Is *Brown* Holding Us Back?  
Moving Forward, Six Decades Later: 
Visionary States, Civic Locals, and Trusted Schools and Teachers

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“Because this country has been changed, 
we must change too if we are going to continue to carry on the struggle . . . .

You move into a struggle with certain kinds of visions and ideas and hopes. 
You transform the situation 
and then you can no longer go on with the same kinds of visions . . .
because you have created a new situation yourselves.”  
Vincent Harding ¹

*Brown v. Board of Education*, decided by the U.S. Supreme Court in 1954,² can justifiably lay claim to being the foundational articulation of U.S. constitutional law in the second half of the 20th century. The Civil Rights Movement grew from *Brown* and led first to the Civil Rights and Voting Rights Acts in 1964 and 1965 and then to the Fair Housing Act in 1968. *Brown’s* invigoration of equal rights claims on the basis of race

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grounded sex discrimination claims in the 1970’s and sexual orientation claims in subsequent decades. Brown’s reach has extended far past the specific context of race.

Brown solidified in our constitutional framework a commitment to equal treatment of all citizens by the government. Though the language of the Equal Protection Clause attested to that value, it was recognized primarily in the breach before Brown. Brown’s interpretation of the Equal Protection Clause as mandating evenhanded treatment for previously marginalized groups caused a tectonic shift in power dynamics within the body politic throughout the country, especially vis-à-vis race and gender. Its broad anti-discrimination admonition has taken root, and the law is unlikely to return to pre-Brown Equal Protection blindness, though it may avert its eyes from documented inequalities or rebound in response to backlash or continuing privilege.

Brown brought home the realization that democracy without equality is an empty shell. But though equality as a core democratic value has now been widely accepted, questions remain. How does equality coexist with other core democratic values and to what degree can equality ensure that overarching national goals are met? As they did six decades ago, these questions converge on the crucial issue of education. Because democracy rests on popular control and calls for equality, education of

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6 See, e.g., Washington v. Davis, 426 U.S. 229 (1976) (holding that the verbal test administered by the District of Columbia Police Department was neutral on its face and was not racially discriminatory despite the disproportionate impact of the test as applied to black applicants and white applicants); McKlesky v. Kemp, 481 U.S. 279 (1987) (holding that study indicating that Black defendants overall received the death penalty more often than White defendants was insufficient to establish unconstitutional discrimination against individual Black defendant). See also Geduldig v. Aiello, 417 U.S. 484 (1974) (holding that denial of insurance benefits for work loss resulting from pregnancy did not violate the Fourteenth Amendment because it was not discrimination based on sex) (overruled legislatively by Pregnancy Discrimination Act of 1978, P.L. 95-555).
8 See infra notes 36-49 and accompanying text.
citizens—of the public—is essential: Education provides the skills necessary for popular control and the rough parity necessary for equality.

Six decades on, however, Brown and its many ripples have not resulted in quality public education for all U.S. children. Schools are more integrated than they were in 1954, but progress has stalled. Many districts under court-ordered desegregation have been released. The persistence of racially segregated housing combined with neighborhood school attendance policies have led to resegregating schools. Hypersegregation of poor Black children in urban centers attending substandard urban schools is an urgent and unaddressed problem.

The Supreme Court’s refusal in San Antonio Independent School District v. Rodriguez in 1973 and Milliken v. Bradley in 1974 to require interdistrict remedies gave the green light to the continuation of racial and ethnic as well as socioeconomic structures of inequality. In 2007, the Court in Parents Involved in Community Schools v. Seattle School District No. 1 ended the use of


13 In this Article, the racial terminology I use, except when quoting others, is Black, White, and Hispanic. See BEVERLY DANIEL TATUM, WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA? AND OTHER CONVERSATIONS ABOUT RACE 15-17 (1997); TIM WISE, WHITE LIKE ME: REFLECTIONS ON RACE FROM A PRIVILEGED SON (rev. ed. 2011); Maria Chavez, “The Rise of the Latino Lawyer,” ABA Journal 37 (Oct. 2011).

14 See generally GASTON ALONSO, NOEL ANDERSON, CELINA SU, & JEANNE THEOHARIS, OUR SCHOOLS SUCK: STUDENTS TALK BACK TO A SEGREGATED NATION ON THE FAILURES OF URBAN EDUCATION (2009) (describing seriously substandard majority-minority urban schools and debunking “blame the kids” justifications for those schools).


voluntary K-12 racial integration as an educational strategy.\textsuperscript{17}

The academic achievement of children of color and low socioeconomic status lags behind that of White children,\textsuperscript{18} which leads to our national performance overall falling short. In international comparisons, U.S. performance is below average for developed nations.\textsuperscript{19} Economists Claudia Goldin and Lawrence Katz conclude that a “slowdown in education at various levels is robbing Americans of the ability to grow strong together.”\textsuperscript{20} Embracing the principle of equality, it appears, has not led to either actual equality or to widespread quality in education.

The purpose of this article is to identify alternative legal paradigms for moving from the status quo of uneven and often lackluster public education toward broad-based educational excellence. In historian Vincent Harding’s words, \textit{Brown} and the events accompanying \textit{Brown} transformed the situation; because of that transformation, the struggle must change.\textsuperscript{21} From our vantage point two or three generations down the road, we are in a position to take a long view of \textit{Brown}. Understanding how the situation has changed can shed light on how to move forward.

I start, in Part I, by summarizing the reach—and the limits—of \textit{Brown} in terms of three widely-acknowledged values of modern democracy: Equality, popular control, and education as a substantive right.

\begin{footnotes}
\footnote{551 U.S. 701 (2007).}
\footnote{DARLING-HAMMOND, supra note 18, at 9-11. These low averages result in large part from the inequality along racial and socioeconomic lines. \textit{Id}. In addition, achievement varies widely by State. For example, New Jersey, if considered alone would rank #5 in reading and #15 in math (about the U.S. overall) internationally. DAVID L. KIRP, IMPROBABLE SCHOLARS: THE REBIRTH OF A GREAT AMERICAN SCHOOL SYSTEM AND A STRATEGY FOR AMERICA’S SCHOOLS 176 (2013). Further, one recent study concludes that the relatively poor U.S. performance is a function of our high proportion of low-socioeconomic students. Martin Carnoy & Richard Rothstein, \textit{What Do International Tests Really Show About U.S. Student Performance?} ECONOMIC POLICY INSTITUTE (Jan. 28, 2013) available at http://www.epi.org/publication/us-student-performance-testing/ (acknowledging socioeconomic achievement gap and finding that if high proportion of low-socioeconomic students in the U.S. is taken into account, U.S. students are achieving better than most international comparisons indicate). See also infra notes 270-271 and accompanying text (Finnish and U.S. poverty rates).}
\footnote{CLAUDIA GOLDIN & LAWRENCE KATZ, THE RACE BETWEEN EDUCATION AND TECHNOLOGY 323 (2010).}
\footnote{See supra note 1 and accompanying text.}
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As stated above, Brown’s primary achievement was establishing equality as a fundamental democratic principle in the context of U.S. constitutional democracy. This achievement had the effect of inhibiting popular control, though that value has reasserted itself since Brown. The Brown Court also alluded to the importance of education, but education as a substantive right has proved elusive at both federal and state levels. Nevertheless, consensus regarding the importance of universal quality education has grown since Brown.

In Part II, I look at developments since Brown that have transformed the situation and that call for a new struggle in U.S. education. Brown facilitated a shift away from the traditional White/Black racial construct, and we live in a more multiethnic, less racially rigid world. Concurrently, however, economic inequality has increased and low intergenerational mobility is the norm—both issues unaddressed by Brown. Further, top-down measures since Brown have led to the institutionalization of distrust of schools and teachers. No Child Left Behind is an apt example. Finally, in the 21st Century, meaningful educational opportunity calls for access to quality preschool through post-secondary—not just a basic K-12 education.

In Part III, I step “sideways,” moving away from the Brown lens to spark new insights and ideas. By many international measures, Finland ranks #1 in student performance. Finland is a very different country than the U.S., but its successful educational system exhibits key characteristics: Vision, civility, and trust. These correspond to the three core democratic values identified above: Education as a core right, equality, and popular control.

In Part IV, I offer new legal ideas for addressing our post-Brown educational malaise. First, we need a new educational vision grounded in the foundational assumption that children from all backgrounds are an essential national resource and that their education is thus a top national priority. Public education must include not only quality K-12 schooling but preschool and post-secondary as well, and the States can best articulate this vision because of their place in our federal constitutional scheme. Second, we must cherish each child as a member of the civic body, setting our sights high for all students. This will require, paradoxically, acknowledging that different students will thrive with different approaches. Local school districts are in the best position to innovate, and they should be provided a civic zone for doing so. Third, it is time to begin to build and/or rebuild trust within our educational system. Education happens in classrooms, in interpersonal interactions between teachers and students. Structures and

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22 DARLING-HAMMOND, supra note 18, at 5; PASI SAHLBERG, FINNISH LESSONS: WHAT CAN THE WORLD LEARN FROM EDUCATIONAL CHANGE IN FINLAND? 38 (2010).
institutions of trust will most effectively support schools and teachers and their work. As to this last, federal funding is an essential demonstration of such trust.

I. **Brown’s Contributions to U.S. Democracy**

In 1954, unequal treatment of Black citizens by the government was and had been the norm since the founding of the nation, especially in the South: Racial inequality extended to voting, representation, and due process of law. The Jim Crow, “separate but equal” doctrine that the Supreme Court approved in *Plessy v. Ferguson* in 1896 had endorsed racially-segregated schools that were from equal. For decades, the Supreme Court was complicit in this manifest inequality, but in the 1930’s and 1940’s it began to move slowly toward enforcing a measure of “equality,” at least in higher education.

By 1954, pressure for U.S. democracy to take a more substantial, systemic step toward racial equality was rising. Domestically, the Black citizens of the Great Migration had experienced for themselves greater protections and privileges of citizenship, and word of these experiences had spread back to the South. Tolerance for racial inequality was wearing thin, and organizations such as the NAACP were pulling people together to act. Internationally, the post-War U.S. was becoming concerned about its reputation on the world stage. In its *Brown* briefs, for example, the Justice Department emphasized how racial segregation was tarnishing the U.S. international image, making the U.S. vulnerable in the Cold War context.

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24 163 U.S. 537, 543 (1896). See also KLARMAN, supra note 23, at 48-52.


26 See, e.g., Cumming v. Richmond Cnty. Bd. of Educ., 175 U.S. 528 (1899) (closing of Black school for economic reasons upheld); Berea College v. Commonwealth of Kentucky, 211 U.S. 45 (1908) (Kentucky school segregation law upheld). See also KLARMAN, supra note 23, at 45-46 (Cumming), 23-25 (Berea); Hall & Henderson, supra note 25, at 15-17.


29 KLARMAN, supra note 23, at 299.
In the unanimous *Brown* opinion, Chief Justice Earl Warren first noted the historical indeterminacy of the 14th Amendment as applied to education\(^\text{30}\) and then the post-14th Amendment emergence of the “separate but equal” doctrine in *Plessy*.\(^\text{31}\) He offered a ringing affirmation of the importance of education to democracy,\(^\text{32}\) which concluded with an assertion of equality: “Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”\(^\text{33}\) The Court then held the “separate but equal” doctrine approved in *Plessy* to be a violation of a State’s constitutional obligation under the Equal Protection Clause of the Constitution’s 14th Amendment to treat all citizens equally.\(^\text{34}\) Legally mandated racial segregation in education alone stigmatizes.\(^\text{35}\)

**A. Equality**

First and foremost, *Brown* was a decision about equality. The International Institute for Democracy and Electoral Assistance, which has developed an assessment framework for nations to gauge their progress toward democracy, explicitly asserts two foundational democratic values: “The key democratic principles are those of *popular control* and *political equality*.”\(^\text{36}\) These two values also lie at the core of the Democracy Index of the Economist Intelligence Unit, which assesses the state of democracy worldwide through observations of individual nations:

\(^{30}\) *Brown*, 347 U.S. at 489-90.

\(^{31}\) *Id.* at 491-92.

\(^{32}\) See text accompanying note 89 infra.

\(^{33}\) *Brown*, 347 U.S. at 493.

\(^{34}\) *Brown*, 347 U.S. at 494-95.


\(^{36}\) DAVID BEETHAM, ET AL., INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, ASSESSING THE QUALITY OF DEMOCRACY: A PRACTICAL GUIDE 20 (2008) (emphasis in original). “These principles define what democrats at all times and in all places have struggled for—to make popular control over public decision making both more effective and more inclusive; to remove an elite monopoly over decision making and its benefits; and to overcome obstacles such as those of gender, ethnicity, language, class, wealth, and so on to equal exercise of citizenship rights.” *Id.* The IDEA approach supports the idea that democracy assessment should be a self-searching enterprise. *Id.* at 19. It also emphasizes that democracy is a spectrum rather than an “either-or” proposition. *Id.* at 17.
The fundamental features of a democracy include...government based on majority rule and the consent of the governed, the existence of free and fair elections, the protection of minority rights and respect for basic human rights. Democracy presupposes equality before the law, due process, and political pluralism.

Similarly, these same two values anchor contemporary philosopher Cornel West’s understanding of democracy, though West examines them in the context of the “deep democratic tradition” that contributes to their realization. For West, popular control relates not just to government structure but to the corresponding role of citizens: “[T]o be a democratic individual is to speak out on uncomfortable truths.” Similarly, equality calls for “grappl[ing] with the hard mystery of America’s imperial impulse to dominate and conquer others and expos[ing] the martial ideas and monarchical principles hiding behind peaceful language and benign democratic rhetoric.” West reveals that the dual democratic principles are not just the stuff of political theory but are deeply integrated into our history and cultural norms.

In the U.S., the development of the popular control value of democracy has preceded the development of the equality value. The U.S. Constitution resulted from intense negotiations regarding the parameters of government and popular control, and it is dominated by provisions that keep the government on a tether while empowering it. The Bill of Rights ensures sufficient freedoms for citizens to exercise their guardianship role.

As to equality, in contrast, the Constitution originally extended to

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37 ECONOMIST INTELLIGENCE UNIT, DEMOCRACY INDEX 2012: DEMOCRACY AT A STANDSTILL 25 (2012) (emphasis added). Unlike the IDEA assessment, which is designed to facilitate self-evaluation and envisions a democratic continuum, the EIU approach generates an external assessment of all nations and denotes categories of democracies: “Full democracies, Flawed democracies, Hybrid regimes, Authoritarian regimes.”


39 Id. at 74 (referring to the work of Ralph Waldo Emerson). West continues: “[T]o be a democratic individual—a self-confident and self-respecting Socratic questioner—in America is to be an ‘incorrigible disturber of the peace.’” Id. at 80 (referring to the work of James Baldwin).

40 Id. at 88 (referring to the work of Herman Melville). From this comes an awareness “that there can be democratic dialogue only when one is open to the humanity of individuals and to the interior of their personalities.” Id. at 100 (referring to the work of Toni Morrison).

41 U.S. CONST. amend. I-X; see also BEETHAM ET AL., supra note 36, at 26, 74-78, 300-02 (IDEA criteria, especially 1.2, 1.3, 2.1, 3.1, and 3.2); ECONOMIST INTELLIGENCE UNIT, supra note 37, at 29-39 (Democracy Index Criteria).
only a small proportion of the overall population of the fledgling U.S.\textsuperscript{42} Expansion of the formal right to vote to Black men, women, those who could not afford to pay a poll tax, and finally 18-year-olds took almost two centuries.\textsuperscript{43} \textit{Brown}, building on the promise of the 14\textsuperscript{th} Amendment, laid the cornerstone for the inclusion of the fundamental principle of equality into U.S. democracy in the second half of the 20\textsuperscript{th} century—\textit{not just for race but for immigration status and ethnicity, sex, gender and sexual orientation, and mental capacity}—\textit{and not just in education but in voting} and employment.\textsuperscript{49} \textit{Brown} and post-\textit{Brown} implementation confirmed equality as a core value in U.S. constitutional democracy.

