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SCHOOL FUNDING Inequality in District Funding and the Disparate Impact on Urban and Migrant School Children

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SCHOOL FUNDING

Disparity and Inequality in District Funding

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I. Introduction

Today schools are more segregated than ever before in our recent history, and it is largely due to problems with the disparity of funding between districts. While lower funded schools attract migrant low income and inner city urban families due to decreased property values, the demographic of students becomes increasingly homogenous, and more affluent families move to better communities with better schools and more resources. While this is not the intended outcome, it is none the less the de-facto outcome. So why is this de-facto segregation caused by the school funding disparity not being challenged? It is, but progress towards adequacy is low and courts are not equipped to implement meaningful change. This paper will examine why our efforts to remedy the problem have failed, and what we can do about it moving forward. We will examine the problem, and examine parallel problems and how they are addressed under the law in order to come up with a model for the future. Every child has the right to an adequate and proper education, and it is worth thinking about the way we can fix this system to at least provide the very basic necessities for every child in school to meet the goals of the educational system. I will discuss the possible alternatives to the traditional constitutional challenges, including looking at possible remedies through federal statutory law which could be implemented under the spending or commerce clauses.

II. Underfunding is Leading to Continued Segregation and Inadequately Prepared Citizens.

Schools are more segregated today than at any time within the last 40 years, and the problem is only getting worse. While the population of Latino and black children in schools has increased dramatically since the 1960's, this population of students is increasingly segregated into their own districts, effectively creating further economic and racial segregation in our

education system.[1]There is a strong correlation between educational segregation and residential segregation. [2]These "low schools," as I will call them, meaning low funded and underachieving, contribute to a host of other inequality problems. Experienced and well-credentialed teachers will not choose to teach in these low paying districts, and resources will move to the districts who receive more funds as a result.

To achieve a more equal system of education the low schools need to have resources targeted to them, otherwise opportunity disparity will continue to increase. Without an adequate education, students in low schools cannot become productive members of society. Schools, which are primarily funded based on property values,[3] will continue to be low, and the disparity will grow as inadequately educated people will remain in the same geographic areas with low property values, and underfunded schools.

In *Brown*, the court looked to compulsory school attendance laws and the substantial financial investment in our nation's education system as support to find that education is among the most important functions of state and local governments. The court commented that education is the foundation of good citizenship and is vital in the formation of cultural values. Without a proper education, children will be inadequate to participate in professional life. The court stated that, "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[4] While the court failed to recognize education as being a fundamental right, they recognized its unparalleled importance as a

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[1] Gary Orfield & Chungmei Lee, *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies*, 4 (2007). (Noting that students in intensely segregated (90-100%) minority schools are more than four times as likely to be in predominantly poorschools).

[2]*Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 8 (1971) (noting that racially segregated schools led to segregated housing); *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 437-38 (1668); *Milliken v. Bradley*, 433 U.S. 267 (1977).

[3]*School Dist. of City of Monessen v. Farnham & Pfile Co.*, 878 A.2d 142 (2005).

[4]*Brown v. Board of Educ*ation, 347 U.S. 483 (1954).

government function. Similar to the assertion made in *Brown*, Kennedy wrote, "Our [n]ation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting us in commitment to the freedom of all,"[5] in one of the most commonly cited cases on educational funding disparity. Schools are the institutions that teach our children democratic ideals and schools are what enable our children to be successful and productive citizens, while also teaching them moral and community responsibility.[6]The government plays a fundamental and important role in ensuring that every child receives an education that meets these standards, and states have the primary power of regulating schools.

III. Shared Responsibility for the School Funding System Lacks Accountability.

States inspect, supervise, implement policies regarding mandatory attendance, and examine teachers and students.[7] State regulations must not violate the state constitution, or federal mandates.[8] The community has a very important interest in promoting involvement and support through their schools, and it is their responsibility to be responsive to the needs of schools within their community. While states retain primary responsibility for schools, through local taxing and school districts, the federal government has taken on an increasing role in funding and policy making.[9]Congress has the power "to lay and collect taxes, duties, imports and

[5]*Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 782 (2007).

