

ARTICLES

Brown in State Hands: State Policymaking and Educational Equality After *Freeman v. Pitts*

By BERNARD JAMES* and JULIE M. HOFFMAN**

*At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools. We are close to that time.*¹

—Justice Antonin Scalia

*This, then, is the dread that seems to lie beneath the fear of equalizing. Equity is seen as dispossession. Local autonomy is seen as liberty. . . . Again there is this stunted image of our nation as a land that can afford one of two dreams—liberty or equity—but cannot manage both.*²

—Jonathan Kozol

On the constitutional Richter scale, *Brown v. Board of Education*³ has proven to be one of the few truly high magnitude tremors. Its aftershocks continue to provide a jolt to equal protection jurisprudence. It is fair to add that the impact of *Brown* jurisprudence extends even to contemporary areas of law not usually associated with notions of suspect classifications and discrimination.⁴

* Professor of Law, Pepperdine University School of Law. B.G.S., J.D., University of Michigan.

** Research Analyst, LEARN (Los Angeles Educational Alliance for Restructuring Now). B.A., University of California, San Diego; J.D. Pepperdine University.

1. *Freeman v. Pitts*, 112 S. Ct. 1430, 1453 (1992) (Scalia, J., concurring).

2. JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* 173 (1991).

3. 347 U.S. 483 (1954).

4. In the recent abortion case of *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (plurality opinion), Justice O'Connor, writing against the overruling of *Roe v. Wade*, 410 U.S. 113 (1973), relied on the *Brown* decision as a barometer for *stare decisis*: "[T]he sustained and widespread debate *Roe* has provoked calls for some comparison between that case and others of comparable dimension that have responded to national controversies and taken on the im-

Most attention is directed to notions of equality and federalism—*Brown's* rule that race is an invalid classification for policymaking and the constitutional principle that states as sovereigns are free to enact laws that further policies distinct from those of the central government. With this focus, one discovers the contradictions of the *Brown* era and their impact on public education: supremacy versus autonomy, delegation versus accountability, liberty versus equality. Point and counterpoint.

The initial impact of the *Brown* decision on public education not only shattered the idea of racial classification, but also dismissed what remained of the concept of states rights, particularly as that label was used for the notion that federal policies could be acknowledged or ignored. An interesting and often problematical state-federal relationship evolved after *Brown*—*Brown II*⁵ in particular—and its emphasis on a deliberate dismantling of local school systems that have been built on invidious classifications and inequitable programs. States either did nothing at all in the way of formulating new educational policies or acted defensively in response to supervised federal orders and coercive federal spending programs. While the evolution of this relationship clarified much of what we now associate with modern federal supremacy, it has created a new set of problems concerning the ultimate accountability for formulating educational policies to address inequalities arising out of race, wealth, and other classifications.

These problems come into sharper focus when one considers the future impact of *Brown* on educational policymaking after *Freeman v. Pitts*.⁶ This twenty-year long desegregation battle involved the policies of the DeKalb County, Georgia school system. The Court held that federal judicial supervision of the implementation of consent decrees to integrate public schools could occur on a piecemeal basis. After *Freeman*, judges have discretion to identify incremental progress toward a unitary school district and relinquish jurisdiction over those areas ostensibly free from

press of the controversies addressed." *Casey*, 112 S. Ct. at 2812. See also Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505 (1992); Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board*, 91 COLUM. L. REV. 1867 (1991); Book Review, *Banning the Bomb: Law and Its Limits, Nuclear Weapons and Law*, 86 COLUM. L. REV. 653 (1986); Book Note, *Judicial Review in Comparative Law*, 90 COLUM. L. REV. 1449 (1990).

5. *Brown v. Board of Educ.*, 349 U.S. 294 (1955) [hereinafter *Brown II*].

6. 112 S. Ct. 1430 (1992). This article does not focus squarely on *Freeman* except to suggest how the decision might further distort the role of states in taking responsibility for promoting educational equality. For a more critical examination of *Freeman*, see Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1 (1992); see also Maria L. Marcus, *Learning Together: Justice Marshall's Desegregation Opinions*, 61 FORDHAM L. REVIEW 69 (1992).

the vestiges of official race-based policymaking.⁷ Approved in the sweep of the Court's reasoning was a decision by the judge in the DeKalb case to relinquish jurisdiction as to student assignments, transportation, physical facilities, and extracurricular activities. Remedial authority was retained to supervise progress on faculty assignments, resource allocation, and the quality of education being offered to the white and black students in the district.

The willingness of the Court in *Freeman* to permit federal judges to fragment their remedial authority over desegregation also seemed influenced by competing concerns of federalism and equality. The former was used to justify the Court's preference that local educational policies in the long run be advanced by public officials. The Court reasoned that because judicial supervision in *Brown* litigation often had a long term impact on school districts (in DeKalb County, the federal court began its remedial supervision in 1969), partial relinquishment of jurisdiction was "an important and significant step in fulfilling the district court's duty to return the operations and control of schools to local authorities."⁸ "Returning schools to the control of local authorities at the earliest practicable date," opined the majority, "is essential to restore their true accountability in our governmental system."⁹

It is on the equality theme, however, where the ruling in *Freeman* is most significant. The Court admits that under current doctrine equality concerns would, in the future, become more difficult to validate and as a result be outweighed by the desire for autonomy.¹⁰ The majority advised federal judges to act with caution when relinquishing jurisdiction, giving "particular attention to the school system's record of compliance."¹¹ But the Justices admitted that over time, the difficulty of making equality assessments increases as factors other than official race-based policies contribute to the demographic and systemic characteristics of a school district. After noting that even DeKalb County was for a brief period in compliance with the desegregation order, and that later population shifts accounted for some of the statistical imbalance, the Court concluded:

As the *de jure* violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de*

7. *Freeman*, 112 S. Ct. at 1445-46.

8. *Id.* at 1445.

9. *Id.*

10. "[W]ith the passage of time the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish, and the practicability and efficacy of various remedies can be evaluated with more precision." *Freeman*, 112 S. Ct. at 1446.

11. *Id.*

jure system. The causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith.¹²

It is against this backdrop that the legacy of *Brown* should be examined. As aftershocks over time lose their capacity to affect or influence, so too does the force of law of the *Brown* jurisprudence. Only the force of its logic may serve to influence public educational policy in a nation with a student body that is increasingly diverse, both socially and economically. When the observations of Justice Scalia in *Freeman* come to represent the dominant view of the Court—as surely they must¹³—an observer may well conclude that the federalism theme has come full circle.

But this observation begs the larger question. If one limits the characterization of *Brown* to the proposition that educational policies based on racial classifications are per se invalid, this goal has been accomplished. No state would consider using race as a criteria for furthering an otherwise legitimate policy. But beyond racial classifications, the question becomes how much official resistance remains to the moral influence of *Brown*, which postures education as “perhaps the most important function of state and local governments.”¹⁴ As it becomes more difficult to characterize disparity in public education in constitutional

12. *Id.* at 1448.

13. It is a fairly well-accepted notion in constitutional law that “the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.” *Milnot Co. v. Richardson*, 350 F. Supp. 221, 224 (S.D. Ill. 1972) (citing *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-48 (1924)). In Equal Protection Clause litigation, such an attack may be the only way to prevail when a suspect classification is not available to raise the level of judicial scrutiny to something higher than traditional rational basis review. Compare *Milnot* with the landmark case on rational basis scrutiny, *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

Of course, it is also true that in litigation involving fundamental rights, the maintenance of a constitutional case depends on a stable factual pattern on which both the finding of unconstitutionality and the remedy can be grounded. The rules of justiciability demand as much. Cases involving injunctions or declaratory judgments are the clearest example of this dependence on factual continuity. See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (government used lack of factual continuity as defense to defeat request for injunctive relief by plaintiff injured as result of police chokehold).

Because of the role that continuity plays in case adjudication, it is reasonable to expect, as does Justice Scalia in *Freeman*, that without a continuing pattern of what the Court deems “official government action” to serve as a reinforcing predicate for federal judicial interest in state and local school board decisionmaking, a natural point of attenuation will occur. This equation is so predictable that four Justices in *Freeman v. Pitts* concurred to suggest ways in which federal district court judges might imply continuity as a basis for future school desegregation orders under the framework of *Green v. County School Board*, 391 U.S. 430 (1968). See *Freeman*, 112 S. Ct. at 1454 (Souter, J., concurring); *id.* at 1455 (Blackmun, J., concurring).

14. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

terms (so as to trigger the safeguards of federal equal protection rules), states will again find themselves in charge of formulating policies to address the remaining facets of inequality.

The equality principle will, in effect, revert to state hands. This, in some ways, will be a return to normalcy. Public education has been one of the essential responsibilities of state and local governments. It is the constitutions of the states, after all, that provide for a "uniform" education,¹⁵ a "thorough and efficient" education,¹⁶ and a "right to safe schools."¹⁷ The school desegregation jurisprudence of the *Brown* era is in this respect something of an anomaly developed out of the urgency to prompt reluctant elected officials to "come forward with a plan that promises realistically to work . . . now."¹⁸

If one assumes the eventual demise of *Brown*, it becomes clear that more is at stake than the elimination of policies based on racial classifications. In fact, soon after the mandate of *Brown II*, the Court expanded the remedies analysis, going beyond equal pupil assignments based on race to include other factors. These factors, announced in *Green v. County School Board*, suggest a natural extension from race to qualitative components designed to remove the stigma spawned by maintaining race-separate schools for decades.¹⁹ Thus, after *Brown*, what actually rests in the hands of state policymakers is the resolution of the educational equality debate.

15. See COLO. CONST. art. IX, § 2 ("The General Assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the State."); IDAHO CONST. art. 9, § 1 ("[I]t shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools.").

16. See W. VA. CONST. art. 12, § 1 ("The legislature shall provide, by general law, for a thorough and efficient system of free schools."); see also ARK. CONST. art. 14, § 1 ("[T]he State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education.").

17. CAL. CONST. art. 1, § 28(c) ("All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful."). See generally Stuart Biegel, *The "Safe Schools" Provision: Can a Nebulous Constitutional Right Be a Vehicle for Change?*, 14 HASTINGS CONST. L.Q. 789 (1987).

18. *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968).

19. The *Green* factors include student assignments, transportation, physical facilities, extracurricular activities, principal and teacher assignments, and general resource allocation. *Id.* at 435. Significantly, the decision of the Court in *Freeman* left undisturbed an additional factor used by the District Court in DeKalb County—the quality of education—a measure of comparing the trends in the school district in per pupil expenditures and teacher competence.

"It was an appropriate exercise of its discretion for the District Court . . . to inquire whether other elements ought to be identified . . . in ways that required the formulation of new and further remedies . . ." *Freeman v. Pitts*, 112 S. Ct. 1430, 1446 (1992).

The state constitutions are good reference points for speculation about notions of equality in public education after *Brown*. The growth of the state lawmaking machinery—particularly on constitutional issues—has been unprecedented over the last two decades. Whatever one may think of the phenomenon of modern state constitutional law in the abstract, it is now clear beyond quibble that these documents have become the cloth out of which modern social compacts are woven. On matters of taxation,²⁰ spending,²¹ crime and punishment,²² the environment,²³ and substantive due process,²⁴ state constitutions are being used to provide a forum for both discussion and resolution of the major issues of the day.

A closer examination of the capacity of state policymakers to use these tools to direct the future of public education now seems essential in the twilight of the *Brown* era. The inquiry highlights a dire prognosis. Since *Brown*, state policymaking on education issues has been unimaginative and reactive. State educational policy generally reflects the fear that meaningful equality—when defined as merely an equal opportunity to succeed—is undesirable, too costly, or both. Any movement toward public school reform is boilerplate, reflecting the spirit, and reluctantly, the letter of federal law.²⁵

This Article begins with a summary of federal court decisions on education after *Brown* and leading up to *Freeman*. It concludes that Supreme Court decisions have led to a way of thinking about educational equality that has helped reinforce the reluctance of the states to embrace the equality mandate of *Brown* while embracing federalist arguments in

20. See *Durant v. State Bd. of Educ.*, 381 N.W.2d 662 (Mich. 1985), *enforced sub. nom. Durant v. Department of Educ.*, 463 N.W.2d 461 (Mich. Ct. App. 1990); see also *Huntington Park Redevelopment Agency v. Martin*, 695 P.2d 220 (Cal. 1985) (en banc); *Vernon v. State Bd. of Equalization*, 4 Cal. App. 4th 110 (1992); *Boone County Ct. v. State*, 631 S.W.2d 321 (Mo. 1982) (en banc).

21. See *Wein v. State*, 347 N.E.2d 586 (N.Y. 1976); *Wein v. Carey*, 362 N.E.2d 587 (N.Y. 1977).

22. See *Florida v. Casal*, 462 U.S. 637, (1983) (search and seizure); see also *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1984) (capital punishment).

23. For example, the Massachusetts Constitution states:

The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and aesthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

MASS. CONST., art. 97. See also *Opinions of the Justices to the Senate*, 424 N.E.2d 1092 (Mass. 1981).

24. See *Bulova Watch Co. v. Brand Distrib.*, 206 S.E.2d 141 (N.C. 1974) (liberty of contract); see also *Department of Ins. v. Dade County Consumer Advocate Office*, 492 So. 2d 1032 (Fla. 1986) (liberty to set rates and business practices).

25. See *infra* text accompanying notes 143-76.

defense of inaction. Thereafter, the focus of the Article shifts to the action of state and local policymakers and the history of their responses to *Brown* and its call for educational equality.

What emerges is a pattern of avoidance, contradiction, and fear. A disinclination to take the inequality claims of school-aged plaintiffs seriously combines with an indifference to educational rights that curiously contradicts the current explosion of state-created individual liberties. Federalism on noneducational issues is alive and well. States now routinely forge new ground on individual rights, independent of, and often in spite of, federal law.²⁶ Few, if any, states approach the subject of educational equality as though real flexibility in tailoring approaches to local conflicts exists.²⁷ The traditional excuses offered by states when confronted with this anomaly poorly masks what appears to be a belief that the benefits of educational equality are outweighed by its cost to local autonomy. This sentiment—the fear of equalizing—succinctly framed by Jonathan Kozol at the beginning of this article, provides the backdrop for an examination of *Brown* in state hands.

26. See *infra* text accompanying notes 116-42.

27. Two local reform movements, one in Los Angeles, California, the other in Baltimore, Maryland, are worth mentioning as exceptions to the barren landscape of education reform. Los Angeles is working with the Los Angeles Educational Alliance for Restructuring Now (LEARN) Foundation to reform its schools. LEARN is a southern California consortium of over 600 educators, business people, civic policymakers, and parents. It has taken a multi-task force approach to producing a reform plan that proposes a restructuring of the Los Angeles Unified School District. Under the LEARN plan, the District—which is the second largest school district in the nation—would be broken up. Policymaking and accountability under the plan is transferred to the local school and its administrators, teachers, and parents. Hiring, retention, spending, and curriculum matters would be decentralized in the hope of making schools more responsive and effective to the communities they serve. The LEARN plan may take effect in 1993. See *Perspective on Vouchers: Try 'Choice' among Public Schools Before Subsidizing Private Schools, Which Will Shut Out the Vast Majority of Children?*, L.A. TIMES, Feb. 12, 1992, at B7.

Baltimore has formed a partnership with an outside agency in order to reform its school system. Education Alternatives, a Minnesota-based group, has taken over a group of schools in mostly poor sections of the city in hopes of instituting a “for-profit” method of management. The centerpieces of the reform are “personal educational game plans” which are drawn up for each student. These plans, devised after a series of parent-teacher meetings, are executed using more adult classroom supervision—often by recent college graduate volunteers—and relying heavily on computers and technology to make sure that no student is taught based on some prior group classification or tracking label. See William Trombley, *For-Profit Public Schools Test is Off to a Mixed Start; Education: Private Firm is Running Nine Baltimore Campuses. Some Teachers Say Little Has Changed*, L.A. TIMES, Dec. 22, 1992, at A1.