The limits of \textit{Brown}'s mandate in education began to be revealed, however, only 20 years later. In 1973, for example, \textit{Keyes v. School District No. 1, Denver, Colo.}\textsuperscript{50} demonstrated the difficulties of making the legal case against inequality “in the case of a school system...where no statutory dual system...ever existed...not only that segregated schooling exists but also that it was brought about or maintained by intentional state action.”\textsuperscript{51} Though the Court sustained relief for those asserting segregation in \textit{Keyes},\textsuperscript{52} \textit{Keyes} may be seen as the turning of the tide, with Justice Rehnquist arguing in dissent that while \textit{Brown} required the prohibition of de

\begin{footnotesize}
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\item[\textsuperscript{43}] U.S. CONST. amend. XV, § 1 (ratified in 1870) (vote extended to Black men); U.S. CONST. amend XIX, § 1 (ratified in 1920) (vote extended to women); U.S. CONST. amend. XXIV (ratified in 1964) (elimination of the poll tax in federal elections); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (elimination of the poll tax in State elections under the Equal Protection Clause); U.S. CONST. amend. XXVI, § 1 (ratified in 1971) (vote extended to 18-year-olds).
\item[\textsuperscript{44}] See, e.g., \textit{Rodriguez}, 411 U.S. 1 (Mexican-Americans); \textit{Plyler v. Doe}, 457 U.S. 202 (schoolchildren without immigration papers).
\item[\textsuperscript{46}] See, e.g., \textit{Lawrence v. Texas}, 539 U.S. 558 (especially opinion by O’Connor, J., concurring); \textit{Windsor v. U.S.}, 570 U.S. ___.
\item[\textsuperscript{47}] See, e.g., \textit{City of Cleburne}, 473 U.S. 432.
\item[\textsuperscript{50}] \textit{Keyes v. Sch. Dist. No. 1, Denver, Colo.}, 413 U.S. 189 (1973).
\item[\textsuperscript{51}] \textit{Id.} at 198 (1973). \textit{See also Milliken}, 418 U.S., at 793 (Marshall, J., dissenting) (“We recognized only last Term in \textit{Keyes} that it was the State itself which was ultimately responsible for \textit{de jure} acts of segregation committed by a local school board. A deliberate policy of segregation by the local board, we held, amounted to ‘state-imposed segregation’” (quoting \textit{Keyes}, 413 U.S. at 200)).
\item[\textsuperscript{52}] \textit{Keyes}, 413 U.S., at 207-08, 213-14.
\end{itemize}
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jure segregation it imposed no affirmative duty of de facto integration.\textsuperscript{53}

More broadly, once the spotlight shifted to less clearly defined intent and causation, the Court foundered. The inequalities that characterized public education often resulted from institutional structures that operated—sometimes without invidious intent—to produce unequal outcomes. Soon after Keyes, the Court encountered these less straightforward, less obvious “cause and effect” situations. In San Antonio Independent School District v. Rodriguez in 1973, the Court declined to award relief in a challenge by residents of a low-property-tax, poorly-funded school district to the Texas system of school financing, which by virtue of reliance on local taxes led to substantial interdistrict funding inequalities.\textsuperscript{54} And in Milliken v. Bradley in 1974, the Court overturned a district court desegregation remedy that crossed school district lines in metropolitan Detroit.\textsuperscript{55}

Keyes, Rodriguez, and Milliken embodied a shift from cases addressing conscious, overt discrimination to situations involving structural, institutional racism. In overt discrimination cases, the State disadvantages a member or members of a racial group in a way that is explicit and intentional—and relatively straightforward to identify and address. In institutional racism situations, in contrast, laws or individuals acting with State authority or authorization disadvantage a member or members of a racial group in a way that is implicit and/or unintentional.\textsuperscript{56} Identifying and addressing such institutional racism is far more complex. The Supreme Court made clear in Washington v. Davis\textsuperscript{57} soon after Keyes, Rodriguez, and Milliken that while the former cases are actionable under the Equal Protection Clause, the latter situations are not. These cases demonstrated that there are limits to the protection of equality as a democratic value.

To further complicate matters, the Rodriguez Court was faced not only with racial but with socioeconomic inequality—socioeconomic inequality that might well have been related to racial inequality. The Rodriguez Court proved unequal to the task of disentangling these issues,

\textsuperscript{53} Id. at 258 (Rehnquist, J., dissenting); id. at 200 n.11 (opinion of the court).
\textsuperscript{54} Rodriguez, 411 U.S. at 5-6.
\textsuperscript{55} Milliken, 418 U.S. at 734-35, 752-53.
\textsuperscript{56} For a useful discussion of institutional racism, see ROBERT MILES & MALCOLM BROWN, RACISM 66-71, 78-80, 109-112 (2nd ed. 2003).
\textsuperscript{57} 426 U.S. 229, 240-241 (1976).
\textsuperscript{58} In this article, I refer to socioeconomic status or economic inequality rather than “class.” Though the distinction is not entirely clear, class generally applies in caste societies in which movement between classes is explicitly prohibited. The South under slavery and Jim Crow was a caste/class society. Our current society, though economic inequality may make social mobility difficult, is not a class society in this sense—though collective memory of racial caste may remain and be internalized in the form of implicit bias.
which led to a one-dimensional consideration of the claim as based on socioeconomic status alone.\textsuperscript{59} The Court then lumped socioeconomic status with other economic regulation cases into the category of cases that merit only minimal “rational basis” review.\textsuperscript{60} \textit{Rodríguez}, then, minimized socioeconomic status as a factor in inequality.

\textit{Brown} enshrined equality as a fundamental principle in our constitutional law canon. That equality, however, is not unbounded. It does not reach unequal outcomes without invidious intent or structural disadvantage. Nor does it extend to socioeconomic inequality.

\section*{B. Popular Control}

Popular control and equality are, to a large extent, interlocking and mutually reinforcing values. A commitment to popular control breaks down the anointing of a ruler or monarch who is inherently different from other people and paves the way to treating people as equals. Conversely, a belief that people are essentially equal points toward sharing power rather than ceding unlimited and indefinite authority to a single person.

Despite this general alignment, the phenomenon of path dependence\textsuperscript{61} can lead to deep inequalities in a popular control democracy such as ours, where equality as a broadly held value has lagged behind that of popular control. Imagine, if you will, an exclusive country club that is governed by its members (popular control). The club develops rules and practices that suit the preferences, norms, and values of those members. Later, even if it opens its doors to membership by a much broader group (equality), vestiges of those original rules and practices will remain. The new members will over time make their views known and the club’s rules and practices will evolve, but those rules and practices will reflect, among other factors, the continuing power dynamics between “founding” and “contingent” members.\textsuperscript{62}


\textsuperscript{60} \textit{Rodríguez}, 411 U.S., at 18-28.

\textsuperscript{61} “Path dependence” is the “tendency of habits and processes to persist…despite some disadvantages, because people have before then been doing it and because it takes effort to switch.” ALEX MARSHALL, \textit{THE SURPRISING DESIGN OF MARKET ECONOMIES} 162 (2012). A classic example of this is the QWERTY keyboard, developed so that typewriter keys would not stick, but inefficient with electronic keyboards. \textit{Id.} at 163-164. Path dependence means that “history matters,” \textit{id.} at 165, not necessarily a bad thing given the human need for stability, \textit{id.} at 170, especially in our institutions.

\textsuperscript{62} Compare this scenario to one in which all individuals who are known to one another come together as equals to decide how they will live and work together. In this scenario, rules and practices will—from the outset—embody the preferences, norms, and values of everyone. Here the original value of equality will work against unnecessary accretions of
With respect to our own history of racial inequality, Critical Race Theory illuminates these power dynamics and how they impede the realization of equality: The suppression of stories and the need for counter-stories, structural racism, and Whiteness as property, for example, all result from popular control that developed ahead of a commitment to racial (and other) equality. 63 The “club” rules and practices lag behind the relatively recent embrace of new “members.”

As we move into the present, moreover, the Critical Race Theory phenomenon of interest convergence64 describes the interplay of the two core democratic values. Interest convergence posits that Whites (the dominant majority) will not support initiatives by Blacks (the oppressed minority) unless those initiatives benefit Whites as well as Blacks. But this is the essential, majoritarian nature of popular control. The point of equality is precisely to empower a (previously disadvantaged) group to the point where interest convergence and coalitions are freely negotiated, the point at which the majority no longer automatically draws together against the oppressed minority. Ideally, that is, there comes a point at which special enforcement of equality gives way to negotiation between majority and minority in the realm of popular control. 65

In essence, the Court declared in Rodriguez and Milliken in the 1970’s that this point had been reached for K-12 education. 66 Before Rodriguez and Milliken, Brown and its progeny represented a kind of equality “trump card” that the federal judiciary would play to keep popular power, but on terms and through processes that reflect from the outset the experiences and viewpoints of all.


65 In Federalist #10, James Madison acknowledged the potential problem of the “tyranny of the majority” (popular control) and protection of minorities (equality) in his discussion of faction. FEDERALIST PAPERS #10. But Madison, unlike the Brown Court, failed to address the problem of equality in the case of what law professor Lani Guinier has referred to as “consistent[ly] exclude[d]” minorities. See LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 103 (1994).

66 The recent decision of Shelby County v. Holder, 570 U.S. ___ (2013), in which the Court held that popular control over voting arrangements outweighed the mandated equality of the Voting Rights Act may be seen as a similar declaration in the context of voting.
control within certain anti-discrimination boundaries. In *Rodriguez* and *Milliken*, the Court declined to play that card. These decisions thus revealed that equality, while an important democratic value, does not invariably override popular control—and is perhaps not even coequal. Since *Rodriguez* and *Milliken*, the challenge has been to define the equality/popular control boundary and perhaps even to push equality and popular control toward symbiosis rather than antagonism.\(^{67}\)

In addition to the general pull of popular control, the Court in *Rodriguez* and *Milliken* was on uncertain ground in federalism terms. In both the *Rodriguez* and *Milliken* opinions, the Court invoked a history of local control over public schools,\(^{68}\) and these cases have often been read as the Court abdicating its role as protector of the national value of equality to the unequal whims and practices of our decentralized system of public education.\(^{69}\) Read more closely, however, both cases concern not only the creation of a zone of protection for local entities but also a deep caution regarding federal judicial interference into the internal institutional arrangements of the States, especially in the field of education. Equality, that is, does not interact with popular control only on a national level. Equality applied to the States through the federal judiciary interacts with State-based popular control.

The legal backdrop for this interaction is twofold. First, the U.S. Constitution is a document of grant, which means that only powers given may be exercised by the federal institutions of government.\(^{70}\) State constitutions, in contrast, are documents of limitation, which means that States may exercise all powers except those denied them.\(^{71}\) Second, the States rather than the federal government have primary legal responsibility for education: All fifty States explicitly assume an affirmative duty to provide a public education in their State constitutions:\(^{72}\)

\(^{67}\) See infra notes 80-87 and accompanying text (political pressure since *Rodriguez* at the State level has resulted in more equalized intrastate school funding).

\(^{68}\) *Rodriguez*, 411 U.S. at 49-54; *Milliken*, 418 U.S. at 741-42.

\(^{69}\) See, e.g., Joan Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 Wis. L. Rev. 83, 110 (1986) ("In both cases...the quasi-constitutional principle of local sovereignty serves to divert attention from the fact that established federalism principles are not available to justify constrictions on the ability of plaintiffs to recover under the fourteenth amendment."")

\(^{70}\) See, e.g., U.S. CONST. amend. X (ratified 1791).


In *Rodriguez*, the Court emphasized that proof was lacking that poverty of districts equated to poverty of individuals. It also referred to the historical grounding of the Texas approach to school financing and the essentially legislative nature of tax systems. These comments reveal the Court’s discomfort with intervening in State structures—local districts and the statewide system of school financing—that, while having clear repercussions for individual citizens, operate on those citizens indirectly rather than directly.

Similarly, the *Milliken* Court emphasized:

The Michigan educational structures involved in this case, in common with most states, provide for a large measure of local control, and a review of the scope and character of these local powers indicates the extent to which the interdistrict remedy approved by the two courts could disrupt and alter the structure of public education in Michigan.

…

[A]bsent a complete restructuring of the laws of Michigan relating to school districts the District Court will become first, a de facto “legislative authority” … and then the “school superintendent” for the entire area.

Here the Court’s unwillingness to intervene in a State’s internal institutional arrangements is even clearer.

*Rodriguez* and *Milliken* are consistent with Supreme Court precedent regarding the reticence of federal courts to interfere with the supervision by States of their local jurisdictions. In *Hunter v. City of Pittsburgh*, the landmark case in federal law regarding state and local governments, the Court issued a ringing declaration of State control over locals: “The number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.”

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73 *Rodriguez*, 411 U.S. at 22-23.
74 *Rodriguez*, 411 U.S. at 7-8, 58.
75 *Milliken*, 418 U.S. at 743-44.
76 207 U.S. 161 (1907).
77 *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907). On this reasoning, the *Hunter* Court gave short shrift to a Due Process challenge by plaintiffs protesting the consolidation of two cities:

The state…at its pleasure, may modify or withdraw all [governmental] powers, may take without compensation [governmental] property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality,
was decided in 1907, it stands today for the view that State governments wield control over their localities.\textsuperscript{78}

The \textit{Rodriguez} and \textit{Milliken} dissents made explicit that the Court’s decisions allowed the States, the primary entities upon which the 14\textsuperscript{th} Amendment operates, to avoid constitutional claims by leaving intact institutional structures—the state school funding system in Texas and school district boundaries in Michigan—that led to manifestly unequal outcomes.\textsuperscript{79} The dissents made clear, moreover, that the Court was affirming the primary responsibility of the States and their majoritarian processes, given that the local districts operated at the State’s discretion. Rather than unadulterated localism, then, \textit{Rodriguez} and \textit{Milliken} represent also the tipping of the scales away from the nationalized value of equality back toward popular control by the States.

This underlying (though unexpressed) shift, though clear in hindsight, did not lead to complete domination of the equality value by that of popular control in education—especially in the area of school funding. According to Judge Jeffrey Sutton, since the 1970’s State-level efforts to equalize education have been active, widespread, and to a significant degree effective.\textsuperscript{80} Since \textit{Rodriguez}, concludes Sutton, most States have improved foundation funding programs and shifted toward wealth-equalization formulas: \textsuperscript{81} “As of today, every State has enacted a school-financing

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\textsuperscript{79} \textit{Rodriguez}, 411 U.S. at 68-69 (White, J., dissenting) (focus on State purposes in relying on local initiative); \textit{id.} at 70 (Marshall, J., dissenting) ("a State may constitutionally vary the quality of the education which it offers its children in accordance with the amount of taxable wealth located in the school districts within which they reside."); \textit{Milliken}, 418 U.S. at 763 (White J., dissenting) ("the State of Michigan, the entity at which the Fourteenth Amendment is directed, has successfully insulated itself from its duty to provide effective desegregation remedies by vesting sufficient power over its public schools in its local school districts"); \textit{id.} at 790-98 (Marshall J., dissenting) (especially 796)(noting the State has "wide-ranging powers to consolidate and merge school districts, even without the consent of the districts themselves or of the local citizenry").
\textsuperscript{81} \textit{Id.} at 1971-1972.
\end{flushright}
equalization scheme of one form or another.” Though these initiatives, based on State constitutions, have been more successful in initiating funding minimums than in eliminating funding disparities, Sutton’s overarching point is that States have not—in many cases because of legal and/or political pressure—been allowed to use Rodriguez as “cover” for a failure to act: “All told, as of June 2008, forty-five States have faced state-constitutional challenges to their systems of funding public schools. Plaintiffs have won twenty-eight of these challenges and in the process compelled legislatures to adopt a host of additional reforms, many of which increased funding and closed equity gaps.”

From a long-term, institutional perspective, Sutton suggests that, by spawning this wave of State activism, “the Rodriguez plaintiffs [may have] ultimately won by losing.” State courts and State legislatures, with local expertise vis-à-vis their specific funding schemes and no “federalism discount” may be better equipped to address questions to which there is no perfect answer, and “the policy issues implicated by Rodriguez seem more amenable to fifty imperfect solutions than one imperfect solution.” Further, the cause of equality may have been ingrained more deeply by post-Rodriguez activism (popular control) in the States than it would have by a different result in Rodriguez itself.

C. (Education)

Brown’s unveiling of equality as a core value in U.S. democracy applied to public education. The crucial passage in Brown is forceful and

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82 Id. at 1972.
83 Id. at 1974.
84 Id. at 1978.
85 Id. at 1979.
86 Id. at 1984.
87 Id. at 1986.
88 It was not accidental that the legal assault on segregation arose in the context of public education, though the first step on the path was public law schools:

The plan was to build a string of precedents, one victory leading to and supporting the next. The place to begin [Charles] Houston [of Howard University Law School and the NAACP] was convinced, was at the graduate-school level. And law schools were the most promising target of all, because judges were of course themselves lawyers who would be most inclined to grasp the absurdity of a separate-but-equal law school for Negroes. In a properly framed case brought in a moderate Southern state, no court would order the opening of a colored law school or the closing down of the white one.

RICHARD KLUGER, SIMPLE JUSTICE 186-187 (1976). See also Derrick Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation 228, 229-230 in CRITICAL RACE THEORY, supra note 63.
confident:

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.  

Brown’s vision of a right to education is deep and broad.  

We have, certainly, long recognized the importance of public education and its connection to democracy. Thomas Jefferson’s “Bill for the General Diffusion of Knowledge” in Virginia in the late 1700’s is one of the best-known articulations of this view, though several States (Pennsylvania, Georgia, Massachusetts, New Hampshire, North Carolina) actually included public education in their earliest constitutions.  Horace Mann and the establishment of common schools in the 1800’s as the result of grass-roots movements throughout the country breathed life into these goals.  And, once those schools had been established, John Dewey in the early 1900’s closed the philosophical loop connecting education and democracy, articulating the essential role of public education in developing the citizenry necessary for a functioning democracy.

