND THEIR PLACE IN THE AMERICAN RACIAL MATRIX

The Asian American political identity was born in the wake of the Civil Rights and Black Power movement and opposition to the Vietnam War. The Third World Liberation Front (TWLF) student strikes, which closed San Francisco State University in 1968 and UC Berkeley in 1969, established coalition building with other minority groups as a key factor for social change. They established the first wave of Asian American community organizations; their politics embodied the history they came from and the era in which they were created. All Americans benefited as racist barriers fell to the sweeping changes in the law. The defense of affirmative action and close allyship with the African American freedom struggle became the defining Asian American cultural and political norm.

Today, however, progressive Asian Americans are on hair-trigger alert, quick to point out perceived “anti-Blackness” within their own communities. Of course, anti-Blackness should indeed be called out. But Asian American progressives should be equally vigilant of anti-Asian policies that emerge from their own nominal allies. Asian American activists should not blithely dismiss the concerns of the new immigrant communities. While they should engage in coalition building to achieve social justice, they should not be silent or refrain from opposing anti-Asian bias, whether it comes from the

135. See N.Y. CITY CHARTER SCH. CTR., supra note 105.
136. Id.
138. Chang, supra note 50.
left or right.

We are fighting the original civil rights battles with an analytical lens that is sorely in need of an update. Allyship is being defined as always walking in lockstep with African American and Latinx political needs, even if it means ignoring Asian American interests. The Asian American movement gave us analytical tools like the model minority and allyship, and these terms are used frequently, without cognizance of the new world in which they are being used. Our analytical tools have become dogma.

Part of the reason for this failure is that universities do not widely teach or disseminate Asian American studies and its ideas beyond the West Coast. With the difficulty that Asian American studies is having making its way into the academy, the level of political dialogue among Asian Americans is low. Every generation must learn basic ideas from one another, the Internet, and self-directed study. Without a perspective that takes into account the enormous demographic and social change that has occurred over the last fifty years, we risk advocating for poor policy choices that do not increase social justice. Instead, what we get are op-eds that retread the same old ideas over and over again.

As this article went to press in August 2020, opponents of SHSAT restarted legislative and political efforts to eliminate the SHSAT. Hoping to ride the political momentum of the Black Lives Matter protests, they have stressed two points: that standardized testing has racist origins and that Hecht Calandra is rooted in racist opposition to Civil Rights era desegregation efforts. If they were correct on these two counts, the SHSAT should indeed rightly be removed. But the reader of this article knows that the true “origin” of standardized exams begins in China, long before western alignment of standardized exams with racial discrimination. The attachment and importance that Asian Americans have to exams begin in a completely different political and social space. But was Hecht Calandra legislated in opposition to desegregation efforts? This is a more nuanced and difficult question to answer, but it is instructive that Samuel Wright, New York State Assemblyman and Chair of the African American and Puerto Rican caucus at the time, supported Hecht Calandra. The 2020 effort to repeal Hecht Calandra in a pandemic-shortened legislative session was ultimately unsuccessful, but no doubt sets up another battle for 2021.

139. See id.
It is easy to oppose Mayor de Blasio’s plan simply because of the ham-fisted political process, which he used to dismiss the concerns of the Asian American community. Playing zero-sum race politics without the desire, ability, and capacity to understand the diverse groups of people in the city he serves, the Mayor has espoused deeply and unmistakably racially divisive policies. But one should also oppose his specific policy choice because the civil rights lens through which he views the problem is antiquated. The Asian population in NYC increased from 105,000 to 843,000 from 1970 to 2011.\footnote{Shapiro & Lai, supra note 53; Jie Zong & Jeanne Batalova, Asian Immigrants in the United States, MIGRATION INFO. SOURCE (Jan. 6, 2016), https://www.migrationpolicy.org/article/asian-immigrants-united-states [https://perma.cc/AU6L-887W].} Test prep took hold and the level of competitiveness dramatically increased. Charter schools and Prep for Prep-type programs became options for African Americans and Latinx students. Parents have a dizzying array of educational options. Some pathways lead to the specialized high schools and other pathways lead away from specialized high schools. We should resist easy explanations and feel-good programs that offer cosmetic solutions for complex problems.

When progressive politicians like Mayor de Blasio fall into the trap of using the model minority myth against Asian Americans, progressives think it is acceptable because of coalition building requirements.\footnote{See Roseann Liu, Opinion: Asian, Black and Latino Solidarity Should Come First, THE HECHINGER REP. (Sept. 5, 2018), https://hechingerreport.org/opinion-asian-black-and-latino-solidarity-should-come-first-not-a-test [https://perma.cc/P5XF-4YVG].} Carranza engages in racist rhetoric, and progressives lay off because of coalition preservation. This cannot be right. Our social justice allies could not want this for the Asian American community. As I argue above, what if the decrease was due to an increase in opportunities for African American and Latinx students? What then of allyship requirements? The allyship requirement runs both ways, and Asian American community activists should speak from a real place of connectedness to their community. Knee-jerk allyship reactions eliminate carefully considered approaches to complex social problems that take into account the interests, histories, and social changes in contemporary America.

**CONCLUSION**

Our interconnected future is complex and fraught. Mayor de Blasio’s proposed remedy for the specialized high schools was a step in the wrong direction—a feel and look good plan. It rendered Asian Americans politically and socially invisible. It died a worthy death when Mayor de Blasio gave up on the plan in September 2019.\footnote{Paula Katinas & Meaghan McGoldrick, As Mayor Pulls Back from SHSAT Plan, Brooklyn Pols Call for Gifted Program Expansion, BROOK. DAILY EAGLE (Sept. 26, 209), https://brooklyneagle.com/articles/2019/09/26/as-mayor-pulls-back-from-shsat-plan-brooklyn-pols-call-for-gifted-program-expansion [https://perma.cc/C3YR-K2LU].} Using brute political force
based on ignorance to clear Asian Americans out the way, Mayor de Blasio should not be able to claim to be the moral authority of the civil rights movement. Asian Americans are part of the fabric of New York City. Their perceived newness to existing systems have historically marked them for social exclusion and political invisibility. Nevertheless, our interests, as Asian Americans, should count. Asian Americans should take as allies anyone who wants to engage in an intellectually rigorous and socially conscious process that takes social justice as its first priority.
Asian-American Parents Sue New York City Schools
Alleging Harassment, Racial Bias

Activists say Education Department’s diversity agenda often overlooks Asian students

The Tweed Courthouse in Manhattan, which houses the Education Department.

PHOTO: JOHN NACION/ZUMA PRESS

By Lee Hawkins
April 14, 2021 9:20 am ET

Depositions will soon begin in a case in which five Asian-American parents of New York City public school students are suing the city’s Education Department, claiming they were harassed while protesting against the proposed changes to the agency’s gifted and talented admissions process.

The lawsuit, which seeks class-action status and names Mayor Bill de Blasio and the New York Police Department, claims that at a DOE town hall meeting in Brooklyn in February 2020 about the controversial gifted program, the agency “treated Asian-Americans differently from non-Asians by prohibiting, restricting and/or limiting Asian-Americans’ access” to the meeting.

The parents and their co-plaintiff, the Chinese American Citizens Alliance of Greater New York, also allege that they were unfairly detained in retaliation for protesting outside the
building before the meeting. Depositions are scheduled to begin next week in the case, which was filed in January.

Plaintiff Siu-Lin Linda Lam was “physically grabbed by police officers and school security agents and prevented from going inside the school building,” according to the group’s lawyer, Laura Barbieri.

DOE spokeswoman Katie O’Hanlon declined to comment on the lawsuit, but said no one was denied access to the meeting on any discriminatory basis.

She said the DOE’s goal is “making our public schools safe and inclusive for every student,” saying Asian students “need our support now more than ever, as we continue to deepen our work against racism and injustice.”

Students have to pass a test to be admitted to the city’s gifted and talented programs and selective high schools. Critics of the admissions tests have said that Black and Hispanic children are underrepresented in these programs because white and Asian families have more resources to pay for tutoring and navigating the programs’ complexities.

Since 2018, many of the clashes described in the lawsuit have centered around access to gifted elementary programs and the agency’s failed attempt to persuade state lawmakers to abolish an admissions test for elite public high schools like Stuyvesant.

Plaintiffs in the case say that the DOE’s diversity agenda often overlooks Asian students, as most of the Asian students in the DOE system are low-income and families are contending with the rise in crimes directed toward Asian-Americans.
Lucas Liu, a Chinese-American, sees the attempts to change the admissions process for the gifted classes and selective schools as an intentional effort to reduce the number of Asian students in the programs.

He cited a 2019 report from the city’s Independent Budget Office, which found that under Mr. de Blasio’s 2018 proposal to scrap the entrance exam for New York City’s elite high schools, the number of Asian students admitted would have dropped by half, to about 31% of offers. Offers to white students would have remained relatively flat.

The DOE said its admissions decisions aren’t based on race. The agency’s Diversity Admissions Initiative, its diversity plan, is based on free or reduced-price lunch, disability and/or English Language Learner status. It said that changes to the Discovery program, a summer enrichment program, has sparked a near-tripling of specialized high school offers to low-income Asian students.

“Our goal is to reduce barriers, increase access and transparency, and introduce more diversity which benefits all students,” Ms. O’Hanlon said.

Asian students represent about 16% of the district’s enrollment and 54% of the students in the city’s specialized schools. About 68% of Asian students in the district live in poverty, compared with 83% of Hispanic students, 77% of Black students and 42% of whites, according to DOE data.

Write to Lee Hawkins at lee.hawkins@wsj.com

Appeared in the April 15, 2021, print edition as ‘Parents Sue Over Admission To Program.’
The Next Step: Prioritizing Equity and Recovery in NYC High School Admissions

The New York City High School Application Advisory Committee (HSAAC) Subcommittee on Rubrics for Screened Programs

November 11, 2021

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Dora Galacatos, Executive Director
Karuna Patel, Deputy Director
Lauren Kanfer, Associate Director
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Andy McCord, Founder, Exam Schools Partnership Initiative*
I. STATEMENT OF PURPOSE AND POLICY

This report follows the May 12, 2020 report titled Public Schools, Public Oversight: Principles and Policy Recommendations During COVID-19 and Beyond (Public Schools, Public Oversight). The Rubrics Subcommittee (Rubrics Subcommittee or Subcommittee) of the New York City High School Application Advisory Committee (HSAAC) authored that report during the height of the COVID-19 pandemic to offer the New York City Department of Education (NYCDOE) policy recommendations and principles to guide its policy decisions for the 2020-2021 high school admissions cycle and beyond.

As stated in that report, members of the Rubrics Subcommittee represent diverse experiences and philosophies related to high school admissions in New York City, and the Subcommittee’s membership has since grown. We continue to share the same common goals: increasing educational opportunity and racial, ethnic, and socioeconomic equity in New York City schools by addressing the structures that have made it among the most segregated school systems in the country.

We are honored that the Mayor and NYCDOE adopted many of the recommendations in our 2020 report. We applaud the decisions to eliminate the use of middle school screens for the 2020-2021 school year, to centralize and standardize much of the high school admissions process for improved transparency, and to end geographic priority in admissions—all important first steps in undoing the City’s biased, labyrinthine, and segregative student-assignment policies. We believe these steps to be necessary prerequisites to instituting further changes to increase equity and transparency in admissions for NYC public high schools.

However, NYCDOE did not take deliberate action to expand diversity in admissions methods for the 2020-2021 school year, including requiring admissions priorities for the most marginalized students, as outlined in the report’s second principle, Seat Assignment Must Increase Equity. Education advocates have long made clear—the goal of educational opportunity and equity for all students can only be realized through deliberate measures aimed at addressing systemic racism and dismantling the structures that create and reinforce segregation.

This report outlines the necessary steps for NYCDOE to increase equity and access to opportunity in NYC public high schools beginning in the upcoming admissions cycle and beyond.

* These members participate only in their individual capacity.


2 Since 2012, Fordham Law School’s Feerick Center for Social Justice has convened the New York City High School Application Advisory Committee (HSAAC), which is composed of service providers, after-school programs, education advocates, researchers, and other stakeholders. HSAAC members gather every other month during the academic school year to discuss ways to improve the New York City (NYC) public high school admissions process and to provide feedback directly to the New York City Department of Education Office of Student Enrollment (NYCDOE OSE). NYCDOE OSE officials regularly attend HSAAC meetings. After publication of the Feerick Center’s October 2019 report, Screened Out: The Lack of Access to NYC Screened Program Admissions Criteria, see supra, n. 1, NYCDOE OSE invited HSAAC to convene a subcommittee on rubrics to gather feedback and provide recommendations on the admissions process for screened high school programs.
II. MEMBERS

The members of the Rubrics Subcommittee represent significant and diverse expertise in education policy and New York City high schools. The members are:

**Fordham Law School Feerick Center for Social Justice**
- Dora Galacatos, Executive Director
- Karuna Patel, Deputy Director
- Lauren Kanfer, Associate Director
- Laura Petty, Fordham Law School Class of 2021
- Sadaab Rahman, 2021-2022 Amanda Rose Laura Foundation Education Law Fellow
- Matty Motylenski, Former AmeriCorps VISTA Member
- John Kauffman, AmeriCorps VISTA Member

**New York Appleseed**
- Nyah Berg, Interim Executive Director
- Lena Dalke, Integrated Schools Project Associate

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**Michael Kraft**, Panel for Educational Policy, Manhattan Borough President Appointee

**Parastoo Massoumi**, Doctoral Candidate, Harvard Graduate School of Education and Founder, Middle School Student Success Center at Cypress Hills Local Development Corporation

**Andy McCord**, Founder, Exam Schools Partnership Initiative

III. DEFINITIONS

We define the terms below for the purposes of this document.

1. “Screened programs” are defined here as programs that rank students based on selection criteria. This term, as it is used here, includes audition and screened language programs to the extent that they also rank students based on selection criteria other than the audition and relevant language respectively.

2. “Publicly available” means information posted on the NYCDOE website and in MySchools in a logical and accessible way, in addition to availability at Family Welcome Centers, 311, by mail or email, on school websites, if applicable, and by request from any school or public-facing NYCDOE office.

3. “Stakeholders” include students, families, school personnel, local government officials, community-based organizations, and the public and other interested parties (e.g., advocates, researchers, etc.).


5. We define “equity” as the ability of all students to have the opportunity and access to attend a school of their choosing that meets their educational needs, as promised by NYCDOE’s Equity and Excellence agenda.

This report outlines the necessary steps for NYCDOE to increase equity and access to opportunity in NYC public high schools

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3. Sean P. Corcoran, Associate Professor of Public Policy and Education, Peabody College of Education and Human Development at Vanderbilt University, remains a member of the Subcommittee but was not able to contribute to the authorship of this report.

4. The opinions expressed in this document are Mr. Kraft’s and do not represent the views of the Panel for Educational Policy.

5. The opinions expressed in this document are Mr. McCord’s and do not represent the views of the Exam Schools Partnership Initiative.


IV. CONTEXT: COVID-19, NYCDOE ADMISSIONS POLICY FOR 2020-2021, AND THE RESULTS

New York City was one of the first major cities in the U.S. to experience the devastation of COVID-19. By mid-May of 2020, there were nearly 350,000 cases of COVID-19 in New York, resulting in just under 20,000 deaths in New York City. Between April 2020 and June 2020, Black and Latinx New Yorkers were 1.5 times more likely to be infected by COVID-19 and twice as likely to die from the virus when compared to their white counterparts. It was a time of survival mode, particularly for the City’s most marginalized communities who had far fewer options to protect themselves and their families than more affluent families, many of whom fled the City in its darkest moments. For the vast majority of NYC public school students and families, surviving the pandemic was all-consuming; certainly, it was much more concerning than heated education policy topics such as grades, re-opening, and admission changes.

The 2020-2021 school year paralleled a time of immeasurable loss for our city and nation. It was (and remains) inevitable that a historic global pandemic would lead to unprecedented policy changes. The Subcommittee recognized this and wanted to ensure policies addressing admission methods for the City’s public middle and high schools were centering tenets of equity and inclusion and forwarding integration efforts.

In May 2020, the Subcommittee released our Public Schools, Public Oversight report, which lays out principles and policies to address the well-documented shortfalls of the NYC admissions processes as well as challenges presented by COVID-19. Shared with the Office of the Mayor, former Chancellor Richard A. Carranza, Deputy Chancellor Josh Wallack, and staff at the Office of Student Enrollment (OSE), the report recommended that Mayor Bill de Blasio end screening in middle schools, standardize and centralize the high school admissions process, prioritize equity, and effect real transparency. More specifically, the report recommended that NYCDOE:

1. Standardize admissions criteria for screened schools. Develop a set menu of standard criteria for screened high school programs, including criteria that promote equity

2. Encourage the removal of screens. Allow schools to choose from the menu, but also provide the option and support for programs that wish to opt out of screening altogether

3. Make screening rubrics accessible. Collect and make public each screened program’s choices from the standard criteria, and ensure that rubrics are accurately described on MySchools

4. Centralize all administration of screens. Require NYCDOE to collect screen inputs or rubrics from schools and apply the rubrics centrally to facilitate consistency, oversight, and transparency

5. Incorporate equity in seat assignment. Assign students based on both inputs chosen by each program and equity considerations

The Subcommittee reiterates and reaffirms our recommendation that NYCDOE require admissions priorities for the most marginalized students

In December 2020, the Mayor announced a temporary pause of middle school screens; an end to district geographic priority at the high school level; and some standardization and greater transparency in the high school admissions process. Latter reforms included making selection criteria (rubrics) available and accessible to the public and centralizing the process with NYCDOE now holding the reins (i.e., schools no longer involved in the ranking of students based on their rubrics).

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9 Territorial Empathy, Segregation is Killing Us... (Jan. 18, 2021), https://www.territorialempathy.com/segregationiskillingus.
These measures led to promising improvements to equity in admissions. The temporary pause on middle school screens resulted in a sharp increase in access to 50 of the most selective middle school programs—48% of seats were offered to low-income families and 7% were offered to English Language Learners.\textsuperscript{11} The centralization and standardization of the admissions process for screened high schools made application to those schools more transparent. Additionally, initial data from two selective schools in District 2 suggest that a combination of the elimination of district priority and increases to the programs’ percentage of “set-aside seats” as participants in the Diversity in Admissions program increased equity and access.\textsuperscript{12} At Eleanor Roosevelt High School, offers to free and reduced price lunch (FRL)-eligible students more than tripled, from 16% last year to 50% this year; and at Baruch College Campus High School offers to FRL-eligible students increased from 36% to 66%.\textsuperscript{13}

It is no surprise that the removal of gatekeeping tools led to more equitable admissions outcomes. The Subcommittee views these preliminary results as an indication that NYCDOE must sustain and improve upon last year’s changes. NYCDOE and the present and future mayoral administrations must refrain from taking the tragic misstep of reinstating policies that perpetuate a segregated status quo. The following section provides guidance on next steps that would deliberately address increasing equity in our public schools.

We strongly encourage NYCDOE to make unscreened admissions the default for all schools and require schools to opt-in to screened admissions.


V. RECOMMENDATIONS FOR THE 2021-2022 ADMISSIONS CYCLE AND BEYOND

1. Eliminate middle-school screens permanently.

The Subcommittee insists that NYCDOE make the one-year pause on middle school screens permanent. Not only did middle school screens compound and exacerbate present school segregation by excluding our most marginalized students from public school programs, but the use of screens to judge the educational attainment of students as young as nine years old was fundamentally inappropriate and morally reprehensible.

Eliminating middle school screens is a necessary step to make high school enrollment equitable. At a time when all of us are called to address systemic racism, it would be devastating for our school system and city to watch middle school programs that had taken their first steps to inclusion and integration suddenly lurch backwards by reverting to admissions policies that reliably excluded children of color, low-income students, and English Language Learners at grossly disproportionate rates. Logistically, there is no equitable way to reinstitute a relic of school segregation like middle school screens given the disparities of the 2020-2021 school year and the expected impact of the pandemic for years to come; their elimination must be permanent or dramatic re-segregation will occur. At the same time, NYCDOE must provide more robust and targeted support for under-resourced middle school students and families consistent with recommendation 3 below, as they navigate the application process. Without this support, under-resourced students will not be able to identify and rank schools in a way that improves access to schools that would best fit their preferences and needs and also advances equity.

Intentional desegregative policies and practices will not succeed unless NYCDOE . . . greatly expands resources to equalize navigation of the process

2. Elevate equity: Require schools to opt-in to screening, prevent exclusionary screening methods, and prioritize the formulation and implementation of equity in admissions policies.

In our previous report, the Subcommittee noted the deep inequality of screens and remained committed to efforts to eliminate academic screens altogether. We also acknowledged that, while some members were ready to eliminate screens immediately, there were also special challenges associated with high school screens and dismantling all aspects of screens in unprecedented times without adequate planning could do more harm than good. Although we continue to acknowledge these special challenges, we also remain committed to providing guidance for a swift and considered incremental approach.

There must be recognition of the truth that our high school admissions system logistically cannot go back to what it was two years ago. Much of the data needed to “proceed as normal” remains incomplete or entirely unavailable. Our leadership must see this as an opportunity to build on the momentum for greater equity. To prioritize implementation and construction of equitable admissions, the Subcommittee proposes the following:

a. Every program that wants to screen must opt-in to screening and provide an educational purpose to justify screens.

Taking into consideration the lack of selection criteria available for the 2021-2022 admissions cycle due to the pandemic, as well as the lack of incentives for selective programs to truly evaluate the justification of their screens, we strongly encourage NYCDOE to make unscreened admissions the default for all schools and require schools to opt-in to screened admissions. To make sure that an opt-in process does not advantage better-resourced screened programs, NYCDOE should disseminate guidelines and examples of what constitute educationally-sound justifications and what do not. For instance, NYCDOE could advise that criteria directly related to Career and Technical Education (CTE) requirements and auditions or portfolios for art schools would be considered educationally sound.

b. The Subcommittee does not endorse any screened high school admissions, but insists that NYCDOE terminate the following selection criteria for the 2021-2022 admissions cycle due to their inequitable implications.

i. State test scores: For current 8th graders, state tests for 6th grade were not administered and 7th grade tests required families to opt-in. Additionally, former Chancellor Carranza went on record encouraging parents to opt out of state testing for the 2020-2021 school year.


\[20\] Christina Veiga, NYC’s COVID catchup plan for students? More tests. Here’s what we know about them. Chalkbeat (Oct. 13, 2021), https://ny.chalkbeat.org/2021/10/13/22724875/nyc-covid-learning-loss-testing-nwea-map-iready-acadience (“Education department officials stressed the assessments are only used for diagnostics and described them as ‘low stakes’ since they don’t affect a student’s grades.”).


ii. Attendance: Due to remote and hybrid learning, records of attendance are inconsistent and therefore would be unreliable data to consider for admissions.

iii. First and second term marking periods from 6th grade: First term marking period grades from 6th grade are a reflection of the transition from elementary to middle school and not an appropriate determinate for admission into high school. Second term grades are inappropriate and unreliable measures of attainment due to the onset of COVID-19. Moreover, grading policies were in flux throughout the City and therefore would be an unreliable and inconsistent data point.

iv. First and second term marking periods from 7th grade: As mentioned above, any grades recorded during the height of the pandemic, when much of the school year and policies related to grading were in flux, should not be considered due to their unreliability and subjectivity.

v. Assessments: Diagnostic tests or assessments administered during the 2021-2022 school year to gauge students’ academic levels in the wake of remote schooling must not be used as criteria for admission to selective schools. Using diagnostic assessments in that way would defeat their educational purpose. Moreover, students and parents have been assured that these assessments would not be used for high-stakes admissions purposes.

vi. New metrics: In Public Schools, Public Oversight, a main recommendation was to standardize rubrics because selection tools that are individual to particular schools (e.g., tests or essays) can stand as barriers to equitable access for marginalized students. Not only do individual screens add complexity and lack of transparency in the process, they also create an
additional hurdle for those who do not have the resources and supports to navigate the admissions process. Moreover, a standard screening tool, even if created and administered by NYCDOE, does not solve the problem; it would still present an unnecessary obstacle for marginalized students and their families.

c. Mandate equitable admission priorities for high schools citywide.

The Subcommittee reiterates and reaffirms our recommendation that NYCDOE require admissions priorities for the most marginalized students and set admissions priorities to ensure equitable access by requiring consideration of socioeconomic and demographic indicators already available to NYCDOE. Students who should receive priority include students with disabilities, students with different levels of academic achievement, English Language Learners (ELLs), Emerging Multilingual Learners (EMLs), students in the child welfare system, students in temporary housing, and low-income students. With additional opportunities for equitable access for the most marginalized students, NYCDOE must provide additional supports for students to be able to take advantage of that access. NYCDOE must ensure that the information on MySchools related to admissions priorities is accurate and accessible and must make available real and direct assistance for students and families throughout the admissions process.

d. Rehaul the high school admissions system by 2022-2023.

The Subcommittee strongly encourages NYCDOE to study other jurisdictions across the country to inform a comprehensive plan that would become the new (COVID-informed) admissions policy. The development of this plan should take place over the course of the 2021-2022 school year to be implemented no later than fall of 2022.

Several metropolitan school districts across the nation took time throughout the pandemic to develop and implement more equitable admission methods for their district’s selective high schools. The Subcommittee recognizes that the school system as a whole and all of the people who work tirelessly to keep the system afloat have faced unprecedented challenges throughout the pandemic with one tremendous challenge being ever-changing policies. At the same time, it is important to acknowledge that change has and will continue to be unavoidable in the coming years. With that in mind, NYCDOE must take the opportunity to make thoughtful, timely changes to completely overhaul the high school admissions process to vastly improve equity through a comprehensive process that incorporates needed support for all stakeholders in the system. The process must include education and conversation in all communities about the importance of equity as well as community involvement that elevates the interests of those disadvantaged by the current system. The process must result in a plan that is definitive and can be implemented for the 2022-2023 admissions cycle. While recommendations for an entire rehaul are beyond the scope of this document, Subcommittee members support the 2021 recommendations by IntegrateNYC and Territorial Empathy. Drawing upon the expertise of members of our Subcommittee, we also commit to working with NYCDOE as it develops a new plan to rehaul the admissions system by 2022-2023.


23 Territorial Empathy, Segregation is Killing Us..., supra, n. 9. https://storymaps.arcgis.com/stories/b9d7b073400c4c18950469ef79efe98a.
3. Provide students and families equitable access and support in navigating the high school admissions process.

The NYC high school admissions process is notoriously labyrinthine and time-intensive, as media accounts and literature have detailed extensively and as HSAAC members have experienced firsthand. A pressure-cooker process that consumes parents and students alike, those with the greatest barriers to time, inside know-how, online information, technology, and resources are at the greatest disadvantage. Guidance counselors, who are primarily charged with guiding middle school students through the high school admissions process, are overworked and overwhelmed; this important role is not structured as a key component of job descriptions. So long as high school admissions remains complex and requires students to rank schools, intentional desegregative policies and practices will not succeed unless NYCDOE completely overhauls and greatly expands resources to equalize navigation of the process. Now, when NYCDOE has resources from federal stimulus dollars, is the time to do it.

a. Ensure that all information regarding screening is accurate and up-to-date on MySchools, program websites, and any other place where this information is offered to the public.

b. Give school leadership ample notice, support, and education to adopt equitable admission priorities and to opt out of screening.

c. Provide school administrators and classroom educators technical assistance, professional development, and ongoing support to effectively transition to high schools with greater diversity of students, by many metrics including socioeconomic, learning attainment, language learning, and more.

d. So long as NYC high school admissions remain complex, integrate into middle school curricula and mandate and fund in all NYC after-school academic enrichment programs the skills and knowledge students, families, and service providers need to effectively navigate the process.

e. Replicate and expand, with increased and dedicated funding, the demonstrated successful peer leadership programs operated by Henry Street Settlement and Cypress Hills Local Development Corporation to help middle school students make informed decisions when ranking schools.

f. So long as NYCDOE continues to task guidance counselors with the primary role for assisting students and families with the high school admissions process, ensure that the role is part of their official job description, that performance evaluations include this work, and that NYCDOE greatly expand training, support, resources, and time allotted for this work.

g. Provide NYCDOE OSE with the expanded funds necessary to shepherd the desegregative intentional policies and practices outlined above, including robust data collection, enhanced programmatic capacity (such as community and student engagement), and evaluative resources.

VI. CONCLUSION

The Subcommittee commends the Mayor’s and NYCDoe’s boldness in eliminating middle school screens and geographic priorities, and we hope that these changes mark the beginning of a considered and intentional process toward the elimination of most competitive admissions processes from high schools—which have proven to be devastatingly segregative. The Subcommittee believes the promise of more integrated schools and equitable admissions processes can become a reality and is standing by to support and advise NYCDoe in achieving this goal.

Raquel Muñiz
Boston College

Empirical data show that the COVID-19 pandemic deepened and exacerbated social inequalities, to the detriment of low-income communities of color. Using the law as a conceptual framework and legal research methodology, this study examines education law against the exacerbated social inequalities low-income students of color faced during the pandemic. Considering the bounds of the law against the exacerbated social inequalities surfaces the limitations of the law in a time of large-scale crisis and thereby exposes issues of educational inequity. In this context, policymakers bear the responsibility to adopt policies that promote educational equity. The study brings educational law and policy issues in the COVID-19 context to the fore of the educational equity discourse within the educational research community and has implications for policy and practice as well. The study is of import as educational researchers continue to examine the impact of COVID-19 across numerous social contexts and disciplines.

Keywords: education law, education policy, marginalized populations, educational equity

The COVID-19 pandemic changed the context in which K–12 and higher education institutions (HEIs) operated and raised questions regarding the law and policies governing education (National School Boards Association, 2020; Smalley, 2020; U.S. Department of Education [DoE], 2020a, 2020b). Educational institutions were required to safeguard students’ rights during the crisis and prepare for its aftermath (Carver, 2020; Reich et al., 2020; U.S. DoE, n.d.-a, n.d.-b). In this context, the rights of low-income students of color are of particular interest (e.g., Burch, 2020; NAACP, 2020); they have historically faced educational inequities (e.g., Kosciw et al., 2018), exacerbated during the pandemic. Thus, it is important to examine the law against the exacerbated inequalities to identify the limitations of the law in a time of large-scale crisis. In this article, I employ a legal framework to examine the limitations of the legal bounds against the exacerbated social inequalities during the pandemic to expose issues of educational inequity.

The pandemic exacerbated inequalities (Armitage & Nellums, 2020; Fisher & Bubola, 2020; Lancker & Parolin, 2020; van Dorn et al., 2020), disproportionately, negatively affecting low-income communities of color (e.g., Benfer & Wiley, 2020) who have historically faced rampant inequality (Eisenhauer, 2001; Park & Quercia, 2020; Wilson & Shelton, 2012). To minimize the spread of COVID-19, governments adopted social distancing policies (Chiu et al., 2020). Businesses operated under restricted conditions and some subsequently closed (Bartik et al., 2020). Most affected were low-income people of color holding low-wage jobs (K. Parker et al., 2020; see also Halpern-Meekin et al., 2015; Hoffman, 2017). People lost their jobs and, with them, employer-provided health insurance (see Koch, 2009; Legerski, 2012). Low-income people of color who kept their jobs faced different challenges: reduction in work hours or change in working conditions (K. Parker et al., 2020). People of color were also more likely to live in racially segregated low-income communities and households with essential workers (DeLuca et al., 2013; Kantamneni, 2020) who risked their health each time they left home (Gray et al., 2020; van Dorn et al., 2020). They were also more likely to contract COVID-19 (Benfer & Wiley, 2020; Haynes et al., 2020) and had a higher likelihood of having underlying conditions that increased the risk of COVID-19-related complications and death (Dyer, 2020; Hooper et al., 2020; Pirtle, 2020; see also Dickman et al., 2017).

Educational institutions closed or adopted hybrid, remote options (Education Week, 2020; Malee Bassett & Arnhold, 2020). Many students living in low-income communities experienced unstable internet connection and lacked electronic devices, both critical to fully participate (Katz et al., 2017; McMurtrie, 2020; National Center for Education Statistics, 2020; Wooley et al., 2020). The digital divide falls along socioeconomic and ethnoracial lines, and early data suggest the pandemic deepened this divide (Blagg et al., 2020, 2021).
Some students shared electronic devices when living in households with limited devices. Others parked outside businesses to access the internet (Editorial Board, 2020). Others struggled to find a space to study in households with little space (Stewart, 2020).

Schools in low-income communities prioritized providing students food (Dunn et al., 2020), electronic devices, and internet (Herold, 2020b); these schools are often underresourced (Sosina, 2020). Wealthier, often predominantly White schools enjoyed more resources to shoulder the pandemic (see Kelly, 2020). Some privileged parents withdrew their children from schools operating remotely and started their own nano-schools, small groups of children learning together (Kuhfeld et al., 2020). Others enrolled their children in private schools with low teacher–student ratios, allowing in-person classes (Sullivan, 2020). The disparate responses threatened to widen the inequality and educational inequities facing low-income students of color (Kuhfeld et al., 2020).

These few challenges listed here highlight what early research found: low-income people of color bore the brunt of the negative consequences of the pandemic (Benfer & Wiley, 2020; Dunn et al., 2020; Haynes et al., 2020; K. Parker et al., 2020). During the pandemic, educational institutions served students in a context in which COVID-19 exacerbated inequalities, and they will serve students as long-term inequalities unfold (Burgess & Sieverts, 2020; Dorn et al., 2020; Lancker & Parolin, 2020; see also Bozkurt et al., 2020; Gupta & Garg, 2020). A discussion of the laws that bound students’ rights, the limitations of the bounds, and the implications for equity, is thus merited.

The following overarching questions guide the analysis: Given the social inequality low-income students of color in private and public K–20 educational settings face, what must (not) and may (not) schools and HEIs do to safeguard students’ rights? What are the limitations of these legal bounds? What are the implications of these legal bounds for educational equity as schools and HEIs consider what they should do? I use a legal framework and research methodology (Eckes & McCall, 2014; McCarthy, 2010; Mead, 2009; Mead & Lewis, 2016) and focus on students’ rights, drawing on pertinent constitutional law, agency guidance, and case law (see Bowden, 2010; S. B. Thomas et al., 2009). I anchor the discussion on students’ rights, because any right draws across multiple sources of law to bound the right across different contexts (i.e., private vs. public institutions). I focus on (1) K–12 students from low-income communities and (2) ethnoracial minoritized students in K–20—they experienced acute challenges during the pandemic. Within each category, I describe students’ rights, note the relevant context (i.e., private vs. public schools and HEIs), and analyze how the exacerbated inequalities draw attention to the limitations of the legal bounds, exposing issues of educational (in)equity and shifting the responsibility to schools and HEIs to further equity.

An increased knowledge of the students’ rights amid the pandemic serves as a tool to understand and promote short- and long-term educational equity for marginalized students (Burgess & Sieverts, 2020). I argue that while the pandemic does not change the students’ rights, COVID-19 exacerbated the inequalities marginalized populations faced and, considering the legal bounds of the students’ rights in light of the exacerbated inequalities, exposes the limitations of the law. These limitations increase the risk that marginalized students may not fully enjoy an equitable education. Considering the limitations of the bounds of the law in the context of the pandemic, thus, emphasizes the urgency for courts to strengthen students’ rights and educational institutions to adopt policies that promote educational equity.

Given the implications for educational equity, the pressing education law and policy issues are of valuable import for educational researchers, policymakers, and practitioners (see Cauchemez et al., 2009).

### Framework

This article relies on the law as a framework (see Rebell, 2011). The laws guaranteeing students’ educational rights can be described as falling within four sources of federal and state laws (Russo, 2012). The first source of law (constitutional law) guarantees students certain rights (Avant & Davis, 1984). The federal and state constitutions also bestow the power on the three branches of government to create other sources of law (U.S. Constitution [Const.] art. I, § 1; art. II, § 1; art. III, § 1). The legislative branches create statutes. These statutes include laws that protect students against discrimination on the basis of, for example, race, color, and national origin (Title VI of the Civil Rights Act of 1964). The executive branches, via government agencies (e.g., the U.S. DoE), have the constitutional power to execute the law through regulations and policy guidance, which include “interpretive rules” and “general statements of policy” (Government Organization and Employees, 1966). Lastly, the judiciary interprets the law, employing common law reasoning, applying precedent in case law (Caminetti v. United States, 1917; Marbury v. Madison, 1803; Re, 2014).

Any student right across K–12 school/postsecondary and private/public contexts is delineated by a conglomeration of multiple sources of law (Cohen, 1968; Warnick, 2013). For example, the Equal Protection Clause guarantees students’ right to be treated equally under the law (U.S. Const. amend. XIV, § 1). Courts have interpreted the Clause to mean students cannot be segregated based on race (Brown v. Bd. of Educ., 1954), and the U.S. DoE (2020c) has issued policy guidance to help educators comply with the law. Together, these sources of law give students the right to be free from racial discrimination.
Because the law answers the “Must we?” and “May we?” questions, using a legal framework focused on students’ educational rights helps discern the legal boundaries of discretion that govern the work of educational institutions as they consider the “Should we?” policy question in a time of public health crisis and amplified social inequalities (see Mead, 2009). For example, using a legal framework helps to answer: May we give greater weight to poverty-related stressors, often disproportionately affecting students of color, in the college admissions process? These are legal questions, which inform policy decisions (Superfine, 2009). The “Must we?” and “May we?” questions considered against the inequalities COVID-19 exacerbated surfaces questions of educational equity as institutions consider what policies and practices they “should” adopt. Through the framework, I identify the legal bounds of discretion for educational institutions, identify the limitations of the bounds in light of the exacerbated inequalities, and discuss the implications for educational equity.

**Method**

This article uses legal research methodology (Eckes & McCall, 2014; McCarthy, 2010; Mead, 2009; Mead & Lewis, 2016). I examined constitutional law, statutes, and accompanying guidance and regulations to discern the boundaries of students’ rights. Mead (2009) explained, “Legal research may seek to capture the current statutory boundaries and jurisprudential thinking on a topic in order to describe its implications, both for current practice and for future policy development” (p. 287). To retrieve pertinent constitutional law, statutes, and regulations, I used the LexisNexis legal database. I also used the U.S. DoE to retrieve department guidance and other informational resources. Using legal reasoning, I identified the students’ rights. This article does not cover all decisions, legislation, or regulations bearing on students’ rights. Moreover, the study does not analyze how COVID-19 may have affected nonstudents. Instead, the study presents a comprehensive, in-depth analysis of areas with salient law and policy issues that arise because of COVID-19 and have a direct bearing on educational equity issues for low-income students of color in K-20. Other historically marginalized groups, for example, students experiencing homelessness and students in rural communities, are also beyond the scope of the article.

**Students’ Educational Rights**

**Students From Underresourced Communities**

Students’ right to receive an education is limited to the public K–12 context and is largely a state matter (Hubsch, 1989; *San Antonio Indep. Sch. Dist. v. Rodriguez*, 1973). While state-sponsored education was historically a local matter, by the 1970s, all states had adopted education clauses in their constitutions, compulsory education laws, school curricula, and state funding frameworks. The funding schemes were similar: local taxes supplemented state and federal funding. Because states did not cap the amount local districts could contribute, wealthier communities made greater contributions to schools and disparate inequality was common (*San Antonio Indep. Sch. Dist. v. Rodriguez*, 1973).

Seeking to redress the disparities, in *Rodriguez*, Mexican American children in Texas tested the constitutional theories governing education. Upon entering the Union in 1845, Texas adopted a constitutional clause establishing free state-sponsored education. Texas adopted a dual system for financing education as early as 1883 (E. Parker, 2016). School districts could raise local taxes, and Texas supplemented the funds. The dual financing scheme remained in place, but by the 1970s, inequality was becoming patently evident as migration patterns shifted. Similar to other states, Texas shifted from primarily rural, where most wealth was evenly spread across the state, to industrialized, where differences in the value of assessable property grew disparate. Migration patterns fell along ethnoracial lines; people of color were predominantly segregated in urban areas, whereas many White people fled to the suburbs.

The Plaintiffs resided in Edgewood, a district where approximately 90% of students were Mexican American and over 6% Black. In contrast, the most affluent school district in San Antonio, Alamo Heights, was predominantly White, with only 18% Mexican Americans and less than 1% Black people. In 1967–1968, Edgewood spent $356 per pupil (state: $222, federal: $108, local: $26), while Alamo Heights spent $594 per pupil (state: $225, federal: $36, local: $333). Despite increases in state funding, disparities persisted. Plaintiffs argued that Texas’ funding system discriminated against them on the basis of wealth and infringed on their fundamental right to an education. If the Supreme Court of the United States (SCOTUS) agreed, Texas would need to show a compelling interest for maintaining the financing system and to establish how the funding scheme was narrowly tailored to meet their interest.

But SCOTUS rejected the arguments, finding “wealth” too amorphous to be a suspect class, because “wealth” did not encompass any class “fairly definable as indigent, or as composed of persons whose income are beneath any designated poverty level” (*San Antonio Indep. Sch. Dist. v. Rodriguez*, 1973, p. 22-23). According to SCOTUS, Plaintiffs also did not experience a complete deprivation of education and “at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages” (*San Antonio Indep. Sch. Dist. v. Rodriguez*, 1973, p. 24). Additionally, SCOTUS rejected the claim that education is a federal fundamental right. Plaintiffs argued that education is a fundamental right, because it is essential to the exercise of First Amendment rights and to the intelligent use of the right to vote, but SCOTUS...
explained, “[We have] never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice” (San Antonio Indep. Sch. Dist. v. Rodriguez, 1973, p. 58). Having found no suspect class and no fundamental right, SCOTUS declared Texas’ funding scheme rational.

Notably, SCOTUS distinguished between the role of law and policy:

> [This case involves] persistent and difficult questions of educational policy, another area in which this Court [lacks] specialized knowledge. . . . Within the limits of rationality, ‘the legislature’s efforts to tackle the problems’ should be entitled to respect. (p. 42; internal citations omitted).

Since Rodriguez, state legislatures have exercised substantial discretion and have maintained similar funding schemes. While states have generally improved public schooling, educational disparities along socioeconomic status have deepened.

The U.S. Sixth Circuit Gary B. v. Whitmer (“Gary B.”) case in April 2020 exposed the persistent inequalities facing low-income students of color in the 21st century, decades after Rodriguez. Plaintiffs in the case lived in low-income communities and attended districts among the lowest performing in Michigan. The districts did not require teachers be licensed or knowledgeable in the content area they taught. Teachers lacked meaningful curricula and taught elementary level reading to high school students who struggled to sound out elementary grade level books. Teacher shortages were common; teachers were chronically absent. Lacking qualified teachers, districts relied on paraprofessionals, substitute teachers, and students to teach.

The facilities’ conditions were equally lacking—dilapidated and unable to meet state and local safety codes. Buildings lacked proper ventilation and heat systems. Classes were scorching hot during the summer and below zero in the winter. Buildings were infested with mice, cockroaches, bedbugs, and other vermin. The water in the buildings was hot and contaminated, and the restrooms were filthy, lacked toilet paper, working sinks, and stall doors. Windows were boarded up and there was a shortage of desks. When there were desks, they were cramped wall-to-wall with no aisles to accommodate the number of students.

Schools lacked books or owned outdated, torn, and irreparable books. Teachers shared the same books, using the most relevant sections to teach their subjects. Schools did not own enough books to assign homework. Basic school supplies also lacked.

Plaintiffs argued that they received an education in name only. In April 2020, a 2-1 panel in the Sixth Circuit agreed and found a fundamental right to a basic minimum public education, that is, access to literacy (Gary B. v. Whitmer, 2020a). In finding the fundamental right to a minimum education, the Court applied the Glucksberg and Obergefell frameworks. The Court detailed the country’s history of provision of free state-sponsored education and found people have come to expect and recognize education as a right. In a powerful statement, the Court also acknowledged the inequalities low-income communities of color face:

> The history of education in the United States also demonstrates a substantial relationship between access to education and access to economic political power, one in which race-based restrictions on education have been used to subjugate African Americans and other people of color. (p. 648)

A fundamental right to a minimum education would mean that similarly situated districts in the Sixth Circuit would have to provide a compelling interest in maintaining funding schemes that allowed districts to employ uncredentialed teachers, operate in decrepit buildings, and lack appropriate books and materials, while allowing other districts to enjoy access to a higher quality of education.

Though a watershed case, Gary B. was short-lived (Testani, 2020). After the ruling, the Michigan legislature, some defendants, and interest groups petitioned the Appellate Court to rehear the case en banc, before the entire Court (Brief of Home School Legal Defense, 2020; Gary B. v. Whitmer, 2020d; M. Walsh, 2020b). Rather than granting any of the parties’ petitions, the Court called for a hearing before the entire court on its own, sua sponte. According to Appellate Court Rule 35(b), a sua sponte rehearing automatically vacated the 2-1 ruling without an opinion (Gary B. v. Whitmer, 2020c), leaving it with no precedential value.

Following Plaintiffs’ request, the Court dismissed the case as moot (Gary B. v. Whitmer, 2020c; M. Walsh, 2020a). The case was a win for Plaintiffs inasmuch as they received a substantial monetary award via the settlement (The Office of Governor Gretchen Whitmer, 2020). In dismissing the case, the Court did not provide extensive rationale. Relying on a technicality and not providing rationales allowed the Court to avoid siding with any perspective, a highly suspect action (Epstein, 2020).

Gary B. was as much about the education of the children in Michigan as it was about testing, in the 21st century, the boundaries Rodriguez established. Since Rodriguez, advocates and academics have debated whether education should be a federal fundamental right (e.g., Black, 2020; Lynch, 1998; T. J. Walsh, 1993; Wilkins, 2005). Gary B. tested how low the constitutional floor can be before courts intervene (Tampio, 2021). By relying on technicalities to vacate the case and not providing any rationale when dismissing the case, the Appellate Court gave no indication regarding its thinking about the constitutional floor. As opportunity gaps continue to widen across socioeconomic lines, other cases will likely continue to test and seek to establish a federal constitutional floor beyond Rodriguez’s ruling that there is no federal fundamental right to an education. While the debate regarding the right at the federal level unfolds,
students have a right to a public education under each state’s constitution, which vary by state (see B. Friedman & Solow, 2013; Minorini & Sugarman, 1999; E. Parker, 2016; Slade, 2017).

Rodriguez and Gary B. provide little recourse for students facing worsening conditions during the pandemic. The federal legal bounds do not establish a minimum fundamental right to education that would require states to allocate more resources to low-income districts that had fewer resources to shoulder the pandemic (e.g., Nicola et al., 2020). Lack of resources has historically negatively influenced student performance (Mangino & Silver, 2011). In turn, lower performance translates into being underprepared for work or postsecondary education and a lower earning potential (Dorn et al., 2020; Hein et al., 2013; see also Bangser, 2008; Walpole, 2008). Students who came to rely on their schools for resources necessary to learn (e.g., meals, internet, electronic devices) had restricted access to these resources during the pandemic. Wealthier, predominantly White districts were better positioned to adapt to the pandemic and continued to draw from well-resourced local tax pools, given state school funding largely continue to resemble schemes in place at the time of Rodriguez (see Education Law Center, 2019; Rivera & Lopez, 2019). Low-income districts predominantly adopted remote modalities but struggled to teach students who did not have stable internet or devices and students who stopped attending (see Reza, 2020; Trinidad, 2021; Vogels, 2020).

No court has ruled on what it means for schools to meet their constitutional duty to provide an education during a pandemic. The legal bounds require districts provide an education (see Plyler v. Doe, 1982; E. Parker, 2016). However, Rodriguez suggests that states can provide educational opportunities that are vastly different and vary across socioeconomic status and still pass constitutional muster. Moreover, Gary B. v. Whitmer (2020a, 2020b) provides insights into the role of the courts in addressing the deepened, exacerbated inequalities. While the Sixth Circuit Court agreed that the conditions Plaintiffs faced were abysmal, the Court vacated the ruling, which would have required the state to address the conditions Plaintiffs faced.

Amid the pandemic, Rodriguez offers some guidance:

The very complexity of . . . managing a statewide public school system suggests that ‘there will be more than one constitutionally permissible method of solving them,’ and that, within the limits of rationality, ‘the legislature’s efforts to tackle the problems’ should be entitled to respect. (p. 42)

Ultimately, the legal bounds place the responsibility of the quality of education on state and local policymakers. State policymakers retain the discretion to decide how they should address the deepened inequalities the pandemic exacerbated. They have the authority to fashion policies and reallocate resources to meet the demands of low-income communities. At the local level, district and school leaders who are equity oriented also have discretion in adopting plans within their spheres and creating budgets. While the law does not require that states guarantee equal or equitable outcomes, district and school leaders can lead with an equity framework. They can adopt policies and practices that go beyond what is legally expected but that ultimately mitigate the challenges low-income students face (Zhao, 2020). District and school policies should center the needs of low-income students, prioritizing providing these students access to their education.

The disparate, widening opportunity gaps and inequalities expose the limitations of the federal constitutional boundaries during a pandemic (see Herold, 2020a). The federal boundaries are insufficient to address the needs of low-income students because the boundaries require little. Rodriguez states there is no fundamental right to an education, and no subsequent cases have been successful in identifying a more concrete federal constitutional floor. In Schoolhouse Burning, Derek Black (2020) cogently advocated that the courts should recognize a fundamental right to an education. The United States, Black (2020) argued, has democratic norms which are predicated on the importance of public education, and thus, a robust public education is vital to the survival of the democracy. While for decades litigation has surfaced to establish a fundamental right to an education, these lawsuits have not been successful (see Cook v. Raimondo, 2018; Martinez v. Malloy, 2018). Recognizing the fundamental right would secure better funding and would require policies and practices that promote better opportunities and outcomes, especially during the pandemic and as the long-term effects of the pandemic unfold.

Ethnoracially Minoritized Students in K–20

K–12. In 1954, SCOTUS ruled that Plessy v. Ferguson’s (1896) doctrine, “separate but equal,” was inherently unequal under the 14th Amendment to the U.S. Constitution (Brown v. Bd. of Educ., 1954). Brown shone light on the systemic inequalities facing Black students in the 1950s and connected the inequalities to a history of exclusionary policies and practices (Young et al., 2015). At the time of the adoption of the Amendment, “Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent . . . In fact, any education of Negroes was forbidden by law . . .” (Brown v. Bd. of Educ., 1954, p. 489). The ruling promised educational equality through desegregation (Young et al., 2015).

While Brown promised desegregation, some communities resisted integration efforts, such as school busing (Delmont, 2016; see also, Knoester & Au, 2017). Integration efforts plateaued in the 1970s and seemed to reverse themselves thereafter (Muñiz & Frankenberg, 2019). Additionally, local politics and district boundaries complicated Brown’s
promise of integration (Frankenberg et al., 2019; Frankenberg & Le, 2008; Rivkin, 1994). In The Color of Law, Rothstein (2017) detailed resistance to integration and the government’s role in influencing de facto (i.e., by chance) segregation post Brown. Rothstein argued that government policies played a significant role in redlining and prohibiting people of color from accessing housing in well-resourced communities. People of color were pushed and segregated into predominantly urban, low-income areas, while many White people fled to the suburbs. People of color also faced additional burdens, including the placement of toxic waste plants within close proximity of their communities and schools (Mohai & Saha, 2007). These conditions presented a hazard that threatened to negatively impact long-term health (see Mendez et al., 2014).

By the 1990s, districts across the nation were highly segregated (Orfield & Frankenberg, 2014; see also Bischoff & Owens, 2019). Districts took initiative to integrate students, adopting race-based student assignment policies (Parents Involved in Cmty. Sch. v. Seattle, 2007). In 2007, these efforts came under SCOTUS’s scrutiny in Parents Involved. The districts in the case were in Seattle, Washington and Louisville, Kentucky. The district in Seattle, which had never operated legally segregated schools, allowed incoming ninth graders to choose their school by ranking schools. If too many students ranked the same school as their top choice, the district employed tie breakers to admit students. The district gave preference to students with siblings in the school. The second tiebreaker involved the racial composition of the school and the incoming students’ race. If the school was not within 10 percentage points of the district’s White/non-White racial makeup, the school selected incoming students whose race would help balance the school’s racial makeup.

The district in Louisville adopted a similar policy. In 1973, a federal court found the district was legally segregated and issued a desegregation decree in 1975. In 2000, the court found that the district had achieved “unitary status,” eliminating “[t]o the greatest extent practicable” the vestiges of prior segregation (Parents Involved in Cmty. Sch. v. Seattle, 2007, p. 716). In 2001, the district adopted a race-based assignment policy to avoid segregation that required all nonmagnet schools to maintain a Black enrollment between 15% and 50%. Thirty-four percent of the district’s students were Black and most of the remaining students were White. The district clustered elementary schools to facilitate integration. To assign students, the district considered space available, the racial makeup of the school, and students’ race. If the school had reached “extremes of the [district’s] racial guidelines,” the school would not assign a student whose race would contribute to racial imbalance (Parents Involved in Cmty. Sch. v. Seattle, 2007, p. 786).

Applying strict scrutiny, SCOTUS found both districts’ policies unconstitutional. SCOTUS found that the districts did not argue either of two court-recognized compelling interests: remedying past discrimination or diversity in post-secondary education (see Grutter v. Bollinger, 2003). SCOTUS declined to determine whether the interests the districts asserted were compelling but found racial diversity and avoiding racial isolation were compelling interests. SCOTUS ruled that the race-conscious approaches the districts adopted were not narrowly tailored (Parents Involved in Cmty. Sch. v. Seattle, 2007). Applying the Grutter v. Bollinger (2003) factors to determine whether the districts narrowly tailored their race-based approaches to their goals, SCOTUS found that the districts had not considered workable race-neutral alternatives; the racial classifications seemed to have minimal impact, suggesting they may not be necessary; the districts adopted a limited definition of diversity that did not reflect the diversity in the district; and the districts did not engage in individualized evaluation of students.

Following the case, districts hesitated to adopt race-conscious approaches, interpreting the ruling as prohibiting the use of race and ethnicity in assignment policies (Himes, 2013; see also McNeal, 2009). In 2008, the U.S. Department of Justice and the U.S. DoE (2008) provided guidance to districts nationwide. The guidance explained that districts could seek to achieve racial diversity and avoid racial isolation through race-neutral and race-conscious approaches. Districts should prioritize workable race-neutral approaches that may increase ethnoracial diversity through general correlates of race (e.g., socioeconomic status). When race-neutral approaches are unworkable, districts can adopt race-conscious approaches that do not make race the defining factor in assigning students and do not rely on students’ individual race.

By 2020, cities and school districts were as segregated as in the time of Brown (Orfield & Jarvis, 2020), most through de facto segregation (see Booker v. Bd. of Educ. of City of Plainfield, 1965), which courts interpreted to occur fortuitously (Startz, 2020; see also De Voto & Wronowski, 2018; Gingerrelli, 2020). As a result, de facto segregation is not legally redressable (Frankenberg & Taylor, 2018). District leaders and educators bear the responsibility of adopting policies and practices that promote integration (Diem & Pinto, 2017; Turner, 2020) even when their district boundaries are racially segregated.

It is this district responsibility that is heightened in the context of COVID-19 and its aftermath. The COVID-19 context threatens to disrupt schools’ ability to find diverse populations to further racial diversity and avoid racial isolation, in part, because the pandemic disrupted the lives of ethnoracially minoritized populations and their communities (see Abedi et al., 2020; Blanchard et al., 2020; Centers for Disease Control and Prevention, 2020). Troubling trends in the Black and Brown communities have caused disruptions for students and their families (Quirk, 2020). “Black,
Hispanic, and Indigenous people have been disproportionately affected. For example, the age-adjusted mortality rate among Black people with COVID-19 is 3.4 times as high as that of White people and in July 2020, Black men were dying at nine times the rate of other groups (Tiako et al., 2021, p. 50). These statistics may be less surprising when considering that men of color have the lowest life expectancies from any group in the United States (see Bond & Herman, 2016). Similarly, women of color have struggled to legitimize their pain and convince health care workers of their COVID-19 related symptoms (see Leigh et al., 2014). Access to COVID-19 testing has also favored wealthier predominately White communities (Rubin-Miller et al., 2020), a function influenced by racial residential segregation (McMinn et al., 2020). While these trends are general in nature, they cannot be divorced from the fact that students live in these communities, because they reside in racially segregated neighborhoods.

The disruption to the communities can create access issues for students of color in K–12—access to their schools and campus resources, such as meals, internet, devices, and peer interactions (Rolland, 2020). Given the high risk of contracting COVID-19, many schools located in communities of color closed at disproportionate rates compared with wealthier, predominantly White communities (Smith & Reeves, 2020). This has led to complications. For example, low-income students attending densely populated schools and without access to electronic devices may attend remotely with unreliable internet, have to locate a reliable internet hotspot location, or, in extreme circumstances, not attend at all (Trinidad, 2021; Reza, 2020; Vogels, 2020). Students in secondary school had less access to college admittance tests (e.g., SAT; College Board, n.d.). These are only some of the ways in which the pandemic disrupted the students' lives.

The disruptions and issues of access can present challenges for schools seeking to achieve racial diversity and avoid racial isolation, because the legal bounds are substantially limited (e.g., the courts are willing to recognize few state goals as compelling enough to adopt race-conscious assignment policies). Recruiting students from ethnoracial minorities for educational programs require additional capacity and targeted efforts. Rather than recruiting through in-person formats, schools would have to consider how to reach students who have difficulties with access via, for example, community flyers. As schools decide what policies they should adopt, they must work within the legal bounds. Specifically, they must adopt narrowly tailored approaches—approaches with a close connection to their goals. Before adopting race-conscious approaches, the schools would have to consider workable race-neutral alternatives. If these are unworkable, then schools can adopt race-conscious approaches. However, race should be one of many factors in a comprehensive process.

The COVID-19 context also complicates schools’ efforts to integrate within schools (see Ahearn, 2017). The context significantly restricts student–student contact and complicates the implementation of integration policies and practices (see M. Anderson & Perrin, 2018; Dolan, 2015, 2017; Garland & Wotton, 2002). For instance, consider programs such as the Boston’s Metropolitan Council for Educational Opportunity (METCO) program (Angrist & Lang, 2004; Batson & Hayden, 1987). Designed to promote integration across ethnoracial and socioeconomic lines across school districts, METCO buses participating students to different school districts (Eaton, 2001). METCO increases diversity in schools (Stokes, 2019). Amid the pandemic, interactions among students were limited to virtual meetings, for those students who have access to electronic devices and a stable internet connection. To be clear, in-person meetings do not automatically lead to integration. Students remain deeply segregated within schools (Joyner & Kao, 2000; Moody, 2001; Tatum, 1997). However, literature demonstrates the benefits of interactions among students from diverse backgrounds (Gurin et al., 2004; Hawley, 2007; Juvonen et al., 2018). COVID-19 limits the venues that allow for these meaningful interactions, and suggests schools should reconsider how to adopt policies and practices virtually to further meaningful integration (see Freeman et al., 2020) and policies and practices that encourage integration as students return to schools.

Postsecondary Education. Ethnoracial equity is also of concern in postsecondary education. The law in postsecondary education regarding race and ethnicity has focused on admissions policies (Donaldson, 2014; Wright & Garces, 2018). The admissions process is an entry point for students seeking a postsecondary degree and thereby to improve their social mobility (Bowen, 1999; Carnevale & Rose, 2004). A postsecondary degree has implications for students’ postgraduation quality of life (Edgerton et al., 2012).

In 2021, less than 10 states had bans on affirmative action policies; thus, race-conscious admission policies should be of interest in approximately 40 states wherein HEIs can bolster ethnoracial diversity (see Potter, 2014). Ethnoracial diversity in higher education is itself a worthy goal, contributing to a pluralistic society, on which the U.S. democracy depends (Chang et al., 2006; Engberg & Hurtado, 2011; Zhang, 2019). Scholarship and courts have identified the benefits of an ethnoracially diverse student body for the university experience and postgraduation (Bowman, 2013; Denson et al., 2017). While there is a correlation between ethnoracial identity and socioeconomic status, studies have shown the value of explicitly considering race and ethnicity in admissions (Torres, 2020). For example, in states that have banned race-conscious admissions, ethnoracial diversity decreased after the bans (Garces, 2012; Peele & Willis, 2020). These findings suggest that other proxies are not as
effective as the explicit use of race and ethnicity to bolster ethnoracial diversity. Given its importance for students and graduates, this is an area in which identifying the legal boundaries in light of the pandemic can surface the limitations of the law.

SCOTUS has affirmed diversity as a compelling interest HEIs can pursue by considering an applicant’s race and ethnicity as factors in holistically evaluating applicants (Fisher v. Univ. of Texas at Austin, 2013; Gratz v. Bollinger, 2003; Grutter v. Bollinger, 2003). The latest SCOTUS case regarding race-conscious admissions arose in Texas. Fisher, a White woman, challenged The University of Texas (UT)–Austin’s admissions policy, arguing UT’s policy discriminated against her because of her race by denying her admission in 2008 (Fisher Univ. of Texas at Austin, 2013).

UT employed a Top Ten Percent plan through which UT admitted the top 7% to 8% graduates at any Texas high school and accounted for 75% of the incoming class. UT filled the remaining seats through a combination of the “Academic Index” (based on SAT score plus academic performance) and “Personal Achievement Index” (based on essay scores, supplemental materials, potential contributions to UT’s community, and special circumstances). Special circumstances included “socioeconomic status,” “family responsibilities,” “single-parent home[s],” “SAT score in relation to the average SAT score at the applicant’s school,” “language spoken at [home, and] the applicant’s race” (L. Friedman, 2019, p. 723).

SCOTUS found that UT had articulated a compelling interest and its policy was narrowly tailored to meet their interest (Fisher Univ. of Texas at Austin, 2013). Regarding the former, UT had articulated concrete and precise goals in its “Proposal to Consider Race and Ethnicity in Admissions.” UT sought to destroy stereotypes, promote cross-racial understanding, prepare students for an incredibly diverse workforce and society, cultivate leaders with legitimacy in the eyes of citizens, and to provide an environment that promotes a robust exchange of ideas. UT engaged in continual reassessment of its policy and found it had not yet achieved its goals. The policy was also narrowly tailored. UT’s policy had an impact in advancing UT’s goals; the percentage of Black and Brown students had increased marginally by 2007. UT considered other race-neutral alternatives to advance their goals, but these were unworkable.

In short, the law allows HEIs to consider race and ethnicity in admissions, but only as a plus factor. While Brown’s focus was on racial integration, in the 21st century, the focus has shifted to achieving diversity, broadly defined. HEIs do not need to consider race or ethnicity. When they do, they can include race and ethnicity with a goal to achieve a critical mass of students such that all students can benefit from a diverse student body (Miksch, 2003). From a racial equity lens, the legal bounds are insufficient: HEIs need not consider race or ethnicity, if they do not want. The boundaries are also problematic because a critical mass is difficult to assess. Furthermore, seeking a critical mass risks becoming a ceiling for HEIs; HEIs need not consider how to improve or work toward racial equity beyond a vague critical number of ethnoracially diverse students (Arms, 2007; E. C. Thomas, 2007).

Because the pandemic exacerbated inequalities, arguably, HEIs have a pressing need to consider how the pandemic deepened socioeconomic inequality across ethnoracial lines and to integrate these considerations in admissions (Jaschik, 2020b, 2020c; see also Robinson & Maitra, 2020). HEIs that do not consider race or ethnicity risk underevaluating students who are negatively affected by the pandemic (Keller et al., 2020). Contextualizing the students’ challenges through the consideration of race and ethnicity can reframe the cases before admissions committees. Ultimately, changes in admissions can lead HEIs to gain a more ethnoracially diverse student body, which benefits all students.

Their approaches must also be narrowly tailored, considering race only as a plus factor. The approaches may take different forms that account for the pronounced disruption to incoming students’ lives. The pandemic may adversely affect students’ academic records (T. C. Anderson, 2020; García & Weiss, 2020). Students’ race can be a unique factor that calls attention to the systemic challenges communities of color faced during the pandemic (e.g., the lack of access to testing, healthcare, vaccinations). Race and ethnicity can contextualize the potential negative repercussions students faced in their educational trajectory and inequalities returning students of color faced generally (T. C. Anderson, 2020; Camera, 2021). Without this context, students’ profiles may be incomplete.

Recruitment efforts are also impacted. The legal boundaries do not require recruitment efforts use race-conscious approaches (Weser v. Glen, 2002; Raso v. Lago, 1998). However, the law permits (may) schools to engage in practices that would boost the ethnoracial makeup of the applicant pool. Creative efforts are necessary to reach low-income, ethnoracially minoritized students less likely to attend school in person or who have limited access to technological devices and internet. For example, HEIs can increase online and socially distanced recruitment events in communities where ethnoracially minoritized students do not have access to reliable internet or electronic devices (Heisel & Pinion, 2020).

Admissions practices that account for the disruption can contextualize students’ academic performance during and after the pandemic, akin to UT’s consideration of special circumstances. The disruptions to the students’ lives can have an impact on academic performance during the pandemic and can disrupt the educational foundation students need. Thus, the disruptions can have ramifications postpandemic.