I. State Policymaking And the Influence of the Federal Judiciary

It is difficult to account for all of the causes that have led to the hibernation of state policymaking on educational equality issues, but some of the components are easy to discern. Ironically, the policies of the federal government, both in defining the parameters of the *Brown* mandate and in implementing the law, contributed greatly to the current morass. The decisions of the Supreme Court and the domestic policies of the executive branch have led to a way of thinking about accountability for educational equality issues that has proven counterproductive.

A. The Desegregation Cases

On the judicial side, this influence began innocently with the Court's attempt to define the scope of authority of the district courts, whose judges had assumed control over state educational policy in order to dismantle segregated schools. The increasing use of federal authority had caused quite a stir among state and local government officials, many of whom predicted a growing imperialism among the district court judges.

In 1971, the Supreme Court announced its decision in the case *Swann v. Charlotte-Mecklenburg Board of Education*,²⁸ in order to "review . . . the scope of powers of federal courts under this Court's mandates to eliminate racially separate public schools established and maintained by state action."²⁹ The facts before the Court were rather typical for the times. Seventeen years after the ruling in *Brown v. Board of Education*,³⁰ the schools of this North Carolina town remained virtually segregated.³¹

The Court in *Swann* reaffirmed the traditional equity power of the federal judiciary to remedy violations of the Constitution. Chief Justice Burger then proceeded to limit its application in public school desegregation cases. "If school authorities fail in their affirmative obligations,"

28. 402 U.S. 1 (1971).

29. *Id.* at 5 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

30. 347 U.S. 483 (1954).

31. The Court in *Swann* found:

During the 1968-1969 school year the system served more than 84,000 pupils in 107 schools. Approximately 71% of the pupils were found to be white and 29% Negro. As of June 1969 there were approximately 24,000 Negro students in the system, of whom 21,000 attended schools within the city of Charlotte. Two-thirds of those 21,000, approximately 14,000 Negro students, attended 21 schools which were either totally Negro or more than 99% Negro.

Swann, 402 U.S. at 6-7.

reasoned the Chief Justice, "judicial authority may be invoked."³²

In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults. . . . As with any equity case, the nature of the violation determines the scope of the remedy.³³

The framework announced in *Swann* made sense. It settled norms for the officials of state public school systems who thereafter could anticipate the nature of federal involvement in dismantling segregated schools. The *Swann* rules also provided federal district courts with a checklist and a barometer against which their orders could be reviewed.³⁴ But the contributions of the Supreme Court to the progress of *Brown* took an ominous turn in later decisions. A subtle shift in the manner in which the Court characterized the nature of a violation led to the beginning of the end of *Brown's* legal force, and for state and local officials, the end of a sense of responsibility for addressing educational equality.

Nothing in *Swann* dictated the decision of the Court in later cases to define violations of *Brown* in increasingly narrow terms. District courts were already looking for segregation attributable to state action, "showing that either the school authorities or some other agency of the State ha[d] deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools."³⁵ But the *Brown* jurisprudence after *Swann* began to emphasize a decentralized notion of agency that had the effect of first suggesting, then later encouraging, states to leave educational policymaking localized and fragmented.³⁶

Perhaps no case is more important in this regard than *Milliken v. Bradley*.³⁷ *Milliken* utilized the narrow version of agency theory to insu-

32. *Id.* at 14.

33. *Id.* at 15-16.

34. After *Swann*, the remedies checklist was essentially closed. First, "eliminate invidious racial distinctions [Then], take corrective action . . . with regard to the maintenance of buildings and the distribution of equipment . . . faculty assignment and new school construction." *Id.* at 18-19.

35. *Id.* at 32.

36. As it relates to government entities, the law of agency is based on the notion that the acts of one agency or instrumentality of a government fall on the government itself when the former are "so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity . . . is concerned." *United States v. New Mexico*, 455 U.S. 720, 735 (1982). See Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225 (1986).

37. 418 U.S. 717 (1974).

late local subdivisions from accountability for discrimination caused by the policies of the Michigan State Board of Education. The decision effectively sanctioned local control and autonomy as defensive mechanisms to evade responsibility altogether. Later, the decision in *Pasadena City Board of Education v. Spangler*³⁸ encouraged an extension of the *Milliken* non-responsibility rationale through manipulation of the de facto/de jure dichotomy.³⁹ After these decisions, one clearly sees an emphasis on decentralization in school governance and a growing isolation of those in charge of day-to-day administration of the schools from those with an interest in formulating long-range policies.

Milliken has been seen by some as the key to this shift in emphasis, because it occurred at a time when state legislators appeared to be playing an active role in the deliberate resistance to *Brown* desegregation orders.⁴⁰ The Court was faced with reviewing an order of the District Court (affirmed by the Court of Appeals) that imposed an interdistrict desegregation remedy on the Michigan State Board of Education. All of the Justices agreed with the findings of the lower courts (or assumed the correctness of the findings for purposes of reviewing the order) that several acts by the State Board contributed to the pattern of segregation that existed in the City of Detroit public schools. These actions helped to create a scheme of metropolitan schools that were segregated with blacks at the core and whites at the periphery.⁴¹ The lower courts approved of a remedy that would effectively combine fifty-three school districts with the City of Detroit district to "achieve the greatest degree of actual

38. 427 U.S. 424 (1976).

39. De jure segregation ("by law") is that which is tied to intentional acts of government. De facto segregation ("by the facts") is not attributable to government because it exists outside of—and often in spite of—the law. The distinction is critical in racial inequality cases. See *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973). The Court has on occasion cautioned state and local governments that they should ignore private biases based on race in policymaking or else risk converting the effects of the bias into a de jure conflict. See *Palmore v. Sidoti*, 466 U.S. 429 (1984).

40. In 1971, the Supreme Court described the response of the states over the 16-year period after the decision in *Brown II*:

Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then. Deliberate resistance of some of the Court's mandates has impeded the good-faith efforts of others to bring school systems into compliance. The detail and nature of these dilatory tactics have been noted frequently by this Court and other courts.

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 13 (1971).

41. Of the 86 school districts in the Detroit metropolitan area, the racial composition was 81% white and 19% black. Within the City of Detroit, the school ratio was 64% black and 34% white with most schools either all-white or all-black. *Milliken v. Bradley*, 418 U.S. 717, 765 (1974) (White, J., dissenting).

desegregation.”⁴²

The majority, led by Chief Justice Burger, ruled that the order was too broad and that, in any event, the remedy should be confined to the area where the segregation actually occurred—the Detroit City school system. The Court reasoned:

[O]ur assumption, . . . that state agencies did participate in the maintenance of the Detroit system, should make it clear that it is not on this point that we part company. The difference between [the majority and the dissenters] arises instead from established doctrine laid down by our cases. [These cases] addressed the issue of constitutional wrong *in terms of an established geographic and administrative school system*⁴³

The result in *Milliken*—that the remedy should be limited to the Detroit City public schools—was a blow to proponents favoring a more integrated society after *Brown*. The decision also redirected much of the jurisprudence. After *Brown II*, the primary obligation to provide a remedy for unlawful segregation in schools rested with federal courts. The judges—primarily district court judges—were supposed to fashion decrees relying on the traditional equity power of the federal judiciary. The Court in *Brown II* noted that “[i]n fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.”⁴⁴

The position of the *Milliken* majority (the Justices split 5-4) was thus difficult to justify. It offered a stunted version of judicial authority after a constitutional violation had been found because of the potentially disruptive effect multi-district orders might have on state educational operations.⁴⁵ Justice Burger wrote:

No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process. . . . [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

42. *Milliken v. Bradley*, 418 U.S. 717, 734 (1974) (citing *Bradley v. Milliken*, 345 F. Supp. 914, 918 (E.D. Mich. 1972)).

43. *Id.* at 746 (emphasis added).

44. 349 U.S. at 300 (footnotes omitted).

45. See Robert A. Sedler, *Metropolitan Desegregation in the Wake of Milliken: The View Largely From Within*, 1975 WASH. U. L.Q. 535; Leonard P. Strickman, *School Desegregation at the Crossroads*, 70 NW. U. L. REV. 725 (1975).

structure of public education in Michigan.⁴⁶

The *Milliken* majority's preference for a remedy defined in geographic rather than organizational terms created a natural defense for state school officials. Most of the minorities affected by the vestiges of segregation, then, as now, lived in urban areas. Under *Milliken*, therefore, the suburban school districts—the beneficiaries of segregation in housing and prior state educational policies—were now “independent” and insulated from remedial action except in the highly unlikely event that state action created interdistrict segregation. Justice White, one of the four dissenters, noted:

The core of my disagreement is that deliberate acts of segregation and their consequences will go unremedied, not because a remedy would be infeasible or unreasonable in terms of the usual criteria governing school desegregation cases, but because an effective remedy would cause what the Court considers to be undue administrative inconvenience to the State. The result is that 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. If this is the case in Michigan, it will be the case in most States.⁴⁷

After *Milliken*, the Supreme Court began a pattern of issuing rulings that effectively narrowed the equity powers of federal district court judges as to both the breadth of desegregation orders as well as the scope of discretion by which these judges would evaluate compliance with the orders.

The decision in *Spangler*⁴⁸ is in the latter category. In *Spangler*, the Court reversed the ruling of the district and circuit courts that continued the supervision of the district court on pupil assignments in the Pasadena School District. The district court based its decision, in part, on “a 3-year pattern of opposition by a number of the members of the Board of Education to both the spirit and letter” of the desegregation plan.⁴⁹ This finding served as a counterpoint to the fact that the school district had achieved the pupil assignment goals set in the plan during the first year. Thereafter, the pupil assignment goal, that there be no school in the district with a majority of any minority students, was not met. Goals set in other areas, including hiring and promoting teachers and administrators, were also not met.

46. *Milliken*, 418 U.S. at 742-43.

47. *Id.* at 763 (White, J., dissenting).

48. *Spangler v. Pasadena City Bd. of Educ.*, 427 U.S. 424 (1976).

49. *Id.* at 442 (Marshall, J., dissenting).

The *Spangler* Court, however, decided that the initial year of compliance with the goal justified restriction on the equity powers of the court. The key to the Court's logic was the fact that the shift away from the pupil attendance goals "resulted from people randomly moving into, out of, and around the PUSD [Pasadena Unified School District] area."⁵⁰ The Court ruled that one year of compliance was enough to take the issue of pupil assignments out of the remedial authority of the courts. "For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function"⁵¹

An observer of these events might well have concluded that the Supreme Court had simply changed its jurisprudence to fit its conclusion that busing, the most common remedy at the time, was not desirable as a solution to educational equality problems arising from racial classifications. After *Swann*, *Milliken*, and *Spangler*, federal district courts were hard pressed to fashion effective desegregation plans. Demographic changes, combined with the reorganization of state educational systems into literally hundreds of local and independent school districts, left judges tinkering with remedies in school districts that were mostly minority and primarily poor.⁵²

The effect of this shift in interpreting the requirements of *Brown* also profoundly affected state authority over educational policy. The state's accountability for public education survived as a concept, but with blurred contours. The concept became almost irrelevant for purposes of remedying educational inequality. It still influences the drawing of boundaries of school districts and participates in school site selection. State legislatures still maintain and support the educational system under the general supervision of the state board of education.⁵³ Construction of schools is still accomplished through municipal bonds controlled by state

50. *Spangler*, 427 U.S. at 435-36.

51. *Id.* at 436-37.

52. See generally Sedler, *supra* note 45. Professor Sedler notes:

Stated simply, the problem of metropolitan desegregation results from placing the responsibility for public education in local school districts, which are often organized along urban-suburban lines. Because the blacks in most metropolitan areas are concentrated in the central cities and seldom reside in the suburban areas, an urban school district will necessarily have a high percentage of blacks while suburban districts will be substantially white in composition. . . . Experience indicates that such desegregation accelerates the general movement of middle-class white to the suburban school districts so that the urban district soon becomes resegregated, blacker and poorer than before.

Id. at 538.

53. See *Milliken v. Bradley*, 418 U.S. 717, 758 (1974) (Douglas, J., dissenting).

agencies, and some portion of funding for each independent district comes from the state.

It was no surprise then that the Court in *Freeman v. Pitts* would continue this trend by emphasizing that “[as] the *de jure* violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system.”⁵⁴

B. Education as a Fundamental Right

The theme of anti-accountability represents only one part of the federal judicial contribution to state thinking on educational issues. The other component involves the attitude of the Supreme Court on the role of education in a democracy.

During the period in which *Swann*, *Milliken*, and *Spangler* were decided, the uncertainty about the legal status of educational issues went beyond the desegregation cases. There was considerable discussion about the notion that access to education should be part of the newly emerging list of fundamental rights, deeply rooted in our tradition and part of the American scheme of ordered “liberty” under the Due Process Clause of the Fourteenth Amendment.

Much of the post-World War II activities of the Court has involved the discovery and announcement of the scope of protection for individuals to engage in activities deemed fundamental. The right to marry, the right to establish a home and raise and educate children, and the right to travel previously have been found fundamental, although a textual source for the rights has “proven elusive.”⁵⁵ The rights to familial, marital, and individual privacy were added to the list of fundamental rights with a stir of controversy over the scope of the limitation placed on government power to regulate lifestyle choices.⁵⁶

It was not until 1973—two years after the decision in *Swann* and one year before the *Milliken* ruling—that the Supreme Court squarely faced the issue of whether education had a place under the rubric of implied rights. In the case of *San Antonio Independent School District v. Rodriguez*,⁵⁷ the Court considered whether the school financing laws of the State of Texas violated the Constitution.

54. *Freeman v. Pitts*, 112 S. Ct. 1430, 1448 (1992).

55. *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986); *see also* *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

56. *See* *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

57. 411 U.S. 1 (1973).

Jonathan Kozol, in his study of educational policy, described the disparity that led to the lawsuit:

A class action suit had been filed in 1968 by a resident of San Antonio named Demetrio Rodriguez and other parents on behalf of their own children, who were students in the city's Edgewood district, which was very poor and 96% nonwhite. Although Edgewood residents paid one of the highest tax rates in the area, the district could raise only \$37 for each pupil. Even with the "minimum" provided by the state, Edgewood ended up with only \$231 for each child. Alamo Heights, meanwhile, the richest district, was able to raise \$421 for each student from a lower tax rate and, because it got state aid (and federal aid), was able to spend \$543 on each pupil. Alamo Heights, then as now, was a predominantly white district.

The difference between spending levels in these districts was, moreover, not the widest differential to be found in Texas. A sample of 110 Texas districts at the time showed that the ten wealthiest districts spent an average of three times as much per pupil as the four poorest districts, even with the funds provided under the state's "equalizing" formula.⁵⁸

The Supreme Court in *Rodriguez* upheld the state school-financing scheme. The Court refused to declare education fundamental, reasoning that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."⁵⁹ In a 5-4 decision the Court ruled that "to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory."⁶⁰

In rendering this decision, the Court set in motion a way of thinking about educational policy that continues to influence state policymaking. The Court dismissed two alternative methods of viewing the state's obligations to equalize educational opportunity that would have raised the constitutional status of education. Fundamental right status for education was rejected because of the difficulty in articulating the new standard of review. The majority worried:

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [speech and of full participation in the political process], we have no indication that the present levels of educational ex-

58. KOZOL, *supra* note 2, at 214. The dollar figure presented in this narrative are 1968 dollars not adjusted for inflation.

59. *Rodriguez*, 411 U.S. at 33.

60. *Id.* at 54-55.

penditures in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights⁶¹

The Edgewood parents also presented the Court with an argument based on fundamental fairness, asking the Justices to treat the poor children of the Edgewood School District as a suspect class for purposes of the Equal Protection Clause. Yet the Court ruled that “the Texas system does not operate to the peculiar disadvantage of any suspect class.”⁶² To reach this conclusion, the Court had to sidestep the strong logic supplied by the facts of the educational disparity. “Disadvantage” is forbidden under the Equal Protection Clause when it is inflicted on classes of persons that meet preset criteria. The protected class must be identifiable by discrete characteristics and “subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”⁶³

The *Rodriguez* Court declined to recognize the poor as a protected class. Economic disadvantage would remain outside the equal protection equation, unless perhaps keyed to a long-term denial of access to majoritarian political processes. As a result, disparate impact standing alone means little to the equal protection analysis.⁶⁴ Laws that discriminate on the basis of insignificant factors are presumed valid if they have a rational relationship to a permissible state objective—a judicial test that almost no law fails.⁶⁵

61. *Id.* at 36-37.