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89 Brown, 347 U.S., at 493.
90 The alchemist who brought together democracy, equality, and education was Chief Justice Earl Warren, and Brown’s language evinces his deep commitment to and practical grounding in the nuts and bolts of public education. Warren appreciated education and public schools. Warren’s undergraduate alma mater was the University of California, and he had graduated from its law school as well. JACK HARRISON POLLACK, EARL WARREN: THE JUDGE WHO CHANGED AMERICA, 27-32 (1979). More tangibly, “[h]e built more schools and hospitals than any governor in U.S. history.” Id. at 104.
92 Pennsylvania Constitution of 1776 (Sec. 44); Georgia Constitution of 1777 (Art. LIV); Massachusetts Constitution of 1780 (Chapter V); New Hampshire Constitution of 1784 (Art. 83); North Carolina Constitution of 1776 (Section XLI).
93 www.pbs.org/onlyateacher/horace.html (Horace Mann). See also GOLDIN & KATZ, supra note 20, at 135-136, 162 (describing democratic values underlying early grass-roots movements that resulted in public schools).
94 JOHN DEWEY, DEMOCRACY AND EDUCATION 94-116 (1916).
Universal public education was endorsed internationally when Former First Lady Eleanor Roosevelt led the framing and eventual passage by the United Nations in 1948 of the Universal Declaration of Human Rights, which explicitly asserted education to be a human right. The Declaration, which is an aspirational rather than legally enforceable document, has given rise to other covenants, conventions, and treaties such as the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which reaffirms a universal right to education. The U.S. has signed, but not ratified this Covenant, leaving education—as an aspirational but unenforceable human right.

The rationale for a human right to education communicates a vision of education as not merely a certain set of marketable skills or a minimal civic competence to formally participate in democracy. The Declaration asserts that the purpose of education is “the full development of the human personality.” Similarly, the ICESCR states “that education shall be directed to the full development of the personality and the sense of its...
dignity.”

This language—which speaks of human development and dignity—resonates deeply with more recent thinking by Nobel Laureate Amartya Sen and philosopher Martha Nussbaum, who have offered views of the purpose of human economy (Sen) and political activity (Nussbaum) as being the development of human potential. And, as Dewey recognized, it ties back to the two primary democratic principles: The development of human capabilities facilitates popular control, while support for the development of each individual ensures a rough measure of equality.

In Brown, the Court issued a ringing affirmation of the importance of public education. Since then, notwithstanding our own history and international developments, the Court has demonstrated less certainty. In Rodriguez, most notably, the Court concluded that differential State treatment vis-à-vis education evokes no heightened scrutiny under the Equal Protection Clause: Education is not enumerated as a right in the U.S. Constitution and therefore cannot be deemed “fundamental.”

Yet the Rodriguez holding that education merits no more than rational basis review has not proceeded completely undisturbed. Two cases in the 1980’s evinced the Court’s uneasiness with minimizing education in the constitutional calculus. In Plyler v. Doe in 1982, holding that Texas could not constitutionally deny non-citizen children without immigration papers access to its public schools the Court appeared to apply more searching inquiry than standard rational basis review. Then, in Papasan v. Allain in 1986, the Court held that a cause of action could be brought to challenge the State of Mississippi’s unequal disbursement of school funds (as versus Rodriguez’s financing structure leading to unequal local funding). Again in Papasan, though the Court asserted that rational basis review applied, that review appeared to have “teeth.”

It is noteworthy that all of the Court’s education decisions—before, including, and after Brown—rest on the Equal Protection Clause. Similarly,

101 ICESCR, supra note 97, Article 13, Section 1.
103 See DEWEY, supra note 94, at 101 (necessity of education for both popular control and the “breaking down of …barriers of class, race, and national territory”).
108 Farrell, supra note 106, at 386-87, 361.
all of the Court’s voting decisions sound in Equal Protection. The legal construction at the federal level results from the fact that substantive creation of both education and voting rights lies within the constitutional province of the States. This federalism factor goes a long way toward explaining why even in reviewing voting arrangements, which concern at least as fundamental a right as education and certainly a right of longer standing, the Court’s review is not always particularly searching. Overall, in both education and voting jurisprudence, the Court has provided little guidance for distinguishing how searching its review should be or the constitutional role of the underlying State-created right. In both voting and education, the result is Equal Protection jurisprudence in which the Court’s decisions are announced but poorly explained.

Voting and education are not federal rights, but their integral role at the State level points toward more than cursory attention. And yet the assignment of responsibility to the States in the first instance counsels caution in intruding into State efforts to address complex situations. It is difficult to imagine the Court conjuring a national right to public education, a government duty that is not grounded in constitutional language and that is in fact undertaken as a responsibility by the States in their own constitutions. Our federal system, unquestionably, complicates adoption of a right to public education that is applicable nationwide.

Two generations after Brown’s stirring endorsement of the importance of public education, then, the constitutional protection it is afforded is indirect and indistinct. The equality guarantees of the 14th Amendment apply, but only in deferential rational basis terms—except on those occasions when rational basis has “teeth.” States guarantee a public education, but there is no national right. Education, “the very foundation of good citizenship,” appears constitutionally adrift.


111 But see Imoukhuede, supra note 98, at 83-89 (proposing judicial creation of such a right).

112 See note 99 supra.
II. CHANGES IN THE EDUCATIONAL LANDSCAPE SINCE BROWN

It may be an overstatement to refer to education as “constitutionally adrift” when it is quite clear that the States are assigned the lead. Perhaps, as Sutton suggests with respect to state education funding, education overall is flourishing in the decentralized realm of the States—albeit imperfectly. The overall performance of U.S. students on international achievement tests, however, indicates that though decentralization may be flourishing, the results are indeed imperfect. Unless we view U.S. students as intrinsically less able than the students in a significant number of other countries, including several with fewer resources than we have, we must admit that there is room for improvement.113

A further characteristic of the decentralized approach is significant interstate disparities in both funding and student achievement.114 Most estimates place interstate funding disparities as greater than any intrastate disparities addressed by Rodriguez’s State progeny. State investment in and prioritization of education leads to quite different educational opportunity depending on where children live.

In Part IV, I consider legal initiatives to move the U.S. educational system as a whole forward toward excellence and equality. The grounding for those initiatives lies in this Part and the next. Here I discuss three changes in the educational landscape in the U.S. that have occurred since Brown. Some of these changes resulted from Brown; others were either independent of or interdependent with Brown. With all of these changes, however, Brown has become less applicable in addressing contemporary educational challenges.

A. Equality—Race and Economic Inequality

Brown is, first and foremost, a decision about race. Since Brown, the social construct of race has evolved. Further, though race and socioeconomic status continue to be correlated, economic inequality has gained social salience in recent decades.

113 See, e.g., KIRP, supra note 19, at 176 (U.S. reading scores comparable to those of Poland and Iceland; math scores beyond Hungary and the Czech Republic); DARLING-HAMMOND, supra note 18, at 10 (U.S. 2006 PISA [Program in International Student Assessment] math and science scores below OECD average and those of lower-resource nations). If we accept that U.S. students and in particular U.S. students of color are intrinsically less able, this amounts to either acceptance of a policy and practice of disinvestment in those children or implicit bias leading to the assumption and expectation of lower achievement. See infra notes 282-283 and accompanying text.

114 See infra note 303 and supra note 19 and accompanying texts.
When *Brown* was decided in 1954, Whites represented an overwhelming 89.5% majority of the U.S. population, though a significantly lesser majority in a number of Southern states. Blacks comprised the largest non-White racial group at 10.0% of the population, and the predominant racial construct was binary White/Black. Both U.S. demographics and our racial constructs are different today, in some instances because of *Brown*.

First, Whites constitute a significantly less predominant racial and ethnic majority than when *Brown* was decided. Down from 89.5% of the U.S. population in 1950, Whites made up only 72.4% of the population in 2010, and non-Hispanic Whites made up only 63.7% of the population.

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116 Only seven of the sixteen States categorized as Southern for the 1950 Census had a White population over 80% (Delaware—86%, Kentucky—93%, Maryland—83%, Oklahoma—91%, Tennessee—84%, Texas—87%, West Virginia—94%). The remaining nine had White populations lower than 80%, with Mississippi having the smallest proportion of Whites at 55%. (Alabama—68%; Arkansas—78%; Florida—78%; Georgia—69%; Louisiana—67%; North Carolina—73%; South Carolina—61%; Virginia—78%). See id. at 38 (1954). Racial demographics were in flux, however, as the Great Migration of Blacks North was still in process. See Wilkerson, supra note 28, at 8-15 (Great Migration began in the early 1900’s and continued into the 1970’s).

117 See 1954 Statistical Abstract, supra note 115, at 40 (all other racial groups (“Indian,” “Chinese,” “Japanese,” and “other” comprised only 0.4%).

118 See, e.g., Takao Ozawa v. United States, 260 U.S. 178 (1922) (denying naturalization to Japanese-born immigrant, who had been living in the United States for 20 years, because only Caucasians would be classified as White); United States v. Bhagat Singh Thind, 261 U.S. 204 (1923) (same result for Hindu appellee); see also Gong Lum v. Rice (1927) (upholding Mississippi decision to deny student of Chinese ancestry access to White school). Note also that the U.S. Statistical Abstract covering the census years before Brown is organized by “White,” “Negro,” and “Other Races.” See, e.g., 1954 Statistical Abstract, supra note 115.

119 See Alaina Walker, Choosing to be Multiracial in America: The Sociopolitical Implications of the “Check All That Apply” Approach to Race Adopted in the U.S. Census, 21 Berkeley La Raza L.J. 61 (2011) (describing evolution of U.S. Census racial categories); Juan Perea, Ethnicity and the Court: Beyond the Black and White Binary Constitution, 36 Wm. & Mary L. Rev. 571, 571 (1995) (discussing the uneasy fit of “ethnicity” in the current binary legal paradigm);

120 See supra note 115 and accompanying text.

121 United States Census Bureau, Statistical Abstract of the United States: 2012 25 (2012). In terms of the remaining racial groups, Blacks were 12.6% and all other racial groups, including those identifying as two or more races were 15%. Id.

122 Id. at 23. Hispanics are 16.3% of the population. Id. Note that race (White, Black, Asian, etc.) and ethnicity (Hispanic and non-Hispanic) are distinct and sometimes overlapping categories.
Moreover, the White population is older than the non-White population, a fact remarked upon in 2012 with news articles pointing to a shift from more White to more “minority” babies being born.\textsuperscript{123} The U.S. Census Bureau predicts that by about 2040 “non-Hispanic, single-race” Whites will no longer comprise a majority of the population.\textsuperscript{124}

Second, the U.S. has shifted from a strict White/Black binary racial nation toward a multi-racial, multi-ethnic nation. As the non-Hispanic White population has decreased, others have increased—especially the Hispanic population, which now outnumbers the Black population (16.3% compared to 12.6% in 2010)\textsuperscript{125} and has spread throughout the U.S.\textsuperscript{126} The proportion of the population with Asian heritage has grown to 4.8%.\textsuperscript{127} It is, of course, possible that our historical binary racial sense is sufficiently strong that Hispanics and Asians will intermarry and eventually assimilate as White and a new Black/non-Black racial line re-emerge.\textsuperscript{128} At the current moment, however, the sense of moving toward racial and ethnic pluralities is strong.

Third, as journalist Eugene Robinson describes, the Black community has itself been transformed over the past two generations:

Forty years ago [1970], if you found yourself among a representative all-black crowd, you could assume that nearly half the people around you were poor, poorly educated, and underemployed. Today, if you found yourself at a representative gathering of black adults, four out of five would be solidly middle class.\textsuperscript{129}


\textsuperscript{125} 2012 STATISTICAL ABSTRACT OF THE UNITED STATES, supra note 121, at 23, 25 (2012).

\textsuperscript{126} \textit{Id.}, at 23.


\textsuperscript{129} EUGENE ROBINSON, \textit{DISTINTEGRATION: THE SPLINTERING OF BLACK AMERICA} 7-8
Robinson calls that four-fifths the Black “Mainstream.”\textsuperscript{130} He also identifies three other subgroups in Black America today: the “Transcendant,” the ultra-successful who have attained heights comparable to ultra-successful Whites (think Oprah Winfrey, Tiger Woods, and Barack Obama);\textsuperscript{131} the “Emergent,” a group comprised of both African immigrants, who tend to be well-educated and high achievers,\textsuperscript{132} and the multiracial offspring of \textit{Loving v. Virginia};\textsuperscript{133} and the “Abandoned,” those left behind without transportation in hypersegregated urban centers as jobs have migrated to the suburbs.\textsuperscript{134} Robinson also offers the results of “that stunning 2007 survey by the Pew Research Center, in which 37 percent of black Americans said that black people in this country could no longer ‘be thought of as a single race.’”\textsuperscript{135}

Since \textit{Brown}, then, the meaning of race has evolved, though it has by no means disappeared.\textsuperscript{136} In the mid-1970’s, however, another trend began to take root: Following thirty post-War years in which “America grew together,”\textsuperscript{137} socioeconomic inequality began rising; today, inequality in the U.S. is at its highest point since before the Depression.\textsuperscript{138} “[T]he


\textsuperscript{130} ROBINSON, supra note 129, at 77-106.
\textsuperscript{131} Id. at 139-62.
\textsuperscript{132} Id. at 163-76.
\textsuperscript{133} 388 U.S. 1 (1967). ROBINSON, supra note 129, at 177-190. Robinson notes that according to one estimate, “the number of Black-White interracial couples has increased fivefold since 1960.” Id., at 178.
\textsuperscript{134} Id., at 107-138. The Abandoned may be understood as those whom \textit{Brown} did little to assist, especially in its lack of confrontation of the residential segregation that remained embedded in urban America when middle-class Blacks moved to the suburbs.

According to Robinson, the Abandoned account for approximately one quarter of the total and the youngest group of Black Americans. \textit{Id.}, at 7. With post-\textit{Brown} civil rights, the Black poverty rate declined to today’s 25%, which has remained the case since the 1990’s. \textit{Id.}, at 6-7. Robinson views the Abandoned as the priority for today. The longer these citizens remain as the symbol—and the reality—of Black as marginalized and failing, “the longer we forestall the possibility of a day when race ceases to be the defining attribute of African-Americans.” \textit{Id.}, at 236. In Robinson’s view, over-emphasis on symbolic racial issues deflects attention from this group. \textit{Id.}, at 4.

\textsuperscript{135} Id., at 226.
\textsuperscript{136} See, e.g., Lee & Bean, supra note 128.
\textsuperscript{137} JOSEPH STIGLITZ, \textit{THE PRICE OF INEQUALITY} 4 (2012).
\textsuperscript{138} Id., at 5.
wealthiest 1 percent of households [now hold] 225 times the wealth of the
typical American, almost double the ratio in 1962 or 1983.\textsuperscript{139}

The connections between race, economic inequality, and education
are troubling, though not entirely clear. First, education plays a significant
role in upward social mobility, but acquiring an education is impeded by
low socioeconomic status.\textsuperscript{140} Inequality renders the American myth of equal
opportunity precisely that—a myth: Kids from the socioeconomic bottom
in the U.S. are more likely to be stuck there than in other developed
countries; kids from the top are more likely to stay there.\textsuperscript{141} As an example,
“in America’s highly selective colleges…[o]nly around 9 percent come
from the bottom half of the population, while 74 percent come from the top
quarter.”\textsuperscript{142}

Second, while race may be less determinative of socioeconomic
status than it once was, race and socioeconomic status are still strongly
correlated.\textsuperscript{143} Holdovers from historical allocations of wealth, perhaps most
widely in the form of differential access to wealth in the form of home
equity, perpetuate the connection between race and socioeconomic status.\textsuperscript{144}
Further, it is often impossible to distinguish correlation from causation, and
so the continuing entanglement of race and economics is difficult to
address.\textsuperscript{145}

Third, \textit{Brown} and its progeny, in focusing our attention on the
invidious effects of race, neglected to attend to the invidious effects of
socioeconomics. One result is that we are now in the situation of providing
K-12 education in a nation where more than one in five children lives in
poverty,\textsuperscript{146} despite the fact that poverty undermines children’s ability to
learn.\textsuperscript{147} Disregarding socioeconomics has allowed this phenomenon to

\textsuperscript{139} \textit{Id.}, at 8.

\textsuperscript{140} \textsc{Pew Charitable Trusts, Economic Mobility Project, Pursuing the American Dream: Economic Mobility Across Generations} 23-26 (July 2012); Ron Haskins, \textit{Wealth and Economic Mobility}, in \textsc{Julia B. Isaacs et al., Pew Charitable Trusts, Economic Mobility Project, Getting Ahead or Losing Ground: Economic Mobility in America} 47 (2008).

\textsuperscript{141} \textsc{Tom Hertz, Understanding Mobility in America} 2-3 (April 2006).

\textsuperscript{142} \textsc{Stiglitz, supra note 137, at 19.}

\textsuperscript{143} \textsc{Pew, Pursuing the American Dream, supra note 140, at 18.}

\textsuperscript{144} \textsc{Strand, Inheriting Inequality, supra note 129, at 475-477, 462.}

\textsuperscript{145} \textit{Id.}, at 477. \textit{See also} Walsh, \textsc{supra note 59.}

\textsuperscript{146} \textsc{Suzanne Macartney, Child Poverty in the United States 2009 and 2010: Selected Race Groups and Hispanic Origin} 1 (Nov. 2011) (childhood poverty rate was 21.6% in 2010).

grow unchecked.

