

The Structural Inadequacy of Public Schools for Stigmatized Minorities: The Need for Institutional Remedies

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Introduction

For decades, public schools have failed stigmatized minorities. In so doing, schools defy state and federal constitutional rights granting minorities effective-education services. Courts have struggled to remedy these violations, constantly reconfiguring public-school inputs in search of a solution. First, courts tried racial integration, then additional school funding, and, more recently, expert-approved remedial programs. These have not worked. Majorities of African-American and Hispanic students fail to meet even basic proficiency standards. These efforts flounder because courts neglect the incompatibility of racial stigma's educational consequences and public schools' institutional conditions. Stigma uniquely obstructs educational achievement, demanding schools with the capacity to adapt services to meet the varied ways stigma individually affects performance. Public schools, however, are institutionally disposed toward uniformity, preempting the very flexibility stigmatized minorities require. Traditional school remedies fail largely because they leave unaddressed these institutional impediments. To vindicate minorities' educational entitlements, courts therefore must employ institutional remedies that reshape the structural incentives governing public-school policymaking.

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The constitution of essentially every state in the country entitles individuals to an effective public education. While state constitutions vary in their respective definitions, they generally guarantee an education enabling students to participate meaningfully in the state's economic and civic life. The federal Constitution, on the other hand, does not affirmatively entitle individuals to education services, but the Constitution's Equal Protection Clause requires states to provide education services equitably if they choose to provide them at all. Among the remedies available to litigants for federal equal-protection violations is compensatory education designed to counteract the harms of educational inequity. These federal remedies intersect with state-constitutional entitlements, as compensatory education irreducibly involves services courts find effective in enabling students to participate effectively in society's economic and civic life. Although recent Supreme Court decisions significantly limit the availability of federal effective-education remedies, these interests still remain viable. In this way, based either on direct, state constitutional rights or indirect federal remedies, essentially all racial minorities in this country possess a constitutional promise to an effective education.

Despite these guarantees, public schools have been chronically ineffective in educating racial minorities. This broad ineffectiveness stems, I argue, from the antithetical relationship between education and stigma. Educational values, of course, reflect substantive judgments about preferred civic, social, and cultural outcomes. These values, at the same time, reveal presuppositions about student capacity: educational systems teach only what its sponsors believe students can achieve. The philosophies motivating schools therefore necessarily presume students possess the competencies required for achieving educational objectives.

Yet, while education depends on students possessing the capacities enabling education, social stigma attacks these very same capabilities. Stigma refers to a trait so thoroughly discredited as to challenge the humanity of those bearing it. Stigma thus signals intellectual, social, and cultural incompetence and, in so doing, undercuts the capacities enabling education. In the United States, the prototypical stigmatized trait is race; the prototypical stigmatized group, African-Americans.¹

1. This Article focuses on racial stigma and will refer throughout to "stigmatized minorities." By that I mean minority groups in the United States victimized by social stigma. That class includes African-Americans. *See infra* Part III.B.1. I also include Hispanic Americans in my definition. To protect against monotony, I use the terms "minorities" and "racial minorities" synonymously with "stigmatized minorities."

While stigma, moreover, generally compromises the class-wide educational fortunes of minorities, it affects individual children differently. Children have varying abilities to defend themselves from stigmatic harm. Some have access to familial or cultural resources shielding them from internalizing stigma. Churches, community groups, and civic organizations, for example, play a key role in minority communities in combating the self-doubt engendered by stigma. Children, likewise, cope variably with stigma. Some reflexively blame stigma for educational insufficiency; others limit their educational potential to observed intra-group accomplishment; and others, most insidiously, dis-identify with educational achievement altogether.² Although stigma affects racial minorities collectively in ways that uniquely compromise education, it also affects each child in diverse ways reflecting the breadth of their experiences.

Because stigma undermines the educability of stigmatized minorities as a class and individually, schools require the discretion to flexibly craft services to address stigma's educational consequences. Across-the-board policies un-targeted to specific stigmatic harms neglect racial minorities' particular needs. Moreover, even uniform policies generally responsive to stigma overlook the varied ways stigma obstructs the education of individual children. In short, stigma specially burdens the education of racial minorities, and schools, consequently, need the ability to adapt services to these particular impediments.

Despite this need for flexibility, public schools, especially those primarily serving stigmatized minorities, operate in a morass of mandates that systematically remove discretion from school-based officials. Federal, state, and central-office rules dictate uniform policies on matters spanning the range of a school's responsibilities: the length of the school year, staff tenure, choice of textbooks, how schools assess student achievement, teacher certification, and pedagogical methodologies, to name a few. Collective-bargaining rules—created by union contracts—pile on to the already onerous statutory restrictions, and remove operational discretion in the same way that government mandates undercut substantive discretion. Union contracts, among other things, cap the number of successive and total hours a teacher must teach; restrict the number of lesson plans a teacher must prepare; limit teachers' participation in after-school programs; and restrict administrative evaluation and discipline of staff. In urban districts disproportionately serving stigmatized minorities, the rigidity of

2. See *infra* notes 129-132 and accompanying text.

this cumulative body of rules is stark. As one analyst said, “a big city [school] superintendent . . . operates in a straitjacket.”³

This bureaucratic uniformity is not accidental, but is central to the institutional conditions governing public schools. Public schools, fundamentally, are government agencies—their priorities set, determined, and regulated by political authorities. Political accountability, moreover, is characterized by two foundational elements: democratic hierarchy and political uncertainty. These elements impel rulemaking because the removal of local discretion is vital both to the imposition of hierarchical democratic values and to insulating current priorities from interference by other government actors. Three additional public-school dynamics exacerbate these bureaucratic tendencies: (1) the monopolistic nature of public schooling; (2) large federal and state subsidy of public schools; and (3) extraordinary public concern for school effectiveness. As discussed in detail below, the absence of competitive pressure facilitates bureaucracy because government regulation inevitably accompanies government money and politicians generally respond to public pressure by implementing more rules. These five factors instill a centralizing bureaucracy into the very structure of public schools.