[6]*Board of Education v. Pico*, 457 U.S. 853, 909 (1982) (Rehnquist, J., dissenting) (the government, through its role in education, influences impressionable children in the development of their social values and knowledge); *Plyer v. Doe*, 457 U.S. 202, 221 (1982) (noting "the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child."). See, e.g., *Ambach v. Norwich*, 441 U.S. 68, 76-78 (1979); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 29-30 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972); *Brown v. Bd. Of Educ.*, 347 U.S. at 493.

[7]*Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[8] *U.S. Const. Ammend. 10*, (the powers not specifically delegated to the federal government are reserved for the states); See also *Epperson v. State of Arkansas*, 393 U.S. 97, 104 (1968) (By and large, public education in our nation is committed to control or the state and local authorities).

[9] Philip K. Porter & Michael L. Davis, *The Value of Private Property in Education: Innovation, Production, and Employment*, 14 Harv. J.L. & Pub. Pol'y 397, 413-16 (1991).

excises, to pay the debts and provide for the common defense and general welfare of the United States." [10]However, local taxes make up the predominant portion of school funds.

Under the tenth amendment of the federal constitution, the powers that are not specifically delegated are reserved for the states. State constitutions lay out the duties of the state with regards to what is a proper and adequate education. States are responsible for funding their educational systems, and standards for doing so vary among the states. The question of the adequacy of education is interpreted in different ways under state law. Someinterpret adequate education to mean education shall be adequate as an institution, others interpret it as meaning that the state has a right to provide an adequate education for every individual child within the state.[11] State constitutions may also hold education to a higher standard than adequate, and many do. State constitutions do not mandate specific requirements for minimum funding, this is a function left to state legislatures in creating a budget. Court decisions may mandate additional funds to achieve adequate education within a state when a challenge has been upheld by a court.[12]Another major problem for the courts has been enforcing the right once a violation has been found. [13]

IV. Recent Trends Toward Using Outcomes Based Data to Determine Funding Threatens to Exacerbate Inequalities Between Districts.

Beginning in the 1970s, state school financing systems began to be challenged on equal

[10]*U.S. Const. Art. 1, §8*

[11] Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Educaiton in Basic Skills*, 63 Tex. L. Rev. 777, 814 n.138 (1985) (citing provisions).

[12]*San Antonio Indep. Sch. Dist.*, 441 U.S. at 43 (Justice Powel notes the difficulty of specifying the goals of a system of public education); See generally Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. Rev. 399, 412-14 (1999) (describing the emergence of definitions of an adequate education in school finance litigation).

[13] See generally Frank B. Cross, *The Error of Possitive Rights*, 48 UCLA L. Rev. 857 (2001) (arguing that differences between positive and negative rights make positive rights difficult to enforce and that empirical evidence shows no improvement in the plight of the poor in those states recognizing positive rights).

protection basis', with limited results.[14] The equity-based litigation has been criticized as having inherent limits, because it examines only the relative levels of financing between districts, and because it is unlikely that districts will work together to relieve disparity. [15]Because of the limited success of these challenges, relatively poor districts began to be challenged on constitutional grounds, recognizing a constitutionally protected right to education.[16] Now, the trend is becoming more focused on educational outputs, especially with the passing of the*No Child Left Behind Act,* which relies on standardized tests to measure the quality of output in the system. [17]This outcomes based assessment process assumes that resource reallocation will help flatten out statistically significant differences in student educational outcomes such as grades, test scores, and attainment.

No Child Left Behind essentially requires states (as a condition of federal funding for education) to establish standards for educational outcomes, test students for the attainment of those outcomes, and achieve test scores that meet the standards they have adopted.[18] Given this, the reality remains that some children will be more expensive to educate than others. This is true of children in low schools, who currently receive less funding and who are also statistically performing poorly on standardized assessments due to their highly divergent backgrounds

[14]*Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971); see also *Robinson v. Cahill*, 287 A.2d 187 (N.J. 1972) (challenging finance system on equal protection grounds).

[15] See *Palmer v. Thompson*, 403 U.S. 217, 227 (1971) (holding that closing a public swimming pool was a permissible response to a lower court judgment invalidating enforced segregation of the pool).