COVID-19 also presents an opportunity for HEIs to reimagine admissions in a rapidly changing world (e.g., Halford, 2019). For example, some HEIs dropped or
suspended their admissions tests requirements, a choice that can promote equitable opportunities for prospective students (Smalley, 2020). The University of California (UC) system provides an example of action that aimed to disrupt the status quo and account for the inequality that marginalized students face (Jaschik, 2020d; see also Keller & Hoover, 2009). The UC system temporarily suspended the use of the Scholastic Aptitude Test (SAT) and Graduate Record Examinations (GRE) scores as an admissions requirement, in relevant part, to account for the anticipated pandemic disparities (Jaschik, 2020a; Kuhfeld et al., 2020). Nonetheless, the literature suggests such a change in policy is not enough to increase racial diversity (Bennett, 2021). Moreover, after removing standardized testing in the admissions process, HEIs, especially those most selective, have seen an increase in applications and their selectivity has increased (Jaschik, 2021; O’Malley & Bohanon, 2021). Thus, to further racial equity across all institutions, other changes, such as different practices in recruitment and admissions may also be necessary.

By summer 2021, the litigation in this area remained active. The First Circuit upheld Harvard’s affirmative action policy, finding the college did not violate Title VI (1964) because it had a compelling interest in furthering diversity and its policy was holistic (SFFA v. Harvard, 2020). Title VI race discrimination cases follow a similar legal analysis as 14th Amendment’s Equal Protection Clause analysis. The lawsuit reached SCOTUS, a court divided into six ideologically conservative justices and three ideologically liberal justices (Liptak, 2020). SCOTUS was scheduled to decide on June 10, 2021 whether to hear the case.

The same group challenging Harvard’s policy sued the University of North Carolina over its affirmative action policy, arguing the policy violates the Equal Protection Clause (SFFA v. UNC, 2018). A federal court heard the case in November 2020, noting the case presented important constitutional law questions (University of North Carolina at Chapel Hill, n.d.). Thus, while schools may adopt race-conscious policies, the boundaries could change amidst the unfolding deepened inequalities during and after the pandemic. Scholars argue race-conscious admissions may not survive a SCOTUS ruling, which would further restrict the legal boundaries (Kiracofe, 2020).

In sum, districts and HEIs need not use race and ethnicity in their admissions policies, but, importantly, they may. Courts have articulated a preference for race-neutral alternatives and permit holistic race-conscious alternatives where institutions do not find workable race-neutral alternatives. Notably, this is a shift from the Brown approach where SCOTUS explicitly identified racial issues. Scholars have conceptualized “race-neutral” approaches as “race evasive” (Garces, 2020). Race-conscious policies can further racial diversity and are a pressing need amidst a global crisis in which incoming students face exacerbated inequalities.

Discussion

This study builds on the scholarship on COVID-19, which has found a disproportionate, negative impact on marginalized populations (Gupta et al., 2020; Haffajee & Mello, 2020; Hale et al., 2020; Kim et al., 2020; Singh & Singh, 2020; van Dorn et al., 2020). The virus exacerbated preexisting inequalities (Condon et al., 2020; Robinson et al., 2020). Though research has yet to document the long-term impact of COVID-19, researchers have long documented how inequality inhibits marginalized students’ success (Greenwald et al., 1996; Hanushek & Woessmann, 2017).

This study extends this work, examining issues of education law and policy amidst the pandemic with a focus on educational equity (see Bishop & Noguera, 2019; Olden, 2017). Educational inequity often involves the same student groups who experienced a disproportionate, negative impact because of COVID-19 (Benfer & Wiley, 2020; Haynes et al., 2020). Multiply marginalized students might experience the ramifications in compounding ways (Dyer, 2020; Hooper et al., 2020; Kantamneni, 2020; Pirtle, 2020).

The findings surface a policy dilemma. The pandemic exacerbated inequalities, and focusing on these in relation to the legal bounds exposes the limitations of the law, the inequities the law permits. With its limitations, the law is insufficient to further educational equity. The law does not offer stronger protections for students in a time of a pandemic in a manner that would require educational institutions make changes toward equity. Of course, the law does not guarantee the best educational outcomes (San Antonio Indep. Sch. Dist. v. Rodriguez, 1973) but can change the policymakers’ legal bounds of discretion by, for example, recognizing greater protections for students (e.g., a federal fundamental right to education; Black, 2020).

Given the limitations of the legal bounds, institutional policymakers interested in promoting educational equity are continually confronted with “Should we?” policy questions during the pandemic and its aftermath (Smalley, 2020). These questions present a type of crossroads, a point in time in which policymakers can adopt policies that can promote equity (Armitage & Nellums, 2020; Dorn et al., 2020; Lancker & Parolin, 2020). This crossroads presents an opportunity for policymakers to lead with an equity-orientation. Scholars argue that one way to further equity is through democratic processes (Urbinati & Warren, 2008) that consider the multiple viewpoints that are marginalized in mainstream discussions (Ricci, 1970; Urbinati, 2006). Thus, approaches that explicitly identify the assumptions that policymakers carry and student needs are critical to adopt policies that do not further marginalize students.

The impact that COVID-19 has had on low-income communities of color threatens to have reverberating negative effects. While the law does not require more during the pandemic, knowing the law first and foremost is critical.
Even when the law does not require action, educational equity is a matter of policy, institutionalized action that can further equity. In other words, if the law responds with “You must not.” to “Must we?” schools interested in adopting policies that promote equity can ask “May we?” to adopt policies that are furthering equity and are still within the boundaries of the law. Then, there should be a conversation around “Should we?”—a normative policy question. Is it a good policy to adopt? Who does it serve and who should it serve? These are empirical and normative questions that can help further equity by centering the needs of those most in need.

To be clear, I do not argue that education policy will resolve all the challenges students face. Students face issues outside the school system that can only be addressed through social policy. At the same time, these issues affect students’ lives in ways that interfere with their ability to perform academically to their potential. Educational institutions have a role to play in supporting their students. Equitable education, a core goal for educational institutions, is about accounting for individual student needs. The needs of students will be informed by the challenges that students face outside of school. To this end, educational institutions have a role to play in deciding which policies to adopt. Thus, while the law may not require certain action, given its limitations, education policies and practices can make a difference.

Implications

The study informs the work of researchers in at least two ways. First, the study identifies concrete areas that raise educational equity issues for marginalized students during the pandemic and after (see Armitage & Nellums, 2020; Lancker & Parolin, 2020), which can inform the research questions researchers ask. Second, the study informs the general literature on COVID-19, which includes work on the impact of the pandemic on law and education (Blankenberger & Williams, 2020; Daniel, 2020; Jennings & Perez, 2020). The study brings these two fields together to examine issues affecting marginalized students. The focus on education law and policy allows a discussion on the legal bounds and the often difficult normative “Should we?” question that continually arises during the pandemic and its aftermath.

The study has implications for policymakers and practitioners too. As policymakers debate which policies to adopt in response to COVID-19 and in preparation for its aftermath, they should center the voices of marginalized populations (Greder et al., 2004; Stonewall et al., 2017), even when the law does not require such centering. For example, practitioners can redirect funding to students unable to meet college costs (Kerr, 2020). Policymakers can also reallocate resources in K–12 (M. Anderson & Perrin, 2018; Dolan, 2015, 2017; Garland & Wotton, 2002). The policies and practices that they can adopt will vary locally, but generally, responding to students’ needs and reallocating resources—even when not legally required—can center marginalized students.

Conclusion

The pandemic exacerbated inequalities (Condron et al., 2020; Pirtle, 2020; C. Walsh, 2020), and marginalized students were most affected (Burgess & Sievertsen, 2020). Using the law as a lens, I identified the legal boundaries delineating students’ rights. Considering these legal bounds in light of the exacerbated inequalities exposes the limitations of the law. The analysis also surfaced the dilemma that policymakers face when observing the boundaries: what policies should they adopt given the inequalities, even when the law does not require much more? This question invites careful deliberation. In answering the question, policymakers have the ability to center marginalized students and, thereby, promote educational equity.

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Using a Legal Framework to Expose Educational Inequity


U.S. Const. art. I, § 1

U.S. Const. art. II, § 1

U.S. Const. art. III, § 1

U.S. Const. amend. XIV, § 1


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UNEQUAL EDUCATIONAL OPPORTUNITIES FOR GIFTED STUDENTS: ROBBING PETER TO PAY PAUL?

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UNEQUAL EDUCATIONAL OPPORTUNITIES
FOR GIFTED STUDENTS:
ROBBING PETER TO PAY PAUL?

Charles J. Russo*

If an unfriendly foreign power had attempted to impose on America the mediocre education performance that exists today, we might well have viewed it as an act of war.¹

With these provocative words, the National Commission on Excellence in Education's seminal report, A Nation at Risk: The Imperative for Educational Reform,² gave birth to a plethora of reform reports aimed at reinvigorating the quality of American schools.³ Previously, the Supreme Court's monumental decision in Brown v. Board of Education⁴ served as the impetus to propel local and national leaders to take steps to ensure equal educational opportunities for all students by recognizing that "[t]oday, education is perhaps the most important function of state and local governments."⁵ Brown ushered in an era that has led to admirable, yet arguably incomplete, gains in equal educational opportunities for all chil-

¹ NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 3 (1983) [hereinafter A NATION AT RISK].
² Id.
³ By the end of the 1980s, the era of reform reports seemed to draw to a close. For representative major reports, see, for example ERNEST L. BOYER, HIGH SCHOOL: A REPORT ON SECONDARY EDUCATION IN AMERICA (1983); CARNEGIE COUNCIL ON ADOLESCENT DEV., TURNING POINTS: PREPARING AMERICAN YOUTH FOR THE 21ST CENTURY (1989); CARNEGIE FORUM ON EDUC. AND THE ECON., A NATION PREPARED: TEACHERS FOR THE 21ST CENTURY (1986); JOHN GOODLAD, A PLACE CALLED SCHOOL: PROSPECTS FOR THE FUTURE (1984); HOLMES GROUP, TOMORROW'S TEACHERS: A REPORT OF THE HOLMES GROUP (1989); and THEODORE SIZER, HORACE'S COMPROMISE: THE DILEMMA OF THE AMERICAN HIGH SCHOOL (1984).
⁴ Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that segregation was a denial of the equal protection of the laws under the Fourteenth Amendment and that separate educational facilities were inherently unequal).
⁵ Id. at 493.
children, most notably minorities, females, and students with disabilities. However, despite the progress that has been made in the struggle for educational equality, many exceptional students are not being fully served. A Nation at Risk cogently observed that “over half of the population of gifted students do not match their tested ability with comparable achievement in school.” The report further suggested that “most gifted students, for example, may need a curriculum enriched and accelerated beyond the needs of other students of high ability.”


9. This neglect is contrary to the express wishes of Congress. See 20 U.S.C. § 1400(c)(5)(E)(ii) (Supp. IV 1998) (noting that Congress intended that all children with disabilities should “be prepared to lead productive, independent, adult lives to the maximum extent possible”); 20 U.S.C. § 1221 (1994) (declaring that National policy is “that every citizen is entitled to an education to meet his or her full potential”). In light of these statements, Congressional inaction in safeguarding the rights of the gifted is, at best, perplexing.

10. A Nation at Risk, supra note 1, at 8.

11. Id. at 24.
Aside from commission reports and rhetoric, little has been done at either the federal or state level to offer appropriate programming for gifted and talented children’s educational needs. The poor state of gifted education is reflected in the fact that the most recent federal study on gifted students reports that states spent only two cents out of every one hundred dollars in education on programs for gifted students. It is questionable whether educational leaders and policy makers have taken sufficient steps to meet the educational needs of gifted children.

This Article discusses various challenges in meeting the educational needs of gifted students. Part I provides a brief overview of educational perspectives on gifted students. Part II examines statutory developments in the United States dealing with the rights of

12. The term gifted was first used by Lewis Terman who defined gifted students as those who placed in the top one percent in general intelligence ability on the Stanford-Binet Intelligence Scale or a similar test. Lewis Terman, Mental and Physical Traits of a Thousand Gifted Children (1925). For later definitions of gifted, see, for example, J.A. Borland, Planning and Implementing Programs for the Gifted (1989); Raymond B. Cattell, Abilities: Their Structure, Growth, and Action (1971); Robert F. DeHaan & Robert J. Havinghurst, Educating Gifted Children (1957); Howard Gardner, Frames of Mind: The Theory of Multiple Intelligences (1983); Jane Hirto, Talented Children and Adults: Their Development and Education (1999); Valerie Ramos-Ford et al., Growing Up Gifted 54 (5th ed. 1997); Abraham J. Tannenbaum, Gifted Children: Psychological and Educational Perspectives (1983); Nicholas Colangelo & Garry A. Davis, The Meaning and Making of Giftedness, in Handbook of Gifted Education 27 (1997); Nicholas Colangelo & Garry A. Davis, Toward a Differentiated Model of Giftedness and Talent, in Handbook of Gifted Education 65 (1997); Joseph Renzuli, What Makes Giftedness? Reexamining a Definition, Phi Delta Kappan, Nov. 1978, at 180; François Gagné, From Giftedness to Talent: A Developmental Model and Its Impact on the Language of the Field, 18 Roeper Rev. 103 (1995); and A Proposal for Subcategories Within Gifted and Talented Populations, Gifted Child Q., Apr. 1998, at 87. For a discussion of many of these definitions, see Kristen F. Stephens & Frances A. Kearns, State Definitions for the Gifted and Talented Revisited, Exceptional Child., Jan. 1, 2000, at 219, 220-22. For earlier versions of this article, see Frances A. Kearns & E.C. Collins, State Definitions of the Gifted and Talented. 1 J. Educ. Gifted 44 (1977) and Frances A. Kearns & Susan F. Koch, State Definitions of the Gifted and Talented: An Update and Analysis, 8 J. Educ. Gifted 285 (1985). For purposes of consistency and brevity, unless otherwise specified, the term “gifted” refers to students who are both “gifted” and “talented.”

gifted students. Part II focuses predominantly on the author’s belief that the federal government must protect the educational rights of gifted students. The author recommends the passage of a bill enabling systematic protection of the educational rights of gifted children modeled after the Education for All Handicapped Children Act (now the Individuals with Disabilities Education Act (IDEA)). Part III reviews the growing body of case law dealing with rights of gifted children. Part IV discusses various proposals aimed at providing equitable programming for gifted students.

I. The Educational Needs of Gifted Students

The subject of programming for gifted students is a contentious issue in America. In an egalitarian nation, where all are considered equal, critics are reluctant to support special programming for gifted students because of the fear and suspicion that intellectualism may lead to elitism. On the other hand, there is the American ideal, most notably reflected in Brown, Title IX, and the

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16. Pat O’Connell Ross, U.S. Dep’t of Educ., National Excellence: A Case for Developing America’s Talent: Part I: A case for Developing America’s Talent 5 (1993) [hereinafter National Excellence: Part 1] (referring to Alexis de Tocqueville’s depiction of the early “United States as a society with low levels of interest in education and intellect... that values equality... [and is] uncomfortable with social or intellectual distinctions or with hierarchies that they believe can stand in the way of success for industrious individuals.” (quoting Alexis de Tocqueville, Democracy in America 124 (Univ. of Chicago Press 2000) (1840))).

17. National Excellence: Part 1, supra note 16, at 5-6 (“Again and again, it has been noticed that intellect in America is presented as a kind of excellence, as a claim to distinction, as a challenge to egalitarianism, as a quality which almost certainly deprives a man or woman of the common touch.” (quoting Richard Hofstadter, Anti-intellectualism in American Life 211 (Knopf 1963))).

18. Abraham J. Tannenbaum, Programs for the Gifted: To Be or Not to Be, 22 J. Educ. Gifted 3 (1998) (discussing the conflict between egalitarianism and excellence in the context of gifted education); Mary F. Toll, The Importance of Teacher Preparation Programs To Appropriately Serve Students Who Are Gifted, Understanding Our Gifted, Winter 2000, at 14 (offering examples to counter the notion that classes for the gifted are elitist).

19. Supra note 4.

20. Supra note 7.
IDEA, of helping all to succeed and reach their full potential. As noted in this Article, this ambivalence is far from resolved.

Regardless of one's attitude toward the subject of giftedness, research indicates that gifted students have unique educational needs and require special programs. In addition, it is important to consider the value of gifted student programs, since many gifted children not only fail to succeed on their own, but indeed may underachieve, experience learning disabilities, and drop out of school because their potential is stifled by the traditional school curriculum. Moreover, although data is typically not tracked consistently, it indicates that gifted children from low income fami-

21. Supra note 15.


23. See Juan A. Alonso, The Differentiated Program: Significant Curriculum Adaptations, 14 GIFTED EDUC. INT'L 80 (1999); see also A NATION AT RISK, supra note 1, at 24 ("[M]ost gifted students . . . may need a curriculum enriched and accelerated beyond the needs of other students of high ability.").


29. National Excellence: Part 2, supra note 13, at 2 ("Programs for gifted and talented students exist in every state and in many school districts, but it is difficult to determine the exact number of students served because not all states and localities collect this information."). This report points out that while about 8.8% of all eighth grade students in public schools participated in programs for the gifted, disparities abound: "[f]or example, 4 states identify more than ten percent of their students as gifted and talented, while in 21 states fewer than 5 percent [sic] are identified as such." Id. at 3.
lies, minority families, or families living in urban areas are in even greater need of programming than their middle-income peers because of the greater risk of failure, poor achievement, or underachievement.

In response to various reports and commissions calling for educational excellence, there has been growing, albeit far from unanimous, support for programs for the gifted. The next section of this Article reviews the legislative history of programs for gifted students.

II. LEGISLATION ON GIFTED EDUCATION

A. Federal Legislation

1. Early History

It is well settled that students do not have a constitutionally protected right to receive an education absent a constitutional violation or a clear statutory entitlement. Even so, Congress has

30. See Paul D. Slocumb & Ruby K. Payne, Identifying and Nurturing the Gifted Poor, PRINCIPAL, May 2000, at 28 (discussing the needs of gifted students from poorer backgrounds).


33. See, e.g., Joetta L. Stack, Support Building for Renewed Focus On Gifted Education, EDUC. WK., Mar. 29, 2001, at 32; National News Roundup, EDUC. WK., Dec. 9, 1992, at 2 (indicating that results of a Gallup poll indicated that 84% of respondents would favor programs for the gifted as long as they did not reduce funding for other students and that 61% were of the opinion that schools should do more to challenge the “very smartest” children). The poll also revealed that 35% of respondents indicated that schools should continue to act as they have with regard to the gifted while 2% were of the opinion that schools should do less for these students. NATIONAL EXCELLENCE: PART 2, supra note 13, at 2.

34. See, e.g., Lowell C. Rose et al., The 29th Annual Phi Delta Kappan / Gallup Poll Of the Public’s Attitudes Toward the Public Schools, PHI DELTA KAPPAN, Winter 1997, at 53 (indicating that a narrow majority of respondents favored separate classes for gifted students).

35. In San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), a case involving the constitutionality of a state funding plan in relation to equality of educational opportunities, the Supreme Court declared that “[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.” Id. at 35.

36. If, for example, as in Brown v. Board of Education, 347 U.S. 483 (1954), a party can allege that state action has led to the deprivation of a constitutionally protected right, such as equal protection, then a lawsuit may proceed in federal court.
taken a leadership role in safeguarding the educational rights of minorities, women, and children with disabilities. However, the history of federal programming for gifted students has been sporadic.

The earliest federal program on gifted education was created in 1931 when the United States Department of Education instituted a Section on Exceptional Children and Youth. Similar to later federal legislative actions, most notably the Jacob K. Javits Gifted and Talented Students Act, this program lacked specific legislative or fiscal authority, but laid a foundation for later federal actions regarding the gifted.

After World War II, with the threat of Soviet aggression and the spread of communism to China, federal interest in the gifted was essentially present, although unstated, when Congress enacted the National Science Foundation Act of 1950. This historic act "not only directed resources toward the development of the sciences and basic research, but for the first time focused federal attention on the nation's gifted and talented." Previously, Congress directed its attention mostly towards higher education of the gifted in basic and applied science areas related to the general welfare. However, under this act, programs and projects were geared toward improving the curriculum in schools and encouraging gifted students to seek careers in mathematics and the physical sciences.

Even as federal interest in the gifted was evolving, two research studies revealed a decreased interest in programs for the gifted.

37. For a brief review of major federal statutes on education, see Charles J. Russo, Know Your Federal Statutes, 67 SCH. BUS. AFFAIRS 46 (2001).
42. Zettel, supra note 40, at 52.
44. The first report, a 1948 follow-up on a 1929 survey, found that while nearly two-thirds of school districts with populations of over 25,000 had some form of ability grouping, only fifteen reported having special classes for gifted students. The second report, from Ohio, revealed that only two percent of schools reported providing specialized services for gifted students. Zettel, supra note 40 at 52-53 (citing ARCH OLIVER HECK, THE EDUCATION OF EXCEPTIONAL CHILDREN (1953) and OHIO COMM'N ON CHILDREN AND YOUTH, THE STATUS OF THE GIFTED IN OHIO (1951)).
This declining interest was exacerbated by anti-intellectualism during the McCarthy era when "intellectuals" were often viewed with suspicion. For example, discussing President Eisenhower's 1952 defeat of Adlai Stevenson, one commentator noted "an alarming fact long suspected: there is a wide and unhealthy gap between the American intellectuals and the people." Not surprisingly, concerns for gifted education was overshadowed by the much larger debate over school desegregation during the early part of the 1960s.

2. Equal Educational Opportunities: A Brief, But Necessary, Excursus

Amid the ebb and flow of support for programs for gifted students, the much larger and far-reaching debate over school desegregation came to a head in Brown v. Board of Education and its progeny. Indeed, Brown is the cornerstone of all subsequent legal developments ensuring the rights of disenfranchised groups. Consequently, reviewing the development of special education is relevant because, like students with disabilities, gifted students have individualized needs and should be entitled to some protection.

A major impetus in protecting the rights of students with disabilities was provided by Pennsylvania Ass'n for Retarded Children v.
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Pennsylvania and Mills v. Board of Education. Consistent with the reasoning in Brown, both cases were decided on the basis of equal protection and due process. Viewed together, these cases stand for two principles that permeate later developments. First, children with disabilities have the substantive due process right to receive a public school education based on their unique, individual needs. Second, students with disabilities are entitled to the protection of procedural due process before they can be classified as being disabled, placed in a non-regular classroom, or transferred to a new placement.

One year after Mills, Congress enacted Section 504 of the Rehabilitation Act. This was the first major federal law to offer broad based protection for otherwise qualified individuals with impairments. Although not originally intended to assist students, Section 504 has had a profound impact on schools. The law required that individuals who are otherwise qualified must be permitted to participate in school programs or activities as long as it is possible to do so by means of a “reasonable accommodation.”

In 1975, Congress enacted the Education for All Handicapped Children Act, now the IDEA, as the most comprehensive federal law protecting the rights of students who have disabilities. Among its provisions, the IDEA guarantees all children between the ages

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50. 334 Pennsylvania Ass’n for Retarded Children v. Pennsylvania, F. Supp. 1257 (E.D. Pa. 1971) (recognizing the right to appropriate education for the mentally retarded in the least restrictive environment possible in light of their needs and prescribing due process safeguards prior to their being placed outside the regular classroom).

51. Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972) (holding that a school board had an affirmative duty to provide mentally retarded children with publicly supported education suited to each child’s needs, including special education and tuition grants, and a constitutionally adequate prior hearing with periodic review).


53. 29 U.S.C. § 794(a) (1994) (“No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance.”).

54. Id.; see also 34 C.F.R. § 104.39 (2000) (“A recipient that operates a private elementary or secondary education program may not, on the basis of handicap, exclude a qualified handicapped person from such program if the person can, with minor adjustments, be provided with an appropriate education, as defined within [34 C.F.R. §] 104.33(b)(1), within the recipient’s program.”).

55. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400-1491 (1994)). In order to avoid inconsistency, unless otherwise noted, from this point on, the article uses the acronym IDEA throughout.
of three and twenty-one\textsuperscript{56} with specifically identified disabilities\textsuperscript{57} a
"free appropriate public education"\textsuperscript{58} in the least restrictive envi-
ronment\textsuperscript{59} in conformance with an Individualized Education Pro-
gram (IEP).\textsuperscript{60} However, in \textit{Board of Education v. Rowley},\textsuperscript{61} the
first Supreme Court case reviewing the IDEA, the Court held that
the Act "did not impose any greater substantive educational stan-
dard than would be necessary"\textsuperscript{62} to provide access to a public edu-
cation for children with disabilities. The Court ruled that the Act
established a floor of educational opportunity below which public
schools could not fall rather than creating an open-ended contin-
uum maximizing available programs.\textsuperscript{63} Given the Court's reduc-

\textsuperscript{57} 20 U.S.C. § 1401(3) (1995) offers the following definition:

\begin{itemize}
  \item [(A)] In general
    The term "child with a disability" means a child —
    (i) with mental retardation, hearing impairments (including deafness),
    speech or language impairments, visual impairments (including blindness),
    serious emotional disturbance (hereinafter referred to as "emotional distur-
    bance"), orthopedic impairments, autism, traumatic brain injury, other
    health impairments, or specific learning disabilities; and
    (ii) who, by reason thereof, needs special education and related services.

\end{itemize}

\textsuperscript{58} 20 U.S.C. § 1401 (8) (2001):

The term "free appropriate public education" means special education and
related services that:

\begin{itemize}
  \item [(A)] have been provided at public expense, under public supervision and
direction, and without charge;
  \item [(B)] meet the standards of the State educational agency;
  \item [(C)] include an appropriate preschool, elementary, or secondary school
  education in the State involved; and
  \item [(D)] are provided in conformity with the individualized education pro-
  gram required under section 1414(d) of this title.

\end{itemize}


\textsuperscript{60} 20 U.S.C. §§ 1401 (11), 1414 (d) (1995); 34 C.F.R. § 300.340-350 (1999) (pro-
viding additional details on IEPs).


\textsuperscript{62} \textit{id.} at 192.

\textsuperscript{63} Although states must adopt policies and procedures that are consistent with
the IDEA, they may provide greater benefits than those required by federal law. Fur-
ther, if a state does establish higher standards, courts will consider them when evalu-
tionist interpretation of the broadly supported IDEA, it is not surprising that the rights of gifted students were not assigned a higher priority.

3. Modern History of Federal Legislation

On October 4, 1957, the Soviet Union successfully launched the world's first artificial satellite, Sputnik. This led to a swift federal response in the form of the National Defense Education Act of 1958 ("NDEA"). Although the NDEA was not adopted specifically to address the needs of gifted students, its emphasis on mathematics, science, and foreign languages served as a precursor to the development of programs for the gifted. Furthermore, the Act and the local response it elicited to it implicitly made gifted students the prime targets of curricular reforms that were designed to redress underachievement among students who were capable of success. Consequently, as the 1950s came to a close, there was an increased recognition that since gifted students had the ability to make significant contributions to the Nation's welfare, especially in the essential areas of science and technology, it was vital to develop programs to assist them in achieving their full potential.

The promise to the gifted of the late 1950s that might have flowered under President Kennedy's leadership waned under President Johnson's Great Society programs, which emphasized services for the educationally disadvantaged and economically deprived. Although the Elementary and Secondary Education Act of 1965 ("ESEA") was vital and necessary in looking after the needs of

64. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (codified at scattered sections of 20 & 42 U.S.C. (1994)). Although the gifted were not the focal point of the Act, Congress indicated that "the Nation had to increase its efforts to identify and educate more of our talented individuals." Zettel, supra note 40, at 54.


66. Zettel, supra note 40, at 55.

disadvantaged students, it may have hindered development of programs for the gifted. Federal resources that would otherwise have been earmarked for programs for the gifted were diverted to other programs under the auspices of the ESEA. The federal government adopted a policy that essentially robbed Peter to pay Paul by providing resources for one group of deserving students at the expense of another. Even though the adoption of the ESEA meant that scant resources were reserved for the gifted, advocates continued to lobby Congress. Two years later, while some funds were allocated for innovative and exemplary programs under the 1967 Amendments to the ESEA, very little was spent on programs for the gifted.

The lobbying efforts on behalf of the gifted were rewarded when versions of a bill were introduced in the Senate and House in January of 1969. The bill, proposed as a result of the White House Task Force on the Gifted and Talented, was initially defeated but later won passage as The Gifted and Talented Children's Education Assistance Act. The Act was passed as Section 806 of the Elementary and Secondary Education Amendments of 1969, "Provisions Related to Gifted and Talented Children." President Nixon signed the bill into law on April 13, 1970. This law gave the first federal statutory definition of the term "gifted," called for the development of model programs, and made programs eligible

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68. For a history of this comprehensive statute, see Stephen K. Bailey & Edith K. Mosher, ESEA: The Office of Education Administers a Law (1968).
69. Zettel, supra note 40, at 55.
71. See Lynn Pollins, Comment, Legal Rights of Gifted Students: Special Education at the Other End, 19 Conn. L. Rev. 145, 149 (1986) (citing Thomas Pledgie, Has E.S.E.A. Fostered Innovative and Exemplary Programming for the Gifted?, 20 Gifted Child Q. 466, 466 (1976)) and noting that although more than 1500 projects were funded under Title III of the ESEA during the 1975 fiscal year, only 28 were for gifted students).
72. Zettel, supra note 40, at 55.
73. "The act amended Section 1201 of the Higher Education Act of 1965 by adding the following definition: The term 'gifted and talented children' means in accordance with objective criteria prescribed by the Commissioner, children who have outstanding intellectual ability or creative talent, the development of which requires special activities or services not ordinarily provided by local education agencies." Zettel supra note 40, at 56; The Gifted and Talented Children's Act, Pub. L. No. 91-230, 84 Stat. 121 (1969).
74. Zettel, supra note 40, at 58.
for federal financial assistance under Titles III and IV of the ESEA.75

At the outset of the 1970s, the federal government had assumed a much more active role in providing for the educational needs of the gifted. On October 6, 1972, Commissioner of Education Sidney Marland submitted his national assessment of programs for the gifted to Congress.76 Not surprisingly, the Marland Report urged Congress to provide ongoing support for the development and maintenance of programs for gifted students not only because of their unique needs, but also because the federal government had virtually no role in this process.77

Following the impetus of the Marland Report, three similar bills were introduced in Congress in February of 1973.78 The final bill, signed into law by President Ford on August 21, 1974, as part of the 1974 Amendments to the ESEA,79 called for federal involvement in four major areas. First, it created the Office of Gifted and Talented within the United States Office of Education. Previously, this Office had been created administratively and was housed in the United States Bureau of Education for the Handicapped.80 Second, it called for the creation of a National Clearinghouse for the Gifted.81

75. Given the role that Senator Jacob Javits of New York played in this and other laws for the gifted, see Zettel, supra note 40, at 55 (in 1969), 59 (in 1973), 62 (in 1978), it was only fitting that a subsequent statute was named in his honor.

76. The Marland Report contains a definition of giftedness that has been and continues to be the one most widely adopted by state and local education agencies:

Gifted and talented children are those identified by professionally qualified persons who by virtue of outstanding abilities, are capable of high performance. These are children who require differentiated educational programs and/or services beyond those normally provided by the regular school program in order to realize their contribution to self and society. Children capable of high performance include those with demonstrated achievement and/or potential ability in any of the following areas, singly or in combination:

1. general intellectual ability;
2. specific academic aptitude;
3. creative or productive thinking;
4. leadership ability;
5. visual and performing arts;
6. psychomotor ability.


78. Zettel, supra note 40, at 59.


and Talented. Third, the Act made funds available to state and local education agencies along with grants for training, research, and projects for the gifted. Fourth, the Act authorized an annual federal appropriation not to exceed $12.5 million for programs on the gifted. Insofar as the original draft of the bill called for an annual federal authorization of $80 million for programs for the gifted, it is not surprising that advocates were disappointed since this amounted to about one dollar a year for each eligible student.

An era of ongoing progress appeared to be on the horizon when the Gifted and Talented Children's Education Act of 1978 became law. This act extended the funding provisions of the Special Projects Act. Unlike the IDEA, which was designed to place children with disabilities in fully inclusive educational settings, the Gifted and Talented Children's Act was intended to provide separate programs for gifted students. The Gifted and Talented Children's Education Act provided financial assistance to states to plan, develop, operate, and improve programs for gifted students and allowed the United States Commissioner to provide discretionary funding for such programs.

The promise of the Gifted and Talented Children's Education Act of 1978 was short-lived since it was repealed in 1981 when President Reagan signed the Omnibus Budget Reconciliation Act ("OBRA"). OBRA also closed the Office of Gifted and Talented, eliminated categorical funding from federal sources, and combined authorizations for gifted education and twenty-one other programs into a single block grant while reducing funding by more than forty percent. As a result, the federal government completely suspended its direct involvement in programs for gifted students during much of the 1980s.

Amid concerns of "a rising tide of mediocrity," education reform swept the Nation in the early 1990s. The passage of the Jacob

81. Zettel, supra note 40, at 61.
82. Id.
86. Zettel, supra note 40, at 61-3.
88. Zettel, supra note 40, at 83-84.
89. A NATION AT RISK, supra note 1, at 5.
K. Javits Gifted and Talented Students Act of 1994 marked the culmination of the efforts of supporters of gifted education. This Act, which incorporated many of the recommendations of the Marland Report, reinstated, expanded, and updated earlier programs while offering priority funding for programs to serve gifted students who are economically disadvantaged, speak limited English, or have disabilities.

As significant as the Javits Act is, it has three major shortcomings. First, although the Act provides some modest resources, it does not offer enough assistance to help create widespread programs. Second, the Act does not mandate the creation of programs for gifted students. Third, the Act does not include substantive or procedural due process safeguards similar to those available to students with disabilities under the IDEA. Consequently, its good intentions aside, the Javits Act can virtually be ignored by states that do not place a priority on programs for gifted children.

Most recently, The Gifted and Talented Education Act of 2001 was introduced in both houses of Congress and sent to Committee. This Act proposes to assist state educational agencies to develop or expand programs for gifted students. These programs can take the form of professional development programs, technical assistance, innovative programs and services, or emerging technolo-

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90. Jacob K. Javits Gifted and Talented Students Act of 1994, Pub. L. No. 89-10 (1965), as added Pub. L. No. 103-382, 108 Stat. 3820 (current version at 20 U.S.C. §§ 8031-37). The Javits Act was designed “to provide financial assistance to State and local educational agencies . . . to initiate a coordinated program of research . . . designed to build a nationwide capability in elementary and secondary schools to meet the special educational needs of gifted and talented students.” 20 U.S.C. § 8032 (b)(1). According to the Act,
The term “gifted and talented,” when used with respect to students, children and youth . . . who give evidence of high performance capability in areas such as intellectual, creative, artistic, or leadership capacity, or in specific academic fields and who require services or activities not ordinarily provided by the school in order to fully develop such capabilities.

20 U.S.C. § 8801 (16) (1994). Unlike earlier versions, the Act not only eliminated specific references to preschool, elementary and/or secondary education, but also excluded any reference to performing arts.


94. The House version was referred to the House Committee on Education and the Workforce, H.R. 490, 107th Cong. (2001), while the Senate version was sent to the Senate Committee on Health, Education, Labor and Pensions, 147 Cong. Rec. S1746 (2001).
Amid controversy and politics, versions of the Act were ultimately approved in the House, but the bill faces an uncertain future in Senate Committee.

Regardless of whether Congress adopts a new version of the Javits Act, it is clear that since gifted students have special needs, only states can provide appropriate programs. Yet, as reflected in the next section of this Part, inconsistencies in state responses necessitate a federal legislative response.

**B. State Action**

Information on state programs for the gifted is elusive since state laws and regulations defy accurate, fully up-to-date compilation. With this caveat in mind, this brief review examines state definitions of the term "gifted," the degree to which state programs are mandated and funded, and the requirements regulating educators of the gifted.

The most recent study reported that forty-five states categorize gifted students under a variety of rubrics such as "gifted," "gifted and talented," "learner of high ability," "highly capable students," and "exceptional student." Five states have no definitions or cate-

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95. For a discussion of this bill see Fine, supra note 90 at 21, 23. See also Kristen B. Stephens, Gifted Education and the Law, GIFTED CHILD TODAY, Jan./Feb. 2001, at 30, 31-32 (2001).

96. Although both the House and Senate adopted versions of the Javits Act, it may still face an uncertain future in the Senate and in forthcoming conference committee meetings designed to reconcile both versions. Supporters fear that the Javits Act seems to have little chance of surviving since it was not originally contained in President Bush’s proposed education plan contained in the House version and was reinstated late in the process. Moreover, the chair of the House Education and Workfare Committee, Rep. John Boehner, R-Ohio, is not opposed to a consolidation of the Javits Act, even though he was responsible for the version of the bill that kept the Act. Lisa Fine, Advocates Say Bill Leaves Gifted Students Behind, EDUC. WEEK, June 13, 2001, at 21, 23. See also Joetta L. Sack, Advocates Unite to Block Bush Consolidation Plan, EDUC. WEEK, May 2, 2001, at 26, 30 (including a discussion of efforts to save Javits grants for the gifted).


gories of gifted students. Presently, at least thirty-one states mandate programs for gifted students. At least twelve of these states mandate programs under their own education laws. Other states deal with this issue separately.

Twenty-nine states reported that they provided various levels of support funding while another thirteen did not provide any financial support. Even among those states providing support, tremendous levels of disparity exist. Texas, for example, reported spending $56 million on gifted education while Massachusetts only reported spending $437,970.

At least twenty-eight states require certification for individuals who teach in programs for the gifted while an additional three provide it as an option. The remaining twenty-two states reported that they had no specific certification requirements for working with gifted students.

III. Litigation Involving Gifted Students

Litigation concerning gifted children is increasing rapidly. However, courts are still reluctant to grant gifted students additional rights absent statutory mandates. Before reviewing the

101. Stephens & Kearns, supra note 100, at 236. Only Massachusetts, Minnesota, New Hampshire, New Jersey, and South Dakota did not have definitions for gifted. Id. at 222.

102. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STAT., DIGEST OF EDUCATION STATISTICS 66 tbl. 55 (2000) (reviewing state legislation on gifted and talented programs and number and percent of students receiving services in public elementary and secondary schools in 1993-94 and 1995-96); see also Landrum et al., supra note 100, at 355 (reporting that of the thirty-three states that reported having legislation on the gifted, seventeen mandated programming).

103. Landrum, et al., supra note 100, at 355.

104. Id. Ohio, however, only mandates the identification of gifted students and does not provide funding for programs. OHIO REV. CODE ANN. §§ 3324.10-3324.07, 3324.04 (West 1994) (providing for identification of gifted students).

105. U.S. DEP'T OF EDUC., supra note 102, at 66 (indicating that as of July 1997, sixteen states had provided discretionary state-supported programs).

106. Fine, supra note 100, at 21.

107. Frances A. Karnes et al., Certification and Specialized Competencies for Teachers in Gifted Education Programs, 22 ROPER REV. 201 (2000). See also Frances A. Karnes & James E. Whorton, Teacher Certification and Endorsement in Gifted Education: A Critical Need, 19 ROPER REV. 54, 54 (1996); see also Landrum et al., supra note 100, at 356 (reporting that twenty states had certification requirements).


110. But see Centennial Sch. Dist. v. Commonwealth, 503 A.2d 1090 (Pa. Commw. Ct. 1986), aff'd, 539 A.2d 785 (Pa. 1988) (upholding the Education Secretary's determination that student was entitled to individualized educational program, apart from
case law pertinent to gifted students, it is worth reiterating that elitism is a concern often raised in connection with gifted education,111 which appears to exclude other children, suggesting tracking or ability grouping.112 Tracking is the practice of examining school children at a young age, typically by IQ tests, and then assigning them to curricular "tracks," frequently to the detriment of poor and minority students.113 This article does not review the litigation on tracking114 because states have typically avoided challenges to their gifted programs on the basis that they have learned their lessons and have adopted expansive definitions of giftedness that employ multiple criteria for inclusion in programs.115

This section of the article reviews the case law involving gifted students.116 This section discusses cases focused on admissions and placement, transportation, federal claims, and race.

111. For discussions of these criticisms, see Abraham J. Tannenbaum, Programs for the Gifted: To Be or Not to Be, 22 J. FOR THE EDUC. OF THE GIFTED 3 (1998) and Mary F. Toll, The Importance of Teacher Preparation Programs To Appropriately Serve Students Who Are Gifted, UNDERSTANDING OUR GIFTED, Winter 2000, at 1.


115. See Stephens & Kearns, supra note 100, at 219.

116. Even though this article focuses on the rights of gifted students, it is worth noting that teachers in gifted programs have engaged in litigation to protect their rights. See, e.g., Dilley v. Slippery Rock Area Sch. Dist., 625 A.2d 153 (Pa. Commw. Ct. 1993) (upholding the RIF of a staff member with greater seniority where the school board demonstrated the need to retain a gifted teacher with less seniority); Egan v. Bd. of Educ., 406 S.E.2d 733 (W. Va. 1991) (directing a school board to hire a teacher with certification in gifted education to replace a faculty member who lacked certification in this area); Dallap v. Sharon City Sch. Dist., 571 A.2d 368 (Pa. Commw. Ct. 1990) (reversing a board's decision to retain the coordinator of a gifted program while teaching teachers with greater seniority to a RIF); Rosen v. Montgomery County Intermediate Unit No. 23, 495 A.2d 217 (Pa. Commw. Ct. 1985) (permitting RIFs of teachers in a program for gifted students); Degener v. Governing Bd., 136 Cal. Rptr. 801 (1977) (upholding a reduction in force (RIF) where one of the employees was a teacher in a program for the gifted).
A. Admissions and Placement

Absent an express statutory or regulatory mandate, when a school board employs a rational method of selection, such as a lottery, that gives all qualified children an equal opportunity to enter a program with a limited number of openings or a program restricted to students of a certain age, courts have generally adopted an all or nothing approach to the extent that a student is either admitted or excluded from gifted education.

The earliest case on admission to a program for gifted students was Ackerman v. Rubin. In Ackerman, a state appellate court affirmed that the New York City Board of Education did not act improperly in denying a student admission to a special progress class that accelerated the regular three-year junior high school curriculum into two years. The court reasoned that in light of a board directive that admissions decisions had to be based on factors beyond academics, such as students' emotional, social, and physiological development and maturity, educators did not act arbitrarily or capriciously in finding that the child was not qualified because he failed to reach the appropriate age cut-off. Interestingly enough, in the context of this discussion, the trial court acknowledged that "[i]t appears that the Board of Education initiated special progress classes more than forty years ago."

In Central York School District v. Commonwealth, an appellate court rejected a school board's argument that it did not have to provide a placement for a gifted student since doing so was contin-

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117. Bennett v. City Sch. Dist., 114 A.D.2d 58 (App. Div. 1985) (affirming, inter alia, that a gifted child was not entitled to admission to a full-time program for gifted students where school officials employed a lottery for selecting a limited number of applicants from a pool of qualified students; the student was one of 112 applicants for 27 openings in the program).

118. Zweifel v. Joint Dist., 251 N.W.2d 822 (Wis. 1977) (affirming that the state constitution did not require a school board to grant early admission to a bright four-year-old). Although regarding it irrelevant, the dissent noted that one of the reasons why the board refused to admit the child was that it did not have special programs for gifted students. Id. at 828. See also Wright v. Ector County Indep. Sch. Dist., 867 S.W.2d 863 (Tex. App. 1994) (affirming that since a Texas law requiring school boards to create programs for gifted students required a child to be six years old in order to be enrolled in a first grade gifted program, a five year-old gifted student did not have a right to enter first grade).


120. Ackerman v. Rubin, 231 N.Y.S.2d 112, 113 (Sup. Ct. 1962) (noting that the student was going to be 10.7 rather than the required 11.3 years of age at the start of the school year in Sept. 1962).

121. Id.

gent on receiving state funding. The court responded that because state funding was not a condition precedent to providing the child with an educational program, the child was entitled to an appropriate placement.

Pennsylvania has had more litigation than any other state with regard to the rights of gifted students and has the most significant case safeguarding the statutory rights of these children. In Centennial School District v. Commonwealth, the Supreme Court of Pennsylvania unanimously affirmed that, pursuant to a Commonwealth statute and regulations requiring an IEP

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123. For a similar state case unsuccessfully challenging special education as an unfunded mandate, see City of Worcester v. Governor, 625 N.E.2d 1337 (Mass. 1994).


(1) Standards for Proper Education and Training of Exceptional Children.

The State Board of Education shall adopt and prescribe standards and regulations for the proper education and training of all exceptional children by school districts or counties singly or jointly . . . .

(2) Plans for Education and Training Exceptional Children. Each intermediate unit, cooperatively with other intermediate units and with school districts shall prepare and submit to the Superintendent of Public Instruction, on or before the first day of August . . . for his approval or disapproval, plans for the proper education and training of all exceptional children in accordance with the standards and regulations adopted by the State Board of Education. Plans as provided for in this section shall be subject to revision from time to time as conditions warrant, subject to the approval of the Superintendent of Public Instruction.


127. In their most relevant parts, the regulations read:


(iv) Mentally gifted.—Outstanding intellectual and creative ability the development of which requires special activities or services not ordinarily provided in the regular program. Persons shall be assigned to a program for the gifted when they have an IQ of 130 or higher. A limited number of persons with IQ scores lower than 130 may be admitted to gifted programs when other educational criteria in the profile of the person strongly indicate gifted ability.


The Individualized Education Program for each person assigned to special education programs or services shall include:

(1) A statement of the present level of educational performance of the person.
for each gifted student, a child had a right to gifted education. The
court reasoned that a school board’s provision of a 150 minute-a-
week pull-out program was insufficient for a gifted child because
the enrichment program did not address his need for accelerated
instruction in reading and mathematics. However, similar to
Rowley, where the Supreme Court ruled that the IDEA provides
a floor of opportunity, the court held that “instruction to be of-
fered need not ‘maximize’ the student’s ability to benefit from an
individualized education program” as long as what a school
board makes available is appropriate to a child’s needs. Follow-

(2) A statement of annual goals which describes the expected behaviors
to be achieved through the implementation of the Individualized Education
Program of the person.

(3) A statement of short-term instructional objectives.

(4) A statement of specific educational services to be provided to the
child, including a description of special education and related services re-
quired to meet the unique needs of the child, a special instructional media
and materials to be provided, and the type of physical education program in
which the child will participate.

(5) A description of the extent to which the child will be able to partici-
pate in regular education programs.

(6) The projected date for initiation and the anticipated duration of
services.

(7) Appropriate objective criteria, evaluation procedures and schedules
for determining, on at least an annual basis, whether the instructional objec-
tives are being achieved.


128. This is virtually identical to the requirement under federal law that an IEP be
developed for each child with a disability. 20 U.S.C. §§ 1401 (11) (1994), 1414 (d); 34

129. Between the intermediate and appellate decisions in Centennial, in Scott. S. v.
that a gifted student with a state-mandated IEP was not entitled to his parents’ prefer-
ence for further instruction in mathematics after he completed the district’s final and
most advanced course.


132. See also Gateway Sch. Dist. v. Commonwealth of Pa. Dep’t of Educ., 559 A.2d
118 (Pa. Commw. Ct. 1989) (relying on Centennial in disallowing the school district’s
appeal and holding that the district had waived the issue of whether it should be
required to develop an IEP that included the student’s college courses).
ing Centennial, not all cases in Pennsylvania have been resolved in favor of gifted students.

Broadley v. Board of Education is more typical of the states' treatment of gifted children. In Broadley, the Supreme Court of Connecticut unanimously affirmed that a gifted child's state constitutional right to a free public education did not include the right to special education. The court also decided that the legislature's failure to mandate a program for a gifted child did not violate rights under the equal rights and equal protection provisions of the state constitution.

B. Transportation

Absent transportation, a child, gifted or otherwise, may be unable to participate in any educational program. This section reviews cases where the controversy was whether gifted children were entitled to transportation to special programs. All three of the main


134. See Sch. Dist. of Phila. v. Commonwealth, 547 A.2d 520 (Pa. Commw. Ct. 1988) (directing a school board to provide tuition and transportation to a learning center for a gifted student with a hearing impairment); Conrad Weisner Area Sch. Dist. v. Dep't of Educ., 603 A.2d 701 (Pa. Commw. Ct. 1992) (affirming that the success of a student identified as mentally gifted in regular education did not preclude his classification as an exceptional child with a specific learning disability who was entitled to special education).

135. See, e.g., New Brighton Area Sch. Dist. v. Matthew Z., 697 A.2d 1056 (Pa. Commw. Ct 1997) (denying a gifted student's request for tuition reimbursement and transportation costs in connection with his taking college courses not listed in his IEP where the school provided an appropriate placement); Huldah A. by Anderson v. Easton Area Sch. Dist., 601 A.2d 860 (Pa. Commw. Ct. 1991) (affirming that the parent of a gifted child who was maintained in a "pull-out" program rather than being placed in an enrichment class that was open to gifted and non-gifted students pending completion of her state-mandated IEP was not entitled to attorney fees and costs since the student failed to comply with the IDEA's definition of disabled).


137. Broadley, 639 A.2d at 505.


139. For a case peripherally involving gifted education and transportation, see O’Campo v. School Bd., 589 So. 2d 323 (Fla. Dist. Ct. App. 1991). O’Campo reversed a grant of summary judgment that had been entered in favor of a school board where a student who was waiting in front of her school at 6:55 A.M. to be transported to a special arts program for gifted children was raped. The court noted that school officials had been notified that suspicious persons had been observed on school grounds prior to the rape.
cases involved students in non-public schools, although the type of school attended was not dispositive in any of the cases.

The earliest case on transportation was *Sands Point Academy v. Board of Education*\(^{140}\) in which a trial court ruled that a school board did not have to provide bus transportation for children attending a non-public school that was "universally recognized as one of the most important centers for the education of gifted children."\(^{141}\) As a prelude to its holding, the court observed that the board had never deviated from its twenty-eight-year-old policy which set a five mile limit for all school bus routes (other than those for children with disabilities),\(^{142}\) including those for schools outside of the New York City limits. The court concluded that since the school was located 8.69 miles from the New York City line in neighboring Nassau County, the board properly exercised its discretion in refusing to provide bus transportation for these gifted students.\(^{143}\)

In the first of two cases from Pennsylvania, *Woodland Hills High School District v. Commonwealth*,\(^{144}\) a state court safeguarded the rights of gifted children.\(^{145}\) The court granted the state department of education's request for summary judgment in a dispute over whether eligible children who attended non-public schools had a right to midday transportation to public schools so that they could attend, and participate in, programs for the gifted. In rejecting the local board's argument that it was only obligated to transport gifted students under the state's general transportation statute, the court essentially reasoned that the right to gifted education was meaningless without transportation to the midday programs. The court concluded that parental decisions "to have their children attend a nonpublic school and to be dually enrolled in the District's gifted program should not impose on them the choice between a duty to provide midday transportation or in the alternative forego their children's right to gifted special education."\(^{146}\)

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141. *Id.* at 590.
142. The court pointed out that "[a] different rule pertains to the transportation of the physically handicapped, emotionally disturbed or children with retarded mental development." *Id.*
143. *Id.* at 591.
145. See also *Sch. Dist. v. Commonwealth*, 547 A.2d 520 (Pa. Commw. Ct. 1988) (directing a school board to provide tuition and transportation to a learning center for a gifted student with a hearing impairment).
Conversely, in *Ellis v. Chester Upland School District*,\(^\text{147}\) an appellate court in Pennsylvania affirmed a hearing officer's denial of a parent's request for transportation and tuition reimbursement so that her daughter could attend a private, out-of-state program for gifted students.\(^\text{148}\) The court was satisfied that since the IEP developed by school personnel was appropriate to meet the child's educational needs, there was no reason to disturb the hearing officer's determination. In the alternative, the court explained that state law did not entitle a gifted student to placement in a private or out-of-state school.\(^\text{149}\)

### C. Federal Claims

Insofar as it can be argued that gifted students and children with disabilities tend to reflect disparate points on a continuum of exceptionality, advocates of the gifted had hoped that the IDEA and federal claims would have offered support in their quest to obtain programming for gifted students. However, this has typically not been the case.

Apparently the earliest reported case alleging a violation of a student's "constitutional and statutory 'rights to a decent education'" was *Johnpoll v. Elias*\(^\text{150}\) in which a father sought an injunction permitting his gifted son to enroll in the high school of his choice. A federal trial court in New York City rejected the father's claim on the basis that he failed to raise serious questions on the merits and was unable to demonstrate how his son would have suffered irreparable harm had he not been admitted to the school. Further, while the father neither adequately clarified the nature of his constitutional claim as, for example, equal protection or due process or whether the alleged violations were of state or federal rights, the court examined these issues in disposing of the claim. The court also rejected the father's claim that his son was covered by the IDEA.\(^\text{151}\)

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148. See also *New Brighton Area Sch. Dist. v. Matthew Z.*, 697 A.2d 1056 (Pa. Commw. Ct 1997) (denying a gifted student's request for transportation (and tuition reimbursement) costs in connection with his taking college courses not listed in his IEP where the school provided an appropriate placement).
149. *Ellis*, 651 A.2d at 619-20. Further, the court rejected the parent's request for attorney fees. *Id.* at 620.
151. *Id.* at 432.
At issue in *Student Roe v. Commonwealth*\(^{152}\) was whether a local school board's refusal to place a child in a program for gifted students violated the child's rights to equal protection or due process.\(^{153}\) The plaintiff unsuccessfully claimed that the Commonwealth of Pennsylvania violated her federal constitutional and statutory rights under the IDEA, but the court found that the dispute was "solely a matter of state law."\(^{154}\) The court declared that school officials did not violate the student's rights since she did "not have a property interest in being placed in gifted education"\(^{155}\) or a liberty interest insofar that she failed "to identify any information or ideas which she has been precluded from receiving."\(^{156}\)

In *Hope v. Cortines*,\(^{157}\) the Second Circuit affirmed a district court's refusal to grant relief to a gifted student in New York with dyslexia who filed suit under the Americans with Disabilities Act.\(^{158}\) The student claimed that a local school board unlawfully engaged in discrimination on the basis of disability and race by refusing to provide him with appropriate educational services.\(^{159}\) The court was satisfied that the student's claim was without merit be-

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153. *See also* *Student Roe v. Commonwealth*, 593 F. Supp. 54 (E.D. Pa. 1984) (dismissing a claim for injunctive relief challenging the constitutionality of the procedures by which a student was denied participation in a class for gifted students on the basis that her rights to equal protection were not violated and that she could not claim a violation of procedural due process since she did not avail herself of available state remedies); Lisa H. v. State Bd. of Educ., 447 A.2d 669 (Pa. Commw. Ct. 1982), aff'd 467 A.2d 1127 (Pa. 1983) (mem.) (holding that while all students in Pennsylvania have a property interest in the educational process, only exceptional children have a right to an individualized level or quality of education).


155. Id.

156. Id. at 932.


158. The Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1994), was adopted in 1990 to provide "a comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Although the Americans with Disabilities Act applies primarily to the private sector, it has implications for public entities such as schools.

159. The IDEA and accompanying regulations contain extensive procedural due process requirements, including the requirement that an aggrieved party exhaust administrative remedies before filing suit. 20 U.S.C. § 1415(f)(g), 34 C.F.R. §§ 300.500-300.517.
cause he failed to exhaust administrative remedies pursuant to the IDEA.\textsuperscript{160}

In a case initially resolved prior to the enactment of the 1997 Amendments to the IDEA, the Tenth Circuit, in \textit{Fowler v. Unified School District},\textsuperscript{161} ruled that a school board in Kansas was not required to provide an on-site sign language interpreter for a gifted student who attended a private non-sectarian school if doing so cost more than delivering a similar service at a public school. On remand, in a case that only peripherally involved the child’s being gifted and which is of much greater significance for special education, the Tenth Circuit affirmed that since the 1997 IDEA Amendments were not applicable retroactively, the court’s original judgment stood with respect to events that took place before the Amendments went into effect on June 4, 1997.\textsuperscript{162} Conversely, as to actions after June 4, 1997, the court explained that the school board’s sole obligation was to spend a proportionate amount of federal funds on students in non-public schools.

\textit{J.D. v. Pawlet School District}\textsuperscript{163} was a lawsuit filed on behalf of a gifted student in Vermont with emotional and behavioral problems who unsuccessfully alleged that his school board refused to place him in special education because his parents and educators could not agree on whether his disability affected his school performance. The suit also claimed that school officials failed to accommodate the student’s needs by not reimbursing his parents for tuition and costs at an out-of-state residential school. The Second Circuit affirmed that insofar as the student was ineligible for special education under the IDEA, he was not entitled to its procedural protections.\textsuperscript{164} In addition, the court affirmed that the school board’s proposed IEP (offering the student access to programming such as college-level courses at a nearby college) was more appropriate to

\textsuperscript{160} See also Huldah A. v. Easton Area Sch. Dist., 601 A.2d 860 (Pa. Commw. Ct. 1991) (affirming that the parent of a gifted child was not entitled to attorney fees where the child was kept in a “pull-out” program rather than being placed in an enrichment class open to gifted and non-gifted students pending completion of her state-mandated IEP costs because the student failed to comply with the IDEA’s definition of disabled).

\textsuperscript{161} Fowler v. Unified Sch. Dist., 107 F.3d 797 (10th Cir. 1997), \textit{vacated and remanded}, 521 U.S. 1115 (1997) (mem.).

\textsuperscript{162} Fowler v. United Sch. Dist., 128 F.3d 1431 (10th Cir. 1997) (on remand).


\textsuperscript{164} 224 F.3d at 60.
his needs and thus a reasonable accommodation within the parameters of Section 594 of the Rehabilitation Act. The court conceded that while the accommodations were not "optimal," the school board was only required to provide the student with "the same access to the benefits of a public school education as all other students," and therefore did not grant relief.

**D. Race**

All three of the cases directly implicating race and gifted education could arguably have been placed under the heading of "Admissions and Placement." However, these cases are examined under their own heading in order to emphasize the still unfulfilled promise of Brown v. Board of Education.

In Board of Education v. Sanders, a local school board in Illinois challenged the state board of education's withholding of funding from the local board's program for gifted students on grounds that since minority students were under-represented in the programs, then the programs must be being operated in a discriminatory fashion. An appellate court affirmed that since neither the state board's general supervisory authority over the gifted program nor federal anti-discrimination policy authorized it to withhold funding based on its unilateral determination that the local board engaged in racial discrimination, it had to provide the funding.

In Simmons ex rel. Simmons v. Hooks, an African-American mother claimed that a school board violated her children's rights through its use of ability grouping. In Reviewing the board's policies on ability grouping at various times, a federal trial court concluded that the "old policy of ability grouping and the new policy, in so far as it groups by ability entire classes of children in kindergarten through third grade." had violated the student's Fourteenth Amendment rights. However, in turning to gifted education specifically, the court found that while the board's past

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165. *Id.* at 71.
166. *See also* Punxsutawney Area Sch. Dist. v. Kanouff, 663 A.2d 831 (Pa. Commw. Ct. 1995) (holding, in a case only incidentally involving a child's being gifted, that a school board failed to provide an appropriate place for her, and another child, after officials were notified of their potentially disabling conditions).
169. *Id.*
171. *Id.* at 1298.
172. *Id.* at 1303.
actions had a segregative effect on students, there was no evidence that it continued to engage in intentional discrimination with regard to admitting students into its gifted programs.\textsuperscript{173} The court concluded that since the board has taken active steps to overcome the past effects of segregation in identifying minority students and increasing their participation in gifted programs, it no longer operated to continue results of past discrimination.\textsuperscript{174}

\textit{Keyes v. Congress of Hispanic Educators,}\textsuperscript{175} an extension of the long-running school desegregation litigation in Denver, Colorado,\textsuperscript{176} was a complex case with gifted education being only one component. Employing a rationale not unlike the one in \textit{Simmons}, the federal trial court acknowledged that the current disparities with regard to the low level of “participation [of minority students] in gifted and talented programs may be remaining vestiges of the dual system.”\textsuperscript{177} Even so, the court refused to grant relief in light of \textit{Missouri v. Jenkins,}\textsuperscript{178} the most recent Supreme Court case on school desegregation, since \textit{Jenkins} “defeats the plaintiffs’ call for compelling additional action to investigate and redress racial disparities in student achievements [sic] and participation in special programs for gifted and talented pupils.”\textsuperscript{179} More specifically, the court was convinced that although disparities remained with regard to gifted students’ programming, since school officials had adopted reasonable, if not entirely successful, steps to equalize participation

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{173} Id.
\item \textsuperscript{174} Id.
\item \textsuperscript{175} Keyes v. Cong. of Hispanic Educators, 902 F. Supp. 1274 (D. Colo. 1995).
\item \textsuperscript{176} Keyes v. Sch. Dist., 413 U.S. 189 (1973) (holding that since the school board’s actions gave rise to a prima facie case of intentional segregation, the burden of proof shifted to it to prove that other segregated schools in the district were not created deliberately). In Keyes, for the first time, the Court ruled that another minority group, Mexican-Americans, should be placed in the same category as African-Americans because both groups suffered from the same educational inequities.
\item \textsuperscript{177} Keyes, 902 F. Supp. at 1282 (D. Colo. 1995).
\item \textsuperscript{179} Keyes, 902 F. Supp. 1274, 1282 (D. Colo. 1995).
\end{itemize}
\end{footnotesize}
between and among various racial and ethnic groups, it would not grant relief.  

IV. Recommendations

Advocates, parents, educational leaders, and policy makers as well as all others who are interested in meeting the needs of gifted students might wish to consider the following suggestions.  

As reflected in National Excellence: A Case for Developing America’s Talent: Part 3: The Future of Education for the Nation’s Most Talented Students, the challenge of meeting the needs of “students with exceptional talent must be shared by many sectors of society and levels of government.”

First, advocates must work to ensure legislative action at the national level. If gifted students are ever to receive the special education that they deserve, then their supporters must encourage Congress to strengthen and expand existing federal legislation pertinent to the gifted. Such legislative reform at the national level should be the priority because gifted students, much like their peers with disabilities, will not receive protection of their rights without the passage of federal legislature. Moreover, while states should and will retain the option of providing greater services than federal law might dictate, unless a national standard is enacted, it is unlikely many states will take these steps on their own. While more than thirty states require the identification of gifted students, not all of them provide funding for such programs.

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180. The Tenth Circuit dismissed an appeal, addressing gifted education only in a footnote. Keyes v. Sch. Dist., 119 F.3d 1437, 1441 n.4 (10th Cir. 1997).
181. For earlier discussions of some of these recommendations, see Donna Y. Ford et al., Meeting the Educational Needs of the Gifted: A Legal Imperative, 17 ROEPER REV. 223 (1995); Charles J. Russo et al., The Educational Rights of Gifted Students: Lost in the Legal Shuffle? 16 ROEPER REV. 67 (1993); Charles J. Russo et al., The Kentucky Education Reform Act and Gifted Education: Overlooked or Ignored? KY. CHILDREN’S RIGHTS J., Fall 1994 at 1, 1.
182. PAT O’CONNELL ROSS, U.S. DEPT OF EDUC., NATIONAL EXCELLENCE: A CASE FOR DEVELOPING AMERICA’S TALENT: PART 3: THE FUTURE OF EDUCATION FOR THE NATION’S MOST TALENTED STUDENTS 2. This report makes five specific recommendations, all of which are addressed to some degree in this section of the article: establish challenging curricular standards; establish high-level learning opportunities; ensure access to early childhood education; expand opportunities for economically disadvantaged and minority children; encourage appropriate teacher training and technical assistance; and ensure that high-achieving students in the United States match or exceed the performance of high-achieving students anywhere in the world. Id. at 2-3.
183. If the IDEA is to serve as an example, it is worth noting that as of July 1, 1974, about one year prior to the Act’s passage, the Bureau for the Education of the Handicapped estimated that 78.5% of eligible children nationwide received some form of
mum, federal legislation should provide a comprehensive definition of giftedness, install substantive and procedural\textsuperscript{184} safeguards,\textsuperscript{185} mandate the identification of gifted students, require the delivery of programs, and offer financial support to states and local school systems that exceeds the paltry sums that have been allocated to date.\textsuperscript{186}

Second, state legislatures, working in conjunction with their departments of education and colleges of education, must marshal their efforts to meet the needs of all gifted students. A central goal of cooperation between these key players should be to strengthen certification and licensing standards for all prospective teachers\textsuperscript{187} and administrators. This should assist all prospective educators to better serve gifted children. At the same time, schools and colleges of education, in accordance with the standards of appropriate accrediting agencies, should expand existing course work and field experiences so that all prospective educators can have better exposure to gifted children and their needs. While it may not be feasible to require separate courses on gifted students in general formation programs, at the very least, especially for colleges and universities that are located in states that do not require teacher certification for educators who will work with the gifted, an intro-

\begin{itemize}
\item \textsuperscript{185} For a study of state due process actions protecting the rights of the gifted, see Frances A. Karnes et al., \textit{Due Process in Gifted Education}, 20 \textit{Roepur Rev.} 297 (1998) and Frances A. Karnes et al., \textit{A Survey of Mediation Opportunities in Gifted Education}, \textit{Gifted Child Today Mag.}, May-June 1998, at 46.
\item \textsuperscript{186} For further support of this position, see Mary Lou Herring, \textit{Note, Model Federal Statute for the Education of the Talented and Gifted}, 67 \textit{Chi.-Kent L. Rev.} 1035 (1991).
\end{itemize}
ductory course on exceptionality should devote a significant amount of time and interest to gifted children.