Fourth, the education achievement gap between rich and poor is now “more than twice as large as the black-white” gap.\textsuperscript{148} Fifty years ago, in contrast, the Black-White gap was “one and a half to two times” as large as the gap due to income.\textsuperscript{149} Economic inequality \textit{per se} does not appear to be responsible, but related factors such as higher wealth parents investing more to cultivate their children cognitively or greater access to quality schools in higher-income neighborhoods may be the cause.\textsuperscript{150}

Building on this latter point, though as a nation we assert diversity and the ability to navigate different ethnicities and cultures as valuable to our economy and our nation,\textsuperscript{151} children with different backgrounds often neither live in the same neighborhoods nor attend the same schools.\textsuperscript{152} As a result, they lack many early experiences from which the facility to navigate the 21\textsuperscript{st}-century global, multicultural world can grow. Also lacking are interpersonal experiences to build a sense of social “we”-ness. Nobel-winning economist Joseph Stiglitz notes with respect to socioeconomic segregation, “Inequality may be at once cause and consequence of a breakdown in social cohesion over the past four decades.”\textsuperscript{153} This social cohesion is directly related to being part of a civic body with a sense of the common good.

In \textit{Brown’s} U.S., race was binary and unambiguous, and economic prosperity and equality were increasing. \textit{Brown} and its progeny responded with constitutional doctrines that countered explicit racial categories and sidelined socioeconomics. Over the decades, with the deconstruction of race and rise of global immigration, shifts from overt to institutional racism, and the increased salience of economic inequality, judicial doctrine has struggled. As to race, doctrine oscillates between those who assert that it means nothing (colorblindness) and those who assert that it means what it did pre-\textit{Brown} and pre-\textit{Loving}. As to socioeconomics, intertwined with race or alone, it continues to be downplayed as a vital social cleavage.

\begin{footnotes}
\item[148] Reardon, \textit{ supra} note 18, at 5.
\item[149] \textit{Id.}
\item[150] \textit{Id.} at 14-25.
\item[152] \textit{See} Reardon, \textit{ supra} note 18, at 24. In response to continuing patterns of racial and socioeconomic segregation, the U.S. Dept. of HUD recently issued proposed regulations to Affirmatively Further Fair Housing under the Fair Housing Act of 1968. \textit{See} https://www.federalregister.gov/articles/2013/07/19/2013-16751/affirmatively-furthering-fair-housing.
\item[153] STIGLITZ, \textit{ supra} note 137, at 65.
\end{footnotes}
B. Popular Control—The Institutionalization of Distrust

Many school systems did not fall into line behind Brown and embrace racial desegregation. The role of the federal government in backing up Brown—though sometimes reluctantly and cautiously—is well-known. Federal troops enforcing desegregation in Little Rock,154 the federal-State faceoff over massive resistance in Virginia,155 and 5th Circuit judges enforcing Brown in Southern schools156 are all familiar. So too is the grand triumvirate of federal civil rights legislation of the 1960’s: the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968.157

Less familiar is the role played by the Elementary and Secondary Education Act (ESEA) of 1965,158 part of President Lyndon Johnson’s Great Society “War on Poverty” legislation. With Title I of the ESEA, Congress dispersed federal funds to support educating children from low-income families. In its implementation, the Johnson Administration used ESEA as a “carrot” in conjunction with the “stick” of the Civil Rights Act to desegregate schools: Funds were denied segregated schools.159

Education historian Diane Ravitch describes how concerns a decade later about falling student achievement—concerns that may have resulted in part from a post-Brown expansion of the number of students taking the SAT160—contributed to the sounding of the alarm as to educational decline in the U.S. with the high-profile A Nation At Risk (ANAR) report in 1983.161 ANAR proposed a “rich, well-balanced, and coherent” curriculum162 and higher graduation requirements for students163 along with stronger preparation, higher salaries, and peer review for teachers.164 In the 1980’s

154 KLARMAN, supra note 23, at 326-329.
155 Id., at 332-334, 395-421.
156 See generally JACK BASS, UNLIKELY HEROES (1990) (describing 5th Circuit federal appellate and district court judges who implemented Brown into the 1960’s).
161 Id., at 24-28.
162 Id., at 29.
163 Id., at 26.
164 Id., at 27.
and 1990’s, however, the move for national standards disintegrated in the face of a political backlash. \(^{165}\)

Eventually, in 2002, the No Child Left Behind (NCLB) legislation adopted a quite different approach—one centered on testing and accountability—to reforming the nation’s public schools. \(^{166}\) Ravitch observes that, in the post-9/11 bipartisan honeymoon, Democrats liked NCLB’s expansion of federal power and Republicans liked its emphasis on testing. \(^{167}\) Neither party, she asserts, appeared to realize that the quality of the tests was key. \(^{168}\) NCLB left to each State the task of adopting its own test. \(^{169}\) This gaping disconnect has resulted in fifty different levels of NLCB “compliance” and States “gam[ing] the system.” \(^{170}\) In essence, Ravitch concludes, NCLB imposed not a national curriculum but a national pedagogy of teaching to the test. \(^{171}\) NCLB shifted the focus from professionalism in teaching and an emphasis on multiple subjects to test scores in two subjects: reading and math. \(^{172}\) Overall, though NCLB brought the essence of a transparent, data-driven approach aimed at identifying trouble spots and challenged populations to U.S. education, \(^{173}\) Ravitch designates NCLB as a failure because the remedies it provides for “failing schools”—closing schools and private tutoring—do not work. \(^{174}\)


\(^{166}\) RAVITCH, *supra* note 160, at 20-21, 97-98. Public reporting of the results of these tests was required, 20 U.S.C. § 6311(h); *see also* http://www2.ed.gov/teachers/nclbguide/toolkit_pg8.html. So too was disaggregation of those results by school and by race, ethnicity, socioeconomic status, and primary language. 20 U.S.C. § 6311(h)(1)(C)(i); *see also* http://www2.ed.gov/teachers/nclbguide/toolkit_pg8.html. NCLB also imposed sanctions on schools with low scores that failed to make “adequate yearly progress” (AYP) 20 U.S.C. § 6311(b)(2)(B) (AYP) toward competency benchmarks. 20 U.S.C. § 6311(g).

\(^{167}\) RAVITCH, *supra* note 160, at 21, 94-95.

\(^{168}\) *Id.*, at 95.

\(^{169}\) *Id.*, at 97.

\(^{170}\) STEVEN BRILL, CLASS WARFARE: INSIDE THE FIGHT TO FIX AMERICA’S SCHOOLS 85 (2011).

\(^{171}\) RAVITCH, *supra* note 160, at 73 (describing similar New York City approach).

\(^{172}\) *Id.*, at 107. Overall, Ravitch condemns NCLB as bereft of any educational ideas. It was a technocratic approach to school reform that measured “success” only in relation to standardized test scores in two skill-based subjects, with the expectation that this limited training would strengthen our nation’s economic competitiveness with other nations. This was misguided, since the nations with the most successful school systems do not impose such a narrow focus on their schools.

\(^{173}\) *Id.*, at 29.

\(^{174}\) *Id.*, at 99-111. *See also* KIRP, *supra* note 19, at 53.
In the absence of the congressional reauthorization of and revisions to NCLB that were due in 2007, the Obama Administration announced in 2011 a “flexibility package” under which States could develop “locally-tailored solutions” to educational challenges and receive waivers from NCLB requirements. To date, 47 States have applied for these waivers, and 39 applications have been approved. The Department of Education also initiated new programs, such as the Investing In Innovation (I3) Fund and Race to the Top (RTTT), under which grants for educational innovation are awarded to local schools and school districts. Embedded in these initiatives are federal goals of supporting state-developed common core standards to replace the individual state tests used under NCLB and performance standards for teachers. In some discussions about these standards, student test scores have been proposed as the sole appropriate measure not only of student achievement but of teacher performance as well.

All of these developments ratchet up pressure on public schools and teachers. Testing limits teacher choice of pedagogy. Testing and test preparation occupy substantial teacher and classroom time. At the same time, the teacher supports proposed by ANAR have not been widely implemented. “Between 40 percent and 50 percent of new teachers do not survive the first five years.” Ravitch reminds us that “[t]eachers, like

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178 For example, though the Common Core Standards effort was led by the States, one of the RTTT criteria for awarding grants is whether a State has adopted the Standards. See Tamar Lewin, Many States Adopt National Standards for Their Schools, N.Y. TIMES (July 21, 2010) available at http://www.nytimes.com/2010/07/21/education/21standards.html?_r=0. See also infra notes 216-221 and accompanying text.
181 RAVITCH, supra note 160, at 177.
other professionals, ‘need to feel competent, effective, and admired.’”182 They need to feel trusted.

Other developments also undermine public schools and public school teachers. Charter schools, now officially supported by the Obama administration,183 generally do not hire teachers who are union members.184 High-profile initiatives supported by wealthy philanthropists, initiatives such as charter schools and Teach for America,185 discredit public schools and teachers. All of these communicate the idea that “startup” schools can succeed where traditional schools have not and that a newly-minted college graduate can be as effective as—or more effective than—an experienced teacher.186

Compare this palpable message of distrust toward schools and teachers—the local professionals responsible for education—with the very different message communicated by the 1972 Clean Water Act (CWA) initiative to clean up discharges from municipal sewage treatment plants. The CWA set standards followed by many billions of dollars to help local governments and districts build the facilities needed to meet those standards.187 In an intensely local matter, the federal government worked through the States to offer locals a helping hand, without taking upon itself the actual operation of the program. The CWA did not discredit the competence or intentions of the local jurisdictions and plant operators, though a negotiating process to improve performance was certainly undertaken. Support to bring the locals along was the overarching approach. Support demonstrates trust—in competence, in desire, in ability. In education, in contrast, lack of support evinces distrust.

In Brown’s fundamental articulation of the democratic value of equality, it necessarily expressed disapproval and distrust of the racial inequality inherent in “separate but equal.” With acceptance of the value of equality, a value that was nationally proclaimed, faith in the federal government went hand-in-hand with distrust of the States and locals that had generated and then clung to segregation and discrimination. As part of

182 Id., at 193.
183 Id., at 145-146; BRILL, supra note 170, at 4-7 (as part of Race to the Top initiative).
184 RAVITCH, supra note 160, at 124.
185 Id., at 195-222.
186 Ravitch summarizes evaluations of charter schools, id., at 132-145, and of TFA, id., at 188-191. An exception to the philanthropic disinterest in public schools is Eli Broad and the Broad Prize. See KIRP, supra note 19, at 214-215.
this process, local operation of schools was superseded to a significant degree by federal control—judicial, legislative, and executive. State control also increased. Yet as this attitude of distrust has permeated education, it has sapped the energy inherent in our federal system—the energy inherent in decentralization and local popular control. In education, we have come to distrust not only States and districts but also schools and teachers—the very places and people where education happens.

C. (Education)—Preschool Through Post-Secondary

In the past sixty years, as our economy has shifted from domestic and industrial to global and knowledge-based, post-secondary educational achievement has become increasingly important for socioeconomic success. At the other, preschool end of the educational spectrum, few families have a non-working caretaker parent, yet the importance of early childhood care and education is now well-recognized. In between, the quality—not just the availability—of K-12 education is of increasing importance. Overall, as one regional initiative asserts, education must now be “cradle to career.”

Looking first at the “cradle,” when Brown was decided, the question of formal pre-kindergarten education was new on the educational radar screen. In 1950, moreover, only 33.9% of all women worked outside the home; in 1960, only one-fifth of all mothers with children under the age of six did so. Caring for children was perceived to be part of the traditional work of mothers, even mothers on welfare.

The world of work, preschool, and childcare has changed dramatically since the 1950’s and 1960’s. In 2010, 58.6% of all women

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188 See note 298 infra and accompanying text.
190 Neal Peirce, Communities Setting Audacious ‘Cradle to Career’ Education Goals, citiwire.net (April 8, 2012) available at http://citiwire.net/columns/communities-setting-audacious-cradle-to-career-education-goals/ (profiling “Strive” — America’s first network to push for in-depth regional alliances, championing an exciting if highly challenging cause: ‘Every Child, Every Step of the Way, Cradle to Career’; ‘Strive’ was initiated in Cincinnati, OH, but the concept has since spread to other regions).
193 Id.
worked outside the home;\textsuperscript{194} in 2012, 65\% of all mothers with children under six did so.\textsuperscript{195} Welfare now requires mothers to work, the number of single-parent families has risen, and significant percentages of preschoolers receive out-of-home childcare.\textsuperscript{196}

Moreover, the importance of quality care and preschool experiences to child development and a solid educational foundation are increasingly recognized.\textsuperscript{197} Preschool is particularly important for children who lack learning opportunities at home.\textsuperscript{198} And it is broadly perceived as being cost-effective,\textsuperscript{199} which likely grounds the fact that it enjoys broad-based political support.\textsuperscript{200}

Head Start, which opened in 1965 as part of President Johnson’s War on Poverty, initiated public provision of formal early childhood preschool.\textsuperscript{201} From its inception, Head Start was designed to serve only children from low-income families.\textsuperscript{202} Even so, Head Start has never been funded so as to make it available even to all eligible children.\textsuperscript{203}

States have also gotten into the business of preschool, to the point where “[e]nrollment in state programs now almost matches enrollment in federal Head Start programs,”\textsuperscript{204} though “the federal government pays the

\textsuperscript{194} \textit{U.S. DEPT. OF LABOR, WOMEN’S BUREAU, WOMEN IN THE LABOR FORCE} 2010, \textit{available at} \url{http://www.dol.gov/wb/factsheets/Qf-laborforce-10.htm}.

\textsuperscript{195} \textit{BUREAU OF LABOR STATISTICS, EMPLOYMENT CHARACTERISTICS OF FAMILIES SUMMARY} (Apr. 16, 2013) \textit{available at} \url{http://www.bls.gov/news.release/famee.nr0.htm}. \textit{Compare} James E. Ryan, \textit{A Constitutional Right to Preschool?} 94 \textit{CALIF. L. REV.} 49, 51 (2006) (“As of 2000, over 70\% of women with children between the ages of three and five were in the workforce.”)

\textsuperscript{196} Passachoff, supra note 192, at 370 (46\% of three-year-olds and 70\% of four-year-olds received out-of-home childcare according to one 1999 study).

\textsuperscript{197} \textit{Id.}, at 371; Ryan, supra note 195, at 56-57. \textit{See also} Haskins, supra note 140, at 7-8.

\textsuperscript{198} Ryan, supra note 195, at 63-64.

\textsuperscript{199} \textit{Id.}, at 68-69.

\textsuperscript{200} \textit{Id.}, at 91 (90\% of voters support State funding of quality preschool for all three- and four-year-olds in one recent poll).

\textsuperscript{201} Passachoff, supra note 192, at 351-52, 370.

\textsuperscript{202} Ryan, supra note 195, at 55; Passachoff, supra note 192, at 349. Head Start was actually designed “‘as a comprehensive program, providing much more than a preschool program to ease poor children’s transition to school….The [designing] committee purposely avoided defining Head Start as an education program and linking Head Start to the school system, which they saw as enforcing racial segregation and traditional patterns of economic power, as well as lacking in the comprehensive effort they believed to be key to conquering poverty.” \textit{Id.}, at 362.

\textsuperscript{203} NANCY FOLBRE, \textit{THE INVISIBLE HEART: ECONOMICS AND FAMILY VALUES} 131 (2001) (“In 1997, approximately 40 percent of all eligible children were enrolled in Head Start.”).

\textsuperscript{204} Ryan, supra note 195, at 54. Ryan notes further: “Forty states and the District of Columbia currently sponsor preschool programs, up from only ten in 1980. State spending
lion’s share of funds spent on preschool, spending roughly three times the amount of all states combined. 205 Most of these programs echo Head Start in targeting low-income children—and in serving only “a fraction” of those eligible.206 Several States, however, including Georgia, Oklahoma, New York, West Virginia, and Florida have gone further, taking concrete steps toward providing public preschool for all children.207

Despite this progress, and despite law professor James Ryan’s animated argument for extending state constitutional rights to education to preschool, the status quo is a “complicated and chaotic”208 patchwork that varies substantially State to State.209 This status quo leaves almost half of all U.S. children, children who “tend to be from poorer and less-educated families,” without a preschool experience.210 In no State is there anything “close to a system of preschools…remotely comparable to the system of K-12 public schools.”211

In K-12 schools, the core of our educational system, we are close to universal availability but both de facto racial and socioeconomic segregation and uneven funding of schools remain significant challenges.212 Much of the national conversation about equality in education has shifted over the past several decades, however, to achievement gaps—primarily between higher-performing White and Asian students and lower-performing Black and Latino students,213 but increasingly between students of higher and lower socioeconomic status.214 NCLB, as noted above, left standards

\[\text{id.}\]

205 Id., at 55.
206 Id.
207 Id.
208 Id. (referring to system of publicly funded preschools).
209 Id. (referring to system of publicly funded preschools).
210 Id. at 55 (“[U]nlike public K-12 education, ‘public’ preschool programs are more likely to be offered outside of the public schools than within them. Most publicly funded preschool programs rely heavily on private providers, including for-profit, non-profit, and religious organizations.”) Note, however, that kindergarten was originally offered outside of the public school system; only after it had developed in private contexts was it eventually drawn within the jurisdiction of public education. See ABBIE GORDON KLEIN, THE DEBATE OVER CHILD CARE, 1969-1990: A SOCIOHISTORICAL ANALYSIS 261-320 (1992).
211 See notes 9-14 supra and 303 infra and accompanying texts.
212 See, e.g., DARLING-HAMMOND, supra note 18, at 11.
213 See, e.g., Reardon, supra note 18. See also Carnoy & Rothstein, supra note 19.
up to the States and those do not address or even reveal much of this unevenness.