[16] Perry A. Zirkel & Jacqueline A. Kearns-Barber, *A Tabular Overview of the School Finance Litigation*, 197 Ed. L. Rep. 21 (2005) (noting that the outcomes of school finance litigation in each state vary greatly).

[17]*No Child Left Behind Act of 2001*, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in scattered sections of 20 U.S.C.); See, e.g., James S. Liebman & Charles F. Sabel, *TheFederalNo Child Left Behind Act and the Post-Civil Rights Desegregation Era*, 81 N.C. L. Rev. 1703, 1725-30 (2003).

[18]*No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425.*

andlanguage barriers. [19] This leaves deficiencies in the quality of education that these children will receive under *No Child Left Behind* and possibly other outputs based assessment models for determining funding.

Outcomes based assessment remains very contested, however, and some people support the act on the premise that it is unfair to reward those schools who are low performing.[20] Standardized tests fall short of measuring the real knowledge level of children and encourage teachers to "teach to the test" in order to attain high test scores.[21]To use test scores as a measure to determine funding is fundamentally unfair. It is not contested that using such assessments has its useful place in the education process, however by holding the results of a standardized test as the ultimate determining factor for measuring achievement and quality of education only leads to increase the disparity in funding in the low schools, who stand to lose funding if their standardized test scores do not meet the goals of *No Child Left Behind.*[22] Another possibly more useful application of this outcomes based data, would be to focus on outcomes as evidence of inequitable or inadequate funding. [23] It is highly counterproductive to punish the schools who need the most help, and encourage teachers to engage in practices like "teaching to the test" while simultaneously withholding essential funding from these already disadvantaged children.

The *Elementary and Secondary Education Act* (ESEA), which was established to give

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[19] See, e.g., *Montoy v. Kansas*, No. 99-C-1738, 2004 WL 1094555, at *12 (Kan. 2004) (nothing that the most expensive students to educate are those at poor or at risk schools, english as a second language learners, and racial minorities).

[20] See generally Frederick M. Hess & Michael J. Petrilli, *No Child Left Behind: Primer* 4-6, 23-25, 124-26 (2006) (summarizing various criticisms).

[21] Derrick Darby, *Slaying the Inequality Villian in School Finance: Is the Right to Education the Silver Bullet?* 20 Kan. J.L. & Pub. Pol'y 351, 380 (2001).

[22] See, e.g., Joshua Williams, Note, *The "War on Education": The Negative Impact of the No Child Left Behind Act on Inner-City Public Schools, Students, and Teachers*, 11 J. Gender Race & Just. 573, 586-91 (2008).

[23] See, e.g., *DeRolph v. State*, 677 N.E.2d 733, 745 (Ohio 1997) (the court noted low performance on proficiency evaluations to be evidence supporting the finding that schools lacked sufficient funds with which to educate their students).

special attentionto low schools which are primarily dominated by racial minorities, made education a priority of the federal government. Studies under ESEA have revealed that analysis of per pupil expenditures are not the best way to predict student achievement.[24] Other studies have shown that the most telling predictors are students' family background and the parents' level of education.[25]Facilitating racial inclusion in schools is thus essential to achieving adequate education levels across the board.

Choice legislation, such as the *Magnet Schools Assistance Program*, has proven to be most effective when "coupled with sufficient funding, an understanding of current racial demographics, and an acknowledgement of the complexities of persistent racial segregation and disparities in education."[26] Racial inclusion cannot be achieved without adequate funding in low schools, making funding a central issue for these particular schools. Educational and social science literature suggests that adequacy of education needs to be addressed at the societal level. "Educational outcomes are dramatically affected by exogenous factors, such as a student's family background and neighborhood environment, […] Health and cognitive effects of poverty, teacher perceptions of student ability, teacher expectations, [and] student expectations of discrimination in the labor market a[re] factors shaping educational outcomes. [T]hen it is also clear that merely recognizing a right to education will not suffice."[27] Addressing problems of societal discrimination and poverty are central to attacking the issues surrounding the adequacy of education.

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[24]*Elementary and Secondary Education Act*, Pub. L. 89-10, 79 Stat. 27 (1965) (noting that inequalities in educational inputs are not the best predictors of unequal student achievement).