Third, at the school level, educational leaders should provide professional in-house preparation programs to assist school personnel to identify and assess gifted students while still providing them with challenging course work and other educational experiences to assist them to reach their full potential. Concomitantly, educators should deliver programs for children of all ages, beginning in pre-school, to address, and redress past and on-going inequities by paying particular attention to the needs of poor, urban, minority children who have been historically under-represented in programs for the gifted. Schools, especially in states that do not follow the lead of jurisdictions such as Pennsylvania, which provides written IEPs for gifted students, should make ADA-like curricular accommodations designed to challenge the gifted to

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190. National Excellence: Part 2, supra note 13, at 2 (noting that “[o]nly nine percent of students in gifted and talented education programs were in the bottom quartile of family income, while forty-seven percent of program participants were from the top quartile in family income”). See, e.g. Paul D. Slocumb & Ruby K. Payne, Identifying and Nurturing the Gifted Poor, Principal, May 2000, at 28 (discussing the needs of gifted students from poverty backgrounds).


193. See supra notes 127-127 for the discussion of the regulation.
reach their full potential. Among the accommodations that educators might consider are adding additional classes and appropriate assignments for students who are deprived of a right to a full program of gifted education.

Finally, given the key role of parents in the growth and development of their children, school officials should work with them to assist them in nurturing the development of their children. In particular, and as appropriate, school officials should offer a range of services including classes on parenting, child development, and working with children to enhance their chances for success. Further, school officials, perhaps in conjunction with local, regional, and state associations as well as local colleges and universities, might wish to consider bringing in outside experts on the gifted who can offer workshops to parents of gifted children.

**Conclusion**

As the nation stands poised on the brink of the new millennium, it is time to redress the ongoing inequity of failing to provide equal educational opportunities for gifted children. If these children are to reach their full potential, then educational leaders and policy makers need to consider ways to assist these children in their development for their own good and the welfare of the nation.

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WASHINGTON — NEW YORK CITY’S elite public high schools were always meant to provide a quintessentially American blend of academic excellence and democratic accessibility. Unlike the city’s expensive private schools, they would be free and open to all who were academically qualified, irrespective of pedigree.

“You pass the test, you get the highest score, you get into the school — no matter what your ethnicity, no matter what your economic background is,” Mayor Michael R. Bloomberg said in 2012. But this year, only 5 percent of seats at those eight schools were offered to black students and 7 percent to Latinos, in a city where the public schools are 70 percent black and Latino. At Stuyvesant High School, just 3 percent of offered seats this year went to black and Latino students.

When the number of black and Latino students admitted to a public school is a tiny fraction of their share of the general population, it raises red flags about the fairness of the admissions system.

New York City’s eight selective public high schools base admissions on a single two-and-a-half-hour assessment — the Specialized High Schools Admissions Test — a practice that is unusual among other large public school systems in the nation. The N.A.A.C.P. Legal Defense and Education Fund, along with other groups, has filed a federal civil rights complaint against this arrangement.

In his campaign for mayor, Bill de Blasio called for diversifying these schools. His administration recently endorsed proposed state legislation that would broaden the criteria for admissions to the city’s three original specialized high schools — Stuyvesant, the Bronx High School of Science, and Brooklyn Technical High School — where the use of the test is mandated by state law, to also include factors such as a student’s grade point average, state exam scores and attendance. At the five other selective schools, Mr. de Blasio has the power to change the criteria without legislation.
The proposed law moves in the right direction, but simply adding grades to test scores may not do much to promote equity. And giving students credit for attendance sounds a bit like the old joke that 80 percent of success is showing up.

Is there a way to capture a more meaningful notion of merit without throwing out the test — a system that rewards hard work and talent and also recognizes the extra hurdles some students face?

Five years ago I worked with Chicago public school officials to create a program for their selective and magnet schools. Chicago had previously been under a racial desegregation consent decree that employed racial quotas, but when the consent decree ended, the city sought a new way to promote fairness and diversity without relying on race.

Under the policy we developed, 30 percent of students are admitted to Chicago's highly selective high schools (such as Walter Payton College Prep) based strictly on the traditional criteria of grades and test scores. The remaining seats are allocated to the highest-scoring students from four different socioeconomic tiers, under the premise that students in the poorest parts of the city who score modestly lower on standardized tests have a lot to offer, given the obstacles they've had to overcome.

Demographers rank Chicago's census tracts from most to least advantaged by six criteria: median family income, average level of education attained by parents, percentage of single-family homes, percentage of homes where English is not the first language, percentage of homeowner-occupied residences, and school achievement scores by attendance area.

The policy has resulted in far more racial and ethnic diversity than in New York City's elite public schools. At Walter Payton, 21 percent of students are black and 25 percent are Latino. Some critics worry that these numbers are still inadequate in a public school system where 41 percent of students are black and 45 percent Latino. But compared with Stuyvesant, Payton is a multicultural paradise.

Other critics argue that the system tilts too far in favor of children from low-income neighborhoods. But the plan has proved to be the basis for a stable and enduring compromise. Fears that students from low-income areas would fail have not come to pass, and Chicago's top selective schools still rank as the top three in the state.

New York City schools have never been subject to a citywide desegregation suit, and the state's schools are now more segregated than Mississippi's. But the unfortunate reality of segregation can be leveraged to promote a positive outcome in the city's elite schools. Isn't it time for New York City's top schools to recognize that excellence can be found among students of all racial and economic backgrounds?
Stealing Education
LaToya Baldwin Clark

ABSTRACT
While most state constitutions include provisions that indicate a commitment to equal access to education within one state, that commitment remains unfulfilled. This Article shines a light on a practice that has been overlooked by those concerned about school district inequality, but that contributes to this incongruity: a phenomenon I call “stealing education.” A parent “steals” education when he falsifies a child’s residence to take advantage of a school district’s schools. Stealing education also refers to the legal infrastructure that allows for criminal or civil punishment.

In this Article, I argue that stealing education laws contribute to the apparatus of race-class opportunity hoarding, where a race-class-privileged community sequesters valuable resources to the exclusion of another race-class-subordinated community. I show how stealing education laws structure and perpetuate stratified school districts between residents and nonresidents and describe how many supporters of the laws use racist master narratives to justify the unequal distribution of rewards. The task of rationalizing the legal apparatus that denies equal educational opportunity to nonresidents is easier when supporters can appeal to “common sense” explicit racist narratives and dog whistles of inferior and undeserving Black people and Black children.

This Article focuses on one suburban-urban school district boundary that separates a majority-White school from a majority-Black school to highlight how some supporters of this structure justify this unequal system. I show how the subordinating effects of the stealing education apparatus mirror Brown-era race and class segregation. Stealing education is a perfectly legal mechanism by which to subordinate poor Black children, their families, and their communities.

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INTRODUCTION

Oak Park and River Forest High School District (OPRF) in suburban Chicago is a majority White and middle to upper-middle class one-school

1. While other authors may choose not to capitalize “White” in their writing, I disagree with that convention. I believe that capitalizing “Black,” as I do throughout this Article, without also capitalizing “White” normalizes Whiteness, while the proper noun usage of the word forces an understanding of “White” as a social and political construct and social identity in line with the social and political construct and social identity of “Black.” I believe that a lowercase “white” signifies a color, not a social group. While White Supremacist groups also capitalize White as a term of racial superiority, I am not of the view that how one group uses a word should dictate how I, as a scholar, use that word. To be sure, this is an area of disagreement within the scholarly community and there is no right or wrong answer. I find myself agreeing with some Black authors who, during the summer 2020 racial reckoning, grappled with the term. See, e.g., Kwame Anthony Appiah, The Case for Capitalizing the B in Black, ATLANTIC (June 18, 2020) https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackand-white/613159/ [https://perma.cc/E8J5-S2F3] (arguing for capitalizing White as well as Black because White is a social category and Black is a social identity, not only an absence. It’s not a hole in the map of America’s racial landscape. Rather, it is a specific social category that confers identifiable and measurable social benefits… When we ignore the specificity and significance of Whiteness — the things that it is, the things that it does— we contribute to its seeming neutrality and thereby grant it power to maintain its invisibility.”); Eve L. Ewing, I’m a Black Scholar Who Studies Race. Here’s Why I Capitalize “White,” MEDIUM ZORA (July 1, 2020), https://zora.medium.com/im-a-black-scholar-who-studies-race-heres-why-i-capitalize-white-f94883aa2dd3 [https://perma.cc/8NMG-A3X4] (discussing capitalizing White when referring to the social identity: “Whiteness is not only an absence. It’s not a hole in the map of America’s racial landscape. Rather, it is a specific social category that confers identifiable and measurable social benefits… When we ignore the specificity and significance of Whiteness — the things that it is, the things that it does— we contribute to its seeming neutrality and thereby grant it power to maintain its invisibility.”); Nell Irving Painter, Opinion, Why “White” Should be Capitalized Too, WASI POST (July 22, 2020) https://www.washingtonpost.com/opinions/2020/07/22/why-white-should-be-capitalized/ [https://perma.cc/L6CC-AERB] (arguing for capitalizing White to challenge the invisibility and naturalization of Whiteness: “In terms of racial identity, white Americans have had the choice of being something vague, something unraced and separate from race. A capitalized “White” challenges that freedom, by unmasking “Whiteness” as an American racial identity as historically important as “Blackness”— which it certainly is. No longer should white people be allowed the comfort of this racial invisibility; they should have to see themselves as raced. Being racialized makes white people squirm, so let’s racialize them with that capital W”); Nat’l Ass’n of Black Journalists, NABJ Statement on Capitalizing Black and Other Racial Identifiers (June 2020), https://www.nabj.org/page/styleguide [https://perma.cc/HP87-SK4C], (“The organization believes it is important to capitalize “Black” when referring to (and out of respect for) the Black diaspora. NABJ also recommends that whenever a color is used to appropriately describe race then it should be capitalized, including White and Brown.”); Kristen Mack & John Palfrey, Capitalizing Black and White: Grammatical Justice and Equity, MACARTHUR FOUND. (Aug. 26, 2020), https://www.macfound.org/press/perspectives/capitalizing-black-and-white-grammatical-justice-and-equity [https://perma.cc/8GNJ-KYQB] (“We will also begin capitalizing White in reference to race. Choosing to not capitalize White while capitalizing other racial and ethnic identifiers would implicitly affirm Whiteness as the..."
A large school of about 3400 students, OPRF boasts a 91 percent four-year graduation rate, and approximately 82 percent of its students test proficient or near proficient in both English and math. It far outpaces the state average graduation rate and average proficiency rates, making it one of the best school districts in Illinois.

Less than two miles away, Austin College and Career Academy High School (Austin High), a Chicago Public School (CPS), is 97 percent Black, and 95 percent of its students are eligible to receive free or reduced-price lunch, an indicator of poverty. A small school with only 195 students, Austin High graduates 88 percent of its students, but only 21 percent of its students test at or near proficient in English, and only 12 percent test at or near proficient in math. Compared to other schools in CPS and the state, Austin High performs far below.
If a parent living equidistant between OPRF and Austin High had a choice and were choosing on the above factors alone, that parent would likely prefer that their child attend OPRF rather than Austin High. But not every parent has that choice. If the family lives west of North Austin Boulevard—the municipal border that separates OPRF and Austin, Chicago—the child will attend OPRF. To the east of the same street, the child will attend Austin High. Only residence within a school district’s jurisdiction confers on a parent a “seat license” unavailable to nonresident parents.9

Since Brown v. Board of Education,10 lawyers, policymakers, and scholars have grappled with the problem of race-class11 segregation in the context of public education.12 While many argue that today's school segregation results from de facto residential segregation and thus the law cannot reach it, race-class segregation so pervades public education that many Black children, especially working-class and poor Black children, continue to experience the same


11. I refer to “race-class” to resist many scholars’ temptation to separate issues of race from those of class. I seek “to call attention to the interweaving of race and class relations.” Joe Soss & Veha Weaver, Police Are Our Government: Politics, Political Science, and the Policing of Race-Class Subjugated Communities, 20 ANN. REV. POL. SCI. 565, 567 (2017) (“We intend for the term [race-class subjugation] to trouble the tidy analytic opposition of race and class variables that prevails in much American politics research and to avoid the tendency to reduce race and class to discrete sets of labels. By using this term, instead of discussing poor communities or minority communities as distinct, we encourage attention to the crucial interplay of race and class in the lives of the racialized poor.”).

subordination that accompanied de jure segregation. Black children and their families have long experienced this plight: persistent, hierarchical, and caste-like unequal status in economic, social, cultural, and political power in multiple areas of life.

We can see Black children’s subordination in schools. In the 2009–2010 academic year, 74 percent of Black children attended majority-minority schools, and 15 percent of Black children attended “apartheid schools,” where 99 percent of the pupils are non-White. This phenomenon especially isolates poor Black and Latinx children in large cities; in half of the largest American cities like Chicago, most Black and Latinx children attend schools where at least 75 percent of all students are poor or low-income. Also, poor Black children are more likely to attend high-poverty, majority-minority schools than are poor White children.

The problem is not that poor Black and Latinx children cannot learn when educated in segregated schools. Rather “school poverty . . . [is] a good proxy for the quality of a school.” Poor schools:

- are in poorer communities, they have less local resources, they have fewer parents with college degrees, they have fewer two parent families where there are parents who can come spend time volunteering in the school, they have a harder time attracting the best teachers. So for a lot

14. What constitutes “subordination” can be gleamed from what Ruth Colker calls the anti-subordination principle:
   Under the anti-subordination perspective, it is inappropriate for certain groups in society to have subordinated status because of their lack of power in society as a whole. This approach seeks to eliminate the power disparities between men and women, and between whites and non-whites, through the development of laws and policies that directly redress those disparities. From an anti-subordination perspective, both facially differentiating and facially neutral policies are invidious only if they perpetuate racial or sexual hierarchy. Ruth Colker, Anti-Subordination Above All: Sex, Race, and Equal Protection, 61 N.Y.U. L. REV. 1003, 1007–08 (1986). Black subordination is plain when looking at differences in wealth, home ownership, employment, and mass incarceration, to name just a few areas.
15. ORFIELD, KUCSERA & SIEGEL-HAWLEY, supra note 13, at 19. The situation for Latinx students is similar. During the same academic year, almost 80 percent of Latinx students attended a majority-minority school, and about 14 percent attended a school that is 99 percent non-White. Id.
18. Boschma & Brownstein, supra note 16 (quoting Sean F. Reardon).
of reasons schools serving poor kids tend to have fewer resources, both economic and social capital resources.19

The persistent race-class segregation and subordination in public schooling blatantly lay bare the notion that we have improved schooling opportunities for poor Black children since the U.S. Supreme Court declared that separate can never be equal. Segregated schools are contrary to the Fourteenth Amendment of the U.S. Constitution precisely because, in part, "[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education” and that segregation itself has a “detrimental effect” on Black children who know that the separation is because of race.20

Many state constitutions explicitly require state legislatures to provide educational access to all residents.21 Often, these state constitutional education provisions explicitly state a similar commitment endorsed in Brown: that if a state provides education to any child, it must provide education to every child and on an equal basis.22 Yet contemporary educational inequality according to race and class leaves us both questioning this commitment and searching for reasons to explain the inconsistency between Brown’s promise and the current reality.

This Article shines a light on a major phenomenon that contributes to this incompatibility: what I call “stealing education.”23 Stealing education is a legal
mechanism of race-class stratification and subordination that has been largely overlooked by legal scholarship. Opportunity hoarding occurs when a well-defined network of actors control access to valuable resources that are subject to monopoly and excludable. Under a theory of opportunity hoarding, the network sequesters these resources by “creating beliefs and practices that sustain their control.”

To justify exclusion based on residence, some supporters recite master narrative beliefs about nonresidents’ cultural inferiority to sustain the monopolistic resource control. This Article both describes the stealing education apparatus and the “beliefs and practices” some use to justify the control.

“Stealing education” looks something like this: When first enrolling their child, and then for every year thereafter, parents must attest to having a bonafide residence within the school district boundaries. Only residence within a school district’s jurisdictional boundary confers a child an educational “seat license” unavailable to nonresident parents. Parents purportedly “steal” an education when they falsify a nonresident child’s address to be able to benefit from a school district’s schools that are designated only for resident children. Both school district officials and community members in highly desirable school districts aggressively enforce these residential requirements by surveilling and investigating children

Brown v. School Board of Education Continues, 13 WHITTIER J. CHILD & FAM. ADVOC. 20, 27 (2014) (referring to Williams-Bolar as "the Rosa Parks of the modern day parent empowerment movement"); Camille Walsh, White Backlash, the Taxpaying Public, and Educational Citizenship, 43 CRITICAL SOCIO. 237, 244 (2017) (discussing the Williams-Bolar case as "the use of residence (within historically segregated communities) and therefore taxing status, in order to target, investigate, and exclude black students from wealthy white schools"); Erika K. Wilson, Toward a Theory of Equitable Federated Regionalism in Public Education, 61 UCLA L. REV. 1416, 1418–19 (2014) (using Williams-Bolar’s case to illustrate how “the geographic boundaries that define school districts are the product of local government law structures that foster residential segregation and exclusion based on race and class” and how "[a] result, race, class, and geography intersect to shape the opportunities available to students and to exclude poor minority students from access to high-quality schools").

This Article differs from the above articles in several ways, including going beyond Williams-Bolar’s specific case to describe stealing education within the context of the “education as property” framework. See LaToya Baldwin Clark, Education as Property, 105 VA. L REV. 397 (2019). Most importantly, the Article interrogates the cultural underpinnings of the support for these laws, arguing that the structural arrangement of school district boundaries is bolstered by race-class beliefs about cultural inferiority.

24. Stratification refers to the “hierarchical status or rank” among groups. Talcott Parsons, Equality and Inequality in Modern Society, or Social Stratification Revisited, 40 SOCIO. INQUIRY 13, 13 (1970).
25. See supra note 14 for Colker’s definition of subordination.
27. Id. at 154.
28. See Stark, supra note 9, at 4.
and families suspected of providing false information. As a result of those investigations, school districts and prosecutors threaten parents suspected of falsifying their addresses with criminal and civil penalties, including jail time, felony records, and back tuition for “free” education. “Stealing education” refers to the legal mechanism by which school districts investigate and criminalize these parents.

Stealing education laws appear facially race-neutral and colorblind. Most states’ educational financial schemes rely on local property taxes to fund local school districts.29 In some rich districts, property taxes fund a majority of per-pupil spending. Stealing education laws, therefore, protect a school district’s tax dollars such that they only fund education for children who live within that district’s borders. In theory, they do not target any race or class, but rather target nonresidents to protect residents.

Stealing education laws also protect what the U.S. Supreme Court called the “mo[st] deeply rooted” “tradition in public education”: “local control over the operation of schools.”30 According to the Court, “local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to [the] quality of the educational process.”31 One aspect of local control is the school district’s ability to control expenditures—and to whose benefit. Again, local control does not directly implicate race and class, as every school district, in theory, has the right to local control. Under the theory of local control, how much money a district spends reflects the community’s priorities concerning education.32

29. In fiscal year 2018, over 37 percent of total revenue for K–12 schools derived from local funds, including property taxes and revenues from the parent governmental agency (such as a village or town) if the district is not independent of another municipal entity. INST. EDUC. SCI., REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS: FY 18 4 (2020), https://nces.ed.gov/pubs2020/2020308.pdf [https://perma.cc/K8VC-G3MR]. In 16 states, local funds contributed over 40 percent of K–12 education funding. Id.
31. Id. at 741–42.
32. Yet, judging how much a community cares about education based on how much money they contribute to educating the community’s children is a “cruel illusion.” Serrano v. Priest, 487 P.2d 1241, 1260 (Cal. 1971) (“We cannot agree that Baldwin Park residents care less about education than those in Beverly Hills solely because Baldwin Park spends less than $600 per child while Beverly Hills spends over $1,200. As defendants themselves recognize, perhaps the most accurate reflection of a community’s commitment to education is the rate at which its citizens are willing to tax themselves to support their schools. Yet by that standard, Baldwin Park should be deemed far more devoted to learning than Beverly Hills, for Baldwin Park citizens levied a school tax of well over $5 per $100 of assessed valuation, while residents of Beverly Hills paid only slightly more than $2. In summary, so long as the assessed valuation within a district’s boundaries is a major determinant of how much it can spend for its schools,
Some who support the enforcement of stealing education laws argue that school districts’ enforcement of the laws follows from school districts’ responsibility to protect education dollars generated from local property taxes and to effectuate the tradition of a commitment to local control of public education. In a previous paper, I argued that school district officials justify stealing education laws by conceptualizing public education as private community property. I argued that:

[S]takeholders organized against “stealing education” conceive of education as property that (1) belongs to someone and so can be stolen, (2) is valuable for use and enjoyment, and thus (3) deserves to be vigorously protected by the state against outsiders. . . . [T]he crime of “stealing education” only makes sense if stakeholders regard education as a property right bearing the essential functions of property, including the right to exclude.

Thus, if one were inclined to see this process as nonhistorically contingent and race-class-neutral, the issue arises between residents and nonresidents, people who live in the community and those who do not, local taxpayers and those who do not contribute to the property tax base.

But despite stealing education laws’ formal colorblindness, in many areas the context in which districts enforce those laws is anything but colorblind. Who lives where is not random or by chance or mistake; who is a resident and who is not a resident derives from histories of public and private race-class discrimination in residential development, employment discrimination, and public school attendance, shaping the literal and figurative race-class landscape of school attendance. To then say that all nonresidents who falsify an address are “stealing” education as if they are refusing to “pay” for it willfully ignores those histories and contexts. Indeed, rather than seeing poor Black parents as stealing education, we could characterize their behavior as attempting to reclaim the education debt owed to them after hundreds of years of educational neglect.

only a district with a large tax base will be truly able to decide how much it really cares about education. The poor district cannot freely choose to tax itself into an excellence which its tax rolls cannot provide. Far from being necessary to promote local fiscal choice, the present financing system actually deprives the less wealthy districts of that option.).

33. See Baldwin Clark, supra note 23.
34. See Milliken, 418 U.S. at 741–42.
35. Baldwin Clark, supra note 23, at 401–02.
37. Gloria Ladson-Billings, a leading educational sociologist, argues that the U.S. owes Black children an “education debt.” Gloria Ladson-Billings, From the Achievement Gap to the
As a result, stealing education laws often exist in contexts where “us” are middle-class White people and “them” are working-class and poor Black people. Differentiating between “us” and “them” in this context is essentially differentiating on the basis of race and class.

In this Article, I illustrate this point by interrogating the operation of stealing education laws across the border separating OPRF, the school district with which I began this Article, and the Austin neighborhood in Chicago. OPRF is a one-school high school district in suburban Chicagoland, Illinois. Oak Park is a majority White, relatively affluent suburban community that has, since the 1970s, aggressively investigated and enforced residential school district boundaries against families from the neighboring, predominately Black and poor, Austin, Chicago neighborhood. This border deserves special investigation given Oak Park’s reputation as an “earnestly progressive” suburb regarding race.\footnote{Richard R.W. Brooks & Carol M. Rose, Saving the Neighborhood: Racially Restrictive Covenants, Law, and Social Norms 216 (2013); infra Part I.} I show that some vocal supporters of OPRF’s border enforcement justify the institutional and structural exclusion of Austin residents through an “us versus them” logic that relies on racist stereotypes about Black inferiority.

To be sure, the race-class segregation that arises from these laws is an indefensible example of institutional racism, even if racist beliefs and ideas did not motivate the laws. In this Article, however, I show that in this community, some community members’ racist and classist beliefs provide an additional justification for the propriety of stealing education laws.

While opportunity hoarding is a form of structural inequality that can exist independent of invidious stereotypes, it is more stable when supported by a set of beliefs and practices that provide “explanations, justifications, and practical routines for unequal distribution of rewards.”\footnote{Tilly, supra note 26, at 76.} In other words, stealing education
laws comprise the apparatus of opportunity hoarding, while racist narratives provide the beliefs and practices that justify the unequal distribution of resources. The laws themselves legally limit access to resources, and the methods by which the laws allow for prosecution and civil fines permit communities to sequester economic, social, cultural, and human capital within their school district to the disadvantage of children not living within those boundaries. Racial master narratives illustrate the “beliefs” that underlie part of opportunity hoarding, in which racist stories about nonresidents as Black families and Black children explain why school districts must protect their schools. The task of rationalizing the legal apparatus that denies equal educational opportunity to nonresidents is easier when some supporters can appeal to “common sense” racist narratives and dog whistles of undeserving Black families and Black children.

Part I of this Article describes the challenge OPRF has with stealing education. I focus on OPRF’s relationship with Austin for two reasons. First, while the stealing education apparatus exists in many communities and states, it is essentially a local process of investigation, surveillance, and eventual removal. Thus, to understand how stealing education laws create and reify race and class subordination, we must analyze them at the level in which the practices and beliefs perpetrating that subordination originate.

Second, the contemporary relationship between Oak Park and its Chicago neighbor has well-researched historical antecedents that help to explain the context in which OPRF enforces stealing education laws. Oak Park enjoys a reputation as a previously all White suburban community that welcomed racial integration during a time when most communities like it, including Austin, were suffering from White flight. Today, Oak Park boasts a racially diverse suburban community with about one fifth of its residents identifying as Black, but it is still predominately White. Despite its diversity, Oak Park is not socially integrated.

40 White flight is measured by a school district’s change in “the ratio of white students (the numerator) to the total of white and black students [the denominator] combined” over a specified time. John R. Logan, Weiwei Zhang & Deirdre Oakley, Court Orders, White Flight, and School District Segregation, 1970–2010, 95 SOC. FORCES 1049, 1059 (2017).
including within OPRF.41 A recent ten-part documentary, America to Me,42 follows Black and White students and their parents, as well as staff and teachers, for one year as they navigate the 3000-plus person high school. The documentary shows the extent to which the school relegates Black students, parents, staff, and teachers to a form of second-class citizenship. I use insights from the documentary to give further context to the desire to keep Austin residents out.

Part II of this Article describes the legal structure of stealing education: state constitutional promises of equal opportunity for education, state laws on school attendance, and school district policies. While most state constitutional requirements seem intended to promote equal access to education within a state, state laws about residence, property taxes, control and autonomy, and criminal and civil sanctions undermine that commitment.

In Part III of this Article, I show how this combination of law and policy distinguishes residents from nonresidents. I argue that some supporters of stealing education laws justify the resident versus nonresident structural distinction using racist arguments about cultural distinctions between middle-class White people and poor Black people. I illustrate this through an analysis of local Oak Park online discourse about the problem of illegal enrollment. This analysis shows that some vocal supporters of stealing education laws find them justified when enforced against residents of the predominately poor and Black Austin community because they believe racist stereotypes about Black cultural inferiority.

41. From a resident commenting on an article about residency verification:
Oak Park is not a [sic] integrated community. We have many ethnicities here but all the white people who move here for “diversity” actually have no interest in actually being diverse. They want to say they are, but how many actually interact with people of color? It’s obvious on any block in our village. And when you talk to them, you hear it in their conversation. Diverse? Maybe. Integrated? Hardly.


42. AMERICATO Me (Kartemquin Films 2018). Langston Hughes’ poem, “Let America be America Again,” inspired the title, “America to Me.” Hughes writes, in part, “Let America be America again./Let it be the dream it used to be./Let it be the pioneer on the plain-seeking a home where he himself is free.(/America was never America to me.)” Langston Hughes, Let America Be America Again, ESQUIRE, July 1936, at 92, https://classic.esquire.com/issue/19360701#!/&pid=92 [https://perma.cc/8WWZ-TWNM].
Part IV explains how both the legal structure of stealing education laws and the racist beliefs that justify them create and reinforce racial subordination. Specifically, I argue that enforcing residency requirements in contexts like that of OPRF and Austin is a form of opportunity hoarding, a mechanism of race-class subordination that legal scholars generally overlook. The racial inferiority justification for aggressive border enforcement plays a key role in sustaining the legitimacy of the laws and the legitimacy of the stratification and subordination that results. Appeals to cultural differences "transform[] the situational control over resources and [political] power into a . . . difference between ‘types’ of people that are evaluatively ranked in terms of how diffusely ‘better’ they are.”43 In other words, even though the stratification and subordination inherent in opportunity hoarding are obvious, these types of cultural arguments seek to justify them on other terms that those in the network are familiar with—“we” are better than “them.”

Laws that privilege local control of schools, laws that enforce attendance boundaries, and the history of racialized community development effectively deny equal opportunity because of both race and class. While we know that racist attitudes and White supremacist thinking justified these laws in the past, this analysis shows that these attitudes are more persistent than some may have thought and play a role in how practices of opportunity hoarding endure. Furthermore, they find expression and effect in the phenomenon of protecting borders by policing families and children to exclude nonresidents.44

I. UNCOMFORTABLE TRUTHS ABOUT RACE IN PROGRESSIVE SUBURBIA45

Before 1900, Oak Park and Austin were both a part of the township of Cicero, a municipality to the west of Chicago.46 In 1899, Chicago annexed Austin, and in 1901, Oak Park incorporated as a separate municipality.47 Despite this political separation, before the 1970s the communities looked similar—both

44. The parallels to immigration studies and how countries police their borders are undeniable. Future work will further interrogate those parallels.
47. Id.
predominately middle-class and White. Yet from the beginning, Oak Park enjoyed a higher cultural reputation.48

Oak Park considered itself culturally superior to Austin and other surrounding communities for several reasons. It was the home of cultural icons such as architect Frank Lloyd Wright and the childhood home of Ernest Hemingway.49 Unlike their neighbors, Oak Parkers enjoyed opportunities to engage in many “high” cultural activities such as the opera, theater arts, and art fairs, separating Oak Park culturally from Austin and other nearby communities.50 Oak Park also began as a “temperance” community, lending an “air of moral superiority” over Austin and other nearby communities.51 As a result of these dynamics, Oak Park residents considered their lifestyle to be superior to the lifestyles of their neighbors, including those in Austin.52

Despite their similarities before 1970, in the late 1970s, the demographics of Oak Park and Austin began to diverge sharply. While Austin underwent a racial transition53 from a predominately White neighborhood to a predominately Black neighborhood,54 mimicking the experience of near-suburb neighborhoods in many urban centers across the country,55 Oak Park was able to stem racial transition,56 remaining a majority White suburb with a dispersed Black community.

“The Oak Park strategy,” as it is known, was a progressive confluence of public and private efforts to encourage integration and stem White flight. It

48. Id. at 45 (“The Oak Park community was of generally higher status than Austin. That is, not only were Oak Park’s residents of higher status, but the community itself enjoyed greater prestige.”).
49. Id. at 34.
50. Id. at 35–37.
51. Id. at 32.
52. Id. at 36.
54. GOODWIN, supra note 46, at 48 (“In the four years between 1966 and 1970, 148 [Austin] blocks changed from white to black occupancy, an average of rate of 37.0 blocks per year. Between 1970 and 1973, an estimated 113 more [Austin] blocks changed occupancy, a rate of 37.7 blocks per year.”). In contrast, “[i]n 1974, Oak Park’s black population was still less than 3 percent, and in 1977 it had grown only to 8 percent . . . .” Id. at 50.
56. GOODWIN, supra note 46, at 67 (“Oak Park was never clearly defined as a ‘changing neighborhood,’ as was Austin.”).
consisted of several local efforts. Oak Park passed a fair housing ordinance in 1968, and in 1972, the municipality outlawed redlining, a racist tool of the Federal Housing Agency (FHA) to keep communities segregated. An Oak Park community organization tested real estate agents and banks to root out racial discrimination in steering and lending, and released the number and types of loans available in Oak Park to prove they were not racially discriminating in loans. Using that data, the community pressured local banks to offer conventional mortgages, instead of FHA loans which relied on redlining. It also fought against “panic-peddling” by encouraging real estate brokers to practice “affirmative marketing,” where brokers actively marketed homes to White buyers rather than discouraging White people from buying in certain areas, again to prevent White flight. Because of this history, Oak Park has and continues to have a national reputation for liberalism amid massive racial change.

Oak Park’s success in remaining predominately White but with a sizable non-White population stands in stark contrast to Austin’s experience. Beginning in the 1970s, while Oak Park fought against White flight and dramatic racial transition, Austin was unable to achieve the same feat. As described above, in the early twentieth century, Austin was an affluent neighborhood in Chicago, and as late as the 1960s was predominately White. In the 1970s, however, Black families began to move in, prompting White flight. By the 1980s, Austin was majority Black. Unlike Austin, because of its effort to stem racial change, Oak Park was “never clearly defined as a ‘changing neighborhood’ as was Austin,” and thus remained racially diverse.

Recently, Austin has undergone another dramatic transition. Chicago’s largest neighborhood by area, Austin for many years was also its most populated neighborhood. Today, Austin is one of the most violent neighborhoods in the

57. Id. at 149.
58. Id. at 156.
59. Id. at 156–57.
60. Id. at 60 (“FHA in any form, accompanied by redlining or not, has become despised in white neighborhoods with black communities nearby.”).
61. Id. at 72.
62. Id. at 24–25. In 1960, Austin had a negligible Black population. Id. By 1970, Austin was 32.5 percent Black, mostly concentrated in only six of twenty-four Census tracts. Id.
63. Id.
64. Id.
65. Id. at 67.
city,\textsuperscript{67} fueling a recent exodus of middle-class Black families, leaving behind only the poorest Black families.\textsuperscript{68} Between 2000 and 2014, more than 21,000 Black residents left the neighborhood.\textsuperscript{69} Journalists called the exodus a reverse Great Migration,\textsuperscript{70} referring to the early twentieth-century mass movement of Black people to northern cities to escape the cruelty of the Jim Crow south.\textsuperscript{71}

Today, Austin is nearly 80 percent Black, while Oak Park is approximately 64 percent White.\textsuperscript{72} In addition to race, the table below summarizes the two communities' differences.\textsuperscript{73}

\begin{table}
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{Characteristic} & \textbf{Austin} & \textbf{Oak Park} \\
\hline
Population & 75,000 & 17,000 \\
\hline
Income & $35,000 & $55,000 \\
\hline
Education & 80% & 90% \\
\hline
Crime Rate & 10 & 2 \\
\hline

\end{tabular}
\caption{Comparison of Austin and Oak Park}
\end{table}


\textsuperscript{69} Eltagouri, supra note 66 (referencing a chart titled “Community area demographics” showing a decline in the Black population in Austin).

\textsuperscript{70} See Kellogg, supra note 68.


\textsuperscript{72} CHI. METRO. AGENCY FOR PLAN., \textit{COMMUNITY DATA SNAPSHOT AUSTIN, CHICAGO COMMUNITY AREA JUNE 2020 RELEASE 10} (2020) [hereinafter CDS AUSTIN], https://www.cmap.illinois.gov/documents/10180/126764/Austin.pdf [https://perma.cc/R7Y2-5H8P]; CHI. METRO. AGENCY FOR PLAN., \textit{COMMUNITY DATA SNAPSHOT OAK PARK, MUNICIPALITY JUNE 2020 RELEASE 12} (2020) [hereinafter CDS OAK PARK], https://www.cmap.illinois.gov/documents/10180/102881/Oak+Park.pdf [https://perma.cc/T6J5-9NBK]. (The Community Data Snapshots are a series of county, municipal, and Chicago Community Area data profiles that primarily feature data from the 2014–2018 American Community Survey (ACS) 5-Year Estimates. As noted in each profile, the data comes from multiple sources in addition to the ACS, which include U.S. Census Bureau, Illinois Environmental Protection Agency (EPA), Illinois Department of Employment Security (IDES), Illinois Department of Revenue (IDR), and the Chicago Metropolitan Agency for Planning (CMAP).)

\textsuperscript{73} See CDS AUSTIN, supra note 72, at 5, 8, 10–12; CDS OAK PARK, supra note 72, at 5, 9, 12–15.
Table 1: Austin, Chicago and Oak Park, Illinois Community Attributes

<table>
<thead>
<tr>
<th></th>
<th>Austin, Chicago (IL)</th>
<th>Oak Park, Illinois</th>
</tr>
</thead>
<tbody>
<tr>
<td>Race</td>
<td>White, non-Hispanic: 4.8%</td>
<td>White, non-Hispanic: 63.6%</td>
</tr>
<tr>
<td></td>
<td>Black, non-Hispanic: 79.1%</td>
<td>Black, non-Hispanic: 17.9%</td>
</tr>
<tr>
<td></td>
<td>Hispanic or Latinx: 14.4%</td>
<td>Hispanic or Latinx: 8.8%</td>
</tr>
<tr>
<td></td>
<td>Asian, non-Hispanic: 0.5%</td>
<td>Asian, non-Hispanic: 5.0%</td>
</tr>
<tr>
<td></td>
<td>Other: 1.1%</td>
<td>Other: 4.8%</td>
</tr>
<tr>
<td>Education (highest</td>
<td>Less than HS: 20.2%</td>
<td>Less than HS: 3.6%</td>
</tr>
<tr>
<td>attained)</td>
<td>High School: 35.3%</td>
<td>High School: 9.3%</td>
</tr>
<tr>
<td></td>
<td>Some College: 23.2%</td>
<td>Some College: 12.5%</td>
</tr>
<tr>
<td></td>
<td>Associates: 7.1%</td>
<td>Associates: 5.1%</td>
</tr>
<tr>
<td></td>
<td>Bachelor’s: 9.1%</td>
<td>Bachelor’s: 30.8%</td>
</tr>
<tr>
<td></td>
<td>Advanced: 5.0%</td>
<td>Advanced: 38.9%</td>
</tr>
<tr>
<td>Median Household</td>
<td>$33,420</td>
<td>$91,945</td>
</tr>
<tr>
<td>Income</td>
<td>[&lt; $25K: 39.2%]</td>
<td>[&lt; $25K: 15.9%]</td>
</tr>
<tr>
<td>Employment</td>
<td>Unemployed: 13.6%</td>
<td>Unemployed: 5.2%</td>
</tr>
<tr>
<td></td>
<td>Not in Labor Force: 43.6%</td>
<td>Not in Labor Force: 29.1%</td>
</tr>
<tr>
<td>Housing Type</td>
<td>Owner-occupied: 35.0%</td>
<td>Owner-occupied: 54.2%</td>
</tr>
<tr>
<td></td>
<td>Renter-occupied: 50.4%</td>
<td>Renter-occupied: 38.9%</td>
</tr>
<tr>
<td></td>
<td>Vacant: 14.5%</td>
<td>Vacant: 7.3%</td>
</tr>
<tr>
<td>Median Housing Value</td>
<td>~ $188K$^{74}</td>
<td>~ $403K$^{75}</td>
</tr>
</tbody>
</table>

As Table 1 shows, Austin is overwhelmingly Black and poor, while Oak Park is racially diverse, with almost 40 percent of the population being non-White. Oak Park is also middle class, with 69.7 percent of its adult residents having a college degree or above, and a median income of about $92,000. In contrast, only 14.1 percent of Austin residents have a bachelor’s degree or higher, and the median income hovers around $33,000. Forty percent of Austin’s population earns below the poverty line for a family of four, compared to 16 percent in Oak Park. Over half of Austin’s adults are unemployed or not in the labor force, while in Oak Park, only 35 percent of adults are either unemployed or not in the labor force.

The communities’ attributes, beyond demographics, are also different. In Oak Park, the median home value is $403,000, and homeowners occupy more than half of the homes. Only about one-third of Austin’s homes are occupied by homeowners, and the median home price is less than half of that of Oak Park, at $188,000. Austin also has twice as many vacant homes as a percentage of total housing stock as does Oak Park.

While Oak Park and OPRF are both racially diverse, the high school itself is racially divided.

Table 2: OPRF Students’ Racial Test Score Gap Across Minimum Subject Proficiency

<table>
<thead>
<tr>
<th></th>
<th>State</th>
<th>District Overall</th>
<th>White</th>
<th>Black</th>
<th>Asian</th>
<th>Latinx</th>
</tr>
</thead>
<tbody>
<tr>
<td>English</td>
<td>37%</td>
<td>66%</td>
<td>83%</td>
<td>23%</td>
<td>66%</td>
<td>56%</td>
</tr>
<tr>
<td>Math</td>
<td>35%</td>
<td>59%</td>
<td>75%</td>
<td>16%</td>
<td>70%</td>
<td>50%</td>
</tr>
<tr>
<td>Science</td>
<td>49%</td>
<td>60%</td>
<td>75%</td>
<td>23%</td>
<td>56%</td>
<td>50%</td>
</tr>
</tbody>
</table>

| Four-year Graduation Rate | 88% | 95% | 95% | 95% | 96% | 86% |

As Table 2 shows, while OPRF substantially outperforms state averages in test scores in both English and math, the racial test score gap between student populations exists among students testing as at least proficient in a subject. In 2019, 83 percent of White students tested as proficient in English, but only 23 percent of Black students and 56 percent of Latinx students tested as at least proficient. In math, the test score gaps of students testing as at least proficient is even larger: 75 percent of White students tested as at least proficient compared to only 16 percent of Black students and 50 percent of Latinx students. While 91

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78. Id.
79. Id.
percent of Oak Park students graduate within four years, only 85 percent of Black and Latinx students graduate within four years.80

This historical and contemporary context of race in OPRF and Oak Park’s relationship to Austin sets the stage for the drama around stealing an education.

II. HOW TO STEAL AN EDUCATION

How did we get here? Why is it that one child’s educational experience differs dramatically from another child’s experience, even though they only live two miles apart? In this Part, I describe stealing education laws as central planks of educational stratification and opportunity hoarding. These laws and policies undermine the abstract commitment to equal educational access as described in Brown81 and state constitutional hortatory provisions about education.

A. The Promise: Constitutional Law

In 1954, the U.S. Supreme Court in Brown v. Board of Education explained that the U.S. Constitution requires equal access to education:

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

... 

[I]n the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal.

Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.82

Note Brown’s declaration that education is the “most important function of state and local governments.”83 Yet, in the years after Brown, the Court upheld state laws that eroded that importance. In 1973, the Supreme Court held in San Antonio v. Rodriguez that, while the importance of education is “undisputed,” the federal Constitution does not convey an individual right to that education: “[E]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor [is there] any basis for saying it is implicitly so protected.”84

Soon after, in 1974, the Court in Milliken v. Bradley85 invalidated a Michigan desegregation plan across city-suburban school district boundaries. The reasoning was that, despite actual de facto segregation, school districts could not be forced to integrate through interdistrict means absent a finding that the suburban district itself engaged in unlawful de jure segregation.86 In 1983, the Court in Martinez v. Bynum87 further reinforced a school district’s ability to exclude nonresidents by upholding a Texas law that allowed school districts to restrict education to “bona fide residents” because “[a] bona fide residence requirement … furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents.”88

Unlike Rodriguez’s declaration that the U.S. Constitution does not contain a fundamental right to education, almost every state constitution includes a “right

82. Id. at 493, 495.
83. Id. at 493.
86. Id. at 744–45 (“Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.”).
88. Id. at 327–28.
to education” provision that intimates a state constitutional commitment like that found in Brown. The Illinois state constitution, for example, declares “the educational development of all persons to the limits of their capacities” to be a “fundamental goal” of the state:

§ 1. Goal—Free Schools

A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.

The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law.

The State has the primary responsibility for financing the system of public education.90

The constitutional drafters intended that this provision, while hortatory, set a high standard to provide an excellent education to “all persons” living in the state. During the debates of the Illinois 1847 constitutional convention, a delegate read into the record a letter from a state legislator regarding the need for a state superintendent of education.91 The state legislator wrote: “Nothing, it seems to me, in laying the foundations of a republican state, can be of more importance than a provision for securing the devoted application of some single mind to the special purpose of advancing the interests of education.”92 Other conventioneers too underscored the primacy of education. Indeed, one placed the importance of education squarely within the meaning and legitimacy of the state constitution:

What would become of the constitution itself, unless it was sustained by the intelligence and morality of the people, which depended on their means of education. The rights of men had for their sole protection the creation of just laws, and they could be founded and sustained upon the dissemination of virtue and knowledge among the people.93

This is not the only example of Illinois drafters’ commitment when they wrote these hortatory provisions. One drafter, speaking of the requirements that education across the state be “high-quality,” explained that he “had in mind the

89. See infra notes 96–102.
90. ILL. CONST. art. X, § 1.
92. Id.
93. Id. at 916.
highest, the most excellent educational system possible."\textsuperscript{94} Similarly, a drafter commented that including the constitution's reference to "all persons" was to generate "a good goal for the educational status of the state."\textsuperscript{95}

Not all state constitutions specify high quality education or a commitment to "all persons" as does Illinois. For example, the Alaskan constitution only requires the legislature to "establish and maintain a system of public schools open to all children of the State."\textsuperscript{96} Georgia’s constitution declares only that "adequate public education for the citizens shall be a primary obligation of the State."\textsuperscript{97} Yet, even without the explicit mention of "all people," almost all state constitutions say something about what that education system must look like using words that


\textsuperscript{95} \textit{Id.}

\textsuperscript{96} ALASKA CONST. art. VII § 1.

\textsuperscript{97} GA. CONST. art. VIII § 1.

suggest both quality and applicability to all state residents: “efficient,”98 “general,”99 “common,”100 “uniform,”101 and “thorough.”102

B. The Reality: State Education and Criminal Law

But, similar to the U.S. Supreme Court’s backpedaling from Brown’s constitutional commitment to equality of educational opportunity, many state supreme courts eroded those state constitutional commitments to quality and equality. In 1994, the Illinois Supreme Court held that the constitutional provision cited above “does not mandate equal educational benefits and opportunities among the State’s school districts as the constitutionally required means of establishing and maintaining an ‘efficient’ system of free public schools.”103 Specifically, the state education codes’ bonafide resident requirements discussed in Milliken and Martinez and the imposition of criminal and civil penalties for transgressing intrastate boundaries further erode the constitutional promises established by Brown and adopted by the states.

98. Ark. Const. art. XIV, § 1, amended by Ark. Const. amend. 53; Del. Const. art. X, § 1; Fla.
Const. art. IX, § 1 (amended 1998); Ill. Const. art. X, § 1; Ky. Const. § 183; Md. Const. art.
VIII, § 1; Minn. Const. art. XIII, § 1; N.J. Const. art. VIII, § IV(1); Ohio Const. art. VI, § 2;

Const. art. X, § 1; Idaho Const. art. IX, § 1; Minn. Const. art. XIII, § 1; N.C. Const. art. I; id.
art. IX, § 2(1); Or. Const. art. VIII, § 3; Wash. Const. art. IX, § 2.

100. Cal. Const. art. IX, § 5; Idaho Const. art. IX, § 1; Ind. Const. art. VIII, § 1; Iowa Const.
art. IX, 2d, § 3; Ky. Const. § 183; Neb. Const. art. VII, § 1 (amended 1972); Nev. Const. art. XI,
§ 2 (amended 1938); N.Y. Const. art. XI, § 1; Ohio Const. art. VI, § 2; Or. Const. art. VIII,
§ 3; Wash. Const. art. IX, § 2.

101. Ariz. Const. art. XI, § 1; Colo. Const. art. IX, § 1; Del. Const. art. IX, § 1 (amended 1998);
Idaho Const. art. IX, § 1; Ind. Const. art. VIII, § 1; Minn. Const. art. XIII, § 1; Nev. Const.
art. XI, § 2 (amended 1938); N.M. Const. art. XII, § 1; N.C. Const. art. IX, § 2(1); N.D.
Const. art. VIII, § 2; Or. Const. art. VIII, § 3; S.D. Const. art. VIII, § 1; Wash. Const. art. IX,
§ 2; Wis. Const. art. X, § 3 (amended 1972); Wyo. Const. art. VII, § 1.

102. Colo. Const. art. IX, § 2; Idaho Const. art. IX, § 1; Md. Const. art. VIII, § 1; Minn. Const.
art. XIII, § 1; N.J. Const. art. VIII, § IV(1); Ohio Const. art. VI, § 2; Pa. Const. art. III, § 14

generous; for example, the Connecticut Supreme Court held that its constitutional provision
for education “entitles Connecticut public school students to an education suitable to give
them the opportunity to be responsible citizens able to participate fully in democratic
institutions, such as jury service and voting.” Conn. Coal. for Just. in Educ. Funding, Inc. v.
Rell, 990 A.2d 206, 253 (Conn. 2010).
I. State Education Law

Most school districts operate as autonomous municipal entities with their boards of education elected directly by voters. These autonomous jurisdictions create their attendance boundaries, which may or may not correspond with other political geographic boundaries like city or county limits.

Thirty-three states, plus the District of Columbia, explicitly allow school districts to privilege students who have bonafide residence within their borders.


105. ARK. CODE ANN. § 10-18-202 (2020); CAL. EDUC. CODE § 48200 (2020); COLO. REV. STAT. ANN. § 22-36-101 (2020); DEL. CODE ANN. tit. 14, § 202 (2020); GA. CODE ANN. § 20-2-133 (2020); IND. CODE ANN. § 20-26-11-2 (2020); KAN. STAT. ANN. § 72-3118 (2020); ME. REV. STAT. ANN. tit. 20-A, § 5202 (2020); MD. CODE ANN. EDUC. § 7-101(b)(1) (LexisNexis 2020); MASS. GEN. LAWS ANN. ch. 76, § 5 (West 2020); MINN. STAT. ANN. § 120A.20 (2019); MONT. CODE ANN. § 20-5-101 (2019); MO. ANN. STAT. § 167.020 (2019); NEB. REV. STAT. ANN. § 79-215 (2020); NEV. REV. STAT. ANN. § 392.040 (West 2020); N.C. GEN. STAT. § 115C-366 (2020); N.H. REV. STAT. ANN. § 193:12 (2020); N.J. STAT. ANN. § 18A:38-1 (West 2020); N.Y. EDUC. LAW § 3202 (McKinney 2020); OHIO REV. CODE ANN. § 3313.64(B) (West 2020); OLA. STAT. ANN. tit. 70, § 1-113 (West 2020); OR. REV. STAT. ANN. § 339.115 (West 2020); PA. STAT. AND CONS. STAT. § 13-1302 (West 2020); R.I. GEN. LAWS § 16-64-1 (2020); S.C. CODE ANN. § 59-63-30 (West 2020); S.D. CODEFORED LAWS § 13-28-9 (2020); TENN. CODE ANN. § 49-6-3003 (2020); TEX. EDUC. CODE ANN. § 25.001 (West 2019); UTAH CODE ANN. § 53G-6-302 (West 2020); VT. STAT. ANN. tit. 16, § 1075 (2019); VA. CODE ANN. § 22.1-3 (2020); WASH. REV. CODE ANN. § 28A.225.160 (West 2020); D.C. CODE Mun. Regs. tit. 5-E § 2002.1 (LexisNexis 2020).

Some states not included in this list have statewide interdistrict transfer programs, otherwise known as “open-enrollment” plans. See COLO. REV. STAT. § 22-36-101 (2020); LA. STAT. ANN. § 17:221 (2019); N.M. STAT. ANN. § 22-1-4 (2004); WYO. STAT. ANN. § 21-4-301 (2020). Even for states with open enrollment policies, residents often get first dibs on school
Black’s Law Dictionary defines “residency” as “[t]he act or fact of living in a given place for some time.”

What does it mean to “live” in a place for some time? Consider Ohio, a state where a Black mother, Kelley Williams-Bolar, served nine days in jail for stealing an education. There, residency requires “something more” than “purchasing a house or apartment building or even . . . furnishing such a house or apartment so that it is suitable for the owner’s use”; a bonafide residence “must be a place where important family activity takes place during significant parts of each day; a place where the family eats, sleeps, works, relaxes, plays. It must be a place, in short, which can be called ‘home.”

In Illinois, a student’s bonafide residence means an established presence in a place and an intent to make that place a permanent home. Illinois law forbids families from establishing residence in a school district solely to “have access to the educational programs of the district.” A court considers a child’s residence to be his or her “home base,” which depends on factors like where the child eats meals and where the child sleeps most nights.

Districts thwart many nonresidents from enrolling through the documentation they require at initial registration and annual residence verification. Illinois state law does not mandate to districts the documentation they must collect for school enrollment, and thus school districts create their own requirements. OPRF requires, at a minimum, four documents; CPS requires only two documents to prove a child’s address. In OPRF, one document must be a

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107. See supra note 23; infra note 140.
109. 105 ILL. COMP. STAT. ANN. 5/10-20.12b(a)(2)(v) (LexisNexis 2020); see also Mina ex rel. Anghel v. Bd. of Educ., 809 N.E.2d 168, 176 (Ill. App. Ct. 2004) (ruling that a student was not a bonafide resident and thus was required to pay tuition).
110. Mina ex rel. Anghel, 809 N.E.2d, at 175–76 (explaining that “a residence, even for a temporary purpose, in a school district is sufficient to entitle children of school age to attend school, so long as the residence is not established solely to enjoy the benefits of free schools”).
111. Id. at 179.
112. Compare Enrollment and Residency Verification Checklist, OAK PARK & RIVER FOREST HIGH SCH. [hereinafter OPRF Enrollment and Verification Checklist], https://campusuite-storage.s3.amazonaws.com/prod/1558748/bd01c7ae-765f-11e9-9402-0a56f8be964e/1928952/
real estate tax bill, mortgage statement, or rental lease. The other three
documents must include at least two documents generated monthly, such as a
utility bill, and can include one yearly-issued document such as a driver’s license
or car registration. CPS requires only two documents, including a utility bill, a
driver’s license, or an Illinois Department of Public Aid card. Under either
a flexible or strict document requirement regime, these rules envision children’s
homes as the physical place around which their everyday lives revolve.

To aid with catching residency violators, school districts sometimes hire
“residency officers” whose work involves investigating cases of residency
violations. Instead of hiring an employee, some districts contract with
investigatory firms; these firms search online databases and conduct visual
surveillance of families with hopes of uncovering residential discrepancies.

Districts also sometimes depend on community cooperation; some school
districts set up official “tip” lines where community members can report suspect
parents, or create website forms that allow community members to report their
suspicions and upload any visual evidence to support their allegations.

2. State Criminal Law

In 1996, the Illinois legislature proposed, and the then-governor signed, a bill
that criminalized unauthorized nonresidents enrolling their children in school

113. OPRF Enrollment and Verification Checklist, supra note 112.
114. Id.
115. CPS Enrollment Process, supra note 112.
116. School districts concerns about a child’s home base shows in how they investigate and surveille
students and their families: school district investigators visit homes early in the morning and
late at night to determine where a child sleeps. Eddy Ramirez, Schools Crack Down on
[https://perma.cc/ERV4-B9H4] (quoting Valerie Williams, Director of Pupil Services, Freumont Unified School District).
117. See Baldwin Clark, supra note 23, at 405, 416.
118. Id. at 416–20.
119. Id. at 418–19.
120. Id. at 419.
districts where they did not reside. Described then as a “weapon” against nonresidents and “the teeth of a tiger,” the law makes it a crime—a Class C misdemeanor—to “knowingly enroll[] or attempt[] to enroll . . . on a tuition free basis a pupil known by that person to be a nonresident of the district” or to “knowingly or willfully present[] to any school district any false information regarding the residency of a pupil for the purpose of enabling that pupil to attend any school in that district without the payment of a nonresident tuition charge.” Illinois school districts can pursue these charges and sue for back tuition.

Seven other states and the District of Columbia criminalize residency violations: Delaware, Michigan, Missouri, North Carolina, Pennsylvania, Texas, and Vermont. All of these states (except Pennsylvania) classify the criminal offense as a misdemeanor that can carry a fine, jail time, or both, with jail time ranging from a maximum of thirty days in Illinois to five years in Vermont. In addition to these states, eleven states’ education codes provide for civil penalties, most often back tuition: Arkansas, Georgia, Illinois, Maryland, Massachusetts, Montana, New Jersey, North Dakota, Ohio, South Carolina, and Virginia. Civil penalties range in severity from automatic disenrollment to fines, either measured

122. Id.
123. Id.
126. 105 ILL. COMP. STAT. ANN. 5/10-20.12.a(a) (LexisNexis 2020) (authorizing school districts to charge "non-resident pupils who attend the schools of the district tuition in an amount not exceeding 110% of the per capita cost of maintaining the schools of the district for the preceding school year. Such per capita cost shall be computed by dividing the total cost of conducting and maintaining the schools of the district by the average daily attendance, including tuition pupils").
127. DEL. CODE ANN. tit. 14 § 202(f)(5) (West 2020); MICH. COMP. LAWS SERV. § 380.1812 (LexisNexis 2020); MO. ANN. STAT. § 167.020.4 (West 2020); N.C. GEN. STAT. § 115C-366(a3) (2020); 24 PA. CONS. STAT. § 13-1302(c) (2020); TEX. PENAL CODE ANN. § 37.10(c)(3) (West 2020); VT. STAT. ANN. tit. 16, § 1075(j) (West 2019).
128. 730 ILL. COMP. STAT. ANN. 5/5-4.5-65 (LexisNexis 2020).
129. VT. STAT. ANN. tit. 13, § 3016(b) (2019).
130. In civil penalties, I am including expulsion and payment of back tuition.
as tuition fees\textsuperscript{132} or as standard fines.\textsuperscript{133} The states levy civil penalties in one of two ways: (1) the statute makes the offender automatically liable for tuition without any intervention from the school district (e.g., Maryland\textsuperscript{134}) or (2) the statute gives school districts the right to charge or sue the offender for these fines in a proceeding (e.g., Georgia\textsuperscript{135}).

Beyond the states that include criminal provisions in their education codes, others allow school districts to threaten parents with prosecution under general criminal statutes. Seventeen states, plus Washington D.C., have at least one school district in the state that threatens criminal prosecution under general theft, perjury, and fraud statutes as indicated on their school enrollment forms.\textsuperscript{136} I

\begin{itemize}
\item \textsuperscript{132} For example, Georgia law authorizes districts to charge nonresident students tuition fees if such charges do not “exceed the average locally financed per student cost for the preceding year.” \textsc{Ga. Code Ann.} \textsection\textsuperscript{20-2-133(a)} (2020).
\item \textsuperscript{133} For example, Arkansas law caps the civil fine at $1000. \textsc{Ark. Code Ann.} \textsection\textsuperscript{6-18-202(f)} (2020).
\item \textsuperscript{134} \textsc{Md. Code Ann., Educ.} \textsection\textsuperscript{7-101(b)(3)} (LexisNexis 2020) (“If a child fraudulently attends a public school in a county where the child is not domiciled with the child’s parent or guardian, the child’s parent or guardian shall be subject to a penalty payable to the county for the pro rata share of tuition for the time the child fraudulently attends a public school in the county.”).
\item \textsuperscript{135} \textsc{Ga. Code Ann.} \textsection\textsuperscript{20-2-133(a)} (2020) (“[A] local school system is authorized to charge nonresident students tuition or fees or a combination thereof; provided, however, that such charges to a student shall not exceed the average locally financed per student cost for the preceding year . . . .”).
found twenty-four states, plus Washington D.C., that allow school districts to threaten civil suits against offending parents. For example, a Missouri court...
found a mother to have committed fraud for falsifying her daughter’s address and ordered her to pay over $35,000 to the St. Louis, Missouri, School Board, including $3000 in punitive damages.\textsuperscript{138} In seven states, plus Washington D.C., I located verified criminal prosecutions of parents who allegedly falsified their addresses and were prosecuted under the education code’s criminal provisions or general criminal statutes of fraud, perjury, etc.\textsuperscript{139} This includes Ohio, where a court...
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infamously jailed Black mother Kelley Williams-Bolar for nine days under a “tampering with records” conviction for falsifying her children’s address. In Pennsylvania, a suburban district attorney prosecuted Latinx parents Hamlet and Olesia Garcia for theft of services and conspiracy to commit theft of services for falsely stating that their child lived with a grandparent in the suburbs rather than with her parents in Philadelphia.

Most state constitutions herald a quality education to all students to be an important goal in their respective states. But these residency laws, together with state funding schemes, force children to attend schools that may be devastatingly unequal from each other, with some offering more educational opportunities than others.

Yet residency laws are not the end of the story. School districts do not enforce these laws in vacuums. The specific geographic spaces, historical contexts, and
contemporary realities in which this enforcement occurs give deeper meaning to the laws themselves and the people affected by them. The next Part continues this story by showing how some supporters of aggressive enforcement of residency laws in one suburban community justify their opportunity hoarding through race-class-conscious notions of residential areas representing distinctive cultural communities.

III. RACIAL NARRATIVES IN SUBURBAN AMERICA

In a previous article, I developed my overarching theoretical frame: communities justify the unequal system that hoards opportunity by conceiving of education as property. I argued that school district officials invoked property’s “bundle of sticks” metaphor, specifically the right to exclude, the right to transfer, and the right to use and enjoy. I approached this Article’s project with a related research question: “How do communities justify an unfair system that relegates children to schools that correspond to their address regardless of the quality of those schools?”

While my previous analysis collected examples of residency violation laws from around the country, here I choose to focus on Oak Park, Illinois. Even though it has a well-known reputation as a model of a racially progressive community, journalists have covered OPRF’s concern with nonresident enrollment since at least 1988.142 That year, the district uncovered over 75 students illegally enrolled because of residency violations.143 That number increased to between 150 and 200 students in the 1991–1992 school year.144 Recently, the district has averaged investigating over 800 of its approximately 3000 student body per year for residency violations, and remove over 200 students per year because of illegal enrollments.145 In the 2017–2018 school year, the district flagged and
investigated 1102 students for possible residency irregularities, and declared 245 of those students ineligible to attend the school.\textsuperscript{146} That number represented an increase from the 2016–2017 and 2015–2016 school years, when OPRF turned away 185 students and 230 students, respectively.\textsuperscript{147}

In my previous work, I collected school district officials’ public comments regarding enforcing these laws. For this project, I focused on a similar question, but from the community’s perspective. In this Article, I analyze comments connected to news articles that appeared in the local Oak Park online newspaper, www.OakPark.com, between 2010 and 2019.\textsuperscript{148} I chose to look at online news articles as the best source of public discourse on the matter. Between 2010 and 2019, the newspaper featured eleven stories about OPRF’s residency

\textsuperscript{146} Id.

\textsuperscript{147} Id.

investigations. Most of the articles can be classified as “news” in the sense that they reported on issues regarding residency, such as the number of residency cases the district reported flagged and the number of students turned away. Others are opinion pieces, such as an op-ed about the propriety of drug-sniffing dogs at the high school, or an editor’s opinion about the America to Me documentary.

These articles’ comments sections yielded 475 comments. From these, 180 comments, or almost forty percent, directly provided justifications for why residency laws must be enforced. (Other comments were, of course, also about residency, but I focused only on those comments that directly offered a justification for enforcement.) My analysis for this paper involved coding those comments according to the justifications offered. My previous knowledge regarding the role of parents in schools informed my analysis, and that knowledge included existing literature on common stereotypes about Black parents and children in educational stratification, as I describe below.

In these 180 comments, justifications center around four themes. Not surprisingly, fifty-seven comments, approximately 30 percent, center on protecting taxpayers. Fifty-one comments, or another 30 percent, focus on Black parents; thirty-seven comments, or 20 percent, focus on Black children; and thirty-eight comments, another 20 percent, directly implicate community differences between Austin/Chicago and Oak Park-River Forest. Thirty-one comments include two or more justifications, and the vast majority of those connect Black parents to Black children, as I discuss below.

Three interrelated themes emerge in this analysis of how those who support stealing education laws rely on racist stereotypes—“master narratives”—about Black cultural inferiority.149 Reginald Leamon Robinson defines the master narrative of White supremacy and Black inferiority as:

the absolutely dominant or privileged story that defines how blacks win or lose, succeed or fail. This story depends on social mythology and has been previously defined as a “preexisting narrative.” Taking the myth and the story together, the master narrative of black inferiority is a systemic story, whether openly spoken or silently acted upon, that describes, solely on racial terms, how and why whites legitimately hold power over blacks. Although it depends more on mythology than

reliable empirical evidence, the master narrative of black inferiority is both pervasive and powerful.\textsuperscript{150}

The comments reveal that some of those who justify the laws rely on three master narratives associated with Black families and Black neighborhoods: (1) Black parents do not care about education and are general criminals; (2) Black children cannot (or will not) learn, and; (3) Black communities are depraved. These master narratives validate keeping Black children from Austin out and allow OPRF to legitimately hoard educational resources.

Before continuing, let me first address a few concerns readers may have about my using these comments to support the thesis of this Article. First, one might ask, does not the commentators' anonymity suggest that only the most extreme views will be voiced? Well, even though anonymity protects from public shame the most extreme and bigoted views, anonymous commentating may also broaden the views shared in the public deliberation of important issues. Indeed, communications research suggests that anonymity encourages a wider range of opinions to be shared, which nonanonymous posts might discourage.\textsuperscript{151} The possibility of public shame that derives from nonanonymity may discourage some commentators from sharing their views, but that does not mean that those people do not hold those views.