62. *Id.* at 28.

63. *Id.*

64. *See* *Washington v. Davis*, 426 U.S. 229 (1976).

65. In *Harris* the Court enunciated the standard:

The guarantee of equal protection . . . is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity. It is well settled that where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless “the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective.” This presumption of constitutional validity, however, disappears if a statutory classification is predicated on criteria that are, in a constitutional sense, ‘suspect,’ the principal example of which is a classification based on race

Harris v. McRae, 448 U.S. 297, 322 (1980) (citations and footnote omitted).

The federal judiciary thus lent its imprimatur to a way of thinking about educational equality that catered to the reluctance of the states to include the mandate of *Brown* in their policymaking calculus. The message is far from subtle: education is not a fundamental right. Even if there were a right to an education, no particular level of education would be guaranteed. Therefore, as long as states do not use prohibited classifications or completely deny access to public education, their programs will pass constitutional muster. Racial classifications will trigger stricter scrutiny by the courts, but even then, remedies will be limited in time and geographic area by the doctrine of state action.

II. State Policymaking and the Influence of the Congress and the President

In addition to the case law spawned by the judiciary, congressional and executive branch policies also have had an effect on the way in which state policymakers view their obligations toward education policy.

A. The Civil Rights Years

As a direct result of the *Brown* ruling, the federal government, through legislation and judicial actions, worked to secure equal educational opportunities for blacks on a nationwide basis. Among the actions taken were 1) the defeat of proposals for federal aid to education that would have strengthened the dual school system; and 2) the insertion of nondiscrimination clauses by the Department of Health, Education, and Welfare (HEW) in contracts with colleges participating in National Defense Education Act programs.⁶⁶ In addition to federal action, and perhaps most importantly, black organizations and white liberals began to organize and work together in ways that forced confrontations with southern political leadership. Ultimately these challenges to the status quo lead to the 1964 Civil Rights Act.⁶⁷ In 1965 the primary purpose of federal financial assistance shifted from helping schools in general to implementing a remedy for failure to provide equal educational opportunity to black children.⁶⁸ This shift was the result of the Elementary and Secondary Education Act of 1965 and the issuance of enforcement guidelines for Title VI of the Civil Rights Act of 1964. Moreover, the Civil

66. DAVID L. KIRP ET AL., *EDUCATIONAL POLICY AND THE LAW* 481 (3d ed. 1992).

67. *Id.*

68. Yet on a local level, resistance grew as federal guidelines mandated more actual desegregation. Neal Devins & James B. Stedman, *Symposium Civil Rights and Federalism: New Federalism in Education: The Meaning of the Chicago School Desegregation Cases*, 59 NOTRE DAME L. REV. 1243, 1246-48 (1984).

Rights Act empowered HEW to withhold federal funds from school districts that discriminated against blacks.⁶⁹ HEW also implemented earlier reform proposals granting the Attorney General the authority to file desegregation suits against local school boards that engaged in segregation upon the complaints of private citizens.⁷⁰

By the end of the 1960s, however, the doors of federal support for desegregation began to close. Resistance by state and local officials and discomfort on the part of a Republican-controlled Congress mounted as HEW heightened its demands for desegregation. By the third year of Title VI's enforcement, the guidelines were frozen.⁷¹ Moreover, congressional efforts to limit HEW's enforcement of Title VI finally resulted in language that significantly decreased HEW's authority.⁷²

B. The Nixon Years

The Nixon Administration, which tapped into the widespread anti-busing sentiment, began distancing itself from the directives of the Supreme Court.⁷³ On July 3, 1969, the Department of Justice and HEW jointly announced that strict compliance with timetables for integration would be dropped: "A policy requiring all school districts, regardless of the difficulties they face, to complete desegregation by the same terminal date is too rigid to be either workable or equitable."⁷⁴ This joint statement was interpreted by most observers as signifying a slowdown of school integration.⁷⁵

The Administration filed a motion to delay desegregation with the Supreme Court.⁷⁶ When this motion was denied, Nixon stated that the

69. See 42 U.S.C. § 2000d-1 (1964).

70. KIRP, *supra* note 66, at 481.

71. Devins & Stedman, *supra* note 68, at 1249.

72. THOMAS B. EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 81-82 (1991).

73. Some suggest that from the 1950s to the mid-1960s, school desegregation did not affect northern whites or affluent southern whites in the suburbs of larger cities. It was not until school desegregation threatened to reach their schools, that they became aroused in opposition. Initially, desegregation affected southern and working class whites; gradually, middle-level white groups in the North and West and in the suburbs of the South became involved. When this occurred, opinion polls showed a huge majority of middle-level whites opposed to busing beyond the nearest school as a means of promoting school desegregation. Finally, in the late 1960s, large-scale white protests in the North and West began to appear. SCHOOL DESEGREGATION: A POLITICAL PERSPECTIVE, SCHOOL DESEGREGATION: PAST, PRESENT AND FUTURE 42 (Walter G. Stephan & Joe R. Feagin eds., 1980).

74. EDSALL & EDSALL, *supra* note 72, at 81.

75. HARRELL R. RODGERS, JR. & CHARLES S. BULLOCK III, LAW AND SOCIAL CHANGE: CIVIL RIGHTS LAWS AND THEIR CONSEQUENCES 89-90 (1972).

76. EDSALL & EDSALL, *supra* note 72, at 82. The Supreme Court rejected the Administration's request for a one-year delay of school integration in southern school districts and

law would be carried out, "but stressed that he did 'not feel obligated to do any more than the minimum the law required,' and he made clear that he 'disagreed' with the Court."⁷⁷ He defined forced desegregation as the responsibility of the courts and not of his administration.⁷⁸ So while the federal courts mandated that desegregation take place, the federal government did not support the Court's directives.⁷⁹

Despite the Administration's stand, it should be recognized that the Administration did not prevent desegregation. The wheels of desegregation had gained sufficient momentum before the Administration had an opportunity to employ its strategy. By 1968, the percentage of black children in all-black schools in the South had dropped from ninety-eight percent to twenty-five percent.⁸⁰ Moreover, the Administration's policies did not go unchallenged. Civil rights groups charged that the Administration had relaxed its standards with respect to school desegregation by refusing to threaten or employ the ultimate sanction of a cutoff of federal funds in noncomplying districts.⁸¹ Suit was filed against the Secretary of HEW, and HEW was ordered by the court to take "appropriate action to end segregation in public educational institutions receiving federal funds."⁸²

Furthermore, the Administration and Congress took actions which weakened busing in some instances and maintained busing in others. While Congress rejected an Administration proposal that would have effectively banned busing for integration below the seventh grade, it did enact a busing moratorium as part of the Education Amendments of 1972.⁸³ Similarly, Congress once again limited busing in the Equal Educational Opportunities Act of 1974 (the Esch Amendment). The Act indicated that "no court of the United States shall order the implementation of any plan to remedy a finding of de jure segregation which involves the transportation of students, unless the court first finds that all alternative remedies are inadequate."⁸⁴ Moreover, when busing was ordered, no student could be bused beyond the school next closest to his home, unless the courts determined that more extensive busing was

ordered the immediate integration of previously de jure school districts. *Alexander v. Homes County Bd. of Educ.*, 396 U.S. 19 (1969).

77. EDSALL & EDSALL, *supra* note 72, at 82.

78. *Id.*

79. *Id.*

80. Devins & Stedman, *supra* note 68, at 1251.

81. KIRP, *supra* note 66, at 558.

82. *Adams v. Richardson*, 480 F.2d 1159, 1161 (D.C. Cir. 1973) (en banc).

83. KIRP, *supra* note 66, at 558.

84. 20 U.S.C § 1755 (1988).

needed to ensure the protection of constitutional rights.⁸⁵ An amendment to the Labor-HEW appropriations bill for fiscal 1976 (the Byrd Amendment) prohibited HEW from using funds, either directly or indirectly, to force a school district to transport a student beyond the school nearest his home for reasons of race.⁸⁶ Later appropriations acts carried the same restrictions.⁸⁷

The Eagleton-Biden Amendment in 1977 modified the Byrd Amendment prohibiting the use of HEW funds to require busing to implement desegregation plans that involved the pairing, clustering, or reorganizing the grade structure of schools.⁸⁸ This modification was carried forward in future appropriations acts.⁸⁹

In support of busing, the Nixon Administration and Congress continued to give direct financial assistance to help school districts throughout the country implement desegregation plans. In 1970, Nixon called for federal funds to assist "school districts in meeting special problems incident to court-ordered desegregation."⁹⁰ He requested \$500 million for the Emergency School Aid Act of 1970 (ESAA) in fiscal year 1971 and \$1 billion in 1972. These funds were directed to supporting desegregation plans at schools around the country. Between fiscal year 1973 and fiscal year 1981, \$2.2 billion was provided to "desegregating school districts under ESAA for staff training, additional staff, new curriculum development, community relations activities, and in its final years, the financing of magnet schools."⁹¹ In its last two years, ESAA focused on activities directly related to the implementation of desegregation plans and on those districts most recently adopting desegregation plans, rather

85. 20 U.S.C. §§ 1714, 1718 (1988).

86. KIRP, *supra* note 66, at 558.

87. *Id.*

88. *Id.* The Eagleton-Biden Amendment has been attached to every piece of HEW or Department of Education appropriations legislation since 1977 and reads as follows:

None of the funds contained in this Act shall be used to require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home, except for a student requiring special education, in order to comply with Title VI of the Civil Rights Act of 1964. For the purpose of this section an indirect requirement of transportation of student includes the transportation of students to carry out a plan involving the reorganization of the grade structure of schools, the pairing of schools, or the clustering of schools, or any combination of grade restructuring, pairing, or clustering. The prohibition in this section does not include the establishment of magnet schools.

Pub. L. No. 98-139, § 306, 97 Stat. 871, 895 (1992).

89. 42 U.S.C. § 2000d (1992).

90. *Statement About Desegregation of Elementary and Secondary Schools*, 1970 PUB. PAPERS 304, 317 (Mar. 24, 1970).

91. Devins & Stedman, *supra* note 68, at 1252.

than on compensatory education.⁹² On the down side, ESAA's pre-grant review process allowed many schools which were ineligible for funds because of violations of the program's anti-discrimination provisions to obtain waivers by agreeing to take specific remedial desegregation actions.⁹³

C. Post-Nixon: Chain Reaction

During the Carter Administration, Congress modified ESAA by passing the Education Amendments of 1978 in response to criticism that ESAA was unduly funding old desegregation plans and that its funds were used excessively for compensatory education. However, the ESAA remained an important source of federal funding for school desegregation, with annual appropriations exceeding \$300 million in some years.⁹⁴

The Reagan Administration reevaluated the federal government's role in education, especially federal efforts to secure equal educational opportunities for all students.⁹⁵ Prior to the Reagan Administration, federal executive and legislative policy of the 1960s and 1970s had been to subordinate local control of education to the pursuit of the national goal of equal educational opportunity.⁹⁶ During this time the federal government did not trust the local school districts' willingness or ability to address the needs and concerns of minority students. This federal policy led to an antagonistic relationship between the federal government and local school systems.⁹⁷ Once President Reagan took office, he set out to return to a more amiable relationship between the federal government and the local school districts. He vowed to put control back into local hands.⁹⁸

92. "Compensatory education" meant those programs (new curriculum development, community relations) intended to bring schools, students, and communities that had previously suffered as a result of segregation and "separate and unequal" conditions up to speed with those schools, students, and communities that had not been so disadvantaged. ESAA funds were not to be used for student transportation, nor to supplant state or local funds. *Id.* at 1253.

93. "One measure of the effectiveness of the pre-grant review was the extent to which ineligible districts secured waivers. Between fiscal year 1975 and fiscal year 1981, of the 731 districts declared ineligible, . . . 502 or sixty nine percent secured waivers." *Id.*

94. *Id.* at 1254.

95. *Id.* at 1254-55. A February 1981 Gallup poll reflected the continuing popular opposition to forced busing. This "survey show[ed] opinion among whites 4-to-1 in opposition to busing. Blacks however, [were] 2-to-1 in favor of this means of achieving better racial balance in the schools." Neal Devins, *School Desegregation Law in the 1980's: The Courts' Abandonment of Brown v. Board of Education*, 26 WM. & MARY L. REV. 7, 8 n.1 (1984) (citing Gallup, *Whites, Blacks in Sharp Disagreement on Busing*, at 1 (Feb. 5, 1981)).

96. Devins & Stedman, *supra* note 68, at 1252.

97. *Id.*

98. *Id.* at 1254.

In 1981, the administration issued "America's New Beginning: A Program for Economic Recovery," a list of proposed changes to:

federal programs to reduce federal expenditures and the federal presence in many areas of domestic life. . . . For elementary and secondary education, it called for consolidating forty-five federal programs in order to "shift control over education policy away from the Federal Government and back to State and local authorities—where it constitutionally and historically belongs."⁹⁹

The administration also requested a cut of \$59.3 million in fiscal year 1981 from ESAA funds. "In 1981, categorical aid designed to encourage the adoption of federally-approved school desegregation programs was eliminated along with other categorical aid programs. These programs were replaced by a block grant of federal funds which local school systems could spend to suit their own preferences."¹⁰⁰

This approach presumed that federal, state, and local policy goals were in harmony with each other.¹⁰¹ Again, this was a departure from the previous twenty years of the federal, state, and local relationship. In essence, the local schools now had to decide between spending limited federal funds on busing programs or buying much needed supplies and hiring additional teachers. The Administration was forcing local districts to choose between funding needs, whereas before, even though there had been distrust by the federal government, there were also enough funds to allow school districts to both fund desegregation and buy what was needed. During the Reagan Administration, school districts were asked, under the guise of renewed local control, to sacrifice one or the other. With opposition to busing widespread and the need to apply federal monies to teachers and supplies urgent, busing programs were the obvious choice for sacrifice.

Between 1982 and 1989, the federal government's share of the education dollar declined from seven and a half cents to just over six cents.¹⁰² Among the nation's largest school districts, those with ESAA

99. *Id.* (citing WHITE HOUSE, AMERICA'S NEW BEGINNING: A PROGRAM FOR ECONOMIC RECOVERY 7-1 (1981)).

100. Devins & Stedman, *supra* note 68, at 1244.

101. *Id.*

102. David S. Broder, *Report Cards from the Governors*, WASH. POST, Aug. 1, 1990, at A19. According to Kevin Phillips:

Under Reagan, Federal budget policy, like tax changes, became a factor in the realignment of wealth, especially after the 1981-82 recession sent the deficit soaring. The slack was made up by money borrowed at home and abroad at high cost. The first effect lay in who received more Government funds. Republican constituencies - military producers and installations, agribusiness, bondholders and the elderly clearly benefited, while decreases in social programs hurt Democratic interests and constituencies: the poor, big cities, subsidized housing, *education*.

grants of over \$1 million in fiscal year 1981 lost between six and seventy-nine percent of their previous federal funding in that year under the block grant.¹⁰³

Additionally, the Reagan Administration actively worked to reduce busing litigation. The Justice Department began to settle many, if not most, of the cases it brought (and it brought fewer cases than past administrations) by consent decree.¹⁰⁴ This process left the plaintiffs out of the settlement, often denying them an actual remedy, and actually resulted in limiting desegregation. Problems inherent in this closed process were demonstrated in the administration's first elementary school desegregation suit, initiated against the school board of Bakersfield, California.¹⁰⁵ The Department of Education had found that the schools of Bakersfield were segregated by law. Minority children were actually bused across town to attend segregated schools. Pursuant to Title VI of the Civil Rights Act of 1964, the Education Department referred the case to the Justice Department for action.¹⁰⁶ On the same day the Justice Department filed a complaint initiating suit, it also filed a consent decree ending the suit. The decree was signed the same day by United States District Judge Edward Price without a hearing.¹⁰⁷

The Bakersfield decree was an exceptionally weak settlement, merely requiring that a series of magnet schools be established to induce voluntary transfers and thus desegregation.¹⁰⁸ It provided for dismissal of the claim against Bakersfield and termination of court involvement after three years, regardless of whether actual progress was made toward integration of the city's schools. When the Bakersfield decree is compared with settlements achieved in other desegregation cases brought by parties other than the federal government during the same period, it becomes clear that the decree embodied a weaker remedy than was legally obtainable and weaker than parents and students may have wanted. Even the administrative law judge who originally heard the Bakersfield

Kevin P. Phillips, *A Capital Offense: Reagan's America*, N.Y. TIMES, June 17, 1990, (Magazine), at 26 (emphasis added).