[25] James S. Coleman et al., *Equality of Educational Opportunity* 22, 22 (National Center for Education Statistics 1966). (concluding that "socioeconomic factors bear a strong relation to academic achievement").

[26] Lia Epperson, *Equality Dissonance: Jurisprudential Limitations and Legislative Opportunities*,7 Stan. J. Civ. Rts. & Civ. Liberties 213, 236 (2011).

[27] Derrick Darby, *Slaying the Inequality Villian in School Finance: Is the Right to Education the Silver Bullet?,* 20 Kan. J.L. & Pub. Pol'y 351, 370-76 (2001).

V. Challenging Funding as De Facto Discriminatory is Likely to be More Effective Where an Negative Impact on Self-Identity can be Proven.

The standard of review for cases challenging school funding systems is whether the policies at issue are rational to serve the government's legitimate interest. That narrow tailoring analysis requires the Court to understand the scope and availability of less restrictive alternatives.[28] Cases have focused on the correlation between funding and educational achievement generally, and whether the funding process enables schools to meet state standards.[29] Admittedly, adequate funding is not the only factor relevant for a district to meet state educational standards, but it is an important one. Without basic necessities for students and classrooms, it is impossible for students to learn. What these basic necessities are, in fact, is what is at issue in many challenges.

Courts have recognized two kinds of racial discrimination. The first category of discrimination applies to policies that are discriminatory on their face, for example in *Struader v. West Virginia*, the policy at issue excluded black men from serving on jurys. This policy was deemed 'facially discriminatory' because the fourteenth amendment of the constitution guaranties a right to have a jury of your peers, and it was directly contrary to that right.[30] In addition to facial discrimination, the court also recognizes de facto discrimination. This is discrimination in effect, by raising equal protection issues. This was the persuasive argument in *Brown*, where it was successfully shown that the students were developing a negative self-identity through the separate but equal policy. Separate but equal was not an area in which courts

[28]*Parents Involved*, 551 U.S. at 784 (Kennedy, J., concurring).

[29] Derrick Darby, *Slaying the Inequality Villian in School Finance,* 20 Kan. J.L. & Pub. Pol'y at 353 (noting the disparities and inadequacies in education funding will not necessarily improve educational outcomes).

[30]*Struader v West Virginia,* 100 U.S. 303, 310 (1880).

were willing to intervene[31] until a disparate impact on human identity could be shown. When a damaging effect on the psyche was shown in *Brown,*[32] the court ruled that separate but equal was not adequate. By examining this evolution in desegregation cases, we can better understand what the currentchallenges school funding disparity are lacking. If a similar disparate and negative self-image could be shown by the implementation of school funding policies, indicating a psychological impact on minority children in lowschools, perhaps we could achieve a more meaningful court decision.

Education funding disparity is de facto racially discriminatory. The policy, in effect, keeps the low schools poor and segregated. For wealth based deprivation, the standard is very difficult to prove, and the court has been unwilling to step in to rule on mere economic issues. To succeed on this kind of challenge, you must prove absolute deprivation and that there is no other possible relief where the class of people is defined by their inability to pay (an example is the right to an attorney being denied. There is no substitution for fair representation).[33]In *San Antonio ind. School dist. v. Rodriguez,* they did not meet this high burden.The court found that students were not being absolutely deprived of an education, only a quality one, and that the class of children was not defined by their inability to pay since education is funded by the state.[34] One could argue that, based on our discussions above, education is within the nexus of rights provided by the constitution as essential to upholding the rights explicitly granted under the constitution. However, the courts have said that this is not so.

[31]*Plessy v. Ferguson*, 163 U.S. 537, 547 (1896).

[32]*Brown v. Board of Educ*., 347 U.S. at 495.

[33]*San Antonio Indep. Sch. Dist.*, 441 U.S. at 35.

[34]*Id.* at 50.