Ravitch asserts that “any national curriculum must be both nonfederal and voluntary, winning the support of districts and states because of its excellence.” The recent Common Core Standards movement has been portrayed as an effort to address uneven curricula and standards and to articulate a unified vision for K-12 public education across the U.S. Led by the National Governors Association Center for Best Practices and the Council of Chief State School Officers and supported by multiple groups including both teachers’ unions, K-12 Common Core Standards have been developed for English Language Arts and Mathematics and adopted by all but five States (Alabama, Minnesota, Nebraska, Texas, and Virginia). The Standards are evidence-based and were developed with input from “teachers, researchers, and leading experts.” This bipartisan effort has not proceeded without opposition, in large part because the Standards were adopted by many States to become eligible for Race to the Top grant funding. Ravitch herself opposes the Standards as untested and “foisted” on the States. Further developments await.

On the “career” end of K-12 schools, while approximately a third of the adult population completed high school in the mid-20th century, only a small proportion of citizens attended college. Then, from the late 1940’s into the 1970’s, GI Bill subsidies for college and college deferments to avoid military service fueled the growth of post-secondary education. Today, high school graduation rates across the country stand

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215 Ravitch, supra note 160, at 235.
216 See Brill, supra note 170, at 414.
218 www.corestandards.org/frequently-asked-questions.
223 Id., Table 2. (4.6% of adult population in 1940; 6.2% in 1950).
224 John Bound & Sara Turner, Going to War and Going to College: Did World War II and the G.I. Bill Increase Educational Attainment for Returning Veterans? 20 J. LABOR
at 85.3%, and 27.9% of the U.S. adult population 25 years or older has at least a college degree. Accompanying this enormous increase in educational attainment, a college degree is now the ticket to entry into the middle class.

That ticket, however, has become increasingly costly in recent decades. Tight State budgets have caused State legislatures to squeeze expenditures for higher education and raise tuition. The demographic pressures of the baby boomer generation weakened the fiscal capacity of State universities. Federal funding has primarily taken the form of student loans and research grants rather than direct investment or subsidization. The result has been greater student loans and debt.

As the educational baseline has shifted from a high school diploma toward a college degree, equal access to post-secondary education has lagged behind. Substantial disparities by race, ethnicity, and socioeconomic

ECON, 784 (2002); David Card & Thomas Lemieux, Going to College to Avoid the Draft: The Unintended Legacy of the Vietnam War, 91(2) AM. ECON, REV. 97 (May 2001).
226 Id., at 6 (data show 17.6% of the population with a bachelor’s degree only; 7.2% with a master’s degree; 1.9% with a professional degree; and 1.2% with a doctorate degree).
229 Id., at 316-326.
230 Id., at 312.
status of family of origin are evident. The correlation between access to higher education and intergenerational social mobility means that true educational equality goes beyond K-12 schooling to encompass post-secondary opportunities.

Brown very clearly limited its holding to a requirement that equal education be provided “where the state has undertaken to provide it.” Education cases since Brown all sound in Equal Protection; no substantive right to education has been recognized, even though all States provide a substantive right to education in their constitutions. In most instances, moreover, that right is limited to K-12 schooling.

III. A “Sideways”—Finnish—Perspective on Education

In Part II, I surveyed major post-Brown developments that have transformed the educational landscape. Brown’s confident assertion of equality falters in the face of the deconstruction of race and the shift from overt to institutional racism, and it does not address the dramatic increase in economic inequality. Post-Brown legislation has led us down a path of top-down, institutionalized distrust of public schools and their teachers—those who actually do the day-to-day work of education for most of the nation’s students. And Brown’s assertion of the integral nature of public education to democracy has been proved hollow by the uneven quality of K-12 schools and limited access to comprehensive preschool through post-secondary. Brown’s familiar paradigm is inadequate to address current challenges. We need a new vision.

In this Part, I describe a “sideways” journey to gain a fresh perspective. In recent years, the Finnish educational system has attracted much attention because it is ranked #1 globally in terms of student achievement and because Finland achieved that rank through purposeful educational reform. Finland is, of course, a very different country than the U.S, but surely Finnish youth are not less capable than U.S. youth. What are the Finns doing that we might learn from—not to copy, but to stimulate questions and brainstorm answers that will enable us to reframe, to move past Brown?

A. The Finnish Educational System

The ideal of a quality education equally available to all has guided reform efforts in Finland that have transformed its educational system from

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233 Id. (minority student enrollment lagging); PEW, PURSUING THE AMERICAN DREAM, supra note 140 (challenges for upward socioeconomic mobility).
an elitist system that reinforced social inequality and was “nothing special in international terms” to an international star in terms of both quality and equality.\textsuperscript{235} The shared vision is that investment in education and “highly educated people” are the country’s path to success in today’s “knowledge-based economy.”\textsuperscript{236} Finland’s educational reform embodies a long-term national commitment to carrying out that vision.\textsuperscript{237}

Finnish educator, researcher, administrator, and commentator Pasi Sahlberg\textsuperscript{238} describes the current Finnish system and its evolution in depth. Central to the system is the conviction that most students will master the same level of studies until university or advanced vocational training.\textsuperscript{239} To facilitate this expectation, special education is readily available to help children along the learning path: A large proportion of children receive this help, though “special education” as a label is rarely applied.\textsuperscript{240} The education adapts but no stigma attaches, and there are multiple paths to the same end.

More broadly, education is only one aspect of child development, and a “less is more” approach prevails.\textsuperscript{241} Children do not start formal school until age 7.\textsuperscript{242} Homework is minimal.\textsuperscript{243} Sports are not part of school, though myriad opportunities outside of school are available through organized clubs.\textsuperscript{244} Finally, Finnish \textit{peruskoulu}, equivalent to our K-12 core,\textsuperscript{245} is only part of a broader system of support for children. All children receive free lunch at school.\textsuperscript{246} They receive public early childhood care, and 98\% of Finnish children attend preschool before entering formal school.\textsuperscript{247} University or quality vocational training is available free of charge after \textit{peruskoulu} is completed.\textsuperscript{248}

Further embodying a focus on students as individuals, the system recognizes that teachers are at the core of successful education.\textsuperscript{249} While a


\textsuperscript{236} Sahlberg, \textit{supra} note 22, at 106-12.

\textsuperscript{237} \textit{The Finland Phenomenon, supra} note 235.

\textsuperscript{238} Sahlberg, \textit{supra} note 22, at xix.

\textsuperscript{239} \textit{Id.} at 45-49.

\textsuperscript{240} \textit{Id.}

\textsuperscript{241} \textit{Id.} at 61-62.

\textsuperscript{242} \textit{Id.} at 62.

\textsuperscript{243} \textit{Id.} at 62, 65.

\textsuperscript{244} \textit{Id.} at 62-63.

\textsuperscript{245} \textit{Id.} at 21-25, 128.

\textsuperscript{246} \textit{Id.} at 48, 90.

\textsuperscript{247} \textit{Id.}, at 48.

\textsuperscript{248} \textit{Id.} at 49 (60\% of upper-secondary school graduates enroll in higher education).

\textsuperscript{249} See generally \textit{Id.} at 70-95 (importance of teachers). Further, schools tend to be
curriculum framework is provided nationally,\(^{250}\) teachers have discretion to customize that framework and structure their own lessons to meet the needs and interests of diverse students.\(^{251}\) This teacher ability to tailor pedagogy according to student needs reflects both the research-based nature of the Finnish system and teachers whose training is research-based.\(^{252}\) The trust given to teachers is evidenced by the fact that students are evaluated solely by their teachers; no standardized tests are administered until students seek to matriculate in university.\(^ {253}\) These conditions allow classrooms to be student-centered with discovery of knowledge and problem-solving rather than memorization as the learning objectives.\(^ {254}\)

In Finland, teaching is a professional occupation: A masters, research-based degree is required,\(^ {255}\) and teacher training entails watching master teachers and being critiqued by those teachers and by one’s own peers, which fosters a spirit of collaboration.\(^ {256}\) Resources are directed to teachers in the form of space, equipment, and, perhaps most importantly, time—time both to teach and to develop professionally.\(^ {257}\) Further, teachers are not only treated as professionals; they are paid as professionals.\(^ {258}\) As a result of these conditions, teaching is a well-regarded occupation in Finland: Top students seek to become teachers, and entry to the profession is competitive.\(^ {259}\)

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250 SAHLBERG, supra note 22, at 88.
251 Id., at 88-92.
252 Id., at 17, 83-86.
253 Id., at 66-67, 88-89.
254 The Finland Phenomenon, supra note 235. Darling-Hammond also notes that other countries with successful educational systems have shifted away from standardized tests to focus on problem-solving, critical thinking, and creativity. DARLING-HAMMOND, supra note 18, at 175-178 (South Korea); 184-189 (Singapore); 192-193 (summary).
255 SAHLBERG, supra note 22, at 129.
256 The Finland Phenomenon, supra note 235.
257 SAHLBERG, supra note 22, at 86-92. Specifically, Finnish teachers are responsible for approximately 600 hours of actual instruction annually (leaving time for planning, reflection, mentoring, and research), while U.S. teachers are responsible for about 1,080 hours annually. Id. at 63.
258 Id., at 76-77. Compare Palma Joy Strand, Do We Value Our Cars More Than Our Kids? The Conundrum of Care for Children, 19 DUKE J. OF GENDER L. & POL’CY 1, 15-16 (U.S. K-12 teaching “[a]rguably…underpaid compared to similar male jobs”).
259 SAHLBERG, supra note 22, at 72-76.
As to resources, long-term commitments to adequate and equitable funding are essential. Money matters. But money matters most when it is spent not on district bureaucracies but on kids and teachers. And money spent well goes further than money spent poorly. For core schooling, the average per-pupil expenditure in Finland is $7,800; in the U.S. it is $8,700.

B. Three Key Characteristics of the Finnish Educational System

Three characteristics of Finnish education emerge as essential to its success. The first and most fundamental is its overarching vision, a goal toward which the entire system is directed and to which the nation is committed. Over a period of time and through national conversation, Finland answered “yes” to the question: “Is it possible, in principle, that all

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260 DARLING-HAMMOND, supra note 18, at 192-193 (summary).
261 For example, New Jersey began to make real progress in the wake of a court order when it invested directly in students by way of preschool and in teachers by way of professional development. Id. at 128-129. See also id. at 132-147 (Connecticut [curriculum revision and teacher support] and North Carolina [preschool, curriculum revision, and teacher support]).
262 The Finland Phenomenon, supra note 235. In addition to these costs, Finland pays for both preschool and post-secondary education. See notes 247-248 supra and accompanying text. These costs are also lower than costs associated with maintaining individuals in U.S. prisons by orders of magnitude. Darling-Hammond observes:

Because the economy can no longer absorb many unskilled workers at decent wages, lack of education is increasingly linked to crime and welfare dependency. Women who have not finished high school are much more likely than others to be on welfare, while men are much more likely to be in prison. Most inmates are high school dropouts, and more than half of the adult prison population is functionally illiterate—with literacy skills below those required by the labor market. Nearly 40% of adjudicated juvenile delinquents have treatable learning disabilities that were often undiagnosed and unaddressed in the schools. Some states are said to predict the number of prison beds they will need in a decade based on 3rd-grade reading scores.

This is substantially, then, an educational problem associated with inadequate access to the kinds of teachers and other resources that could enable young people to gain the skills that would enable them to become gainfully employed. States that would not spend $10,000 a year to ensure adequate education for young children of color spend over $30,000 a year to keep them in jail. The strong relationship between under-education, unemployment, and incarceration creates a vicious cycle as lack of adequate investment in education increases the need for prisons, which now compete with the funding available for education.

DARLING-HAMMOND, supra note 18, at 24.
The embodiment of this goal is a system organized to provide all Finnish students the kind of comprehensive education that is necessary for success in the 21st-century knowledge-based economy: top-quality preschool, high-level core schooling, and post-secondary opportunities. Finnish students and their families are also supported by a broad-based public infrastructure outside of school, which facilitates their success in school.

None of these specific attributes are unique to Finland. In fact, many were not even developed there. Sahlberg credits the U.S., along with the UK, Australia, and Canada, as the source of many of its educational innovations and insights. What Finland had, however, was a vision. With that vision as an organizing principle, Finland assembled selected strategies for moving forward.

The second characteristic, intertwined with the first, emphasizes the comprehensive nature of the vision. The organizing principle of Finnish education is investment in all Finnish youth. All Finnish children are capable and deserving of quality education. Providing such an education to all Finnish children is in the best interests of Finland as a nation. The expectation—communicated to teachers, children, and Finns at large—is that children across the board can and will succeed and that it is important to Finland as a whole that they do.

This commitment to education is not only articulated as an explicit system goal but demonstrated tangibly by equivalent investment in all Finnish students: All Finnish students have highly-trained and well-supported teachers. All receive top-quality preschool, core schooling, and post-secondary opportunities. All have adequately and equitably funded schools. All students are supported outside of school in ways that assist their success in school.

Somewhat paradoxically, the commitment to all children goes along with flexibility as a result of the recognition that some children will require greater support than others. With respect to cultural, especially immigration-based diversity, Sahlberg notes:

The Finnish education system follows the principle of inclusiveness regarding the treatment of students with differing characteristics and needs...[I]n a typical Finnish classroom, one finds teachers teaching different abilities,

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263 Sahlberg, supra note 22, at 19. See also The Finland Phenomenon, supra note 235.
264 Sahlberg, supra note 22, at 106-112.
265 Id., at 34.
266 The Finland Phenomenon, supra note 235.
267 Darling-Hammond, supra note 18, at 192.
interests, and ethnicities, often with the help of assistant teachers.\(^{268}\)

As to socioeconomic challenges, Sahlberg observes both that “[p]overty is a difficult fact that affects teaching and learning in schools”\(^{269}\) and that Finland’s low child poverty rate of 3.4%\(^{270}\) contributes to Finland’s ability to educate all children:

> The equitable Finnish education system is a result of systematic attention to social justice and early intervention to help those with special needs, and close interplay between education and other sectors—particularly health and social sectors—in Finnish society.\(^{271}\)

The way Sahlberg frames and considers the question of disparate educational challenges and needs is revealing in two ways. First, the characteristics that he identifies as relevant from an educational perspective are defined not as problems with children but as circumstances some children experience that are likely to get in the way of their learning. Coming into a new culture as an immigrant and being poor are such circumstances. Second, even in the face of such circumstances, the Finnish imperative is inclusion: Children are included and supported in schools and in classrooms, which leads to their academic success.\(^{272}\)

Finland’s education vision is profoundly civic in that it values the development of all children as members of the civic body. “Inclusiveness” and equitable outcomes are the touchstones—for children with learning challenges, children who are poor, children who are immigrants.\(^{273}\) Of necessity, this vision recognizes and accommodates to diversity, and it focuses on teaching all the children in the classroom.

The third key characteristic of the Finnish education system is the recognition that because the primary work of the system is accomplished in decentralized, individual student-teacher interactions,\(^{274}\) these interactions must be supported and nurtured. In Finland, this occurs through support of teachers and their interactions with students. As described above, teachers are trained and treated as professionals. Finland’s training of and support

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\(^{268}\) \textit{SAHLBERG, supra} note 22, at 69.
\(^{269}\) \textit{Id.}
\(^{270}\) \textit{Id.} The Finnish poverty rate for children of 3.4% is approximately \textbf{one-sixth} of the rate in the U.S.: Sahlberg refers to a 2007 U.S. poverty rate of 21.7%. \textit{Id. See also Strand, Care for Children, supra} note 258, at 3 (U.S. child poverty rate was 20.7% in 2009).
\(^{271}\) \textit{SAHLBERG, supra} note 22, at 69; see also \textit{id.}, at 48.
\(^{272}\) \textit{Id.} “Immigrant students in Finland scored on average 50 points higher than their peers in other countries.” \textit{Id.} There does appear to be, in Finland, a threshold proportion of immigrant students—20%—above which effects on achievement appear. \textit{Id.}
\(^{273}\) \textit{Id.}, at 23, 45-49.
\(^{274}\) \textit{GAINING ON THE GAP, supra} note 63, at 72-74.
for educational leaders and provision of the physical buildings and resources that facilitate teaching and learning also support productive student-teacher interactions.

The teaching environment and teacher supports communicate a high degree of trust. In schools, the trust associated with individualized planning and assessment creates positive working conditions for teachers. Trust enables the taking of risks that lead to creative teaching and student engagement. Trust nurtures relationships between teachers and students. Trust rather than control calls teachers to be worthy of that trust. Trust, in fact, is explicit in the Finnish educational system, though it has taken time—decades, in fact, to take hold.

The three key characteristics of Finnish education, then, are (1) a clearly articulated and widely-supported vision of high-quality education for all students as a national priority, (2) a civic commitment to inclusion and equitable outcomes for all students in that vision regardless of learning disadvantages, and (3) trust in schools and teachers, which facilitates collaboration, high expectations, and student learning.