103. Devins & Stedman, *supra* note 68, at 1256.

104. Randolph D. Moss, Note, *Participation and Department of Justice School Desegregation Consent Decrees*, 95 YALE L.J. 1811, 1814 (1986).

105. *Id.* at 1812.

106. *Id.* (citing N.Y. TIMES, Feb. 12, 1984, at A28).

107. *Id.*

108. *Id.* The creation of a magnet school was not a new remedy, the difference here was the failure to require any progress as a result of the program being instituted. In fact, magnet school programs have been heralded in many situations for beginning as an attempt to integrate and ultimately providing superior education for all students who attend them. Troy Segal et al., *Saving Our Schools*, BUS. WK., Sept. 14, 1992, at 70.

case called the decree weak.¹⁰⁹

Bakersfield was not unique. In fact, the Justice Department at the time called the Bakersfield decree "the blueprint for desegregation in this Country" and entered similar settlements in a number of other cities.¹¹⁰

The Bush Administration followed in the footsteps of its predecessor in that it maintained block grants and did not attempt to reestablish a separate program to encourage desegregation. Furthermore, President Bush proposed a new direction: school choice. The President presented Congress with *America 2000*, his program for educational reform. The plan called for all students to attend the school of their choice.¹¹¹ In doing this, the apparent assumption was that there would be no need for funding desegregation programs if all parents were choosing their children's schools.¹¹² On the one hand, natural integration would occur, and on the other, once the states had given parents the power to choose their children's schools, the states could not step in and relocate the children to achieve racial diversity.¹¹³

This policy also suggests that the allocation of resources for public education would be shaped by the competition created by parental choice. In this way, much of educational policy would become a part of microeconomic theory in which educators respond to the demands cre-

109. Moss, *supra* note 104, at 1812 n.11 (citing N.Y. TIMES, Feb. 12, 1984, at A28).

110. *Id.* at 1814.

111. On April 18, 1991, President Bush unveiled his strategy for improving education. White House Fact Sheet on the President's Education Strategy, WEEKLY COMP. PRES. DOC. 468, 468 Apr. 18, 1991. *America 2000* received mixed reviews from educators throughout the country. The program would give \$1000 apiece to 500,000 children from low and middle-income families in 50 communities to help them pay for private or public education and would create 535 new schools. *Id.* at 470. The program was criticized by Albert Shanker, President of the American Federation of Teachers, for lacking adequate funding, being shortsighted, and not addressing the real problems facing the nation's schools.

112. When asked about the goal of racial integration in this country and *America 2000's* dependence on school choice, Secretary of Education Lamar Alexander assured television viewers that:

[T]he federal civil rights laws would continue to apply as they have in every single choice plan that's been adopted in America. There's no problem with that. In Memphis, where there have been optional choice schools for the last 10 or 12 years, that has actually reduced the amount of crosstown busing and that money has been used for academic programs.

This Week With David Brinkley (ABC television broadcast, Apr. 21, 1991). What Secretary Alexander was not asked, and did not address is whether the reduction in busing had also resulted in resegregation in Memphis schools or other states where choice had been employed.

113. See U.S. DEP'T OF EDUC., *AMERICA 2000 — AN EDUCATION STRATEGY: SOURCEBOOK* (1991); see also, Richard Daugherty, *Choice Initiatives: Historical Perspectives on the Issue*, 71 W. EDUC. L. REP. 585 (1992); Paul Gerwitz, *Choice in The Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728 (1986); Julie K. Underwood, *Commentary: Choice Is Not A Panacea*, 71 W. EDUC. L. REP. 599 (1992).

ated by the dominant sector of the educational marketplace. Any resemblance between this model of public education and one which emphasizes protection against majoritarian abuses would be accidental. Kozol asks:

What reason have the black and very poor to lend their credence to a market system that has proved so obdurate and resistant to their pleas at every turn? Placing the burden on the individual to break down doors in finding better education for a child is attractive to conservatives because it reaffirms their faith in individual ambition and autonomy. But to ask an individual to break down doors that we have chained and bolted in advance is unfair.¹¹⁴

Federal legislative and executive policies have had the effect of de-emphasizing the equality notion of *Brown* while reinforcing federalism concerns. What began as a response to anti-busing sentiment has given way to policies that have sought to delay integration, place moratoriums on mandates for equality, and finally to hasten the return of local control over educational policy by discouraging litigation and eliminating federal funding.

III. State Policymaking and Local Control: The Anti-Liberty Myth

Of course, the states have done well, without regard for federal influence, in resisting the legal and moral implications of *Brown* on educational policy. At one level, it seems that the promise by state policymakers of the 1950s and 1960s to resist *Brown* tooth and nail has, in some sense, come to fruition as the largest factor in the current tendency to write off the *Brown* jurisprudence as the by-product of a bygone era.¹¹⁵ Yet, on another level and after forty years of desegregation decisions, it appears that the zealous resistance has given way to an implausible indifference to educational equality matters. The implications of this indifference on one's view of state policymaking are relatively easy to highlight through a brief review of modern federalism. The picture provided by a look at the sovereign of the 1990s suggests that the future of *Brown* in State hands is uncharitably bleak: states are not unable to respond to what remains of the *Brown* legacy, but that states are unwilling to do so.

114. KOZOL, *supra* note 2, at 62.

115. In one instance in 1956, 96 congressmen from the South issued a manifesto promising to use "all lawful means" to maintain segregation. David Kirp notes that between 1954 and 1964 very little desegregation took place. He concludes that "[t]he myriad new pupil assignment laws, 'interposition' plans, and other ingenious schemes demonstrated the truth of the popular saying, 'as long as we can legislate, we can segregate.'" KIRP, *supra* note 66, at 479. See generally Daniel J. Meador, *The Constitution and the Assignment of Pupils to Public Schools*, 45 VA. L. REV. 517 (1959).

A. The Expansion of State-Created Rights

Despite the enormous growth and influence of federal policy over the last four decades,¹¹⁶ states have not become mere spectators. State policymaking power, unlike that of the Congress, does not depend on enumeration for its vitality and thus is not limited by the grant of powers contained in a constitution.¹¹⁷ This distinction in the nature of the sovereign, more so than issues of the Tenth Amendment or states' rights, allows states to carve out independent jurisprudence on matters of individual rights that go beyond the federal framework.¹¹⁸

Placing internal limits on state power by creating individual rights is thus a more significant event than many perceive. State law enjoys a presumption of validity not shared by its federal counterpart. State courts routinely resolve doubts that arise as to the validity of legislation in favor of the law unless the state-created individual right is defined with clarity and precision.¹¹⁹ When legislators carve out rights that effectively impose limitations on state power, they are pursuing a policy interest of the highest order. The last two decades suggest that a great deal of carving has occurred.

The reluctance by states to embrace *Brown* has coexisted with an explosion in state policymaking through the creation of rights. If one turns away from education law for a moment to consider the larger picture, it becomes clear that the state policy machine is alive and well. There has been a marked willingness to address and resolve a variety of autonomy and fairness issues using the tools available to a sovereign.

State constitutions have declared new rights, legislation has assumed responsibility in areas where traditional immunities previously existed, and state judicial opinions have reached decisions providing a greater level of constitutional protection than the federal constitution. Justice

116. For recent line of cases on what remains of Tenth Amendment jurisprudence, see *New York v. United States*, 112 S. Ct. 2408 (1992); *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

117. For a general overview of state power in this regard, see W. F. Dodd, *The Function of a State Constitution*, 30 POL. SCI. Q. 201 (1915); Frank P. Grad, *The State Constitution: Its Function and Form in Our Time*, 54 VA. L. REV. 928 (1968).

118. See William J. Brennan, Jr., *The Bill of Rights and the States: Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Cf. Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429 (1988).

119. "It is fundamental that our state constitution limits rather than confers powers. Where the constitutionality of a statute is involved, the question presented is, therefore, not whether the act is authorized by the constitution, but whether it is prohibited thereby." *State ex rel. Schneider v. Kennedy*, 587 P.2d 844, 850 (Kan. 1978).

William Brennan has called the trend toward expansion of individual liberties in the states "the most important development on constitutional jurisprudence in our times."¹²⁰

The list of subjects addressed in this movement is diverse. The right to privacy has been expressly constitutionalized.¹²¹ The right to sue the owner of a motor vehicle for injuries sustained while a guest or invitee has been broadened by applying higher standards of rationality under state equal protection laws.¹²² The right to resist searches and seizures has been expanded, even when the search occurs as an incident to a lawful arrest.¹²³ Rights guaranteed under state due process laws have been expanded to require that pretrial detainees in custody be allowed contact visitation.¹²⁴ State law has even been construed to require state Medicaid funding for abortions despite the rejection of this proposition under the federal Constitution in *Harris v. McRae*.¹²⁵ And of course, a few states have relied on federalism to make education a fundamental right.¹²⁶

120. Ronald K.L. Collins, *Looking to the States*, NAT'L L.J., Sept. 29, 1986 (Special Section), at S2. It is true that most of Justice Brennan's remarks in this regard focus solely on the judicial element in the state policy movement, but it is likely that his approving remarks would embrace any effort by a state to consider the expansion of individual liberties beyond the federal benchmark.

121. The following 10 states expressly provide a right of privacy in their constitutions: Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington. See ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, §§ 12, 23; HAW. CONST. art. I, §§ 6, 7; ILL. CONST. art. I, §§ 6, 12; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7.

122. *Beirkamp v. Rogers*, 293 N.W.2d 577, 579 (Iowa 1980) (en banc) ("The result reached by the United States Supreme Court in construing the federal constitution is persuasive, but not binding upon the court in construing analogous provisions in our state constitution.").

123. For example, Massachusetts law provides:

A search conducted incident to an arrest may be made only for the purposes of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, in order to prevent its destruction or concealment; and removing any weapons that the arrestee might use to resist arrest or effect his escape. Property seized as a result of a search in violation of the provisions of this paragraph shall not be admissible in evidence in criminal proceedings.

MASS. GEN. L. ch. 276, § 1 (1992). Compare this with the federal standard found in *United States v. Robinson*, 414 U.S. 218 (1973). *Robinson*, in which the Court held that a search incident to an arrest of a suspect based on probable cause is an exception to Fourth Amendment protections and requires no additional justification, is rejected by several states. See *State v. Brandimart*, 720 P.2d 1009 (Haw. 1986); *People v. Torres*, 543 N.E.2d 61 (N.Y. 1989); *State v. Ringer*, 674 P.2d 1240 (Wash. 1983), *overruled by State v. Stroud*, 720 P.2d 436 (Wash. 1986).

124. See *Cooper v. Morin*, 399 N.E.2d 1188 (N.Y. 1979).

125. See, e.g., *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982). Cf. *Harris v. McRae*, 448 U.S. 297 (1980).

126. *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (*Serrano I*). For other states, see *infra* note 128.

Standing alone, this rediscovery of state-created rights is one of the most important developments in late twentieth century constitutionalism and federalism. When placed alongside the demise of *Brown* and the persistent failure of states to eliminate inequalities in education, it highlights an almost inexplicable anomaly.

Initially, one is drawn to the body of decisions by state courts and legislatures that have repudiated notions of equality in education in specific contexts. References to school finance, busing, access to educational services, and desegregation frequently appear accompanied by a bulky footnote revealing the long list of states that have disavowed equality in education.¹²⁷ This list is countered by one which reveals states that are promoting policies consistent with the *Brown* jurisprudence.¹²⁸ But the accomplishments of the states on noneducational issues is formidable in contrast to the confusing mosaic represented by the education cases.

For example, the state of Alaska has expanded protection for individual rights in certain areas far beyond the minimum standard set by the federal Constitution. In *Baker v. City of Fairbanks*,¹²⁹ the courts expanded the right to trial by jury to apply to almost any state prosecution. In *Baker*, the court held that a defendant accused of violating a local ordinance was entitled to a jury trial. In doing so, the court noted:

[W]e recognize that this result has not been reached in certain other jurisdictions or by the United States Supreme Court. The mere fact, however, that the United States Supreme Court has not extended the right to jury trial to all types of offenses does not preclude us from acting in this field. . . . [W]e are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our

127. For decisions finding that education is not a fundamental right, see *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981); *Board of Educ. v. Walter*, 390 N.E.2d 813 (Ohio 1979), *cert. denied*, 444 U.S. 1015 (1980); *Levy v. City of New York*, 345 N.E. 2d 556 (N.Y.), *appeal dismissed for want of federal question*, 429 U.S. 805 (1976); *Olsen v. State*, 554 P.2d 139 (Or. 1976); *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975); *Milliken v. Green*, 212 N.W.2d 711 (Mich. 1973).

128. For decisions finding that its state constitution does create a fundamental right in education, see *Shofstall v. Hollins*, 515 P.2d 590 (Ariz. 1973); *Alma School Dist. No. 30 v. Dupree*, No. 77-406 (Ch. Ct., Pulaski City., Ark., Oct. 26, 1981); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976) (en banc) (*Serrano II*), *cert. denied*, 432 U.S. 907, (1977); *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (*Serrano I*); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1976); *Somerset County Bd. of Educ. v. Hornbeck*, No. A-58438 (Cir. Ct., Baltimore, Md., May 19, 1981); *Robinson v. Cahill*, 303 A.2d 273 (N.J.), *cert. denied sub nom.*, *Dickey v. Robinson*, 414 U.S. 976 (1973); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978) (en banc); *Pauley v. Kelly*, 255 S.E.2d 859, 864 (W. Va. 1979); *Buse v. Smith*, 247 N.W.2d 141 (Wis. 1976); *Washakie County Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 333 (Wyo.), *cert. denied*, 449 U.S. 824, (1980).

129. 471 P.2d 386 (Alaska 1970).

local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.¹³⁰

The Constitution of the State of Arizona has been construed many times to provide a greater level of protection for individual rights than the federal Constitution. In *State v. Ault*,¹³¹ the court held that the protection given criminal defendants from unlawful searches and seizures was more exacting than the federal standard so that a warrantless search of a defendant's home could not be justified by the inevitable discovery doctrine. The court reasoned that:

our decision not to extend the inevitable discovery doctrine into defendant's home in this case is based on a violation of art. 2 § 8 of the Arizona Constitution regardless of the position the United States Supreme Court would take on this issue. While our constitutional provisions were generally intended to incorporate federal protections, they are specific in preserving the sanctity of homes and in creating a right of privacy.¹³²

Occasionally this penchant for recognizing rights results in a departure from federal norm even when the state provision is identical to the federal. For example, in the Colorado death penalty case *People v. Young*,¹³³ the court found the Colorado death penalty sentencing statute¹³⁴ invalid on its face because of the state constitutional prohibition against cruel and unusual punishment.¹³⁵ The court ignored the federal standard, justifying its holding based on its responsibility to evaluate state constitutional provisions independently.

The eighth amendment [sic] to the United States Constitution also prohibits "cruel and unusual punishments," and the fourteenth amendment [sic] forbids any state to deprive any person of life "without due process of law." The existence of federal constitutional provisions essentially the same as those to be found in our state constitution does not abrogate our responsibility to engage in an independent analysis of state constitutional principles in resolving a state constitutional question. This responsibility springs from the inherently separate and independent functions of the states in a system of federalism.

We have recognized and exercised our independent role on a number of occasions and on several have determined that the Colorado Constitution provides more protection for our citizens than do similarly or identically worded provisions of the United States

130. *Id.* at 401-02.

131. 724 P.2d 545 (Ariz. 1986).

132. *Id.* at 552 (citation omitted).

133. 814 P.2d 834 (Colo. 1991) (en banc).