Courts have held that education is more akin to the right to food and shelter. They are important but not fundamental rights. Courts do not have expertise in education and because of this they leave it to the states to make their own policies. States have handled education in their constitutions before the framing of the US constitution, and there is some evidence that this was contemplated by the framers as they explicitly left it out of our federal constitution. [35]In *San Antonio,* the court acknowledged the complex interactions of the myriad of problems with the adequacy of public education, but questioned the demonstrability of a correlation between educational expenditures and quality of education. [36] A question of whether a similar correlation existed between the procedure in question and adequacy of education was raised in *Brown,* which overturned *Plessy v. Ferguson* and the adequacy of "separate but equal." Up until *Brown,* constitutional arguments had failed, and it was upheld that separate but equal did not violate equal protection or overcome the rational basis standard set by the court which requires that the state have a legitimate interest at stake and that the policy implemented is rational to achieve its goals. This is the same standard applied to funding disparity issues. But *Brown* emphasized that there could be no rational basis where students self-identity was affected.

Education's role in developing democratic citizens, who are functional and productive within American society, was the foundation of the persuasive argument in *Brown*. The very fundamental goals of education were undermined by what had been previously held to be a rational means to a legitimate end under the test. And while *Brown* overturned formal inequality in schools, that is discriminatory inequality, it has not eliminated other inequalities within education or alleviated deep seeded racial disparities in achievement.[37] Now, more than ever,

[35]*Id.* at 59.

[36]*Id.* at 41-42.

[37] See, e.g., *Grace Kao & Jennifer S. Thompson, Racial and Ethnic Stratification in Educational Achievement and*

funding disparity issues are taking center stage and being increasingly recognized in state courts.[38]A student in a low school, from a low property tax area of the country, lives in a "bad neighborhood" who attends an urban inner city school or a heavily migrant school, will grow up segregated from others based on incomeand achieve education levels that make him inadequate to participate in our democratic lessee faire society. This will unquestionably lead a young person in this position to develop a negative self-image and sense of hopelessness in his future. Why the courts have ignored this fact, is possibly because adequacy of education is not measured by individual achievement and because teaching to the test is common in these areas where outcomes based assessments are being increasingly used to measure a teacher's adequacy.

In *Plyer v. Doe* it was held that children of illegal immigrants have a right to receive a public education, just as any other child. They are perhaps the most impacted by the problem of educational funding disparity. This Quasi Suspect Class, the court has held, is subject to a slightly higher standard than the rational basis scrutiny we have discussed above. Intermediate scrutiny, under the equal protection clause, applies to those who are invidiously discriminated against and who possess some kind of unchangeable, immutable characteristic.[39]Applying this framework to Illegal aliens, they do not qualify because of their lack of citizenship. They have the possibility to become citizens and they are here illegally, so they do not fit the traditional strict scrutiny test, however courts have recognized that their children should not suffer from their parent's wrongdoings.[40] The court has recognized that the children of illegal immigrants are

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Attainment, 29 Ann. Rev. Soc. 417 (2003) (describing the persistence and causes of racial and ethnic inequalities in educational achievement and attainment); James E. Ryan, *The Influence of Race in School Finance Reform*, 98 Mich. L. Rev. 432 (1999).

[38] See generally Richard E. Levy, *Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation*, 54 U. Kan. L. Rev. 1021, 1025-34 (2006).

[39]*Plyer v. Doe*, 457 U.S. at 244.

[40]*Id.* at 249.

not themselves responsible for their illegal status and that this qualifies them as a quasi-suspect class. Justice Ruth Bader Ginsburg, concurring in *Grutter v. Bollinger*, observed: "[I]t remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities."[41]If these students are among those most dramatically adversely affected by the current funding schemes within states they should certainly prevail, should they bring the right case, under this intermediate standard.Furthermore, they should prevail based on the argument of negative self-identity, like that presented in *Brown*, if held against the heightened intermediate scrutiny test held for their class.

VI. Courts are Inadequate to serve the Role of Facilitating Implementation of Ordered Remedies.

If education is so important to upholding our democratic ideals, take notice that school desegregation policies of the twentieth century have also highlighted the democratic and civic importance of a racially inclusive education.[42] Nonetheless, local control and funding of schools tends to exacerbate inequalities in educational quality and achievement. In the wake of *Brown*, for example, the independence of local school districts limited the ability of courts to achieve desegregation through 'interdistrict' remedies. In *Milliken v. Bradley*, the Court created "an insurmountable burden" to desegregation by requiring district courts to find that cities and their surrounding suburbs violated the Constitution before including their school districts in desegregation efforts.[43] Progress toward improvement is often slow at best, and the court is unwilling to take the role of enforcement short of examining whether an adequate effort is underway.