Second, one might ask, can the comments sections of online news articles be generalizable to the entire population? Likely not, but I do not claim generalizability. Rather, I argue that some individuals who support aggressive enforcement of boundaries use well-worn racist narratives of Black inferiority to justify their support. These justifications make opportunity hoarding seem fair and shore up an unjust form of structural subordination. The comments illustrate those racist, anti-Black justifications.\textsuperscript{152} Even if these justifications reflect a minority's outlook, one must still ask: Why, if we know the system is unfair, do we allow it to continue? What are the subconscious beliefs behind the support?

\textsuperscript{150} Id. at 72–74 (footnotes omitted).

\textsuperscript{151} Arthur D. Santana, Virtuous or Vitriolic: The Effect of Anonymity on Civility in Online Newspaper Reader Comment Boards, 8 JOURNALISM PRAC. 18, 29 (2014) (“[A]nonymity in comment boards expands the number of participants in the discourse as well as the range of views aired.”) (citation omitted).

\textsuperscript{152} Media research about these forums that shows how they are important sites of public discourse supports my use of these comments to back my thesis. See Patrick Weber, Discussions in the Comments Section: Factors Influencing Participation and Interactivity in Online Newspapers' Reader Comments, 16 NEW MEDIA & SOC'Y 941, 942 (2014) (“Commenting on the news is the most common form of participation in contemporary news use, and it is certainly one of the most common forms of citizen engagement online.”) (citation omitted).
Furthermore, we know that even a minority of thinkers can have devastating effects on public discourse.153

Another concern about generalizability may be that this border differs in material ways from other borders. Of course, borders reflect hyperlocal processes because of distinct local histories. But, the border that separates Oak Park and Austin deserves examination because, given Oak Park’s reputation, this community should be the last place to find these types of racist justifications. If stealing education enforcement happens in Oak Park, the chance that stealing education enforcement replicates in less self-proclaimed progressive communities is high.

Third, how do I know that some of the commentators are talking about race if they do not explicitly mention race? I suggest that some commentators use what Ian Haney López identifies as racial dog whistles.154 The dog whistle metaphor “pushes us to recognize that modern racial pandering always operates on two levels: inaudible and easily denied in one range, yet stimulating strong reactions in another.”155 According to Haney López, dog whistles are codes directed to a particular group or audience.156 The whistle is a “hidden message” about race that those in the audience can identify as being about race without being explicit.157 To support my argument that some commentators use racial dog whistles when they do not mention race specifically, I contextualize the comments within the sociological literature about White middle-class people’s perceptions of poor Black parents and children in education. I also situate the comments within the specific racial dynamics in the area as illustrated in the *America to Me* documentary.

Lastly, how do I know that some commentators who support stealing education laws are primarily concerned about residency violators from Austin and not from other communities? In the comments sections of the articles I coded, when supporters of the law reference an area, they almost always mention Chicago, even though I found no evidence that the school district ever released the true addresses of students whom it stopped from enrolling or otherwise removed

153. The January 6, 2021, riot at the U.S. Capitol shows how a minority of actors can endanger an entire system.
155. *Id.* at 3.
156. *Id.* at 4.
157. *Id.*
to determine that most offenders are from Austin.158 Nevertheless, some commentators make that assumption explicit: "IF YOU DON'T LIVE IN OAK PARK OR RIVER FOREST, THEN YOU DON'T DESERVE TO GO TO OUR SCHOOLS. . . . Keep your kids in Chicago";159 "Our problems began when black students started attending ILLEGALLY from the city";160 "I think that any family who does this should be pursued by the village for the taxes spent educating their kids they ship in from Austin after they are expelled";161 "Perhaps [OPRF] turned a blind eye to residency requirements, word spread of this permissiveness, and now the problem is too big and needs to be reined in. This town cannot singlehandedly solve greater Chicago’s education system inequities";162 “[Unauthorized nonresident enrollment] explains entirely why property taxes are becoming unsustainable and it is unique to us because of our walking distance proximity to Chicago.”163

To be sure, the comments I highlight here do not represent all the comments left on these articles. Some commentators question whether removing students from school was the right answer.164 Others express anger and shock at the most disparaging comments165 and take other commentators to task for failing to

161. no thanks from Chicago, Comment to ‘Questionable’ Residency, supra note 148 (Jan. 17, 2015, 1:50 PM).
162. Big picture, Comment to Verify All Families, supra note 148 (Feb. 3, 2013, 2:23 PM).
164. “I don’t have a solution but I guess I wish there was a way as a society to help provide a decent public education to those who want one. Opening our school doors to everyone at taxpayer expense is not an answer but tossing motivated kids out the door doesn’t feel right either.” Adam Smith, Comment to ‘Questionable’ Residency, supra note 148 (June 25, 2014, 9:01 AM).
165. These comments stated: Leave it to this area to put a price tag on a kid’s worth. . . . Furthermore, would you all care if the kids were well behaved? Talked “better”? . . . But of course, it comes down to the all-mighty dollar. Fraud? Financial crimes? ARE YOU KIDDING? . . . Your children are watching you—and where your ethics lay. KR from River Forest, Comment to Verify All Families, supra note 148 (Jan. 30, 2013, 12:38, 12:45 PM); Wow, I am embarrassed by the lack of empathy expressed in the comments below. Am I really reading an Oak Park newspaper? We privileged (mostly White) folks shake our heads and complain about gangs and crime and parents who don’t seem to give a darn. And here we have parents who are so desperate
recognize their privilege. Other commentators, while declaring support for the laws in theory, argued for more open enrollment programs where children enroll in their school of choice and funding follows the child or even scholarships that would allow Austin children to attend OPRF legally. I do not argue, however, that the comments I highlight represent how everyone in the community feels. Rather, my project involves understanding those who support the laws, and why. And, in any case, the laws continue to be on the books and enforced; at least some of these arguments about education as property and racial justifications for the laws are widespread.

Even if the comments do not reflect the attitudes of a majority, they perpetuate the system, both by justifying it to those who otherwise would shy away from racist attitudes and in a subconscious way promoting fears and triggering protective reactions and emotions. The very public expression of racist ideas perpetuates an environment that makes it all but impossible to prompt political leaders to undertake law reforms that would solve these problems of separate and unequal life circumstances and the perpetuation of White supremacist attitudes.

for their kids to be safe and to get a good education—to have a real chance in life—and our first response is to “publicly shame” them?? Am I suggesting that we open the doors wide to non-residents? Of course not. But I am appalled that we’re focusing on punitive actions instead of empathic discussion. This is not what Oak Park stands for.

Kathy Müller, Comment to Residency Cases Rising, supra note 145 (Apr. 27, 2018, 4:59 PM).

166. Another comment stated:

Again, put yourselves in the parents[‘] shoes. You likely have limited education and want better for your child. Not saying it is right—but until you walk one day in thier [sic] shoes stop hi fiving [sic]. Many of the people on this board were born into families with money, advantage and are white. To use baseball analogy. You were born on third, someone got a hit and your [sic] act like you hit a home run. Many of these kids have two strikes with two outs . . .

OP, Comment to ‘Questionable’ Residency, supra note 148 (June 26, 2014, 6:27 AM).

167. A comment in support of open enrollment maintained:

Open enrollment is what other states are using . . . for anyone wanting to go to school out of district there is then state funding that follows the child giving them both school choice AND not having local residents pay for the extra students. I find our desire to keep non-OPers out of our schools to be sadly intolerant.

Open enrollment, Comment to Verify All Families, supra note 148 (Jan. 30, 2013, 1:12 PM).

168. I don’t know where the non-resident students come from, if there are any, but I assume their parents send them here because the local schools are of poor quality. And let’s face it, Oak Park schools aren’t as good as they could be. Those parents must be pretty desperate. Instead of hunting them down, perhaps some nonprofit could be developed to offer scholarships. Oak Park could use an infusion of talented students from the wider Chicago area.

Mary Ellen Eads from Oak Park, Comment to OPRF Eyes Residency Check, supra note 41 (Nov. 2, 2012, 7:24 PM).
My argument is that the comments presented below illustrate the “us versus them” logic of so-called cultural differences that supports aggressive enforcement of the residency laws. This “us versus them” categorization facilitates opportunity hoarding, in which “members of a categorically bounded network acquire [exclusive] access to a resource that is valuable, renewable, [and] subject to monopoly.”169 These resources include economic capital, social capital, and cultural capital that tend to differentiate school districts from each other.170 I argue that one way the OPRF community engages in opportunity hoarding is through the maintenance of these categories—us and them, resident and nonresident—that “provid[e] explanations, justifications, and practical routines for unequal distribution of rewards.”171 The following analysis illustrates how cultural beliefs about White superiority and Black inferiority legitimate the unequal distribution of education resources. I return to this theoretical discussion of opportunity hoarding in Part IV.

A. Black Parents

The dominant trope used by some supporters of stealing education laws says that Austin parents—poor Black parents—do not prioritize or value education. Black parents “not caring” about education is a well-worn and common narrative some use to explain why Black children do not perform as well in school as their White counterparts.172 According to this racist master narrative, Black children’s relative academic performance results from deficits in Black parenting, not structural impediments to well-resourced schools.

169. TILLY, supra note 26, at 10.
170. See infra Part IV.
171. TILLY, supra note 26, at 76.
172. See, e.g., Dory Lightfoot, “Some Parents Just Don’t Care” Decoding the Meanings of Parental Involvement in Urban Schools, 39 URB. EDUC. 91 (2004); see also Edwin Rios, Racists in One of America’s Richest Counties Are Freaking Out over a “Forced Busing” Proposal, MOTHER JONES (Oct. 7, 2019), https://www.motherjones.com/politics/2019/10/racists-in-one-of-americas-richest-counties-are-freaking-out-over-a-forced-busing-proposal/?fbclid=IwAR2r-qOZ7Rzn6ku8CKgH5a5Vjys0MlqspwLpAFxMGwVvjNSXdcBlN7ZQ [https://perma.cc/C5F9-9SFJ] (reporting a parent’s testimony regarding a wealthy district in Maryland and why the district should not embark on an intradistrict busing program aimed to reduce the concentration of poor children in specific schools. Written testimony included many suggestions about the cultural deficits in Black parenting, including “Black families (as a core group) don’t value education like other cultural groups.”). Other groups too have felt the stigma of “not caring” about education. See, e.g., Richard R. Valencia & Mary S. Black, “Mexican Americans Don’t Value Education!”—On the Basis of the Myth, Mythmaking, and Debunking, 1 J. LATINOS & EDUC. 81 (2002).
For an example of this discourse, consider the following exchange. One commentator attempts to highlight CPS’s institutional dysfunction as a reason for why an Austin parent might lie to gain access to OPRF:

The schools in poor neighborhoods are poorly equipped, this is a fact. Look at a disparity in terms of access to books and computers. I have been to these schools. I was at a school that had a shortage of toilet paper. How can you expect the most from students when you don’t even provide them a way to be clean?173

In response, another commentator dismisses this point of view as to why schools’ resources matter:

All schools will not be equal—EVER. Maybe in your utopian dream land with liberal unicorn tears, but not in the real world. Heck, I barely had toilet paper in my dorm IN COLLEGE. That didn’t stop anyone from getting an [sic] top notch education. We went out and bought it. If parents can afford to smoke a pack of Newports, they can buy toilet paper.174

Here, rather than address the structural problem posed by the original poster—how can children focus on learning when they do not have access to basic hygiene for the eight-plus hours they spend in school?—this response reframes the problem as one about parental priorities.175 Selfishness defines the narrative; poor Black parents would rather spend money on cigarettes than on their children’s education.

175. In addition to the stretch analogy of a college student to an elementary, middle, or high schooler, the commentator implies that public schools are not responsible for basic supplies, but their parents are. This argument does not hold water; schools that lack basics like toilet paper likely also lack other supplies, like books and computers, supplies that many parents may not be able to afford to donate to the public school. Parents whose children attend poor schools themselves likely stretch monthly budgets to take care of basic needs in their homes, without anything left over to donate to their local schools. Most perniciously, rather than blame this disparity in resources on poverty per se, this comment suggests that the real reason poor Black parents do not buy basic supplies like toilet paper reflects misplaced priorities, such as in a cigarette habit, and not on their children’s education. The reference to Newports is a racial dog whistle; Newport cigarettes are well-known to be the choice cigarette brand among Black smokers. See, e.g., Natasha Noman, Newport, the Top Cigarette Brand for Black Americans, Is Aggressively Targeting Youths, Mic (Sept. 14, 2016), https://www.mic.com/articles/154126/newport-the-top-cigarette-brand-for-black-americans-is-aggressively-targeting-youths [https://perma.cc/WE8W-XRBQ].
Priority misalignment also shows up in the belief that poor people refuse to forgo luxuries to better their children’s educations. Consider the response to this commentator who highlights the difficulty of a poor person legally residing in Oak Park:

If a mother goes through the trouble to improperly enroll her child in OPRF, she is doing it in the best interest of her child, rather than send her kid to some horrible Austin school. If she could actually afford to live in Oak Park, she would likely do so, but renting an apartment or flat big enough for a family is not exactly cheap here.176

In response, a commentator questions whether such an Austin mother “is doing all she can to afford to live here:”

Is she paying for cable/satellite? Expensive cell phone? Car payment? Frugal wardrobe? Working hard and educating herself so she can get a better paying job? Once I see the personal sacrifices are being made, then we can talk. If an OP education is that important, the parents will make ALL necessary sacrifices to get it. Or perhaps it’s truly not important[.]

177. muntz, Comment to Verify All Families, supra note 148 (Jan. 31, 2013, 5:46 PM). Another commentator makes a similar, yet less sophisticated response: “If you want to go to school hear [sic], live here. Pretty simple really. Yep, it’s too bad for those … kids [that were removed], but their parents have made something other than the kids’ education the priority.” OPDad, Comment to ‘Questionable’ Residency, supra note 148 (June 26, 2014, 1:09 PM).

This line of argument finds support in conservative spaces. For example, a publication sponsored by the conservative think tank The Heritage Foundation suggests that being poor in America is not real poverty:

According to the government’s own survey data, in 2005, the average household defined as poor by the government lived in a house or apartment equipped with air conditioning and cable TV. The family had a car (a third of the poor have two or more cars). For entertainment, the household had two color televisions, a DVD player, and a VCR. If there were children in the home (especially boys), the family had a game system, such as an Xbox or PlayStation. In the kitchen, the household had a microwave, refrigerator, and an oven and stove. Other household conveniences included a clothes washer, clothes dryer, ceiling fans, a cordless phone, and a coffee maker...

Poor families certainly struggle to make ends meet, but in most cases, they are struggling to pay for air conditioning and the cable TV bill as well as to put food on the table. Their living standards are far different from the images of dire deprivation promoted by activists and the mainstream media.

ROBERT RECTOR & RACHEL SHEFFIELD, HERITAGE FOUND., BACKGROUNDER NO. 2575: AIR CONDITIONING, CABLE TV, AND AN XBOX: WHAT IS POVERTY IN THE UNITED STATES TODAY? Executive Summary 1, Main Text 2 (2011). Publications such as this one perpetuates the belief that poor people are not actually poor, but rather have different priorities than working-class
But for the typical Austin family, forgoing living expenses like cable or a car note will not make Oak Park affordable. For example, a two-bedroom apartment—likely not suitable for a family of four—averages more than $2000 a month in Oak Park.\textsuperscript{178} For that rent payment to comprise less than 30 percent of one’s income,\textsuperscript{179} a family would need to have a net income of approximately $6600 per month. That corresponds to an annual salary that nets $80,000 per year. While that may be barely affordable to a resident of Oak Park, where the median household income is $92,000 per year, it is not nearly as possible for the average resident of Austin, where the median household income is only $32,800 per year, and unemployment hovers at almost 40 percent.\textsuperscript{180}

Nevertheless, in the eyes of some community members who support aggressive boundary enforcement, the failure to take the bus, forgo a cell phone, or not have cable television reflects parental educational neglect. Poverty is not the problem, the argument goes, priorities are: “My point is, people across this country seem to find a way to sacrifice for the things they TRULY value. That is true for all income levels. Which begs the question . . . is education truly valued?”\textsuperscript{181}

Somewhat bewilderingly, commentators pillory Austin parents for selfishness, laziness, and not making sacrifices because they do not reach beyond Oak Park for their children’s education. From the previous commentator:

\begin{itemize}
  \item or middle-class people. They also perpetuate the belief that American poverty is not real poverty, as if financial instability can only be judged when a family forgoes air conditioning. The commentator above, however, makes this same argument: if only a parent would take the bus or be hot in the summertime, they could afford to do what the numbers suggest they truly cannot. The gendered nature of the first comment also suggests an underlying concern specifically about Black mothers and notions of the welfare queen. See infra note 183 and accompanying text.
  \item Several real estate website and financial experts suggest spending no more than 30 percent of net income on housing. See, e.g., Kathleen Elkins, Don’t Spend More Than This on Housing, Warns Money Expert, CNBC (Nov. 27, 2018, 2:41 PM), https://www.cnbc.com/2018/11/27/dont-spend-more-than-this-on-housing-says-david-bach.html [https://perma.cc/8A99-QN5F].
  \item See CDS AUSTIN, supra note 72, at 5, 8; CDS OAK PARK, supra note 72, at 5.
  \item See Real List, Comment to ‘Questionable’ Residency, supra note 148 (June 26, 2014, 1:00 PM).
  \item Another commentator goes so far as to suggest that parents who “stole” education are actually abusing their children: “The apologists will say ‘oh the parent is just trying to get their children a quality education.’ Bull Roar The [sic] parent is wrong for involving their children in criminal conduct and they should be referred to DCFS [Department of Children and Family Services].” Dan Hefner from Oak Park, Comment to ‘Questionable’ Residency, supra note 148 (June 26, 2014, 1:41 PM).
\end{itemize}
Is it the better education or just the convenience of being right across the border that drives the Austin folks? If they truly valued the better education, they would drive up to [New Trier] or west to Hinsdale Central/South, schools that consistently rank higher than OPRF. That would demonstrate a parent truly vested in what is best for their child. Directing your child to walk 3 blocks west is lazy.\textsuperscript{182}

Some of the commentators’ discussions about the “crime” of residency violations refer to it as a form of fraud and make specific analogies to welfare fraud and Black mothers. A common racist imagery of Black motherhood is that of the “welfare queen”—a mother who repeatedly bears children and pays for expensive “amenities” through government assistance, all the while being able to work.\textsuperscript{183} Seeing an OPRF education as property, an entitlement reserved for private taxpayers who paid for the education, commentators draw on analogies to welfare fraud to explain the harm inherent in residency violations:

Damn straight [this] isn’t fair—neither is going to Jewel [a grocery store] and watching someone with a WIC [an antipoverty food program] card putting their groceries into an Escalade.\textsuperscript{184}

While the commentator does not say so specially, using the example of WIC—a program specifically available to women, infants, and children—raises the specter of residency violations as both racial and gendered.

Other commentators express the belief that if a parent is willing to falsify an address, she may also be willing to engage in other forms of immoral behavior:

Honesty and integrity are the types of things that parents are supposed to teach first and foremost to their children, but that can’t be true here since it’s the shame-less parents themselves who are liars and thieves by

\begin{footnotes}
\item[182] Real List, Comment to 'Questionable' Residency, \textit{supra} note 148 (June 25, 2014, 12:32 PM).
\item[184] Done from Oak Park, Comment to Verify All Families, \textit{supra} note 148 (Jan. 31, 2013, 3:17 PM). Another commentator, who claims to work for a charitable organization, expresses similar dismay: “I have had people blatantly ask me to help them cheat their way into federally funded programs. I saw several examples, repeatedly, os [sic] being abusing the system with no intention to use it I was shocked at the amount of working people we served, true, but there was NO shortage of hustling, lying & misuse.]” another OP transplant, Comment to 'Questionable' Residency, \textit{supra} note 148 (June 27, 2014, 11:26 PM).
\end{footnotes}
falsifying official paperwork so their kids can attend OPRF for free (while sticking the costs to the taxpayers of OPRF). Doing things like this (lying and/or stealing to get whatever you want) is the worst example any parent can set for their kid and it contradicts what the teachers try to install [sic] into the children every day, sometimes to no avail. So that being said, what is the next crime/sin/wrongdoing to be tolerated by OPRF [...] how ’bout cheating on tests?185

This linkage is a form of symbolic violence, in which a superordinate group’s perceptions of a maligned group associate that group with crime and thus “[a]ny act of criminality then works to legitimate and naturalize those arbitrary associations.”186 To this commentator, a parent who violates residency laws cannot teach other moral lessons like “honesty and integrity.” The logic: a parent who lies about one thing—residence to get into school—will lie about other things “to get whatever [they] want.” The criminal framing of a parent falsifying an address for their child to attend OPRF works to reinforce the racist stereotype of Black criminality. It is thus not surprising that Oak Park’s residence czar is a former police officer.187

Rather than framing the situation as one of bravery for risking getting caught, some supporters use the crime frame to mark Black parents who break the law as generally immoral and use it to distinguish themselves as law-abiding citizens.

B. Black Children

While some of the commentators supportive of aggressive enforcement of the school district boundary save their harshest criticism for Black parents, they also employ a racist description of Black children’s intellectual inferiority and negative cultural proclivities to justify keeping Austin children out of OPRF. As one commentator remarks, “I chose to live in the oak park/river forest area so my children can go to school with other children from OP/RF.”188 This suggests Oak Park children are somehow superior to non-Oak Park children. When deciding

188. Brendan, Comment to ‘Questionable’ Residency, supra note 148 (June 26, 2014, 8:13 AM).
where to send a child to school, this parent worries not only about academics, but also about their child’s peers.

Rhetoric about Black children concerning stealing education is tame in comparison to the rhetoric about Black parents. Yet the discourse is no less suggestive of pernicious racial stereotypes that serve to distinguish between OPRF students who live in Oak Park legally and Austin students who may be attending illegally.

Some commentators express concern that students from Austin cannot keep up academically. They presume Austin children to be less educationally prepared than OPRF students and, thus, more expensive to educate than OPRF students—another reason to reject them:

[S]tudents who jump [from] Austin often do not have the same level of academic and social preparation as the kids who came up through the OP and RF schools. The resources required to manage behavior and remediate learning deficits can make them even more expensive for the HS to educate than local kids.189

The idea that Black children have more behavioral and learning “deficits” is a common belief used to justify opportunity gaps.190 This belief often plays out in the overrepresentation of Black children in some special education categories,191 increased contacts with law enforcement in schools,192 and disproportionate suspensions and expulsions.193 Unfortunately, this commentator’s beliefs may actualize, not because Black children inherently misbehave more often or have learning “deficits,” but because schools’ engagement with Black children leads to

189. OP Transplant, Comment to ‘Questionable’ Residency, supra note 148 (June 25, 2014, 11:17 AM).
190. This sentiment, that Black children are somehow less able to learn, is expressed elsewhere and explicitly ties the criticism to race. See LaToya Baldwin Clark, Opinion, District Policy Shuts Out Some Students From UC/CSU Eligibility, PALO ALTO WKLY., Dec. 2, 2011, at 17, https://issuu.com/paloaltonew/pa...section1 [https://perma.cc/DSQR-QSPD].
inappropriate special education placements,\textsuperscript{194} tracking into lower-level classes,\textsuperscript{195} and over surveillance for bad behavior.\textsuperscript{196}

Some commentators perceive these differences between Austin children and Oak Park children to be detrimental to the community at large if the children attend school together:

\begin{quote}
As non-PC this [sic] may be, I’d bet a high percentage of non-residents are performing below average which further brings down the overall quality of the school which indirectly affects housing values of the entire village. The intangible costs of this issue are huge.\textsuperscript{197}
\end{quote}

While the commentator says her concerns are about “intangibles,” her concerns about property values are very tangible and perhaps, if research supports them, reasonable. But the impact of test scores on property values is difficult to

\textsuperscript{194} Not only do Black children experience disproportionate special education identification, but they also experience more restrictive special education placements, meaning more time outside of the general education classroom than do non-Black students. See Baldwin Clark, supra note 191, at 396–400.


\textsuperscript{196} For example, even Black preschoolers are expelled from day care centers at disproportionate rates. U.S. DEP’T EDUC. OFF. FOR C.R., 2013–2014 CIVIL RIGHTS DATA COLLECTION: A FIRST LOOK 3 (2016), https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf [https://perma.cc/7FHF-42KG] (showing that, in the 2013–2014 school year, preschools suspended Black children at rates 3.6 times that of White preschoolers, and that although Black preschoolers were only 19 percent of the preschool population, they comprised 47 percent of preschoolers receiving one or more out-of-school suspensions). Teachers also tend to perceive more misbehavior when evaluating young children’s behavior when that child is Black. WALTER S. GILLIAM, ANGELA N. MAUPIN, CHIN R. REYES, MARIA ACCAVITTI & FREDERICK SHIC, YALE UNIV. CHILD STUDY CTR., DO EARLY EDUCATORS’ IMPLICIT BIASES REGARDING SEX AND RACE RELATE TO BEHAVIOR EXPECTATIONS AND RECOMMENDATIONS OF PRESCHOOL EXPULSIONS AND SUSPENSIONS? (2016), https://medicine.yale.edu/chilstdudy/zigler/publications/Preschool%20Implicit%20Bias%20Policy%20Brief_final_9_2_6_276766_5379_v1.pdf [https://perma.cc/RE8Z-5T6U].

\textsuperscript{197} Uncommon Sense, Comment to Residency Process Under Review, supra note 148 (Nov. 5, 2013, 1:46 PM).
measure,198 and studies that examine the issue are mixed as to the magnitude of the effect of test scores on property values.199

But the research on the relationship between a school’s racial composition and home prices, independent of test scores, appears to be more robust.200 Using experimental methods, one study found support for what the authors called a “pure race” effect on White parents’ school choice.201 They found that White parents prefer schools with fewer Black students compared to schools that are identical on all other measures but have more Black students.202 In another study of a school choice process, the authors found that 75 percent of the variation in which schools White parents preferred could be explained by the percentage of Black students in available schools.203 These studies suggest that White parents’ school concerns transcend test scores. White parents may be willing to pay a home price premium as the percentage of Black students decreases.

198. See Phuong Nguyen-Hoang & John Yinger, The Capitalization of School Quality Into House Values: A Review, 20 J. HOUS. ECON. 30 (2011). Methodological issues abound when trying to directly compare housing values on either side of a school district boundary line. School district boundaries reflect not only different schools, but different communities altogether. For example, Oak Park and Austin do not differ only in school quality, but also have different demographics, housing stock, municipal governance, and so forth. See supra tbl. 2. One solution to the methodological problem of comparing unlike neighborhoods is to account for those differences in neighborhoods by focusing on similar homes distinguished only by the border. Sandra E. Black, Do Better Schools Matter? Parental Valuation of Elementary Education, 114 Q.J. ECON. 577 (1999).

199. See, e.g., Patrick Bayer, Fernando Ferreira & Robert McMillan, A Unified Framework for Measuring Preferences for Schools and Neighborhoods, 115 J. POL. ECON. 588, 588–89 (2007) (finding that home buyers will pay a 1 percent premium in exchange for a 5 percent increase in district test scores); Black, supra note 198, at 578 (finding that parents are willing to pay a premium of approximately 2.1 percent for a 5 percent difference in district test scores).

200. See Thomas J. Kane, Stephanie K. Riegg & Douglas O. Staiger, School Quality, Neighborhoods, and Housing Prices, 8 AM. L. & ECON. REV. 183, 185 (2006) (showing that the “effect of schools on housing values operates through the characteristics of the population living in different neighborhoods,” including racial characteristics); see also Jack Doughtery, Jeffrey Harrelson, Laura Makony, Drew Murphy, Russell Smith, Michael Snow & Diane Zannoni, School Choice in Suburbia: Test Scores, Race, and Housing Markets, 115 Am. J. Educ. 523, 539–40 (2009) (finding that, over a five-year period, test scores’ impact on housing values in one Connecticut school district declined compared to their impact over the previous five years while, during the same time period, a school’s racial composition became over seven times as influential on housing prices).


202. Id. at 111.

Another theme in the comments is that Austin students themselves might be uncomfortable in OPRF because of cultural differences between bonafide Oak Parkers and Austin residents. One commentator questions why Austin parents would choose OPRF instead of a school that is more like Austin demographically: “How many of those parents are shipping their kids to Proviso East, where they might be a better social fit?”204 Proviso East is 98 percent Black and Latinx, and 70 percent of their students are low-income.205 The conclusion is that if Austin parents “really” care about their children, they would not intentionally send their children to a school where they would feel like outsiders.

But it would likely be the racially hostile learning environment causing those feelings of exclusion. As revealed in the America to Me documentary, within OPRF, students and staff believe that teachers assumed different “cultures” between racial groups. For example, cheerleading is a predominately Black activity, while the drill team is a predominately White activity. The coach for both teams, a White teacher, treats the girls in the activities differently, according to a rare White student on the cheerleading team:

> The coach that I used to know from when I was twelve . . . she was a lot nicer. She did tell me that she has to put herself in [a place of] authority more because all the girls are Black and she has to . . . put up her own fight to makes sure that she gets what she wants.206

Differences in cultures within the school need not lead to more punitive practices for Black children as compared to White children. Yet this punishment stretched to how Black administrators perceived their positions in the school concerning culture. In describing her reasons for resigning, consider the words of a Black former assistant principal: “Every place has a culture. And this school is grounded on White cultural norms. If I don’t show up thinking, talking, being, feeling, White, specifically as a White male in this building, there are repercussions connected to that.”207

204. Done from Oak Park, Comment to ‘Questionable’ Residency, supra note 148 (June 25, 2014, 1:21 PM).
207. The administrator continued: “Some of things that I experience as an administrator in this building . . . I feel more affinity to a black girl in a classroom than other administrators. I guess
Even when some supporters of stealing education laws talk about Black children, the conversation almost always returns to Black parents. One commentator argues that Austin children would not benefit from the OPRF educational opportunities because of their parents’ influence:

One of the main reasons kids fall behind is because of poor “learning culture.” One of the reasons kids in the suburbs do well is due to positive “learning culture.” When parents have expectations of their children to do well, kids tend to do well. When peers are doing well, it pushes kids to compete. When parents don’t care, kids will see no value in learning, and do poorly.\textsuperscript{208}

In another comment, this commentator continues:

The students who enter towns from low income communities and do well are the exception, not the rule. This shows that merely moving low income families into an area with higher performing schools with more resources is not the magic bullet. There needs to be a change in the culture of parenting in those areas for there to be progress. Without that, nothing positive will happen.\textsuperscript{209}

In other words, Black low-income students cannot get the benefit of a “better” school because after school, they ultimately go home, and that home does not prioritize education.

Parenting culture as the key to a child’s academic success is a common theme some individuals use to explain why some racial and ethnic groups are more academically successful than others. Law professors Amy Chua and Jed Rubenfeld argue that three cultural traits associated with groups can explain life success: (1) a superiority complex; (2) insecurity; and (3) impulse control.\textsuperscript{210} While proponents of this theory claim that neither race nor class distinguishes between “good”

\textsuperscript{208} Taxpayer, Comment to Verify All Families, supra note 148 (Feb. 4, 2013, 8:28 PM).
\textsuperscript{209} Taxpayer, Comment to Verify All Families, supra note 148 (Feb. 4, 2013, 3:17 PM).
cultures and “bad” cultures, they often leave Black American culture off the “good” list.

Consider the following commentator who distinguishes between Black and Jewish culture and Black orientation toward academic achievement:

Jewish culture embraces learning, and I’ll bet Jewish families rank above average in income. Here’s a contrast in OPRF’s cafeteria: A group of black students at a table. A freshman says she just got an “A,” and one of the down-and-out culture says, “You tryin’ be like whitey?”

This commentator’s words reflect a now-debunked belief that only Black children experience the social pressures against high-achieving students. Yet this belief is false: Black children as a group are achievement-focused, and the social pressure against high-achieving students transcends race.

One commentator suggests that Black students from Austin, especially Black boys, need a different type of education not available at OPRF, one that is more compatible with their needs:

Just giving kids access to higher performing schools does not change having a screwed up home life. All that occurs is the “gap” that constantly gets discussed now. What is really needed are boot camp like schools i.e., Urban Prep [an all-boys public charter network of schools in Chicago] that are based on tried and true approaches—all male, harsh discipline, and focus on reading, writing, and math. Keep the new math and other mumbo jumbo stuff out.

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211. See, e.g., id. at 2 (arguing that the triple package cannot be racist because they there are “[B]lack and Hispanic subgroups in the United States far outperforming many White and Asian subgroups.”).

212. Jim from Oak Park, Comment to Verify All Families, supra note 148 (Feb. 6, 2013, 11:57 AM).


215. Uncommon Sense, Comment to Verify All Families, supra note 148 (Feb. 4, 2013, 1:19 PM). Urban Prep is an all-boys public charter network of schools in Chicago. About, URB. PREP ACADEMS., urbanprep.org/about [https://perma.cc/GR5L-UWQX]. Its motto is “We Believe,” which it says is “a constant reminder that Urban Prep students will not fall into the trap of negative stereotypes and low expectations.” Id. It boasts of 100 percent college acceptance rates for its graduating seniors, but a founding teacher at the school recently suggested that those numbers are misleading:

For starters, the reality is only 12.8% of Urban Prep students at the West campus met Illinois’ college readiness benchmarks. Further, only about two-thirds of the class of 2017 at Urban Prep’s West campus actually enrolled in college. A
The comment reveals several things about how some see Black children's opportunities in education. First, the commentator supports "boot camp"-like schools for Black children, suggesting that Black children, more than anything, need discipline and order.216

Second, the commentator’s dismissal of “new math and other mumbo jumbo” suggests that Black children cannot learn according to more innovative methods, a riff off the “Black children cannot learn” theme. Third, while the debates about “new math”217 and pedagogical innovations under Common Core218 are not necessarily about race, this commentator suggests, rather paternalistically, that Black students might be harmed by new and innovative teaching and learning methods.

In sum, like the stereotypes used against Black parents, supporters of aggressive enforcement of stealing education laws perceive a clear cultural

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demarcation between White and middle-class Oak Parkers and Black and poor nonresidents. First, they presume Black children to be academically behind Oak Park students, with little prospect of catching up. Second, they assume that Black parents hold negative values around education. Third, they believe Black children require harsh discipline and traditional, rote pedagogy. And lastly, commentators consider Black children from outside Oak Park to be culturally different—involved in drugs and gangs and unable to leave behind the Austin culture when they enter OPRF. The end conclusion: “they” should not be let into “our” schools. Black children do not belong in schools like OPRF.

C. Black Spaces

Austin’s social problems shape how some supporters of stealing education laws perceive residency violations. Commentators express contempt toward Austin as a crime-ridden space of deviant behavior. Austin’s woes, according to some supporters of the stealing education laws, illustrate why the laws need to be aggressively enforced. Specifically, they believe that Austin, a Black and economically depressed community, reflects a different way of life that is incompatible with the Oak Park lifestyle.

Commentators cite concerns about crime following Austin students to the detriment of Oak Park students. In one comment, a self-described OPRF graduate complains about how students from Austin treated him and other White kids:

Most white kids are terrorized at least 4–6 times during their 4 year stint, or they were like me and attacked and viciously bullied in the stairway quarterly. I think that any family who does this should be pursued by the village for the taxes spent educating their kids they ship in from Austin after they are expelled.219

For this graduate, his troubles and those of his fellow White students can be directly blamed on non–Oak Parkers, and he implies that the non–Oak Parkers are Black children from Austin.

Another commentator expresses concern that the Oak Park police would struggle to “keep track” of non–Oak Park students from predominately Black and Latinx neighboring communities:

It is difficult enough for the oak park and river forest police to know the students in the area and their behavior. Now throw in kids from

219. no thanks from Chicago, Comment to ‘Questionable’ Residency, supra note 148 (Jan. 17, 2015, 1:50 PM).
Berwyn, Austin, Maywood, Galewood, etc and it becomes impossible to keep track of these kids.220

While this commentator did not explicitly name race, for Oak Parkers, the dog whistle rings clear given the racial demographics of the communities he references: Berwyn is 65 percent Latinx;221 Maywood is 68 percent Black;222 and Galewood is 35 percent Black and 41 percent Latinx.223 Because the commentator presumes this influx to be non-White, their fear that the police cannot “keep track” means that the nonresidents will blend in with the resident non-White students, students who already need to be surveilled. The influx adds to the police’s surveillance work.

To be sure, violence drives many Black residents out of the neighborhood. In response to a comment suggesting the commentator might too lie to get into a better school district (“Maybe parents send their kids across the border so they’re less likely to get killed? I would probably do the same”),224 a commentator states incredulously:

Really? Is that what you’d do? Because a lot of us worked really hard so we wouldn’t have to raise our kids in dangerous neighborhoods. But you’re in favor of cheating other people into paying for your kid’s education . . . .225

Another commentator expresses concern about this dangerous neighborhood following Austin students: “Is there a beef with a gang and a student outside the district? No one will know until something horrible happens.”226

Some supporters of stealing education laws contrast their schools with CPS schools to claim cultural superiority. For example, a former CPS parent complains about Chicago parents who, allegedly, did not sacrifice as she did:

My family moved from Chicago to Oak Park specifically to get away from CPS and enroll in a better school system, and I don’t want

224. Maybe, Comment to ’Questionable’ Residency, supra note 148 (June 25, 2014, 1:16 PM).
225. OP Transplant, Comment to ’Questionable’ Residency, supra note 148 (June 25, 2014, 3:02 PM) (emphasis added).
resources diverted from my children by Chicago families looking to border-jump. Our “tuition” is built into the taxes we pay, and no one who lives outside our borders should be allowed to commit fraud and get a free ride.\footnote{Anna from Oak Park, Comment to \textit{Questionable} Residency, \textit{supra} note 148 (June 26, 2014, 10:35 AM).}

Similarly, while another parent expresses “great compassion for those trying to escape failing schools,” she nonetheless believes that her family’s multigenerational sacrifice and investment in the schools makes her children more worthy of access to OPRF than Austin children:

\begin{quote}
[M]any of us are holding on by fingernails to get our kids through their OP educations in which we have invested great time and treasure for decades . . . . It is not my children’s full bellies that destroyed Westside Schools, and we are eating lots of canned goods to afford ours. I have great empathy, but that is all many of us can give after funding OP schools and services for 25 years. D200 [a short form name for OPRF] is far too expensive and inefficient a charity vehicle.\footnote{Jenna Brown Russell, Comment to \textit{Residency Cases Rising}, \textit{supra} note 145, (Apr. 27, 2018, 6:06 PM).}
\end{quote}

This animosity toward Chicago and its schools permeates discussions about stealing education enforcement. For example, some commentators recognize CPS’s dysfunction, but argue that CPS’s problems are not their problems:

\begin{quote}
I now pay too damn much money to live in this town and send my kids to Oak Park schools to have someone who lives in Austin attend OP schools because Chicago is too screwed up to care enough “about the kids” to run a decent school system.\footnote{Done from Oak Park, Comment to \textit{Verify All Families}, \textit{supra} note 148 (Jan. 31, 2013, 1:55 PM).}
\end{quote}

Likewise, some supporters of stealing education laws express their resentment about their proximity to Austin, believing they are being punished as a result of the closeness. Some even argue that the proximity to Austin is the reason OPRF uniquely faces this problem:

\begin{quote}
It’s truly lazy parents in Austin who merely direct their kids to the nearest suburban school. I see no reason for OP to be punished (more so) for its proximity to Austin. I would give them props if they drove their kids back/forth to Hinsdale Central, LTHS, New Trier every day. That takes sacrifice/commitment. That would show me they truly
\end{quote}
cared. Instead they point their kids to walk a few blocks west and OP
foots the bill. That we cannot tolerate. That’s laziness.230

Even though these comments do not reference race specifically, in this
context, talking about Austin is talking about race. Sociologists have studied the
confluence of place with race in Chicagoland; a study on racial discrimination in
employment showed how Chicago area employers used job applicants’ city
addresses as racial proxies to construct racist narratives about urban Black men as
“unstable, uncooperative, dishonest, and uneducated.”231 Likewise, commentators
with concerns about stealing education seem to believe that even if you take the
student out of Austin, you cannot take the Austin out of the student.

For example, one commentator, while acknowledging a student’s reasonable
desire to attend a better school than that available in Austin, argues that the student
really would not be escaping Austin anyway:

You have a point about the kids who maybe look at their surroundings
and hop the border for what they know is better opportunity but cannot
obtain. I feel bad for those kids. But the idea that it’s safer for those kids
at OPRF is an illusion. They still have to walk through Austin. They still
have to live in Austin. How will the locals perceive the “sell-out” who
thinks he/she is better than them?232

In sum, some supporters of the stealing education apparatus make liberal use
of racial stereotypes about differences between Oak Parkers and Austin residents,
and between Oak Park and Austin. Black parents do not have the right values,
Black children are unprepared, and Austin, as a Black neighborhood, is culturally
incompatible with Oak Park culture. These stereotypes show that the school
district boundary between the two communities needs to be protected not only for
reasons of school district accountability but because that boundary represents a
cultural boundary across which the two communities are incompatible.

230 muntz, Comment to Verify All Families, supra note 148 (Feb. 4, 2013, 9:53 AM).
231 Joleen Kirschenman & Kathryn M. Neckerman, “We’d Love to Hire Them, But . . . ”: The
Meaning of Race for Employers, in THE URBAN UNDERCLASS 203, 204 (Christopher Jencks &
232 Real List, Comment to ‘Questionable’ Residency, supra note 148 (June 26, 2014, 2:13 PM). To
be sure, peril may befall Austin children who must walk through Austin to attend a school not
in Austin. Carla Shedd’s ethnography of Chicago teenagers’ travels to and from school shows
that, for many teens in dangerous neighborhoods, the road to school and back home is filled
with anxieties about their physical safety. See CARLA SHEDD, UNEQUAL CITY: RACE, SCHOOLS,
created the “Safe Passage” program, which “position[s] adults along the paths that kids took to
and from school.” Id. at 20. Even with the program, however, Shedd’s work shows that there
is still “danger[ ] . . . crossing neighborhood boundaries for educational purposes.” Id.
IV. STEALING EDUCATION, HOARDING OPPORTUNITY

Supporters of stealing education laws might take issue with the above analysis, pointing to race-neutral justifications for why districts must enforce the law. Is not the problem really about school funding and the local administration of education? Is the problem really about race? Why is it not okay to restrict education only for our kids? Our taxes fund schools, and schools reflect our community's preferences and priorities, so aren't we justified in keeping those resources and control among our families and children?

Certainly, in affluent communities like Oak Park, homeowners' property tax revenue represents the bulk of per-pupil spending, while other sources represent the bulk of per pupil spending in relatively poorer communities. In Oak Park, local property tax revenue provides 79 percent of the district's revenue, and the out-of-district tuition set by the state roughly reflects the per capita contribution of local property taxes to school expenditures. For a nonresident to attend OPRF, their parent must pay over $22,000 per year. In the other direction, for a child who lives in Oak Park to attend school in CPS costs a parent about $13,000 per year. An education in Oak Park is worth more in terms of dollars than an education from a CPS school. Accordingly, Oak Park homeowners and taxpayers predictably want "their" tax dollars to only pay for "their" children. Indeed, this is


234. Table 23: Illinois Public School Per Capita Tuition Charge (PCTC) and Operating Expense Per Pupil (OEPP) by District, 2017–2018, ILL. STATE BD. OF EDUC., https://www.isbe.net/Documents/Il-Public-Schools-Per-Capita-Tuition-Charge-PCTC-Operating-Expense-PP-18.pdf?search=ttuition [https://perma.cc/AQX2-SW3T]; Finance, Budgets & Funding: Operating Expense Per Pupil (OEPP), Per Capita Tuition Charge (PCTC), and 9 Month Average Daily Attendance (ADA), ILL. STATE BD. OF EDUC., https://www.isbe.net/Pages/Operating-Expense-Per-Pupil.aspx [https://perma.cc/Z9GG-LLSQ] ("The per capita tuition charge is the amount a local school district charges as tuition to nonresident students as defined by Sections 18-03 and 10-20.12a of the School Code. The per capita tuition charge is determined by totaling all expenses of a school district . . . for the preceding school year less expenditures not applicable to the regular K–12 program (such as adult education and summer school), less offsetting revenues from state sources, except those from the Common School Fund, less offsetting revenues from federal sources except those from federal Impaction Aid, less revenues from student and community services, plus a depreciation allowance and dividing this amount by the nine-month ADA for the year.").

235. Table 23: Illinois Public School Per Capita Tuition Charge (PcTC) and Operating Expense Per Pupil (OEPP) by District, 2017–2018, supra note 234, at 156.

236. Id. at 158.
often exactly how school district representatives across the country justify the exclusion.237

Rarely do the school district officials explicitly name race as a factor in their analysis of education as property. Yet they most certainly know that school funding inextricably connects to race and class precisely because of the relationship between property and race-class residential segregation. A school district like CPS has more difficulty adequately funding its schools given its property tax base. That is, the value of the homes upon which taxes are levied is lower in CPS than they are in OPRF. Even if the tax rates were similar, reflecting a shared belief in the importance of education, the amount raised per student would be considerably less in CPS than in OPRF. OPRF officials must be aware that these differences reflect histories of racist housing development.238

Furthermore, constitutionalizing local administration of education is far from race-neutral or class-neutral given its race-class-conscious pedigree. For example, in Milliken, Michigan sought to bus children between almost all-Black Detroit and its surrounding, predominately White suburbs to effectuate desegregation in Detroit.239 Practically, the only way to achieve racial integration in Detroit was to involve surrounding White suburbs. But the U.S. Supreme Court rejected Michigan’s approach:

Boundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief, but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community 237. Baldwin Clark, supra note 23, at 410 (showing three ways in which school district officials use property taxes to justify enforcing attendance boundaries: “First, officials treat education as transferrable, such that a taxpayer, by virtue of his contribution to the school district, assigns his or her interest in public education to the children in the district. Allowing children who do not live in the district to attend the district’s schools violates this taxpayer right. Second, officials acknowledge a taxpayer’s right to use and enjoy education. Homeownership gives taxpayers control over their community’s education, such that school district officials and law enforcement officials alike treat taxpayers as fiduciaries to which they owe protection. Lastly, officials treat education as property by allowing taxpayers to lawfully exclude others, particularly through the coercive machinery of civil and criminal penalties.”).


concern and support for public schools and to the quality of the educational process.240

Likewise, the Supreme Court held in San Antonio v. Rodriguez that, while the Texas school financing scheme through property taxes led to stark inequalities between school districts, such a scheme did not violate the U.S. Constitution’s Fourteenth Amendment.241 Furthermore, the Court stated:

The merit of local control was recognized last Term . . . . Mr. Justice Stewart stated there that ‘[d]irect control over decisions vitally affecting the education of one’s children is a need that is strongly felt in our society.’ The Chief Justice, in his dissent, agreed that ‘[l]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well.’242

Both Milliken and Rodriguez correctly state that school district borders are not arbitrary or only for political convenience. But the opinions ignore how spatial borders are both physical and symbolic representations of historic and contemporary institutional racism and social stratification243 that keep people in their place physically, socially, and culturally. Borders create “geograph[ies] of opportunity,”244 in which only legitimate community members can access resources. Borders sequester opportunities and create the “racial-spatial divide,” a subordinating “social arrangement in which substantial ethno-racial inequality in social and economic circumstances and power in society is combined with segregated and unequal residential locations across racial and ethnic groups.”245

The stealing education apparatus is a key institutional mechanism of opportunity

240. Id. at 741–42. But see Goodwin Liu, Brown, Bollinger, and Beyond, 47 HOWARD L.J. 705, 719 n. 72 (2004) (arguing that although the Court in Milliken declared local control to be “deeply rooted,” the concept did not emerge until the Court’s 1972 decision in Wright v. Council of City of Emporia: “Up to that point, the most notable education cases decided by the Supreme Court not only never mentioned local control, but could hardly be characterized as deferential to local control.”).

241. Id. at 55 (“The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. We hold that the Texas plan abundantly satisfies this standard.”) (citation omitted).

242. Id. at 49 (citations omitted).


244. SHEDD, supra note 232, at 3 (footnote omitted).

245. Id. at 16.
hoarding that reinforces these physical and symbolic borders across the racial-spatial divide.

How? Stealing education laws allow for opportunity hoarding through categorical stratification between residents and nonresidents. Some of those who support these laws defend hoarding by alluding to commonly held beliefs about White supremacy and Black inferiority. These beliefs justify why one community deserves better opportunities than the other. Given the master narratives that come to define race-class groups, the distinction between resident and nonresident takes on racialized meanings because “race,” modified by “class,” has “already established understandings, practices, and relations . . . . [that provide] potent scripts and [reinforce] common knowledge.” In other words, racial stereotypes that brand poor Blackness as inferior justify the hoarding by residence because “nonresident” and “Black and poor” correspond.

The distinction between racialized residents and nonresidents allows for the hoarding of valuable resources by a racially privileged group at the expense of a racially subordinated group. Here, the resources are educational capital—a valuable set of assets that drives social mobility and future opportunities. The structure of who controls capital “at a given moment in time represents the immanent structure of the social world, i.e., the set of constraints, inscribed in the very reality of that world, which govern its functioning in a durable way,

246. See TILLY, supra note 26, at 75. Categorical inequality involves stratification among pairs of a socially relevant attribute. Id. at 8–9. For example, the attribute “race” can be described (albeit incompletely) as a category consisting of specific values, such as White/Black. Id. at 8. The attribute “resident” can be described as a category with the values resident/nonresident. Categories can be interior categories, like residence, that describe an internal structure specific to the context, and exterior categories are diffuse and occur among many contexts, like race. Id.

When interior categories match exterior categories, such as when faculty tend to be comprised of White men while adjuncts tend to be women of color, or “honors” students tend to be White while “regular” students tend to be Black, an unequal relationship between pairs in the interior category is reinforced by the exterior category. For example, when White men are perceived as more intelligent because of their race and gender, such a connection seems justified because White men tend to comprise the superior positions in interior categories, like being tenured professors (versus adjuncts), or honors students (versus students in “regular” classes). Here, as the stratification in the race-neutral category (“residence”) matches the stratification in the race category, the stratification between resident and nonresident takes on racial meaning.

247. Id. at 76.

248. See id. at 155.

249. See Pierre Bourdieu, The Forms of Capital, in HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241 (John G. Richardson ed., 1986) (“Capital is accumulated labor (in its materialized form or its ‘incorporated,’ embodied form) which, when appropriated on a private, i.e., exclusive, basis by agents or groups of agents, enables them to appropriate social energy in the form of reified or living labor.”).
determining the chances of success for practices." Within a school like OPRF, economic capital, human capital, social capital, and cultural capital abound, but are available only to children who attend that school. This structure of who controls capital in education corresponds to the larger social structure of stratification and subordination.

First, economic capital, or, more simply, money. As described above, OPRF per student spending exceeds what the state determines would be required for an “adequate” education. As the school maintains a reputation for excellence, more families want to move within the school district boundary, which then drives up property values. As property values increase, so too does property tax revenue. The more property tax revenue, the more the school district can spend per student. And so on.

Second, human capital. Samuel Bowles and Herbert Gintis argue that students in rich schools are taught how to be managers and capitalists that control the modes of production, while poor schools teach students how to be workers, occupying the bottom tiers of occupational prestige. They write:

These differences in the social relationship among and within schools, in part, reflect both the social backgrounds of the student body and their likely future economic positions. Thus, [B]lack [students] and other minorit[yers] [students] are concentrated in schools whose repressive, arbitrary, generally chaotic internal order, coercive authority structures, and minimal possibilities for advancement mirror the characteristics of inferior job situations. Similarly, predominantly working-class schools tend to emphasize behavioral control and rule-following, while schools in well-to-do suburbs employ relatively open systems that favor greater student participation, less direct supervision, more student electives, and, in general, a value system stressing internalized standards of control.

250. Id.
252. Samuel Bowles & Herbert Gintis, Schooling in Capitalist America: Educational Reform and the Contradictions of Economic Life 11–12, 130 (1976) (calling this phenomenon the “correspondence principle” by which “schooling has contributed to the reproduction of the social relations of production largely through the correspondence between school and class structure”).
253. Id. at 132.
In well-funded suburban schools like OPRF, students are taught higher level skills than students in resource-poor schools, affording them the economic and occupational mobility unavailable to students in resource-poor schools.

Third, social capital. Social capital accrues from membership in a resources-rich network, where a member of that network acquires access to information about jobs, internships, and college admissions that he might not be privy to or have access to on his own. Access to middle-income peers and their parents, for example, can offer social capital to less-resourced individuals. Derek Black argues that:

[m]iddle-income peers (and their parents) . . . bring a host of experiences, outside learning, and high expectations to schools that positively impact other students in their schools. The percentage of middle income students in a school can be more important to the educational achievement of all students in that school than any other resource or factor.

Lastly, cultural capital. Cultural capital accrues from embodying and accumulating markers that signal an individual belongs to a high-status group. One such marker is an elite high school diploma, in which graduation allows members to signal their high status and gives a student a better chance to attend elite colleges and universities than students who attended a less prestigious school. Other markers are the cultural knowledge gained by traveling abroad as part of a high school program or learning about classical literature or art in a high school class.

The claim that school district borders operate as a mechanism of opportunity hoarding does not mean that all those who live within the border have equal access to the resources being hoarded. The story is complicated. As discussed above, similar racist beliefs about Black people are weaponized against Black students already inside the school. Even when Black children enroll legally, White middle-

255. Id.
258. R. L’HEUREUX LEWIS-MCCOY, INEQUALITY IN THE PROMISED LAND: RACE, RESOURCES, AND SUBURBAN SCHOOLING (2014) (arguing that even in resource-rich suburban schools, schools deny Black and poorer families access to those resources).
class schools disproportionately subject them to harsher discipline than their White peers.259 Schools also deny Black students access to classes where teachers have high expectations260 like honors and AP classes. Students at schools like OPRF find themselves segregated into racially identifiable classes and activities, such as the majority Black football team, the majority White band, the majority Black cheerleading squad, and the majority White drill team.261

Residence, for the legally enrolled Black students, does not directly bar access to the benefits that derive from attending a school like OPRF. But the same “us versus them” discourse justifies their subordination within the school. Race shapes opportunities within the school as it does outside of the school when protecting its borders. Blackness represents outsider status, such that resident Black students are almost as much as outsiders as those who are implicated in stealing education.

The racist justifications for aggressive border enforcement—both within and outside of the school—play a key role in sustaining institutional stratification and social subordination beyond the schoolhouse. The discourse of so-called racial differences supports more than stealing education laws; it justifies many types of structural and institutional racism—racial subordination in housing, higher education, employment, politics, etc. In doing so, these arguments inherently downplay, and often dismiss, the explicit law and policy choices that created and now reinforce these inequalities. Stark inequality can feel fair and stable when you believe education is a form of property that can legitimately be withheld from those who did not “pay” for it.262 This is especially the case when racism lies shallowly beneath the surface.263

Children’s educational opportunities in K–12 set them up for a lifetime of privilege or disadvantage in many areas—health, employment, and even political participation. Indeed, stark inequality can feel fair when you think of education as

259. See supra notes 193, 196, 227.
261. See supra note 206 and accompanying text.
262. See Baldwin Clark, supra note 23.
263. Social psychologists argue that inequality based only on material resources and social power is inherently unstable. Ridgeway, supra note 43, at 3. Appeals to cultural differences “transform[] the situational control over resources and [political] power into a . . . difference between ‘types’ of people that are . . . ranked in terms of how diffusely ‘better’ they are.” Id. (emphasis omitted).]
a form of property that can legitimately be withheld from those who did not “pay” for it. What then to do?

A policy change must start with a foundational moral commitment: Every single child deserves the education now being afforded to middle-class and affluent students. Inherent in that moral commitment is that we first devise a system of education that discourages and makes it difficult for families to hoard educational opportunities from other people’s children. This means recognizing that part of the problem lies not with Austin, but squarely with school districts like OPRF. In other words, to truly attack hoarding, we must acknowledge that status matters: that those who can hoard opportunities will do so to remain at the top of the social hierarchy. Thus, to truly live out the moral commitment, those who are hoarding must give up some of those resources.

CONCLUSION

Stealing education laws violate state constitutions’ and Brown’s moral obligation to educate all children equally. The obligation is arguably strongest when racial stratification—no matter the cause—allows for racial monopolization of valuable educational resources. Residential requirements to attend a school district’s schools undermine that obligation.

The stealing education legal apparatus subordinates, “oppress[es] and disempower[s].” It works to undermine the commitment to equal access to high-quality education. It does so by allowing and encouraging communities to hoard educational resources only for their children. Racist stereotypes justify opportunity hoarding by solidifying opposition to reforms that would break old racist patterns of job segregation, denial of economic opportunity and wealth creation, and housing segregation.

The above analysis shows that vocal supporters of the laws are concerned not only with protecting tax dollars, but also with maintaining race-class stratification between school districts because of deeply held negative racial stereotypes about Black parents, Black children, and Black communities. These stereotypes suggest

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264. See Amanda Oglesby, Stealing Education: Families Fake Residency for School, ASBURY PARK PRESS (Sept. 15, 2015, 11:35 AM), https://www.app.com/story/news/education/in-our-schoo...ecting how a school district official believed that normatively “only people who are . . . supporting the property taxes . . . should be sending their children” to the district’s schools as that rule reflected the “best interest of the taxpayer.” (quoting Jackson Township School District spokeswoman Allison Erwin).


266. Ford, supra note 243, at 1844.
that students on the “wrong” side of the border do not deserve high-quality education not only because they did not “pay” for it, but also because they are racially inferior. Ultimately, far from being race-class-neutral, stealing education laws perpetuate race-class subordination justified by pernicious racial stereotypes and master narratives.
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THE UNDERREPRESENTATION OF CLD STUDENTS IN GIFTED AND TALENTED PROGRAMS: IMPLICATIONS FOR LAW AND PRACTICE

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INTRODUCTION

According to the U.S. Department of Education’s Office of Civil Rights (OCR), gifted and talented programs offer special educational opportunities, such as enhanced curricula to students who demonstrate “a high degree of mental ability” or an “unusual physical coordination, creativity, interest, or talent.”1 Culturally and Linguistically Diverse (CLD) students are underrepresented in gifted programs.2 Although this group makes up eleven percent of the students in schools offering gifted programs, fewer than three percent of gifted students nationwide are CLD students.3

State and local gifted identification policies contribute significantly to the underrepresentation of CLD students in gifted education.
programs.\textsuperscript{4} The second section of this article identifies several such identification barriers.\textsuperscript{5} The third section discusses practices that state and local education agencies, such as school districts, can adopt to counteract this lack of representation.\textsuperscript{6} The final section analyzes legal strategies to compel such action.\textsuperscript{7}

II. STATE AND LOCAL IDENTIFICATION POLICIES THAT CAUSE UNDERREPRESENTATION OF CLD STUDENTS

Due to the minimal role the federal government has played in the development of gifted education, state and local agencies have taken the lead in this area.\textsuperscript{8} Twenty-eight states have mandates for identifying and providing services to gifted students, while four states require only identification.\textsuperscript{9} Although some states dictate identification and/or services through state policy or law, school districts generally have significant flexibility to establish criteria for these matters.\textsuperscript{10} The remainder of this section discusses the ways in which state and local gifted identification policies may contribute to the underrepresentation of CLD students.

A. Definitions of Giftedness

The definitions used for identifying giftedness is one factor that has contributed to the underrepresentation of CLD students in gifted programs.\textsuperscript{11} According to the report \textit{2014-2015 States of the States in Gifted Education},\textsuperscript{12} twenty-eight states have mandates for identifying and providing services to gifted students, while four states require only identification.\textsuperscript{13} Although some states dictate identification and/or services through state policy or law, school districts generally have significant flexibility to establish criteria for these matters.\textsuperscript{14} The remainder of this section discusses the ways in which state and local gifted identification policies may contribute to the underrepresentation of CLD students.


\textsuperscript{5} See infra Part II.

\textsuperscript{6} See infra Part III.

\textsuperscript{7} See infra Part IV.

\textsuperscript{8} Donna Y. Ford et al., \textit{Culturally and Linguistically Diverse Students in Gifted Education: Recruitment and Retention Issues}, 74 EXCEPTIONAL CHILD. 289, 290 (2008).


\textsuperscript{10} Id. at 23.

\textsuperscript{11} Valentina I. Kloosterman, \textit{The Schoolwide Enrichment Model: Promoting Diversity and Excellence in Gifted Education}, in \textit{REACHING NEW HORIZONS: GIFTED AND TALENTED...
Gifted Education, thirty-seven responding states had their own definitions of giftedness.\textsuperscript{12} Most of these states had definitions that embraced academics or intellect: thirty-four states included “intellectually gifted”; twenty-four states included “academically gifted”; twenty-four states included the “performing/visual arts”; twenty-one states included “creatively gifted”; and twenty states included “specific academic areas.”\textsuperscript{13} Definitions of giftedness that emphasize academics or intellect may serve as a barrier to the recruitment of CLD students because these qualities are more aligned with middle-class, White-American values and resources.\textsuperscript{14}

B. Identification Assessment Instrumentation

The use of intelligence quotient (IQ) tests and other traditional standardized test methods as the sole measure for identifying giftedness also has a detrimental impact on CLD students.\textsuperscript{15} One problem with these tests is that they are primarily dependent on English oral and written language.\textsuperscript{16} If CLD students are forced to take tests in a language in which they are not yet proficient, they may be unable to demonstrate their abilities and achievements.\textsuperscript{17} This problem is especially true when the tests favor highly verbal students.\textsuperscript{18}

Traditional measures of academic achievement might also contribute to the underrepresentation of CLD students in gifted programs because they are often culturally biased.\textsuperscript{19} A test is defined as biased if

\textsuperscript{12} State of the States in Gifted Education, supra note 9, at 27.
\textsuperscript{13} Id.
\textsuperscript{14} Ford et al., supra note 8, at 293–94.
\textsuperscript{15} Kloosterman, supra note 11, at 182.
\textsuperscript{16} Id. (noting that the assessment “should always take into account the cultural and linguistic background of the child and should be conducted in the student’s native language”).
\textsuperscript{18} Donna Y. Ford, The Underrepresentation of Minority Students in Gifted Education: Problems and Promises in Recruitment and Retention, 32 J. Special Educ. 4, 8 (1998).
\textsuperscript{19} See Jaime A. Castellano, Renavigating the Waters: The Identification and Assessment of Culturally and Linguistically Diverse Students for Gifted and Talented Education, in Reaching New Horizons: Gifted and Talented Education for Culturally and Linguistically Diverse Students 94, 94, 99–100, 110 (Jamie A. Castellano & Eva I. Díaz eds., 2002) (noting that “most of the identification procedures used” are “really a measure of conformity to middle class academic values and achievement” resulting in the “exclu[sion]”
it “systematically underpredicts or overpredicts” for any one group.\textsuperscript{20} 
Tests that are insensitive to the linguistic and cultural backgrounds of the students taking them place CLD students at a disadvantage.\textsuperscript{21} Due to differential socialization experiences, different cultural groups tend to have “different distributions of style,” resulting in abilities or achievements being “confounded with styles because the person scoring the material will generally be unable to separate stylistic preference from the abilities or achievements supposedly being measured by the tests.”\textsuperscript{22}

Moreover, CLD students’ results on traditional measures of achievement have questionable validity.\textsuperscript{23} When CLD students who are still in the process of learning English are tested in English, their proficiency in English is also tested, irrespective of the content or objective of the assessment.\textsuperscript{24} These students may have the content knowledge and the cognitive ability needed to perform successfully on assessment tasks, but are not yet able to demonstrate in English what they know.\textsuperscript{25} Thus, the use of standardized assessments may yield invalid results for CLD students.

\textsuperscript{20} Sternberg, supra note 17, at 105–06 (discussing the “challenge” students face when “forced to take tests in a language that is not fully their own”).
\textsuperscript{21} See Castellano, supra note 19, at 100 (noting that standardized tests discriminate against students whose linguistic and perceptual orientation . . . and cultural or social backgrounds differ from the norm group – White, middle class, native-English-speaking populations’); Emilia C. Lopez, Identifying Gifted and Creative Linguistically and Culturally Diverse Children, in CREATIVITY AND GIFTEDNESS IN CULTURALLY DIVERSE STUDENTS 125, 125–26 (Giselle B. Esquivel & John C. Houtz eds., 2000) (discussing the “importance of identifying” CLD students in order to “cultivate and nurture” their gifted abilities because they are “directly influenced by their cultural background”).
\textsuperscript{22} Sternberg, supra note 17, at 115. See James C. Kaufman, Using Creativity to Reduce Ethnic Bias in College Admissions, 14 REV. GEN. PSYCHOL. 189, 194 (2010).
\textsuperscript{23} Lopez, supra note 21, at 129.
\textsuperscript{24} Annela Teemant, ESL Student Perspectives on University Classroom Testing Practices, 10 J. SCHOLARSHIP TEACHING & LEARNING 89, 90 (2010) (noting that students feel they are “forced into demonstrating knowledge in a language over which they have only partial . . . control”) (citing Elizabeth Bernhardt et al., Assessing Science Knowledge in an English/Spanish Bilingual Elementary School, 4 COGNOSOS 4, 6 (1995)).
\textsuperscript{25} Id. at 92, 96 (discussing the concept that CLD students feel their content knowledge is “trapped” in their native language in such a way that they could not adequately access that knowledge to demonstrate mastery in test situations” and how current test practices “fail to ‘capture’” CLD students’ content knowledge).
C. Teacher Referrals

In addition, teacher referral policies contribute to the underrepresentation of CLD students in gifted programs. Specifically, teachers systematically under-refer CLD students for gifted services. This finding is problematic because teacher referrals serve as gatekeepers, opening or closing doors to gifted education classrooms.