These dynamics, furthermore, apply with particular force to urban districts disproportionately serving minorities. First, the functioning of stigma suggests government is likely to impose on these districts special rules reflecting diminished visions of minorities’ capacity, such as unchallenging curricular requirements and policies facilitating special-education classification.⁴ Second, in urban districts led by minority administrators, stigma induces greater bureaucracy given its messages about minorities’ competence. Democratic hierarchy generates rulemaking, in part, to ensure subordinate officials appropriately implement preferred policies. Stigma intensifies this tendency because it suggests minority administrators lack the competence to do so. Third, because racial minorities are relatively poor and under-perform academically—both of which stem, in part, from stigma—the institutional dynamics specific to public education affect urban schools disproportionately. Stigmatized minorities are unlikely to have the resources necessary to exit public schools or move to another district, and thus are especially vulnerable to the way monopoly breeds rulemaking. Urban districts also depend disproportionately on state and federal subsidy; these districts therefore are uniquely constrained by the strings government inevitably attaches to public funding. Finally, chronic under-performance, coupled with

3. See *infra* note 173 and accompanying text.

4. See *infra* notes 121-125, 227 and accompanying text.

vulnerability to legal challenge, generates substantial political concern for urban-district performance. This heightened scrutiny itself precipitates even more regulation.

The institutional disposition toward uniformity is particularly challenging for stigmatized minorities because of their political weakness. Minorities' political limitations stem from their minority status, their lack of wealth, and, most insidiously, stigma itself. Their minority status ensures they cannot self-generate political outcomes at the state and federal levels where educational policies increasingly are set. Additionally, their lack of wealth undermines their political agency at all levels given the vital role money plays in contemporary politics. Moreover, stigma impedes their ability to align with other groups to facilitate political objectives. These weaknesses preclude minorities from systematically influencing the content of bureaucratic mandates. As such, the rules not only eliminate discretion to flexibly adapt services to student needs, but also reflect educational priorities that are neutral, if not hostile, to stigma's educational consequences.

For these reasons, I argue that courts must upend the traditional way they have approached remedies for stigmatized minorities showing public-school inadequacy under state or federal constitutional law. Courts have focused on public-school inputs, principally student-body integration, school funding, and expert-approved remedial programs. Manipulating these inputs, courts have ignored the institutional conditions governing how schools use them, let alone whether those institutional conditions advance the unique needs of stigmatized minorities.⁵ My critique argues that the

5. No court, based on my research, has ever considered the particular institutional critique I offer here; nor has any court ordered the kind of class-wide institutional remedies I suggest. In addition, virtually all legal commentators considering the breach of education rights focus on public-school inputs, principally the three I mention. A few commentators do suggest school-choice remedies. See, e.g., James E. Ryan, *Sheff, Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529 (1999); Michael Heise, *Equal Educational Opportunity and Constitutional Theory: Preliminary Thoughts on the Role of School Choice and the Autonomy Principle* 14 J.L. & POL. 411 (1998); Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Federalism*, 15 YALE L. & POL'Y REV. 113 (1996); Greg D. Andres, Comment, *Private School Voucher Remedies in Education Cases*, 62 U. CHI. L. REV. 795 (1995). But these arguments are generally premised on the extent to which private schools provide an immediately available supply of effective schools, not public schools' institutional limitations—and surely not the relationship of these limitations to stigmatized minorities' particular educational needs. Outside of the legal context, John Chubb and Terry Moe, in their groundbreaking book *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990) and James Q. Wilson, in his classic *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (Basic Books, Inc. 1989), offer structural critiques of the effect of politics on public-school efficacy. These texts, however, do not address legal remedies and thus do not consider the jurisprudential implications of an institutional account. Most importantly, these texts also do not develop a critique in light of racial minorities' educational needs, let alone the effects of social

institutional incentives governing public schools are incompatible with these needs, and therefore requires courts to impose remedies that alter the structural conditions governing decision-making. For racial minorities, constitutional entitlements to effective education demand institutional remedies.

Institutional remedies, however, are necessary but insufficient. Flexibility is a necessity, but alone it can not guarantee adequate resources, quality teaching, or challenging curricula, among other things. Courts should continue to evaluate many of the inputs historically relevant, but do so only after ensuring public schools' institutional conditions permit needed flexibility. Because my principal purpose is to show the incompatibility of public schools' institutional context with stigmatized minorities' educational rights, I do not offer here a comprehensive remedial account. The institutional critique by itself demonstrates the need for a paradigm shift in the way courts approach remedies for minorities in education cases; and that critique by itself covers significant conceptual ground. I nonetheless outline preliminary thoughts on potentially responsive remedies, suggesting that charter-school and private-choice designs better vindicate the constitutional rights of racial minorities than traditional remedies. In both of these models, publicly subsidized schools have already used institutional flexibility—for example, modifying policies on staff qualifications and hiring, pedagogical and curricular methodologies, and the length of the school day and year—to effectively adapt services to stigmatized minorities' specific needs.⁶

Part I of this Article fleshes out the legal framework concerning individual rights to effective-education services under state and federal constitutional law. Part II discusses the ineffectiveness of traditional inputs-based remedies in achieving systematically effective education for minorities. Part III discusses the antithetical relationship between stigma and effective education. It begins with a discussion of the cultural and identity-forming character of education. In that context, Part III unpacks the anatomy of stigma, focusing on the existential harms it produces and the paradoxical relationship of these harms to educational achievement. Part IV then discusses the highly bureaucratic character of public schools; first describing the fact of dense bureaucracy and then arguing that such rulemaking is central to public schools' institutional context. Finally, Part

stigma on these needs. These texts, consequently, ignore the fundamental contribution of this article: the institutional inability of public schools to respond systematically to the educational effects of stigma; and the correlative need for judicial remedies that alter the institutional conditions governing public schools.

6. See *infra* notes 261-262 and accompanying text.

V argues that courts must consider institutional remedies that re-design the conditions governing policymaking, specifically offering charter-school and private-choice designs as two alternatives.