These key characteristics correspond loosely to the three democratic values identified and discussed in Parts I and II. First, Finland’s educational vision manifests the democratic value of education, a primary function of a government that is working on behalf of its people. The endorsement of the necessity of this function, in a formal democracy, must arise from the people themselves. In Finland, that process was led by politicians and education professionals and led to a formal national policy. In the U.S., because the States are assigned primary responsibility for education, this work must be done primarily at the State level.

Second, Finland’s civic commitment to education for all children despite their circumstances embodies—and actually deepens—the democratic value of equality. Equality—especially the equality of educational excellence—is not a one-size-fits-all proposition. As the challenges in Finland’s classrooms differ from place to place and from child to child, so too do educational strategies.

Finally, Finland places an enormous amount of trust in its teachers,

275 SAHLBERG, supra note 22, at 78-83.
276 The Finland Phenomenon, supra note 235.
277 Id.
278 SAHLBERG, supra note 22, at 130-131; The Finland Phenomenon, supra note 235.
279 The Finland Phenomenon, supra note 235.
which both taps into and replenishes a reservoir of civic goodwill that is essential for the effective popular control that is the last democratic value. We are accustomed to thinking of popular control in terms of voting, in terms of representation, occasionally in terms of town meetings or so-called “direct democracy.” These are all important processes, but these processes do not function well without civic relationships—relationships of trust and respect and a sense of the common good. Further, especially in local governance, formal processes are heavily interwoven with interpersonal relationships. In researching this article, I have time and time again been struck by the frequency of references in the education literature to trust, the lack of trust, the importance of trust. In education, government interacts with the public in classrooms: Teachers are the government and students are the public. Teachers lie at the very core of the government-public interface in education, and teacher trust or distrust sets the tone for the entire enterprise.

IV. A NEW EDUCATIONAL AGENDA

In Part I, I described Brown and post-Brown developments in terms of core democratic values. In Part II, I identified changes in the national landscape since Brown that are relevant to the struggle for broad-based excellent public education. In Part III, I turned to the Finnish system of education for insights to assist in the task of renewing that struggle and identified three characteristics of that system that correspond to the core democratic values. In this Part, I offer a three-pronged strategy for moving forward.

We in the U.S. need a new educational vision. In our federal system, because the States carry the weight of primary responsibility for education, they must be the visionaries. A civic inclusiveness that embraces all children is essential to this vision, yet diverse circumstances call for individual classrooms, schools, districts, and regions as the loci for the generation of educational equality initiatives. Finally, we need to build trust throughout the system. In doing so, we must acknowledge that the “action” of the system happens in the decentralized, individual interactions between students and teachers and that trusting teachers affects those interactions in powerfully positive ways. At the same time, national support is indispensable.

A common thread that runs through the three parts of this strategy is reestablishing a “bottom up” dynamic in U.S. education—not as it was

281 See Strand, Civic Underpinnings, supra note 280, at 134-149 (describing how civic relationships and networks emerge from civic experiences and engagement).
before Brown but in a new way. If our vision is to reform the system of U.S. education, institutional and legal structures that provide space and incentives for innovation and change will be more effective than top-down command-and-control. Trust must be built in a new way. All along the way, however, we cannot lose sight of the unchecked inequality that necessitated the disruption of the prior “bottom up” structures. Moreover, though we have not yet eradicated racial inequality, we cannot afford to continue to ignore socioeconomic inequality.

The strategy described in this Part takes three pages from the Finnish educational book—educational vision, civic innovation, and trust for public schools and teachers—and imagines what we in the U.S. might learn from studying those pages, how we in the U.S. might begin to reform and improve our entire educational system. These proposals do not simply take the Finnish approach as a cookbook recipe to be replicated. The intent here is to look to their underlying essence and consider how that essence might be adapted given our own institutions, laws, and history. The strategy here is presented as a sketch, a gesture toward possible directions, rather than as a detailed blueprint. The intent is to invite “sideways,” innovative thinking in approaching institutional systemic reform.

Preemptively, Sahlberg notes two likely objections to a Finnish-style approach in a U.S.-style nation: Finland is both smaller and more homogenous. In response, Sahlberg notes that Finland is comparable in size to a U.S. State and Finnish diversity, especially linguistic diversity, is larger than many think.282 The strategy articulated here centers on the States, which addresses the size issue. As to the second, an acceptance of diversity as an excuse for lack of educational excellence and equitable outcomes either denotes endorsement of disinvestment in certain children or constitutes evidence of implicit bias283 that “those kids” are incapable of succeeding. Neither of these excuses is acceptable.

282 SAHLBERG, supra note 22, at 8.
283 CHERYL STAATS, KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2013 29-34, available at www.Kirwaninstitute.osu.edu/docs/SOTS-Implicit_Bias.pdf. See also Charles R. Lawrence III, Education Law: Unconscious Racism and the Conversation About the Racial Achievement Gap 128 in IMPLICIT BIAS ACROSS THE LAW (Justin D. Levinson, ed., 2012) (“Unfortunately, the achievement gap debate is less about a search for ways to improve the educational opportunities of poor black and brown children than it is about the reinforcement of beliefs about their intelligence. This belief system, rooted in slavery, colonization, and the ideology of white supremacy, has led academics and professional educators to begin with a search for black students’ deficiencies as the explanation for their academic failure or success.”). For general overviews of implicit bias and the implicit association test on which the concept is based, see STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2013, supra, at 6-19; https://implicit.harvard.edu/implicit/demo/background/index.jsp.
B. A New Vision for U.S. Education

1. The States as visionaries

Blue-ribbon reports point to educational malaise in the U.S. as imperiling our future: Our children are our future, assert these reports, and our lack of investment in them will cost us dearly down the road.\(^{284}\) We have seen how Finland began the journey to educational reform with just such a conviction. Is the time ripe for the U.S. to develop our own educational vision?

Economists Claudia Goldin and Lawrence Katz, in their history of U.S. public education, conclude that a primary factor in the economic success of the U.S. in the 20\(^{\text{th}}\) century—the Human Capital Century—was its early commitment to general public education.\(^{285}\) Most nations have now followed suit, recognizing that “[h]uman capital, embodied in one’s people, is the most fundamental part of the wealth of nations.”\(^{286}\) This commitment, and the system of public schools that grew from it, emerged not by national edict, or even from State mandates, but from local efforts. Evidence examined by Goldin and Katz “points to the importance of local, rather than state, regulations and to grassroots rather than top-down campaigns”\(^{287}\) in the development of broad-based public education.

Though the States had legal responsibility for education, their primary role was authorizing local taxing authority to fund public “common school” education. The decentralized nature of the arrangements led to \textit{ad valorem} property taxes as the largest source of funding. Communities paid for schooling that was provided to all students free of charge through a system under which

the taxes of older property owners, whose children had already attended school, would pay for the schooling of other children, most likely those of younger members of the


\(^{285}\) \textit{Goldin \\ & Katz, supra} note 20, at 11-43, 324-325.

\(^{286}\) \textit{Id.}, at 41.

\(^{287}\) \textit{Id.}, at 146.

\(^{288}\) \textit{Id.}, at 148. \textit{See also id.}, at 198 (high schools in the early 20\(^{\text{th}}\) century developed according to a similar pattern).
community. Communities would bond together in a system of “overlapping generations” in which the older members implicitly paid back to the community what they had received a generation before.\textsuperscript{289}

Goldin and Katz refer to this system as “egalitarian in nature.”\textsuperscript{290} Local, fiscally independent public units provided and funded non-sectarian schools that were gender-neutral as well as “open and forgiving”—available to almost all children and allowing for continuation even without success at lower grades.\textsuperscript{291}

This decentralized system of “egalitarian” education did have a signature disadvantage: inequality. Goldin and Katz observe, “Decentralization…is likely to increase inequality in funding across school districts. Some districts will be richer than others and will be able to raise more tax revenue to support schools.”\textsuperscript{292} They conclude that our decentralized system “once operated to provide healthy competition through residential location choices. But the system may not [now] work well for many poor, inner-city residents who cannot easily relocate to new jurisdictions.”\textsuperscript{293}

In fact, the system was historically far from “egalitarian” for Black citizens in the South. In 1950, for example, the U.S. White high school graduation rate was 36.4\% while the Black rate was 13.7\%.\textsuperscript{294} Nor did it work well for the South as a region. Also in 1950, the South as a region lagged behind in its high school graduation rate (26.7\% versus 35.7\% for the Northeast, 35.4\% for the Midwest, and 45.8\% in the West).\textsuperscript{295} Moreover, as of 2000, the South still exhibited lower graduation rates than the other regions—though the region had made substantial progress in closing the gap (77.7\% for the South versus 81.6\% for the Northeast, 83.5\% for the Midwest, and 79.9\% for the West in 2000 [80.4\% national average]).\textsuperscript{296}

The U.S. thus has a long history of achieving broad-based success in

\begin{itemize}
  \item \textsuperscript{289} Id., at 142.
  \item \textsuperscript{290} Id., at 161.
  \item \textsuperscript{291} Id., at 130-155.
  \item \textsuperscript{292} Id., at 138.
  \item \textsuperscript{293} Id., at 348. Goldin & Katz conclude, in this regard, “it is important to recognize that schools are essentially failing particular students.” Id. Increased mobility and privatization have also increased educational disparities: Mobile elderly voters are less likely to support education, which is funded locally, while those who are well-resourced have private educational options that can lead to lackluster support for public schools. Id.
  \item \textsuperscript{294} Id., at 131, 133. U.S. CENSUS, EDUCATIONAL ATTAINMENT, supra note 222, Table 3.
  \item \textsuperscript{295} Id., Table 5.
  \item \textsuperscript{296} Id.
\end{itemize}
education through decentralized initiatives at the local level, with the States acting primarily as minority partners except in the context of post-secondary education. The primary exception to this success was segregated schooling in the South. Brown, to a significant degree, federalized education, and since Brown States shifted from their traditional laissez faire posture into a more active role in meeting their state constitutional responsibilities vis-à-vis public education. This shift resulted from Civil Rights Act enforcement and the funneling of ESEA Title I federal aid through State departments of education. NCLB accelerated this trend away from predominantly local authority to State oversight, bringing actual practice more into alignment with the formal legal assignment of responsibility to the States.

Yet the State-local balance is still in flux. In terms of equalizing intrastate expenditures, many States—notwithstanding Sutton’s relative optimism about post-Rodriguez changes, have found themselves constrained by their own localities. State courts have viewed “local control” as requiring “local funding,” which trumps equalizing. And even when State courts have invalidated State educational funding structures, it has often proved difficult for State legislatures to formulate remedies that pass muster.

Perhaps more important, many State have difficulty raising educational expenditures overall, and most estimates place interstate disparities as being much higher than intrastate disparities. Rising corrections and especially Medicaid costs crowd out investing in education at the State level. Many States have balanced budget requirements or have debt limitations or require electoral approval for

297 Federal support for education historically had taken the form of land grants for both public common schools and for universities. See Carolyn Jefferson-Jenkins and Margaret Hawkins Hill, Role of Federal Government in Public Education: Historical Perspectives (League of Women Voters) available at http://www.lwv.org/content/role-federal-government-public-education-%C2%A0historical-perspectives.


300 See, e.g., KIRP, supra note 19, at 97.


302 See, e.g., KIRP, supra note 19, at 83-85, 232-233 n. 13 (example of New Jersey).

303 Walsh, supra note 59, at 167 & n. 256.

304 Mumper & Freeman, supra note 228, at 324.

305 Id.
local bonds. More active voters, who tend to be older and White, may also feel less invested in the future of children who are increasingly non-White. Though current average expenditures at the K-12 may be sufficient, moreover, the additional expenditures necessary for affording widespread access to preschool and post-secondary are not forthcoming at the State level.

Despite these challenges, a significant number of States have undertaken initiatives to redefine the public education they offer. As described above, several States have moved toward universal preschool. And, though the large majority of States have signed on to the Common Core Standards, some view those Standards as inferior to those that some States had in place beforehand. This, along with the perception of federal coercion in adoption of the Standards, is likely to lead to further developments in the area of standards and coordinated curricula.

Some States are already looking beyond NCLB and the Common Core Standards in improving K-12 education. Utah has begun to invest in foreign language immersion programs. Kentucky has entered into a public-private partnership resulting in a fund designed to encourage education innovation in the State. South Carolina brought together representatives from Kentucky, Maine, Wisconsin, and New Hampshire to learn from them in pulling together its own initiative to bring innovation to public education.

Other States are focusing on encompassing the full preschool-to-post-secondary spectrum. Oregon’s 40-40-20 Program provides an

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307 Strand, Care for Children, supra note 258, at 9.
308 See note 123 supra and accompanying text (aging of non-Hispanic White population along with growth of younger minority population).
309 See note 207 supra and accompanying text.
314 Echoing the view that education today extends beyond K-12, Goldin and Katz
educational “North Star”: “[B]y 2025, 40 percent of Oregonians will have one or more college degrees, another 40 percent at least a certificate or associates degree from a community college, and the remaining 20 at least graduating from high school.” These ambitious goals, moreover, are accompanied by a vision for systemic overhaul: “Today there are bright lines between pre-K, K-12, and college. Under the governor’s proposal, the experience for students would begin to be seamless.” Oregon has augmented this Program with a plan to waive tuition at State colleges for its students in return for a percentage of their future income. Along similar comprehensive lines, Nebraska’s “P-16” initiative articulates integrated goals for improving preschool, quality K-12, and college graduation in the State. Overall, more States are taking decisive steps to define and expand what quality education means.

The States, with their legally assigned responsibility for education, are in the best position to build a new national educational vision. The assert:

[T]hree main types of policies are needed to increase the growth rate of U.S. educational attainment and the relative supply of college workers. The first policy is to create greater access to quality pre-school education for children from disadvantaged families. The second is to rekindle some of the virtues of American education and improve the operation of K-12 schooling so that more kids graduate from high school and are ready for college. The third is to make financial aid sufficiently generous and transparent so that those who are college ready can complete a four-year college degree or gain marketable skills at a community college.

GOLDIN & KATZ, supra note 20, at 350-351.


317 Id.


319 See, e.g., Nebraska’s P-16 Initiative Education Goals: A Statewide Effort to Improve Student Success and Boost the Economy (May 2011) available at http://apps.educationquest.org/pdfs/P16_Goals_brochure.pdf.

320 Nor are such efforts confined to States. Initiated in Cincinnati and now spread to dozens of communities throughout the country, the Strive “cradle to career” Network joins regions that are making a commitment to setting ambitious goals and working together collaboratively, across institutions, to meet them. http://strivenetwork.org/strive-approach; http://strivenetwork.org/strive-network. Two other such initiatives are the Minority Student Achievement Network, http://msan.wceruw.org/ and the League of Innovative Schools, http://www.digitalpromise.org/initiatives/league-of-innovative-schools/.
progression since Brown has been from local toward State responsibility. Unlike local school districts, the States have constitutional stature and clout. And the States are in a better position than the federal government to generate and “filter” the various approaches and stories from which a unified national story and commitment can emerge. Though some States will charge ahead and others will lag behind, the States must play the leadership role in creating a new vision.

2. Activist visionaries

The assignment of responsibility for education to the States is a double-edged sword. Cutting one way, it ensures that education governance, design, and implementation stay close to where education happens—in classrooms and schools located throughout the nation and in more centralized community colleges and State universities. Cutting the other, it inhibits the emergence of a collective national consensus on and practical (funding) support for education and evokes resistance when the federal government seeks to move in that direction. This institutional conundrum of our federal structure confines our movement at the current frontiers of democracy: recognition of substantive economic and social rights, increasingly viewed as integral to democratic societies. Of these rights (which also include health, access to work, and the necessities of life), education probably enjoys the broadest and deepest support in the U.S.

The discussion in Part I frames education as one aspect of an emerging value of democracy: the rights necessary to ensure political control and equality. In the U.S., popular control came first historically, and equality followed. The civil and political rights necessary for popular control have enjoyed longstanding support: The First Amendment to the Constitution embodies this history. The economic and social rights to render equality meaningful, in contrast, are now the subject of heated disagreement as we continue to work through the practical implications of having embraced equality as a core democratic value. In this struggle, our Constitution provides few venues for joint federal-State exchange, yet in the area of education such an exchange is essential given the tradition of local control and initiative, the State’s historical and legal role, and the increasing national interest.

One provision that offers promise for such engagement is the Guarantee Clause of Article IV, in which the United States guarantees to each State a Republican Form of Government. A Guarantee Clause

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321 The emphasis in Justice Marshall’s Milliken dissent on State responsibility foreshadowed this trend. See note 79 supra and accompanying text.

322 “The United States shall guarantee to every State in this Union a Republican Form
approach could create legal, constitutional space for the development of a national consensus, a consensus that supports rather than straitjackets actions such as education that must occur on a decentralized basis and for which responsibility is dispersed. This approach offers the possibility of federal participation without federal control.