There are several reasons why teachers fail to identify CLD students as gifted. The first stems from the deficit-thinking paradigm: Some teachers have negative stereotypes and inaccurate perceptions about the abilities of CLD students, which lead to low expectations. Second, teachers are more effective at identifying giftedness among students with whom they are culturally similar. The majority of teachers are White, which results in teachers more effectively identifying giftedness in White students and less effectively identifying giftedness in CLD students. Finally, these White teachers might fail to identify CLD students because they lack intercultural competency. Specifically, these teachers may have low levels of awareness of the cultural and linguistic behaviors of potentially gifted CLD students, insensitivity to the differences within and among groups, and an inability to recognize “gifted behaviors” exhibited by CLD students.

III. RECOMMENDATIONS FOR CORRECTING IDENTIFICATION POLICIES

A. Definition of Giftedness

If states and school districts are committed to improving the representation of CLD students, they should develop broader, more encompassing understandings and definitions of giftedness. For example, states should do away with static definitions and theories of giftedness that fail to consider cultural differences and disregard ways in which

26 Ford et al., supra note 8, at 295.
27 Id.
28 Id.
29 Id. at 293.
30 Id. at 295.
31 Brian L. Wright et al., Ignorance or Indifference? Seeking Excellence and Equity for Under-Represented Students of Color in Gifted Education, 4 GLOBAL EDUC. REV. 45, 57–58 (2017) (“Educators who lack cultural competence risk misinterpreting or worse undermining the educational experiences of Black and Hispanic students, and thus contribute to segregated gifted education programs”).
students’ backgrounds influence their opportunities to show skills and abilities. Because giftedness is a social construct, definitions and views of giftedness vary among cultures. Thus, policymakers should look to theories that are inclusive, comprehensive, and culturally sensitive. Donna Ford and associates suggest two possible alternatives. The first is Robert Sternberg’s Triarchic Theory of Intelligence (also called the Theory of Successful Intelligence), which presents intelligence as multidimensional and dynamic and asserts that no type of intelligence or talent is superior to another. The second is Howard Gardner’s Theory of Multiple Intelligences, which differentiates among seven types of intelligences: linguistic, logical-mathematical, interpersonal, intrapersonal, bodily kinesthetic, spatial, musical, and natural.

Definitions of giftedness should also be built around the concept of talent development because this conceptualization recognizes that many CLD students, unlike their White counterparts from high socioeconomic backgrounds, have had inadequate opportunities to develop and perform at high academic levels. Considering talent development as part of the definition is also important because it may help draw attention to underachievers. Programs guided by definitions that equate giftedness with high achievement or demonstrated performance will overlook gifted underachievers in the recruitment process. This oversight has key implications for CLD students, many of whom have lower grades and achievement scores than their White classmates. Further, the concept of talent development acknowledges that some CLD students face greater barriers in life than others due to the impact that discrimination and prejudice have on their motivation, ambition, and

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32 Ford et al., supra note 8, at 301 (discussing the importance of “multicultural preparation for educators” to increase the “recruitment and retention of CLD students in gifted education”).
34 Ford et al., supra note 8, at 299.
35 Id.
36 Id.
37 Id.
38 See, e.g., Ford et al., supra note 8, at 298; Donna Y. Ford & Tarek C. Grantham, Providing Access for Culturally Diverse Gifted Students: From Deficit to Dynamic Thinking, 42 THEORY INTO PRACT. 217, 219 (2003).
39 Ford et al., supra note 8, at 299.
40 Id. at 298–300; Donna Y. Ford & Tarek C. Grantham, Providing Access for Culturally Diverse Gifted Students: From Deficit to Dynamic Thinking, 42 THEORY INTO PRACT. 217, 219 (2003).
41 Ford et al., supra note 8, at 300.
mental health.\textsuperscript{42} Discrimination increases the risk of low achievement, academic disengagement, school failure, and other social difficulties.\textsuperscript{43}

B. Identification Assessment Instrumentation

School districts should also adopt culturally sensitive instruments that have minimal cultural and linguistic demands.\textsuperscript{44} The instruments with the most potential for assessing the strengths of CLD students are nonverbal tests of intelligence such as the Naglieri Non-Verbal Ability Test, Universal Non-Verbal Intelligence Test, and Raven’s Progressive Matrices.\textsuperscript{45} These assessments are considered less culturally loaded than traditional assessments and thus may be more effective means of evaluating cognitive strengths of CLD students.\textsuperscript{46} These nonverbal assessments also provide CLD students with opportunities to exhibit their intellect and skills without the confounding impact of language, vocabulary, and academic experience.\textsuperscript{47}

It is important to not rely on one measure alone. Rather, data collection of students who are being assessed for giftedness should be multidimensional and gathered in a variety of ways.\textsuperscript{48} Information should be collected verbally, such as through interviews, focus groups, and conversations, along with illustrative measures such as observations, writing, and performances.\textsuperscript{49} In implementing verbal data collection with CLD students who are not yet proficient in English, educators may have to use appropriately trained interpreters or adopt instruments translated into students’ dominant language.\textsuperscript{50} Further, the educators involved in gifted identification should gather both subjective and objective information, keeping in mind associated advantages and disadvantages of both.\textsuperscript{51} Among the informal cognitive and academic measures recommended to assess potentially gifted CLD students are observation scales, checklists, inventories, product judgments,

\textsuperscript{42} Id. at 298.
\textsuperscript{43} Id.
\textsuperscript{44} Id. at 300.
\textsuperscript{45} Id.
\textsuperscript{46} Ford et al., supra note 8, at 300.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{51} Id. at 239.
interviews, portfolios, biographical data, and case studies. Additionally, informal creativity measures can be used as an additional source of assessment data with CLD students. Such methods of assessing creativity include divergent thinking tests, rated creative products, problem solving tasks, self-report inventories, checklists, and rating scales.

It may also be helpful for educators to assess the language skills of potentially gifted CLD students. Formal tools are available to assess CLD students’ language-proficiency skills, but they have several limitations. Interviews, observations, language samples, and checklists are some of the informal tools recommended to gauge proficiency levels. Language assessment is important because gifted CLD students often exhibit strength in language skills. For example, linguistically gifted CLD children often “demonstrate rapid and significant growth in English acquisition.” Furthermore, empirical research suggests that bilingual students “demonstrate cognitive and creative strengths in concept formation, classification, and metalinguistic awareness.” Thus, special talents in language-related areas is a criterion that can be applied to the identification of CLD students as gifted.

C. Teacher Referrals

Finally, the teacher referral process can be improved by encouraging referrals from multiple sources. For example, the referral process should involve a wider variety of educators. Possibilities include English as a Second Language teachers, bilingual teachers, counselors, and school psychologists. Research suggests training targeted toward helping the school’s various educators to identify potentially gifted CLD students results in increased referrals related to more diverse manifestations of talents and abilities. Referral sources who are familiar

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52 Id. at 238.
53 Id.
54 Lopez, supra note 21, at 133.
55 Id. at 135 (commenting that most formal tools are “not available in languages other than Spanish and English” and they “evaluate a limited range of domains”).
56 Id. at 133–34 (noting the use of “case studies, performance-based products (e.g., tape recording of a musical performance), and portfolio assessment” for identifying students with special talents in music and sports).
57 Id. at 134.
59 Lopez, supra note 21, at 135.
60 Id. at 134–35.
61 Id. at 134.
62 Id. at 134–35.
with CLD students’ level of language proficiency and with their progress in acquiring English are often able to better identify particular strengths in language related areas.63

Families can also be effective sources for referrals because they can identify strengths that CLD students exhibit at home and in the community.64 Using family referrals requires effective communication on the part of the school.65 Educators and administrators must be proactive in building trust, open dialogue, and relationships with CLD families.66 They must ensure that CLD families understand the purposes and benefits of gifted education and are meaningfully informed of the school’s gifted program and identification policies and procedures.67

IV. Analysis of Legal Options for Correcting Identification Barriers

While the previous section has identified a number of measures that states and school districts can take to correct the policies that have contributed to the underrepresentation of CLD students in gifted education, it must be acknowledged that many local and state education agencies have failed to take action.68 Consequently, CLD students and the federal government have resorted to legal action to compel the adoption of identification policies that would improve the representation of CLD students in gifted programs. This section analyzes the possible effectiveness of three legal provisions: (1) the Equal Protection Clause; (2) Title VI of the Civil Rights Act of 1964; and (3) the Equal Education Opportunities Act of 1974.

A. Equal Protection Clause

The Equal Protection Clause, which forbids states to “deny to any person within its jurisdiction the equal protection of the laws,”69 provides a vehicle for CLD students and federal agencies to challenge identification policies that serve as obstacles to their participation in

63 Id. at 132.
64 Lopez, supra note 21, at 132.
65 Id. at 139.
66 Id. at 132.
67 Id.
68 See Ford et al., supra note 8, at 290.
69 U.S. CONST. amend. XIV, § 1.
gifted education. For instance, courts have the authority to treat the underrepresentation of Latino students in gifted programs as a vestige of a district’s intentional, or de jure, segregation. Such findings would make it difficult for school districts to justify the use of identification policies, such as standardized test scores, that contribute to this problem.

An analysis of desegregation jurisprudence supports this assertion. In Brown v. Board of Education,\(^{70}\) the Supreme Court ruled that the de jure, or official, segregation of Black students violated the Equal Protection Clause.\(^{71}\) The Court extended the holding of Brown to Latino students in Keyes v. School District No. 1, Denver.\(^{72}\) In Green v. County School Board of New Kent County, Virginia,\(^{73}\) the Court held that school districts had a heavy burden to justify ineffective desegregation strategies if more effective measures were available.\(^{74}\) The Court also established a standard, known as the Green factors,\(^{75}\) for determining when school districts had achieved constitutional compliance and could thus be released from their desegregation decrees. Districts had to achieve desegregation to the extent practicable with respect to facilities, faculty, staff, student body, extracurricular activities, and transportation.\(^{76}\) In addition to the Green factors, some courts have considered other indicia, including gifted education.\(^{77}\)

It follows that courts have the authority to require school districts to take affirmative action to correct the de jure segregation of Latino students from gifted education. In accordance with this authority, courts could order school districts to abandon the use of standardized tests that contribute to their exclusion from gifted education. Nonetheless, in Keyes v. Congress of Hispanic Educators,\(^{78}\) the court refused to extend a desegregation decree over the Denver school system to address the underrepresentation of Latino students in the school system’s gifted programs. The plaintiffs acknowledged that the Denver system had

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\(^{70}\) 347 U.S. 483 (1954).

\(^{71}\) Id. at 495.


\(^{73}\) 391 U.S. 430 (1968).

\(^{74}\) Id. at 439.

\(^{75}\) Id. at 435. See Freeman v. Pitts, 503 U.S. 467, 486 (1992) (applying the “Green factors”).

\(^{76}\) Green, 391 U.S. at 435.

\(^{77}\) See Goodwine v. Taft, No. C-3-75-304, 2002 WL 1284228 at *3 (S.D. Ohio Apr. 15, 2002) (considering “student achievement, student discipline, assignment of students to special education classes, honors classes and gifted programs or graduation rates” in addition to the Green factors).

\(^{78}\) 902 F. Supp. 1274 (D. Colo. 1995).
achieved compliance with the Green factors, but argued that racial disparities in the gifted programs showed that the system was still unconstitutionally segregated. The court rejected this claim because it had never found that the racial and ethnic disparities in the district’s gifted programs were the result of the district’s prior discriminatory actions. Additionally, there were no findings of any new discriminatory conduct that caused Black and Latino students to be underrepresented in gifted programs. In fact, the court observed that school officials had adopted reasonable procedures to improve its identification of Latino gifted students, including parent inventories and peer nomination. As a result of these strategies, the participation of Black and Latino students in Denver’s gifted programs increased. For these reasons, the court refused to extend its desegregation order to address the underrepresentation of Latino students in gifted educational programming.

The U.S. Department of Justice also has the authority to address the underrepresentation of Latino students in gifted education programs through voluntary consent decrees with school districts to eliminate the vestiges of de jure segregation. In United States v. Midland Independent School District, the department exercised this power. In 1999, the parties entered into a consent decree, which required the district to provide “staff development for bilingual education faculty on identifying and enrolling [gifted, limited-English-proficient] students, including use of the portfolio approach used to identify students for the elementary [gifted] program.” As a result of the district’s compliance with the consent decree, minority enrollment in its gifted education program increased. The court found that the district had achieved unitary status (i.e., eliminated the vestiges of its past segregation to the extent practicable) and dismissed the case in 2002.

79 Id. at 1282.
80 Id.
81 Id.
82 Id. at 1300.
83 Id.
84 Keyes, 902 F. Supp. at 1300, 1307.
85 See Randolph D. Moss, Participation and Department of Justice School Desegregation Consent Decrees, 95 YALE L.J. 1811, 1818–21 (1986).
87 Id.
89 Id.
Nevertheless, it is highly unlikely that Latino students can avail upon the federal judiciary or the Department of Justice to correct their underrepresentation in gifted education programs that is the result of de jure segregation in the present time. The federal courts are rapidly dismantling their desegregation decrees, and the Department of Justice, under President Donald Trump has not indicated a willingness to advance the educational interests of Latino students.

CLD students who do not live in de jure segregated school districts can also mount challenges to their underrepresentation in gifted programs pursuant to the Equal Protection Clause. The success of these claims would depend upon the level of judicial scrutiny. In McFadden v. Board of Education for Illinois School District U-46, the court, applying strict scrutiny review, invalidated a gifted education program, which segregated Latino students in their core academic classes. Strict scrutiny is the highest standard of judicial review and the most difficult for a governmental entity to establish. This test required the school district to prove that its racial classification was “narrowly tailored” to satisfy a “compelling governmental interest.” The district claimed that it operated a “separate, segregated” gifted program for Latino students because they were not sufficiently proficient in English to perform well in the regular gifted program classes. Students chosen for the “School within a school” (SWAS) program were identified by scoring ninety-two percent or above on the Measurement for Achievement (MAP) test, a standardized achievement test. The court rejected the use of the MAP

91 See Charlie Savage, Justice Dept. to Take On Affirmative Action in College Admissions, N.Y. TIMES (Aug. 1, 2017), https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html (discussing the Justice Department’s “internal announcement” to investigate intentional race-based discrimination in college admissions which has been viewed as “targeting admissions programs that can give members of generally disadvantaged groups, like black and Latino students, an edge over other applicants with comparable or higher test scores”); Vivian Yee, Affirmative Action Policies Evolve, Achieving Their Own Diversity, N.Y. TIMES (Aug. 5, 2017), https://www.nytimes.com/2017/08/05/us/affirmative-action-justice-department.html (noting that Justice Department signaled to have marshal lawyers “to investigate and perhaps sue colleges over ‘intentional race-based discrimination’ . . . favoring blacks and Latinos”).
94 McFadden, 984 F. Supp. 2d at 897.
95 Id. at 898.
96 Id.
test in this fashion because there were less discriminatory means of identifying gifted children, such as measuring intelligence non-verbally through tests that were culturally neutral with language supports for CLD students.\textsuperscript{97}

It is important to recognize that District U-46 was the only district in the United States to operate a separate gifted program for Latino students.\textsuperscript{98} Because the district had “singled out” Latino students to be treated in this manner, the court found that the school district had operated the program with racially discriminatory intent, which triggered strict scrutiny analysis.\textsuperscript{99} Without evidence of such intent, other courts would probably apply a rational basis analysis, which is a much more favorable standard for governmental entities.\textsuperscript{100} Under this standard of review, discriminatory treatment will be held constitutional, as long as the classification is rationally related to a legitimate governmental objective.\textsuperscript{101}

As \textit{Doe v. Commonwealth of Pennsylvania} demonstrates, school districts can justify the use of gifted identification policies that discriminate on the basis of scores on standardized assessments under the rational basis test.\textsuperscript{102} In this case, a high school student claimed that a school district violated the Equal Protection Clause by using a minimum cutoff score on a standardized aptitude test to determine admission into gifted classes.\textsuperscript{103} The court found that the testing policy was rationally related to the legitimate goal of identifying gifted children.\textsuperscript{104} While the use of minimum cutoff scores was not the best available method, the court could not conclude that it was unreasonable.\textsuperscript{105} Thus, the Equal Protection Clause is an ineffective legal tool for plaintiffs who are trying to challenge gifted identification policies that negatively impact CLD students.

\textsuperscript{97} Id. at 898, 900.
\textsuperscript{98} Id. at 898.
\textsuperscript{99} Id. at 902.
\textsuperscript{101} See Erwin Chemerinsky, \textit{The Rational Basis Test Is Constitutional (and Desirable)}, 14 GEO. J.L. & PUB. POL’Y 401, 402 (2016).
\textsuperscript{102} 593 F. Supp. 54, 57 (E.D. Pa. 1984).
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
B. Title VI of the Civil Rights Act of 1964

At one time, Title VI of the Civil Rights Act of 1964 seemed to provide a more promising vehicle for CLD students who wished to challenge the discriminatory effects of standardized assessments on their access to gifted programs. Section 601 of this statute prohibits entities that receive federal funding from discriminating on the basis of race, color, or national origin. The Supreme Court interpreted the statute as requiring plaintiffs to prove discriminatory intent.

However, Section 602 authorizes federal agencies to adopt regulations to enforce Section 601. In response to this authority, the U.S. Department of Education implemented regulations that prohibits recipients of federal funding from taking actions that had a disparate impact on protected groups. Several federal appellate courts held that plaintiffs have a private right of action to enforce the regulatory provisions that prohibited disparate impact against protected classes. In analyzing these claims, the courts applied the disparate impact analysis used in Title VII employment. First, the plaintiffs had to establish a prima facie case of disparate impact. If the plaintiffs established disparate impact, the burden shifted to the defendants to show that the challenged practice was justified. If the defendants met this burden, the plaintiffs would have to identify alternative practices that had less discriminatory

106 42 U.S.C. § 2000d (2017) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).


108 42 U.S.C. § 2000d-1 (2017) (“Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of [§ 601] of this title . . . by issuing rules, regulations, or orders of general applicability . . .”).

109 34 C.F.R. § 100.3(b)(2) (2017) (“[A recipient of federal funding] may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.”).

110 See, e.g., City of Chicago v. Lindley, 66 F.3d 819, 828–29 (7th Cir. 1995); New York Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995); Elston v. Talladega Cty. Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993); Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985); Larry P. v. Riles, 793 F.2d 969, 982–83 (9th Cir. 1984).

111 Powell v. Ridge, 189 F.3d 387, 393 (3d Cir. 1999).

112 Id.

113 Id. at 393–94.
impact on the protected class, or show that the defendants’ justifications were a pretext for discrimination.\footnote{114 Id. at 394.}

\textit{Larry P. v. Riles} best illustrates how CLD students could have used the implementing regulations to challenge the use of standardized assessments in placement in gifted programs.\footnote{115 793 F.2d 969 (9th Cir. 1984).} In \textit{Larry P.}, the Ninth Circuit ruled that the California school system’s requirement that students who obtained IQ test scores of seventy points or less be placed in classes for the educationally mentally retarded (E.M.R.) violated Title VI.\footnote{116 Id. at 976, 983.} The plaintiffs established a \textit{prima facie} case by showing that Black children scored ten points lower on the placement tests than White students, while the percentage of Black children in E.M.R. classes was significantly higher than the percentage of whites, and the scores were used to remove Black students from regular education classes and place them in E.M.R. classes.\footnote{117 Id. at 982–83.} The court then rejected the defendants’ claim that the IQ test had been validated for the purpose of predicting the educational performance of students.\footnote{118 Id. at 983.} The question of predictive validity was not whether the IQ test generally predicted the educational performance of students, but whether the test predicted that Black students who scored at or below seventy points on an IQ test could not learn in the general education curriculum.\footnote{119 Id. at 980.}

Similarly, CLD students could have asserted that gifted education policies that relied on standardized tests violated Title VI’s implementing regulations under a disparate impact theory. CLD students would have established a \textit{prima facie} case by showing that the reliance on standardized tests caused them to be underrepresented in gifted classes. As shown in Section II of this article, standardized tests have served as a major barrier to CLD-student access to gifted education.\footnote{120 See supra Section II.} By contrast, defendants would have had a difficult time establishing an educational necessity for the use of standardized tests because of their questionable validity.\footnote{121 See Sternberg, supra note 17, at 115 (discussing the validity issues caused by assessing the giftedness of CLD students with assessments in English); Lopez, supra note 21, at 129 (noting the “questionable validity” of “normed cognitive and academic tools” for CLD students because their scores may “reflect English-language knowledge instead of academic or cognitive functioning”).} Because these tests are generally in English, they
may fail to measure the cognitive ability of CLD students – especially those who are not yet proficient in English.\textsuperscript{122} Even if the defendants established an educational necessity, the CLD students could have identified less discriminatory non-verbal assessments of intelligence.

Unfortunately for CLD students, the Supreme Court in \textit{Alexander v. Sandoval}\textsuperscript{123} severely hampered the effectiveness of Title VI as a litigation tool for combating the use of standardized assessments for placement in gifted programs. In \textit{Sandoval}, the Court held that Title VI did not create a private right of action for plaintiffs to enforce the statute’s implementing regulations.\textsuperscript{124} As a consequence of the \textit{Sandoval} ruling, a CLD-student plaintiff would have to prove that the standardized assessments were established with discriminatory intent to prevail under a Title VI claim.

As a result of \textit{Sandoval}, the Department of Education’s Office for Civil Rights (OCR) provides the only means for correcting school district policies that have a disparate impact on CLD-student access to gifted programs under Title VI.\textsuperscript{125} Under the administration of President Barack Obama, the Department signaled that it would take such action. In 2011, OCR entered into an agreement with the Los Angeles Unified School District (LAUSD) that, \textit{inter alia}, required the district to develop a plan “to address the disproportionate participation of . . . Hispanic students and ensure that [gifted] identification reflect[s] the demographics of a school.”\textsuperscript{126} This plan would include the following: (1) “[a]n annual analysis of [gifted] students, including proportionate number of student[s], and equity of access to inform future modification of program policies, procedures and practices”; and (2) “[p]rofessional development that embraces new constructs of giftedness that are multi-faceted, multi-cultural and multi-dimensional for various stakeholders.”\textsuperscript{127}

In 2014, OCR further indicated its commitment to addressing the underrepresentation of CLD students in gifted programs by issuing

\textsuperscript{122} Id.
\textsuperscript{123} 532 U.S. 275 (2001).
\textsuperscript{124} Id. at 293.
\textsuperscript{125} See id. at 289–90 (discussing the power of federal agencies to enforce their Title VI implementing regulations); 34 C.F.R. § 100 et seq. (2017).
\textsuperscript{127} Id.
a Dear Colleague Letter spelling out the obligations that Title VI placed on recipients of federal funds. With respect to disparate impact investigations, the OCR proclaimed that it would “consider the school district’s decision to provide a particular resource to students, such as ... a gifted and talented program, as evidence that the district believes [it] is important.” The letter also signaled OCR’s commitment by citing statistics illustrating the lack of access that CLD students had to gifted education. For instance, the letter noted that during the 2011-12 school year, schools offering gifted education programs “had an aggregate enrollment [of] 25 percent Latino, but their gifted and talented enrollment ... was ... 17 percent Latino.” The letter further observed that “the percentage of non-English language learners participating in gifted and talented programs was three-and-a-half times greater than the percentage of English language learners participating in these programs.”

However, President Donald Trump has signaled that remedying policies that result in the disparate impact of CLD students in gifted education is not a priority of OCR. In June 2017, the Department of Education indicated in an internal memo that it would scale back investigations into civil rights violations. The memo also stipulated that regional offices would “no longer be required to alert department officials in Washington of all highly sensitive complaints on issues such as the disproportionate disciplining of minority students.” Thus, it is unlikely that the Department of Education will fight against policies that limit CLD-access to gifted and talented programs.

C. Equal Education Opportunity Act of 1974

The Equal Educational Opportunity Act of 1974 (EEOA) provides the best legal means for CLD students to obtain access to gifted programs. The EEOA forbids a state from denying a person equal

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129 Id. at 9.
130 Id. at 3–4.
131 Id. at 4.
133 Id.
opportunity on the basis of national origin.\textsuperscript{135} Educational agencies can violate this statute by failing “to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.”\textsuperscript{136} In \textit{Castaneda v. Pickard},\textsuperscript{137} the Fifth Circuit established an influential three-part test for determining whether an educational agency had taken appropriate action.\textsuperscript{138} First, courts must examine the soundness of the program’s educational theory or principles.\textsuperscript{139} Second, courts must determine whether the actual practices of the program are reasonably calculated to implement the theory adopted by the program.\textsuperscript{140} Finally, courts must analyze whether the program has actually helped students overcome language barriers.\textsuperscript{141}

While the \textit{Castaneda} test grants educational agencies flexibility to address the identification policies that limit the participation of CLD students in gifted education programs, it provides no protection for agencies that fail to take action. \textit{Gomez v. Illinois State Board of Education}\textsuperscript{142} supports this assertion with respect to state-level education agencies. In \textit{Gomez}, the plaintiffs claimed that the Illinois state board of education had violated the EEOA by failing to require school districts to establish minimum standards for identifying and placing CLD students in transitional bilingual education programs.\textsuperscript{143} The district court dismissed the plaintiffs’ case for failure to state a claim.\textsuperscript{144} The Seventh Circuit reversed the district court on this ground.\textsuperscript{145} In doing so, the court rejected the defendants’ contention that the EEOA applied only to school districts, noting that the Fifth Circuit had subsequently applied the \textit{Castaneda} guidelines to the Texas school system.\textsuperscript{146}

The \textit{Gomez} court went on to observe that the application of the \textit{Castaneda} test would be less intense for state-level education agencies than their local counterparts.\textsuperscript{147} In the case of school districts, analysis

\begin{itemize}
\item \textsuperscript{135} Id.
\item \textsuperscript{136} Id. § 1703(f).
\item \textsuperscript{137} 648 F.2d 989 (5th Cir. 1989).
\item \textsuperscript{138} Id. at 1009–10.
\item \textsuperscript{139} Id. at 1009.
\item \textsuperscript{140} Id. at 1010.
\item \textsuperscript{141} Id.
\item \textsuperscript{142} 811 F.2d 1030 (7th Cir. 1987).
\item \textsuperscript{143} Id. at 1033–34.
\item \textsuperscript{144} Id. at 1034.
\item \textsuperscript{145} Id. at 1044.
\item \textsuperscript{146} Id. at 1042 (citing United States v. State of Tex., 680 F.2d 356, 370–71 (5th Cir. 1982)).
\item \textsuperscript{147} Id.
of what happened in the classroom would be appropriate. By contrast, state education agencies would be subject to a lesser standard of review because they “are obviously not directly involved in the classroom education process.” As such, state education agencies merely had to establish general guidelines for ensuring the implementation of their states’ programs. Even these general standards had to comply with Castaneda’s guidelines for determining appropriate action.

The court then applied the Castaneda test to the plaintiffs’ allegations. It concluded that the plaintiffs’ claim was not based on the first prong because the plaintiffs had no issue with the transitional bilingual educational program that the state had selected. Rather, the plaintiffs asserted that the defendants had violated the second prong of Castaneda, which related to implementation. By failing to establish minimum guidelines for identifying and placing CLD students in the program, the plaintiffs alleged that the defendants “have only gone through the motions of solving the problems of language barriers.” Because the plaintiffs had alleged that the defendants had failed to establish even minimum standards for identifying and placing CLD students, the court found that the plaintiffs had stated a valid claim, and, thus reversed the lower court’s dismissal of the complaint. As the court explained: “Although the meaning of ‘appropriate action’ may not be immediately relevant…it must mean something more than ‘no action.’”

However, the Supreme Court seemed to limit the scope of a statewide remedy in Horne v. Flores. In this case, English Language-Learner (ELL) students and their parents from the Nogales Unified School District (Nogales) claimed that the state of Arizona violated the EEOA by failing to take appropriate action to overcome language barriers. A federal district judge ruled that the state had violated the

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148 Gomez, 811 F.2d at 1042.
149 Id.
150 Id.
151 Id. at 1041.
152 Id. at 1042.
153 Id.
154 Gomez, 811 F.2d at 1042.
155 Id. at 1042–43.
156 Id. at 1043.
157 Id.
159 Id. at 439–41.
EEOA and applied the declaratory judgment statewide. The Supreme Court reversed, finding that a statewide remedy was unwarranted. The Court pointed out, *inter alia*, that there were no factual findings that any school district other than Nogales had failed to provide equal educational opportunities to ELL students. Thus, *Horne* suggests that the plaintiffs could not prevail on a statewide EEOA claim in the absence of a statewide deprivation of equal educational opportunities for CLD students.

While *Horne* dramatically limits CLD challenges at the statewide level, this case still leaves open the possibility of challenges to local educational agencies, such as school districts, that fail to take action to address barriers to the participation of CLD students in gifted education. *Methelus v. School Board of Collier County, Florida* further supports this claim. In *Methelus*, the plaintiffs initiated a class action lawsuit claiming that a school board policy, which excluded persons from attending high school who were seventeen years or older and who could not graduate by the time they were nineteen years old, violated the EEOA by failing to provide foreign-born students free public education.

The court rejected the defendants’ motion to dismiss the case for failure to state a claim. As the court explained, “Plaintiffs allege that Defendants took no action—let alone appropriate action—to overcome language barriers that impeded their equal participation in public schools.” Consequently, the court decided that it did not have to look toward *Castaneda* because the plaintiffs were not asking “the Court to substitute its judgment for that of the School District’s in terms of how to design, implement, or fund its ELL plan.” Rather, the court continued, the plaintiffs’ allegation “attacks a frontline inquiry—whether Plaintiff Children were denied access to free public education available to other non-ELL children.”

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160 *Id.* at 439.
161 *Id.* at 470–72.
162 *Id.* at 470.
163 *Id.* at 470–72.
166 *Id.* at 1269–70.
167 *Id.* at 1283 (dismissing only the Title VI claim and 42 U.S.C. § 1983 claims).
168 *Id.* at 1276 (emphasis in the original).
169 *Id.* at 1277.
170 *Id.*
Similarly, CLD students could claim that a school district’s failure to design and implement policies that failed to address the language barriers to their participation in gifted programs would violate the EEOA. At the outset, it must be acknowledged that this claim is different from Methelus in one key aspect. In Methelus, the plaintiffs alleged a lack of access to basic education programs. By contrast, the EEOA challenge to access to gifted education programs is obviously not a challenge to the denial of basic education. This distinction should not matter because of the plain language of the EEOA, which requires education agencies “to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.” This statutory language does not include a limitation to basic educational programming. Indeed, the Department of Justice’s discussion of the EEOA supports this claim. According to the Department, one type of discrimination that would violate the statute was the “exclusion of ELL students from gifted and talented programs based on their limited English proficiency.” Therefore, the failure to take action to eliminate the language barriers that block access to gifted education would violate the EEOA.

**Conclusion**

This article has shown that CLD students are underrepresented in gifted programs. State and local agencies can address this underrepresentation by addressing identification policies that cause this underrepresentation. CLD students can also take legal action to compel state education agencies and school districts to take appropriate action. This article concludes that the EEOA provides the best legal vehicle for CLD students to address the language barriers that keep them out of gifted education programs.

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172 Id. at 1269.
175 See supra Part II.
176 See supra Part III.
177 See supra Part IV.
178 See supra Part III-C.
Test Unrest: New York City's Examination High Schools

Aaron J. Saiger

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New York City is experiencing one of its periodic flare-ups over its eight selective "examination" high schools. As in the past, attention has focused upon what a United Federation of Teachers task force calls "the profound inequity in the admissions demographics" at the exam schools. UFT, Redefining High Performance for Entrance into Specialized High Schools 3 (March 2014). This inequity results from these schools' practice of admitting students based exclusively upon scores on the standardized Specialized High Schools Admissions Test. Because the exam schools now function as one component in the broader current system of citywide high school choice, however, it is possible to argue that their test-only admissions in fact enhance the diversity of the system overall, their racial demographics notwithstanding.

The current challenge to the exam schools proceeds on two fronts. In 2012, a team headed by lawyers from the NAACP Legal Defense and Educational Fund filed a complaint with the United States Department of Education, arguing that the City's use of the test violates federal civil-rights law. Meanwhile, Bill de Blasio campaigned against the primacy of the test when he ran for mayor in 2014. Since his victory, he and the new city council, along with allies in the state legislature, have continued to agitate for change.

Their opponents are agitated too. The council's December 2014 hearing on the subject elicited 686 pages of passionate written testimony on both sides.

None of the eight exam schools' student bodies come close to approximating the racial makeup of the city as a whole, whose public school student population is about 28 percent Black, 40 percent Hispanic, and 15 percent each white and Asian. Racial inequities are particularly stark at Stuyvesant High School and the Bronx High School of Science, perennially the most popular of the exam schools and therefore the schools that require the highest scores for admission. (See table on page 17.) Only seven Black students were offered seats in Stuyvesant's 2014 freshman class, of roughly eight hundred. That's seven kids, not seven percent.

(Continued on page 16)
Test Unrest

CONT'D FROM 1

In light of this, the Fund’s complaint, a bill pending in the state legislature, a resolution in the city council in support of that bill, and a raft of testimony and policy reports argue that the exam schools’ exclusive reliance on the Specialized High Schools Admissions Test should be abandoned. They urge instead a multidimensional approach. Assembly bill 9979, submitted June 5, 2014, proposes requiring exam schools to use “multiple measures of student merit including the grade point averages of applicants, school attendance records, school admission test scores, and state test scores.” The Fund’s complaint and an associated report adds that schools might supplement these factors by considering “interviews, essays, recommendations from school staff, and portfolio assessments” as well as students’ “geographical location.” Community Service Society, The Meaning of Merit: Alternatives for Determining Admission to New York City’s Specialized High Schools 12-13 (2013).

“What has been done will be done again”

Little of this is new. Indeed, the similarities to the 1971 controversy over admissions tests are striking. The City then had three selective high schools, Stuyvesant, Bronx Science, and Brooklyn Technical. Each had long used such tests. In the electric atmosphere immediately following the racially charged teachers’ strike of 1968, critics charged that those exams were “culturally oriented” and “screened out” black and Puerto Rican students who could succeed at the school[s].” M.S. Handler, Bronx High School of Science Accused of Bias in Admissions, New York Times, Jan. 22, 1971, at 44. Then-Schools Chancellor Harvey Scribner was prepared seriously to entertain such claims. Leonard Buder, Board Asks Defeat of a Bill Retaining 4 Specialized Schools, New York Times, May 17, 1971, at 26. Proposals were made that year in both the city council and in some community school boards for the replacement of the test with a system of teacher recommendations, a suggestion right in line with positions being advocated today. Handler, supra; Floyd Hammack, Paths to Legislation or Litigation for Educational Privilege, 116 Amer. J. Educ. 371, 377 (2010).

Floyd Hammack’s fine historical account reminds us that a direct line connected this dispute with the 1968 strike. The strike ignited over policies for teacher placement and retention. Advocates for minority groups argued that there should be “responsive and respectul of a community’s customs and values.” The unionized teachers, many of them white and Jewish, thought these “responsive and respectful” criteria would be deployed to deprive them of their positions. They preferred to maintain what they understood to be the schools’ “objective definitions of merit that were based on measures of individual performance.” To the teachers and their allies, complaints in 1971 about the “cultural orientation” of admissions tests for students felt like a “direct replay” of the claims about teachers over which they had struck. Id. at 379-380. They weren’t wrong: advocates of community control had included among their 1968 demands leading up to the strike that the exam schools be converted to “community schools, open to all.” Heather MacDonald, How Gotham’s Elite High Schools Escaped the Leveller’s Axe, 9 City J. 68, 71 (Spring 1999).

Defenders of “objective” measures therefore mobilized. In classic New York City fashion, fearful of a wobbly Schools Chancellor, they decided to outflank him in Albany.

The result was a 1971 state statute known (then and today) as Hecht-Calandra, after the Bronx Assemblyman and Senator who sponsored it. Hecht-Calandra requires that admission to the examination schools “be solely and exclusively” gained “by taking a competitive, objective and scholastic achievement examination.” Laws of New York, Chapter 1212 §12 (1971). (Schools for the arts are treated separately.) A provision in the Assembly’s version of the bill that would have reserved 14 percent of seats for disadvantaged students through a “nonexamination recommendation process” met with fierce resistance and was stricken in the State Senate. Hammack, supra at 380. The bill as amended passed over the objection of some of the same institutional players objecting to the Specialized High Schools Admissions Test today: the Mayor, the State Board of Regents, and the City Board of Education. MacDonald, supra at 73.

Nor do the historical parallels end there. The mid-1970s saw an investigation by the federal Office of Civil Rights, spurred by the same kind of racial imbalance in enrollment that the Fund cites in its 2012 complaint. "The schools' defenders,” reported the Times in 1977, “view the Federal investigation into how the stiff entrance examinations are validated and graded as a threat to the preservation of high-quality education for the city’s academically superior students."

City principals are more circumspect these days than the Bronx Science principal, Dr. Alexander Taffel, was in 1971 when he supported his school's stiff entrance exams publicly and vigorously. Handler, supra. But the defenders' argument is frequently advanced not only by individual alumni of the exam schools, but their alumni associations. Such claims pervade the Council's contemporary hearing testimony and comments posted in online fora.

**Some things new under the sun**

In some respects, little has changed since the seventies but the jargon. We talk today about whether tests are "reliable" and "valid"; the Fund's complaint at some length emphasizes that the Specialized High Schools Admissions Test has not been shown to be either. Such psychometric lingo was not current in the early 1970s. But the basic idea—that plenty of kids not among the tippy-top scorers are as capable as those who are admitted of doing the work and benefiting from the program—has not changed. Similarly, a lot of the fire directed at the test is about the advantages enjoyed by those who can afford to engage the expensive services of a large and growing test preparation industry. It is plausible that these advantages are genuine, although they are of unknown magnitude. Still, this argument remains just the instantiation in today's consumer culture of the longstanding claim that the tests are "culturally oriented."

But a few things are genuinely new. First of all, Hecht-Calandra mandates test-only admissions by name only for three non-arts exam schools that existed when it was passed: Stuyvesant, Bronx Science, and Brooklyn Tech. It also applies to "such further schools which the city board may designate from time to time." Mayor Michael Bloomberg, after he secured mayoral control of City schools, used that authority to establish five more such schools: the High School for Mathematics, Science and Engineering at City College; The High School of American Studies at Lehman College; the Queens High School for the Sciences at York College; Staten Island Technical High School; and the Brooklyn Latin School.

These five schools, along with the original three, all continue to operate as exam schools today. Candidates for the schools, at the time that they sit for the Specialized High Schools Admissions Test (and therefore before receiving their scores), rank their preferences across all eight. Beginning with the high-scoring student, city officials then match each student with that student's most preferred choice that has not already been filled by higher-ranked applicants, until the schools are filled or the pile exhausted. The latter never happens.

All these schools are in the same category for students; but Bloomberg's use of his discretionary authority means that there are two legal categories of exams school. To abolish test-only admissions at Stuyvesant, Bronx Science, or Brooklyn Tech requires legislative change in Albany. But the City can unilaterally abolish test-only admissions at the other five exam schools. It need only revoke their designation as "specialized" to exclude them from the Hecht-Calandra mandate.

There would be substantial irony in such an action, as the racial disparities at Stuyvesant and Bronx Science in particular have been the cause célèbre, whereas the Bloomberg-created specialized schools are more racially integrated. (See table.) But the option is available, and might in some political contexts put real political pressure on Albany if exercised.

A more substantial change is that the eight exam schools are now embedded within a citywide program of comprehensive high school choice. That system requires all aspiring high school students in the City to communicate their ranked preference among all the high schools they wish to attend. High schools simul-
taneously provide ranked lists of the students whom each desire to admit. The City then matches students to schools using an algorithm, modeled upon that used to match hospitals with medical residents, that jointly maximizes students’ and schools’ preferences.

The eight exam schools are a carve-out from the standard procedure, because they make assignments based upon only student preferences, without regard for school preferences. The eight’s test-based selection process runs in parallel to the general match.

But the general match does involve school preferences, and it includes several academically selective schools. A recent census of academically selective schools in the United States lists the eight exam schools, but also fifteen schools that participate in the general match. Chester E. Finn, Jr., & Jessica A. Hockett, Exam Schools: Inside America’s Most Selective Public High Schools 211–13 (2012). These “screened” schools, each of them rigorous, popular, and generally excellent, rank their applicants by considering test scores along with factors like middle-school grades, teacher recommendations, interviews, neighborhoods of residence, and personal background. Various schools use different combinations of these factors and weight them differently. But all use multiple criteria — just as the Council’s resolution, the Fund’s complaint, and the pending bill in the Assembly would have the exam schools do.

The proliferation of selective, excellent, multiple-criteria screened schools raises important new questions about abandoning the Specialized High Schools Admissions Test in the exam schools. The most glaring is that many of the multiple-criteria schools also admit student bodies that do not reflect the demographics of City children — although they are much more representative than Stuyvesant or Bronx Science. The Fund’s complaint hedges on this issue, averring that its advocacy of multiple-measure selectivity should “in no way suggest that the complainants believe that [screened] schools are in full compliance with their federal obligation under Title VI and its implementing regulations to redress unjustified racial disparities.” Complaint at 25. There can be no doubt that the under-representation of Blacks and Latinos relative to the local population, and the overrepresentation of both whites and Asians, is endemic in the City’s academically selective high schools, regardless of admissions systems. It is likewise a pervasive problem in selective high schools nationally, Finn & Hockett, supra at 175–76, and of course in selective colleges.

Perhaps even more important, the exam schools enjoy no monopoly over selectivity or excellence. The Finn and Hockett report, when it chose a single academically selective New York school to highlight, chose not an exam but a “screened” school, Townsend Harris High. Id. at 114–121. The Newsweek and Great City School high-school rankings, upon which the Fund complaint relies in part, rank some screened schools above the exam schools.

As the liberal scholar-activist Pedro Noguera told an interviewer, “I don’t think the exam schools are that great. I would not tell a top African-American student to go to one of those schools, I would tell them to go to Medgar Evers Prep. It’s a much more supportive environment and the quality of education is better.” Eliza Shapiro, How to Address the Stuyvesant Problem, Capital New York, July 1, 2014. Others argue that truly elite schools ought not elevate academic achievement above other crucial values, such as democratic participation. Lani Guinier, The Tyranny of the Meritocracy (2015). These are contested and contestable claims; but it is certainly far from clear that the exam schools are or should be thought of as the City’s “best.”

This recasts the problem of the exam schools as one of first-order versus second-order diversity: does the City benefit more from diversity within each school or diversity among schools? On any account, the racial demographics of Stuyvesant and Bronx Science are deeply disturbing. But solutions must be weighed against their costs. Given that there are highly selective and very desirable screened schools that do use multiple measures, imposing that same system on the exam schools would, it can fairly be said, reduce the diversity of the system in its totality.

This argument gains force because the flip side of low Black and Latino enrollment in the exam schools is a corresponding overrepresentation among Asians. Many of these students are the children of immigrants or from otherwise modest backgrounds. Only two percent of Stuyvesant students are Black or Latino, but nearly half its student body receives free or reduced-price lunch.

Plausibly, children in the City’s immigrant communities, whether hailing from Asian nations or elsewhere, systematically benefit from test-only admissions. Weak English skills make it hard not only to perform on verbal tests but to impress teachers in class in ways that result in high grades and good recommendations, not to mention to shine at interviews. Securing stellar recommendations and interview slots also often requires parental involvement, which again favors informed and English-literate parents. In contrast, not only is half the Specialized High Schools Admissions Test about mathematics rather than English, but because of the way composite scores are calculated, mathematics can represent well more than half of a student’s scaled test score. The math-heavy Specialized High Schools Admissions Test can thus pick out bright kids who might underperform on other dimensions.

It would be disastrously unfair for all schools to rely only on the Specialized High Schools Admissions Test. But for some selective schools to underweigh
measures that demand English proficiency is in an important sense a pro-diversity policy.

This observation has political as well as policy implications. The impact of the City’s Asian community on the politics of testing constitutes, potentially, the other big change since 1971. Even during the debate over Hecht-Calandra, Principal Taffel reported a “substantial number of Chinese” students at Bronx Science. Handler, supra. Today, Asian Americans have more political power. They wield that power in an environment where diversity is widely understood to embrace dimensions like wealth, immigration status, and language. In such a context, the second-order diversity of a system that includes some exam-only schools may come to seem newly compelling.

The problem of the exam schools was not resolved by passing Hecht-Calandra in 1971. Nor can it be resolved by repealing Hecht-Calandra in 2015. The exam schools will remain contested turf in the shifting terrain the City’s ethnic and racial politics. More important, the conundrums the exam schools pose will continue to challenge New Yorkers to struggle over what we mean by concepts like diversity and merit. 

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CONSEQUENTIAL VALIDITY AND THE TRANSFORMATION OF TESTS
FROM MEASUREMENT TOOLS TO POLICY TOOLS

Kevin G. Welner

When used as measurement tools, tests help teachers and others reach judgments about the nature, scope, and extent of students’ learning. This information is used for summative purposes, such as grading, placement, or admission. It is also used for formative purposes, such as the tailoring of subsequent instruction. The design and validation of tests for such purposes can be difficult and even problematic, but these problems are well-known and the subject of a great deal of constructive attention. This reaction paper accordingly starts with the premise, albeit a contested premise, that when tests are used for the primary purpose of measuring the learning of individual students, they are—as a policy matter—on reasonably solid ground.

Notably, however, the enormous expansion of test administration and test use over the past couple decades has not been driven by a mere desire to better measure and understand student learning. Rather, the intent of policies like No Child Left Behind (NCLB) has been to use the measurement of student learning to drive broad policy decisions and to change the behavior of teachers, principals and others. The key object of measurement has correspondingly shifted from students to their teachers, principals, schools, and districts.

While tests have always been policy tools in an indirect or secondary sense, these recent policy shifts in using assessments have brought a parallel shift in how tests have been approached and used. What were once primarily measurement tools have now become policy levers—part of what professor Baker calls “purpose creep” (Baker, in press, this issue).

This reaction paper delves into the implications of that purpose creep, focused on one extremely important element: the use of students’ assessment scores for high-stakes teacher evaluations. Although Baker’s article covers a broader set of issues raised “when measures go public”—affecting students and schools, as well as teachers and principals—the issue of high-stakes employment evaluations has now taken center stage nationally, becoming a primary exemplar of the transformation of testing from measures to levers.
Student Tests as Teacher Evaluators

In large part because of federal pressure exercised through policies such as Race to the Top and the School Improvement Grant program (see Welner and Burris, forthcoming), there has been an enormous shift in state policies regarding the evaluation of teachers. According to a 2012 report from the “National Council on Teacher Quality,” an advocacy group that favors using students’ test scores for teacher evaluations (National Council for Teacher Quality, 2012, p. 2): “In 2009, only four states were using student achievement as an important criterion in how teacher performance was assessed. In 2012, 20 states require student achievement to be a significant or the most significant factor in judging teacher.”

The rationale for these policies is simple: past attempts to measure teacher quality have been largely ineffective. Administrative observations, the most commonly used summative evaluation method, are criticized as subjective and as applied unevenly and irregularly (Weisberg, Sexton, Mulhern, and Keeling, 2009). In contrast, evaluations based on growth in students’ standardized test scores offer three advantages: annual scores are readily available; the test scores are widely accepted as legitimate school outcomes; and the resulting numbers are perceived as objective measures.

The strong focus on students’ scores on standardized assessments is a relatively recent phenomenon. The main turning point is found in NCLB’s Adequate Yearly Progress provisions, which attached to students’ scores an escalating series of high-stakes consequences for schools and districts. Before that point, most states used standardized testing mainly for student-level evaluation and for public reporting of schools’ progress. Race to the Top and similar policies from the Obama administration have extended those stakes to teachers and principals, even while the administration’s “flexibility” waivers have eased some of the stakes faced by schools and districts (see U.S. Department of Education, 2012).

Purpose Creep and Its Implications

Two much-discussed implications of this purpose creep are explained by Campbell’s Law. As applied to education, this Law tells us that when quantitative measures such as test scores are used to make key decisions, the measures themselves are subject to corruption pressures and, in addition, the high stakes distort and corrupt teaching and student learning (see Nichols and Berliner, 2007). But beyond the weakening of tests’ measurement capacity and the often-harmful effects on classroom practice, the core meaning of tests and testing has been changing in profound ways. This is perhaps most clear from the perspective of teachers in the states that have adopted evaluation laws requiring students’ scores to play a key role in high-stakes employment decisions. For these teachers, the standardized testing of their students has now become equivalent to a job evaluation. The corollary, of course, is indeed—as Donald Campbell suggested—that the classroom instruction leading up to that standardized test is now preparation for the teacher’s job evaluation. As the test becomes a core part of the job evaluation policy, preparation for the test becomes the job itself.

Moreover, these job evaluations must feel rather arbitrary, given the research finding that teacher differences account for less than 20 percent of the variance in students’ test scores (see Hanushek, Kai, & Rivken, 1998; Rowan, Correnti, & Miller, 2002). Teachers teach and students learn; the two are connected, but they are not the same. Although this variance issue raises
concerns best thought of in terms of construct validity, the main issue raised here is one of consequential validity (Messick, 1989; Shepard, 1997), but with a twist. The policy landscape has changed a great deal in the 15 years since Shepard and others (see Green, 1998; Mehrens, 1997; Popham, 1997; Reckase, 1998) were debating whether or not consequential validity should be included within the core idea of validity. For instance, consider Mehrens’ contention that it would be “unwise” to confound “inferences about measurement quality with treatment efficacy (or decision-making wisdom)” (1997, p. 17)—a contention made in the context of tests administered for the immediate and overwhelming purpose of measuring student learning. At the time, the broader policy consequences, whether intended or unintended, were secondary to that measurement purpose.

Today, conversely and perversely, we must consider what happens when tests are transformed from being primarily measurement tools to being primarily policy levers. In particular, what happens when tests become policy levers that allocate responsibility for students’ scores to others—to teachers, educational leaders or public education systems—in rigid and largely indefensible ways? Accordingly, we are no longer really considering consequential validity as the consequences of the use of educational tests for measurement of student learning. The use has become the minion of its own consequences.

When educational assessments are used as policy levers more so than as measures of student learning, their usefulness and their merits have relatively little to do with classic notions of content validity, criterion-related validity, or even construct validity. Questions about whether, for instance, the assessments measure what they were intended to measure become subordinated to the key question of whether the policy use of the test is driving recognized goals.

One can imagine, from the perspective of a policy maker, a high-stakes assessment that is poor in validity based on traditional psychometric criteria but which is nevertheless focused on complex, applied learning. As felt at the school level, such a test would be relatively likely to drive more complex, applied instruction. Contrast this with a high-stakes assessment that is sound by the same psychometric standards but measures learning that is more superficial. As compared to the first option, it would be more likely to drive superficial instruction.

While neither of these options is ideal, the second option would be preferable if the assessment were primarily a measurement tool. If, however, the purpose of the assessment shifts to becoming primarily a policy lever, the key validity issue correspondingly shifts, and the first option becomes much more attractive. The issue is no longer whether the assessment measures what it is purporting to measure in teaching and learning contexts. It’s whether the measure as a policy tool is accomplishing what it is intended to accomplish.

Conclusion

Meaning is created by use. The all-encompassing push for test-based accountability policies in the U.S. has fundamentally changed the nature of test use. The core meaning of tests and testing has accordingly been qualitatively changed. This semiotic shift has already been felt on several fronts, but much of the fallout is likely still forthcoming. The ripples will be felt throughout the nation’s schools, making it difficult to fully comprehend what the future holds for changes in a variety of important areas: in prospective teachers’ career decisions, in teacher preparation
practices, in the development of legal liability frameworks, in collegial relationships within schools, and in continued changes to classroom practice.

Over a half-century ago, Cronbach and Meehl (1955) connected the idea of validity to the idea of “inference-making.” Those inferences, they explained, depend on how a test is used. And current policy uses are troubling. When teacher identity can predict less than 20 percent of the variance in test results, but those results are being used in policies that depend on a much greater predictive capacity, there is an inference-making problem. Validity, like meaning, arises from use.

Accordingly, the gravity of the recent transformations in test use is about much more than words or about definitions of validity. That is, good reasons may, notwithstanding those transformations, nonetheless counsel against incorporating consequential validity within the core idea of validity. But the terminology is much less important than the implications. As a policy matter, validity discussions are important because of the basic dictate that tests should be validated; important decisions shouldn’t be based on invalid instruments. Bringing consequential validity into the discussion is another way of saying that tests should not be used when the consequences of their use go against recognized goals. Reframing this to account for the new policy context, the key contention is that tests should not be used to drive policy unless the consequences of that process itself have been validated.

The measurement validity of the instrument tells us only a fraction of what we need to know. Appropriating the wording of Mehrens (1997), it's the “treatment efficacy” and the “decision-making wisdom” that should be validated (along with the assessment itself) before the tests are used as policy levers. The research and evaluation underlying such an evaluation will not always be clear-cut, but they are indeed clearly necessary. In the brave new world of test-based accountability policies, anything less places convention above need.
References


De Blasio's attempt to reduce the number of Asian-American students in the Discovery Program is unconstitutional

By CHRIS KIESER
DEC 15, 2018 AT 2:00 PM
New York City's specialized high schools are the envy of the nation. Schools like Stuyvesant, Bronx Science and Brooklyn Tech provide a world-class public education for about 12,000 children throughout the city each year, many of whom are economically disadvantaged.

For parents who cannot afford to send their children to private school, the specialized high schools are their only option for a top-flight secondary education. These parents often work long hours to give their children the best possible opportunity for a coveted seat in these desirable schools.
Unlike many private schools, the specialized high schools don’t care about your family’s income, race or whether you attended a prestigious middle school. They admit students based on an objective exam, the Specialized High School Admission Test. Every eighth grader in New York City can sign up for the SHSAT and, with a high enough score, attend one of the city’s best schools. It’s a purely meritocratic approach to admissions.

Mayor de Blasio and Schools Chancellor Richard Carranza believe that this fair and transparent approach has led to too many Asian-American students in the specialized high schools. Carranza even tacitly accused Asian-Americans families of believing they
“own” admissions to the schools, while de Blasio called the racial composition of the specialized high schools a “monumental injustice.” According to their twisted logic, Asian-American students and families should be punished for their earned success.

But state law prohibits de Blasio and Carranza from scrapping the exam requirement. So while they wait on legislative changes, they have turned their attention to the Discovery Program, a summer program to help low-income children gain admission to the schools.

Discovery is open to rising freshmen who scored just below the SHSAT cutoff for admission and who are certified as economically disadvantaged. Students who complete the program gain admission to the high school that fall. Discovery has traditionally accounted for less than 5% of the total number of students admitted to the specialized high schools.
Sounds like a great idea, right? But de Blasio and Carranza are concerned that too many low-income Asian-American students have been qualifying for admission through the Discovery Program. In the past two years, about two-thirds of participants in the program have been Asian-American.

To address this “injustice,” de Blasio and Carranza decided to limit the program to certain middle schools that score 60% or higher on the city’s “Economic Need Index,” a measure that estimates the percentage of economically disadvantaged students attending a particular school. Then they expanded Discovery to 20% of the seats at each specialized high school, effectively locking the ineligible schools out of a large portion of available spots.

The effect of this bureaucratic sleight-of-hand is to reduce opportunities for Asian-American students in the specialized high schools. Take the Christa McAuliffe Intermediate School, for example, one of the top performing middle schools in New York City. Located in a low-income neighborhood in Brooklyn, more than two-thirds of the 873 middle schoolers at Christa McAuliffe are Asian-American. Although most McAuliffe students are low-income, it scores exceptionally well on state examinations and sent more than 200 students to the specialized high schools in 2018.
But city officials calculated the school’s Economic Need Index as just 57.9%, rendering its students ineligible for the new Discovery Program. No matter how hard they work, Christa McAuliffe students cannot compete for a full one-fifth of the seats at the specialized high schools.

It is not just McAuliffe. As a result of de Blasio and Carranza’s tinkering, students at nearly half of the city’s majority Asian-American middle schools are now ineligible for the Discovery Program. So are a great majority of the middle schools that have sent the most students to the specialized high schools in the past — most of which have high Asian-American student populations.

The result: De Blasio and Carranza have transformed the Discovery Program from one intended to help poor students of all races into a weapon they can wield to discriminate against Asian-American parents and students.

This plan is not only misguided, it is unconstitutional. The 14th Amendment to the U.S. Constitution prohibits the government from enacting policies with the intent to discriminate against a disfavored race. With their plan to alter the Discovery Program, de Blasio and Carranza have done just that — which is why the Parent Teacher Organization at Christa McAuliffe Intermediate School has filed a federal lawsuit to stop the mayor’s meddling.
Discovery should remain a pathway for economically disadvantaged students of all races to enter the specialized high schools. Government officials should not use race or ethnic background to decide who gets to attend the city’s best schools.

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Pandemic Possibilities: Rethinking Measures of Merit

Jonathan D. Glater

ABSTRACT

The impact of the spread of the novel coronavirus in the United States beginning in winter 2020 has simultaneously laid bare vast chasms of inequality in education and created a crisis in which radical reforms have become possible almost overnight. Schools, colleges and universities have dramatically changed how they admit, assess, and support their students; for example, the University of California abandoned a longstanding and controversial requirement that applicants for admission submit scores on one of two standardized tests, the SAT or the ACT. This Essay analyzes the circumstances that made this change in policy possible and identifies the profound implications of such a move by a public institution of higher learning to consider inequality of conditions among students when making admissions decisions. The decision to drop the tests reflects empathy with students confronting obstacles previously accepted as inevitable and challenges the University’s previous conceptions of merit. The move by the University also demonstrates that the selection of admissions criteria is a political choice; there is nothing sacred about the status quo ante. And suspending criteria makes clear the need to think about what future criteria should be. The Essay suggests ways to think about a more equitable process for determining which applicants a selective institution should admit.

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Professor of Law, University of California, Los Angeles. The author gratefully thanks Patricia Gándara, Mona Lynch, Rachel Moran, Kate Sablosky Elengold, and LaToya Baldwin Clark, who read and provided feedback on an early version of this Essay. The author is grateful for the thoughtful suggestions of the students at the UCLA Law Review, who significantly helped make the Essay stronger.
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INTRODUCTION

In response to the global coronavirus pandemic that raged through 2020 and into 2021, schools, colleges, and universities made drastic and rapid changes in how they admit, assess, and support their students. Large school districts modified assessment regimes to reduce the likelihood of failing grades as students struggled with remote learning.1 At least one school board voted to cease inclusion of nonacademic factors in grades, aiming to address concerns that disparities in grades along lines of race might reflect bias.2 Another decided to promote all students to the next grade regardless of academic performance.3 Colleges, universities, and law schools modified their grading policies, shifting away from the traditional A–F scale to a pass/fail model.4 Schools, colleges, and universities swiftly moved to provide expanded technological support to students to enable all

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to access educational offerings remotely,\(^5\) and provided augmented mental health support to help students cope with the anxiety and stress of pandemic learning.\(^6\) States suspended the bar examination for would-be lawyers\(^7\) and the Association of American Medical Colleges canceled administrations of the Medical College Admission Test.\(^8\) The entities that administer the SAT\(^9\) and ACT\(^10\) postponed the tests. And in May 2020, the Regents of the University of California (the Regents) voted to end the era of the SAT and ACT in undergraduate admissions,\(^11\) essentially making permanent a temporary suspension of the testing requirement

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6. See, e.g., Mental Health Support Resources for Students, COLO. STATE UNIV., https://health.colostate.edu/mental-health-resources [https://perma.cc/5EXA-SNUK] (announcing the “50+ COVID-19 related resources to help students adapt to an ever-changing world while social distancing and learning online”).


11. Bd. of Regents of the Univ. of Cal., Approved Actions 3–4 (May 22, 2020), https://regents.universityofcalifornia.edu/aar/mayb.pdf [https://perma.cc/Y979-8BAJ] [hereinafter MAY 22 APPROVED ACTIONS] (approving recommendation of the president that the University “suspend the current standardized test (ACT/SAT) requirement for undergraduate admissions until 2024”). The plan approved by the Regents did not technically end use of the tests but made consideration of the scores optional for campuses in the UC system if applicants choose to submit them in the fall 2020–21 and 2021–22 admission cycles. Id. Scores on the SAT and ACT would not be considered at all starting in fall 2023. Id. Since then, settlement of litigation against the University of California over admissions practices led to an agreement to abandon use of the test scores completely. Settlement Agreement and Release of All Claims, Smith v. Regents of the Univ. of Cal., No. RG19046222 (Cal. Super. Ct., May 11, 2021), http://www.publiccounsel.org/tools/assets/files/1588.pdf [https://perma.cc/7L76-2NAP].
implemented several weeks earlier, and joining the growing ranks of selective institutions that have dropped the tests. This move by the University of California (the University) provides the case study for this Essay.

The public health justification of the sudden and swift changes in higher education policy, many of which implicate strongly held ideas of what constitutes academic merit, is obvious: The virus that has sickened millions, as of this writing killed more than five hundred thousand in the United States alone, and shut down broad swaths of the nation’s, indeed the world’s, economy. To compel students to gather in proximity, forcing them to risk infecting each other with the potentially fatal COVID-19 virus, under conditions provoking exceptional stress and anxiety, must have struck the Regents as unfair and relaxing the requirement, a necessary modification.

But the move also recognized inequality among students. The shift in policy by the University sought to “ensure prospective students aiming for UC get a full and fair shot—no matter their current challenges,” the president of the University, Janet Napolitano, said in a statement accompanying the announcement of the temporary suspension of the test requirement. To maintain the testing requirement would have both penalized some students whose failure to comply would reflect not a personal lack of merit but instead the disparate impacts of a national disaster, and threatened the health of other students—and their families—who might attempt to take the test when they should have stayed safe at home. In light of the lack of student culpability and in

15. Other admissions requirements were also modified or eliminated in response to the pandemic. Id. For example, the University suspended the requirement that undergraduate applicants receive letter grades in courses mandated by the University and eliminated a penalty for undergraduates whose transcripts were submitted late. Id.
response to a public health emergency, the suspension of an admissions requirement that otherwise would be used to help determine who would be admitted to the University caused hardly any controversy.

Yet at a deeper level, the move to abandon the tests also constituted a remarkable and remarkably swift shift in institutional attitude toward previously untouchable, unyielding rituals of higher education admissions. Virtually overnight, institutions previously hostile to reforms intended to promote equity in access, despite widely recognized disparities in opportunity, began openly prioritizing fairness for students more severely affected by the pandemic and ensuing economic shutdown.

Because of the deeply held conviction that admissions decisions reflect assessment of individual applicants relative to each other, college and university officials have not necessarily wanted to discuss a policy to respond to the inequality among applicants. In this view, the admissions process properly glorifies inequality by admitting applicants who are by some measure, such as test scores, more able and prepared. In normal circumstances, compensating for inequality among applicants would run counter to this meritocratic ideal. University officials were forced to confront these inequalities in response to the pandemic—some applicants had already taken the tests, others had not and now could not; some had resources enabling academic progress while isolated at home, others did not, to name just a few dimensions. The health emergency forced university officials to act and gave them the opportunity to create a more equitable system, demonstrating that equity can be the guide in university admissions, and that the choice to keep or change admissions policies is a political one.17

This Essay explores the reasons for and the implications of suspension and abandonment of the standardized test requirement. The shift in policy highlights the contingent nature of merit and opens the door to deeper rethinking of what selective public institutions of higher learning do and should value. The pandemic destabilized a widely used and accepted tool that maintained hierarchies of students and the institutions they attended because the impact of the coronavirus introduced a new variable to the calculation of merit: However, to maintain a

hierarchy, “you need to measure everyone on a single scale; the moment one begins to introduce more than one criter[i]on (refinement, rationality, money, grace, etc.) into the Great Chain of Being, the whole thing falls apart.” The new consideration—unequal effects of the impact of the pandemic—undermines the credibility of any others.