I. State and Federal Constitutional Rights to Effective Education Services

State constitutions, and to a lesser degree the federal Constitution, require government to provide citizens either an adequate education, an equal education, or both. Every state grants individuals a right to a publicly provided education, generally through Education Clauses contained in the state constitution.⁷ In virtually all states, this constitutional right has a qualitative dimension: the education must be adequate to achieve state-defined substantive outcomes, which generally involve preparing citizens for competitive participation in the economy and inculcating in students civic values.⁸ State constitutions also have equal-protection mandates, requiring government to distribute education services equitably across student populations.⁹ These rights indirectly implicate adequacy entitlements, as stark disparities in educational outputs might suggest impermissible differences in state-provided inputs. In either event, through adequacy or equal-protection imperatives, state constitutions entitle individuals to qualitatively meaningful education services.

Although the federal Constitution does not directly entitle individuals to education services,¹⁰ the Supreme Court held in *Brown v. Board of Education (Brown I)* that, if provided, the Equal Protection Clause requires them to be “made available to all on equal terms.”¹¹ Because all states, in fact, do entitle individuals to education services, the federal Constitution therefore places affirmative obligations on states to provide these services

7. See, e.g., James E. Ryan & Thomas Saunders, *Foreword to Symposium on School Finance Litigation: Emerging Trends of New Dead Ends?*, 22 YALE L. & POL’Y REV. 463, 466 (2004); Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 (1991).

8. See, e.g., Paul A. Minorini & Stephen A. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, in EQUITY AND ADEQUACY IN SCHOOL FINANCE: ISSUES AND PERSPECTIVES 175, 190-99 (Helen F. Ladd et al. eds., 1999).

9. *Id.* at 182-83; Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”*: From Equity to Adequacy, 68 TEMP. L. REV. 1151, 1158 n.64 (1995); Ryan & Saunders, *supra* note 7, at 466.

10. See, e.g., *United States v. Lopez*, 514 U.S. 549, 565-66 (1995) (recognizing limited constitutional authority of federal government to directly regulate education policy). While the federal government does not have the constitutional authority to directly compel states to provide education services, it does induce states to adhere to federal education policy through its Spending Clause power. See *infra* at Part IV.A (discussing federal regulation of school policy).

11. 347 U.S. 483, 493 (1954).

equitably. While *Brown I* and its progeny have focused primarily on identifying racial segregation and correcting it through integration, the Supreme Court in *Milliken v. Bradley (Bradley II)*¹² interpreted *Brown I* to permit, and sometimes require, educational-effectiveness remedies in *de facto* segregated districts. Given “white flight” in the aftermath of *Brown I*, and intervening decisions effectively prohibiting the inclusion of adjacent districts in desegregation remedies, the integrationist dimension of *Brown I* is anemic. The availability of effective-education remedies is also limited by recent decisions limiting these remedies to only those educational deficiencies specifically attributable to segregation. Nonetheless, racial minorities in *de jure* segregated districts retain viable, though limited, federal claims to effective-education services.

This Part will summarize state and federal rights to adequate or equal education services, describing the contours of a common, national right to educational effectiveness. This constitutional right derives primarily from state-law adequacy and equity guarantees. Federal law also permits effectiveness remedies for districts subject to *de jure* segregation, but these remedies are limited given the dwindling number of desegregation decrees and the current difficulty of showing intentional school segregation. After discussing state and federal constitutional rights to educational effectiveness, Part II will discuss the prevailing remedies used by courts to address violations of these rights.

A. Effective-Education Remedies Under State Law

All states have compulsory-attendance laws requiring children to receive some sort of education.¹³ States constitutions supplement these privately binding mandates with public commitments obliging government to make available educational services.¹⁴ These public mandates, moreover, generally require states to provide children with a particular kind of education, primarily an education facilitating the development of those competencies vital to social competitiveness and citizenship.¹⁵ Such so-

12. 433 U.S. 267 (1977).

13. See, e.g., Adriana Lleras-Muney, *Were Compulsory Attendance and Child Labor Laws Effective? An Analysis From 1915 to 1939*, 45 J.L. & ECON. 401, 403 (2002).

14. See, e.g., Heise, *supra* note 9, at 1158 n.64; McUsic, *supra* note 7, at 311; Ryan & Saunders, *supra* note 7, at 466.

15. See, e.g., Thomas Corcoran & Margaret Goertz, *The Governance of Public Education*, in INSTITUTIONS OF AMERICAN DEMOCRACY: THE PUBLIC SCHOOLS 25, 25 (Susan Fuhrman & Marvin Lazerson eds., 2005) (providing that the Founding Fathers, and specifically Thomas Jefferson, advocated the creation of free “common schools” premised on teaching civic virtue and financial self-sufficiency); see also FREDERICK M. HESS, COMMON SENSE SCHOOL REFORM 3-4 (2004). Federal courts likewise have recognized these dual substantive purposes of public

called “adequacy” rights are designed, generally, to ensure that all children receive a common baseline of educational services, even though wide variance may exist in the kind and quality of services received beyond that baseline.¹⁶ State constitutions also prohibit the inequitable dispensation of education services.¹⁷ These equality rights generally prevent states from distributing educational services on the basis of unreasonable classifications. Equality norms are not specifically concerned with the actual quality or effectiveness of the services delivered, although substantive inefficacy—at least to the extent such inefficacy diverges starkly from statewide baselines—often serves as a proxy for inequity.

These adequacy and equity mandates stimulated substantial litigation in state courts after the Supreme Court’s decision in *San Antonio Independent School District v. Rodriguez*, which held that education is not a fundamental right under the federal Constitution.¹⁸ Prior to *Rodriguez*, advocates pursued federal remedies to challenge stark inequities between the educational resources available to racial minorities and those available to Whites. These efforts sought to build on *Brown I*, which, as discussed below, mandated school desegregation but did not specifically address inequities in school funding. Commentators have described these federal efforts as the “first wave” of school-finance litigation.¹⁹ This “first wave” of litigation ended with the rejection of federal school-funding relief in *Rodriguez*. The infeasibility of federal remedies forced advocates to state courts. As such, beginning in the early 1970s, state courts increasingly became the venue of choice for funding-equity claims. This “second wave” effort focused on state equality or adequate-education principles, and sought to ensure an equitable distribution of resources.²⁰

education. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (“We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship.”); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (extolling “the pivotal role of education in sustaining our political and cultural heritage” and providing the “basic tools by which individuals might lead economically productive lives”); *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (“The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by [this Court].”); *Brown I*, 347 U.S. at 493 (providing that education is “the very foundation of good citizenship”).