Historically, understanding of the Guarantee Clause reflected the focus of U.S. constitutional democracy on popular control. Later, the Clause provided the grounding for discussions between States and the federal government over the value of equality in our democracy—what constitutes a “Republican Form of Government.” Before the Civil War and the post-Civil War constitutional amendments, for example, the Clause served as the basis for the assertion that slavery was inconsistent with U.S. democracy. The Guarantee Clause, in fact, provided a constitutional tether for deep national discussion as to the relevance of the democratic value of equality in the U.S. before equality was formally codified as law—and in fact while inequality was still codified. Reflecting this, when the former slave States were readmitted to the Union before the ratification of the Fourteenth and Fifteenth Amendments, “they were readmitted with the express notation that they were now republican in form. At this time, [the Guarantee Clause] was also used to prevent Nebraska from denying the ballot by reason of race or color [as a condition of admission as a State].”

The uneasy and to-this-day unsettled question of the justiciability of Guarantee Clause claims emphasizes its role as a kind of constitutional Rorschach: Is a particular practice, structure, or institution democratic according to our current norms? The commitment of the responsibility for a Republican Form of Government in the States to the United States does not, in my view, let the judiciary off the hook,

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323 See, e.g., Erwin Chemerinsky, Cases Under the Guarantee Clause Should Be Justiciable, 65 Univ. of Colo. L. Rev. 849, 867 (1994) (“The Guarantee Clause is best understood as protecting basic rights of political participation with state governments.”); Deborah Jones Merritt, Republican Governments and Autonomous States: A New Role for the Guarantee Clause, 65 Univ. of Colo. L. Rev. 815, 816 (1994) (“The core meaning of a republican government...is...one in which the people control their rulers.”); Arthur E. Bonfield, The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude, 46 Minn. L. Rev. 513, 528 (1961) (“[L]ate eighteenth century thought...[equated] republican government with that which derived its powers from the will of the people.”).

324 Bonfield, supra note 323, at 530-532, 538-543.
325 Id., at 541.
326 While the Guarantee Clause does not designate the institutions of the United States that are to assume the responsibility specified, it speaks broadly: “the United States.”
fundamental nature of the provision. This is not a responsibility that any part of the U.S. can avoid; it is a responsibility that all parts must assume.

If the Guarantee Clause provides, in a sense, a constitutional touchstone, it offers a useful way to frame and proceed with an essential national conversation about education. First, though public education is a deep-seated value in the U.S., are we ready to make the commitment to public education as an integral component of a Republican Form of Government? Education is necessary to develop human capacities—both individually and relationally. Constructive relationships are the fabric of civic society, the links that constitute civic networks. Without these civic bonds and the conditions that allow them to grow, the formal institutions of democracy will falter. This is the reason IDEA includes these conditions—not just education but others as well—in its democracy assessment. This is why a mandate for public education is included in all 50 state constitutions. All true. But a national vision on education requires explicit acceptance of education as a nonnegotiable part of our democracy as it is constituted today.

Second, the Clause is framed as a protection for the States. Articles I, II, and III of the Constitution enumerate the powers given to the federal government, and these powers are generally exercised at the initiative of the other Sections of Article IV authorize Congress alone to take implementing actions if necessary. Though justiciability is not the primary focus of this article, in my view this language offers no reason to exempt the federal courts from appropriate institutional responsibility under the Clause. See Jacob M. Heller, Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions, 62 STAN. L. REV. 1711, 1750 n. 185 (2010) (citations to those who have concluded Guarantee Clause claims should be justiciable).

327 The IDEA Democracy Assessment includes an entire category of criteria focused on answering the question “Are economic and social rights equally guaranteed for all?” Among these rights, is education: Subquestion 1.4.4 asks: “How extensive and inclusive is the right to education, including education in the rights and responsibilities of citizenship?” EEETHAM ET AL., supra note 36, at 74. See also DEMOCRACY INDEX 2013, supra note 37, at 34 (35. Adult literacy—1 point if over 90%, 0.5 if 70% to 90%, 0 if less than 70%).

328 See note 72 supra and accompanying text.

329 Bonfield, for example, asserts that an early “natural justice” understanding of the Clause envisioned the evolution over time of the meaning of “Republican.” Bonfield, supra note 323, at 527-528. “Since the concept of natural justice tends to expand and contract with the era in which one lives, republican government was therefore to be defined in light of contemporary values, as well as the condition of the federal constitution.” Today, this concept might well extend to public education, id. at 542, 566, or beyond: “Equal access for all to housing, employment, education, transportation and numerous other things, when sufficiently touched with a public interest, must therefore be assured and protected by the state. If it fails to do so, it may be deemed remiss in its obligation to provide republican government.” Id. at 566. See also Mitchell Franklin, Interposition Interposed: I, 21 LAW TRANSITION 1 (1961).
federal institutions. Article IV, in contrast, articulates the duties of the States with respect to each other and, in Section 4., of the United States “to every State in this Union.” Unlike other constitutional provisions, the Guarantee Clause gives States affirmative rights vis-à-vis the U.S. The duty is not a “may” but a “must.” And, while the Guarantee Clause provides a basis for federal action, the federal action it authorizes is reactive rather than initiating. In this particular game, the States make the first move.

The Guarantee Clause thus suggests a way for a national conversation to proceed on the role of education in our democracy, our constitutional order. As an example, assume a State or several States go beyond accepting Common Core Standards to generating minimum standards for support for teachers, students, and school buildings. They could then embed those standards securely in State law as fundamental to a Republican Form of Government and specify the resources needed to meet those standards for all K-12 students. The States would then be in a position to initiate a Guarantee Clause negotiation with Congress and the Department of Education for funding. They would have political solidarity through a common vision. They would have constitutional grounding. They would have the practical “what it will cost” information for a productive negotiation. States could also, following this model, initiate similar negotiations regarding preschool and post-secondary.

The mode of State-federal interaction contemplated here is “bottom-up” versus “top-down.” It is also not about command and control: “Instead…the federal and state governments may have to collaborate as co-

330 There are exceptions. For example, the institutional design of the federal courts constrains them to act only when claims are brought to them; they do not seek out claims themselves.  
331 Article IV, Section 1. ensures Full Faith and Credit among the States, Section 2. guarantees Privileges and Immunities to the citizens of all States and conditions for extradition, and Section 3. regulates the admission of new States. Sections 1. And 3. specifically give implementing authority to Congress. Section 2. does not designate an implementing body. Only Section 4. refers to The United States as the responsible entity.  
332 An exception to this may be the U.S. Supreme Court’s original jurisdiction under Article III.  
333 This view goes a step beyond that of the Guarantee Clause as a “shield” that the States may use to protect themselves from federal intrusion. Here, the Guarantee Clause is viewed as a potential “sword” that the States may use to force the hand of the federal government. Compare Deborah Jones Merritt, Republican Governments, supra note 323, at 833; Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 COLUM. L. REV. 1, 69 (1988) (1988).  
334 See notes 412-419 infra and accompanying text.  
335 See Heller, supra note 326, at 1725.
equals in accomplishing important tasks facing the nation.”

This approach will take time, but building consensus takes time. The signal virtue is that it directly addresses the institutional constraints our federal system places on effectively tackling educational needs. It fits this urgent need into a workable constitutional framework—both process- and substance-wise. And it distributes control over and responsibility for education.

B. Civic Inclusiveness for Students in Diverse Circumstances

1. Local districts as civic innovators

If the States develop a national educational vision and garner the resources necessary to make it real, it will be the more that 13,000 local school districts operating more than 130,000 public schools throughout the nation that undertake the task. With highly diverse student bodies, teacher cohorts, and communities, these districts will shoulder the work of ensuring that all students receive a quality education regardless of their circumstances. At least for the foreseeable future, residential segregation (racial and socioeconomic), geographically-drawn local school districts, and neighborhood schools mean that providing a quality education for all students requires widely disparate strategies.

Local school districts across the nation have already taken up the challenge of providing top-notch education for all students. In doing so, they have looked at their particular mix of challenges and resources, their particular mix of kids, teachers, and community, their particular successes and failures. The result of this widespread decentralized assessment has been a vast array of initiatives designed to tailor schools to kids in different circumstances. What binds these initiatives together is the conviction that schools must adapt so that students in different circumstances can succeed. This conviction represents a radical shift from status quo schools in which school practice remains unchanged as kids flounder.

A commitment to adapting to enable student success calls for high expectations for all students. As well as serving an educational purpose, high expectations send an “our kids” civic message: Public schools are often children’s first encounter with public institutions and civic life.

337 NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS, Table 91. Available at http://nces.ed.gov/programs/digest/d11/tables/dt11_091.asp.
338 STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2013, supra note 283.
339 See, e.g., KIRP, supra note 19, at 17.
This civic message, in turn, reinvigorates innovation and school reform in a virtuous cycle. Such a cycle contrasts to a vicious cycle in which a “those kids” attitude leads to complacency with an inequitable and low-quality status quo for many. In both instances, institutional practices reflect belief and culture, which in turn reinforce institutional practices.\textsuperscript{340}

The issues facing local school districts with respect to educating a range of students are fundamentally different than the issues faced by State universities in the admissions context.\textsuperscript{341} Local districts are not in a position to selectively assemble a diverse student body. They have the students they have. Moreover, the disaggregation of data mandated by NCLB puts particular pressure on improving the performance of groups of students who are not thriving. The task of the locals thus becomes reform that will provide a better education for all kids—but especially for kids of color, low-income kids, and non-native-English-speaking kids.\textsuperscript{342}

A few examples of local school reform efforts are illuminating in several ways. The Arlington Public Schools (APS) in Arlington, Virgina, for example, a system I worked with personally while my children attended school there, chose to address racial achievement gaps—race as a predictor of academic achievement—head-on. As a result of a collaborative effort involving the School Board, the Superintendent, administration and other school system personnel, teachers, and parents,\textsuperscript{343} APS concluded that institutional racism\textsuperscript{344} must be addressed by changing the individual interactions between students and teachers.\textsuperscript{345} To reach into and transform those interactions, APS developed a “cultural competence training” for all instructional personnel\textsuperscript{346} that calls for self-awareness of implicit bias\textsuperscript{347} and

\textsuperscript{340} Cf. A\textsc{cemo}glu & R\textsc{obinson}, supra note 284, at 302-367 (virtuous and vicious cycles on a larger, social/national scale).
\textsuperscript{342} Though not the primary subject of this article, another group for which NCLB required disaggregation of test results is students with disabilities. See Understanding NCLB and What It Means for Students With Disabilities, available at http://nichcy.org/laws/nclb/disabilities.
\textsuperscript{343} G\textsc{aining} on the Gap, supra note 63, at 13-16, 21-32, 94-97, 167-172.
\textsuperscript{344} “Institutional racism encompasses racial disparities that result from institutional structures and operations, although generally not from overt acts of intentional discrimination. Institutional racism is entrenched, intractable, and not easily eradicated, in part because those who perpetuate it are often not even aware that they are doing so and in part because it operates through the cumulative actions of multiple people rather than as a single readily identifiable act of one individual.” \textit{Id.}, at 2.
\textsuperscript{345} \textit{Id.}, at 63-105.
\textsuperscript{346} \textit{Id.}, at 97-165 (describing development of training through initial stages to extension throughout system).
privilege. The goal is to raise expectations and change pedagogy by teachers who are mostly White for a student body that is majority students of color. This training was internally developed and is led by instructional personnel who have been trained and then trained to train others. This is a sustained effort, undertaken and supported over more than a decade.

In Union City, New Jersey, cutting-edge bilingual education takes low-income youngsters in elementary school whose native language is Spanish and seamlessly works from mastery of and literacy in that language to mastery of and literacy in English. “By the time they are four years old, a classic study has shown, children from poor families have heard thirty—thirty million!—fewer words than youngsters growing up in a professional household…This language is even greater…when…English isn’t the youngster’s native language.” Union City’s crusade to overcome these challenges through its state-of-the-art bilingual education program communicates the value of students’ native language as well as expectations that they will learn and excel in English. Again, this homegrown effort is the result of hard and slow-but-steady work.

In the Omaha, Nebraska, area, the Learning Community of Douglas and Sarpy Counties, created in 2007 by the State unicameral legislature, focuses on socioeconomic status. The Learning Community ties together eleven separate urban and suburban school districts with the goal of developing initiatives based on the recognition that the region’s future depends on providing equal educational opportunity for children throughout the metropolitan area—especially children from families in poverty. Only a few years after its formation, the Learning Community had opened centers and provided support in high-poverty parts of the region and

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348 GAINING ON THE GAP, supra note 63, at 69-71, 87-94, 114, 119, 137, 143.
349 Id., at 65-68.
350 Id., at 128-140.
351 Id., at 174-176.
352 Id., at 155-156.
353 Id., at 179-180.
354 KIRP, supra note 19, at 39-40, 57, 80-81. See also notes 396-409 infra and accompanying text.
355 KIRP, supra note 19, at 76.
357 http://www.learningcommunityds.org/about/school-districts/.
358 http://www.learningcommunityds.org/about/mission/.
initiated an open-enrollment choice program with significant participation, including proportional participation by low-income families. Outside evaluation has confirmed the academic value of the Learning Community programs.

The high drama of the school reform efforts undertaken in New York City under Chancellor Joel Klein and in Washington, D.C., under Superintendent Michelle Rhee has tended to obscure slower, steadier district reform efforts such as those in Arlington, Union City, Omaha, and elsewhere. Yet it is those less confrontational, grown-from-within, more collaborative efforts that will ultimately have more staying power. For educational initiatives to truly “take” they must be homegrown. Districts can certainly learn from one another, but buy-in ultimately takes root through the process of identifying issues and opportunities and developing responses internally. Moreover, real change and lasting systemic reform take time. Sustained change takes space and support for reform efforts to take root and grow organically.

2. Civic innovation

_Brown_ did not distinguish between State and local action. It did not need to. The local districts whose actions were challenged in _Brown_ were implementing nondiscretionary State segregation laws. Even Topeka, which had chosen segregation under a “local-option” statute, was acting with the express authority of the State. As the involvement of the State became more attenuated, however, _Brown_’s applicability also became less clear. In _Keyes_, local action was not clearly the result of discriminatory law; in _Rodriguez_ and _Milliken_, State structural decisions with local ramifications were too indirect. As overt State discrimination has been eradicated or gone underground, the legal status of local action and of State action that affects locals and their residents becomes more important.

The civic, innovative role of local districts calls for encouraging “virtuous cycle” experimentation. At the same time, oversight is necessary to disrupt destructive “vicious cycle” patterns. Finally, State actions such as those in _Rodriguez_ and _Milliken_, which have clear local consequences but operate indirectly should not remain unaddressed. A recrafting of Equal Protection jurisprudence as it applies to State-local roles could address all of

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359 http://www.learningcommunityds.org/about/what-learning-community/history/.
360 _Id._
361 _KIRP_, supra note 19, at 208-209; _GAINING ON THE GAP_, _supra_ note 63, at 174-176.
362 _KIRP_, supra note 19, at 196-217.
363 _SAHLBERG_, _supra_ note 22, at 3. For additional examples of local district-wide innovations, see _KIRP_, _supra_ note 19, at 196-217 (Montgomery Co, MD, public schools; Salinas, CA, public schools; Aldine, TX, public schools).
these issues. The key is to refocus on States as the primary actors to which the Equal Protection Clause is directed, an approach that is consistent with the State’s leadership role in education. Three considerations inform this refocusing.

First, the law does not invariably treat local jurisdictions—even general purpose jurisdictions—as “States.” Bodies of law that distinguish the two include voting rights;\(^\text{364}\) Eleventh Amendment doctrine;\(^\text{365}\) antitrust law;\(^\text{366}\) and Section 1983 litigation.\(^\text{367}\) In all of these areas, the Court has determined that locals should not be treated as States because of the language and/or purpose of the law applied. More generally, locals are not just State instrumentalities; they are responsive to their constituents as well as operating within State-defined parameters.\(^\text{368}\)

Equal Protection jurisprudence can also recognize that local schools and school districts are not States.\(^\text{369}\) Though there were good reasons for extending State action to locals in the course of eradicating segregation, there are now good reasons to allow locals leeway in grappling with today’s inequalities. Further, much local governance is interpersonal and management-oriented rather than having the formal structure of State decision-making. As such, many local actions are not in the nature of the widely applicable and relatively permanent “laws” of which the Equal Protection Clause speaks. Instead, these actions are often highly context-specific and comparatively short in duration. These characteristics point

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368 Morris, supra note 78, at 32-34.

toward more deferential Equal Protection review for local school districts than for States. More deferential review allows more innovation. With such an approach, initiatives—including race-based initiatives—that might be unconstitutional if undertaken by States could be permissible at the local level.\footnote{See, e.g., Parents Involved in Community Schools, \textit{supra} note 17 and accompanying text; Strand, \textit{Law as Story}, \textit{supra} note 280, at 636-647, 646 (“And so perhaps one function of these local institutions should be to struggle with the question of when to use race...perhaps it makes sense to charge them with the task of engaging their constituents on this issue—and certainly to allow them to continue where they have already undertaken to do so.”).}

Second, the States are the pivot point in the constitutional framework not only for Equal Protection but also for education. States have delegated the bulk of that responsibility to local school districts or ratified local bottom-up efforts in education. But States do not, by delegating or ratifying, free themselves of their own responsibility. States must retain a supervisory obligation to ensure that the approach chosen by a local district is designed to address the circumstances of all its students—that the approach is civic in the sense of inclusively valuing them. In this view, Equal Protection means that States are accountable for allowing districts to proceed undisturbed—and responsible for intervening where local districts are not making sufficient strides in the direction of equality.