[41]*Grutter v. Bollinger*, 539 U.S. 306, 346 (2003).

[42] Amy Stuart Wells et al., *Both Sides Now: The Story of School Desegregation's Graduates* (2009) (study showing that graduates from racially diverse schools felt better prepared for life in a global society).

[43]*Milliken v. Bradley*, 418 U.S. at 719-20 (holding that a court must find that district lines were drawn for the purpose of segregation before awarding an interdistrict remedy).

There have been many challenges to the mechanism of school funding, however none of them have been quite successful in bringing about real and meaningful change in the system of school finance. Perhaps this is because the court is unwilling to take on the difficult role of oversight when it orders change. The role of the court is narrow, and using courts to implement change is often something not taken up by its function. Historically, a leave it to the legislature approach has been favored. Courts review whether regimes for school financing comply with state requirements, and when change is ordered it is often left to the legislature to determine how it should be carried out.

We can look to Massachusetts as an example for how successful challenges to funding are taken up by the court on review. The commonwealth is obligated under the constitution to "provide all public school students with an 'adequate' education."[44] Whether the state was living up to its constitutional obligation was the issue in *McDuffy,* where the court found evidence indicated students in less affluent school districts had significantly fewer educational opportunities and lower educational quality than in the more affluent school districts. The deficiencies were numerous and widespread. Here, the court found inadequacy with the district financing system, and ordered that the state take steps to equalize funding disparity between districts.[45] More than ten years later the court reviewing the *McDuffy* decision, stated that, "[T]he Commonwealth has a duty to provide an education for all its children, rich and poor, in every city and town the Commonwealth at the public school level, and that this duty is designed not only to serve the interests of the children, but, more fundamentally, to prepare them to participate as free citizens of a free State to meet the needs and interests of a republicangovernment namely

[44] Mass. Const. Pt. 2, c.5 sec. 2

[45]*McDuffy v. Secretary of Executive Office of Education*, 415 Mass. 545, 555 (1993).

the Commonwealth of Massachusetts."[46] The court here found that progress toward adequacy could only be described as slow at best.

Sincethe courts' review function has been limited to the scope of there being meaningful movement in the right direction, in *McDuffy*, they upheld that some progress was better than none at all. But, what of the children who suffer an inadequate education on the states path to becoming adequate? Ten years had passed between the challenge and the states minimal progress toward equalization, resulting in a decade of inadequately educated children. It is often noted that where funding is found to be inadequate, improvement is painfully slow. Similar to the de-segregation cases, the court there had not been willing to take an active role.The traditional constitutional and state challenges under the equal protection clause had failed, leaving the issue for the legislature to decide.

VII. Legislative Action Would Likely Prove to be a Better Hope for the Future.

We have discussed the plethora of problems facing the educational system and school financing systems. The court has proved to be inadequate in implementing remedies for those challenging the system. We have discussed the type of challenge that would be likely to prevail within the current construct of law, but we have only touched on the possible legislative actions that could be taken. We have seen that the system for funding is complex and is governed at the federal, state, and local levels by statutes, regulations, and policies. Perhaps the best hope for lasting and substantial change lies within out democratic process of legislation making.

Justice Kennedy has stressed the importance of racial integration and the essential role of the political branches in addressing systemic racial segregation and inequality in public

[46] *Id.* at 548.

education.[47]The biggest obstacle for change from this angle is that responsibility lies with the American population to demand it. With the problems so heavily concentrated into migrant communities and in urban inner cities, the population is largely unaware of the gravity of the problem and thus unlikely to press the issue with their legislatures.