16. See Minorini & Sugarman, *supra* note 8, at 188-89.

17. See, e.g., Heise, *supra* note 9 at 1158 n.63; Ryan & Saunders, *supra* note 7, at 466.

18. 411 U.S. 1, 18 (1973).

19. See, e.g., Heise, *supra* note 9 at 1152-53; James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 266 (1999); William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision As a Model*, 35 B.C. L. REV. 597, 598 n.4 (1994).

20. Ryan, *supra* note 19, at 267-68.

The current “third wave” of school-finance litigation seeks increased funding to under-served schools, but these claims seek resources adequate to enable constitutionally sufficient education, not resources equitably allocated among districts.²¹ Thus, these claims do not limit the amount of spending permitted by any individual district, but they do require that all districts have sufficient resources to educate their students adequately. States diverge in their substantive conceptions of what constitutes constitutionally adequate education, but their visions generally require them to develop citizens committed to civic values and prepared to participate competitively in the economy.

In short, virtually every citizen in the country is constitutionally entitled to education services. This entitlement, moreover, is generally substantive, requiring states not simply to make services available but to provide services sufficient to achieve favored objectives. These interests form the basis of litigation over the past twenty years aimed at producing effective education for stigmatized minorities. As discussed in Part II, these efforts have fundamentally failed.

B. Effective-Education Remedies Under *Brown v. Board of Education*

1. The Demise of Integrationist Remedies Lays the Groundwork for Compensatory-Education Remedies.

In addition to the state rights just discussed—which currently provide the primary basis for effective-education claims—stigmatized minorities in districts subject to *de jure* segregation also possess a qualified right to effective-education services. The fount of education rights under the federal Constitution is the Supreme Court’s watershed decision in *Brown I*—a decision whose morality not only fueled a myriad of social, cultural, and political transformations, but also the philosophical underpinnings of second and third-wave funding litigation under state law.²² In *Brown I*, the Supreme Court held that legally segregated schools violated the Equal Protection Clause because “in the field of public education[,] the doctrine of ‘separate but equal’ has no place.”²³ By rejecting the separate but equal rationale, the Court abandoned its prior reasoning in *Plessy v. Ferguson* that segregated facilities were permissible insofar as the implicated

21. See Minorini & Sugarman, *supra* note 8, at 188-89; Heise, *supra* note 9, at 1163.

22. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

23. *Id.* at 495. On the same day the Court decided *Brown I*, addressing the Fourteenth Amendment constitutionality of public-school segregation by state actors, the Court also decided *Bolling v. Sharpe*, 347 U.S. 497 (1954), concerning the Fifth Amendment constitutionality of public-school segregation by federal actors.

facilities were substantially equivalent.²⁴ Relying on social-science findings that school segregation generated “a feeling of inferiority” likely to irrevocably affect the “hearts and minds” of minority children—and thus encumber their educability—the *Brown I* Court concluded that segregation was inherently unequal and therefore unconstitutional.²⁵

In so doing, the *Brown I* Court found that state-sanctioned segregation communicated messages to Whites and racial minorities alike about the intellectual, cultural, and indeed ontological,²⁶ status of minority children. These stigmatic messages, in turn, generated psychological harms that undermined education for Black children.²⁷ According to the Court, these harms violated equality principles because Black children suffered these harms unilaterally.²⁸ While pre-*Brown I* precedent had revealed stark resource disparities attendant to school segregation,²⁹ the *Brown I* Court did not discuss the specific educational and developmental damage caused by segregation. Instead, the Court focused exclusively on the psychological injury to African-American children.

Although the Court in *Brown I* held that school segregation violated the Equal Protection Clause, it did not consider remedies until deciding *Brown II*, one year later.³⁰ In *Brown II*, the Court ordered the defending districts to admit “on a racially nondiscriminatory basis with all deliberate

24. 163 U.S. 537 (1896). Though *Plessy* involved segregated transportation services rather than segregated public schools, it was the primary basis for justifying segregated schools throughout the first half of the twentieth century. Thus, the Court’s rejection of *Plessy*’s reasoning in *Brown I*, even if it did not necessarily mean that the *Brown I* and *Plessy* were technically irreconcilable, is a vital element of *Brown I*—and indeed the element that precipitated the subsequent collapse of the jurisprudential foundations supporting Jim Crow. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down anti-miscegenation law based, in part, on morality of *Brown*).

25. *Brown I*, 347 U.S. at 494-95; see also *id.* at 494 (finding that segregation instilled in Black children a “feeling of inferiority” that has a “tendency to (retard) educational and mental development of [Black] children”).

26. Ontology is the branch of philosophy concerning the taxonomy of existence; it describes the kinds of things that exist and the categories into which they fit. See, e.g., *THE OXFORD COMPANION TO PHILOSOPHY* 634-35 (Ted Honderich ed., 1995). I use this term to refer to the way stigma challenges the essence of what kinds of beings the stigmatized constitute.

27. See *Brown I*, 347 U.S. at 494.

28. See, e.g., IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 183-90 (1996). Although the Court was preoccupied with the psychological harms experienced by Black children, segregation also caused White children to suffer psychological injury. Segregation distorted the existential standing of both Blacks and Whites, artificially suggesting the inhumanity of the former and the superhumanity of the latter.

29. See, e.g., *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Bd. of Regents.*, 332 U.S. 631 (1948).

30. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

speed the parties to these cases.”³¹ The invitation for delay implicit in the “deliberate-speed” standard has been subject to substantial scholarly criticism.³² But the Court’s exclusive focus on integrated student assignment is perhaps a greater shortcoming. *Brown II*’s remedy does not specifically address the stigmatic harms motivating *Brown I*: the degree to which stigma so affected the self-perception of African-American children that it undermined education. Rather, *Brown II* focuses on the race-neutral admission of minority students to segregated schools.³³ This approach, as discussed below, would leave minorities without judicial recourse once non-discriminatory pupil assignment had been achieved, even if such policies left unaddressed the particular educational harms caused by segregation and its stigmatic signals.