134. COLO. REV. STAT. § 16-11-103 (1986 & 1990 Supp.).

135. COLO. CONST. art. II, § 20.

Constitution. . . . This history reflects our repeated recognition that the Colorado Constitution, written to address the concerns of our own citizens and tailored to our unique regional location, is a source of protection for individual rights that is independent of and supplemental to the protections provided by the United States Constitution.¹³⁶

Perhaps the most intriguing variety of this exercise of state policy independence occurs when a state effectively overrules a United States Supreme Court ruling on a matter of state law by announcing a new and higher standard. In *People ex rel. Arcara v. Cloud Books*,¹³⁷ the state of New York repudiated the federal standard after the U.S. Supreme Court decision in *Arcara v. Cloud Books*.¹³⁸ The federal court had reversed the state court's ruling that provided protection for an adult bookstore owner from an attempt to close the store under state public nuisance laws. The Court of Appeals held that the nuisance law was content-neutral and "[t]o the extent the order might have an effect on the defendant's legitimate bookselling activities, it was deemed to be too remote to implicate First Amendment concerns."¹³⁹ The New York court noted that "we must now decide whether greater protections are afforded under the State Constitution's guarantee of freedom of expression."¹⁴⁰ The court ruled in the affirmative:

New York has a long history and tradition of fostering freedom of expression, often tolerating and supporting works which in other States would be found offensive to the community. Thus, the minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of this State's constitutional guarantee of freedom of expression.

It is established in this State that the government may not impose a prior restraint on freedom of expression to silence an unpopular view, absent a showing on the record that such expression will immediately and irreparably create public injury. It is also settled that when government regulation designed to carry out a legiti-

136. *Young*, 814 P.2d at 842-43 (citation omitted).

137. 503 N.E.2d 492 (N.Y. 1986).

138. 478 U.S. 697 (1986).

139. *Arcara*, 503 N.E.2d at 494.

140. *Id.* at 494. The New York Constitution provides:

Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

N.Y. CONST. art. I, § 8.

mate and important State objective would incidentally burden free expression, the government's action cannot be sustained unless the State can prove that it is no broader than needed to achieve its purpose.¹⁴¹

The trend of states' general willingness to function independently of federal policies suggests that, in systemic terms, there is more than enough liberty to go around.¹⁴² Federalism has provided a fertile ground for the expansion of rights that has proven fruitful for state policymakers on a variety of subjects. This systemic freedom to respond to needs at the local level can also be measured in personal terms when rights in the abstract are delivered to individuals through the public policy machinery. The anti-liberty myth of the *Brown* era, long overdue for debunking, is that the legal and moral imperatives of *Brown* somehow divest states of local control over educational equality matters. Racial classifications excepted, this has never been the case. Properly viewed, the modern challenge of solving educational inequality in the states is one of engineering, determining how to deliver what every state policymaker says is desirable—a meaningful opportunity to an education.

B. Educational Equality and State Policymaking

Surveying state court decisions on educational issues, one is struck by how often the logic is patterned after the Supreme Court ruling in *Rodriguez*.¹⁴³ Even attempts to disavow *Rodriguez* tend to adopt its assumptions.

The influence of *Rodriguez* arises out of the test used by the Court for determining whether education was a fundamental right. The Justices readily acknowledged the disparity present in the scheme used by the State of Texas to finance public education, but reasoned that “the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.”¹⁴⁴

Under this test, the Court quickly reached an outcome denying the plaintiffs any relief.¹⁴⁵ There was no history to suggest a federal commit-

141. *Arcara*, 503 N.E.2d at 495.

142. For a discussion of state court decisions that expand the scope of rights protection in noneducational areas, see Ronald K. L. Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981); Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980); Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985).

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

144. *Id.* at 33-34 (citations omitted).

145. The Court stated:

It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering

ment to education as such. Education had always been within the province of the states. The paradigm for a right “implicitly guaranteed by the Constitution” was the right to travel. This right, the Court said, “had long been recognized [as a federal interest and] as a right of constitutional significance . . . and did not require an *ad hoc* determination as to the social or economic importance of that right.”¹⁴⁶

While this logic in *Rodriguez* may have shielded state policies from examination under the U.S. Constitution, many of their constitutions and statutes made repeated references to the long recognized importance of education.¹⁴⁷ For many states, the language used to describe the importance of education provided a beacon for the well-aimed arguments of opponents of current educational policies. In this way, the *Rodriguez* test created potential difficulties for state policymakers on educational issues without regard for the outcome of the case as a matter of federal law. The Connecticut Supreme Court quickly recognized this potential in a case involving a challenge to state school finance laws, noting, “[n]or have we found the *Rodriguez* test . . . of particular help—although under that test it cannot be questioned but that in light of the Connecticut constitutional recognition of the right to education (article eight, § 1) it is, in Connecticut, a ‘fundamental’ right.”¹⁴⁸

On the other hand, the rationale of *Rodriguez* also contained language helpful to those states seeking a path away from their constitutions and the history of commitment to public education. In dicta, the majority noted that it was as concerned with the difficulties of quantifying a constitutional standard as it was with ascertaining its textual basis. As to the former, the Court stated:

whether education is ‘fundamental’ is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State’s social and economic legislation.

Id. (citations omitted).

146. *Id.* at 32.

147. *See supra* notes 15-17.

148. *Horton v. Meskill*, 376 A.2d 359, 372-73 (Conn. 1977). Compare Stuart Biegel, *Reassessing the Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy after Kadrmas v. Dickenson Public Schools*, 74 CORNELL L. REV. 1078 (1989), with Troy Reynolds, Note, *Education Finance Reform Litigation and Separation of Powers: Kentucky Makes Its Contribution*, 80 KY. L.J. 309 (1990).

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditure in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.¹⁴⁹

Rodriguez, therefore, represents something of a picket fence for states on opposite sides of the education-as-a-fundamental-right issue. A few states have relied on language in their constitutions that provide for a “thorough and efficient” or a “uniform” education, or have used the state equal protection clause as the basis for making education a fundamental right.¹⁵⁰ Perhaps the most substantive decision in this regard is the Kentucky decision in *Rose v. Council for Better Educ., Inc.*,¹⁵¹ where the state court detailed the factors that make for an “efficient” education.¹⁵²

149. *Rodriguez*, 411 U.S. at 36-37.

150. See, e.g., *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Robinson v. Cahill*, 303 A.2d 273 (N.J.), *cert. denied*, 414 U.S. 976 (1973); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979).

151. 790 S.W.2d 186 (Ky. 1989).

152. The court listed the following factors:

- 1) The establishment, maintenance and funding of common schools in Kentucky as the sole responsibility of the General Assembly.
- 2) Common schools shall be free and available to all.
- 3) Common schools shall be available to all Kentucky children.
- 4) Common schools shall be substantially uniform throughout the state.
- 5) Common schools shall provide equal education opportunities to all Kentucky children, regardless of place of residence or economic circumstances.
- 6) Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence.
- 7) The premise for the existence of schools is that all children in Kentucky have a constitutional right to an adequate education.
- 8) The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education.
- 9) An adequate education is one which has as its goal the development of the seven capacities recited previously.

Id. at 212-23.

The majority of states fall on the other side, however, embracing in some form the outcome of *Rodriguez* with little or no attention given to the implications of their own constitutions or their current habit of showing solicitude for individual rights in other areas.¹⁵³ Typically, these courts apply a mere rational basis analysis to reviewing disparate educational inequality suits. Education is not treated as a fundamental right. These states also demur on the fairness issue, usually relying on the history of the education clauses to avoid finding an equality principle in the “uniform” or “efficient” notions. Moreover, the courts in these decisions are uncomfortable addressing these matters, usually opining that it is not the role of the judiciary to promote equality on the subject of education when current policies are emphasizing local control. States on this side of the *Rodriguez* fence present a posture of avoidance, even when compelled by a constitutional provision that declares education a fundamental right—like the Wisconsin court in *Kukor v. Grover*¹⁵⁴—refusing to apply some form of stricter scrutiny, on the belief that the state legislature and the citizens of the states were better equipped to make decisions about educational standards than the courts.¹⁵⁵ The influence of *Brown*

153. See *Lujan v. Colorado State Bd.*, 649 P.2d 1005, 1022-23 (Colo. 1982); *McDaniel v. Thomas*, 235 S.E.2d 156, 167-68 (Ga. 1981); *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 789 (Md. 1983); *Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982); *Board of Educ. v. Walter*, 390 N.E.2d 813, 820 (Ohio 1979), *cert. denied*, 444 U.S. 1015 (1980); *Olsen v. State*, 554 P.2d 139 (Or. 1976); *Danson v. Casey*, 399 A.2d 360, 367 (Pa. 1979); *Kukor v. Grover*, 436 N.W.2d 568, 580 (Wis. 1989).

154. 436 N.W.2d 568, 580 (Wis. 1989).

155. *Id.* at 582-83. There is at least one case that reaches the same outcome, but which is more defensible as a correct application of substantive due process norms. In *Hootch v. Alaska State-Operated School System*, 536 P.2d 793 (Alaska 1975), the Alaska Supreme Court reaffirmed that education is a fundamental right under its constitution. The court had previously spoken of such a right in *Macauley v. Hildebrand*, 491 P.2d 120 (Alaska 1971), and *Breese v. Smith*, 501 P.2d 159 (Alaska 1972). Acknowledging the *Rodriguez* test, the Alaska court noted that “[i]n construing art. VII, § 1 of the Alaska Constitution, we are free to give a different construction from that of the United States Supreme Court.” *Hootch*, 536 P.2d at 804 n.42. The Alaska court ruled that although the right to education is fundamental, the right was not absolute. At issue there was a policy of the State that required school-aged youths in far away rural areas to travel great distances in order to get to the public school. *Id.* at 796-97. Taking an “undue burden” approach, much like that currently used in federal privacy cases, such as *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), the court ruled that the right to an education did not place a duty on the state to place public schools wherever potential students lived.

We conclude that art. VII, § 1 permits some differences in the manner of providing education. Reference to the events preceding [sic] the ratification of the Alaska Constitution further bolsters our conclusion. The delegates to the constitutional convention were aware that the principal Alaska opposition to statehood was based on arguments that the territory could not afford the costs of a state government. . . .

It may well be that the exercise of the right to education is burdened by certain disadvantages. The existence of disadvantages is not, however, tantamount to a vio-

is absent in these decisions as reliance by the courts on history and separation of powers poorly mask what appears to be a disinclination to take the inequality of their school-aged plaintiffs seriously.¹⁵⁶

The reliance by state courts on history and the separation of powers principle poorly masks a disinclination to take the inequality claims of their school-aged plaintiffs seriously. The separation of powers argument—that the role of judges in shaping and prompting the resolution of constitutional disputes has natural limits that are surpassed in educational policy disputes—is particularly thin. The sentiment of the Maryland courts is typical of state courts which believe that:

it is not within the power or province of members of the Judiciary to advance their own personal wishes or to implement their own personal notions of fairness under the guise of constitutional interpretation. The quantity and quality of educational opportunities to be made available to the State's public school children is a determination committed to the legislature or to the people of Maryland through adoption of an appropriate amendment to the State Constitution.¹⁵⁷

This notion has been roundly criticized as representing “a fundamentally flawed view of the concept of judicial review.”¹⁵⁸ One critic notes that a major purpose of “unrepresentative judicial review is to as-

lation of the constitutional provision dictating that the right to education be open to all. The contemplation in art. VII, § 1 of some differences in the manner of providing education sanctions some disadvantages. So long as they are not violative of equal protection, the nature and proper means of overcoming the disadvantages present questions for the legislature. Appellants have been afforded a right to education, although they are not furnished a right to attend secondary schools in their communities of residence.

Hootch, 536 P.2d at 804-05.

It is hard to criticize *Hootch*. It follows rather closely the traditional strict scrutiny methodology of balancing the nature of the state interest against the impact of the law on a fundamental right. While sensitive to the historical pattern of policies toward meaningful access to an education, the *Hootch* court found compelling the government's argument against locating schools in every remote village.

156. Measured in terms of impact alone, the states that rely on these arguments when reviewing educational equality cases effectively close the door of the state judiciary to school-aged plaintiffs, leaving them to fashion alternatives in the political arena. It is an odd way to treat a fundamental right or to acknowledge legally mandated inequality.

Both separation of powers in constitutional adjudication and the use of history in constitutional interpretation are more thoroughly examined in other scholarship. For excellent articles on these subjects see Peter J. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731 (1982); Martin H. Redish, *Judicial Review and the "Political Question"*, 79 NW. U. L. REV. 1031 (1985); and Joshua S. Lichtenstein, Note, *Abbott v. Burke: Reaffirming New Jersey's Constitutional Commitment to Equal Educational Opportunity*, 20 HOFSTRA L. REV. 429 (1991).

157. *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 790 (Md. 1983).

158. Redish, *supra* note 156, at 1031.

sure that the Constitution restrains majority will."¹⁵⁹ Otherwise, "[i]f the majoritarian branches could act as final arbiters of the limits of their own power, there would have been little purpose in imposing super-majoritarian constitutional limitations in the first place."¹⁶⁰

The rationale of the states on this issue defies logic. As one commentator has pointed out, whether viewed as raising a question of justiciability or general separation of powers issues, "it simply does not follow that a constitutional mandate that imposes an affirmative duty upon the legislature to provide for the education of the state's children also grants the legislature unreviewable authority to determine when it has complied with that constitutional mandate."¹⁶¹

Even if one accepts the position of the state courts, then the question arises whether or not the power of judicial review has any ascertainable contours. This is not an idle inquiry, for riding on the outcome is ultimately the scope of protection given to guarantees of individual rights. "The fact that a provision [like the education clauses] vesting power refers to the political branches and not to the judiciary cannot justify a finding of a textual commitment of discretion to the political branches, because the same could be said of virtually every provision vesting authority in a political branch."¹⁶²

Moreover, the view that state courts tend to ignore the influence of *Brown* in decisionmaking is strengthened by the dichotomy created between the educational cases—laden with institutional concerns—and the decisions in other areas of state substantive due process analysis. The decision by the New York court in *Arcara v. Cloud Books*,¹⁶³ giving greater protection than the federal constitution to sexually oriented expression,¹⁶⁴ is difficult to square with the decision in *Board of Education, Levittown Union Free School District v. Nyquist*.¹⁶⁵ There the court used the rational basis test to hold that the school finance scheme was constitutional despite savage disparities in per pupil expenditures among the state's school districts,¹⁶⁶ except to suggest cynicism toward the goal of educational equality.

Consider for example two cases decided within a year by the Arizona courts. The Arizona Constitution mandates "a general and uni-

159. *Id.* at 1045.

160. *Id.* at 1045-46.

161. Lichtenstein, *supra* note 156, at 456-57.

162. Redish, *supra* note 156, at 1060.

163. 503 N.W.2d 492 (N.Y. 1986).

164. For a discussion of *Arcara*, see *supra* notes 137-42 and accompanying text.

165. 439 N.E.2d 359 (N.Y. 1982).

166. For a discussion of *Nyquist*, see *supra* text accompanying notes 153-55.

form public school system . . .”¹⁶⁷ and “a system of common schools by which a free school shall be established. . . .”¹⁶⁸ In a school finance case, *Shofstall v. Hollins*,¹⁶⁹ the Arizona Supreme Court held that its constitution established education as a fundamental right. It held “that the constitution does establish education as a fundamental right. . . . [T]he constitution, by its provisions, assures to every child a basic education.”¹⁷⁰ But the court then held that state public school finance laws needed to meet only the rational-basis test rather than strict scrutiny.¹⁷¹ As a result, the court rejected the challenge to the Arizona system of school finance:

A school financing system which meets the educational mandates of our constitution, i.e., uniform, free, available to all persons aged six to twenty-one, and open a minimum of six months per year, need otherwise be only rational, reasonable and neither discriminatory nor capricious.¹⁷²

One year later, in a less sweeping challenge to state educational policies, the Arizona court relied on some newly-discovered teeth fundamental right jurisprudence to produce a result that appears to conflict with its rational basis standard. In *Carpio v. Tucson High School District*,¹⁷³ the court quoted *Brown* heavily in support of its ruling that “indigent high school students who cannot afford textbooks must be provided as adequate an educational opportunity as students who can afford to buy their own textbooks.”¹⁷⁴ The books, reasoned the court, “may remain the property of the school district but a sufficient number of them must be made available so that indigent students can have access to them.”¹⁷⁵ This kind of decisionmaking effectively undermines *Brown* as the inconsistencies in a string of decisions dilute the value of the education clauses as a framework for coherent discourse by potential plaintiffs who are left to guess as to how to make intelligible state claims.¹⁷⁶

167. ARIZ. CONST. art. XI, § 1.

168. ARIZ. CONST. art. XI, § 6.

169. 515 P.2d 590 (Ariz. 1973).