This Equal Protection analysis acknowledges the need for local innovation and the wide range of approaches that need must allow. But it keeps States—the primary entities to which the Equal Protection Clause is directed—on the hook. The States must ensure that the zone of innovation is restricted to approaches that focus on supporting quality education for students in all circumstances.

The third consideration builds on this recognition of primary State responsibility, and it circles back to \textit{Rodriguez}. Forty years ago, \textit{Rodriguez} essentially held equality and education to be outweighed by popular control, with a federal twist. That balance no longer holds: Equality is more internalized as a national value, and the values of equality in education and in adequate educational funding in particular have made steady progress. Longstanding knowledge of the devastating effects of poverty\footnote{RAVITCH, \textit{supra} note 160, at 229.} is leveraged by nascent awareness of the destructive effects of economic inequality.\footnote{STIGLITZ, \textit{supra} note 137, at 1-27, 265-268.}

Most important, traditional local authority over schools is far more cabined by State regulation today. This tempering of the localism of \textit{Rodriguez} and \textit{Milliken} offers a way past the stark choice perceived by the

\footnote{See, e.g., Parents Involved in Community Schools, \textit{supra} note 17 and accompanying text; Strand, \textit{Law as Story}, \textit{supra} note 280, at 636-647, 646 (“And so perhaps one function of these local institutions should be to struggle with the question of when to use race...perhaps it makes sense to charge them with the task of engaging their constituents on this issue—and certainly to allow them to continue where they have already undertaken to do so.”).}
Rodriguez Court of either taking over the business of State school funding or staying out entirely. The key shift is a rejection of the idea that States can sometimes choose to be responsible for education (when they regulate local school districts) and sometimes not (when they have delegated the bulk of performance of that function to local districts). States cannot have their constitutional cake and eat it too: They must not be allowed to circumvent Equal Protection requirements by handing off important functions to their locals. And attempting to distinguish between permissibly indirect State-caused inequalities such as those in Rodriguez and impermissibly direct State-caused inequalities such as those in Papasan is an “angels dancing on the head of a pin” analysis that seeks to create a bright line where there is none.  

A straightforward legal approach to educational Equal Protection claims involving local district action follows from these three considerations. If students in a district or a large body of students in a district are shown to not be succeeding educationally, a presumption arises that the State is not performing its educational function. This approach makes clear that education is a State responsibility and disallows blaming children rather than their circumstances for lack of educational success. Once the presumption arises, the State must admit or counter it. Unless the State successfully counters the presumption, its arrangements violate Equal Protection and the State is responsible for changing its educational practices to move toward parity. This approach allows for a zone of civic innovation by locals. It holds States accountable for ensuring that local innovation is affirmatively serving an expressly articulated State function. And it brings Equal Protection review to the students of each State in a way that responds to contemporary legal and cultural norms.

Where do race and socioeconomics fit into this approach? Within the zone of civic innovation, local school districts are generally free to experiment with race-, socioeconomic-, language-, or diversity-based approaches to achieving educational success. Equal Protection of such approaches is deferential given the non-State status of the locals and the evolving nature of race. Where gaps in educational outcomes between districts or within districts are demonstrated, the State’s supervisory responsibility over education calls it to account vis-à-vis local district actions. To resonate with contemporary norms, this review must take into account old and new constructs of race and ethnicity, the rising salience of socioeconomics, and the State’s commitment to public education.

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373 For an example of a herculean attempt at such an analysis, see Robinson v. Kansas, 117 F. Supp. 2d 1124, 1146-1150 (D. Kansas 2000).
374 Strand, Civic Underpinnings of Legal Change, supra note 280.
C. Trust in Public Education

1. Trust for public schools and teachers

Over the past couple of decades, U.S. education reformers have highlighted negatives and emphasized the need for alternatives to failing public schools and public school teachers. Vouchers and charter schools have received massive political and philanthropic attention and support. Teach for America (TFA) attracts the best and brightest to teach in our most challenged schools—for a couple of years after college. Unions and associations are castigated as interested only in protecting lazy, incompetent teachers.

Journalist Steven Brill, in his sweeping account of the education reform movement, highlights the dedication of charter school founders, principals, and teachers. He traces the trajectory of TFA from an undergraduate thesis at Princeton to a more than $200 million enterprise with nine thousand members by 2010. He describes the founding of the KIPP (Knowledge is Power Program) charter schools and their growth as a franchise. He dissects the intricacies of educational reform funding and politics. Brill finds much to admire and little to criticize in these efforts and those who have led them. Concurrently, his portrait of American Federation of Teachers leader Randi Weingarten pulls no punches, and his detailing of union processes emphasizes protection for undeserving teachers.

The “education reform” Brill portrays is inspiring in its embrace of the conviction that poor, inner-city, minority kids should not be written off, that they can learn, and that true educational reform must include them. But the working pace of the charter school principals and TFA teachers Brill describes is not only demanding; it is unsustainable. Disconnects between reformers and the communities they seek to serve can lead to breakdowns in reform efforts. And disrespect for teachers’ unions poisons

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375 Ravitch, supra note 160, at 195-222.
376 Id.
377 See, e.g., id. at 172-173 (Michelle Rhee on teachers and teachers’ union).
378 See generally Brill, supra note 170 (accounts of Jessica Reid, Sarah Usdin, Michael Johnston, Dave Levin).
379 Id., at 51-52 & generally.
380 Id., at 2-76 & generally.
381 Id., at 1-9 (Race To The Top).
382 See, e.g., id., at 186-187, 199-200.
383 See, e.g., id., at 27-29.
384 Id., at 26 (“the epiphany”).
385 See, e.g., id., at 424 (Jessica Reid).
collaboration between districts and those who must do reform work. Most compelling—and surprising—about Brill’s account is his conclusion: Though the education reform efforts he describes are innovative, inspiring, and illuminating—they are not game-changing. Brill concludes,

[T]here are about 50 million American public school students in 95,000 K-12 schools. If just half of them need the kind of intensive care offered by the good charters because they lack the supplemental support that more affluent families can provide, that would require overhauling schoolrooms serving more than twenty-five times as many children as those charters serve, in 47,500 or more schools. That cannot be done charter by charter; it takes the infrastructure of the public school systems.386

The “education reform” Brill describes in the first 400 pages of his book is not systemic.387

Just as dramatically, despite his earlier criticisms of teachers’ unions and their leaders, Brill concludes that working with the unions and associations that represent the teachers who actually teach the bulk of the nation’s students is the path to reform: “[U]nions…have to be enlisted in th[e] fight because unions are the organizational link to enable school improvement to expand beyond the ability of the extraordinary people to work extraordinary hours.”388 Why? Because teachers teach; classrooms are where learning occurs; schools are where the work of education is done. If we want education reform, that reform needs to occur in schools and classrooms across the nation, and reaching public school teachers is the way to make it happen.389

In schools and classrooms, conclude sociologists Anthony Bryk and Barbara Schneider, “a key resource for reform” is “relational trust”—“teachers with students, teachers with other teachers, teachers with parents, and all groups with the school principal.”390 Relational trust is grounded in

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386 Id., at 427 (emphasis added). See also Kirp, supra note 19, at 5.
387 See Kirp, supra note 19, at 74.
388 Brill, supra note 170, at 425.
389 Brill acknowledges, for example, that systemic reform “means creating working lives and career paths for teachers that will motivate a good portion of them to stay for more than a few years.” Id., at 427. See also Ravitch, supra note 160, at 176.
“social respect,”391 “personal regard,”392 “competence in core role responsibilities,”393 and “personal integrity.”394 Most important, “[a] school cannot achieve relational trust simply through some workshop, retreat, or form of sensitivity training...schools build relational trust in day-to-day social exchanges.”395

Education observer David Kirp spent an entire year examining the Union City, New Jersey, schools in a quest to discover why their predominantly low-income, immigrant, non-native-English-speaking kids were bucking the trend of low achievement. Union City offers no vouchers, includes no charter schools. Organizationally, it is a traditional school system. Yet Union City has risen to the occasion to meet the needs of its students using the resources of its teachers, administrators, and community.396 Underlying Union City’s success, Kirp found consistent, sustained, system-wide efforts grounded in expectations of excellence, relationships, and trust.397

In Union City, the elements of trust-building Bryk and Schneider identify permeate the system. Many of the teachers and administrators were in their students’ shoes a generation ago398 and have faith in the potential of those students. High expectations in the form of a challenging curriculum, pedagogy designed to maximize the learning of bilingual students, and an emphasis on language as the basis for other learning are in place.399 A “Parents College” explicitly reaches out to parents,400 and more than nine in ten eligible families entrust their children to Union City’s preschools.401 Support for teachers exists in the form of master teachers in elementary school and coaches in the high school.402 Elementary school teachers also have weekly planning time.403

Union City has, in many ways, been lucky in both institutional and financial support. The district received a pre-NCLB wakeup call in 1989 when the State told it that achievement was so low there would be a State

391 Bryk & Schneider, supra note 390.
392 Id.
393 Id.
394 Id.
395 Id.
396 KIRP, supra note 19, at 7-9, 14-16.
397 Id., at 45, 128-129.
398 Id., at 17.
399 Id., at 9.
400 Id., at 109.
401 Id., at 102.
402 Id., at 54-57, 148-151.
403 Id., at 65.
takeover if things didn’t turn around;\textsuperscript{404} this bespeaks a State that is alert and active in supervising its local school districts. New Jersey has the third-highest per capita spending on public schools in the nation,\textsuperscript{405} and its standardized tests are among the best.\textsuperscript{406} Under a series of post-\textit{Rodriguez} state constitutional judicial orders, the State pays for high-quality preschool for all low-income three- and four-year-olds.\textsuperscript{407} The State has also paid for smaller class sizes, teacher training, and computers in the schools.\textsuperscript{408} And thanks to savvy Union City politicos, the State paid for a new high school building.\textsuperscript{409} All of these funds were directed as close to students as possible.

The story of Union City embodies the third part of the strategy for moving forward post-\textit{Brown}, the strategy that Brill identifies: Doing the day-to-day work in schools and classrooms that shifts the needle. Nationwide, this can only be accomplished by public school teachers working in partnership with other teachers and with administrators, parents, and their communities.\textsuperscript{410} Given the importance of trust in school reform, instead of demanding that teachers and schools perform despite given constraints, we must start asking what teachers and schools need to ensure success for their students.

\textbf{2. Support for building relational trust}

In observing a school, Kirp asks whether it has met “the Golden Rule Test—you would send a child you love to this school.”\textsuperscript{411} Trust on the individual level is implicit in this test: You would only choose to send a child you love to a school you trust. But trust can, and must, be demonstrated socially as well. Social trust in public schools and teachers can be manifested in three distinct ways. All of these manifestations require money, in particular money that is spent close to teachers and students.

First and foremost, we demonstrate social trust when teachers have support so that they have time to plan, time to assess, time to train and retrain, opportunities for peer review, opportunities to share innovations and successful practices. As in Kirp’s description of Union City, we must “bake[ ] into the system the kind of support that elsewhere might occur only through happenstance.”\textsuperscript{412} Most importantly, the message that accompanies

\begin{thebibliography}{10}
\bibitem{404} Id., at 9.
\bibitem{405} Id., at 85.
\bibitem{406} Id., at 176.
\bibitem{407} Id., at 84-85.
\bibitem{408} Id., at 85-86.
\bibitem{409} Id., at 135.
\bibitem{410} \textit{Cf.} id., at 54-57 (teacher collaboration).
\bibitem{411} Id., at 17.
\bibitem{412} Id., at 154; \textit{see also} id., at 63 (“The teacher has traditionally been treated as if she

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data-driven analysis of student strengths and weaknesses must be not punitive but supportive and strategic. At a system level, teachers need to be engaged in shared governance—not an easy task but a necessary one that “requires an arduous process of building mutual understanding and, eventually, trust.” And, perhaps most fundamentally, conditions of work must change so that the professional demands on teachers are sustainable and pay recognizes the value of their work. As Brill concludes, this “means creating working lives and career paths for teachers that will motivate a good portion of them to stay for more than a few years…and [paying them] in some proportion to their importance.”

In my own experience, public school teachers enter the profession because they want to help kids. Tangible manifestations of trust remind them of that desire.

Second, we demonstrate social trust when students are supported in ways that support the work of public schools and teachers. The lack of such support makes a mockery of professions of equal educational opportunity. Quality preschool for all children and social supports for the more than one-fifth of U.S. kids below the poverty line are an integral part of demonstrating trust. So too is ensuring that realistic opportunities for post-secondary education exist so that students have a future to strive for. Funding and support for college are essential not only for low-income students but also for students from middle-class families who currently incur high levels of student debt. While student debt does represent a private investment by young adults in their individual futures, direct payment of more student expenses would evince social investment in rising generations for our collective future.

Third, we demonstrate social trust when all schools have high-quality infrastructure—buildings that are up-to-date, maintained, and that communicate a commitment to education and to the teachers and students

—a modern-day Queen Victoria who reigns supreme in her classroom and rarely leaves her monarchy. No one questioned what these teachers were doing, but no one came to their aid either, so they had to sort out the whats and hows of teaching on their own. Engaging with the teacher down the hall, pulling apart a particular lesson, or sharing ideas about how to handle a certain kind of student makes them better at their job. A wise district like Union City doesn’t leave these exchanges to happenstance—it carves out time for teachers to work together.” (emphasis added).

Id., at 92. See also id., at 58, 149.

Id., at 206-207; 207 (“It isn’t the union that makes or breaks a district’s efforts to change outcomes for poor and minority students—it’s the district’s commitment to turning the personnel they have into the professionals they need.”).

BRILL, supra note 170, at 427, 433.

The Finland Phenomenon, supra note 235.

For a proposal to address this problem directly, see Michael A. Rebell, The Right to Comprehensive Educational Opportunity, 47 HARV. C.R.-C.L. L. REV. 47 (2012).

See, e.g., KIRP, supra note 19, at 46.
who spend their days in those buildings. Inequality undermines the trust that is essential to the functioning of our democratic system. Inequality in schools and of schools corrodes trust: The tangible message is that some kids are valued and some are not.

As with the Clean Water Act described above, though local school districts and States must contribute so that they have “skin in the game,” federal funding is essential, especially for preschool and post-secondary. Local ad valorem property taxes and even State-level income taxes are not a feasible way to fund schools for national excellence, and only federal funding can address the substantial interstate disparities in student opportunities, teacher support, and physical facilities. The Clean Water Act, however, resulted from an exercise of Article I Commerce Clause power over “navigable waters of the U.S.” Federal funding, as is typical, flowed with federal direction and federal control. The institutional conundrum that stymies us now in education is the assignment of authority to the States of a function that has undisputable national importance. A renegotiation of traditional State-federal roles such as that proposed here is necessary to move beyond the predictable stalemate that inhibits federal funding because of State control, which inhibits the demonstration of social trust in public schools and teachers.

Money not only pays for education, spending money on education communicates trust. Federal funding says to States, local districts, and public school teachers, “We trust you.” Money spent on teachers, kids, and public schools also aligns with a vision of our children and their future as one of our “deeper core values and our highest commitments.” With this alignment, our national budget becomes an expression of our national soul. It also is an indispensable aspect of bringing trust to scale.

Brown embodied federal distrust of the States and locals in the area of education. The reasons for that distrust were compelling, inarguable. Nevertheless, education reform today depends on reversing that vicious cycle of self-reinforcing distrust and construction of a virtuous cycle of self-reinforcing trust. As the States, locals, and schools and teachers all have a part to play, so too does the federal government.

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421 Id., at 224.

422 See The Finland Phenomenon, supra note 235.

423 See also Ravitch, supra note 160, at 101-102 (identifying role for federal government in data collection and analysis).
V. Conclusion

Brown v. Board of Education brought the democratic value of equality to U.S. democracy, which had previously embodied primarily the value of popular control. Brown also opened the door to the idea of a substantive right to education. In the years since Brown, equality and popular control have negotiated an uneasy equilibrium, and the door to a substantive educational right, while not closed, remains only slightly ajar.

Developments since Brown have changed the educational landscape. Race has declined in social salience; economic inequality has risen dramatically. Legislative and other developments have extended the federalization of Brown and sown distrust of those who do the day-to-day work of education: public schools and the teachers within them. Because of demographic and economic shifts, quality preschool through post-secondary is increasingly a 21st-century necessity, and Common Core Standards represent a significant step toward defining quality K-12 education nationwide.

The Finnish school system—ranked #1 internationally—offers insights for a post-Brown world. A national educational vision of civic innovation that embraces all students and trusts public schools and teachers points to a three-pronged strategy for moving forward. States take the initiative in defining the vision; local districts act as civic innovators to fulfill that vision in diverse circumstances; public schools and teachers undertake the day-to-day work of building the relational trust that enables real reform. The federal government models trust through funding and other support.

The future of our nation lies in the hands of our children. Though we do not live in a post-racial era, we do live in a very different world than the world Brown confronted. For this transformed situation, we need a new vision—and new legal paradigms to make realization of that vision possible.