The University of California offers a compelling case study. In April 2020, at the beginning of the pandemic, the faculty government mounted a staunch defense of the role of the SAT and ACT in the University’s undergraduate admissions. Less than a month later, the UC Regents rejected this position, deciding to remove the SAT and ACT from the admissions process. The health threat reordered priorities, showed that longstanding notions of merit were neither absolute nor inviolable, and created an opportunity to prioritize fairness. The decision by the Regents shows that selection of criteria for determining whom to admit is, as Lani Guinier argued more than fifteen years ago, a political decision. That means that policymakers, like the Regents, can choose to emphasize equity for students.

Selective college and university admissions decisions do not rest solely on objective measures of academic excellence, however defined. Nor have they in the past, either. Test scores, like grades, extracurricular activities, athletic ability, socioeconomic status, volunteer work, and other applicant activities and characteristics, all play a role in admissions decisions to varying degrees for different applicants, because they are regarded as indicators of actual and potential excellence and as evidence of likely contributions to a university. Consequently, selective institutions value these metrics for the information they may contain, not because they have independent and intrinsic meaning. The question of how
much weight to give to any admissions criterion must be resolved by recourse to some external set of values, valorizing academic excellence, or diversity, or procedural legitimacy—or, as actually happens, an opaque, muddled, and inarticulate mixture of these and other goals.

This Essay aims to untangle these objectives by identifying the implications of recognizing the new concern about protecting public health. The analysis that follows, which is intended to facilitate a more precise public debate on admissions practices proceeds in three Parts. Part I briefly provides context for the move by the Regents, describing the University’s response to the disparate effects of the global health emergency, then contrasting that response to years of little or no action to address enrollment disparities along lines of race and class. Part II undertakes the task of disentanglement, identifying the different goals pursued through the admissions process of the University and addressing the perception that goals like equity, diversity, and academic excellence inevitably conflict. Part III contends that once goals other than admission of high-scoring students are accepted, the normative justification for assigning any weight to standardized test scores collapses. Part III further argues that in light of historical disparities in higher education access and the role that test scores have played in justifying those disparities, the force of arguments for pursuit of values like inclusion, representation, and democratic legitimacy, increases. The pandemic has created an opportunity to reconsider and redesign admissions, with a goal of realizing a vision of equitable excellence.

I. WHEN THE REGENTS CHOSE TO END THE TEST REQUIREMENT

The University of California has grappled with the role of the SAT and ACT in admissions decisions for decades; really, the story could begin with the decision

preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”). But disparities in representation of different racial and ethnic groups on University of California (UC) campuses—especially the flagship campuses at Berkeley and Los Angeles—loom large in discussions of admissions policies here. See Teresa Watanabe, *Drop the SAT and ACT as a Requirement for Admission, Top UC Officials Say, L.A. TIMES* (Nov. 23, 2019, 6:00 AM), https://www.latimes.com/california/story/2019-11-23/uc-officials-recommend-dropping-sat-admission-requirement [https://perma.cc/RD82-D247] (reporting on statements by UC Berkeley Chancellor Carol T. Christ and UC Provost Michael Brown to the effect that “performance on the SAT and ACT was so strongly influenced by family income, parents’ education and race that using them for high-stakes admissions decisions was simply wrong”).
to require the SAT in the fall of 1968.\textsuperscript{23} For purposes of this Essay, the sensible starting point is the more recent effort, beginning with the appointment in January 2019 of a task force charged with, among other things, evaluating whether the use of scores “fairly promote[d] diversity.”\textsuperscript{24} After a year of deliberation, the task force recommended continuing to require the SAT or ACT.\textsuperscript{25} The Regents decided nonetheless to suspend the requirement shortly thereafter.\textsuperscript{26} This Part briefly explores each of these moments.

The University had taken on the difficult question of how to use standardized test scores in deciding whom to admit more than a year before the pandemic and the Regents’ decision. The Academic Senate, a faculty body, had appointed a faculty task force in January 2019 to develop draft recommendations for its review and submission to the office of the president. Questions about whether the SAT and ACT contributed to the underrepresentation of Black and Latinx undergraduate students in the University overall and especially on its most prestigious campuses were not new: a committee of the Academic Senate had conducted reviews and produced reports in 2002 and 2010. The 2019 task force spent months behind closed doors conducting interviews, reviewing research, and analyzing data.

\begin{itemize}
\item \textsuperscript{23} \textit{Board of Admissions and Relations With Schools, The Use of Admissions Tests by the University of California} 6 (2002), \url{https://senate.universityofcalifornia.edu/_files/committees/boars/admissionstests.pdf} [hereinafter UC USE OF ADMISSIONS TESTS]. According to this report, the goal was to reduce the pool of eligible students. \textit{Id.}
\item \textsuperscript{24} Letter From Robert C. May, Chair of the Assembly of the Acad. Senate, Univ. of Cal., to the Acad. Council Standardized Testing Task Force, Univ. of Cal. (Jan. 30, 2019), \url{https://www.google.com/url?client=internal-element-cse&cx=0107550046317995238411b-22oivitzw8q=https://senate.universityofcalifornia.edu/_files/committees/sttf/standardized-testing-tf-charge.pdf&sa=U&ved=2ahUKEwiD2P2zY_OPpAhV3HjQIHa0dBC4QFjAAegQ1AxAC&usg=AOvVaw2_Em77zuRMrzbH-2HH14-18z} [hereinafter 2019 Task Force Report].
\item \textsuperscript{25} Procedurally, the task force recommendation went to the Academic Council—the executive committee of the full Academic Assembly—which in turn consisted of representatives of each of the campuses of the UC system. See \textit{Univ. of Cal. Acad. Senate, Shared Governance}, \url{https://senate.universityofcalifornia.edu/_files/resources/shared-gov-org-of-senate-review-process.pdf} (graphical representation of the Academic Senate’s governance structure). After considering comments on the report from various University committees, the full Academic Assembly transmitted its own recommendation on the task force report to the president of the University, who in turn was to offer her own recommendation to the Regents of the University. Bhavnani Letter, \textit{supra} note 19.
\item \textsuperscript{26} UC Office of the President, \textit{University of California Board of Regents Unanimously Approved Changes to Standardized Testing Requirement for Undergraduates}, U. C.: PRESS ROOM (May 21, 2020), \url{https://www.universityofcalifornia.edu/press-room/university-california-board-regents-approves-changes-standardized-testing-requirement}.
\end{itemize}
While the task force proceeded, a group of students filed a lawsuit demanding that the tests be dropped from the admissions process because they constituted an unfair barrier to access for Black and Latinx high school students applying to the University. But current and prospective students did not play a direct, major role in the task force’s analysis and discussion: it had only one undergraduate student member. Nor were students invited to address the task force as witnesses with expertise on the admissions process from the user’s perspective or on the undergraduate experience. Nor were students invited to comment on how they viewed the criteria considered by the University admissions office. In retrospect, the absence of student voices is striking, because students have strong views on the subject of merit.

Various senior officials in the University and a few of the Regents also weighed in on the issue the task force was to address, arguing that the University should abandon the tests. The task force was closely monitored by the news media, which reported that a decision by the University to stop using the tests would reverberate throughout higher education because the University of California is enormous and because its campuses are considered bellwethers in academia.


28. Student newspapers around the University of California system ran editorials revealing such strong views. See, e.g., A New UC Test Would Fail as SAT, ACT Have, DAILY CALIFORNIAN (May 28, 2020), https://www.dailycal.org/2020/05/28/a-new-uc-test-would-fail-as-sat-act-have [https://perma.cc/Y7QB-TNTA] (arguing that the University should “[b]ecome test-blind . . . [to] help the UC system abandon admissions criteria that further inhibit diversity”); see also Elaine Chen, Opinion, UC Must be Mindful to not Perpetuate Inequity With Replacement Admissions Exam, DAILY BRUIN (May 28, 2020, 5:35 PM), https://dailybruin.com/2020/05/28/uc-must-be-mindful-to-not-perpetuate-inequity-with-replacement-admissions-exam [https://perma.cc/7SBK-SSGX] (calling on the University to “dedicate the proper resources, time and oversight to ensure its test is ready by 2025 and doesn’t further accentuate existing socioeconomic cleavages”); see also Ean Kimura, UC Needs to Consider These Alternates for the SAT, ACT, CAL. AGGIE (Oct. 28, 2020), https://theaggie.org/2020/10/28/uc-needs-to-consider-these-alternates-for-the-sat-act/ [https://perma.cc/GP4C-UULM] (proposing that the University require other arbitrary tests, such as measuring prior sexual experience and the ability to endure tests of the national emergency broadcast system).

29. Watanabe, supra note 22 (reporting that the “chancellors of UC Berkeley and UC Santa Cruz, along with the University of California’s chief academic officer, said they support dropping the SAT and ACT as an admission requirement” and that “some of the UC system’s 26 voting regents have expressed deep skepticism or outright opposition to the continued use of the SAT and ACT, including Chairman John A. Pérez, Vice Chairwoman Cecilia Estolano and Regent Eloy Ortiz Oakley”).
The task force produced a draft report (the Report) for the Academic Senate in January 2020. The Report called for creation of a new set of assessments to take the place of the SAT and ACT—a development project that the Report predicted would require nearly a decade—and for continued use of the SAT and ACT until new assessments were created. The recommendation to continue use of the tests in the meantime, which deeply divided the task force, was met with consternation by civil rights advocates concerned over equity in access to higher education. By way of disclosure, I note that I was a member of the faculty task force, and one of six members who signed an additional statement calling for abandonment of consideration of standardized test scores in admissions more quickly than the full report contemplated.

In April 2020, the Academic Assembly, the representative body of the faculty of the University, voted unanimously to endorse the recommendations of the task force, though with reservations about the possibility of designing a new test. The Assembly also discussed the additional statement “at length, but did not arrive at a final decision.” Less than a month later, the Regents rejected the recommendation and voted to suspend use of the SAT and the ACT in admissions. This Part identifies challenges the pandemic posed for retaining prior measures of merit: the disparate effects of requiring differently situated students to take standardized tests during the pandemic and the disparate effects of requiring differently situated students to take standardized tests at all.


31. Id. at 109–16.


34. With one abstention. See Bhavnani Letter, supra note 19.

35. Id. Members of the Assembly expressed concern about the UC’s “capacity to develop the assessment, its expense, its utility beyond UC, and the related concern that a new test could burden students who would need to take both a UC-specific test and the SAT/ACT for admission to other institutions.” Id.

36. Id.
A. Health and Equity

On the advice of medical experts who had studied how the virus was transmitted, in March 2020 much of the United States shut down and cities, counties, and states—including California—issued “stay home” orders requiring residents to remain inside. California’s K–12 schools closed, while colleges and universities in the state switched almost overnight and mid-term to offering classes online, closed their campuses, and sent most of their residential students home. The goal of these drastic steps, akin to those taken almost exactly a century earlier when the nation confronted a flu pandemic, was to reduce rates of transmission or “bend the curve” by reducing how often students were in close proximity to each other. Not surprisingly, the University took these steps despite their potential adverse impact on the ability to achieve other goals like protecting the quality of education of students, or preserving standards for admission to the University.


41. EXECUTIVE ORDER, supra note 37.

42. Or at least, not for weeks. Well into the second month of the lockdown, education experts with increasing frequency expressed concern over the harm caused by school closures to students’ education. See, e.g., Shawn Hubler, Erica L. Green & Dana Goldstein, Despite Trump’s Nudging, Schools Are Likely to Stay Shut for Months, N.Y. TIMES (Apr. 30, 2020), https://www.nytimes.com/2020/04/28/us/coronavirus-schools-reopen.html [https://perma.cc/8HEP-H42H] (“To make up for lost classroom time, schools may need to provide remedial instruction, additional special-education services and counseling. . . .”). College student groups filed lawsuits alleging that the move to remote learning had severely impacted the quality of the education they received. See Teresa Watanabe, Students Sue UC, Cal State, Demanding Coronavirus-Related Refunds of Campus Fees, L.A. TIMES (Apr. 28, 2020, 5:34 PM), https://www.latimes.com/world-nation/story/2020-04-28/lawsuit-california-universities-owe-virus-related-refunds [https://perma.cc/8SEM-J89L] (reporting on lawsuit against California schools as well as against colleges and universities in other states). Those focused on inequality in K–12 education worried that continued and consistent access to public
This Subpart examines how the COVID-19 pandemic forced a new receptiveness to changes to admission criteria.

In this context, requiring students to take the typical admissions tests, would have constituted a serious risk to the health of test-takers and anyone who might come into contact with test-takers. After all, the typical test administration practice through winter 2020 involved students assembling in close proximity in rooms at test sites and sharing the same airspace: a practice that could result in students potentially passing the virus on to each other. Under the plan approved by the Regents in May 2020, the University would consider SAT and ACT scores in making admissions decisions if applicants provided them in the fall 2021 and fall 2022 admissions cycles and would not consider them at all in admissions thereafter. The University would adopt a new test for applicants by fall 2025 or use no test at all.

The University of California was not alone in taking this step, but the system is one of the largest users of these standardized tests, and the Regents’ decision drew considerable public attention. A growing number of selective colleges and universities issued announcements over the course of March and April 2020 that they would not require applicants for admission to submit test scores. And suspending the test requirement was not the only change in policy that the University announced: the University also suspended specific course requirements for admission, as well as minimum grade requirements in those classes.

Concerns beyond the immediate risk of contributing to the spread of disease seem to have motivated the University to make these changes, however. For example, there was the worry that students who had taken the test before the nation’s shutdown would enjoy an unfair advantage over those who had planned education was more available to students whose families already had greater financial resources. See Editorial Board, Opinion, Locked Out of the Virtual Classroom, N.Y. TIMES (Mar. 27, 2020), https://www.nytimes.com/2020/03/27/opinion/coronavirus-internet-schools-learning.html [https://perma.cc/2GWE-NAXD] (“America came face to face with the festering problem of digital inequality when most of the country responded to the coronavirus pandemic by shutting elementary and high schools . . . .”).

43. MAY 22 APPROVED ACTIONS, supra note 11, at 3–4. Test scores could still be considered for purposes of awarding scholarships, placement in classes, and determination of whether an applicant was eligible for the state’s admission guarantee. Memorandum From Office of the President, Univ. of Cal., for the Meeting of May 21, 2020, to the Bd. of Regents (May 21, 2020), https://regents.universityofcalifornia.edu/regmeet/may20/b4.pdf [https://perma.cc/GG8G-34ED].

44. MAY 22 APPROVED ACTIONS, supra note 11, at 3–4.


to take it on dates now unavailable. And outside advocates for greater equity in admissions cited a third concern: the fear that requiring the tests under such extraordinary and difficult circumstances could exacerbate preexisting inequality among the applicant pool.47

The concerns other than health were not entirely new; relative privilege and the benefits advantaged students enjoy in admissions are widely recognized. But the receptiveness to these concerns was new. The temptation may be great to dismiss suspension of testing requirements as a case of interest convergence, as analyzed by the late Derrick A. Bell, Jr.: relatively powerful groups will support policies that aid Black people only if doing so also advances the interests of the powerful.48 However, the plan to eliminate the testing requirement represented a recognition of the opportunity that the University had to try to ameliorate the effects of longstanding inequality that the pandemic made more visible.49 The pandemic helped make possible what more abstract arguments about equity had long failed to achieve.50

48 Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518, 523 (1980) (famously postulating that the “interest of blacks [sic] in achieving racial equality will be accommodated only when it converges with the interests of whites . . . [but that] the fourteenth amendment [sic], standing alone, will not authorize a judicial remedy providing effective racial equality for blacks [sic] where the remedy sought threatens the superior societal status of middle and upper class whites”). Certainly, at the time of the announcement of the initial suspension of the test requirement in May 2020, both University faculty and the president of the University emphasized that the move was temporary. Press Release, BD. OF REGENTS OF THE UNIV. OF CAL., supra note 12.
49 There is another consideration, rarely explored openly, that may have played a role in making the decision. Consider: Perhaps the requirement that applicants submit scores on the SAT or ACT functioned as a barrier in general to aspiring University students. At a time of great uncertainty about application and enrollment volume, any hurdle to enrolling sufficient students, and obtaining the corresponding revenue from them, must have appeared most unwelcome.
50 The pandemic also bolstered the arguments made by plaintiffs who had sued the University over its use of standardized tests. A trial court judge issued an injunction enjoining use of the tests because of the disparate effects on applicants with disabilities under the interim “test optional” regime adopted by the Regents. Smith v. Regents of the Univ. of Cal., No. RG19046222, (Cal. Super. Ct., Aug. 31, 2020), (order granting preliminary injunction), http://www.publiccounsel.org/tools/assets/files/1489.pdf [https://perma.cc/SUNY-DFHZ].
B. Merit and Equity

The University’s Academic Senate had at various times in the past investigated the role and effect of using standardized test scores in undergraduate admissions, recognizing the disturbing patterns in admission and enrollment: Black and Latinx students are underrepresented systemwide and are particularly underrepresented at the flagship campuses of the University of California, Berkeley and the University of California, Los Angeles. This was so even when the University was permitted to take race into account in making admissions decisions, though the loss of that ability made achieving diversity even more difficult. This Subpart explains that because test scores have been accepted as indicia of merit, longstanding disparities in enrollment have fed into a narrative of tension between diversity and excellence.

The task force concluded that scores on the SAT and ACT are “better predictors of first-year GPA than high school grade point average (HSGPA), and about as good at predicting first-year retention, [university grade point average], and graduation.” If the University were to abandon consideration of these test scores in admissions, the Report asserted, several undesirable results would follow, including lower grades earned by the average undergraduate student in the first year, weakened ability of the University to support students who need academic assistance, higher costs of educating students as more students would take longer to graduate, and an uncertain effect on diversity. The conclusion, not so explicitly stated, was that changing admissions factors would cause more harm than would keeping the factors then in use. The basis of this normative conclusion goes unspecified in the Report itself. Like prior faculty reports on the impact of

52. The Regents of the University of California banned consideration of race in admissions in 1995 and the people of California banned the practice both in the context of admissions and financial aid by referendum the following year. WILLIAM C. KIDDER & PATRICIA GÁNDARA, TWO DECADES AFTER THE AFFIRMATIVE ACTION BAN: EVALUATING THE UNIVERSITY OF CALIFORNIA’S RACE NEUTRAL EFFORTS 1 (Oct. 2015), https://www.ets.org/Media/Research/pdf/kidder_paper.pdf [https://perma.cc/58M-YSF5]. Kidder and Gándara found that the University “has never come close to a student body representing the state’s population.” Id. at i.
53. REPORT, supra note 30 at 3.
54. Id. at 85.
standardized testing, the Report did not specify how “useful” a test had to be as a predictor of success in the University.

The recommendation that the role of the SAT and ACT be maintained encountered fierce criticism from scholars who study the impact of standardized tests on access to higher education and from advocacy groups pursuing equity in admissions. One critic argued that the methodology used to assess whether the SAT and ACT predicted academic performance in the University failed to consider student demographics, including family income and level of parental education. These demographic characteristics correlated with test scores and with performance in college, Saul Geiser wrote, and “when researchers fail to control for income in their prediction models, the predictive value of the tests is artificially inflated and appears much greater than is actually the case.” Geiser argued that high school grades were better predictors of performance in the University once other variables are considered, and noted that prior studies of correlates of academic performance had reached the same conclusion. Jesse Rothstein, in a separate critique, made the point succinctly: “[T]he SAT appears to be a strong predictor of student success because students from disadvantaged backgrounds are less prepared to succeed, and the SAT is a very effective measure of student advantage.” The implication was that the SAT and ACT scores were

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55. In addition to the 2002 and 2009 reports on the use of standardized tests in admissions generally, the Academic Senate’s Board of Admissions and Relations with Schools also evaluated particular aspects of the tests, addressing revisions to the SAT examination, for example. Letter From George Johnson, Chair, Bd. of Admissions and Relations With Schs., to William Jacob, Chair, Acad. Council (July 8, 2014), https://senate.universityofcalifornia.edu/_files/committees/boars/SAT_Redesign.pdf [https://perma.cc/FDM8-YGU9] (approving adoption of the then-revised SAT for use in University of California admissions).

56. UC USE OF ADMISSIONS TESTS, supra note 23, at 15–16 (specifying principles for use of standardized tests in University of California admissions including the difficult-to-dispute but difficult-to-define requirement that any admissions “test should be useful in a way that justifies its social and monetary costs”).


58. Id.

59. Id.

60. Id. at 1.

not necessary to make admissions decisions if the goal was to identify students more likely to do well—wealth would do just as good a job. That is an uncomfortable finding for institutions that claim their goal is to enroll the best and brightest, rather than the wealthiest.

Analyses of enrollment patterns identify various causes, but the usual suspect blamed for enrollment disparities is the relative ability of public K–12 schools in different neighborhoods, with different levels of resources, to prepare students comparably to gain admission. Schools in California, and in many places nationwide, are highly segregated along lines of race, and better-resourced schools tend to enroll students who are white, who are of Asian descent, or whose families have higher earnings or greater wealth. It is seductive to tell a story of unequal funding of public education that has the unfortunate result of producing students who have poor scores on the ACT and SAT. The tests, in this view, are the thermometer measuring the extent of the problem, and should not be blamed themselves. This perspective requires acceptance of the idea that scores on the ACT and SAT reflect academic readiness as opposed to family wealth and privilege—with which scores also correlate—and that students who earn lower scores are unready and should not be admitted by highly selective colleges and universities. College admission becomes a zero-sum game in which pursuit of

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65. As the Report notes, the pattern in scores of admitted students does not suggest that the University’s admissions offices have a specific, cutoff score in mind—a score indicating that a student is certainly not ready. Rather, the higher a student’s score, the more likely that the student will be admitted, suggesting that admissions offices use scores to rank students relative to each other rather than to assess absolute level of preparation. REPORT, supra note 30, at 67–68 (“Because test scores have predictive power among students within particular disadvantaged groups (e.g. URM, first-generation, low family income, low parental education..."
one goal (academic excellence) precludes achievement of another (equity in access).

Language in the legal complaint filed against the University over use of the SAT did not directly contest this tradeoff but argued that any incremental increase in excellence achieved by using the standardized test scores in admissions did not justify the adverse effects on particular applicants and violated state law. According to the complaint, the Regents had improperly “determined that the minimal added value of SAT and ACT scores in predicting first-year GPA outweigh[ed] their harms to underrepresented minority students, students with disabilities, and students with less wealth.”

Continuing to require the SAT and ACT could have worsened disparities, given changes in test administration methods responding to the impact of the pandemic on test administrations. Both ACT and the College Board—the companies that administer the ACT and SAT, respectively—announced plans to make the tests available remotely, online, enabling students to take them from home. At-home testing could well exacerbate the effects of inequality, because some students would be able to complete the examination in peace and quiet, with the benefit of reliable internet access, perhaps with the benefit of a large computer monitor, while other students might have none of these things. These advantages would reinforce others that relatively privileged students already enjoy, such as access to preparatory courses and private tutoring. Even some of the advocates of preserving a role for these test scores in the admissions process called for changes to make test-taking fairer.

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67. Id. ¶¶ 205–48.
68. Id. ¶ 9.
71. See, e.g., Elizabeth Currid-Halkett, Opinion, A Pandemic Isn’t a Reason to Abolish the SAT, N.Y. TIMES (May 1, 2020), https://www.nytimes.com/2020/05/01/opinion/coronavirus-test-optional-sat.html [https://perma.cc/X8DA-3ED2] (arguing that standardized tests should be retained and that “our top priority should be to figure out a way for lower-income students to prepare for the tests, given that so many will be at home in possibly cramped living environments that are not amenable to studying”). Further, remote administration of the tests
But the zero-sum conceit that the above arguments accept rests on unstated, shaky assumptions. First, colleges and universities do not argue that the goal of admissions is to maximize first-year grades, overall grades, the graduation rate, or any of the results-oriented measures typically cited to justify use of the SAT or ACT in admissions. Second, if colleges and universities blame inequality in K-12 schooling for disparities in admissions along lines of race and class, they must justify their acceptance of such unfairness. Perhaps the mission of higher education institutions should require them to make up for disparities. If colleges and universities are to be complicit in an overall inequitable system of education, there should be a reason. The next Part turns to this question.

II. RATIONALES FOR CONSIDERATION OF SAT AND ACT TEST SCORES AND QUESTIONS OF INSTITUTIONAL MISSION

The California Constitution describes the University of California as a “public trust,” overseen by the Regents. The California Constitution describes the University of California as a “public trust,” overseen by the Regents. Two policies of the Regents, 2101 and 2102, define the goals of the undergraduate admissions process:

74. Policy 2101, supra note 73.
who pay higher tuition to the university.\textsuperscript{75} This can contribute to controversy because it may appear that enrolling more students from elsewhere denies a University of California education to a resident. Some research suggests that nonresident students’ payments contribute to institutional quality, which would redound to the benefit of in-state students.\textsuperscript{76}

The challenge is how to allocate public higher education opportunity in the state. Screening mechanisms include cost, grades, prerequisite high school course requirements, various measures of individual achievement in extracurricular and other activities, and of course, scores on the SAT or ACT.\textsuperscript{77} But the rationales for requiring such qualifications, like the relationships among them (Do higher high school grades make up for fewer extracurricular activities? How much can athletic ability serve as a substitute for lower test scores?), are rarely addressed. The difficulty lies in identifying any single or overriding goal in making admissions decisions: Preparing future leaders?\textsuperscript{78} Countering historic underrepresentation of students of particular backgrounds?\textsuperscript{79} Rewarding hard work? Ensuring a sufficiently well-trained labor force in the future?\textsuperscript{80} Representing the population of the state, nation, or world—and if so, how precisely? The absence of a single, clearly specified goal of admissions and indeed, the impossibility of achieving the multiple, potentially conflicting goals the University pursues, enormously complicates any effort to evaluate, let alone change, current processes. Any reform benefits some and harms others or is perceived to do so. This Part questions who


\textsuperscript{78} This is the rationale recognized by the U.S. Supreme Court. McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637, 641 (1950).

\textsuperscript{79} Regents Policy 4400: Policy on University of California Diversity Statement, U. C.: BD. OF REGENTS, https://regents.universityofcalifornia.edu/governance/policies/4400.html [https://perma.cc/SP36-MPJK] (“The University particularly acknowledges the acute need to remove barriers to the recruitment, retention, and advancement of talented students, faculty, and staff from historically excluded populations who are currently underrepresented.”).

\textsuperscript{80} HANS JOHNSON, MARISOL CUellar MEJIA & SARAH BOHN, WILL CALIFORNIA RUN OUT OF COLLEGE GRADUATES? 2 (Oct. 2015), https://www.ppic.org/content/pubs/report/R_1015HJR.pdf [https://perma.cc/BMZ6-Y8RL] (“If current trends in the labor market persist, by 2030 California will have a shortage of 1.1 million workers holding a bachelor’s degree.”).
A. Decisions To Be Made

A threshold matter is who should be permitted to answer any of these questions, which are inherently bound up in politics, history, and culture. There is no disinterested group: high school students, currently enrolled University students, alumni, parents, politicians, and taxpayers all have strong views. Even faculty members, trained in critical analysis, are conflicted, for they care deeply about institutional excellence, which in turn is reflected in rankings that place a premium on admitted students’ scores on the SAT and ACT. Further, the people who become college and university professors, who have been steeped in the established culture of the academy and who are likely to have attended institutions that disproportionately enroll applicants with high test scores, may find it very difficult to accept, let alone adopt, a more nuanced definition of excellence. At the same time, faculty members may “lean left” in their social and political views, and so may wish to promote mobility and advance equity in the academy.

In recommending that the University continue to use the SAT and ACT in admissions, the faculty task force implicitly endorsed the importance of whatever those tests measure, justifying this position by citing outcomes that correlate with test scores, like first-year grades. The Academic Senate adopted the same reasoning when its decisionmaking body voted to endorse the task force report.


83. There are other correlations as well, but high school grades perform as well or better than SAT and ACT scores for purposes of making predictions. See Report, supra note 30, at 19–20 (“At present, test scores are a slightly better predictor of freshman grades than high school grades are [and] . . . . [b]oth grades and scores are stronger predictors of early outcomes (freshman retention and GPA) than of longer-term outcomes (eventual graduation and graduation GPA”).

84. In endorsing the Report, the Academic Senate disregarded the views of the six members of the task force who supported abandoning the tests more quickly. This point matters, insofar as the decision of the president to side with the task force members who signed the additional statement urging faster abandonment of standardized testing means that when she did not adopt the Academic Council’s recommendation, she did not wholesale reject a role for
The president of the University did not adopt the view of the Academic Council or the majority of the task force, effectively siding with the minority view that the consideration of the standardized tests should cease sooner, and the Regents unanimously supported the president’s recommendation. The sequence of events suggests that the definition of merit is the product of an exercise of power. While the Regents chose to emphasize equity, making the political decision that was theirs to make, they could also choose or be compelled to pursue different goals in the future.85 Battles over who should get in will almost certainly continue—especially as the University takes on the challenge of selecting entering classes without considering test scores.

B. The Malleability of Merit

Discussion of the use of standardized tests in higher education admissions often focuses on the question of whether a particular student possesses the requisite indicia of merit to be granted a precious slot in the entering class. Not surprisingly, this question is top of mind for ambitious applicants and their parents, who are both heavily invested in success in the admissions contest.86 Yet the question of which individual student should get in is at best the fourth to be asked when evaluating admissions processes; this Essay is motivated by concern that insufficient attention has been paid in current debates to the first three. Those prior questions are:

1. What is merit?
2. What is evidence of merit?

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85. For example, as of this writing, lawmakers in Sacramento are debating whether to require the University to reduce the number of out-of-state students enrolled, for example – prioritizing access for in-state residents. Teresa Watanabe, A Bold Plan for U.C.: Cut Share of Out-of-State Students by Half Amid Huge California Demand, L.A. TIMES (May 25, 2021, 5:00 AM), https://www.latimes.com/california/story/2021-05-25/bold-plan-for-uc-admissions-reduce-out-of-state-students.

86. Again, the readiness of parents to engage in criminal conduct in an effort to get their children admitted to selective institutions illustrates just how deep the degree of investment is. See Medina et al., supra note 71 (noting that the criminal “charges also underscored how college admissions have become so cutthroat and competitive that some have sought to break the rules”).
3. To what extent should the designated notion of merit, whatever it is, determine who enjoys access to selective, public higher education?

The meaning of merit has changed over time, as the work of Joseph F. Kett has demonstrated convincingly. Greatness that could be demonstrated on the battlefield as a manifestation of heroic character and raw combat ability, both arguably inherent traits, has declined in importance relative to greatness that can be demonstrated by performing well on a test. There are other attributes that could be assessed and taken into account in admissions decisions, such as the ability to empathize with others, to manage conflict, to engage in critical analysis, or to tolerate difference. The typical standardized test does not capture the many facets of applicants. Admissions officers at selective colleges and universities know this and try to build a class that includes students with different kinds of abilities. One implication is that no single definition of merit is workable. But there is enormous popular reluctance to question any particular notion of merit, in part because to do so is to challenge an entire complex around admissions, but also because the motives behind any such effort are inevitably suspect: those proposing a particular definition of merit may be dismissed as pursuing their own interest, designing a test upon which they expect to excel.

One appeal of the SAT and ACT has been their reduction of merit to a set of numbers. These numbers get considerable attention; applicants with high numbers

87. It bears emphasis that most students in the United States do not attend highly selective colleges and universities. Slightly more than one in five undergraduate students attend institutions that reject half or more of applicants; most students attend colleges and universities that accept at least half of their applicants. Digest of Education Statistics, INST. OF EDUC. SCIENCES: NAT’L CTR. FOR EDUC. STAT., tbl. 305.40, https://nces.ed.gov/programs/digest/d18/tables/dt18_305.40.asp?current=yes (last visited May 2, 2020) [https://perma.cc/YM82-E7T9]. But the most selective institutions, such as those in the Ivy League and several in the University of California system, play an outsized role in discussions of selective admissions, face litigation over the admissions practices they use, and loom large in the minds of millions of students and parents. And the degree of underrepresentation of Black and Latinx students is greater at the more selective institutions, including the University of California, Berkeley, for example.


89. Id.

90. These are some of the kinds of applicant characteristics that the task force hinted at in the section of the Report describing a hypothetical new admissions assessment that would use simulations and performance tasks. Report, supra note 30, at 111.
are not happy to be denied admission to selective institutions. Yet when explaining how they do what they do, admissions officers at selective institutions typically emphasize the multiple aspects of applicants they consider, and some note that though they make individual admissions decisions, the goal is to build a class. Different strengths and weaknesses of different kinds of students are relevant to this exercise—different kinds of merit. While such applicant attributes and skills are difficult to reduce to one number and allowing them to play a role in admissions decisions runs the risk that unfair biases may play a role, tests also reflect subjective choices: Why include algebra in a math assessment for purposes of undergraduate admissions, for example, but not multivariable calculus? After all, just one advanced question could help identify a rare superstar. At some time, a decision was made about what should be tested.

This observation highlights the importance, again, of the three threshold questions on merit. They are interrelated, which makes answering them that much more difficult. A more restrictive definition of merit that would limit greatly who gets in, for example, could be rejected in order to pursue egalitarian goals. A broader definition that results in admission of a group of students broadly representative of the applicant pool might be a reason for its adoption, for the same set of reasons. And some parents and policy makers might see conflict here, worrying that the more broadly distributed merit is—however it is defined—the less valid the definition. Put differently, the search for merit in applicants is part of an effort to distinguish those who have it from those who do not, so some share of students must be identified for exclusion, and the more who do not make it to the end of the process, the more significant that surviving student’s achievement. Conversely, parents, students, and university officials may fear that a more open admissions regime would devalue each student’s achievement.

91. The complaint in the lawsuit challenging Harvard College’s consideration of race in its admissions decisions emphasized the high scores of students who were not admitted, implying that but for consideration of race, they would have and should have been admitted. Complaint at ¶ 20, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 14-cv-14176-DJC (D. Mass. Nov. 17, 2014).


Overt, explicit racism drops out of this story. Again, poor test scores can be attributed to the lack of resources of schools disproportionately attended by Black and Latinx students and to the socioeconomic advantages disproportionately held by students who are white and who are of Asian descent. But acceptance of the translation of socioeconomic advantage into more merit and, by extension, a higher level of college readiness implies that any assessment tool that does not manifest the disparities along lines of race and class that the SAT and ACT currently show, is suspect.

If the lack of financial and other resources is expected to lead to worse test performance, it is impossible to imagine a test that does not reproduce the disparities in the absence of a complete redistribution of resources; poor performance by these test-takers is validation of and essential to race and class hierarchy. Poor performance by Black and Latinx students reinforces a socioeconomic rationale that poverty yields low tests scores at the same time that it reinforces racial subordination. To paraphrase Professor Frank B. Wilderson III, there may be few or no Black people on campus, but, by the same token, there can be no campus without Black people, whose exclusion enables a particular conception of excellence.95 Acceptance of parity of performance across lines of race and class—or even significant narrowing of the gap in scores—on an assessment would require, first, acceptance of an understanding of excellence that decouples socioeconomic advantage and merit. Even without acceptance, though, it should be evident that the tolerable extent of disparities caused by using any particular assessment presents not a positive, empirical question but a normative one: We must decide whether any criterion that reinforces societal inequality is acceptable and if so, how much reinforcement is tolerable. This decision should come before and should inform the choice of a definition of merit.

III. IMPLICATIONS OF THE SUSPENSION OF THE TEST REQUIREMENT

On the question of what definition of merit is normatively appropriate, jurisprudence does not offer much guidance. The Supreme Court has not outlawed use of admissions criteria that produce disparities along lines of race and class.96 Indeed, the efforts of conservative members of the U.S. Supreme Court to

96.  Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2234 (2016) (Alito, J., dissenting) (stating that defense of consideration of race in admissions by the University of Texas at Austin was "more than a little ironic [given] that UT uses the SAT, which has often been
hollow out the equal protection doctrine, undermining efforts to promote equality of opportunity by emphasizing that law provides a remedy only in instances of individual, invidious discrimination based on racial or other prohibited classification rather than in cases involving structural barriers that hinder members of groups long subject to de jure discrimination, is well documented.\footnote{See Ian Haney-López, \textit{Intentional Blindness}, 87 N.Y.U. L. REV. 1779, 1787--88 (2012) (describing conservative justices’ determination to “close courthouse doors to evidence showing continued racial hierarchy”); see also Reva Siegel, \textit{Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action}, 49 STAN. L. REV. 1111, 1144 (1997) (describing the “large body of literature criticizing discriminatory purpose doctrine, advancing proposals to modify, or abolish, the governing doctrinal framework”).} That literature is beyond the scope of this Essay.\footnote{This literature does help to explain why the lawsuit filed last year over the University’s use of SAT and ACT scores rests on the Constitution and laws of the State of California rather than those of the United States.} Rather, this Part draws out the implications of the University’s abandonment of consideration of the standardized test scores in admissions. The discussion that follows turns to the question of what should come next, identifying the potential challenges of designing a new assessment tool, and offering guidance on how to prioritize equity in the process: by closely attending to the results.

The suspension of the testing requirement helps to suggest a path forward, because restricting use of test scores in response to a pandemic implies certain limits on admissions criteria. The University recognized that its need for the SAT and ACT scores in order to decide whom to admit existed in a context that could change. In early spring 2020, the context changed as a result of the COVID-19 pandemic: The considerations of health and safety, which the Academic Senate and the Regents had not previously had to consider, suddenly were not only evident but dispositive. And in the interim, as the disparate effects of the University’s and the nation’s responses to the pandemic became clear, considerations long set aside as insufficient to overcome the University’s commitment to a particular notion of merit also emerged in a new light. The disparate, negative effect of using test scores on admission of Black and Latinx students led the Regents to adopt a plan for permanent abandonment of the tests. Both the interim and permanent moves constituted rejection of the consequences of an historical, ongoing, unfair distribution of resources along lines of race. And evidence emerged quickly of the significance of dropping the tests: The number of
Black and Latinx applicants to the University increased dramatically, suggesting that the tests had been a powerful deterrent to many students of color.

Adopting any new assessment raises difficult, pragmatic questions. Should the distribution of scores on a new test be the same across all racial, ethnic, or socioeconomic groups? More specifically, should the test be allowed to produce some disparities, presumably reflecting the superior opportunities available to students who come from families of greater means? Should the test be allowed to produce or reproduce disparities along lines of race, reflecting structural inequality and the toll of endemic discrimination and racial stress? It is unlikely that there is consensus on how these questions should be answered, but failure to think clearly about them heightens the risk that the University will adopt another assessment that has the same drawbacks as the old ones. Failure to identify a normative target beforehand may ensure a miss by the University.

It is not obvious where to begin in thinking about what an equitable selection process would look like. The best solution would likely entail eliminating the scarcity of college opportunity in the state, so that there would be no need to admit and enroll only a fraction of applicants. Instead, students could take placement tests upon matriculation to ensure readiness for classes they take, and the stakes would accordingly be low. However, as long as scarcity remains a hallmark of public higher education opportunity, students must somehow be chosen. For a moment, consider equity as a guide, then.

If disparities along lines of race and class do not represent innate differences in ability but are the result of students’ opportunities and experiences, then in a

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102. Analysts of the human genome have found that race has no biological basis. See, e.g., Elizabeth Kolbert, *There’s No Scientific Basis for Race—It’s a Made-Up Label*, NAT’L GEOGRAPHIC (Nov. 5, 2020, 6:04 AM) https://www.nationalgeographic.com/magazine/2018/04/race-genetics-science-africa (reporting that “all humans are closely related—more closely related than all
perfect world utterly lacking in racial hierarchy and socioeconomic inequality, the same share of students in each group would earn a particular score.\textsuperscript{103} This is not that world, but the University can decide how great a degree of inequality-driven deviation from the ideal to tolerate. If equity is the guide, then a perfect world should be the destination. In that world, use of a properly fair assessment would result in selection of an admitted class consistent in its demographics with those of the applicant population. Thus, if the assessment screens out 90 percent of applicants because only one in ten people have the requisite ability to do well in college, and if 10 percent of applicants belong to a particular racial group, then 1 percent—one-tenth of one-tenth—of the admitted class should consist of members of that racial group. Students from no racial group would be disproportionately over- or underrepresented.

To be sure, as a practical matter, precise percentages might vary from year to year—but the degree of variance to be tolerated is a subject to be decided. This raises another question to be resolved, because for a state’s public university that serves the nation and to a significant degree the world, the reference population could consist of residents of the state, the class of high school seniors, or some other group. Politically, defining the reference population as the class of in-state graduating seniors may be most compelling.\textsuperscript{104} This is not a call for quotas, although of course quotas are one way to assure particular degrees of representation. The Supreme Court has definitively condemned that particular

\textsuperscript{103} Some contemporary writers argue that there may well be innate differences in ability along lines of race. See, e.g., David Reich, \textit{How Genetics Is Changing Our Understanding of Race}, N.Y. Times (Mar. 23, 2018), https://www.nytimes.com/2018/03/23/opinion/sunday/genetics-race.html [https://perma.cc/V33N-H4G2] (“[S]ince all traits influenced by genetics are expected to differ across populations (because the frequencies of genetic variations are rarely exactly the same across populations), the genetic influences on behavior and cognition will differ across populations, too”). These ideas are not new. See generally Ibram X. Kendi, \textit{Stamped from the Beginning: The Definitive History of Racist Ideas in America} (2016). Even scholars who recognize that merit is susceptible to different definitions and who view themselves as politically progressive may have a hard time acknowledging the possibility of a world in which achievement manifests in the pattern I describe.

\textsuperscript{104} Students from overseas complicate the assessment of group representation, but the purpose of this Essay is not to develop a complete admissions model. Rather, it is to show how many levers are subject to adjustment, and to suggest a way to think about recognizing when they are calibrated correctly.
policy tool, at least in the context of higher education admissions. Rather—and at risk of repetition—this discussion suggests a way to evaluate whether a particular selection mechanism is operating fairly when the primary goal is equity. There are various methods to decide who is admitted by the University, after all, including use of a completely random lottery.

This outcomes-based approach for evaluating an admissions policy is no doubt controversial. Merit has for years been accepted as susceptible to measurement by test performance, a method favored because of concern that the prior selection process yielded both unprepared students and excluded potential superstars. The universe of such potential superstars until relatively recently did not extend to include many Black, Latinx, or Asian applicants, though; that was beyond the realm of the imagination. ‘Therein lies the problem of adopting criteria without explicitly considering the potential outcome: A result that is disproportionately (or absolutely) exclusive becomes accepted as the result of the use of a neutral tool more properly recognized as a possibly biased instrument producing an anticipated outcome. History warns that adopting an admissions assessment without a goal in mind will lead to an instrument that reproduces preexisting hierarchies. History also shows that selective colleges and universities have never used an assessment that did not produce disparate results. College admissions is not a system from which bias can simply be removed, like an obstruction blocking a drain. The water is tainted and there is no filter in place to clean it.

The global pandemic shined a bright light on such structural inequality. Those without health insurance, for example, are obviously more vulnerable to

106. Guinier, supra note 20, at 218, 218 n.403.
107. James Bryant Conant, onetime president of Harvard University, was an early proponent of use of a standardized test in admissions for these reasons. Nicholas Lemann, The Big Test: The Secret History of the American Meritocracy 38 (2000). Conant at the same time oversaw an admissions regime that effectively maintained limits on enrollment of Jewish students, however; the meritocracy operated within limits. Karabel, supra note 17 at 193.
108. Id. at 173–74 (observing that in the seventy-year period between 1870 and 1941, roughly 165 Black students matriculated at Harvard—far more than at Yale and Princeton).
Those without sufficient financial resources do not have broadband internet access at home to facilitate remote learning. There is now widespread recognition that disparities in scores on the SAT and ACT play a role in limiting access to selective institutions of higher education for students who are Black and Latinx. The scores correlate with wealth and opportunity, which in turn are correlated with race. In recognizing the possibility of disparate effects of the pandemic on different populations of potential University students, the president and the Regents also recognized the disparate effects of other challenges, such as a


112. REPORT, supra note 30, at 81 (“It is true that SAT and ACT scores are positively correlated with family income, as are many other measures of student achievement.”).

history of discrimination. The pandemic compels advocates of new approaches to undergraduate admissions to develop alternative processes to reach different and more equitable results.

**CONCLUSION**

The pandemic enabled reform to undergraduate admissions practices at the University of California because the impact of COVID-19 so convincingly demonstrated the weakness of justifications of disparities along lines of race and class. Suspending the use of standardized test scores in admissions followed recognition that a narrow conception of academic excellence is neither necessary nor sacred. The Regents of the University of California decided that applicants’ SAT and ACT scores were not essential in choosing whom to admit; the Regents’ decision showed that the goal of admitting students with high scores was contextual and could be abandoned to pursue other goals. The threat of COVID-19 has made more likely the adoption of an admission assessment that does not penalize students who historically were excluded from opportunity. One result may be the enrollment of a student body that looks more like the population of California. Calamity, in short, created opportunity.
Rethinking Race, Equality, and Liberty: The Unfulfilled Promise of Parents Involved

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In 2007, an unprecedented event took place. Never before had the United States Supreme Court pitted two civil rights victories against each other to produce a high-profile defeat for advocates of school integration. Yet, this is precisely what happened in Parents Involved in Community Schools v. Seattle School District when the Justices struck down voluntary desegregation plans in the public schools of Louisville, Kentucky and Seattle, Washington. To reach this result, the Court ironically turned to Brown v. Board of Education and Grutter v. Bollinger, both of which had supported integration in education. In Brown, the Court famously declared in a unanimous opinion that “[s]eparate educational facilities are inherently unequal.” Admittedly, in the years that followed, Brown’s clout was undermined by ceaseless battles over how its lofty rhetoric would be implemented, even as its iconic status grew. Some saw the decision as endorsing a normative ideal of colorblindness, while others insisted that Brown recognized that race-consciousness was necessary to undo longstanding patterns of segregation, subordination, and stratification. As constitutional law scholar Reva Siegel has observed, Brown’s legacy was far from preordained, and “racial conflict has shaped the path and form of the decision’s canonization.”

By the time that Grutter came before the Court in 2003, there were serious doubts about the future of race-conscious government decision-making even when used to promote policies of access and integration. So, when the Justices upheld the use of race in the University of Michigan Law School’s admissions process, activists hailed the decision as a much needed

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1 127 S. Ct. 2738 (2007).
4 347 U.S. at 495.
shot in the arm for the civil rights movement. In short order, advocates predicted that *Grutter* would provide the basis for upholding voluntary school desegregation plans in public elementary and secondary schools. Yet, far from being the sword that reinvigorated the integrationist ideal, *Grutter* became the shield that blocked race-based student assignment plans.

How did a case about diversity come to play a part in undoing voluntary desegregation? This seemingly paradoxical result was born of a jurisprudence of fragmentation that has manifested itself doctrinally in at least three ways. First, *Brown* has been appropriated in the service of competing agendas and so has become a decision at war with itself. The case is invoked on all sides to support flatly contradictory interpretations of what the Equal Protection Clause signifies. According to these warring accounts, *Brown* alternatively means that strict colorblindness is the constitutional norm or that flexible, color-conscious remedies are absolutely essential to do racial justice.

Second, the school desegregation cases have proceeded on an entirely different logic from higher education decisions that address affirmative action in admissions. In implementing *Brown*, the Court focused on rectifying past discrimination by school officials. Meanwhile, in public colleges and universities, the Court recognized a diversity rationale that has nothing to do with corrective justice and instead turns on the cosmopolitan exchange of ideas among people with a range of backgrounds and experiences. These two lines of authority have co-existed, unreconciled and disconnected, until they collided in *Parents Involved*.

Third, cases involving race and equality have been highly compartmentalized, so that the Court adopts different doctrinal strategies depending on whether education, employment, government contracting, or voting is involved. Again, these distinct approaches often seem to inhabit parallel universes so that affirmative action can survive in colleges and universities, even as it is struck down in government contracting. Or, race-conscious remedies can persist in voting rights jurisprudence while they come under siege in school desegregation cases.

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As *Parents Involved* demonstrates, this fragmentation has led to contradiction and confusion in our country's equal protection jurisprudence. All of the Justices in the voluntary school desegregation cases claimed to be the authentic interpreters of *Brown's* legacy, and there was open acrimony over which of them was betraying the landmark decision. Amid this conflict, the Court appeared incapable of charting a decisive course for social justice in a racially complex world. Indeed, as I will show, the Justices were hamstrung by a contestation between colorblind and color-conscious interpretations of the Constitution that left little room for a dynamic and flexible account of race. Despite the setbacks, *Parents Involved* offers an important opportunity to reflect on how the Court can remain relevant by acknowledging that equality is integrally linked to the freedom to forge distinct identities in a diverse society.

I. WHEN EQUALITY CLAIMS COLLIDE: DESEGREGATION AND AFFIRMATIVE ACTION IN *PARENTS INVOLVED*

When the Court deliberated over whether to hear *Parents Involved*, the parties framed the question for review as whether *Grutter v. Bollinger* could be used to uphold the voluntary desegregation plans in Louisville and Seattle.[^8] In *Grutter*, Justice Sandra Day O'Connor's majority opinion upheld an admissions policy that weighed race as one factor in determining who would be admitted to the University of Michigan Law School.[^9] Building on Justice Lewis Powell's reasoning in *Regents of the University of California v. Bakke*,[^10] she found that diversity was a compelling interest and that democratic legitimacy was advanced by broad access to pathways of education.


[^9]: 539 U.S. at 334.

leadership in elite public institutions.\textsuperscript{11} Although the majority opinion permitted affirmative action to survive, O'Connor was careful to respect Powell's caveat that programs had to be narrowly tailored to survive strict scrutiny. The touchstone of narrow tailoring was a holistic review process that treated all applicants as individuals with a range of backgrounds and experiences.\textsuperscript{12} Race could be one factor but it could not be used in heavy-handed ways that raised the specter of a quota.\textsuperscript{13} O'Connor concluded that the Michigan Law School's admissions system satisfied the standard, but even then, she expressed a fervent hope that race-conscious affirmative action would no longer be necessary in twenty-five years.\textsuperscript{14}

Although the \textit{Grutter} decision was controversial for a number of reasons,\textsuperscript{15} school officials and their counsel in Louisville and Seattle undoubtedly welcomed the ruling as a way to defend voluntary integration plans.\textsuperscript{16} School boards in both cities had adopted plans that gave some weight to race in determining whether a student's application to enroll in a school would be approved. Louisville put its voluntary plan in place when a federal court declared the district unitary and mandatory busing therefore drew to a close. Undoubtedly influenced by the Court's approach to desegregation, the plan assigned students to a school within a specified geographic area, or cluster, but rejected petitions to enroll that violated guidelines on the proportion of blacks in the student body.\textsuperscript{17}

Seattle had not been subject to a desegregation order but had faced the threat of litigation. In part to avert a lawsuit, the school district adopted a series of voluntary plans. The one before the Court assigned ninth graders to

\textsuperscript{11} \textit{Grutter}, 539 U.S. at 328–331.

\textsuperscript{12} \textit{Id.} at 334.

\textsuperscript{13} \textit{Id.} at 334–339; see also \textit{Bakke}, 438 U.S. at 315, 319–320.

\textsuperscript{14} \textit{Grutter}, 539 U.S. at 341–343.


\textsuperscript{16} In fact, a federal court of appeals had relied on the diversity rationale to support a voluntary integration plan shortly after \textit{Grutter} was decided. \textit{See supra} note 7. When the Court granted certiorari in the Louisville and Seattle cases, speculation over \textit{Grutter}'s implications continued. \textit{See} David G. Savage, \textit{Cases Retread Brown v. Board of Education Steps; The Supreme Court Takes Up Two School Integration Disputes that Could Have Far-Reaching Effects}, L.A. TIMES, Dec. 4, 2006, at A14 (describing \textit{Grutter} as the exception to the Court's tendency to strike down government policies that rely on racial classifications).

\textsuperscript{17} \textit{Parents Involved}, 127 S. Ct. at 2749 (with a district population that was 34% black and 66% white, schools had to have a minimum of 15% black enrollment and a maximum of 50% black enrollment).
high schools based on their expressed preferences. In the event that a school was oversubscribed, race could operate as a tiebreaker as could geographic proximity of the school to a student’s residence or the presence of a sibling in the school. With a multiracial population of blacks, whites, Asian Americans, and Latinos, Seattle measured the proportion of white to non-white students in determining whether a school was diverse. Although there were significant differences in the mechanics of the two plans, each school district justified its program, at least in part, as a way to achieve diversity in the student body. In doing so, both districts drew directly on the rationale in Grutter.

Parents Involved easily could have become a referendum on Grutter, but this is not in fact what happened. Indeed, none of the Justices framed the litigation this way. In his plurality opinion, Chief Justice John Roberts deployed Grutter to eclipse Brown. This strategy seemed to suggest that Grutter was a powerful precedent, but at the same time, Roberts’ opinion made clear that the diversity rationale had little force outside the realm of higher education. So, Grutter became a shield that obscured Brown’s relevance but not a sword that would validate race-conscious policies outside colleges and universities. Having limited Grutter to its facts, Roberts made clear that, in general, the Constitution is colorblind and rejects government use of racial classifications. According to Roberts, the Court allowed the use of race-conscious remedies to cure a history of past discrimination, but no such corrective justice rationale applied to these voluntary plans. In Louisville, the vestiges of discrimination already had been eliminated root and branch, and in Seattle, there had never been proof of past wrongdoing. So, remediation was simply irrelevant to the resolution of the litigation and, in effect, so was Brown. With neither diversity nor corrective justice

18 Id. at 2746–2747.
19 Id. at 2747.
20 Id. at 2746–2748 (with a 41% white and 59% non-white student body, schools had to be within 10% of this overall level of racial balance). The first tiebreaker was presence of a sibling, the second was race, and the third was geographic proximity. Id. at 2747.
22 Parents Involved, 127 S. Ct. at 2754.
23 Id. at 2757–2759.
24 Id. at 2752.
25 Id. at 2761.
available as justifications, the school systems had no basis for relying on race in student assignments.\(^{26}\)

Although these observations were fatal in their own right, the plurality went on to note that the plans were not narrowly tailored to advance the districts' stated rationales.\(^{27}\) In particular, each plan sought racial balance for its own sake by enforcing rules of strict proportionality.\(^{28}\) These rules often made no sense from the perspective of diversity, Roberts concluded. For example, Seattle looked solely at the proportions of white and non-white students, so the district would reject as insufficiently diverse schools with enrollments that were twenty percent white, thirty percent Asian-American, twenty-five percent Latino, and twenty-five percent black.\(^{29}\) Yet, this student body certainly seemed diverse insofar as it created the conditions for a lively exchange of ideas across a range of backgrounds and experiences.\(^{30}\)

Even in Louisville, which had a predominantly black and white population, Roberts noted, *Grutter* would require that the district look at factors other than race. He observed that Michigan had considered whether students "have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields."\(^{31}\) Some of these criteria admittedly made little sense in the context of elementary and secondary education. Even so, Roberts faulted Louisville for its failure to supplement the focus on race with other kinds of background and experience.\(^{32}\)

For both political and legal reasons, the school districts had attempted to minimize the burdens imposed on students under voluntary integration plans. Rather than bolster the constitutionality of the assignment plans by demonstrating that race was accorded only a marginal weight, the limited impact became a basis for doubting the necessity of race-conscious remedies.\(^{33}\) Roberts found that race played a negligible role in disposing of the vast majority of transfer applications, especially in Seattle where it operated as a tiebreaker. As a result, he concluded that race-neutral

\(^{26}\) Id.

\(^{27}\) Seattle relied on the need to reduce racial concentration in the schools and to mitigate the impact of residential segregation on access to the most desirable schools, while Louisville cited a desire for "a racially integrated environment." Id. at 2755 (internal quotations and citations omitted).

\(^{28}\) *Parents Involved*, 127 S. Ct. at 2757.

\(^{29}\) Id. at 2756.

\(^{30}\) Id. at 2756.

\(^{31}\) Id. at 2753 (citing *Grutter v. Bollinger*, 539 U.S. at 338).

\(^{32}\) Id.

\(^{33}\) Id. at 2760.
alternatives were apt to be nearly as, if not just as, effective.\textsuperscript{34} Under *Grutter*, Roberts contended, the districts had to employ race-neutral alternatives when they were available, and here, neither had done so.\textsuperscript{35}

In *Parents Involved*, Justice Clarence Thomas was the most vocal critic of race-conscious remedies. Rather than focusing on *Grutter*’s implications, his separate conformance emphasized the ideal of a colorblind Constitution as the essence of *Brown*’s legacy.\textsuperscript{36} Going even further, he condemned color-conscious remedies like the voluntary integration plans as themselves tainted by a segregationist legacy of racial subordination and stratification.\textsuperscript{37} He derided the boards’ efforts as the product of sociological theories of race, the very kind of approach that previously had laid the foundation for the Court’s approval of “separate but equal” policies in *Plessy v. Ferguson*\textsuperscript{38} So Thomas warned: “Can we really be sure that the racial theories that motivated *Dred Scott* and *Plessy* are a relic of the past or that future theories will be nothing but beneficent and progressive? That is a gamble I am unwilling to take, and it is one the Constitution does not allow.”\textsuperscript{39}

The Roberts plurality had accepted strict scrutiny as the standard of review but rejected the relevance of diversity.\textsuperscript{40} By contrast, Justice Stephen Breyer acknowledged diversity as a compelling interest in elementary and secondary schools, but he ultimately found that strict scrutiny was inappropriate because of the special history of school integration.\textsuperscript{41} In his dissenting opinion, *Grutter* mainly was used to demonstrate that even if strict scrutiny applied, it did not automatically invalidate race-conscious programs.\textsuperscript{42} For the Breyer dissent, an in-depth analysis of the diversity rationale also proved largely beside the point, not because *Grutter* was a higher education case but because *Brown* and its progeny were dispositive.

Breyer insisted that *Brown*’s legacy not only compelled desegregation to correct past injustices but also permitted voluntary plans to promote diversity and prevent racial isolation.\textsuperscript{43} As support, he cited the Court’s unanimous decision upholding mandatory busing in *Swann v. Charlotte-Mecklenburg*

\textsuperscript{34} *Parents Involved*, 127 S. Ct. at 2760.
\textsuperscript{35} Id.
\textsuperscript{36} Id. at 2782–2783 (Thomas, J., concurring).
\textsuperscript{37} Id. at 2783 (Thomas, J., concurring).
\textsuperscript{38} Id. at 2776–2779 (Thomas, J., concurring).
\textsuperscript{39} Id. at 2788 (Thomas, J., concurring) (citing *Dred Scott v. Sanford*, 60 U.S. 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896)).
\textsuperscript{40} *Parents Involved*, 127 S. Ct. at 2751–2752, 2753–2754.
\textsuperscript{41} Id. at 2815, 2820–2822 (Breyer, J., dissenting)
\textsuperscript{42} Id. at 2816–2818 (Breyer, J., dissenting).
\textsuperscript{43} Id. at 2811–2816 (Breyer, J., dissenting).
School Board. There, Chief Justice Warren Burger cited the need for judicial deference to school board judgments about whether to implement voluntary plans. In light of the persistence of racial segregation, the dissent argued, the Court's decision to strike down the Seattle and Louisville programs "threaten[ed] the promise of Brown."

Breyer's choice of Swann was far from accidental. It was the last major desegregation case in which the Court spoke with one voice. The unanimous opinion was the product of tense negotiation and behind-the-scenes compromise among the Justices, but this fragile consensus fell apart in later cases as the Justices descended into open bickering about Brown's meaning. Although Roberts' plurality opinion took the dissent to task for overlooking these subsequent decisions, Breyer treated Swann as the last opinion that truly honored Brown's legacy. In his view, the Louisville and Seattle plans fell squarely within Swann's purview. Despite the Court's recent jurisprudence applying strict scrutiny to all government racial classifications, Breyer boldly argued that out of respect for Brown, the Court should defer to school boards' assessments of how best to advance academic achievement and racial tolerance through integration.

Justice Anthony Kennedy was left to split the difference. Kennedy agreed with the plurality that strict scrutiny should apply whenever individuals were subject to differential treatment on the basis of race. Yet, he was not convinced that school boards could consider race only when remedying the vestiges of past discrimination. Instead, he agreed with the dissent that nurturing diversity and preventing racial isolation were

44 Id. at 2811–2812 (Breyer, J., dissenting) (citing Swann v. Charlotte Mecklenburg Sch. Bd., 402 U.S. 1 (1971)).


46 Parents Involved, 127 S. Ct. at 2837 (Breyer, J., dissenting).


49 Parents Involved, 127 S. Ct. at 2762.

50 See id. at 2812 (Breyer, J., dissenting).

51 Id. at 2834 (Breyer, J., dissenting).

52 Id. at 2818–2820 (Breyer, J., dissenting). In this, Breyer appeared to adopt the position advocated by the NAACP Legal Defense and Educational Fund in its amicus brief. See Brief of the NAACP Legal Defense and Educational Fund, Inc., supra note 8, at 9–14.

53 Parents Involved, 127 S. Ct. at 2789 (Kennedy, J., concurring in part and concurring in the judgment).
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acceptable constitutional justifications for the Seattle and Louisville plans.\textsuperscript{54} Nonetheless, Kennedy found that the mechanics of the student assignment programs were too crudely race-based to be acceptable. Instead of offering examples of permissible plans akin to the one upheld in \textit{Grutter}, Kennedy indicated that he preferred race-conscious decisions that did not rely on the differential treatment of individuals. For instance, officials instead could promote integrated student bodies through the selection of school construction sites or the drawing of attendance boundaries.\textsuperscript{55}

Ironically, then, a case that began as a referendum on \textit{Grutter} ultimately marginalized that decision. The plurality confined the diversity rationale to higher education, but even the dissent concluded that the \textit{Parents Involved} litigation mainly implicated school desegregation precedents. As a result, the cosmopolitan ideals of higher education could not save the Louisville and Seattle plans, and the Justices were left to wage the battle for \textit{Brown}'s legacy on other grounds. The fragmented opinions in \textit{Parents Involved} were the culmination of longstanding conflicts over the meaning of race and the nature of equal protection. These disagreements were so profound that they had converted \textit{Brown} into a decision at war with itself.

\textbf{II. \textit{Brown}'s Legacy: A Decision at War With Itself}

In \textit{Parents Involved}, all of the Justices laid claim to \textit{Brown}'s legacy, in part because of its iconic status in civil rights law.\textsuperscript{56} The sense that homage must be paid, however, exhausted any consensus about the landmark decision. \textit{Brown} spawned a jurisprudence of fragmentation that culminated in an acrimonious debate over the legitimacy of voluntary desegregation plans. Although the fractured opinions in \textit{Parents Involved} reflected competing views of race, the Court largely omitted dynamic accounts based on the autonomy to express a unique identity. As a result, the diversity rationale offered little comfort to the Louisville and Seattle school districts

\textbf{A. How the Battle Lines Were Drawn}

At the outset, \textit{Brown} seemed to have a clear objective: to strike down the "separate but equal" doctrine that the Court had endorsed in \textit{Plessy v.}

\textsuperscript{54} Id. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).
\textsuperscript{55} Id. at 2792 (Kennedy, J., concurring in part and concurring in judgment).
\textsuperscript{56} Id. at 2767–2768 (Roberts, C.J., plurality); Id. at 2768, 2783–2786 (Thomas, J., concurring); Id. at 2791 (Kennedy, J., concurring in part and concurring in the judgment); Id. at 2797–2798, 2799–2800 (Stevens, J., dissenting); Id. at 2800–2801, 2836–2837 (Breyer, J., dissenting).
Ferguson'' in 1896. Plessy helped to entrench segregation by giving it the patina of constitutionality and the semblance of equality. Only Justice John Marshall Harlan dissented from the ruling, insisting that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." For him, blacks and whites had to be equal before the law, a formal right conferred by national citizenship. This right was not necessarily a reflection of actual equality of the races, as Harlan made clear when he remarked that "[t]he white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage." Because Harlan saw racial differences as natural and inevitable, he did not expect formally equal treatment to eliminate them. In short, his principle of colorblindness was entirely consistent with racial stratification.

After Plessy legitimized a doctrine of "separate but equal" over Harlan's dissent, civil rights advocates faced a stark legal landscape until events surrounding World War II laid the foundation for renewed demands for racial justice. The National Association for the Advancement of Colored People (NAACP) had been waging a long-term litigation campaign that, from the late 1930s to 1950, resulted in key victories in lawsuits challenging the exclusion of blacks from public institutions of higher education. The Court struck down official practices that barred black applicants from admission and redirected them to schools in neighboring states. The Court also found that a separate public system of black colleges and universities could not justify exclusion from white schools. Finally, the Court concluded that once admitted, blacks could not be segregated from whites in the library, the

58 Id. at 559 (Harlan, J., dissenting).
60 Plessy, 163 U.S. at 559 (Harlan, J., dissenting). See also Devon W. Carbado, Racial Naturalization, 57 AM. Q. 633, 647 (2005) (describing Harlan’s distinction between equality before the law and equality in fact).
61 For a description of how post-World War II developments affected the movement for racial equality in the United States, see Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 STAN. L. REV. 61 (1988).
classroom, or the dining hall. In each instance, the Court cited either tangible inequalities in facilities, personnel, or resources, or intangible inequalities, for example, in access to reputational advantages and elite alumni networks.