While there has not been any real change implemented following the constitutional challenges which have been brought, there is hope in pursuing change through overriding statutory law if the demand were made.[48] We can use the model of desegregation for guidance on how to achieve meaningful change in the school finance structure by legislative action, as we have in looking at challenges. It was not until Statutes were enacted to support the changes mandated by court decisions that meaningful change was seen in the desegregation effort in the South. This was largely due to the fact that courts played a minimal role in effecting a lasting policy remedy.[49]In *Brown*, the court clearly outlawed state-sanctioned racial segregation in education, but following the decision there was little real world effect. Local districts that wanted to eliminate segregation lacked any tools or roadmap for doing so, and were weak in the face of staunch political opposition. Those remedial rulings allowed school districts to proceed at a sluggish pace in removing firmly entrenched barriers to educational opportunity for minorities.[50] In the school finance litigation cases of*McDuffy v. Secretary of Executive Office of Education*, this problem was mirrored. Without a firm push from the courts to see real change, it is unlikely that it will occur absent the crucial statutory law mandating it.

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[47]*Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 787-98 (2007). (Kennedy, J., concurring)

[48] Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, 42-71 (1991) (arguing that power of courts to affect social change is limited to circumstances not present in the desegregation context).

[49] Mark Tushnet, *Some Legacies of Brown v. Board of Education*, 90 Va. L. Rev. 1693, 1694 (2004).

[50]*Brown v. Bd. of Educ.*, 349 U.S. at 301.

The primary motivating factor for political change is accountability. Congress has the critical ability to enforce its policies, and holdsthe responsibility to the electorate for their enforcement. Currently, national legislatureon public education in the United States is extremely decentralized. School districts are predominantly responsible to develop policies through their own departments.[51]Leaving the reliance for accountability at the local level is what allows school districts to adapt to address their unique needs, but it is also what hinders real change for those schools that most need it.Without critical resources to implement change, and without expertise, districts can not affect change.

One resource for districts to look to as they seek to formulate policies is*The Technical Assistance for Student Assignment Plans Program,*which assists in "preparing, adopting, or modifying, and implementing student assignment plans to avoid racial isolation and resegregation ... and to facilitate student diversity."[52]School districts, "use these grant funds to seek assistance and expertise from student assignment specialists, demographers, community relations specialists, facility and other planners, or curriculum specialists and . .. Specialists and consultants from academia, non-profit organizations, civil rights organizations, and the private sector."[53]Following the *Brown* decision, and prior to the passage of national legislation, the vast majority of African American students in southern states still attended fully segregated schools.[54]Absent the funds to develop policies with the help of experts, districts face a serious disadvantage as they seek to address critical problems through policy making.

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[51] Bruce D. Baker et al., *Is SchoolFunding Fair?*, 237 (2010).

[52] U.S. Department of Education, *Technical Assistance Support for Student Assignment Plans Program*, available at http:// www2.ed.gov/programs/tasap/index.html.

[53]*Id.*

[54] Gary Orfield and John T. Yun, *Resegregation in American Schools,* 12 (1999).

Legislation which addressed the desegregation issues following the decisions in the *Brown* cases was the most effective means to achieve needed changes. The national legislature is a logical body to focus these efforts because there is a benefit of scale.The national legislature has the unique ability to seek expertise and implement mandatory change in a uniform way across the states.[55]The government could regulate education finance through the commerce or spending clause of Article 1 section 8.

The commerce clause grants respect to branches of government seeking to regulate the flow ofcommerce.[56]Government has discretion to regulate things in the flow of commerce as it relates to channels or goods of Commerce,[57] instrumentalities of Commerce, or things bearing a substantial relation to interstate commerce. When the court considers which things bear a substantial relation to interstate commerce, they look at whether the action to be regulated is inherently commercial or is itself an economic transaction.[58]The racial segregation of restaurants, has been recognized as falling within congresses scope of regulation under the commerce clause,[59] and could be extended to schools if the federal government so choose as long as the limits of the prescribed regulation were judicially enforceable.

Recognizing education as bearing a substantial relationship to interstate commerce, is only one solution. It could still be argued that education was delegated to the states through the tenth amendment. Congress could choose to regulate education finance through its power to tax

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[55] Lia Epperson, *Equality Dissonance: Jurisprudential Limitations and Legislative Opportunities*,7 Stan. J. Civ. Rts. & Civ. Liberties at 237.