The companion *Brown* decisions stimulated predictable opposition throughout both the North and South. In the immediate aftermath, many state officials flatly rejected the decisions’ legality and simply refused to comply.³⁴ Consequently, little actual desegregation occurred in the first decade following the *Brown* decisions.³⁵ In the late 1960s and early 1970s, the Supreme Court more vigorously enforced *Brown II*, admonishing that the time for delay had ceased.³⁶ These efforts produced substantial desegregation in the South throughout the 1970s and 1980s,³⁷ but progress would prove fleeting. The more adamantly the Court enforced *Brown II*, the faster Whites fled from cities into outlying suburbs, leaving inner-city minority communities without sufficient numbers of White children to make intra-district integration feasible.³⁸

31. *Id.* at 301.

32. *See, e.g.*, Alexander M. Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193, 196 (1964); Brian K. Landsberg, *The Desegregated School and the Retrogression Plan*, 48 LA. L. REV. 789, 807 (1988).

33. *Brown II*, 349 U.S. at 301.

34. *See, e.g.*, DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 147-48 (5th ed. 2004); *see also* *Griffin v. County Sch. Bd.*, 377 U.S. 218, 226 (1964) (describing the shutting down of all schools in a county to avoid desegregation).

35. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 13 (1971) (“[I]n 1968, very little progress had been made in many areas where dual school systems had historically been maintained by operation of state laws.”).

36. *See, e.g., id.* at 18-20 (affirming judicial power to issue extraordinary remedies to facilitate desegregation); *Green v. County Sch. Bd.*, 391 U.S. 430, 439 (1968) (“The burden on a school board today is to come forward with a [desegregation] plan that promises realistically to work, and promises realistically to work now.”); *Griffin*, 377 U.S. at 232, 234 (“The time for mere ‘deliberate speed’ has run out.”).

37. *See, e.g.*, Lia B. Epperson, *True Integration: Advancing Brown’s Goal of Educational Equity in the Wake of Grutter*, 67 U. PITT. L. REV. 175, 182-83 (2002).

38. *See, e.g.*, *Estes v. Metro. Branches of the Dallas NAACP*, 444 U.S. 437, 450 (1980) (Powell, J., dissenting from dismissal of writ of certiorari) (“By acting against one-race schools,

In response, some courts fashioned “metropolitan” desegregation decrees, which corralled adjacent, majority-White suburban districts into the ambit of *Brown II* remedies. These efforts, however, were short-lived. In *Milliken v. Bradley (Milliken I)*, the Supreme Court held that metropolitan remedies were impermissible outside the rare circumstance in which the suburban district itself was complicit in the predicate *Brown I* violation.³⁹ Reasoning that the scope of remedies must correspond to the scope of harm, the Court held that federal courts could only order desegregation in those suburban districts that were culpable for the underlying segregation.⁴⁰ The *Milliken I* Court thus distinguished between *de jure* and *de facto* segregation, and held that judicial authority under *Brown II* extended only to the former.

By prohibiting metropolitan remedies in the face of burgeoning white flight, *Milliken I* represented, in many ways, the death knell of judicially-compelled integration under *Brown II*. Racially-isolated municipalities simply did not have enough Whites to effectuate racial integration, and *Milliken I* ensured that federal courts could not compel White suburban communities to participate in desegregation remedies. In fact, as *de facto* residential segregation increased over the last three decades, *Milliken I* essentially ensured that public schools would become just as segregated as residential neighborhoods.⁴¹ In the context of *Milliken I*'s limitation on metropolitan remedies, the Court subsequently considered, in the second iteration of *Milliken v. Bradley*, whether compensatory education in *de facto* segregated districts vindicated *Brown I*.

courts may produce one-race school systems. . . . A desegregation plan without community support, typically one with objectionable transportation requirements and continuing judicial oversight, accelerates the exodus to the suburbs of families able to move.”).

39. 418 U.S. 717, 744-45 (1974).

40. *Id.*

41. Today public schools are highly segregated; by some indicators, even more so than during the desegregation era. See, e.g., ERICA FRANKENBERG ET. AL., THE CIVIL RIGHTS PROJECT HARVARD UNIV., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 31 (2003) (providing that the percentage of White students in the school of an average Black student was lower in 2000 than it was in 1970); Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1461 (2003) (“Schools are more segregated today than they have been for decades, and segregation is rapidly increasing.”); Leland Ware, *Race and Urban Space: Hypersegregated Housing Patterns and the Failure of School Desegregation*, 9 WIDENER L. SYMP. J. 55, 55-56 (2002-2003) (“[T]he nation’s inner cities are more segregated today than they were 50 years ago.”).

2. *The Availability of Compensatory-Education Remedies Under Milliken II*

In *Milliken II*, the City of Detroit, spurned in its efforts to pursue integration through a metropolitan remedy, sought to vindicate *Brown II* through compensatory education instead.⁴² *Milliken II* thus presented a threshold question of whether substantive education remedies, in *de facto* segregated districts, could relieve *Brown I* harms. The *Milliken II* Court initially approached this question by affirming the basic purpose of *Brown II*: “to restore victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.”⁴³ The Court then emphasized that the harm caused by segregation was not merely one of racial alienation—that White students and minority students were isolated from one another—but also one of educational subordination.⁴⁴ The Court specifically found that segregation caused educational damage to racial minorities and that student assignment alone could not remedy that injury. The Court reasoned that the consequences of discrimination still “linger[ed] and c[ould] be dealt with only by independent measures.”⁴⁵ Moreover, the Court concluded that these independent measures were not discretionary, but mandatory: “[t]he root condition [created by segregation] *must* be treated directly by special training at the hands of teachers prepared for that task.”⁴⁶

Finding that student assignment alone was insufficient to remedy the harms caused by segregation, the Court affirmed the district court’s order requiring state support of compensatory programs designed to mitigate the effects of prior segregation. These compensatory programs included remedial reading programs, counseling and career-guidance services, and in-service training for teachers.⁴⁷ Linking these remedies to *Brown I*, the Court found that these services were natural responses to the educational and cultural harms caused by racial isolation.⁴⁸ Integration alone did not respond specifically to these substantive educational harms, and given the

42. *Milliken II*, 433 U.S. at 283, 286.