*Brown* did not come out of nowhere, but was clearly anchored in these early victories in higher education. *Brown* was special, though, because it had the potential to touch the lives of many Americans who would never attend a college or university. Although a few students enrolled in private elementary and secondary schools for reasons of prestige or religion, the vast majority went to public institutions. These "common schools" were places where children from different backgrounds could come together to forge a unifying and unique American identity.

When Chief Justice Earl Warren wrote that "'separate but equal' has no place" in the public schools, his decision for a unanimous Court was potentially breathtaking in scope. Warren condemned segregation, even if tangible resources in black and white schools could be equalized. He cited the intangible costs, particularly stigmatic injuries that damaged the "hearts and minds" of black children "in a way unlikely ever to be undone." In light of the history of "separate but equal" laws and the description of segregation's cruel effects, *Brown* appeared to take direct aim at conditions of racial stratification and subordination. The Court seemed squarely focused on the harm to victims that inhered in a system of racially identifiable public schools.

Of course, *Brown*’s potential to fight oppression depended not just on its rhetoric but on its implementation. In *Brown II*, the Court faced the daunting task of fashioning remedies to cure the constitutional wrong of de jure segregation. The Justices adopted a formula of "all deliberate speed" and left to the federal district courts the task of crafting plans on a case-by-

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68 *Id.* at 494. In reaching this conclusion, Warren relied in part on psychological research by Dr. Kenneth Clark, which found that regardless of their race, children preferred white dolls to black dolls. *Id.* at 494 n.11. This finding was deemed to be evidence that black children had internalized a sense of inferiority due to segregation. *Id.* at 494. The reliance on social science evidence became a highly controversial feature of the *Brown* opinion. See, e.g., Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157–158 (1955).


70 *Id.* at 301.
case basis. Although there was far more deliberation than speed in the years immediately following Brown, the Court affected a studied silence on the adequacy of remedies for school segregation.\textsuperscript{71}

That passive stance changed when, in the wake of civil unrest, Congress passed the Civil Rights Act of 1964.\textsuperscript{72} With congressional support and agency enforcement, the Justices felt emboldened to speak to the propriety of various remedies for state-mandated segregation. The Court rejected "freedom of choice" plans that merely eliminated formal barriers to attending integrated public schools.\textsuperscript{73} According to the Justices, habits and prejudices born of longstanding forced segregation tainted choices about where to go to school and so perpetuated racial isolation.\textsuperscript{74} Later, the Court identified the affirmative steps that schools had to take to rectify past discrimination. One of the most controversial measures was busing, but the Justices unanimously endorsed this remedy in the Swann case.\textsuperscript{75} Though increasingly conflicted about the scope of desegregation plans, the Court preserved a unified front in deference to Brown.\textsuperscript{76}

As desegregation cases targeted the North and West, this fragile unanimity shattered. Once challenges moved outside the South, with its glaring history of slavery and Jim Crow, the Justices no longer felt compelled to speak with one voice to uphold Brown's legacy. In Keyes v. School District No. 1,\textsuperscript{77} a majority of the Court upheld a city-wide busing plan in Denver, Colorado but only over vigorous dissent. Five Justices were willing to join Justice William Brennan in inferring that segregative practices in one neighborhood were presumptive evidence of discriminatory behavior elsewhere in the school system and had the likely effect of distorting pupil assignments throughout the district.\textsuperscript{78} Chief Justice Warren Burger concurred only in the result,\textsuperscript{79} Justice Lewis Powell filed a separate opinion that rejected the de jure/de facto distinction,\textsuperscript{80} Justice William Rehnquist dissented,\textsuperscript{81} and Justice Byron White did not participate in the case.\textsuperscript{82}


\textsuperscript{73} Green \textit{v.} County Sch. Bd., 391 U.S. 430, 441–442 (1968).

\textsuperscript{74} \textit{Id.}


\textsuperscript{76} SCHWARTZ, \textit{supra} note 47, at 182–184.

\textsuperscript{77} 413 U.S. 189 (1973).

\textsuperscript{78} \textit{Id.} at 201–213.

\textsuperscript{79} \textit{Id.} at 214 (Burger, C.J., concurring in the result).

\textsuperscript{80} \textit{Id.} at 217 (Powell, J., concurring in part and dissenting in part). Powell adopted this position in part because he did not believe that the South should be treated differently
In *Milliken v. Bradley*, a divided Court struck down a mandatory busing plan that enlisted white students in nearby suburban districts to desegregate the heavily non-white school system in Detroit. The majority rejected interdistrict plans unless suburban school boards had contributed in some way to the history of intentional segregation that triggered a busing remedy in the central city. Because Detroit’s situation was typical of most metropolitan areas, *Milliken* sounded the death knell for meaningful integration in most cities outside the South. Even where desegregation orders had been implemented, federal district courts began to withdraw from oversight by declaring school districts free of any vestiges of past discrimination. The Court endorsed these efforts in two decisions in the 1990s. Again, the Justices were split with the majority receptive to the possibility of terminating desegregation orders, and the minority worried about the possibility of resegregation.

*Brown* became a decision at war with itself in part because of the strong political resistance that federal courts faced when they ordered desegregation, in particular, mandatory busing. If *Brown I* and *II* had left the scope of the Court’s remedial ambitions ambiguous, the ensuing backlash against busing made some clarification and even constitutional revisionism seem prudent and indeed imperative. Chief Justice Warren’s opinion had spoken of the devastating effects on children of forced racial separation. Yet, as calls for integration moved North and West, the Justices increasingly turned to the de facto/de jure distinction to limit the scope of unpopular busing remedies. Judicial intervention was appropriate only to redress

from other parts of the country. JOHN C. JEFFRIES JR., JUSTICE LEWIS F. POWELL, JR. 298–300 (1994). He later retreated from this position as an improvident one, the product of “Confederate emotions.” Id. at 306 (internal quotations omitted).

81 *Keyes*, 413 U.S. at 254 (Rehnquist, J., dissenting). Rehnquist took the position that absent express segregation by law, there was no equal protection violation under *Brown*, a classic anti-classification account of the Constitution. Id. at 254–258.

82 Id. at 214.


84 *Milliken*, 418 U.S. at 744–752.


87 *Freeman*, 503 U.S. at 489–490; *Dowell*, 498 U.S. at 251.

intentional wrongdoing by public officials; federal judges were not empowered to undo segregated patterns that resulted from private residential choices.

In short, the government’s invidious reliance on race, rather than the harmful effects on children’s “hearts and minds,” came to dominate the Court’s equal protection jurisprudence. To avoid any appearance of inconsistency with Brown, the Court embraced Harlan’s dissent in Plessy as unequivocal authority for an anti-classification interpretation of equal protection law. Critics have argued that Harlan’s jurisprudential legacy is not so clear-cut, noting that he was sometimes willing to allow the government to rely on racial categories for purposes that were hardly benevolent. Nonetheless, members of the Court not only distilled the principle of colorblindness from the Plessy dissent but also assumed that Warren had endorsed that reasoning in rejecting the “separate but equal” doctrine. By converting Warren into Harlan’s acolyte, the Court was able to shift its gaze from racial subordination to racial classification, all while professing complete fidelity to Brown’s integrationist legacy.

The shift to an anti-classification Constitution meant that the Court was more concerned with the propriety of official behavior than with the lived experience of inequality and the costs exacted from the disadvantaged. Under an interpretation of the type suggested by Justice Harlan in his Plessy dissent, there was little solicitude for voluntary integration plans to counteract the “private choices” and “demographic shifts” that yielded racially identifiable neighborhoods and schools. Because no past official misconduct was at issue, the Court could not justify the plans as cures for past discrimination. Instead, the Justices would be endorsing the use of racial classifications they had decried as insidious. The plans’ approval would depend on weighing the harms of segregation against the benefits of integration. Yet, this was precisely the sort of empirical inquiry that had put the Court at the center of a political maelstrom after Brown. Rather than become self-appointed racial

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89 Siegel, supra note 5, at 1505–1513.


91 Siegel, supra note 5, at 1515–1521.

92 Freeman, 503 U.S. at 495; see also Parents Involved, 127 S. Ct. at 2761 (2007) (Roberts, C.J., plurality) (citing Freeman to make the distinction between de jure segregation, for which remedies are necessary, and de facto segregation, for which they are not).

engineers, the anti-classificationists on the Court preferred to dismiss the use of race out of hand.

For proponents of an anti-subordination Constitution, the Court was obligated to do its utmost to root out stigmatizing segregation, regardless of its causes. Even if the de jure/de facto distinction operated as a constraint on judicial authority to order desegregation plans, the doctrine by no means precluded voluntary plans. In fact, such efforts were essential because long after Brown was decided, public school segregation persisted due to pervasive residential segregation. Experiments with race-neutral alternatives like socioeconomic integration had generated only mixed success in producing racially diverse schools. So, to achieve meaningful integration at the elementary and secondary level, it was essential that the Court uphold some race-conscious voluntary plans.

With court-ordered desegregation drawing to a close, student assignment plans could no longer be justified as purely remedial interventions. Instead, school boards sought to defend the plans on pedagogical grounds. Here, however, advocates of integration faced an important obstacle to preserving Brown's legacy. The decision did not expressly recognize education as a fundamental right under the Constitution, though some of the language clearly seemed to support that interpretation. As Chief Justice Warren observed, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." In other circumstances, the Court had recognized rights not explicitly mentioned in the Constitution because they were necessary to guarantee other fundamental liberties. So, for example, the Justices implied a right to interstate travel to

94 Balkin, supra note 93, at 52–53; Catharine A. MacKinnon, MacKinnon, J., concurring in the judgment, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION, supra note 93, at 145–147.


96 Compare Richard D. Kahlenberg, Socioeconomic School Integration, 85 N.C. L. REV. 1545, 1551–1557 (2007) (citing the success of socioeconomic integration plans in producing racial diversity), with Cashin, supra note 85, at 359–360 (describing the “tide of parental skepticism” that greets proposals for socioeconomic integration, thus limiting their utility in advancing racial integration).

97 In the companion case of Bolling v. Sharpe, 347 U.S. 497 (1954), a passage that came close to recognizing education as a fundamental liberty under the Due Process Clause was dropped to preserve unanimity, but “one could be forgiven for thinking that the Court did hold that education was a fundamental interest in 1954, even if later courts came to a contrary conclusion.” Balkin, supra note 93, at 58 (emphasis in original).

ensure access to the seat of national government. Assuming that public education was integral to preparation for not just work but citizenship, the Court might similarly infer a right of access to the instructional process.

Efforts to reconstruct Brown as constitutional protection for a right to learn were thwarted, however. At the same time that the Court was developing its anti-classification approach to desegregation cases, the Justices dashed any hope that the Constitution mandated equal educational opportunity for all children. In San Antonio Independent School District v. Rodriguez, the plaintiffs argued that a local property tax system used to finance the public schools was unconstitutional because it led to highly unequal per capita student expenditures. The Court rejected this claim because, among other things, education was a state and local responsibility, and the federal Constitution did not mandate precise equivalence in delivering these services (though the Justices indicated in dicta that there might be some guarantee of minimum access).

After Rodriguez, integration could not be defended as a constitutionally required educational strategy—a means of fulfilling the obligation to provide equal opportunity in a common school. Under the Court’s interpretation of the Equal Protection Clause, there was no implied right to attend an integrated school as a necessary component of preparing children for work and citizenship in a diverse society. Shorn of a justification rooted in the right to an education, the war over Brown’s legacy was reduced to a dialectic between an anti-classification and an anti-subordination Constitution.

B. How Race Became Reified

The war over Brown’s legacy has reified race in ways that obscure important aspects of this identity trait. Neil Gotanda identifies four different ways that the Court conceptualizes race. Proponents of an anti-classification Constitution rely on formal-race, defined as a biological trait that is presumptively irrelevant to government decision-making. Colorblindness becomes the normative ideal because race is immaterial to the official allocation of benefits and burdens. Advocates of an anti-subordination Constitution use historical-race, which focuses on “past and

102 Id. at 23–25 & n.60, 37–44.
104 Id. at 4.
continuing [effects of] racial subordination." Historical-race underlies government efforts to eradicate illicit stereotypes and institutional structures like segregated schools that entrench inequality. Desegregation jurisprudence also makes room for status-race, which refers to "the traditional notion of race as an indicator of social status." Status-race undergirds judicial efforts to eliminate intentional discrimination, including de jure segregation, that perpetuates assumptions of racial inferiority.

What is obscured in the Court's analysis of school desegregation, however, is culture-race, which Gotanda describes as a product of "broadly shared beliefs and social practices" that generate a sense of "cultural diversity." Race is no longer a biological irrelevancy that has to be ignored, nor is race automatically a marker of inequality and prejudice that must be erased through assimilative policies. On the contrary, so long as practices and associations are freely chosen, race should be treated as a material feature of everyday life that government must acknowledge and respect.Officials are obligated to ensure tolerance and civility among groups as they pursue their distinct cultural identities in a pluralistic society.

Culture-race engenders concerns about both freedom and equality. Here, constitutional scholar Kenneth Karst's foundational work on equal liberties is especially helpful. Karst contends that equal citizenship requires that members of minority groups be permitted to exercise fundamental freedoms on the same terms as other citizens. Among these freedoms would certainly be a right to inculcate distinct cultural identities. In analyzing citizenship and the Constitution, Cristina Rodriguez has extended this reasoning to language and participation by insisting on a "[f]luid civic

105 Id.
106 Id. at 47–48.
107 Id. at 4.
108 Id. at 4–5.
109 Gotanda, supra note 103, at 67–68.
111 Kenneth L. Karst, The Bonds of American Nationhood, 21 CARDOZO L. Rev. 1141, 1172–1173 (2000) ("Government in America has no constitutional authority to patrol the borders of a cultural group. . ."); Kenneth L. Karst, Paths to Belonging: The Constitution and Cultural Identity, 64 N.C. L. Rev. 303, 337 (1986) ("The most important constitutional development of the twentieth century, the emergence of the principle of equal citizenship, has promoted the freedom of individual choice about cultural identification.").
identity [that], at its core, disavows assimilation." In particular, she contends that "participation in political and social life cannot require that the participant repress or ignore meaningful cultural and linguistic affiliations." Like Karst, Rodriguez links equality to liberty in calling for the autonomy to preserve one’s heritage.

In the school context, a recognition of culture-race and the equal liberty to preserve this heritage would require courts to focus on whether students enjoy equal opportunities to develop their identities in a diverse classroom. Race could no longer be treated as presumptively irrelevant, nor could judges readily equate anti-subordination and assimilation. Had the Justices recognized a fundamental right to education, school boards would have had a legal vocabulary large enough to include culture-race in conceptualizing the challenges presented by increasingly multiracial, multiethnic student bodies. Given the Court’s exclusive focus on rectifying past racial wrongs, however, there was little room for this type of discourse in the school desegregation cases.

During the 1970s, lawsuits in the West raised questions about the trade-offs between busing and bilingual education. In San Francisco, parents opposed a plan that would remove children from Chinatown and diminish their access to programs that addressed Chinese-speaking students’ special linguistic and cultural needs. In Denver, Latino parents raised a similar objection to a busing plan that interfered with bilingual-bicultural instruction. In both instances, the Court rejected the demands to temper court-ordered desegregation in deference to linguistic and cultural autonomy.

The Court already had disregarded the liberty claims of whites who insisted that forced busing infringed on their freedom to associate with those of their own choosing, that is, other whites. These arguments were equated with thinly veiled racism. In many ways, the Court subsumed the arguments of Chinese and Latino parents within this debate. Race could be a mark of wrongful discrimination and subordination, but not of an autonomously...
chosen set of cultural commitments. Chinese and Latino parents who thought otherwise were characterized as victims of a false consciousness that aligned them with white resistance when the Court already had concluded that, as racial and ethnic minorities, their interests were aligned with those of blacks. The Justices emphasized that Jim Crow had come to Chinatown and the barrio, and so would desegregation. In these cases, there was simply no room for a form of culture-race that demanded the freedom to forge a unique identity as well as an equal chance to participate in American society—at least where there had been a history of intentional racial discrimination.

The Supreme Court was not alone in linking bilingual-bicultural education to anti-busing sentiment. In 1974, the Nixon Administration pressed for passage of the Equal Educational Opportunities Act. The measure offered alternatives to busing remedies, and one of these was bilingual programs for students who spoke a language other than English. The legislation had its roots in a powerful backlash against court-ordered busing, a reaction typified by violent protests around the nation. This backlash lay at the heart of a long-running battle over busing in California, a struggle waged at the ballot box as well as in state and federal court. California’s experience reveals how the neglect of culture-race could fuel opposition to busing remedies.

In 1963, the California Supreme Court held that the state constitution prohibited both de jure and de facto segregation in the public schools. As a result, nearly all of the Los Angeles school system potentially became subject to court-ordered student transportation. Widespread resistance ensued, and advocates of “white rights” succeeded in enacting a 1972 ballot measure that declared that: “No public school student shall, because of his race, creed, or color, be assigned to or be required to attend a particular

117 Guey Heung Lee v. Johnson, 404 U.S. 1215, 1216 (1971) (“Brown v. Board of Education was not written for blacks alone. It rests on the Equal Protection Clause of the Fourteenth Amendment, one of the first beneficiaries of which were the Chinese people of San Francisco.”); see also Keyes v. School District No. 1, 413 U.S. 189, 197–198 (1973) (analogizing Hispanics to blacks in defining a segregated school).


120 For a description of some of the violence that arose outside the South in response to school busing plans, see WILKINSON, supra note 48, at 202–215.


Although 63% of the electorate supported the initiative, the California Supreme Court struck it down because it unconstitutionally prohibited schools from dismantling de jure segregation, as required by the federal Constitution.

The next time around, busing foes adopted a different strategy. This time, leaders enlisted the support of blacks and Latinos to rebuff any allegations of racist motivation. One Latino politician in East Los Angeles circulated a letter that warned: "Compulsory busing in most California cities would mean the virtual end of bilingual education as we know it today." Chicano members of a community advisory committee appointed by the Los Angeles school board also expressed doubts about "an integration policy that is totally assimilationist in nature—one that does not respect the rights and needs of the culturally different." This time, opponents of busing successfully enacted a provision that barred California courts from ordering remedies unless they were independently required under the Fourteenth Amendment of the United States Constitution. The measure was justified as a way to respect all children's learning needs; indeed, the campaign's slogan was "We love all kids." The measure not only won nearly 70% of the vote, but also survived legal challenges in state and federal court.

In *Crawford v. Board of Education*, Justice Lewis Powell wrote for the majority that upheld the California ballot measure. Powell noted that the Fourteenth Amendment should not be "destructive of a State's democratic processes and of its ability to experiment." In concluding that the democratic process in California had functioned appropriately, the Court was clearly influenced by the multiracial nature of the state's population and its broad support for the measure. *Crawford* found that the ballot measure was race-neutral both on its face and in practice. As Powell observed,

123 Proposition 21, § 1 (Nov. 7, 1972) (cited in Santa Barbara Sch. Dist. v. Superior Court, 530 P.2d 605, 611 (Cal. 1975)).


125 Martinez-HoSang, *supra* note 124, at 297 (citing a letter from Alex Garcia, California State Senator, to California State Senators (Nov. 30, 1977)).

126 *Id.* at 298 (citing CARLOS MANUEL HARO, MEXICANO/CHICANO CONCERNS AND SCHOOL DESEGREGATION IN LOS ANGELES 17 (1977)).

127 *Id.* at 303.


130 *Id.* at 535.
The benefit [the ballot measure] seeks to confer—neighborhood schooling—is made available regardless of race in the discretion of school boards. Indeed, even if [the measure] had a racially discriminatory effect, in view of the demographic mix of the District it is not clear which race or races would be affected the most or in what way.\textsuperscript{131}

Moreover, because the initiative "was approved by an overwhelming majority of the electorate" and "received support from members of all races,"\textsuperscript{132} Powell rejected any claim that it was motivated by a discriminatory purpose. Under the circumstances, the Court was content to let the political process run its course lest the judiciary "limit seriously the authority of States to deal with the problems of our heterogeneous population."\textsuperscript{133}

Ironically, \textit{Crawford} recognized the dynamic tensions between desegregation on the one hand and linguistic and cultural autonomy on the other only to place these contested notions beyond the Justices' reach. By deferring to the wishes of a multiracial, multiethnic electorate, the Court treated fluid notions of identity, akin to what Gotanda would call culture-race, as the province of private preferences and political strategizing. The complexities of a dynamic approach to identity, expressed as a conflict between the imperative of racial equality and the freedom to preserve a way of life, simply fell outside the realm of judicial second-guessing.\textsuperscript{134} As a result, the Court was able to protect its definition of race as either a formal category or a mark of subordination. Even the lone dissenter in \textit{Crawford}, Justice Thurgood Marshall, focused on the demands of corrective justice to rectify past discrimination. He reminded the Court of the long history of resistance to court-ordered busing in California, and he asserted that, under these circumstances, the initiative was an unconstitutional usurpation of state judicial power to enforce a norm of equal protection.\textsuperscript{135} His strong anti-subordination perspective largely ignored the idea of culture-race.

\textsuperscript{131} Id. at 537.
\textsuperscript{132} Id. at 545.
\textsuperscript{133} Id. at 539.
\textsuperscript{134} Professor Ian Haney Lópex suggests that in adopting a diversity rationale for affirmative action in higher education, Justice Powell relied on the image of "a nation of minorities" in which groups stood on a relatively equal footing in competing for political advantage. Ian F. Haney Lópex, "A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 1063 (2007). Haney Lópex contends that a laissez-faire attitude toward ethnic politics follows from this analysis and criticizes the Court for intervening to invalidate minority set-asides that were the product of a competitive political process in the city of Richmond, Virginia. \textit{Id.} Haney Lópex does not address Powell's opinion in \textit{Crawford}, however. For more in-depth discussion of these issues, see infra notes 247–260 and accompanying text.
As this brief history makes clear, there has been little room in the Court’s jurisprudence to contemplate culture-race. The opinions in Parents Involved all reflect this omission. Whatever their ideological predilections, the Justices have paid little or no attention to dynamic and fluid conceptions of race. For the plurality, an anti-classification Constitution meant that race is a biological irrelevancy, and shifting social practices were beside the point as a matter of constitutional interpretation. To rebuff the Louisville and Seattle school districts’ claims about culture-race and the socialization process, the plurality dismissed a diversity rationale as wholly inapposite outside the realm of higher education. For the dissent, the anti-subordination Constitution controlled, so that schools could presume the benefits of integration as well as the harms of racial isolation with limited judicial oversight. In Breyer’s opinion, historical-race and status-race were key, and the nod to diversity paid lip service to culture-race without really engaging it. In fact, the dissent treated the goal of eliminating racial isolation as largely fungible with diversity, an approach that prompted the plurality to accuse the dissent of seeking racial balance for its own sake.\(^{136}\)

Only Justice Kennedy occupied a niche that does not fit neatly into the conventional struggle over Brown’s meaning. Although persuaded by the dissent that racial stratification persists, he was drawn to the plurality’s anti-classification norm when individuals directly experience differential treatment on the basis of race. Kennedy previously had dissented in Grutter, apparently unconvinced that the law school admissions policy avoided the perils of a racial quota system.\(^{137}\) So, perhaps it is unsurprising that he rejected the mechanics of the assignment policies in Parents Involved, particularly if the school districts engaged in judgments even less nuanced than those in the Michigan case.\(^{138}\) Yet, even if Kennedy deemed the voluntary plans in Louisville and Seattle unworkable, he wanted public schools to offer a space in which children from diverse backgrounds could come together to build their identities and bridge their differences. Without a well-developed account of culture-race in the desegregation jurisprudence, however, Kennedy had difficulty finding a robust way to infuse this value into his concurring opinion.

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\(^{138}\) 127 S. Ct. at 2793–2794 (Kennedy, J., concurring).
III. A DIFFERENT LOGIC: DIVERSITY IN HIGHER EDUCATION

*Parents Involved* reveals how desegregation jurisprudence has diverged from case law on affirmative action in higher education. To a significant degree, the two areas, though both addressing race and integration, have proceeded under entirely different logics. These distinct approaches are an artifact of the interplay of the Court and the political process. Although the Court took the lead in calling for public school desegregation, the executive branch demanded affirmative action in colleges and universities.\(^{139}\) Because special admissions programs became pervasive without any findings of past discrimination, they did not fit neatly into the dialectic between an anti-classification and anti-subordination Constitution that dominated the battle over Brown's legacy. When forced to confront the constitutionality of affirmative action in admissions, the Court sidestepped this ongoing conflict by making room for culture-race through a carefully circumscribed rubric of diversity. In *Parents Involved*, this notion eventually collided with the reified conceptions of race that have characterized the desegregation cases. Ultimately, the Court found it difficult to make room for culture-race in elementary and secondary school classrooms.

A. From Colorblindness to Diversity: The Evolution of Racial Equality in Higher Education Cases

In higher education, the Court's approach to racial equality has evolved from colorblindness to diversity. Initially, the Court embraced a formal approach to race in college and university admissions. In the years before Brown, the Court dismantled "separate but equal" policies but did not mandate any special steps to ensure access for black applicants.\(^{140}\) Instead, the Justices held that if applicants met the relevant standard, they had to be admitted regardless of race.\(^{141}\) This anti-classification strategy allowed black and white applicants "freedom of choice" in higher education.\(^{142}\) Although this type of approach eventually was deemed inadequate to cure past discrimination in elementary and secondary schools, the Justices showed no interest in addressing the strategy's limits when integrating colleges and

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\(^{141}\) Id. at 453.

\(^{142}\) Id. at 452–453.
There was not a similar complacency on the political front. President Lyndon Johnson, fresh from a landslide victory over Senator Barry Goldwater in 1964, moved decisively to consolidate his vision of the Great Society. Part of that vision included the full incorporation of blacks into American life. The Civil Rights Act of 1964 empowered the Court to begin vigorous enforcement of Brown. But Johnson also was concerned about ongoing segregation in other sectors, including higher education. In 1965, he announced at Howard University that:

[F]reedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please.

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair.

To overcome a history of racial exclusion, Johnson promoted policies of affirmative action by executive order. Although still firmly anchored in a rhetoric of remediation, Johnson’s approach permitted race-conscious measures without any judicial finding of past discrimination. In the wake of civil unrest, nearly all colleges and universities responded to Johnson’s invitation by adopting race-conscious admissions programs.

Johnson’s successor, President Richard M. Nixon, built on race-conscious initiatives during the early years of his administration. Shortly

143 See id.
146 Id. at 211.
147 Wilkinson, supra note 48, at 78, 102–108.
148 Lyndon B. Johnson, Commencement Address at Howard University: “To Fulfill These Rights” (June 4, 1965), in Public Papers of the Presidents of the United States: Lyndon B. Johnson 636 (1966).
150 See Karabel, supra note 144, at 384–392.
after his election in 1968, Nixon signed the Voting Rights Act of 1970\(^{151}\) and the Equal Employment Opportunity Act of 1972.\(^{152}\) In addition, he established set-asides for minority business enterprises seeking federal contracts.\(^{153}\) Even so, Nixon soon saw the political advantage in condemning both busing and affirmative action as part of an appeal to America's "silent majority."\(^{154}\) By the early 1970s, with four Nixon appointees on the Court, the retreat from busing and the rise of an anti-classification interpretation of Brown were underway.\(^{155}\)

Given these developments, another question loomed: What would become of affirmative action in the face of growing protests from a not so silent majority? In higher education, the important test case was Regents of the University of California v. Bakke.\(^{156}\) There, a disappointed white applicant, Allan Bakke, challenged the admissions practices at the University of California at Davis medical school.\(^{157}\) He alleged that the school's practice of setting aside seats for underrepresented minorities was a form of "reverse discrimination" that violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause.\(^{158}\) In effect, Bakke was calling on the Court to reject the executive branch's efforts to inject anti-subordination practices into higher education. If the Court acceded, it would revert to the pre-Brown doctrine in college admissions cases, making clear that race-conscious remedies were reserved for rectifying past institutional discrimination and that the Constitution was otherwise colorblind.

The Bakke case split the Court four-to-four with Powell, a Nixon appointee, as the crucial swing vote.\(^{159}\) Four Justices wanted to strike down Davis's plan on the ground that Title VI's non-discrimination provision

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\(^{154}\) See ROBERT MASON, RICHARD NIXON AND THE QUEST FOR A NEW MAJORITY 53–54, 104 (2004); KLINKNER WITH SMITH, supra note 153, at 293–296.


\(^{157}\) Id. at 277–278.

\(^{158}\) Id.

\(^{159}\) JEFFRIES, supra note 80, at 231, 490.
assumed that the Constitution adopted a colorblind standard and thus prohibited reverse discrimination. The call for an anti-classification approach would come at a significant price, however, by disrupting well-established programs of affirmative action necessary to integrate colleges and universities. Another four Justices wanted to uphold the Davis plan because race was being used to promote rather than bar minority access. They believed that benign government programs should not trigger strict scrutiny, but rather a more deferential intermediate standard of review. Under this standard, programs need only be substantially related to an important state interest to satisfy the Constitution. Because Davis’s goals of remedying past societal discrimination and diversifying the medical school and the profession counted as important and because the set-aside plan substantially advanced these goals, the program passed muster.

With his colleagues equally divided, Justice Powell stepped into the breach. He sought a way out of the paralyzing debate over whether to adopt an anti-classification or an anti-subordination approach in analyzing Davis’s program. Although Powell agreed that racial classifications were inherently suspect and therefore triggered the most searching level of judicial scrutiny, he did not totally disallow their voluntary use by government officials as a strict anti-classification view would require. Nor did he permit Davis to justify its program by invoking general societal discrimination or underrepresentation in the profession, both of which reflected an anti-subordination perspective. Instead, Powell turned to the First Amendment and the tradition of academic freedom to recognize a pedagogical rationale for voluntary affirmative action, the very kind of justification that Rodriguez had stymied in the elementary and secondary school setting. According to Powell, diversity was a compelling interest because it promoted the free exchange of ideas by nurturing an “atmosphere which is most conducive to

160 Bakke, 438 U.S. at 413–417 (Stevens, J., concurring in judgment in part and dissenting in part). Although these Justices relied on Title VI as the narrowest ground for decision, their claim that the statute was co-extensive with the Constitution signaled that colorblindness was a requirement under equal protection law, too. Bernard Schwartz, Behind Bakke: Affirmative Action and the Supreme Court 56–62, 109–118 (1988); see also Joel Dreyfuss and Charles Lawrence III, The Bakke Case: The Politics of Inequality 214–216 (1979) (noting that the Title VI analysis was one “indication” of how the Justices would decide the equal protection issue but was designed to avoid “divulging their views on the ultimate question”).

161 Wilkinson, supra note 48, at 302.

162 Bakke, 438 U.S. at 362 (Brennan, J., concurring in judgment in part and dissenting).

163 Id. at 291, 305 (Powell, J.).

164 Id. at 310–311.

165 Id. at 311–315.
speculation, experiment and creation." Race was one of many traits that enabled colleges and universities to identify students who could draw on their backgrounds and experiences to contribute to this dialogue.

Although Powell had deflected the dialectic between an anti-classification and anti-subordination Constitution, he remained deeply concerned about overreliance on race in any facet of government decision-making. As a result, he struck down Davis's plan because it set aside spaces for members of racial and ethnic minority groups, a quota system that in effect precluded whites from competing for a prescribed number of seats in the entering class. To provide guidance to higher education administrators, Powell offered an example of a plan that would pass constitutional muster. Harvard's undergraduate admissions program looked at individuals in a holistic way that took into account a range of characteristics and gave special weight not just to race but also to geographic origin, musical talent, socioeconomic disadvantage, and unique personal experience, among others. This approach at no point precluded applicants from competing for all of the spots in the entering class. Justice Powell was comfortable that Harvard's plan would permit colleges and universities to continue using affirmative action but in a narrowly tailored way that treated each applicant as an individual.

By the 1990s, however, the backlash against affirmative action had intensified, and Bakke seemed ripe for challenge. Critics of Powell's reasoning enjoyed an unprecedented success in 1995 in Hopwood v. Texas. Cheryl Hopwood, a white working-class woman denied admission to the

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167 Bakke, 438 U.S. at 312–313.

168 Id. at 315–316. A number of commentators have questioned whether there is any meaningful distinction between quotas and holistic review that attaches some weight to race. Indeed, even at the time Bakke was decided, Powell's clerks harbored serious reservations about the defensibility of the distinction. JEFFRIES, supra note 80, at 476–478, 484–485.


170 Id. at 318.

171 Id. at 318. See also JEFFRIES, supra note 80, at 484–485 (describing how "Powell's canny instinct for public perception told him that he had much to gain by celebrating the Harvard approach").

University of Texas Law School, alleged wrongful discrimination on account of her race. According to Hopwood, there were substantial disparities between the grades and Law School Admissions Test scores required of white applicants like her and those required of black and Mexican-American applicants.\(^{173}\) Hopwood asserted that race pervaded the law school’s admissions process with files going through separate review processes and students placed on segregated waiting lists.\(^{174}\) She argued that because race was given so much weight, Texas, in effect, had implemented quotas rather than the kind of holistic, individualized review that Justice Powell envisioned.\(^{175}\)

The district court found that the law school could consider race in admitting students, but that its program was not narrowly tailored because it relied on a segregated and stratified process.\(^{176}\) The Fifth Circuit Court of Appeals affirmed the district court but went much further by condemning the diversity rationale in Bakke as illegitimate. Noting that Justice Powell wrote only for himself, the court of appeals concluded that “the classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection.”\(^{177}\) Even though the Fifth Circuit’s call for an anti-classification Constitution was a direct rebuke to Powell’s reasoning, the Supreme Court declined to grant certiorari in the case, perhaps because the highly racialized particulars of the Texas admissions process made it a less than appealing forum in which to address the legitimacy of affirmative action.\(^{178}\)

Instead, the Court heard challenges to admissions practices at the University of Michigan.\(^{179}\) In Grutter, both the plaintiffs and the Michigan law school defendants were content to frame the claims as a referendum on Bakke. The plaintiffs wanted the Court to embrace an anti-classification approach as the Fifth Circuit had done in Hopwood, while Michigan wanted

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173 Hopwood, 78 F.3d at 936–937.

174 Id. at 937–938.


177 Hopwood, 78 F.3d at 944.

178 Texas v. Hopwood, 518 U.S. 1033, 1033 (1996). The brief concurring opinion by Justice Ruth Bader Ginsburg, in which Justice David Souter joined, suggested significant discomfort with the mechanics of the Texas admissions policy, which no party to the case appeared to defend on appeal. Id.

to preserve the constitutional legitimacy of Powell’s diversity rationale.\footnote{Moran, The Heirs of Brown: The Story of Grutter v. Bollinger, supra note 15, at 461.} Only a group of student-intervenors rejected this framework as an evasion that itself was a betrayal of Brown’s legacy. They believed that the challenge to affirmative action presented “a choice between two traditions in American life and law: the tradition of Plessy v. Ferguson and the tradition of Brown v. Board of Education.”\footnote{Defendant-Intervenor’s Brief in Support of Defendants’ Motion for Summary Judgment and in Opposition to the Plaintiff’s Motion for Summary Judgment at 1, Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-CV-75928), available at 2000 WL 35575808.} The student-intervenors impugned the call for an anti-classification Constitution as a “perverse, indeed racist, view of equality” that reverted to Plessy’s vision of a “separate but equal” society.\footnote{Id. at 24–25.} They also took the law school to task for condoning a diversity rationale that did little to address structural inequality and institutional racism.\footnote{Id. at 6–8, 26–27, 28–35, 38.} The student-intervenors wanted the Court to revitalize Brown and thus revive “[t]he tradition of mass mobilization and progressive legal action” in the struggle against racial subordination.\footnote{Id. at 13.}

Justice Sandra Day O’Connor did not take up the student-intervenors’ invitation to treat the Michigan litigation as an indictment of racial injustice in America. Instead, she treated Grutter as an opportunity to revisit Bakke, and she adopted Justice Powell’s approach by choosing the middle way. O’Connor’s opinion in Grutter refused to endorse a pure anti-classification Constitution, even if racial classifications remained suspect and so triggered the highest level of judicial scrutiny. Yet, she also sidestepped the dangerous political terrain historically associated with an anti-subordination principle by limiting the justifications for affirmative action in admissions to promoting diversity and democratically legitimate leadership.\footnote{Moran, The Heirs of Brown: The Story of Grutter v. Bollinger, supra note 15, at 478–480, 481–485.} Though carefully circumscribed, O’Connor’s opinion sat uneasily with the school desegregation cases, which increasingly rejected race-conscious measures except as a remedy for state-sponsored discrimination. Admittedly, the Court had not yet rejected voluntary desegregation plans when Grutter was decided, so the law was at least technically consistent. But even that semblance of consistency would be sorely tested by the decision in Parents Involved.
B. The Contestation over Culture-Race and the Colliding Logics of Diversity and Desegregation

The distinct logics of diversity and desegregation collided in *Parents Involved*. This collision in turn reflected the uneasy relationship between race and ethnicity in the Court's jurisprudence on race. These tensions have augured the possibility of culture-race but also have made it difficult for the Justices to elaborate a consistent theory of the concept. Consider, for example, Professor Ian Haney López's critique of Powell's opinion in *Bakke*. Haney López has argued that *Brown* was about race, while the diversity rationale was not. Reflecting the way in which the recognition of culture-race often devolves into a clash between race and ethnicity, Haney López insists that Powell invoked the image of a "nation of minorities" in *Bakke* so that he could substitute a particular conception of ethnicity for race. As a result, his opinion equated the histories and experiences of a range of groups, including blacks, European immigrants, Japanese Americans, and Mexican Americans.\(^\text{186}\)

According to Haney López, Powell's turn to ethnicity treated groups as standing on an equal footing in the political process. If this were true, Haney López contends, Powell should have rejected strict scrutiny as no longer necessary to police abuses of minorities. Because he was unwilling to embrace an intermediate standard of review, however, Haney López argues that Powell added a gloss to his account of ethnicity. In particular, he "relied on a specific version of ethnicity theory, one that depicted racial subordination as over while simultaneously presenting whites as vulnerable minorities."\(^\text{187}\)

Haney López takes a dim view of Powell's reliance on this theory of ethnicity, arguing that the diversity rationale betrayed *Brown*'s legacy by laying the groundwork for "reactionary colorblindness."\(^\text{188}\) Far from leading to a flexible approach to questions of discrimination and inequality, Haney López asserts, *Bakke*'s account of a "nation of minorities" necessarily converged with formal-race because "these notions work hand in hand to produce a racial ideology capable of claiming that racism is a thing of the past, that group inequality reflects cultural capacity, and that whites are vulnerable minorities."\(^\text{189}\) For Haney López, *Brown* embraced an anti-subordination Constitution that treats race as "a socially and legally produced hierarchical system structurally embedded in U.S. society."\(^\text{190}\) To the extent


\(^{187}\) *Id.* at 1043.

\(^{188}\) *Id.* at 990, 1034, 1043.

\(^{189}\) *Id.* at 1029.

\(^{190}\) *Id.* at 990.
that Bakke (and later Grutter) diverged from this view, the cases already had defeated Brown; the Parents Involved decision just made it official.

Although the higher education cases clearly do adopt a distinct logic from the school desegregation decisions, Haney López’s provocative account of Justice Powell’s turn to ethnicity in Bakke must be tempered by several observations. For one thing, Powell himself probably would not have described his thinking in this way. He reportedly was torn between his distaste for permanent programs of affirmative action and his belief that it was “too late in the day” to outlaw them. Indeed, Powell feared that any effort to do so would be “a disaster for the country”191 and ordered his law clerk to “find a middle ground.”192 The diversity rationale appealed to Justice Powell because it avoided the harshness of invalidating affirmative action under a strict anti-classification approach, while it averted the difficulties of measuring comparative disadvantage to determine which groups deserved compensation under an anti-subordination approach.193 Powell was convinced that his middle way would allow college and university administrators to focus on problems of underrepresentation without permanently institutionalizing quota systems.194

Even if a non-white identity was treated as one trait among many, it is unlikely that a long-time Virginian like Powell considered it truly on a par with white ethnicity. On the contrary, his biographer John C. Jeffries, Jr. writes that:

For Powell, as for many white southerners, the progression from Brown to Bakke brought a revolution in announced conviction, an about-face in articulated belief. Yet remnants of old attitudes survived. Justice Powell still had a gentleman’s sense of responsibility for the less fortunate and a southerner’s instinct for paternalism toward blacks. No southerner could readily deny that blacks needed help, as the excesses of the past and the region were too familiar to ignore. The upper-class sense of noblesse oblige and the southerner’s assumption of white control and responsibility conspired to the same conclusion: Racial justice required racial preference.195

In short, under Jeffries’ account, Powell may have been influenced as much by his sense of southern obligation as by any emerging theory of a “nation of minorities.” Indeed, this underlying ambivalence about race could explain why his vision of ethnicity in Bakke was incompletely realized.

191 JEFFRIES, supra note 80, at 469.
192 Id. at 473.
193 Id. at 475.
194 Id. at 475–476.
195 Id. at 470–471.
Of course, it is entirely possible that whatever Powell's private intentions, his analysis in *Bakke* ultimately had the impact that Haney López describes. If so, it is surprising that advocates of colorblindness in *Hopwood* and *Grutter* went to considerable lengths to discredit the diversity rationale by characterizing it as nothing but Powell's "lonely" opinion. In fact, the very idea that racial identity is malleable, contingent, and thus germane to the exchange of ideas necessarily undermines the view that race is ascribed, fixed, and irrelevant. So, it should come as no surprise that formalists who advocate colorblindness also studiously eschew any consideration of the sociology of race and ethnicity in contemporary America. For them, a dynamic vision of culture-race is simply out of bounds as a constitutional matter.

Among the most notable proponents of a formalist approach to race are the Justices who joined Roberts' plurality opinion in *Parents Involved*. Chief Justice Roberts and Justice Samuel Alito are relatively new to the Court, but both Antonin Scalia and Clarence Thomas have written about their commitment to formalism and an anti-classification Constitution. Scalia has argued that judges normally must abide by a common-sense reading of textual provisions. To consider demographics and social context is to invest judges with substantial discretion to make law as they go along. According to Scalia, judge-made law subverts the democratic process because the clear meaning of a text, whether constitutional or statutory, can be revised on a case-by-case basis. He concludes that "attacking the enterprise [of interpretation] with the Mr. Fix-it mentality of the common-

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197 Scalia has made clear that he would sometimes deviate from this approach when the results would otherwise be intolerable. So, even if the notion of cruel and unusual punishment did not extend to public flogging at the time the Eighth Amendment was adopted, Scalia would declare such a sanction unconstitutional today. For that reason, he describes himself as a "faint-hearted" originalist. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861–862, 864 (1989).


law judge is a sure recipe for incompetence and usurpation." Yet, it is precisely this sensitivity to context that is essential to an understanding of culture-race. Because diversity draws on this concept, context is critical to both Powell's opinion in *Bakke* and O'Connor's opinion in *Grutter*.

These context-specific decisions are anathema to Scalia. In his view, "The Equal Protection Clause epitomizes justice more than any other provision of the Constitution. And the trouble with the discretion-conferring approach to judicial law making is that it does not satisfy this sense of justice very well." Instead, clear neutral principles can be gleaned from a common-sense reading of the text of the Fourteenth Amendment itself: "No State shall... deny to any person within its jurisdiction the equal protection of the laws." At no point does this language distinguish among individuals on the basis of race; for Scalia, the language is race-neutral and this alone is decisive. Given his distaste for textual embellishments, it is hard to see him being influenced by any theory of ethnicity espoused by Justice Powell in *Bakke* and affirmed by Justice O'Connor in *Grutter*. Instead, for Scalia, affirmative action is discrimination pure and simple because the text of the Fourteenth Amendment says so.

Justice Clarence Thomas has embraced originalism since his arrival on the Supreme Court. Thomas wants to be true to the drafters' original intent, so in addition to the text, he examines evidence regarding legislative history to interpret a provision's meaning. He grounds this inquiry in a regime of natural law rights, which he believes is embedded in the form of government created by the Founders. Although his reasoning is different from Scalia's in some respects, Thomas also concludes that the Constitution is colorblind and condemns the official use of racial classifications.

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200 Id. at 14.
202 U.S. CONST. amend. XIV, § 1.
203 See, e.g., Richmond v. J. A. Croson Co., 488 U.S. 469, 528 (1989) (Scalia, J., concurring) ("The relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, 'created equal,' who were discriminated against.").
204 Antonin Scalia, Commentary, *The Disease as the Cure: "In Order to Get beyond Racism, We Must First Take Account of Race"*, WASH. U. L.Q. 147, 148 (1979) (describing Powell's diversity rationale as "an historic trivialization of the Constitution" because of the flimsy pretense used to "overcome the presumption against discrimination by race").
from embracing any sociological theory of ethnicity to bolster his views, Thomas has openly criticized Brown for relying on social science evidence to document black inferiority and condone racial paternalism.\(^\text{208}\) Again, he seems unlikely to be swayed by any theory of ethnicity proposed in Bakke and elaborated in Grutter.

Finally, despite Haney López’s indictment of the insidious impact of Powell’s theory of “a nation of minorities,” ethnicity is not apt to be a stable and monolithic concept any more than race is in the Court’s jurisprudence. Just as anti-classification and anti-subordination rationales have splintered race into versions that are formal, status-based, and historical, the contestation over culture-race, expressed as tensions between race and ethnicity in equal protection law, is likely to destabilize both concepts. In fact, multiple notions of ethnicity have haunted equal protection law just as various definitions of race have.

Historian David Gutierrez has observed that ethnicity has at least two meanings: one that involves “primordial, immutable, preconscious aspects of a group’s social identity (or sense of peoplehood)” and one that consists of “mere[] strategies for pursuing group interests in society and comprises, therefore, situational, circumstantial, or optional components of individual and group identity.”\(^\text{209}\) Haney López worries that because Powell defined ethnicity as something other than peoplehood, the concept subverted race and led inevitably to “reactionary colorblindness.” When ethnicity is treated as a form of primordial peoplehood, it takes on the ascribed, fixed qualities associated with images of race that have dominated the Court’s equal protection jurisprudence. As a consequence, ethnicity is subsumed within the debate over an anti-classification or anti-subordination Constitution.\(^\text{210}\) For example, when Chinese and Latino parents challenged court-ordered busing, the Court found that they were victims of past discrimination and so must benefit from desegregation remedies, whether or not they wanted the cure. In these cases, the Court treated ethnicity as a race-like form of peoplehood and


\(^{209}\) David G. Gutierrez, Walls and Mirrors: Mexican Americans, Mexican Immigrants, and the Politics of Ethnicity 7 (1995). I do not mean to suggest that Gutierrez’s dichotomy is exhaustive of the ways that the courts have used the term “ethnicity,” but the distinction is a valuable starting point. Indeed, it would be quite useful to create a comprehensive taxonomy of ethnicity comparable to Gotanda’s taxonomy of race. See Gotanda, supra note 103, at 4.

\(^{210}\) See Devon W. Carbado, Race to the Bottom, 49 UCLA L. Rev. 1283, 1294–1296 (2002) (questioning the conflation of race and ethnicity for blacks as well as other racialized groups).
so dismissed any notion that it could reflect a dynamic set of strategic interventions to maximize group interest.211

When ethnicity becomes strategic and dynamic, however, it collides with reified notions of race in ways that expose the limits of the debate over the anti-classification and anti-subordination Constitution. With respect to an anti-classification approach, the recognition of ethnicity undercuts biological accounts of race by allowing room for the possibility of culture-race. If, in fact, race like ethnicity reflects socially contingent practices, formalism is no longer equivalent to neutrality. In the area of language, for example, official English mandates clearly disadvantage racial and ethnic groups that speak other tongues. The government may justify these mandates in the name of nation-building or economic mobility, but whatever the rationale, these policies are by no means neutral in allocating burdens and benefits among groups that command very different linguistic resources.212 This observation in turn casts doubt on the assertion that colorblindness operates as a neutral principle if groups similarly find themselves arrayed along a racial hierarchy with very different histories, traditions, and resources.213

As for anti-subordination, an acknowledgment of ethnicity demonstrates the limits of equating assimilation with full inclusion.214 Justice Scalia once remarked that “In the eyes of government, we are just one race here. It is American.”215 In doing so, he captured the notion that there is a single, homogenous national identity that each individual must master. Yet, Walt Whitman’s image of America as a “nation of many nations” suggests a different model, one in which distinct cultural practices, often associated with race and ethnicity, persist and even flourish.216 Under this view, to the extent that members of racial and ethnic groups must sacrifice their language and culture to participate meaningfully in American life, they are neither truly free nor entirely equal.217

211 See supra notes 115–117 and accompanying text.

212 WILL KYM LiCKA, MULTICULTURAL CITIZENSHIP 115 (1995).


217 See supra notes 110–113 and accompanying text.
With only a limited place for culture-race in the Court's jurisprudence, there have been few ways to talk about how race and ethnicity can be voluntary and involuntary at the same time. A subordinated status is unchosen, and it can impede the realization of a professed national ideal, whether it be colorblindness or respect for diversity.\textsuperscript{218} This gap between the ideal and the real in turn can be grist for the development of the social practices and attitudes that comprise culture-race.\textsuperscript{219} As groups deploy strategies to alter their circumstances, members' racial and ethnic self-presentation will shift to reflect new challenges and opportunities.\textsuperscript{220} Despite the fluidity of identity, there are some enduring lessons about the complexities of culture-race: Race is neither static nor irrelevant, nor is it a feature of American life that can be eradicated. So long as the real falls short of the ideal, everyone will belong to America in different ways. The government can not assume the stance of a disinterested bystander in the quest to live up to collective aspirations, nor will the marginalized passively await their moment of uplift and redemption. In the end, government's task is to ensure a level playing field through norms of mutual respect as diverse groups pursue these evolving conceptions of culture-race.\textsuperscript{221}

Whatever the shortcomings of the diversity rationale as an elaboration of the concept of culture-race, the Justices at least have engaged this idea in higher education decisions. By contrast, before \textit{Bakke} was decided, the Court had consigned culture-race to irrelevancy in its elementary and secondary school cases. In \textit{Lau v. Nichols}, for instance, the Court relied on an interpretation of Title VI that recognized Chinese-speaking students' claims only because the San Francisco school district had used language as a proxy to discriminate on the basis of race, ethnicity, or national origin.\textsuperscript{222} This analysis did not acknowledge how language could play an affirmative role in constituting a child's identity. In fact, this line of argument previously had been dismissed when the Court refused to exempt Chinese students from a busing decree based on a desire to preserve their linguistic heritage.\textsuperscript{223} In

\begin{itemize}
\item \textsuperscript{219} See, e.g., Gutiérrez, supra note 209, at 7–8 (describing how Mexican-Americans shifted from a primordial identity to situational ethnicity in response to discrimination in the United States).
\item \textsuperscript{221} Gotanda, supra note 103, at 66–67.
\item \textsuperscript{222} 414 U.S. 563, 563 (1974).
\item \textsuperscript{223} Lee v. Johnson, 404 U.S. 1215, 1215 (1971). For a fuller discussion of these issues, see Rachel F. Moran, \textit{A New Twist on "The One Best System": Structured...
both cases, the Justices treated ethnicity as fungible with race; each was an ascribed characteristic relevant only when it became the basis for discrimination.

_Lau_ was decided one year after _Rodriguez_, and the _Rodriguez_ Court’s rejection of any fundamental right to education effectively foreclosed claims that the district was obligated to accommodate language differences so that Chinese-speaking students could prepare themselves to participate in the workforce and in civic life. As a consequence, language and culture could not be linked to norms of belonging and respect for difference that had to be incorporated into the classroom as a microcosm of a pluralistic society. Strategic choices about linguistic and cultural identity would be grist for the local political process, but only transgressions against a primordial peoplehood would count in court. Despite the tremendous significance of the public schools in socializing children, a role recognized in _Brown_, the Court left no room for culture-race in its desegregation jurisprudence.

Even if Powell’s particular theory of ethnicity in _Bakke_ is a limited one, his intuition that freedom is as much at stake as equality in achieving racial justice is an important one. The unlinking of freedom and equality in school desegregation cases has led to a regrettably effete discourse about race. In _Parents Involved_, for example, although the Louisville and Seattle school districts invoked diversity, they did not fully embrace the rich complexity of culture-race. Because the districts appropriated the rhetoric of diversity without fully engaging its complexity, the plurality expressed bewilderment at the plans’ definitions of success:

> Even when it comes to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/non-white terms in Seattle and black/“other” in Jefferson County.... [U]nder the Seattle plan, a school with 50 percent Asian-American students and 50 percent white students but

*Immersion Initiatives, Equal Opportunity, and Freedom to Learn*, in _Multilingual Matters_ (Grace P. McField ed.) (forthcoming) (arguing that the analogy between race and language limited the Court to focusing on egregious exclusion of English language learners akin to state-mandated segregation).

> Moran, _supra_ note 114, at 129–130.

no African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not. It is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is “broadly diverse.”

As these Justices noted, both districts modeled their voluntary plans on desegregation precedents that presumed a binary racial world. In Louisville, that world was either black or not; in Seattle, that world was either white or not. Under neither plan did the school district fully account for other traits, like language or culture, in promoting a norm of equal respect as well as the autonomy to develop a distinct identity.

The experiences in Louisville and Seattle demonstrate that a notion of culture-race, with its corresponding focus on freedom and flexibility, does not fit readily into a desegregation jurisprudence that characterizes race as either fixed and irrelevant or entrenched and stigmatizing. A narrow focus on equality has permitted the Roberts plurality in Parents Involved to equate an anti-classification perspective with neutral treatment. Formal equality is dispositive, regardless of the impact on a child’s freedom to learn and prepare for life in a diverse society. At the same time, advocates of an anti-subordination Constitution like Justice Breyer can tacitly equate this approach with assimilation. By failing to offer a meaningful account of diversity in the classroom, the dissent has potentially allowed the pursuit of equality to trump the freedom to preserve distinct identities in a multiracial, multiethnic world. Even though a majority of the Justices are now prepared to recognize diversity as a compelling interest at the elementary and secondary level, the stilted translation of diversity from Bakke and Grutter to the classrooms of Louisville and Seattle is cause for concern. Any recognition of schools as a place to build complex, flexible, and dynamic identities has been hampered by the rigid dialectic between an anti-classification and an anti-subordination Constitution, a dialectic that in turn has reified race.

For those who believe that the Constitution must adapt to changing conditions, the Court’s neglect of culture-race, often achieved by pitting race against ethnicity, is deeply troubling. Brown and the desegregation cases looked backwards to a world largely defined as black and white in which the color line could not easily be crossed. Bakke and the affirmative action cases surveyed a multiracial, multiethnic landscape that complicated any notion of a monolithic color line. Haney López insists that in the face of demographic complexity, Powell’s model of ethnicity led away from race and inexorably

to reactionary colorblindness. Yet, this critique of Powell’s approach should not be understood as an indictment of culture-race itself. Whatever the imperfections of the Bakke opinion, culture-race can create a positive, autonomous space for identity-building in a world no longer organized along oppositional, binary racial lines.

IV. THE UNEVEN MARCH TO COLORBLINDNESS: COMPARTMENTALIZED EQUAL PROTECTION LAW

A jurisprudence of fragmentation is by no means unique to education law. Indeed, compartmentalization and inconsistency pervade equal protection law. Each context—whether it be school desegregation, affirmative action in higher education, government contracting, or voting rights—permits a different tale to be told about the Court’s evolving doctrine of race and equality. In some instances, the tale is one of the march to colorblindness, but in others it is not. Here, I want to complicate Haney López’s account of Powell’s turn to ethnicity as an element of civil rights retrenchment by telling two very different tales, one about government contracting and the other about voting rights. Although the contracting decisions show that Powell’s particular conception of ethnicity can play a part in undoing race-conscious remedies, voting rights law demonstrates that fluid notions of culture-race can give these remedies new life.

A. Affirmative Action and Diversity: For Academics Only

The Court has adopted distinct approaches to voluntary affirmative action in higher education and government contracting. Shortly after Bakke was decided, the Justices upheld a federally mandated set-aside program for public works projects in Fullilove v. Klutznick. In response to changing demographics, Congress recognized a number of disadvantaged groups, including not only blacks but also “American Indians, Spanish-Americans, oriental Americans, Eskimos, and Aleuts” who have “been deprived of the opportunity to develop and maintain a competitive position in the economy because of social or economic disadvantage.” The bill’s proponents believed that discrimination played a key role in the low rates of minority participation in public works projects, and congressional concern with rectifying past wrongs became the focus of the Fullilove opinion. Relying on legislative history, the Court found that the program’s supporters sought

227 Haney López, supra note 134, at 1034.
228 448 U.S. 448, 449 (1980) (citation omitted).
229 Id. at 464.
230 Id. at 463.
to "direct funds into the minority business community, a sector of the economy sorely in need of economic stimulus. . ."231 Federal action was necessary because "a number of factors, difficult to isolate or quantify, seemed to impair access by minority businesses to public contracting opportunities."232

Although there were no legislative findings of intentional wrongdoing akin to what would be required for remediation in a court of law, the Fullilove majority accepted an inference of discrimination based on historical and contemporary patterns of differential access to public works contracts.233 Noting Congress's special role in promoting equal protection under the Fourteenth Amendment, the Court applied a more relaxed standard of review than strict scrutiny.234 As a result, Congress did not have to "act in a wholly 'color-blind' fashion"235 to redress inequality and exclusion.236 Although some innocent non-minority firms were burdened by the set-aside, the Court noted that the program did not seek to "confer a preferred status upon a nondisadvantaged minority or to give special assistance to only one of several groups established to be similarly disadvantaged minorities."237 Instead, "Congress has not sought to give select minority groups a preferred standing in the construction industry, but has embarked on a remedial program to place them on a more equitable footing with respect to public contracting opportunities."238

Fullilove's receptivity to a program that rectified underrepresentation for a range of groups without fine-tuned findings of comparative disadvantage might seem consonant with Powell's approach to affirmative action in Bakke. However, in a separate concurrence, Powell went out of his way to distinguish the two cases. Reflecting his concerns about permanent programs of affirmative action, he was at pains to point out that strict scrutiny applied to all racial classifications, whether the set-asides were places in the class at Davis medical school or awards of public works contracts.239 He made clear that he would not approve of voluntary programs of affirmative action that relied on set-asides except in extraordinary circumstances.

231 Id. at 459.
232 Id. at 461.
233 Id. at 477-480.
234 Fullilove, 448 U.S. at 472-473, 480-481.
235 Id. at 482.
236 Id. at 482-483.
237 Id. at 485.
238 Id. at 485-486.
239 Id. at 496 (Powell, J., concurring).
Having observed that "[u]nlike the Regents of the University of California, Congress properly may—and indeed must—address directly the problems of discrimination in our society," Powell emphasized that Congress had greater latitude to redress general patterns of unequal access than Davis did. Fullilove therefore was narrowly limited because

"[T]he issue here turns on the scope of congressional power, and Congress has been given a unique constitutional role in the enforcement of the post-Civil War Amendments. In this case, where Congress determined that minority contractors were victims of purposeful discrimination and where Congress chose a reasonably necessary means to effectuate its purpose, I find no constitutional reason to invalidate [the set-aside program]."

By carefully limiting the diversity rationale in Bakke to its facts, Powell displayed what constitutional scholar Cass Sunstein has termed a minimalist philosophy and what Justice Scalia might refer to more caustically as common-law, Mr. Fix-It constitutionalism. Under the minimalist approach, judges decide "one case at a time," and they carve out compromises by rendering decisions on grounds that "leave open the most fundamental and difficult constitutional questions." In doing so, the Justices can reach agreement on particular results, even when confronting complex questions like affirmative action that provoke deep and divided views on the Court and among the citizenry.

Sunstein describes two key commitments of minimalism. First, decisions should be narrow rather than wide. That is, "[t]hey decide the case at hand; they do not decide other cases too, except to the extent that one decision necessarily bears on other cases . . . ." Second, the decisions are shallow not deep; in this way, Justices can achieve consensus about concrete outcomes, even when there is no agreement about the meaning of abstract

240 Fullilove, 448 U.S. at 499 (Powell, J., concurring).
241 Id. at 499–506 (Powell, J., concurring).
242 Id. at 516–517 (Powell, J., concurring).
243 See, e.g., Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court 5 (1999). Some scholars have criticized Sunstein's account of minimalism as excessively vague and thus not falsifiable. However, these critiques have used the concepts of narrowness and shallowness to give some concrete meaning to minimalism as a method of deciding cases. Neil S. Siegel, A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar, 103 Mich. L. Rev. 1951, 1957–1966 (2005).
245 Sunstein, supra note 243, at 10.
fundamental principles like equal protection. In Fullilove, for instance, Powell chose to limit his analysis to the situation confronting Congress when it addressed problems in government contracting, and he justified the set-aside not upon some grand, unified theory of racial justice but on special congressional powers to rectify discrimination. Meanwhile, lest there be any misunderstanding about the scope of his novel theory of diversity, he confined Bakke’s precedential value to the realm of higher education with its unique history of academic freedom and dedication to the exchange of ideas.

One cost of a minimalist approach is the fragmentation that results as cases are decided in contingent and provisional ways. The concept of culture-race often is implicated by the Court’s efforts to grapple with the relationship between race and ethnicity, and the compartmentalization of precedents can impede recognition of this dynamic interplay. In particular, by confining the diversity rationale to higher education cases, the Justices can revert to reified notions of race elsewhere in the jurisprudence of equality. This is precisely what happened in City of Richmond v. J.A. Croson Co. By the time this case was decided in 1989, the Court had become seriously divided about the legitimacy of set-aside programs in government contracting. In writing for the majority that struck down this type of program in the construction industry, Justice O’Connor employed some of the techniques for compromise used by her friend and mentor, Justice Powell.

Because the Richmond City Council had adopted the plan in Croson, she distinguished away the Fullilove precedent because it was based on congressional powers of remediation under the Fourteenth Amendment. O’Connor analogized city council members in Croson to university administrators in Bakke; neither group of officials had any special competency or authority to rectify general societal discrimination. Unlike university administrators, however, the council members could not defend their program by drawing on a tradition of academic freedom and the need to promote diversity. To institute a set-aside plan, city officials instead had to identify with particularity patterns of discrimination within the

246 Id. at 11–13.
249 Croson, 488 U.S. at 489–491.
250 Id. at 495–497.
municipality’s jurisdiction.\textsuperscript{251} O’Connor concluded that the factual record was insufficient to sustain the plan.\textsuperscript{252}

Professor Haney López argues that O’Connor deployed Powell’s notion of a “nation of minorities” in \textit{Bakke} to conclude that the black majority on the city council wielded unchecked authority and therefore could “too easily act to the disadvantage of a [white] minority based on unwarranted assumptions or incomplete facts.”\textsuperscript{253} In his view, by dismissing the set-aside plan as nothing but “simple racial politics,” she “followed . . . Powell down the ethnic road” yet nonetheless refused to allow the political process to operate freely.\textsuperscript{254} According to Haney López, any genuine faith in a “nation of minorities” would have required the Court to defer to a pluralistic political process in which all groups could fairly compete.\textsuperscript{255} Instead, the Court continued to apply strict scrutiny, emphasized the end of racism and the rise of white vulnerability, and engaged in “reactionary colorblindness.”\textsuperscript{256}

Although O’Connor cited \textit{Bakke} to support the application of strict scrutiny, she did not draw on the imagery of a “nation of minorities” rooted in ethnicity to evaluate the set-aside requirement. On the contrary, she found that Richmond remained a city rooted in binary racial politics of a black-white nature. The set-aside provision included a range of groups, but O’Connor pointed out that if the evidence of past discrimination was weak with respect to blacks, it was wholly lacking with respect to “Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry. . . . It may well be that Richmond has never had an Aleut or Eskimo citizen.”\textsuperscript{257} The inclusion of a laundry list of beneficiaries in turn cast doubt on the bona fides of the plan: “The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city’s purpose was not in fact to remedy past discrimination.”\textsuperscript{258} What had been a virtue of inclusiveness in \textit{Fullilove} became a vice of overbreadth in \textit{Croson}.

For O’Connor, Richmond was a city comprised of blacks and whites, and the mention of other groups in the set-aside plan was mere window dressing to camouflage the raw exercise of power. As the dominant political group, blacks could engage in “simple racial politics” that led to stigma,

\textsuperscript{251} \textit{Id.} at 491–492.
\textsuperscript{252} \textit{Id.} at 505.
\textsuperscript{253} Haney López, \textit{supra} note 134, at 1048 (quoting \textit{Croson}, 488 U.S. at 495–496).
\textsuperscript{254} \textit{Id.} at 1050.
\textsuperscript{255} \textit{Id.} at 1063.
\textsuperscript{256} \textit{Id.} at 1043, 1046–1051.
\textsuperscript{257} \textit{Croson}, 488 U.S. at 506.
\textsuperscript{258} \textit{Id.}
stereotyping, and overreaching. This characterization of municipal officials suggested the kind of solidarity and oppositional politics associated with a fear of "reverse discrimination" rather than with a "nation of minorities." O'Connor's interpretation meant that there was no contest between race and ethnicity in Croson; culture-race could have no place in her analysis of the Richmond plan. In that sense, Croson looks very different from Crawford, where Justice Powell took precisely the hands-off approach to politics that Haney López suggests is a natural outgrowth of the relativism inherent in Bakke's conception of ethnicity.\(^{259}\) In assessing the validity of the statewide ballot measure that halted court-ordered busing to remedy de facto segregation, Powell emphasized the multiracial, multiethnic nature of the electorate and the broad support that the proposition received among a range of racial and ethnic groups.\(^{260}\) None of these features figured in O'Connor's analysis of Croson.