170. *Id.* at 592.

171. *Id.*

172. *Id.*

173. 517 P.2d 1288 (Ariz. 1974).

174. *Id.* at 1295.

175. *Id.*

176. See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 764-65 (1992).

C. History as a Barrier to Equality

State court reliance on history provides a less brittle justification for ignoring the savage inequalities that many state policies produce. There is a long tradition of limiting judicial review power by relying on the intentions of the framers of a constitutional provision or statute. Current Supreme Court views on substantive due process rely heavily on historical analysis.¹⁷⁷ But when a state court relies on history to avoid resolving educational disparities, history offers only partial support for the decision.

The Maryland Court of Appeals' use of history is typical. In *Hornbeck*,¹⁷⁸ the court concluded:

It is manifest from the history underlying the adoption of the Article VIII of the 1867 Constitution . . . that the "thorough and efficient" language of § 1 does not mandate uniformity in per pupil funding and expenditures among the State's school districts. The words of § 1 require no more than that the General Assembly, by law, establish a "thorough and efficient" system of free public schools throughout the State, funded by taxation or otherwise.¹⁷⁹

History lends support for the due process part of the analysis, which is to say that the drafters of the education clause may not have intended to create a fundamental right in state-financed public education. When a fair reading of the history of state law does not support fundamental status for education, a court would be hard-pressed to find a principled basis for inventing it. However, the equality clauses typically found in the constitutions of states that provide for a "uniform" education or a "thorough and efficient" education need not be limited by a static historical analysis. These clauses focus on the nature of what is offered without regard for whether the state is obligated to offer anything. As such, they are best interpreted in terms common to equal protection analysis; state benefits and burdens should be scrutinized to ensure that similarly situated persons are treated similarly.¹⁸⁰ The analysis is dynamic rather than static.¹⁸¹

177. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

178. *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983).

179. *Id.* at 776.

180. For the seminal article that is still instructive on equal protection and the doctrine of reasonable classification, see Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

181. In the 1992 abortion case *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), Justices O'Connor, Kennedy, and Souter, writing for the Court on the significance of *Brown v. Board of Education* in helping clarify standards of *stare decisis* noted: "[i]n constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty." *Id.* at 2809.

Historical views on race have been modified by evolving doctrine. As three Justices in *Freeman* (Blackmun, Stevens, and O'Connor) noted, the impact of racial segregation on school policy generally is sufficiently pervasive that judges must look at evidence of correlation.

School systems can identify a school as "black" or "white" in a variety of ways; choosing to enroll a racially identifiable student population is only the most obvious. The Court has noted: "The use of mobile classrooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty and staff, on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition." Keyes, 413 U.S., at 202. Because of the various methods for identifying schools by race, even if a school district manages to desegregate student assignments at one point, its failure to remedy the constitutional violation in its entirety may result in resegregation, as neighborhoods respond to the racially identifiable schools. Regardless of the particular way in which the school district has encouraged residential segregation, this Court's decisions require that the school district remedy the effect that such segregation has had on the school system.¹⁸²

Brown as a legal force on educational policy is disregarded by the majority of state courts because the role of the "concept of fairness" in policymaking is misunderstood. In an educational inequality case, no state could defend on the argument that its education clauses could withstand the scrutiny of the *Brown* mandate simply because its framers understood and approved of the racially separate schools. Reliance on history is simply "an evasion of the difficulties of reading and the responsibility of a judge to exercise judgment."

D. The Language of Accountability as a Barrier to Equality

Brown as a legal force should influence state court interpretations of the education clauses in state constitutions. But states fear *Brown* less after forty years because its equality mandate is becoming harder to frame in a constitutional case. Aside from the difficulty of imposing *Brown* remedies over an extended period of time (made plain by the Court in *Freeman*), a plaintiff encounters the burden at the outset of establishing a case of government intent to discriminate. There remains some confusion—to the comfort of states that ignore educational inequities—over the role of disproportionate impact in equal protection analysis. The rule is supplied from the line of cases beginning with

182. *Freeman v. Pitts*, 112 S. Ct. 1430, 1458 (1992) (Blackmun, J., concurring, citation omitted).

Washington v. Davis,¹⁸³ where the Court announced that:

a law, neutral on its face and serving ends otherwise within the power of government to Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.¹⁸⁴

Davis and its progeny are responsible for the distortion that creeps into the de jure/de facto dichotomy in *Brown* cases. The notion that disproportionate impact alone does not give rise to a constitutional violation dangerously misleads state policymakers into believing that educational inequalities are immune from the influence of *Brown* unless there is a "smoking gun" proving official intent to make one class of school-aged children less well-off. *Spangler* and *Milliken* offer support for the notion that school districts under federal court supervision should not be accountable for racial segregation attributable to the decisions of private citizens. But *Davis* and cases after it do not support the notion often attributed to them that state and local governments are presumed to operate on a "clean slate." Even the Court in *Davis* agreed that "[n]ecessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."¹⁸⁵

Thus, dynamic factors (race, poverty and other classifications) may help in determining issues of fairness. The same assessment aids courts in tailoring remedial measures to the nature of the disparity, to insure, for example, an education that is, at least, minimally adequate. In public school cases, therefore, educational disparity should not be excused by references to historical determinations of fairness. The Kentucky Supreme Court rejected such excuses in an education finance case by asking: "Can anyone seriously argue that these disparities do not affect the basic educational opportunities of those children in the poorer districts? To ask the question is to answer it. Children in 80% of local school districts in this Commonwealth are not as well-educated as those in the other 20%."¹⁸⁶

183. 26 U.S. 229 (1976) (holding that a test given to applicants for positions on the District of Columbia police force did not violate the Constitution despite a disproportionate failure rate among black applicants).

184. *Id.* at 242.

185. *Id.* See also *Village of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979).

186. *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 198 (Ky. 1989).

E. Non-Judicial Policymaking on Education: Fear of Equalizing

Elected officials have played an even greater role than state judiciaries in resisting meaningful reforms in public education. Kozol observes that "social policy in the United States, to the extent that it concerns black children and poor children, has been turned back several decades. [T]his assertion . . . is not adequate to speak about the present-day reality in public education. In public schooling, social policy has been turned back almost one hundred years."¹⁸⁷

This is not a debate easily won, however, because most state officials are not convinced that educational equality is an end to be desired. Spared from having to discuss the disparity in racial terms because of the decline in desegregation orders as a result of the demise of *Brown*, "they look at equity for all and see it spelling excellence for none."¹⁸⁸

The evidence is overwhelming that the vitality of *Brown* in state hands will depend on how much substance state policymakers give to the notions of an education that is "uniform" or "thorough and efficient" or which takes place in a "safe" learning environment. The present viewpoint is reflected in lawsuits challenging state education finance laws. The rise in litigation challenging school finance laws was a direct result of state legislators' unwillingness to initiate reform without political pressure or court intervention.¹⁸⁹ Even with court intervention, the states have been slow to make changes.¹⁹⁰

F. The School Funding Quagmire

As a result of legislative unwillingness or inability to equalize funding between districts, citizens of over forty states have challenged the constitutionality of public school financing methods under their state constitutions.¹⁹¹ Reform cases have attempted either to obtain greater

187. KOZOL, *supra* note 2, at 4.

188. KOZOL, *supra* note 2, at 173.

189. Between 1972 and 1979, at least 22 states modified their educational finance systems. Some states were motivated by political pressure and others by judicial pressure and orders. By April 1980, approximately 30 states were or had been involved in litigation over their school finance systems. KIRP, *supra* note 66, at 592.

190. See *infra* notes 221-41 and accompanying text.

191. Historically, educational opportunity has been defined primarily in terms of resources (including, among other elements, universally available and free education, common curriculum and equality of resources within a given district). Starting in the late 1960s and early 1970s, state courts and legislatures turned their attention to the inequalities in educational opportunity between school districts. Fiscal pressure on school districts, taxpayer revolts against rising costs of education, concern with equity on the part of school finance scholars, legal experts, citizen groups, foundations, various other reform-minded organizations and government officials brought school finance reform into being in the 1970s. KIRP, *supra* note 66, at 592.

funding for all schools or, alternatively, to obtain substantial equality of funding for all of the school districts within a given state. As of January 1993, twenty-three states have completed litigation bringing such constitutional challenges.¹⁹² But most of these claims have met with little success. Only ten states have found that their system violates the state constitution.¹⁹³

While specific details of school funding programs vary from state to state, these programs have several shared characteristics. Every state except Hawaii relies on a system of funding consisting of both local and state contributions.¹⁹⁴ Local funds are derived from property taxes and then supplemented by state funds.¹⁹⁵ School districts raise ninety-eight

192. *Shofstall v. Hollins*, 515 P.2d 590 (Ariz. 1973); *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983); *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (*Serrano I*); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981); *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975); *Blase v. State*, 302 N.E.2d 46 (Ill. 1973); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983); *Milliken v. Green* 203 N.W.2d 457 (Mich. 1972), *vacated as certification improvidently granted*, 212 N.W.2d 711 (Mich. 1973); *Helena Elementary Sch. Dist. No. One v. State*, 769 P.2d 684 (Mont. 1989); *Robinson v. Cahill*, 303 A.2d 273 (N.J.), *cert. denied*, 414 U.S. 976 (1973); *Board of Educ. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982), *appeal dismissed*, 459 U.S. 1139 (1983); *Britt v. North Carolina State Bd. of Educ.*, 357 S.E.2d 432 (N.C. Ct. App.), *appeal dismissed*, 361 S.E.2d 71 (N.C. 1987); *Board of Educ. v. Walter*, 390 N.E.2d 813 (Ohio 1979), *cert. denied*, 444 U.S. 1015 (1980); *Fair Sch. Fin. Council, Inc. v. State*, 746 P.2d 1135 (Okla. 1987); *Coalition for Equitable Sch. Funding, Inc. v. State* 811 P.2d 116 (Or. 1991); *Danson v. Casey*, 399 A.2d 360 (Pa. 1979); *Richland County v. Campbell*, 364 S.E.2d 470 (S.C. 1988); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Seattle Sch. Dist. No. One v. State*, 585 P.2d 71 (Wash. 1978); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Kukor v. Grover*, 436 N.W.2d 568 (Wis. 1989); *Washakie County Sch. Dist. No. One v. Herschler*, 606 P.2d 310 (Wyo.), *cert. denied*, 449 U.S. 824 (1980). Additionally, other states presently face similar school finance reform cases.

193. There is no regional or chronological pattern to the outcome of these cases. All of the systems challenged have had at least some provision—either flat grants, foundation programs, or power equalization programs (which are addressed in greater detail later in this article)—designed to effect at least partial equalization of funding inequalities. Nor is there any indication that a particular type of provision bears on the outcome of the case. William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1643 (1989).

194. Hawaii collects all local and state funds and then distributes them equally between two at-large school districts. Hawaii has true equality of funding throughout the state. While the state constitution divides the state into two at-large districts, all money spent on public education is raised and distributed by the state department of education. Thro, *supra* note 193, at 1643; see also Jonathan Banks, Note, *State Constitutional Analysis of Public School Finance Reform Cases: Myth or Methodology?*, 45 VAND. L. REV. 129, 132 (1992).

195. Reutter and Hamilton observed:

School taxes are state and not local in nature, even though they are levied by the local district. This result follows logically from the concept that education is a state and not a local function. . . . [A] district may be compelled to establish and maintain schools of a given standard and the burden of financing them may be imposed upon the local district without the consent of its inhabitants.

percent of their revenues through property taxes.¹⁹⁶ A district's real property (the value of buildings and land) effectively defines its wealth. The presence of valuable real property or, more accurately, a high ratio of valuable property to the number of school children, makes a community wealthy in educational finance terms.¹⁹⁷ The assessment of property poses extremely difficult problems. Kirp and Yudof address the problems this way:

[I]t is often difficult to establish the market value of such different kinds of property as residences, farmland, factories, utilities, golf courses — and for political reasons; that is, there is often great pressure to hold down assessments, particularly assessments on residential relative to commercial property. . . . Inequalities in revenue per pupil among school districts within a state are primarily the result of differences among districts in per pupil taxable property base. The differences often are three or four to one.¹⁹⁸

E. EDMUND REUTTER, JR. & ROBERT R. HAMILTON, *THE LAW OF PUBLIC EDUCATION* 179 (2d ed. 1976). On the other hand, it is almost as an accident of history that schools continue to be funded by local property taxes in the manner that we see today. The taxation policy was put into place in the 19th century when the public school system was created, and not since that time has there been a reevaluation by any state legislature of the premise that local funds should be the primary source of revenue for local schools.

196. KIRP, *supra* note 66, at 556.

197. Although states now make major contributions, local school districts still pay most of the bill. In 1982 the annual bill was \$43 billion. *Id.*

198. *Id.* at 592. It is often argued that money is not the answer to the problems that confront our schools. In fact, President Bush suggested that increased funding of primary and secondary schools would not change the state of our nation's school system. The *Boston Globe* analyzed the former President's position as follows:

American industry is demanding a new generation of highly educated workers but the schools aren't producing them. The problem can't be money because the United States already spends more per student than most other industrial countries. So it must be the teachers' unions and the educational bureaucracy. What's needed is to shake up both with school choice.

Peter G. Gosselin, *No More Quick Fixes; Education Seen as Best Hope for Repairing Economy; Can it Deliver?*, *BOSTON GLOBE*, Sept. 13, 1992, at A1. The Bush Administration believed the federal government should serve as a catalyst for change but not provide the funds for that change.

While it is true that throwing money at the problem is not the answer, the Supreme Court has recognized that monetary inequities do play a role in unequal education. Furthermore, the absence of empirical data to prove the impact of money is not surprising. Data would have to be obtained by comparing students in well-funded districts to students in poorly-funded districts, before and after their education—an obviously difficult task. But consider the following:

[In 1986,] a class of 30 students in St. James Parish, the fifth best funded district [in Louisiana, had] \$91,990 spent on its education annually. In St. Martin Parish, the fifth worst funded district, the 30 student class [received] \$66,360 in funding. It seems plain that the \$25,630 difference [could not help but affect] the quality of education in the two districts, whether the additional money [was] used for better classrooms, teachers, special programs, or other educational expenses.

Douglas McKeige, Comment, *Inequality in Louisiana Public School Finance: Should Educational Quality Depend on a Student's School District Residency?*, 60 *TUL. L. REV.* 1269, 1269

The desire of school boards and voters to support education also plays an important role in the variations in the levels of expenditures.¹⁹⁹ High school district taxes can be a disincentive for businesses to move into or remain in an area so business interests can become a subtle indirect lobby against increased funding.

In addition to funds raised locally and supplemented by the state, federal funds make up a small minority of the overall school budget. These limited funds have further diminished within the last twelve years.²⁰⁰ Moreover, state supplemental moneys do not attempt to equalize the funding reaching each school district.²⁰¹ In other words, a poorer district can raise less money for its schools from property taxes than a more affluent district because of the value of the property, and the state does not then contribute enough funds to enable the poorer district to catch up.²⁰² The existence of wide disparities in the amount of money available to individual school districts within a given state inhibits achievement of an overall system of high quality public education. These disparities are largely the result of vast differences in the value of taxable real property within each district.²⁰³

n.2 (1986). Few would argue (with a straight face) that money does not make a difference in the quality of the education a child receives. For an excellent discussion on this issue, see generally KOZOL, *supra* note 2.

199. KOZOL, *supra* note 2, at 221-22.

200. Between 1980 and 1988 the federal outlays for the Department of Education decreased as a percentage of the Gross National Product from 0.6% to 0.4%, funding for the Department as a percentage of the federal budget declined from 2.5% to 1.8%, and the federal share of all primary and secondary education expenditures dropped from 8.7% to 6.2%. The federal government contributed less than a dime of every dollar spent on primary and secondary education and former President Bush only sought \$783 million dollars for his school choice package in 1993, less than 0.4% of the \$218 billion annually spent on our Nation's public schools. Gosselin, *supra* note 198, at A1.