43. *Id.* at 280; *see also* *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (“The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation.”).

44. *Milliken II*, 433 U.S. at 287-88.

45. *Id.*

46. *Id.* at 288 (emphasis added).

47. *Id.* at 294.

48. *Id.* at 287 (“Children who have been . . . educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation.”).

remedial obligations of *Brown II*, the *Milliken II* Court concluded that compensatory education fell comfortably within federal courts' authority.

The logic of *Milliken II* suggested a broad, potentially groundbreaking, re-conceptualization of *Brown II*. By recognizing the remedial necessity of relieving the substantive educational harms caused by segregation, the Court specifically acknowledged that integrated student assignment was insufficient. The *Brown I* Court held that stigma infected the "hearts and minds" of Black children in a way that had a "tendency to retard [their] educational and mental development."⁴⁹ By prohibiting state sanctioned segregation, non-discriminatory student assignment might alleviate the stigmatizing message of segregation (though of course not the myriad of other ways society transmits stigma). But that remedy did not specifically address the substantive educational harms caused by segregation; those harms could be accommodated only by "independent" measures "specially" tailored to stigmatized minorities' educational needs.⁵⁰ While the quality of education services afforded stigmatized minorities is immaterial under *Brown II*, it is paramount under *Milliken II*.

After *Milliken II*, the Supreme Court did not meaningfully address *Brown II*-related questions again until deciding a trilogy of cases in the early 1990s. These cases, which demonstrated the courts increasing fatigue with federal micro-management of school policy, facilitated the dissolution of *Brown II* consent decrees.⁵¹ One of these cases, *Missouri v. Jenkins*, limited the availability of *Milliken II* remedies by raising the predicate evidentiary showing. *Jenkins* specifically provides that effective-education relief under *Milliken II* is obtainable only if achievement deficiencies are specifically attributable to segregation.⁵² *Milliken I* and the 1990s cases thus represent a one-two punch to *Brown II*: the difficulty of showing ongoing *de jure* segregation, coupled with *Milliken I*, diminishes *Brown II* remedies; decisions easing the termination of *Brown II* decrees, coupled with *Jenkins*'s evidentiary burden, impedes *Milliken II* remedies.

49. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 494 (1954) (original parenthesis omitted).

50. *Milliken II*, 433 U.S. at 287-88, 290. Moreover, even in districts with sufficient diversity to make intra-district integration meaningful, compensatory-education remedies could—and, according to *Milliken II*, should—operate alongside integrationist practices.

51. See *Missouri v. Jenkins*, 515 U.S. 70, 99-102 (1995) (limiting use of magnet programs to attract White students to adjacent districts); *Freeman v. Pitts*, 503 U.S. 467, 472 (1992) (permitting piecemeal termination of discrete parts of desegregation decrees despite overall non-compliance); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249-50 (1991) (holding that schools were obligated to eliminate vestiges of segregation only to the extent "practicable").

52. *Jenkins*, 515 U.S. at 101-102.

In sum, state and federal constitutional law provide stigmatized minorities effective-education interests. State constitutions, in general, directly entitle minorities to an effective education. The U.S. Constitution, in a diminishing number of districts, vindicates these interests indirectly through *Milliken II*. Although state law provides the most viable vehicle for vindicating stigmatized minorities' substantive education interests, *Milliken II*, albeit anemic, remains alive. Stigmatized minorities therefore have vindicable state and federal interests to effective education; and these rights have been used over the last few decades to introduce substantial amounts of new resources to schools serving stigmatized minorities. These remedies have principally involved at least one of the following: racial integration, enhanced school funding, and the provision of expert-approved compensatory-education programs. As a rule, these approaches have been ineffective. Large majorities of stigmatized minorities fail even to meet the most basic proficiency standards. This fact is described in Part II.

II. The Systematic Failure of Traditional Remedies

Public schools systematically fail stigmatized minorities.⁵³ Only half of African-American and Hispanic students graduate from high school;⁵⁴ and this statistic overstates graduation rates because minorities disproportionately obtain diplomas through remedial exit programs.⁵⁵ This is merely the tip of the iceberg. According to the National Assessment of Education Progress ("NAEP"), racial minorities generally fail to meet even basic proficiency standards. In five of the seven subjects tested on the NAEP, solid majorities of Black twelfth-graders perform at a "Below Basic" level—meaning they have failed to display even "partial mastery" of the skills needed for grade-level proficiency.⁵⁶ Moreover, the average Black or Hispanic twelfth-grader tests at the level of the average White eighth-grader. In urban districts, which disproportionately serve stigmatized minorities, the results are worse, revealing themselves earlier in the educational process. In these districts, almost two-thirds of African-American and Hispanic eighth-graders fail basic proficiency standards in

53. By systematic failure, I mean the routine, consistent output of public schools over time.

54. GARY ORFIELD ET. AL., THE CIVIL RIGHTS PROJECT HARVARD UNIV., LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS 87-88 (2004), available at http://www.urban.org/UploadedPDF/410936_LosingOurFuture.pdf.

55. See, e.g., Paul T. O'Neill, *Special Education and High Stakes Testing for High School Graduation: An Analysis of Current Law and Policy*, 30 J.L. & Educ. 185, 211-219 (2001).