[56]*U.S. Const. Art. 1, §8, clause 3* (Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

[57]*Gibbons v. Ogden*, 22 U.S. 1, 2 (1824).

[58]*Heart of Atlanta Motel v. US*, 379 U.S. 241, 247-48 (1964) (regulating discrimination policy is an intra state activity that affects commerce, as it is inherently economic).

[59]*Katzenbach v. McClung*, 379 U.S. 294, 299-300 (1964) (Congressional authority under the Civil Rights Act of 1964 gives deference to federal legislation for policy to eliminate racial segregation in restaurants).

and spend under the spending clause. Under the 10th amendment, powers not granted to the federal government are reserved for the state[60]; however Article 1 section 8 also grants the government the ability to offer funds for purposes that serve the public good[61] as long as states retain a meaningful choice in whether to accept the funds through participation.[62] States are bound by the conditions of acceptance if they want to get the funds being offered. Regulations may encompass all of the operations of an entity, any part of which is extended federal financial assistance. This broad general prohibition covers, "race, color, and national origin" which has become important in schools.[63]The only problem with choosing to regulate under the spending clause is that policies must leave room for states to make a choice whether to adopt the regulation in order to receive funds, and many states could opt out.

Whichever way congress choses to regulate the education finance system, a legislative approach should consider the needs of low schools and their particular disadvantages. A more uniform and less disparately impacting system should govern, perhaps one that does not base funding on property values. Education reform will not be effective without the influence of communities and teacher expertise at the local level. If reform is simply a collaborative effort between the three statewide branches of government, it cannot work, as we have seen by the example of *No Child Left Behind*."A school reform strategy that works for an entire state will draw on the expertise and involvement of a diverse group of stakeholders including

[60]*U.S. Const. Ammend. 10*

[61]*U.S. Const. Art. 1, §8, clause 1* (It is the clause that gives the federal government of the United States its power of taxation. Component parts of this clause are known as the General Welfare Clause).

[62]*New York v. US,* 505 U.S. 144, 146 (1992) (Holding that the Take Title provision of New York's Low Level Radio Active Waste Policy Amendments Act 1985 is unconstitutional because it doesn't give the states a meaningful choice to adopt and undermines accountability by forcing it onto the state).

[63]*South Dakota v. Dole,* 483 U.S. 203, 207-08 (1987) (where they withhold 5% for states who don't raise the drinking age. They can do this. If the voters don't like it they can keep them in check through elections).

schoolboards, school administrators, teachers, teachers' unions, parents, community leaders, and local businesses to address the individual needs and values of a local community."[64]Because legislatures have the benefit of seeking expertise, this would likely be the best approach. Legislative action, while tedious, is also likely to be more swift and efficient than placing the burden on courts to oversee progress toward equalization where a court has ruled that a right has been violated.

VIII. Conclusion

It might be most appropriate for the federal government to step in and broadly regulate education funding where disparity has found to negatively impact the adequacy of education through extensive education reform. We have seen that lower funded schools are in low property tax areas with high minority populations, which has led to continuing de-facto segregation in schools through the finance structure. Migrant and inner-city urban districts have been most affected. While adequacy of funding continues to be challenged in courts, the role of the courts in dealing with these problems has been largely unsuccessful. There has been little real or meaningful change, because courts are willing to accept minimal efforts by states which move at a sluggish pace toward adequacy. Though funding is not the only obstacle for school improvement, often in low schools, it is a very important one. Congress, while not holding a right to education to be fundamental, has recognized the grave importance that education plays in developing our democratic citizens and preparing the next generation to be productive members of society.

We have looked extensively at the example of segregation and the movement from court decisions to legislative action in order to move progress forward. We have looked at the parallels

[64]Quintin A. Palfrey, *The State's Role in Fulfilling Brown's Promise*, 8 Mich. J. Race & L. 1, 44 (2002).

in success and shortcomings, and I have proposed we follow the same model with addressing education funding disparity. If we expect to remain the wealthiest and strongest nation in the world, we will need adequately educated citizens and these problems must be addressed. It is time for our electorate to recognize that the problems of the low schools affect all of us as Americans and demand real and meaningful change within the school finance structure from our legislatures.