201. KIRP, *supra* note 66, at 593; Banks, *supra* note 194, at 129.

202. Property-poor districts are trapped in a cycle of poverty from which they are unable to escape.

Because of their inadequate tax base, [property-poor districts] must tax themselves at significantly higher rates in order to meet the minimum requirements for accreditation; yet their educational programs are typically inferior. The location of new industry and development is strongly influenced by tax rates and the quality of local schools. Thus the property-poor districts, with their higher tax rates and inferior schools are unable to attract new industry or development and so have little opportunity to improve their tax base.

Banks, *supra* note 194, at 132 n.15 (citing *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 393 (Tex. 1989)).

203. For example, in Michigan after *Milliken v. Green*, the state set out in the next years to demonstrate that it could make the segregated schools a little less unequal by providing a per-pupil "minimum" of funding aid to every district, which led one commentator to remark:

[A]s has been the case in other states, however, Michigan pegged the minimum so low as to perpetuate the inequalities. In 1988 the average minimum guarantee was

G. State Funding Methods

There are three formulas that states have used to determine the amount of funds to be distributed to each school district.²⁰⁴ The first is called a "flat grant." This flat grant is a fixed number of dollars per school child given to all districts, rich and poor. When a state uses the flat grant it makes two assumptions. The first is that the differences in local fiscal capacity are small and the state's responsibility is limited only to aiding local districts to provide a basic or minimal level of education.²⁰⁵ This decision leaves local communities or individual parents to provide for education in excess of the minimum if they can afford it.

The second and most common formula is the "foundation scheme."²⁰⁶ First introduced in the early 1920s, the formula attempts to reconcile the right of local districts to support and govern their own schools with the obligation of the state to lessen the disparity of educational provision among districts.²⁰⁷ The theory is that any school dis-

\$2,800—less than half of what the richest district had available. More important, however, was the fact that the state minimum, which was expected to be assured by legislative allocations, was dependent on the whim of legislators, and on the shifts in economic trends.

KOZOL, *supra* note 2, at 202-03.

204. See Thro, *supra* note 193. According to Thro, the funding equalization plan is the most effective, but he notes that "[o]ne difficulty with this approach is that the rate of taxation is a function of the value that the district residents place on education. Thus, districts may suffer because residents are unwilling to vote for higher taxes." Generally there is also "a limitation on the amount of money the state will provide. For the most part these remedies have failed to correct completely the vast disparities in funding." An example of this can be found by looking at Texas. The Texas Court of Appeals observed:

The wealthiest school district has over \$14,000,000 of property wealth per student, while the poorest has approximately \$20,000; this disparity reflects a 700 to 1 ratio. The 300,000 students in the lowest-wealth schools have less than 3% of the state's property wealth to support their education while the 300,000 students in the highest wealth schools have over 25% of the state's property wealth; thus the 300,000 students in the wealthiest districts have more than eight times the property value to support their education as the 200,000 students in the poorest districts.

Kirby v. Edgewood Indep. Sch. Dist., 761 S.W.2d 859, 867-86 (Tex. Ct. App. 1988), *rev'd*, 777 S.W.2d 391 (Tex. 1989). Furthermore, local revenues for public education decreased from \$7.2 billion in 1990-91 to \$6.9 billion. State funding in terms of the amount allocated rose from \$800 million to \$6.2 billion, but the state will not be able to provide the full amount and it will fall short by \$540 million under new state legislation. Melanie Markley, *Schools See Rise in Low-Income Students*, HOUS. CHRON., Aug. 20, 1992, at A42.

205. The practical problem here is there is no way to determine how much education is minimally necessary. As a result, there is no way of knowing how much it will cost. Instead, the flat grant is determined through the political process, which inevitably results in even lower levels of funding than even proponents of the flat grant would suggest. WALTER I. GARMS ET AL., *SCHOOL FINANCE: THE ECONOMICS AND POLITICS OF PUBLIC EDUCATION* 188 (1978).

206. MARGARET E. GOERTZ ET AL., *PLAIN TALK ABOUT SCHOOL FINANCE*, THE NATIONAL INSTITUTE OF EDUCATION 15 (1978).

207. KOZOL, *supra* note 2, at 207-08.

trict, even property poor districts, should be assured certain minimum levels of revenue per pupil, provided the district makes its own effort to raise funding by imposing stipulated minimum property tax rates. The emphasis on localism derives from the respect for liberty—which is defined, in this case, as the freedom of the district to provide for its youth—and from the belief that it is more efficient for control of local schools to be held by those who have the greatest stake in their success.

Jonathan Kozol suggests that in its pure form the foundation program operates somewhat like this:

(1) A local tax upon the value of homes and businesses within a given district raises the initial funds required for the operations of the public schools. (2) In the wealthiest districts, this is frequently enough to operate an adequate school system. Less affluent districts levy a tax at the same rate as the richest districts—which assures that the tax burden on all citizens is equally apportioned (in many instances the less affluent districts are willing to institute taxes on themselves which are higher than those of the more affluent districts so that their schools will have access to greater funding)—but, because the property is worth less in the poorer community, the revenue derived will be inadequate to operate a system on the level of the richest district. (3) The state will then provide sufficient funds to lift the poorer districts to a level (the foundation) roughly equal to that of the richest districts.²⁰⁸

In theory, this program creates something close to revenue equality. In practice, however, the program is not strictly followed, causing inequities between school districts. Kozol further notes that even if the program were strictly followed it would still not satisfy the greater needs that exist in districts that have greater numbers of retarded, handicapped, or Spanish-speaking children.²⁰⁹ In these districts it is more expensive to meet the special needs of these children. The program would succeed in treating districts, but not children, equally.²¹⁰

The third of these formulas is “percentage equalizing.”²¹¹ The state assists a district depending on its “ability” to attain the amount of funding the district determines is appropriate. The district determines the size of its budget and the state provides a share of the budget determined

208. *Id.* at 208.

209. *Id.*

210. Even this degree of equal funding is rarely achieved. Furthermore, a continual area of debate with foundation programs is how to determine the “foundation.” States frequently adopt a “low foundation,” a level of subsistence that will raise a district to a point at which its schools are able to provide a “minimum” or “basic” education, but not an education on the level found in the rich districts. *Id.*

211. For a detailed analysis of the flat grant, foundation grant, and percentage equalizing formulas, see GARMS, *supra* note 205, at 185-211.

by the district's "aid ratio." An aid ratio is determined by a specific formula.²¹² The degree to which the percentage equalizing plan equalizes expenditures depends on the level of state support. The larger the state share of expenditures, the more equalizing the plan. In addition, the local district must choose a level of educational expenditures. Two districts of equal property wealth often do not spend the same amount of money on education, and the district with the higher expenditure level receives more state aid. The choice or the ability of a district to spend more money can result in wealthy districts receiving more state aid than poorer ones.²¹³

Each of the three formulas can be demonstrated to have equalizing effects, reducing the differences in the amount of money spent per pupil. But the equalizing effects are often not very strong, even when not hampered by special "save harmless" provisions added for political reasons. Typically legislatures add provisions that guarantee every district that it will receive the same amount of aid it received the prior year even though a straight application of the formula would indicate lessening of aid in the coming year.²¹⁴ These provisions maintain disparities among districts in the amount of money spent per pupil.

A problem with all three programs is that often legislatures will offer the wealthy districts an incentive in order to win their backing for an equalizing plan of any kind, no matter how inadequate.²¹⁵ The incentive is to grant some portion of state aid to all school districts, regardless of their poverty or wealth. While less state aid is naturally expected to be given to the wealthy than the poor, the notion of giving something to all districts is believed to "be a sweetener" that will assure a broad enough electoral appeal to raise the necessary funds through statewide taxes.²¹⁶ In several states, however, these "sweeteners" have been so sweet that they have sometimes ended up by deepening the preexisting inequalities.²¹⁷

212. KIRP, *supra* note 66, at 593-94.

213. GOERTZ, *supra* note 206, at 21.

214. "Save harmless" or "save from harm" provisions insure that the amount of state aid received by a district (either per pupil or total) under a new plan will not differ radically from payments received in a prior year. GOERTZ, *supra* note 206, at 23.

215. In Los Angeles, a suit was brought five years ago by black and latino parents alleging school funding inequities in Los Angeles Unified School District. The district spends as much as \$400 a year less per pupil in predominantly minority elementary schools. A settlement decree was proposed to eliminate the disparity in funding. Sandy Banks, *Schools Consider Major Change in Funding Methods*, L.A. TIMES, Nov. 25, 1991, at B1.

216. KOZOL, *supra* note 2, at 209.

217. *Id.* at 211

The opposition to the drive for equal funding in a given state is sometimes cast as local (district) rights in opposition to the powers of the state. While local control may be defended and supported on a number of important grounds, it is unmistakable that it has been historically advanced to counter equity demands.²¹⁸ Yet offsetting this "local versus state" control or "state versus federal" control argument is the reality that state and federal governments are willing to subvert local control when it suits their purposes and only avoid the issue when it comes to equal funding issues. For example, states establish uniform curricula for all school districts, certify teachers on a statewide basis, and adopt textbooks on a statewide basis. Local control is defined by what the local school board has the power to determine: how clean the floors will be, how well the principal and teachers will be paid, whether the classrooms will be adequately heated, whether the school will be able to provide enough books for its students and its library, whether there is a playground for the kids to play on, whether the school has computers for its students or for its administrators.²¹⁹ If the school board has sufficient money, it can exercise some real control. If it has very little money, it has almost no control; or rather it has only negative control.²²⁰

The history of the education reform battle between the courts and the legislature in the state of New Jersey is a clear indicator of the gulf that will sometimes exist between what the law seems to require in the way of educational equality, and what state policymakers are willing to accept.²²¹ In 1973, the Supreme Court of New Jersey decided *Robinson v. Cahill*.²²² The court ruled that the state scheme (the foundation plan)

218. *Id.*

219. School boards can have implied powers related only to education. Members are selected as the legislature prescribes and their powers may be extended or limited in the discretion of the legislature. In no instance can a board enlarge its powers so as to conflict with state regulation. Moreover, school boards do not have unfettered control of public money for purposes deemed by them to be for the good of the education of the children. For example, the Supreme Court of Washington in *McGilvra v. Seattle School District No. 1*, 194 P.2d 817 (Wash. 1921), held that the maintenance of a "clinic" is beyond the authority of the local school board under its implied powers. E. EDMUND REUTTER, JR., *THE LAW OF PUBLIC EDUCATION* 139-40 (3d ed. 1985).

220. REUTTER, *supra* note 219, at 139-40.

221. The history of the *Robinson* case reads like the "case that would not die." *Robinson* came before the New Jersey Supreme Court seven times in thirteen years. See *Robinson v. Cahill*, 303 A.2d 273 (N.J.), *cert. denied*, 414 U.S. 976 (1973) (*Robinson I*); *Robinson v. Cahill*, 306 A.2d 65 (N.J. 1974) (*Robinson II*); *Robinson v. Cahill*, 335 A.2d 6 (N.J. 1975) (*Robinson III*); *Robinson v. Cahill*, 351 A.2d 713 (N.J.), *cert. denied*, 423 U.S. 913 (1975) (*Robinson IV*); *Robinson v. Cahill*, 355 A.2d 129 (N.J. 1976) (*Robinson V*); *Robinson v. Cahill*, 358 A.2d 457 (N.J. 1976) (*Robinson VI*); *Robinson v. Cahill*, 360 A.2d 400 (N.J. 1976) (*Robinson VII*). In effect it lives on in the recent *Abbott* litigation. See *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990).

222. *Robinson I*, 303 A.2d 273.

of funding its public schools violated the "thorough and efficient" clause of the state constitution.²²³ It held that the guaranteed foundation level of \$400 per student was inadequate to provide all public school students with a quality education.²²⁴

The court compared two New Jersey school districts in Mercer County, one in Princeton and the other in Trenton. Princeton was by far the richer district, having property valued four times greater than property in Trenton. But both districts had to assess property at a rate greater than the state minimum of 1.05 cent per dollar of taxable property value. Trenton levied a tax at the rate of 2.8 cents per dollar and Princeton's tax rate was 1.71 cents per dollar of property taxed.²²⁵

The court found that this scheme created an unacceptable inequality because, although the Trenton community taxed its property at a higher rate, the Princeton tax generated more per pupil funding (\$581.28) than the Trenton revenue (\$362.67).²²⁶ The New Jersey court postponed a final ruling on the case to give the legislature sufficient time to respond.²²⁷ The legislature did nothing for over two years. Finally, in 1975, the court decided it had a "plain, stark and unmistakable" obligation to act.²²⁸

The New Jersey Supreme Court then issued an order requiring state officials to distribute several million dollars in aid to reduce the gap in per-pupil expenditures between rich and poor school districts.²²⁹ Before the order took effect, however, the court gave the state four months in which to remedy the educational inequality through legislation.²³⁰

One month before the court order was to take effect, the legislature passed the Public School Education Act of 1975.²³¹ The Act contained a different equalization formula which was immediately challenged by parents of school-aged children in poorer districts.²³² The court was willing to let the legislature develop the program "assuming it [was] fully funded."²³³

223. *Id.* at 297.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Robinson v. Cahill*, 306 A.2d 65, 66 (N.J. 1974) (*Robinson II*).

228. *Robinson v. Cahill*, 335 A.2d 6 (N.J. 1975) (*Robinson III*); *Robinson v. Cahill*, 351 A.2d 713, 716 (N.J. 1976) (*Robinson IV*).

229. *Robinson IV*, 351 A.2d at 721-22.

230. *Id.* at 722.

231. N.J. Stat. Ann. §§ 18A:7A-1 to -52 (West 1989).

232. *Robinson v. Cahill*, 355 A.2d 129, 131 (N.J. 1976) (*Robinson V*).

233. *Id.* at 139.

The New Jersey legislature never funded the Act. This was due in part to its disagreement with the Governor over whether an income tax needed to be imposed on its citizens. By 1976, however, the courts decided to act once again. The Supreme Court enjoined the state from funding any public educational programs until it provided full funding for the 1975 Act.²³⁴ There was a brief stalemate which resulted in the closing of the public schools. Finally, the legislature passed laws providing for the funding of the Act through an income tax—the first in the history of New Jersey.

In 1981, a new round of litigation began in which the parents of students in poor school districts challenged the constitutionality of the 1975 Act.²³⁵ The New Jersey court ruled in favor of the parents. Figures for school funding in New Jersey for the 1988-89 school year revealed that the Princeton district—still among the richest districts in the state—spent \$7,725 per pupil as compared to \$3,538 for Camden, one of the poorest districts.²³⁶

In California, the battle for educational equality has also taken sobering twists. In 1963, the state courts adopted a more expansive version of *Brown*, requiring local school officials to eliminate racial segregation “regardless of the cause of such segregation.”²³⁷ This policy was reversed by an amendment to the state constitution that modified its equal protection clause to provide that:

[n]o court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution.²³⁸

Voter revolt through constitutional amendment also affected California policymaking on solutions to inequality in educational financing. In *Serrano v. Priest*,²³⁹ the California Supreme Court invalidated the state

234. *Robinson v. Cahill*, 358 A.2d 457, 459 (N.J. 1976) (*Robinson VI*).

235. *Abbott v. Burke*, 575 A.2d 359, 365 (N.J. 1990) (*Abbott II*).

236. KOZOL, *supra* note 2, app. at 236 (citing statistics from the Educational Law Center, Newark, N.J.).

237. *Crawford v. Board of Educ.*, 551 P.2d 28 (Cal. 1976). *See also* *Jackson v. Pasadena City Sch. Dist.*, 382 P.2d 878 (Cal. 1963). Compare *Jackson* with the federal standard in *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

238. CAL. CONST. art. 1, § 7(a) (originally passed as Proposition 1). *See Crawford v. City of Los Angeles*, 458 U.S. 527 (1982). In *Crawford*, the U.S. Supreme Court upheld the validity of Proposition 1 because it merely repealed legislation that was not required in the first instance by the Fourteenth Amendment. *Id.* at 545.