56. See, e.g., ABIGAIL THERNSTROM & STEPHAN THERNSTROM, NO EXCUSES: CLOSING THE RACIAL GAP IN LEARNING 12-16 (2003).

mathematics and over half fail in reading.⁵⁷ Building on these numbers, only six percent of Blacks and Hispanics obtain a college degree.⁵⁸ Even if these results were new, they would still be tragic given the exigencies of a modern economy dependent on intellectual rather than physical capital. But these results are catastrophic given their durability.⁵⁹ Public schools simply fail stigmatized minorities.⁶⁰

The stark insufficiency of these results motivated much of the litigation described in Part I. In fashioning remedies to alleviate these constitutional harms, courts have generally used at least one of three approaches: (1) racial integration, (2) school finance, and (3) compensatory education. Invariably, whether courts grounded these remedies in state or federal rights, equity or adequacy claims, these remedies focused uniformly on public-school inputs: the resources available to public schools rather than the institutional conditions governing the use of resources. Integration, for example, suggested effective education if schools contained larger proportions of White students. School finance suggested the same result if schools were adequately funded; and compensatory education did so where schools contained expert-approved remedial program. However, none of these traditional remedies accounted specifically for institutional conditions. That failure inevitably constrains their effectiveness.

Integration has been the remedy of choice for federal courts enforcing *Brown*. *Brown I*, as discussed, was premised on the educational harms caused by stigma. The theory implicit in *Brown II* is that non-discriminatory student assignment, by removing government sanction from segregation, alleviates stigma and contributes significantly to improved educational performance. This theory is questionable, both logically and empirically. As a matter of logic, it strains credibility that the mere presence of White students would substantially enhance student

57. See U.S. DEP'T OF EDUC., THE NATION'S REPORT CARD: TRIAL URBAN DISTRICT ASSESSMENT, MATHEMATICS HIGHLIGHTS 10 (2003) available at <http://nces.ed.gov/nationsreportcard/pdf/dst2003/2004458.pdf>.

58. Hillary Pennington, *Accelerating Advancement in School and Work*, in BROOKINGS PAPER ON EDUCATION POLICY: 2003 339, 343 (Diane Ravitch ed. 2003), available at http://muse.jhu.edu/journals/brookings_papers_on_education_policy/v2003/2003.1pennington.pdf.

59. See, e.g., Kevin Brown, *The Supreme Court's Role in the Growing School Choice Movement*, 67 OHIO ST. L.J. 37, 43-44 (2006).

60. See, e.g., Paul A. Minorini & Stephen A. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, in EQUITY AND ADEQUACY IN SCHOOL FINANCE: ISSUES AND PERSPECTIVES, *supra* note 8 at 65 (describing "widespread view that the whole public schooling enterprise is inadequate, especially in its failure to educate successfully too many of our urban poor children").

performance.⁶¹ The presence of White students, by itself, does not vitiate the continued social transmission of racial stigma, respond to stigma's psychological effects, or address the substantive educational harms caused by segregation.⁶² In fact, given the educational harms triggered by segregation and schools' current institutional limitations, Whites, at least in the near term, are likely to out-perform stigmatized minorities. That circumstance, when observed directly by stigmatized minorities, may exacerbate notions about their lesser competence and thereby further restrain educational performance. Empirical research, in any event, confirms the dubiousness of a direct link between integration—in and of itself—and educational achievement for stigmatized minorities.⁶³ the

61. See, e.g., Wendy Brown-Scott, *Race Consciousness in Higher Education: Does "Sound Educational Policy" Support the Continued Existence of Historically Black Colleges?*, 43 *Emory L.J.* 1, 44-45 (1994).

62. See, e.g., Alex M. Johnson Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 *CAL. L. REV.* 1401, 1409 (1993) ("[I]ntegrationism has failed to help African-Americans achieve progress in this society."); Dora W. Klein, *Beyond Brown v. Board of Education: The Need to Remedy the Achievement Gap*, 31 *J.L. & EDUC.* 431, 437, 456-57 (2002) ("Most desegregation cases decided under *Brown*, however, are incapable of addressing the disparities that exist between the academic achievement of black and white students.")..

63. See Jeffrey Prager et al., *The Desegregation Situation, in SCHOOL DESEGREGATION RESEARCH: NEW DIRECTIONS IN SITUATIONAL ANALYSIS* 3, 6 (Jeffrey Prager et al. eds., 1986) (providing that even where stigmatized minorities have performed better in desegregated settings, it has not been shown that integration itself caused the improved performance); Russell W. Rumberger & Gregory J. Palardy, *Does Resegregation Matter?: The Social Composition on Academic Achievement in Southern High Schools, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 127, 137 (John Charles Boger & Gary Orfield eds., 2005) (providing that the racial composition of a school does not predict student achievement); David J. Armor, *The End of School Segregation and the Achievement Gap*, 28 *HASTINGS CONST. L.Q.* 629, 631-38 (2001) (listing and rebutting prevailing claims on the link between desegregation and increased racial-minority performance); see also Catherine E. Freeman et al., *Racial Segregation in Georgia Public Schools, 1994-2001: Trends, Causes, and Impact on Teacher Quality, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?*, *supra* at 162 (concluding that there is no direct evidence that segregation itself affects student performance, although predominately Black schools tend to have fewer resources). Even strong supporters of integration's educational efficacy have had difficulty isolating the educational benefits of compelled integration. Gary Orfield, for example, claims that desegregation improves academic performance because it de-concentrates poverty levels in *de facto* segregated districts, and improved socio-economic status correlates to improved academic performance. See GARY ORFIELD & CHUNGMEI LEE, *THE CIVIL RIGHTS PROJECT HARVARD UNIV., WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY* (2005), available at http://www.civilrightsproject.harvard.edu/research/deseg/Why_Segreg_Matters.pdf; see also Epperson, *supra* note 37, at 197-99 (relying primarily on circumstantial effects in claiming integration itself meaningfully enhances the academic performance of African-American students). But this claim, even if true, fails to establish racial integration as the reason for improved performance: socio-economic diversity, not racial, is the predicate for these claims. See, e.g., John A. Powell, *A New Theory of Integrated Education: True Integration, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?*,

benefits, at best, are indirect and limited. At any rate, as a factual matter, integration has failed to produce systematically effective public-school education for stigmatized minorities.