One year later, the Court decided Metro Broadcasting, Inc. v. Federal Communications Commission, which upheld a federal licensing program that gave a plus to broadcast stations owned by minorities.\(^{261}\) The Federal Communications Commission, drawing on the Bakke rationale, justified the policy as a way to include underrepresented groups and promote diversity on the airwaves.\(^{262}\) Writing for the majority, Justice William Brennan relied on Fullilove to conclude that Congress had special powers to remedy patterns of exclusion, so that a less stringent standard of review applied than the strict scrutiny used in Croson.\(^{263}\) Based on the reasoning in Bakke, Brennan concluded that broadcast diversity was, at the very least, an important First Amendment interest that could justify the licensing program.\(^{264}\) Under an intermediate level of scrutiny, the minority ownership policies passed muster because they were substantially related to achieving this goal.\(^{265}\) Here, the Court seemed once again to open the door to culture-race by recognizing that diversity in the media can alter the quality of exchanges on the air waves.

Metro Broadcasting's effort to transplant the diversity rationale to government contracting did not survive for long. Only five years later, in Adarand Constructors, Inc. v. Pena,\(^{266}\) the Court held that strict scrutiny should apply to congressional set-aside programs just as it does to state and

\(^{259}\) Haney López, supra note 134, at 1063.

\(^{260}\) See supra text accompanying notes 129–134.


\(^{262}\) Id. at 554–556.

\(^{263}\) Id. at 563–566.

\(^{264}\) Id. at 566–568.

\(^{265}\) Id. at 569–600.

local initiatives.\textsuperscript{267} The Court, in an opinion by Justice O’Connor, repudiated the relaxed level of review in \textit{Metro Broadcasting} as “undermin[ing] important principles of this Court’s equal protection jurisprudence, established in a line of cases stretching back over 50 years.”\textsuperscript{268} Although O’Connor went to some lengths to point out that Powell’s separate concurrence in \textit{Fullilove} had presumed that strict scrutiny applied to federal affirmative action programs,\textsuperscript{269} she was largely silent about his diversity rationale in \textit{Bakke} and how it fit with longstanding principles of equal protection. Instead, she simply remanded \textit{Adarand} so that a lower court could determine whether strict scrutiny was satisfied.\textsuperscript{270} Even though \textit{Adarand} did not expressly overrule the use of diversity to justify race-conscious contracting, this rationale largely disappeared from the Court’s affirmative action jurisprudence with the exception of decisions involving higher education.\textsuperscript{271}

Why was it so difficult for diversity to find any traction as a justification for affirmative action outside of colleges and universities? Why, in other contexts, did the Court suspect that “simple racial politics” led to the rigidification of race, rather than to dynamic interchange? When diversity was used to defend the special treatment of a designated list of beneficiaries in the broadcasting industry, the set-aside program raised the specter of a permanent racial spoils system, the very consequence that Powell had dreaded and strove mightily to avoid in \textit{Bakke}.\textsuperscript{272} To that end, he had carefully coupled the diversity rationale with Harvard’s individualized review policy. In effect, the narrow tailoring requirement became diversity’s tether, leading to very different results in higher education and government contracting.

Powell saw only a limited sphere in which the Constitution could account for the dynamism of culture-race. When quotas were used, he thought of race as once again a reified biological irrelevancy wrongly deployed for political ends. As a result, culture-race had little role to play outside higher education. After all, it is hard to imagine many arenas in which constituencies vying for recognition and rewards will be satisfied with

\textsuperscript{267} \textit{Id.} at 227.
\textsuperscript{268} \textit{Id.} at 231.
\textsuperscript{269} \textit{Id.} at 235.
\textsuperscript{270} \textit{Id.} at 237–239.
\textsuperscript{272} For a characterization of the set-aside for broadcasting licenses as a racial spoils system, see Alan J. Meese, \textit{Bakke Betrayed}, 63 LAW & CONTEMP. PROBS. 479, 492–493 (2000).
an amorphous promise of holistic review. Instead, interest groups seek the sort of categorical preferences, that is, set-asides, that the Court has rejected except when past discrimination is established.\textsuperscript{273} Culture-race becomes an insupportable justification because the Court fears that quota systems will intensify racial divisions rather than create a space for the development of racial identities. So, diversity remains the province of higher education, where traditions of academic freedom and individual merit insulate administrators from the most direct pressures to set aside seats.

Given the Justices' resistance to using diversity to justify other forms of affirmative action, it is not surprising that Chief Justice Roberts could readily dispense with \textit{Grutter} by declaring it inapplicable to elementary and secondary schools in \textit{Parents Involved}.\textsuperscript{274} What is more surprising is that five Justices, the four dissenters and Justice Kennedy, were willing to recognize diversity as a compelling interest in the voluntary desegregation litigation.\textsuperscript{275} Although there was not much in-depth discussion on the point, these Justices apparently believed that the learning process is not different in kind at the elementary, secondary, and post-secondary levels and that there is significant value in creating diverse classrooms at all levels of instruction.\textsuperscript{276} By translating the diversity rationale to the desegregation context, a majority of the Court recognized expressive and associational aspects of the common school, a discourse that had largely disappeared after the \textit{Rodriguez} decision. Unfortunately, however, the ongoing dialectic between the anti-classification and anti-subordination Constitution left little room to develop a theory of culture-race that could sustain the voluntary integration plans in Louisville and Seattle as essential to advancing the interest in a diverse student body.

As a result, narrow tailoring became diversity's tether once again. The dissent was willing to accept the school boards' findings that any harms associated with voluntary desegregation plans were substantially outweighed by the benefits of an integrated classroom, but Justice Kennedy was unwilling to defer to these political judgments. In particular, he did not

\textsuperscript{273}See Daniel A. Farber and Philip P. Frickey, \textit{The Jurisprudence of Public Choice}, 65 \textit{Tex. L. Rev.} 873, 909 (1987) (describing a program of minority set-asides in government contracting as likely to be the product of special-interest politics).

\textsuperscript{274}See supra note 22 and accompanying text.

\textsuperscript{275}See supra note 54 and accompanying text.

believe that Louisville and Seattle had developed systems of holistic review, nor did he seem sanguine that busing plans ever would approximate the kind of nuanced assessments associated with admission to Harvard's undergraduate program or Michigan's law school.277 Faced with highly reified notions of race in school desegregation law, Kennedy would have to turn elsewhere for doctrinal guidance on how to create spaces that foster identity and expression without infringing on individual rights.

B. The Uncertain March to Color-Consciousness: Voting Rights and Justice Kennedy's Redistricting Strategies in Parents Involved

One possible source of guidance for Kennedy was the Court's voting rights jurisprudence. As the Justices retreated from race-conscious remedies in school desegregation, their use persisted in elections, despite similar judicial debates over an anti-classification and an anti-subordination Constitution. I leave for another day the complicated question of why these two areas have evolved differently, although congressional reaffirmation of the Voting Rights Act coupled with the Court's reluctance to overturn legislative judgments about how to constitute the body politic clearly have played a part.278 Voting has been characterized as a fundamental right, and the Court's "one-person, one-vote"279 mandate offers a highly individualized, race-neutral account of equality.280 Yet, there is no doubt that the way votes are aggregated plays a critical role in shaping the nature of political representation and the perceived legitimacy of the electoral process.281 The Court has entered the thicket of redistricting only with great trepidation, and

277 See supra note 55 and accompanying text.


the Justices clearly prefer bright-line rules that avoid charges of favoritism and the anti-democratic exercise of judicial power.\textsuperscript{282}

Advocates of an anti-classification Constitution have attacked race-conscious redistricting as tantamount to impermissible racial gerrymandering.\textsuperscript{283} Yet, taken to its logical conclusion, such reasoning would imply that the dictates of the Voting Rights Act, like school desegregation decrees, have outlived their usefulness. Presumably, the Court has been unwilling to go this far, lest it provoke a direct confrontation with Congress.\textsuperscript{284} Moreover, the evidentiary rules in voting rights cases offer ongoing proof that race still matters in the electoral process. In particular, evidence of racially polarized voting patterns—that is, that blacks choose black candidates and whites choose white candidates—is treated not as a set of irrelevant private preferences but as verification of the need for remedial intervention.\textsuperscript{285}

In marked contrast, choices to live in segregated neighborhoods are not deemed proof that school desegregation efforts remain imperative because of racially polarized residential patterns. Nor are such patterns an element of defining violations in school desegregation cases.\textsuperscript{286} Ironically, these very different approaches to incorporating racial preferences into equal protection law seem to reinstate the Court's purportedly discredited distinction between political and social equality. In endorsing the doctrine of "separate but equal." \textit{Plessy v. Ferguson} treated full political participation as a


\textsuperscript{284} The Court may have been chastened by Congress's strong reaction to a 1980 plurality decision that required plaintiffs to prove discriminatory purpose in a voting dilution case. Mobile v. Bolden, 446 U.S. 55, 66 (1980) (Stewart, J., plurality). For a description of the congressional reaction, see Frank R. Parker, \textit{The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard}, 69 VA. L. REV. 715, 747–750 (1983). The Court also retreated from a colorblind approach to redistricting a decade later in the wake of the \textit{Shaw v. Reno} decision. See Tokaji, supra note 283, at 534–539.


constitutionally protected value but dismissed efforts to enforce social equality through race-mixing.\textsuperscript{287} Today, this dichotomy is subtly reinstated: Polarized voting patterns during elections command the Court's attention as a barrier to authentic political representation, but racialized choices about real estate are considered a purely private, social matter outside the scope of constitutional concern.

To deflect demands for colorblindness in the area of electoral politics, proponents of race-conscious remedies have invoked not just historical-race and status-race but also culture-race. Because changing patterns of voting by racial and ethnic groups are relevant to defining a violation, these efforts have enjoyed some success. At first, the Voting Rights Act targeted minority exclusion and underrepresentation by eradicating racial barriers to the individual exercise of the franchise.\textsuperscript{288} Later, however, the Act recognized voting and representation as expressive activities, ones that not only reflect preferences and beliefs but also shape them. The second generation of voting rights cases therefore addressed how district lines are drawn and votes are counted, once individuals can cast their ballots freely.\textsuperscript{289} This shift moved from a focus on race-neutral access to the ballot box to a preoccupation with how race influences both the quality of representation and the experience of political participation.\textsuperscript{290} Redistricting litigation did not treat race as a fixed and presumptively irrelevant trait. Instead, identity—including racial identity—was considered fluid and dynamic, the product of both structured opportunities and individual experiences. As a result, second-generation voting rights cases began to make room for the possibility of culture-race.

Consider, for instance, the current debates over whether the Voting Rights Act requires majority-minority districts that establish safe seats for minority candidates. Over the years, voting patterns have changed, so that in some areas, thirty percent of white voters in a Democratic primary reliably cross over to support a minority candidate. In heavily Democratic districts with possibilities for multiracial political coalitions, a minority candidate may have an excellent chance of winning even if minorities comprise only a plurality of the voting population. Under these circumstances, majority-

\textsuperscript{287} The court of appeals in \textit{Milliken} worried that a failure to recognize the connections between housing patterns and school segregation in metropolitan Detroit would raise the specter of \textit{Plessy} and put \textit{Brown} in peril. Bradley v. Milliken, 484 F.2d 215, 249 (6th Cir. 1973) (en banc), rev'd, 418 U.S. 717 (1974).

\textsuperscript{288} Guinier, \textit{supra} note 282, at 1093.

\textsuperscript{289} \textit{Id.} at 1093–1095.

minority districts arguably concentrate minority voters unnecessarily and reduce the total number of representatives they can elect.\textsuperscript{291}

The total number of minority officeholders is one benchmark of success under the Voting Rights Act, but some legal scholars have moved beyond this purely quantitative approach. In fact, sensitivity to culture-race requires a focus on the quality of representation and how it will reflect and shape group identity. For example, Michael Kang has argued that majority-minority districts allow racial constituencies to confront their internal heterogeneity and can gradually diminish presumptions that all members are best served by voting as a block.\textsuperscript{292} Coalitional districts, on the other hand, require the plurality of minority voters to act as a cohesive group to ensure election of a minority candidate.\textsuperscript{293} The result may be coalitions that entrench the in-group solidarity of non-whites and perpetuate their racially polarized voting patterns, even as whites become more willing to vote across racial lines.\textsuperscript{294}

Terry Smith also contends that coalitional districts alter the nature of minority representation.\textsuperscript{295} Because non-white officials must constantly woo cross-over white voters, Smith argues that the representation of minority constituents is diluted by the perennial need for compromise.\textsuperscript{296} If Kang and Smith are right, coalitional districts may not be preferable to majority-minority districts on qualitative grounds. Minorities are less free to express their differences because they must vote as a racial block, while white voters retain flexible identities that allow them to cross over or not, depending on the candidate.

Until 2007, when the Court decided \textit{LULAC v. Perry},\textsuperscript{297} Justice Kennedy had largely ignored questions of culture-race in voting rights cases.\textsuperscript{298} In \textit{LULAC}, Kennedy voted to strike down a redistricting plan because it diluted the Latino vote.\textsuperscript{299} In reaching this conclusion, he acknowledged both the changing political identity and internal heterogeneity of Latinos in Texas.\textsuperscript{300} Kennedy first noted that some Latinos were mobilizing to unseat a Latino

\textsuperscript{291} Pildes, \textit{supra} note 282, at 1529–1539.


\textsuperscript{293} \textit{Id.} at 797–800.

\textsuperscript{294} \textit{Id.} at 798.


\textsuperscript{296} \textit{Id.} at 293.


\textsuperscript{299} \textit{LULAC}, 548 U.S. at 427–435.

\textsuperscript{300} \textit{Id.} at 432–435.
incumbent because of increasing dissatisfaction with his representation. Kennedy did not want redistricting to reify the Latino vote by presuming that a Latino incumbent automatically served Latino interests, particularly when the evidence was strongly to the contrary. Kennedy also observed that the newly created district, designed to protect the incumbent, lumped together Latinos with very different interests and concerns.

Kennedy was convinced that Latinos living near the border were politically distinct from those living in Austin, a state capital several hundred miles north. He rejected a redistricting plan that bleached out these differences by treating Latinos as a homogeneous constituency. He also expressed dismay that just as Latinos in the southern part of the state were poised to exercise their political clout, they were thwarted by the redrawing of district lines. He feared that redistricting was being used to deter political expression and participation of an emboldened and emerging constituency. For all of these reasons, he found a violation of the Voting Rights Act.

Elsewhere, Heather Gerken has argued that LULAC influenced Kennedy's decision in Parents Involved. He did seem to have Texas on his mind, having cited Bush v. Vera, another voting rights lawsuit from the Lone Star State, to support the application of strict scrutiny to voluntary school desegregation. But his preoccupation did not end there. In LULAC, Kennedy relied on First Amendment freedoms of association and expression to countenance race-conscious decision-making that was respectful of racial difference but did not succumb to stereotypes about a monolithic Latino identity.

\[301\text{ Id. at 423–424, 440–441.}\]
\[302\text{ Id. at 428–429.}\]
\[303\text{ Id. at 428–429, 435.}\]
\[304\text{ Id. at 424, 434–435.}\]
\[305\text{ LULAC, 548 U.S. at 435.}\]
\[306\text{ Id.}\]
\[307\text{ Id. at 438–439.}\]
\[308\text{ Id. at 435, 442.}\]

\[309\text{ Gerken, supra note 298, at 105–107. In an article published before the Parents Involved decision, Professor Goodwin Liu argued that the redistricting cases were more relevant than affirmative action cases in the Louisville and Seattle litigation and that the Court's voting rights jurisprudence supported the use of race-conscious student assignment plans. Goodwin Liu, Seattle and Louisville, 95 CAL. L. REV. 277, 301–307 (2007). Justice Kennedy clearly took a different view of the narrow tailoring issue.}\]
\[310\text{ 517 U.S. 952 (1996).}\]
\[311\text{ Parents Involved, 127 S. Ct. at 2792 (2007).}\]
\[312\text{ LULAC, 548 U.S. at 435, 438–442.}\]
In *Parents Involved*, Kennedy also was receptive to race-consciousness in the structuring of opportunities to participate, this time in public schools. Kennedy wanted school boards to be able to build common schools by fostering diversity and reducing racial isolation. In doing so, Kennedy "not only acknowledge[d] race's associational and expressive dimensions, but show[ed] some awareness of the relationship between the two—the possibility that the choices the state makes in grouping individuals will affect the choices individuals make in expressing their identity." Kennedy seemed especially concerned that interracial tolerance and understanding would be difficult to learn in segregated environments, whether they were the product of state action or private residential choices.

Drawing on his experience with crafting remedies for electoral wrongs, Kennedy embraced race-neutral treatment of individuals, just as the first generation of voting rights cases did. For this reason, he rejected the student assignment plans in Seattle and Louisville. At the same time, though, Kennedy endorsed the legitimacy of race-consciousness in structuring opportunities to participate, just as the second-generation vote dilution decisions did. To that end, he allowed race to be a factor in aggregating children when school boards draw attendance boundaries or choose sites for new schools.

Whether a strategy modeled on voting rights will work for voluntary school desegregation remains to be seen. For most voters, the boundaries of an electoral district are an abstraction encountered once a year. But the boundaries of a neighborhood are part of a concrete, lived experience. Residential areas become sites of ordinary, everyday practices that define and entrench the cultural identifications associated with race. Segregated neighborhoods figure among the most profound spaces in which culture-race is made, even if school desegregation cases have treated them as largely beyond the law's reach. It seems unlikely that an occasional school sitting or redistricting decision will disrupt deeply rooted patterns of residential segregation, particularly when decades of court-ordered desegregation remedies have not. Indeed, one recent, albeit controversial, study suggests

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314 *Id.* at 120.
315 *Id.* at 115–116.
316 See *supra* notes 53–55 and accompanying text.
that even in residential areas that are diverse, interchange and cooperation across racial and ethnic lines will not take place without affirmative efforts to build a common experience of community.\textsuperscript{318}

Regardless of whether Kennedy's strategy succeeds, however, his opinion has served the valuable function of reintroducing the concept of culture-race into the school desegregation arena. In doing so, he shows that despite Haney López's grim prognosis regarding Justice Powell's ethnicity turn, a focus on culture-race need not lead to reactionary colorblindness or even to judicial laissez-faire. In fact, recognizing culture-race offers a potential way out of the gridlock associated with endless debates over the anti-classification and anti-subordination Constitution. By acknowledging the ways in which group identity is fluid and flexible, the Court can begin to consider how public spaces should be structured to promote freedom of expression and association on terms of equality, civility, and respect.\textsuperscript{319}

CONCLUSION

The \textit{Parents Involved} decision starkly reveals the limitations of a jurisprudence of fragmentation. The Court's desegregation doctrine has been hamstrung by a longstanding battle over whether \textit{Brown} enshrines a Constitution dedicated to enforcing formal equality or to eradicating racial stratification. \textit{Bakke} and \textit{Grutter} employ a different logic, one that treats diversity as a means to promote identity-formation, personal expression, and interpersonal knowledge. Under this rationale, race is not a rigid absolute but a culturally inflected, contextual trait. Because of the distinct logics underlying the desegregation and affirmative action cases, however diversity could not be readily translated to an arena that has long treated race as either a biological irrelevancy or a marker of inequality.

Only Justice Kennedy made some room for a different approach to race—at least at the margins of school board decision-making. What remains to be seen is whether a recognition of culture-race can restore the full promise of \textit{Brown}'s legacy by demonstrating that race is not simply a product of biology or history over which we have no control. Instead, race is a fluid trait integrally shaped by the choices we make today. \textit{Parents Involved}, by overturning voluntary integration plans, has taken us further down a path of


racial reification and rigidity. Yet, even a fleeting glimpse of a more dynamic vision of race reminds us that we can and must do better.
A Class Act? Social Class Affirmative Action and Higher Education

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I. INTRODUCTION

How much are people the products of their parents’ genes, how much are they the products of their upbringings, and how much do they owe their successes and failures in life to their own efforts? These are notoriously, almost comically, unanswerable questions. But scarcely anyone doubts that nature and nurture—or at a minimum, nature or nurture—greatly affect who we are and what happens to us in life. And plainly, people are not morally responsible for their genes, nor—on the whole—for their upbringings. “Choose your parents wisely” is a wry but obvious truth.

One’s parents’ fate is not necessarily one’s own, of course. Education has traditionally been a means to social mobility. The phrase “careers open to talent” was a byword of the Enlightenment struggle against

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hereditary privilege. Today, although less securely than in the recent past, education opens the way to careers. There is a strong correlation between education, earnings, and social status: the lifetime earnings of college graduates in the United States, on average, are nearly double those of high school graduates. But heredity matters, in education as in other spheres of life. “Native intelligence” presumably has some part in educational success. Upbringing surely has as well. Although there are no guarantees of scholastic success for those whose parents are well educated, well connected, and well off, they start with obvious educational advantages. Scores on college admission tests go up, on average, with parental income, and college students, especially at prestigious universities, are disproportionately the children of financially comfortable families.

Affirmative action in higher education on the basis of social class might therefore seem an attractive way to counteract, and at least partially to balance, the unearned caprices of birth. Barack Obama, as his campaign for the presidency got under way in 2007, implied that he might support affirmative action on the basis of class rather than on the basis of race. Asked whether his own daughters should benefit from affirmative action, Obama said they “should probably be treated by any admissions officer as folks who are pretty advantaged.”


have been disadvantaged and have grown up in poverty and shown themselves to have what it takes to succeed.**

Senator Obama put the suggestion in terms that few could disagree with. But systematic affirmative action on the basis of social class would almost certainly mean more than seeking out college applicants from lower-class families or offering more “need-based” scholarships. It would mean more than informally making allowances for a promising applicant where there is genuine reason to think that a test score or other qualification understates the applicant’s ability. As with racial affirmative action, such measures would arouse little if any controversy. But realistically, class-based affirmative action would almost certainly mean systematic admissions preferences based on class, comparable to affirmative action as it now exists on many campuses on the basis of race: a program for admitting lower-class students with lesser academic qualifications over other applicants with higher qualifications.  

Prominent authors have advocated such preferential programs, and several universities and colleges, including various divisions of the University of California, have instituted such class-based affirmative action in their undergraduate and graduate admissions.

Class-based preferences are often suggested as a better or more acceptable alternative to conventional affirmative action on the basis of race, ethnicity, or sex. After all, if affirmative action is meant to help the underprivileged, surely it is more straightforward to offer preferences to the underprivileged, rather than to racial groups whose members are not all underprivileged, while many underprivileged people are not members of such groups. Class preferences may be especially attractive

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7. See, e.g., Richard H. Sander, Class in American Legal Education, 88 DENV. U. L. REV. 631, 633 (2011) (“Policies implemented by both law schools and undergraduate colleges have shown that class-based preferences are feasible and effective in creating diversity, and they involve much smaller academic costs than do racial preferences.”).
to affirmative-action-minded colleges and universities in states where—as a result of statewide referenda or otherwise—it is illegal for public bodies to discriminate, or to prefer, on the basis of race, ethnicity, or sex.\(^8\)

Measures like California’s Proposition 209 undoubtedly permit preferential treatment based on social class, so long as it is not simply a disguise for preference based on race, ethnicity, or sex.\(^9\)

But there are good reasons to think twice about class-based affirmative action. Some of the problems with class preference are common to any educational preference based on group membership rather than educational qualifications. But some of the most important reasons for caution are specific to preferences based on social class.

Comparing class preferences with racial preferences helps to point up some of the reasons for the allure of class preferences but also points up some of the problems. A crucial consideration is the question of who is to receive class preference. For example, what about immigrants and their children? In general, social class is difficult to define, and this very difficulty would confer great discretion and power on faculties and academic administrators who undertake to bestow class preferences: discretion that would be open to abuse for political, ideological, and other ends. Finally, there is the question of whether preferential treatment is necessary to increase educational opportunities for the less privileged or whether the call for class preferences reflects a mindset inimical to impartial standards and prone to preferences as a first rather than a last resort.

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8. See CAL. CONST. art. I, § 31(a) (prohibiting the state from discriminating against or granting preferential treatment to any individual or group on the basis of race, sex, or national origin in the operation of public education, employment, or contracting); see also MICH. CONST. art. I, § 26 (banning racial preferences in all state public schools), invalidated by Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 701 F.3d 466, 491 (6th Cir. 2012), cert. granted sub nom. Schuette v. Coal. to Defend Affirmative Action, 133 S. Ct. 1633 (2013) (mem.); NEB. CONST. art. 1, § 30 (banning discrimination based on race in public employment, contracting, and education); WASH. REV. CODE ANN. § 49.60.400 (West 2008) (banning discrimination based on race in public employment, education, and contracting); Fla. Exec. Order No. 99-281 (Nov. 9, 1999), available at http://www.dms.myflorida.com/media/general_counsel_files/one_floridaexecutive_order_pdf (banning race-based and sex-based preferences in public employment, education, and contracting).

II. CLASS VERSUS RACE

Racial quotas and preferences, especially in higher education, have serious drawbacks, as even their supporters often acknowledge. The case against racial affirmative action is familiar. Racial preferences enhance race consciousness in a country—and world—in which racism has already done incalculable mischief. They systematically mismatch minority students with institutions where their qualifications are significantly below average, hence maximizing these students’ self-doubts and the likelihood that they will fail or perform poorly. They stigmatize minority students and graduates as recipients of unearned favor. They promote racial self-segregation, through the reluctance of minority students to expose themselves to embarrassment by their academically better-prepared fellows. They diminish incentives, or create perverse incentives, by conveying to minority young people that they need not strive too hard to learn and to achieve. They weaken academic standards because preferences ensure that minority students have lower qualifications on average, and faculties may be loath to maintain high standards at the price of conspicuous minority failure. They may also encourage nihilism about the very idea of high academic standards. And they are widely felt to be unfair, both because educational institutions are generally expected to judge by educational criteria, not by racial ones, and because many of the beneficiaries of racial preferences are children of comfortable families, whereas many who are passed over despite their stronger academic achievements are themselves the children of less comfortable homes.

Affirmative action based on social class would at least have the virtue of not being based on race. Racial animosity, which racial affirmative

11. Id. at 8–10; see generally Richard Sander & Stuart Taylor, Jr., Mismatch: How Affirmative Action Hurts Students It’s Intended To Help, and Why Universities Won’t Admit It (2012) (arguing that affirmative action admissions negatively affect the students they are intended to benefit).
13. Id. at 10–11.
14. Id. at 9–10.
15. Id.
16. Id. at 10.
17. Id.
action might be thought to aggravate, holds particular social and political dangers, a fact that is borne out by the history of racial conflict in America and in many other countries. And many of the drawbacks of racial affirmative action are enhanced by the conspicuous visibility of people’s race. The stigma of having received preferential treatment is greatly enhanced if it is obvious at a glance. Even a minority student admitted on the merits, without any preference, might be assumed by others to have received preference and will know that others are making this assumption. For the same reason, the stigma of racial preference may persist throughout a person’s professional life. And segregation, including self-segregation, is facilitated by obvious physical distinctions.

Beneficiaries of class preferences would not stand out in the same way; it would not be so obvious that a particular student might have received class preference. Hence, there would not be the same stigma in one’s student years or beyond. Moreover, affirmative action based on social class—rather than race—might be less corrosive of academic standards, at least if faculties and administrators are less prone to dilute standards in order to disguise the failure or poor performance of those receiving class preference. After all, students preferred by social class rather than by race would be less conspicuous and cohesive. And if they were to succeed less well than their academically better-prepared fellows, at least it would not appear to replicate the painful American history of racial discrimination, with the scarcely tolerable spectacle of such a racial group being once again at the bottom.

Class preferences would also have the virtue of preferring the less privileged. Racial affirmative action, by contrast, often means preferential treatment for the children of middle class, or even wealthy and prominent, minority families. This is especially true given the minority “applicant pool” at elite colleges, universities, and professional schools: that is, given that the minority applicants with the strongest academic qualifications—although they still might not be admitted without preferential treatment—are often children of prosperous homes. If colleges and universities can satisfy today’s racial affirmative action “goals” by admitting minority applicants with the best academic qualifications, even if these are the most prosperous minority applicants, then the institutions are likely to do so, just as there is an obvious incentive to admit minority applicants who can afford to pay high tuition rates. Insofar as affirmative action is

19. See supra note 2 and accompanying text.
meant to help the less privileged, class preferences would surely be a more direct and a more consistent way of achieving it.20

On the other hand, the moral urgency of class preference is far less clear than for racial affirmative action. The legacy of slavery and the history of racial segregation and discrimination in America are known to everyone; they are rightly sources of national shame and regret. Today there is broad national consensus for racial equality, for “equal justice under law,” and for the moral claims of the civil rights movement: hence the stature of Martin Luther King Jr. as a national hero. There is also a widely shared belief that racial stratification, with dramatically better or worse conditions of life depending on race, is dangerous for society, sowing the seeds of racial conflict. Whether preferential affirmative action is a just way toward racial equality and integration, or even whether it leads to these goals at all, is controversial. But as recompense for undeniable racial injustice and as a means to racial integration, the case for affirmative action is on its strongest ground.

As to class, by contrast, there is reason to feel that America has less to atone for, and possibly less to worry about for the future, than where race is concerned. Unlike many European countries, the United States has no hereditary aristocracy. Historically, class distinctions have been fewer and less rigid in America. Instead, America has been known, sometimes even disparaged, for its emphasis on upward mobility and its cult of success. This is not to suggest that America has ever been a “classless society.” Such a thing may not exist in nature. But America has been more a land of opportunity than most, a chosen destination for immigrants throughout the nineteenth and twentieth centuries. Has social mobility now slowed in America? Are there fewer opportunities today for those who start life without hereditary advantages? These are controversial questions that may be impossible to answer conclusively. There are academic studies—and widespread media reports—suggesting that relative mobility has diminished in America in recent years or decades: that there is less mobility than in the past between lower, middle, and upper income ranges.21 Unsurprisingly, there is also criticism of the

20. See KAHLENBERG, supra note 6, at 42–52 (providing extensive documentation that those granted preferences under racial affirmative action are often from more prosperous families than those who receive no preference).

21. For scholarly studies, see Greg J. Duncan et al., W(h)ither the Middle Class? A Dynamic View, in POVERTY AND PROSPERITY IN THE USA IN THE LATE TWENTIETH CENTURY 240, 240–71 (Dimitri B. Papadimitriou & Edward N. Wolff eds., 1993). For
statistical methods, and even of the tacit biases, of these studies and some evidence that even relative class mobility has not grown or shrunk, or at least not very much, over recent decades. There is less controversy that absolute incomes have continued to rise on average in recent decades, at least until the most recent economic downturn. The rich may have gotten richer, as they proverbially do, but the poor have gotten richer too, albeit at a lesser rate than the rich. Historically, when the rich get richer more slowly, the poor often do not get richer at all. In short, there has been considerable—if far from perfect—class mobility in America in the past, and there is considerable economic and social opportunity in America today, with standards of living that at least until very recently have continued to rise on average.

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The rates of legal and illegal immigration to the United States and the eagerness with which many more seek to come also suggest that there is no present crisis of social opportunity in America, at least assuming that the present economic downturn is temporary. Impressive numbers of people have “voted with their feet” that they can achieve a better life for themselves and their children in the United States despite arriving with few hereditary advantages of wealth, status, or position.

If the moral and social urgency of class affirmative action seems less pressing than for race, the costs and dangers of class preferences, although perhaps less obvious than for racial preferences, are still considerable and for some of the same reasons.


25. See id.
Racial conflict may be socially incendiary in any country unlucky enough to have it, but class conflict is scarcely less so. In various countries that have experimented with class preferences in education, these preferences have not only reflected but also aggravated class division and animosity. Perhaps the least edifying examples of class affirmative action in the twentieth century were in the USSR and in China under Mao Tse-tung. Universities were required to favor applicants with “good”—worker or peasant—class backgrounds and to disfavor or exclude applicants with “bad” class origins. These policies contributed to the thorough politicization of communist universities and to sharply declining academic and intellectual standards. In China during Mao’s Cultural Revolution, there was wholesale persecution of “bad classes,” and sons and daughters of alleged “landlords” were beaten to death on campuses. 26 Even before the Cultural Revolution, class was pervasive in selecting and indoctrinating students in China, at great cost to any possible academic integrity. 27 In Stalin’s Soviet Union, not only were workers’ children given preferential acceptance at institutes of higher education, but camp guards in the gulags who volunteered to work in especially undesirable concentration camps were offered the chance to have their children reclassified as “children of workers” for this purpose. 28

India is another discouraging example. For many decades, India has had extensive preferences for lower-caste applicants in higher education, as well as for various government jobs and benefits. 29 Caste in India is not quite the same, of course, as class in other countries. Caste is rigidly hereditary; traditionally it reflected and determined one’s occupation and social status. 30 Upper castes also tend to be lighter-skinned and more Aryan, so there is something of a racial aspect too. Perhaps it is fairest to think of caste as being somewhere on a spectrum between race and class. In any event, caste affirmative action in India has been incendiary in the most literal sense: there have been cases of disfavored upper-caste

university applicants publicly burning themselves to death in protest.\textsuperscript{31} Caste preferences are widely acknowledged to have contributed to sharply declining academic standards, as well as to reinforcing caste enmity, which erupts in frequent and deadly riots, sometimes verging on caste warfare, in various parts of India.\textsuperscript{32}

The United States is not India or China, to be sure. But there is little reason to think that class preferences in the United States would not promote class animosities, just as Indian caste preferences do and just as racial preferences in America may already tend to aggravate racial ill will.

Moreover, systematic class preferences on campus would create pressures to dilute academic standards, even if not to the same degree, or at least not in quite the same way, as racial preferences. With academically weaker students, classroom standards are almost inevitably lower. Class preferences weaken the academic ethos—the commitment of the institution and its faculty to academic seriousness—in more subtle ways as well. Preferences, at a minimum, convey a message that academic standards are not paramount for the college or university in question. Moreover, maintaining rigorous standards would tend to mean that students admitted with class preferences would cluster at the bottom of the class or fail entirely. Faculty and administrators might find this an unattractive prospect, even if not quite so unattractive as when the same thing happens with racial preferences. Diluting standards here too would be an easy solution. And students admitted with class preferences would have reason to band together as a kind of “victim” group, if only to press for looser standards under which they would not always tend to be at the bottom.

It is sometimes suggested that preferences do not really sacrifice academic merit because applicants who are given a preference—whether on account of race or class—have more potential than their academic qualifications suggest: social deprivation accounts for their lower entering grades and test scores, and given a chance in college or in graduate school, they will do better than predicted. Would that it were so. Studies of minority students show that they do not perform better; if anything they perform somewhat less well than their qualifications would predict. Minority students, that is, receive grades in college or in graduate school that are no better than their entering credentials would predict; in fact their grades after admission are slightly worse on average than those received by nonminority students with the same entering grades and test


\textsuperscript{32} See Sowell, \textit{supra} note 29, at 23–28.
scores.\footnote{ROBERT KLITGAARD, CHOOSING ELITES 161 (1985); see also WILLIAM G. BOWEN \& DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 88 (1998) (“At almost every college in our sample, black students are not only performing less well academically than whites but also performing below the levels predicted by their SAT scores.”).} The “validity” of the SAT, especially when combined with high school grades—the correlation between SAT scores and high school grades on the one hand and subsequent college grades on the other—is strong, both for minority and nonminority students.\footnote{See WAYNE J. CAMARA \& GARY ECHTERNACHT, THE COLL. BD., THE SAT® I AND HIGH SCHOOL GRADES: UTILITY IN PREDICTING SUCCESS IN COLLEGE 9 (2000), available at http://research.collegeboard.org/sites/default/files/publications/2012/7/researchnote-2000-10-sat-high-school-grades-predicting-success.pdf.} There is no evidence that tests like the SAT, or equivalent tests for graduate and professional schools, underpredict the academic performance of lower-class applicants any more than they do for minority students. Richard Kahlenberg, perhaps the leading advocate of class preferences, concedes that there could be only “a very minor” class preference if the preference were merely designed to correct, as he puts it, “the degree (if at all)” that entering academic credentials fail to predict the academic success of underprivileged students.\footnote{KAHLENBERG, supra note 6, at 149.} In short, preferring academically weaker university applicants because of their class backgrounds would mean academically weaker university students.

The extent to which class preferences would compromise academic quality depends in part on the scale of the preferences. Are there minimum credentials below which no one would be admitted, and if so, how low or high is the minimum for disadvantaged applicants? How large a boost would there be for being disadvantaged? What proportion of the entering class will be admitted with a preference: that is, how many disadvantaged students will be admitted who would not have been admitted on their merits? Once a formal program of class preferences gets under way, it is unlikely that it would be restricted to a small number of the “most disadvantaged.” There are proportionally few children of radically disadvantaged homes who could qualify, even by very relaxed preferential standards, for admission to elite or near-elite universities or graduate schools. Moreover, if the most disadvantaged are admitted on a lower standard but there is no academic concession for the next most disadvantaged, then the most disadvantaged are apt to be admitted at the expense of the somewhat disadvantaged: at the expense of applicants
whose qualifications are somewhat lower, on average, than those of “privileged” applicants but who are receiving no preference.

To avoid the apparent injustice of any such “cutoff” in preferences, there would be great pressure to have a sliding scale of preferences for degrees of disadvantage. Moreover, preferences might seem more palatable politically if they were available to a broader range of applicants: the bottom half of the socioeconomic ladder, say, rather than the bottom ten percent. After all, an argument can be made that the “injuries of class” affect all families below the median, not just the poorest in society. Indeed, ninety percent of Americans are not in the country’s top ten percent. In practice, the very poorest would mostly not be qualified on any standard, so that a viable program of class preferences in higher education would mean preferences for the more moderately disadvantaged, a larger class of beneficiaries. Accordingly, when UCLA School of Law adopted a class preference policy shortly after Proposition 209 went into effect in California in the late 1990s, more than half the law school class was admitted with such preferences. Richard Kahlenberg, too, advocates a preference for any applicant below the socioeconomic median: the median of the institution’s applicants, in fact, not the national median. He would therefore give class preferences to solidly middle class applicants, especially at elite universities where the average applicant is well off.

The effect on academic standards might therefore be substantial. Preferences mean admitting academically weaker students. Racial preferences have some natural limit: the proportion of preferentially admitted minority students is unlikely to be greater, roughly, than the size of the minority in society. Class preferences have no such natural limit. If a university admits half or more of its students on a lower academic standard because of their “class origins,” the academic life of that university will almost inevitably suffer, relative to what it would have been with students admitted on their academic merits.

Racial and ethnic affirmative action is already strongly institutionalized on many campuses, at least where laws like California’s Proposition 209 do


38. KALENBERG, supra note 6, at 142 (arguing for preferences for those below the socioeconomic median “in the applicant pool”).
not limit it. Class preferences are sometimes presented as an alternative to racial preferences. Richard Kahlenberg urges straightforwardly that class preferences should substitute for racial ones, both on the moral ground that preferences should be directed to the disadvantaged and on the prudential ground that class preferences would be politically and legally more palatable than racial ones. Carol Swain and other advocates of class-based affirmative action have taken much the same view. Supporters of racial affirmative action, however, respond that class preferences are no substitute: most of America’s “disadvantaged” are not minority, and if class preferences replace racial ones, black applicants in particular will fare much worse than they do when there are implicit or explicit numerical “goals”—and preferential standards—based on race. There ought to be class preferences in addition to the racial ones, not instead of them, insist many defenders of affirmative action, including William Bowen, coauthor with Derek Bok of The Shape of the River, a standard text in support of affirmative action.

Class preferences, in fact, would probably reinforce racial preferences rather than replace them in most states. After all, there is stronger moral and historical justification for affirmative action by race than by class. It is one thing to adhere to a principle that colleges and universities should judge on the academic merits, that preferential treatment is corrosive and wrong. But once it is conceded that class preferences are desirable, it would be difficult or impossible to resist the claims that racial affirmative action should continue as well, wherever it is permitted by law. America’s racial history gives these claims special resonance, and there is well-organized support for the existing preferences, especially on campus. Any systematic program of preference tends to erode the principle of making academic judgments on an academic basis. If higher education is to have preferential treatment by social class, it will probably be in

40. Kahlenberg, supra note 6, at 29, 86.
42. Bowen & Bok, supra note 33, at 50–51; see also William G. Bowen et al., Equity and Excellence in American Higher Education 183–86 (2005) (concluding that class-based preferences are not suitable substitutes for race-based affirmative action).
addition to the already institutionalized racial and ethnic affirmative action programs, not as a substitute for them.

III. CLASS PREFERENCES AND OPEN BORDERS

Preferential treatment for college and university applicants from “less privileged” families would raise an obvious question of social fairness: What about immigrants and their children?

As of 2009, approximately 39 million people living in the United States were foreign-born, just over 12% of the population. Of these 39 million, just under 17 million, roughly 43%, are naturalized American citizens. As many as 11 million are estimated to be “unauthorized residents” illegally present in the United States.

In states such as California, New York, Texas, and Florida, where over half the foreign-born live, there is a high concentration of immigrant families. In 2009, more than one in four Californians were foreign-born, and in New York and New Jersey, the statistic was more than one in five.

There are growing numbers of immigrants in other regions of the country as well. The foreign-born population increased by over 150% in Georgia, Tennessee, and Wyoming from 2000 to 2007, and the numbers of the foreign-born more than doubled in six other states during the same period.

The levels of education and income among the foreign-born are rather polarized. Nearly 29% of the foreign-born over twenty-five years of age never completed high school, compared with just 8% of native-born Americans; yet the percentage of the foreign-born with advanced graduate degrees is equal to that of native-born Americans at 11%. The median annual earnings of the foreign-born are 66% of the earnings of natives, and noncitizens’ earnings are lower still, while 19% of foreign-born workers earned less than $22,000 in 2009, compared with 14% of natives.

The foreign-born are significantly more likely to be poor than the native-born. Nearly 19% of the foreign-born lived in households with

44. Id.
45. Id.
47. CONG. BUDGET OFFICE, supra note 43, at 1.
48. CAMAROTA, supra note 46, at 9.
49. CONG. BUDGET OFFICE, supra note 43, at 15.
50. Id. at 23, 25.
income below the official poverty line in 2009, compared with 14% of natives. Immigrants and their children, in short, make up a significant and disproportionate share of the “underprivileged” in America, almost regardless of how underprivileged is defined. In states like California and New York, immigrants may be a third or more of the underprivileged. This should not be surprising and has undoubtedly been true throughout American history. Newcomers are obviously less apt to be “established” than families long settled in this country. And although immigrants are often ambitious people, they are typically without wealth or privilege: Otherwise, why emigrate?

America has attracted immigrants since the nation became independent and even before by offering something like equal opportunity. Not perfect equality, to be sure: the foreign-born can never be the President or the Vice President, and there have always been more workaday handicaps as well. But America has traditionally offered immigrants a fair chance to live and work, to be educated, and to compete and to succeed economically, on substantially equal terms with natives. Americans generally accept that this is fair, and immigrants have come willingly, even eagerly, and in extraordinary numbers on these terms.

If the underprivileged are to receive preferential treatment for college and university admissions and immigrants and their children are a substantial fraction of the underprivileged, there will be acute questions about who should receive these preferences. Affirmative action is typically seen, at least in part, as a policy to compensate for past injustices. Immigrants or their ancestors may have suffered injustice but not in—or generally at the hands of—the United States. Throughout American history, immigrants and their children assimilated, and in many cases succeeded, without preferential treatment; indeed, in spite of headwinds, because they often faced social barriers of various kinds. Hence, American-born families might reasonably think it perverse now to give preferential treatment to immigrants and their children: “Immigrants

51. Id.
52. CAMAROTA, supra note 46, at 26.
come seeking equal treatment, and that’s fair enough. But why penalize my children for the social capital our family has built up in America? If my children earn better grades and scores, why should they be rejected in favor of less qualified newcomers?”

In theory, various categories of people might be excluded from preference, but such discrimination would not necessarily be very palatable or even very practicable. Illegal immigrants would be obvious candidates for ineligibility. But enforcement would require scrutiny, presumably by college and university officials, of whether admissions applicants are lawful residents. In many American cities, even the police are reluctant to police compliance with the immigration laws. 54 In California, the state higher education law explicitly provides for illegal aliens who have attended three years of high school in California to be treated as state residents, who pay substantially less for public higher education than “out-of-state” American citizens and legal residents. 55 Eleven other states make similar allowances for illegal aliens in higher education. 56 Given such trends, it is difficult to imagine how universities could or would identify illegal aliens and disqualify them from preferences for the underprivileged. As for reserving class preferences exclusively for citizens of the United States, discriminating between citizens and lawful residents would seem even more invidious than discriminating against illegal aliens, and discriminating against lawful residents would almost certainly violate a variety of federal and state civil rights laws. 57


55. Cal. Educ. Code § 68130.5 (West 2012) (stating that persons “without lawful immigration status” are exempt from paying nonresident tuition at the California State Universities and the California Community Colleges, so long as they meet the statute’s residency and affidavit requirements). This statute, by charging higher tuition to out-of-state U.S. citizens and legal residents than to illegal aliens in California, appears to flout a federal law that prohibits states from providing “any postsecondary education benefit” to “an alien who is not lawfully present … unless a citizen or national of the United States is eligible for such a benefit.” Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 505, 8 U.S.C. § 1623 (2006). The California Supreme Court nonetheless upheld the statute as constitutional in 2010. See Martinez v. Regents of Univ. of Cal., 241 P.3d 855, 859–60 (Cal. 2010). However, similar cases are pending in other state courts. See Denise Oas, Immigration and Higher Education: The Debate over In-State Tuition, 79 UMKC L. Rev. 877, 886–92 (2011); Ann Morse & Kerry Birnbach, In-State Tuition and Unauthorized Immigrant Students, Nat’l Conf. St. Legislatures (Nov. 28, 2012), http://www.ncsl.org/default.aspx?tabid=13100.

56. Morse & Birnbach, supra note 55.

57. The Civil Rights Act of 1964 forbids discrimination on the basis of “national origin” by public colleges, 42 U.S.C. § 2000c-6(a)(2) (2006), or by any program or
Moreover, what about the children of the foreign-born? Proportionally to their numbers, perhaps few illegal residents themselves seek higher education, although some surely do. Among the foreign-born in general, there are fewer young people of high school age—the age of the typical college applicant—than among the native-born: only 7% of the foreign-born are under eighteen compared with 27% of the American-born. But children born in the United States, even to illegal aliens, are American citizens. The birth rate, in fact, is higher among the foreign-born in America than among natives. If there is to be preferential treatment for the children of underprivileged homes, one or both parents in a substantial fraction of such homes are apt to be immigrants, legal or otherwise.

Immigration policy is a volatile political topic in America today, as it often has been in the past. Many Americans are inclined toward relatively open borders and a welcoming attitude: “Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!” But opposition to immigration runs strong, especially when the numbers of immigrants increase dramatically, as they have in recent decades.

activity receiving federal financial assistance, id. § 2000d. Although these provisions do not refer explicitly to legal aliens, other federal statutes do, including the Immigration and Nationality Act, 8 U.S.C. § 1324b(a)(1) (2006), which forbids employment discrimination against legal aliens. In general, state government—which includes public colleges and universities—may not discriminate against legal aliens except where authorized or required by federal law. See Graham v. Richardson, 403 U.S. 365, 377–80 (1971). Even the federal government may not discriminate invidiously against legal aliens, although the courts are usually deferential to federal immigration and nationality laws. See Mathews v. Diaz, 426 U.S. 67, 78–84 (1976); see also CAL. Civ. CODE § 3339(a) (West 2012) (entitling aliens to all employment remedies under the state civil rights laws).


59. U.S. Const. amend. XIV.

60. CONG. BUDGET OFFICE, supra note 43, at 14 (explaining that, on average, foreign-born women between the ages of fifteen and forty-nine had given birth to 2.6 children, compared with 2.0 children for U.S.-born women in that age group).


receive preferential treatment in college and university admissions on grounds of being underprivileged, it is surely foreseeable that opposition to immigration—and ill will toward immigrants—would be strengthened, and a liberal public policy toward immigration would be less politically viable than it is today.

IV. PREFERENCE FOR WHOM? THE ELUSIVE DEFINITION OF CLASS

If applicants of lower social class are to receive preference in college and university admissions, social class will have to be defined in order to decide who is eligible. Racial affirmative action confronts this problem too, but in most cases there is broad agreement in America about who meets the rough-and-ready standards of being white, African-American, or Hispanic. About 2.9% of Americans identified themselves as multiracial in the 2010 Census.63 The multiracial category is growing quickly, and nearly 8% of married couples are now interracial;64 racial intermarriage is growing especially quickly among better-educated Americans.65 But more than 90% of whites and blacks still marry within their groups.66 Throughout American history, there have been individuals who have “passed” as members of another race, but there are still relatively few white college applicants who could plausibly claim to be black. Although there may be more “borderline” cases of who is Hispanic, in the great majority of cases—at least up to now—there is no dispute.

At first blush, it might be thought that social class could easily be defined by family income: a college or university applicant would be entitled to class preference if the applicant’s family income were below a certain threshold. If a sliding scale were wanted, there might be a greater preference—a more relaxed standard of admissions—the lower

the income. But for various reasons, many of them cogent, supporters of class preferences do not wish to define class simply and straightforwardly by income.

For one thing, average cash incomes differ depending on geographic location. A given income might seem “underprivileged” in an expensive urban area, less so in a smaller city, and positively middle class in a rural area. This would be an obvious problem for universities with applicants from across America, but even for institutions drawing primarily from a particular state, there are wide intrastate variations in the standards of living that a given income might represent in different areas.

Average incomes also vary by age: most people’s income rises as they get older, then falls when they retire. If class preferences were based purely on parents’ income, applicants with younger parents would have an arbitrary advantage over those whose parents are older and hence earning more, regardless of anything else about the applicants’ family lives. By the same token, if income were the only criterion, children whose parents are retired would also tend to be preferred.

It is also quite possible to have a modest income but substantial capital. A family living on the return from private capital might have the same income as a working family, without being of the same social class by any reasonable standard. Indeed, if college admission standards depended on only income, it might be worthwhile for parents with private capital to decrease their earnings deliberately, by shifting temporarily to investments with lower yield but higher long-term gain.

There are also problems of disclosure and fraud, which may be particularly acute if class is measured—and preference granted—on any single criterion, such as income. For example, a family might fairly easily defer or hide income, whereas the family’s social class, judged on a wider array of criteria, would not at all correspond to the disclosed income.

In fact, it is a commonplace that money and social class are not necessarily the same thing. In the 1930s, George Orwell wrote,

67. Income and Assets of the Elderly and Near Elderly, Nat’l Bipartisan Commission on Future Medicare, http://thomas.loc.gov/medicare/dowdall1.html (last visited July 30, 2013) (“The youngest age group is just beginning their working years and tend to have entry level jobs with low wages. Income increases as people gain experience and some of those in the age group enter mid- and upper-level positions. In the oldest age groups, income declines as people retire.”).
[T]he essential point about the English class-system is that it is not entirely explicable in terms of money. Roughly speaking it is a money-stratification, but it is also interpenetrated by a sort of shadowy caste-system; rather like a jerry-built modern bungalow haunted by medieval ghosts. . . . Probably there are countries where you can predict a man’s opinions from his income, but it is never quite safe to do so in England; you have always got to take his traditions into consideration as well. A naval officer and his grocer very likely have the same income, but they are not equivalent persons and they would only be on the same side in very large issues such as a war or a general strike—possibly not even then.68

The particulars of class differences in twenty-first-century America are not what they were in Orwell’s England. But if class is a measure of unearned hereditary advantage—or its absence—there probably has to be more nuance about it than mere cash income. At a minimum, one would want to take capital into account as well as income: savings, investments, property holdings, trust funds, and so on.

More broadly, as Orwell suggests, money is only one element of hereditary good or bad fortune. In America, as in every society, class is a subtle and many-faceted—if not many-splendored—thing, which is why it is so inexhaustible a topic in literature. A privileged or underprivileged childhood might depend not only on one’s parents’ income and capital but also on their education and culture, their occupational status, whether they were married and stayed married, what sort of home and neighborhood one grew up in, and what sort of schools one attended. And this is to consider only the more tangible, and hence potentially measurable, elements of class; it leaves aside one’s parents’ values, styles, tastes, and connections, which might be important elements too but which are scarcely quantifiable at all.

Colleges and universities that have experimented with class preferences have actually considered some of the more tangible factors, and advocates of class preference urge that they do so. UCLA School of Law, for example, has questioned applicants about their fathers’ and mothers’ level of education, parents’ income and net worth, and the applicant’s home address while in high school.69 No applicant was required to answer these questions, but class preferences were only available to those who did.70 In calculating preferences, the law school considered the proportion of single-parent households in the applicant’s home neighborhood; the proportion of families in the neighborhood receiving welfare; and the proportion of young adults who had not graduated from

68. GEORGE ORWELL, THE ROAD TO WIGAN PIER 154 (1937).
69. Sander, supra note 37, at 481–82, 483 tbl.2.
70. Id. at 481 & n.19.
high school. Richard Kahlenberg urges that seven factors be taken into account: parents’ education; parents’ income; parents’ net wealth; parents’ occupation; the family structure—including whether the parents were married, whether they divorced, and mother’s age when the applicant was born—the quality of the schools the applicant attended; and the quality of the applicant’s neighborhood.

The emphasis on home neighborhood as a criterion of class may be motivated in part by the fact that blacks and Hispanics, in particular, tend to live in neighborhoods that are “worse”—in terms of numbers of single-parent households, families receiving welfare, and so forth—than whites with similar incomes, and a desire on the part of the advocates and designers of class preferences to include as many blacks and Hispanics as possible among those who will benefit from the preferences. Deliberate racial gerrymandering of these criteria, to be sure, would violate the provisions of laws that forbid racial preferences by state institutions and authorities, like Proposition 209 in California.

It will be noticed, of course, that there are a variety of criteria of class here that might or might not be taken into account. UCLA School of Law did not take account of parents’ occupation, family structure, or the quality of the applicant’s secondary school, for example, although Richard Kahlenberg urges that these should be considered. Some of the criteria require further decisions about what should be considered: for example, “family structure” might or might not include whether the applicant’s parents were married and at what age, whether they divorced, whether a single mother was divorced or instead had never married, and so forth. Other criteria would also call for detailed judgment: for example, how to rank parents’ occupation, how to rank the quality of an applicant’s secondary school, and how to rank the quality of parents’ education—if the status of the parents’ schools or colleges, for example, were to be considered and not just how many years of schooling they had.

Choosing criteria of class, in short, entails a lot of discretion, far more discretion than deciding who is eligible for racial preferences, at least so long as most people’s racial identification is easily settled. Moreover, there is further discretion in deciding how much weight to give each of

71. Id. at 485 tbl.3.
72. Kahlenberg, supra note 6, at 132–36.
74. See supra note 9 and accompanying text.
the criteria once they are chosen. For example, to score an applicant’s class, what relative importance should be given to parents’ income, parents’ net wealth, parents’ education, the residential neighborhood, and so forth? Class is a nebulous enough concept that there is no uniform standard of how to define it, nor is it easy to imagine how there could be.

UCLA School of Law’s emphasis on residential neighborhood is probably an example of choosing a criterion—and giving it a lot of weight—in order to steer class preferences in a particular direction: in this case, to racial minorities. If so, it may violate the provisions of Proposition 209 in California. But other plausible criteria might be chosen, or given more weight, if one wanted to favor rural applicants, labor union families, Evangelicals, or other groups. Almost any change in the criteria, or variation in how they are weighed, will change the profile of those eligible for preferential treatment. Faculties and administrators could adapt and change the criteria over time, depending on the results from a particular formula. For example, there have not only been different formulas for class preferences at different campuses of the University of California but different formulas at various schools and programs on the same campuses, and the formulas have also changed from year to year.75

It might be said that colleges and universities make discretionary decisions all the time: about whom to hire as faculty, whom to admit as students, what to teach, how to teach it, and so on. What is so special about their defining social class and granting preferences accordingly?

But these other discretionary decisions are, at least in principle, academic decisions decided on academic criteria. That colleges and universities have academic expertise is—or at least has been—generally accepted: hence the acceptance and respect accorded to academic degrees conferred by these institutions. It is less obvious that academic institutions have any particular expertise in social engineering or in deciding which individuals or groups in society should receive preferential treatment on grounds of class or hereditary disadvantage.

The discretion involved in defining class and disadvantage would be open to political pressures of various kinds. Depending on what criteria a college or university uses—and how it weights these criteria—different racial and ethnic groups would receive greater or lesser preference, for example. At state universities, which are controlled by the state legislatures, well-organized ethnic groups would be in a position to lobby for criteria that would favor them. Private universities receiving public funds would be open to similar lobbying pressures, as well as to pressures from

75. Sander, supra note 7, at 661–64.

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private donors who might be interested in promoting the interests of one or another group.

Deciding who is to receive how much preference would also be open to ideological favoritism. This might simply take the form of ideological preference for some minority groups over others. It might also take the form of shading the criteria in order to give a boost to applicants with particular political views. American colleges and universities are already widely perceived to have become more politicized in recent decades. Studies of university faculties and administrators reveal a heavy tilt to the political left, very disproportionately to the country as a whole and amounting to virtual unanimity on many campuses. This might reflect a legitimate judgment that missionaries’ children are not unlucky by birth or upbringing, but it might also reflect a degree of political or religious prejudice. Along the same lines, Richard Kahlenberg, probably the most widely read supporter of class preferences, explicitly sees preferences as a step that will “help reforge the coalition required to sustain much-needed social programs”—in other words, as a way to strengthen the political left.

Thus, when UCLA School of Law created a preference program based on class, the school was evidently concerned that preferences should not go to “highly talented applicants” with low family incomes who might be the children of “highly educated missionaries.” This might reflect a legitimate judgment that missionaries’ children are not unlucky by birth or upbringing, but it might also reflect a degree of political or religious prejudice. Along the same lines, Richard Kahlenberg, probably the most widely read supporter of class preferences, explicitly sees preferences as a step that will “help reforge the coalition required to sustain much-needed social programs”—in other words, as a way to strengthen the political left.

In the absence of any uniform definition of class or of social disadvantage, each college or university giving class preferences would be free—indeed, obliged—to fix its own definition. Class preferences, accordingly, would

76. See Daniel B. Klein & Charlotta Stern, Political Diversity in Six Disciplines, 18 Acad. Questions 40, 48 (2005) (noting voter registrations indicate as much as a 10:1 ratio of Democrats to Republicans among college and university faculty in humanities and social science disciplines—“pretty much a one-party system”); see also John O. McGinnis et al., The Patterns and Implications of Political Contributions by Elite Law School Faculty, 93 Geo. L.J. 1167, 1170 (2005) (showing that 80% or more of law professors who contribute to political campaigns contribute wholly or mostly to Democrats; the ratio is even more lopsided at many elite law schools).

77. Sander, supra note 37, at 473, 478.

78. Kahlenberg, supra note 6, at 180.
confer great power and discretion on the faculties and administrators undertaking to bestow them. The decisions about preferential treatment would not be made on academic criteria, which is where these institutions’ expertise is thought to be: preferences are avowedly a departure from such criteria. Moreover, because colleges and universities are protective of the confidentiality of their admissions decisions, the precise criteria of class disadvantage—and especially the all-important weightings of these criteria—would certainly not be made public. Indeed, no institution so far that has adopted such preferences has revealed this information. Without public transparency, such preferences would be open to political pressures of various kinds. They would be open to ideological gerrymandering as well. Perhaps class admissions preferences would be attractive if colleges and universities were widely trusted to make nonacademic social policy decisions and if preferential treatment were the only way to expand educational opportunity. Neither is the case.

V. OPENING THE DOORS WITHOUT PREFERENTIAL TREATMENT

In recent decades, economic barriers to educational opportunity have grown in at least two ways. First, the cost of higher education has risen sharply, both at private and at public institutions, far ahead of the rate of inflation. 79 Second, there has been a movement away from need-based scholarships toward merit scholarships, regardless of need. 80 Moreover, reflecting federal aid policies, colleges and universities have moved away from scholarship grants in general toward student loans; students relying on “financial aid” must often incur very substantial debt. 81

The movement away from need-based scholarships is easily explained. Colleges and universities compete for the most highly qualified students. Enrolling such students is an important factor in widely publicized rankings


80. See Fay Vincent, No Merit in These Scholarships, POL’Y PERSP., June 2005, at 2, 2; see also Robert H. Frank, Intense Competition for Top Students Is Threatening Financial Aid Based on Need, N.Y. TIMES, Apr. 14, 2005, at C2 (discussing the shift from need-based to merit-based financial aid).

of colleges and universities, such as in *U.S. News & World Report*, which in turn affect the prestige and competitive standing of these institutions. Many institutions therefore offer scholarship grants to applicants with the very highest test scores and other credentials, regardless of need, instead of directing their aid budgets toward other fully qualified, but needier, applicants.  

The dramatic rise in tuition costs in recent decades is less easily explained. Colleges and universities surely enjoyed a strong market position, with higher education much in demand, especially given the economic advantages of being a graduate. Various fixed costs to the institutions may have risen during those years, perhaps faster than the rate of inflation. But at many colleges and universities, it is also clear that faculty salaries rose very generously in recent years, especially for senior, tenured faculty. In a national survey of 115 colleges and universities, including smaller colleges, full professors’ salaries now average over $100,000 a year.  

At the more prestigious institutions and on the faculties of professional schools, the average salaries for full professors are much higher still. At the same time, tenured professors’ teaching loads have decreased, and the numbers of administrators and the quality of the physical facilities have increased.

If the goal is to increase educational opportunity, a straightforward way of doing it would be to ensure that scholarship aid is offered on the basis of need—to applicants admitted on their merits—rather than to bid for “star” students regardless of need. The academic cost to the college or university of a need-based policy would be minimal, although it might indeed preclude a certain amount of jockeying for position in the *U.S. News* rankings.

More controversially, if higher education is to be more accessible to poorer families, greater effort could be made to control costs. This might mean some sacrifice by tenured professors by way of how much their salaries rise or in terms of their teaching loads. It might mean fewer academic administrators or less lavish buildings. But it would not

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84. See id.
entail the compromise of academic quality and integrity that is inherent in preferential lowering of standards based on students’ class origins.

Perhaps it is understandable that senior professors, including those who express the most fervent commitment to educational equity, might not wish to make any sacrifice in their salaries or teaching loads; that institutions prefer to use scholarship grants to enhance their rankings rather than to aid needy students; and that controlling costs is not a priority when market forces do not compel it. Social class affirmative action, by contrast, requires no sacrifices along these lines, whatever its costs in academic integrity. Indeed, such affirmative action would only increase the power and prerogatives of faculty and administrators, deciding at their discretion who is to receive preferential treatment.

The mystique of affirmative action, moreover, is very strong among academic faculty and administrators. With the passage of Proposition 209 in California and similar initiatives and laws elsewhere and with the looming possibility prior to the Supreme Court’s judgment in Grutter v. Bollinger—and again more recently while the Supreme Court considered Fisher v. University of Texas at Austin—that racial preferences might be declared unconstitutional in public colleges and universities, class affirmative action may have won academic adherents on the basis that “we are committed to preferences, and if we can’t do it by race then let’s do it by class.” The affirmative action outlook, by its very nature, tends to be inimical to impartial academic standards and tends to view preferential treatment, not as a last resort, but as something nearer to a first resort.

There is surely good reason to be concerned about educational equity in America and about making careers genuinely open to talent. Everyone knows that life is not a level playing field. Accidents of birth and upbringing differentiate people and their prospects in life, including their educational prospects. There is an element of injustice, perhaps of tragedy, certainly of inequality, in all this. But there are reasonable things that can be done to mitigate educational inequality. If primary and secondary public education were more academically rigorous, it would reduce the competitive advantage of growing up in a cultured and well-read home. More immediately, colleges and universities could choose to allocate their scholarship budgets on the basis of need. And they could make greater efforts to control their tuition costs.

Class preferences, by contrast, would tend to corrode the quality of higher education, to introduce a new element of arbitrariness and unfairness,

and to mark a quantum jump in politicizing academic life in the United States. In a world economy in which prosperity and growth depend increasingly on education and knowledge and social mobility in turn depends on prosperity and growth, burdening American higher education in this way might threaten social mobility rather than promote it. Some cures are worse than the disease. Perhaps class preference might be justifiable as a last resort. There are many first resorts that ought to be resorted to first.