239. 487 P.2d 1241 (Cal. 1971); *appeal after remand*, *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976).

educational funding scheme and required that the state create a system to eliminate the disparity of funding between wealthy school districts and poor districts. This announcement so shocked citizens that it provided the catalyst for Proposition 13 and other tax revolt measures that, in effect, placed a constitutional cap on the amount of taxes that could be assessed on citizens to pay for state funded programs. Now "while California ranks eighth in per capita income in the nation, the share of its income that goes to public education is a meager 3.8 percent—placing California forty-sixth among the fifty states."²⁴⁰ Kozol describes California as an example of how "legal victories have been devalued by the states."²⁴¹

Conclusion

There is much to consider in a legal environment that places states in control of educational equality issues. There are some who feel that the *Brown* mandate was flawed initially and failed in its mission.²⁴² It is not overly cynical to acknowledge, as has the Supreme Court, that partial compliance with the *Brown* mandate is now an accepted substitute for what initially was a much broader vision.²⁴³

There remains a striking contrast of states willing to progressively move forward in creating and augmenting rights for its citizens, but moving just as decisively away from making a commitment to an equal education for its school-aged children. Terms ordinarily used in discussions defining justice have lost their meaning for children left out of the education loop.

240. KOZOL, *supra*, note 2, at 221.

241. *Id.* at 220.

242. See Tushnet & Lezin, *supra* note 4. "Within the domain of constitutional law, *Brown* has stood for the value of 'judicial activism' on behalf of human rights. Yet, paradoxically, from the point of view of those seeking substantial integration of the public schools, *Brown* was a failure. The Supreme Court endorsed a formula of gradual desegregation that provided the opportunity for massive resistance in the Deep South and for token desegregation elsewhere." *Id.* at 1867.

243. The Court in *Freeman* describes the factual setting the DeKalb County case as one common to *Brown* cases generally:

For decades before our decision in *Brown v. Board of Education (Brown I)*, and our mandate in *Brown v. Board of Education (Brown II)*, which ordered school districts to desegregate with "all deliberate speed," DCSS was segregated by law. DCSS's initial response to the mandate of *Brown II* was an all too familiar one. Interpreting "all deliberate speed" as giving latitude to delay steps to desegregate, DCSS took no positive action toward desegregation until the 1966-1967 school year, when it did nothing more than adopt a freedom of choice transfer plan. Some black students chose to attend former *de jure* white schools, but the plan had no significant effect on the former *de jure* black schools.

Freeman v. Pitts, 112 S. Ct. 1430, 1436 (1992) (citations omitted).

The “victory” for Raymond Abbott, the student responsible for the most recent challenge of the New Jersey educational finance laws, is described by Kozol:

Raymond Abbott . . . is today a 19 year-old high school dropout with the reading skills of a child in the seventh grade. A learning-disabled student who spent eight years in the Camden public schools, his problems were never diagnosed and he was passed on each year from grade to grade On the day that the decision came down from the court, Abbott, now a cocaine addict, heard the news of his belated vindication from a small cell in the Camden County Jail.²⁴⁴

The notion of “good faith” in state officials has taken on a quality that ignores a pattern of behavior that has effectively institutionalized racism and poverty. In *Freeman*, the concurring Justices point out that “[i]t would seem especially misguided to place unqualified reliance on the school board’s promises in this case, because the two areas of the school system the District Court found still in violation of the Constitution—expenditures and teacher assignments—are two of the Green factors over which DCSS exercises the greatest control.”²⁴⁵

The notion of “equality” has become skewed in such a manner that it now competes with “liberty.” As one state court puts it:

Traditionally, not only in Idaho but throughout most of the states of the Union, the legislature has left the establishment, control and management of the school to the parents and taxpayers in the community which it serves. The local residents organized the school district pursuant to enabling legislation, imposed taxes upon themselves, built their own school house, elected their own trustees and through them managed their own school. It was under these circumstances that the ‘Little Red School House’ became an American institution, the center of community life, and a pillar in the American conception of freedom in education, and in local control of institutions of local concern. In the American concept, there is no greater right to the supervision of the education of the child than that of the parent. In no other hands could it be safer.²⁴⁶

This philosophy accounts for the actions of state officials that declare education to be a fundamental right, but then treat education equality issues as merely a social and economic option. It is a zero-sum game. The equality clause cancels out the fundamental rights clause. There is a curious pattern of resistance to a notion of “equality of educational opportunity” if it means “equality of opportunity through education” and an equal chance to succeed. Or, as Coons, Clune, and Sugarman put it,

244. KOZOL, *supra* note 2, at 172.

245. *Freeman*, 112 S. Ct. at 1456.

246. *Thompson v. Engelking*, 537 P.2d 635, 645 (Idaho 1975).

"[t]he crucial value to be preserved is the [equal] opportunity to succeed, not the uniformity of success."²⁴⁷

It is clear that the educational opportunity game is being played on a different field than existed when the *Brown* mandate was declared in 1955 (*Brown II*). Demographics have recast the manner in which we look at statistical imbalances, so that not every disparity yields a constitutional case. Legislative motives are not automatically suspect when these imbalances are present. And as Scalia's concurrence in *Freeman* establishes, any legal implications of statistical imbalance diminish over time.²⁴⁸

However, many elements in the game have remained the same. Educational opportunity is still dependant on where a school-aged citizen lives. Today, while state and local laws requiring segregation have been nullified, the goal of racial integration has not been achieved. According to studies by the National School Boards Association, nearly two thirds of all black youngsters (63.3 percent) still attend segregated schools.²⁴⁹ Many large cities and a growing number of suburbs no longer have enough white schoolchildren attending public schools to give their systems a white majority. Nor, in most cases, will parents or authorities send suburban children to integrate city schools.²⁵⁰ Meaningful progress in the integration of public schools for black children has not happened since the early 1970s.²⁵¹ Similarly, integration for other minorities never truly began. Furthermore, in the twenty-five largest inner-city school districts, there are actually more racially segregated schools today than existed in 1954.²⁵² The courts are not able to impose taxes to fund busing, which leaves it up to state legislatures.²⁵³ State and local bodies are

247. JOHN E. COONS ET.AL., PRIVATE WEALTH AND PUBLIC EDUCATION 447 (1970).

248. See *supra* note 1 and accompanying text.

249. ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 162 (1992).

250. *Id.*

251. Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 YALE L.J. 1285, 1285 (1992).

252. *Id.*

253. Among other concerns, there are federalism concerns:

By ordering state and local officials to exceed their statutory authority, judicial taxation also invades the state legislature's authority over the state executive branch. [Ultimately,] unless a state fiscal scheme is "palpably arbitrary" or "hostile and oppressive . . . against particular persons and classes," it cannot be invalidated by a federal court. "The enormous problem implicit in redesigning taxation methods in order to provide for a more equitable financing of present education policy issues is best decided through legislative and political processes.

G. R. Wolohojian, *Judicial Taxation in Desegregation Cases*, 89 COLUM. L. REV. 332, 341 (1989) (citing *Allied Stores v. Bowers*, U.S. 522, 526 (1959), and *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)).

ingenious in the extreme in devising superficially neutral plans (pupil placement laws, ability grouping, freedom of choice) which are really just subterfuges for keeping the races separate in the public schools.²⁵⁴

254. SCHOOL DESEGREGATION: PAST, PRESENT AND FUTURE 99 (Walter G. Stephan & Joe R. Feagin eds., 1980).

Ability grouping/tracking has come increasingly under fire over the years. It is an issue, and a policy implemented by local school districts, which must be considered seriously, and independent of busing:

School systems can remain segregated even after a court-ordered school desegregation plan has been implemented. Ability grouping and exclusionary disciplinary measures continue to isolate minority children from white children. It is often difficult to determine whether these practices are intentionally being used to segregate or whether they are being used for educational purposes but have the unintended effect of segregating.

KIRP, *supra* note 66, at 564.

Every type of tracking program has significant racial consequences. These programs tend to concentrate minority children in less-advanced school programs. The proportion of minority students assigned to special programs for the educable mentally retarded and placed in slow learners' classes and nonacademic high school programs is typically two or three times greater than their proportion of the school-age population. David L. Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. PA. L. REV. 705 (1973).

Furthermore, a study by the Rand Corporation found that disproportionately high numbers of black and latino students are assigned to low-ability mathematics and science classes, while very few minorities gain access to high-ability classes. In addition, the study found that low-ability classes are frequently taught by less qualified teachers and receive fewer resources, including science laboratories and equipment. Even in elementary schools, 65% of math and science classes are tracked, and the tracking is strongly correlated with race, although tracking in these earlier years is less based on an academic record than in high school. The report determined that high-ability students in the least advantaged and predominantly minority schools may actually have fewer opportunities and less qualified teachers than low-ability students in schools that are more than 90% white. KIRP, *supra* note 66, at 573. Often these students are given tenured teachers who are no longer effective in the classroom. Also, these tracked classes are not used to improve the ability of these children to learn. Instead of providing material that the upper-tracked students are getting (the "more advanced" children) in a more comprehensible format to bring these "slower" children up to speed so that they can eventually enter more advanced classes, usually these children simply receive the exact same material presented more slowly with little or no attempt to provide instruction that would bring these children up to speed.

Little Rock School District v. Pulaski County Special School District No. 1, 584 F. Supp. 328 (E.D. Ark. 1984), *rev'd in part on other grounds*, 778 F.2d 404 (8th Cir. 1985), *cert. denied*, 476 U.S. 1186 (1986), is an example of the use of these types of programs to eliminate the continuing vestiges of a segregated school system that persist as discriminatory educational practices. The district court approved new procedural safeguards proposed by the North Little Rock School District for determining the assignment of students to special education and gifted programs, after finding that the District had administered such programs in a discriminatory fashion.

The court was alerted to the fact that 20% of the black student body had been classified as mentally retarded or learning disabled; the court found that "[n]o valid testing procedure could end up placing one out of every four or five children in special education." *Id.* at 349. In addition, only 9.4% of the gifted program's students were black. According to the court, this was "an underrepresentation of blacks in the gifted program of 6.8 standard deviations,

Thirty-two states contain 98.2 percent of America's black population.²⁵⁵ In the majority of these states over fifty percent of the black population continues to attend segregated schools.²⁵⁶ So one might ask the question, how far have we really come to ending segregation and can the goals set forth in *Brown* ever be accomplished? Sadly, the language

which would occur only seven times in a billion chance." *Id.* See also Tracy E. Sivitz, Note, *Eliminating the Continuing Effects of the Violation: Compensatory Education as a Remedy for Unlawful School Segregation*, 97 YALE L.J. 1173 (1988).

255. HACKER, *supra* note 249, at 162. It must be recognized that this table does not indicate the number of schools attended by a majority of other minority students, specifically hispanics. In recent years the number of schools attended by a mix of minorities as increased dramatically. All of the issues discussed above apply to hispanics as well. Additionally, the question of bilingual education and segregation has been studied and litigated heavily. Because of the overwhelming amount of information and difficulty of compilation, these issues are not specifically addressed here. Such issues as funding, busing, and ability grouping/tracking are equally applicable.

256. Consider the following statistics:

Black Students: School Share and Segregation

	<i>Share of Statewide Enrollments</i>	<i>Attending Segregated Schools</i>
Illinois	18.7%	83.2%
New York	16.5%	80.8%
Mississippi	55.5%	80.3%
Michigan	19.8%	76.7%
California	9.0%	76.6%
New Jersey	17.4%	72.8%
Maryland	35.3%	72.3%
Wisconsin	8.9%	70.4%
Ohio	15.9%	67.6%
Alabama	37.0%	63.8%
Texas	14.4%	63.3%
Pennsylvania	12.6%	62.1%
Louisiana	41.3%	61.6%
Missouri	14.9%	61.0%
Connecticut	12.1%	60.3%
South Carolina	44.5%	60.0%
Tennessee	22.6%	59.7%
Georgia	37.9%	59.3%
Massachusetts	7.4%	58.5%
Arkansas	24.2%	53.8%
Virginia	23.7%	49.5%
Indiana	9.0%	46.8%
Rhode Island	5.6%	45.6%
Florida	23.7%	45.1%
Colorado	4.5%	44.9%
Oklahoma	7.8%	40.8%
North Carolina	28.9%	37.5%
Kansas	7.6%	32.0%
Washington	4.4%	29.6%
Nevada	9.6%	20.0%
Delaware	27.7%	8.9%
Kentucky	10.2%	6.6%

Id. at 163. These statistics come from the National School Boards Association. *Id.*

of inequality after *Brown* represents a poor repackaging; beneath demographics the victims remain the same—the poor, the nonwhite.²⁵⁷

Black children are almost three times as likely as whites to grow up in poor surroundings.²⁵⁸ This Article does not consider the probability that hispanic children will grow up in poverty, but recent looks at Texas and California indicate that the number of poor hispanic children entering public schools is ever increasing.²⁵⁹

Federal educational policies continue to be a key factor of influence. This is as clear now as it was immediately after *Brown* was handed down, when states like Arkansas²⁶⁰ chose to resist attempts to desegregate. It may be an influence of convenience, but it suggests a dual responsibility for making educational equality a reality.

The *Brown* experience has changed the manner in which states think about educational policy. *Brown* first created a language for characteriz-

257. Hacker cites the following statistics:

	<i>White</i>	<i>Black</i>	<i>Multiple</i>
All Persons	8.8%	31.9%	3.63%
All Children	15.8%	44.8%	2.82%
All Families	8.1%	29.3%	3.62%
Female Headed Households	37.9%	56.1%	1.48%

	<i>White</i>	<i>Black</i>
Central Cities	32.7%	60.3%
Suburbs	32.5%	17.5%
Nonmetropolitan	32.1%	22.2%

Id. at 100.

258. *Id.* at 162.

259. See generally HACKER, *supra* note 249.

260. The response of the State of Arkansas to the *Brown* jurisprudence is generally well-known, because it served to highlight the opposition of the southern states to desegregation orders. In 1959, the Arkansas legislature passed a law giving the governor the power to close public schools to prevent desegregation. *Garrett v. Faubus*, 323 S.W.2d 877 (Ark. 1959). Later, these same laws were upheld as valid policy power measures to insure public safety in the event of violence in communities faced with integration. *Smith v. Faubus*, 327 S.W.2d 562 (Ark. 1959).

Since that time, Arkansas policymakers have relied mainly on their constitution to resolve educational equality issues. It has found no duties created by its educational clause. The Arkansas Constitution requires public schools that are “general, suitable and efficient” system of free public schools. But this provision has been interpreted to “merely authorize[] the legislature or individual school districts, to fund the education of these persons, should it choose to do so. The language of the amendment is not mandatory. It does not require the general assembly or school districts to expend any funds. . . . It merely authorizes such action.” *Op. Ark. Att’y. Gen.* 92-072 (1992); see also *Magnolia Sch. Dist. No. 14 v. Arkansas State Bd. of Educ.*, 799 S.W.2d 791 (Ark. 1990).

ing the activities of state and local governments (de facto versus de jure, invidious versus benign). This language was intended to help the courts determine when and how governments were liable for the inequalities in pupil assignments. This lexicon has also facilitated a defensive posture, in effect highlighting for state officials the kinds of inequalities for which they will not be held responsible. Ironically, rather than serving to provide clarity and give teeth to the equality principle of *Brown*, this language has led state officials to address educational policy matters as though they were severable from other issues of individual rights where states routinely fashion constitutional and legislative solutions. This behavior has served to create a love/hate relationship with education—a sentimental allegiance to local control of schools combined with a tendency to disown responsibility for developing meaningful educational policies and disdain federally mandated programs.

The evidence suggests that a favorable outcome for *Brown* in state hands is unlikely. State policymakers must restructure their thinking about educational policy to give substance to the notion of an education that is “uniform” or “thorough and efficient” or which takes place in a “safe” learning environment. Continued failure to provide adequate education for large numbers of our children suggests a future where educational policy will be standardized through additional federal judicial intervention (the declaration that education is a fundamental right) or through federal legislation. Such a development would provide an ironic symmetry to the jurisprudential impact of the *Brown* era on the importance of educational equality.