Moreover, integration as a remedial option fails because it is politically and jurisprudentially infeasible. Politically, legislatures seemingly have no meaningful interest in broad government efforts to facilitate, let alone compel, public-school integration; and, from a litigation standpoint, establishing intentional school segregation in modern times is improbable. At the same time, *Milliken I* forecloses integrationist remedies in majority-minority municipalities and the trilogy of 1990s cases eases the termination of existing consent decrees. Today, integration is largely an impractical option for improving educational outcomes for stigmatized minorities.

While federal courts principally used integrationist remedies, state courts, and those federal courts implementing *Milliken II*, primarily used finance and compensatory-education remedies. These remedies, also, have fundamentally failed. School-finance litigation, whether premised on equity or adequacy, has precipitated significant increases in school funding, particularly in poor, urban districts that disproportionately serve stigmatized minorities.⁶⁴ Yet, these finance remedies have not produced consistent, systematic improvements in educational outcomes. The bald fact remains that large majorities of stigmatized minorities, especially those in urban districts primarily benefited by school-finance litigation, fail to achieve even basic proficiency standards.⁶⁵ Moreover, research findings show that school-finance remedies have not produced sustained, systemic improvements in student outcomes.⁶⁶

supra at 285. It also bears emphasis that mere improvements, without more, do not meet the systemic-effectiveness standard driving this Article.

64. See, e.g., William N. Evans et al., *The Impact of Court-Mandates School Finance Reform*, in EQUITY AND ADEQUACY IN SCHOOL FINANCE: ISSUES AND PERSPECTIVES, *supra* note 8, at 93 (“[T]he bulk of the evidence suggests that court-ordered reform has achieved its primary goal of fundamentally restructuring school finance and generating a more equitable distribution of resources.”); Minorini & Sugarman, *supra* note 60 at 35; see also NAT’L ACCESS NETWORK, SCHOOL FUNDING “ADEQUACY” DECISIONS SINCE 1989 (2006) available at <http://www.schoolfunding.info/litigation/adequacydecisions.pdf> (showing that plaintiffs have been successful in twenty of twenty-seven decided school-funding cases, and that decisions are pending in another twelve states).

65. See *supra* notes 53-60 and accompanying text.

66. Molly S. McUsic, *The Law’s Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 88, 111 (Jay P. Heubert ed., 1999); see also Evans et al., *supra* note 64 at 91 (“[C]ourt-mandated school finance reforms do not significantly change either the mean level or the distribution of student performance on standardized tests in reading and mathematics.”); *id.* at 91-92 (discussing multiple empirical studies failing to show school-finance

Compensatory-education remedies, whether premised under *Milliken II* or state adequacy clauses, have also failed to produce systemic improvements. *Milliken II* remedies, which are comparable to the educational programs used by state courts in adequacy cases, have not achieved substantial increases in stigmatized minorities' educational performance.⁶⁷ Programmatic remedies used by state courts in adequacy suits have likewise been ineffective at generating sustained class-wide educational improvement for minorities.⁶⁸

The systemic ineffectiveness of integration, school finance, and compensatory education does not mean that they have produced no benefits—and could not, under appropriate conditions, produce substantially more. Cultural diversity, leveraged appropriately, surely enhances student learning; adequate resources, allocated wisely, undoubtedly facilitate student learning; and remedial programs, well-designed and responsive to particular student needs, likely improve the performance of discrete student populations. But these approaches fail specifically to address two predicate aspects of public education for racial minorities: the operation of stigma, and institutional constraints on public schools. Stigma, as discussed below in Part III, attacks the competencies that enable education, and therefore presents a threshold challenge to stigmatized minorities' educability. At the same time, public schools' institutional constraints, discussed in Part IV, impede the flexibility necessary to addressing the unique ways stigma affects racial minorities' educability. Stigma coupled with public schools' institutional limitations constrain the capacity of public schools to exploit integration, additional resources, and compensatory education—or, for that matter, any other input—in service of stigmatized minorities' educational needs. As discussed in Part V, courts must use remedies that re-design the institutional incentives governing public-school policymaking in order to effectively meet the educational needs of stigmatized minorities.

remedies meaningfully improve stigmatized minorities' academic performance). *See generally* JAY P. GREENE, EDUCATION MYTHS: WHAT SPECIAL INTEREST GROUPS WANT YOU TO BELIEVE ABOUT OUR SCHOOLS—AND WHY IT ISN'T SO 7-12 (2005) (discussing empirical research generally showing that increased school funding has not produced meaningful increases in student performance).

67. Susan E. Eaton et al., *Still Separate/Still Unequal: The Limits of Milliken II's Monetary Compensation to Segregated Schools*, in DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 143 (Gary Orfield & Susan Eaton eds., 1997).

68. James Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 290-93 (1999). *But see* Michael A. Rebell, *Why Adequacy Lawsuits Matter*, EDUC. WK., Aug. 11, 2004, at 40, available at <http://www.edweek.org/ew/articles/2004/08/11/44rebell.h23.html> (arguing that some remedies used by state courts finding adequacy violations have had favorable effects on student performance).

III. The Antithetical Relationship Between Education and Stigma

This Part shows that educational attainment depends on the very competencies inhibited by stigma. As discussed below, societies pursue culturally desired philosophical objectives through education, and the process of education itself—irrespective of the philosophical purposes pursued—frames the way in which the educated view and imagine themselves. At the same time, stigma challenges the existential status of the stigmatized, imposing a social identity on them that challenges their very humanity. As such, education and stigma cannot co-exist: stigma corrodes the very competencies upon which effective education rests. Moreover, stigma not only distinctively affects the educational prospects of minorities as a group, but also has diverse effects on individual children reflecting their familial, cultural, and social backgrounds. In this context, this Part concludes that schools need flexibility to adapt educational services to stigma's unique group and individual consequences.

A. Educational Philosophy Furthers Cultural Values, Assumes Capacity, and Shapes Individual Identity.

Education is irreducibly cultural. Education policy reflects philosophical judgments about the kinds of social outcomes, and indeed the kinds of people that society deems desirable.⁶⁹ Educational philosophy, in this respect, represents society's self-conception. The capacities and competencies society inculcates in its children—and just as important, those it does not—reveal a society's ultimate vision of itself. Educational philosophy, therefore, is predicated on normative judgments about the very kind of polity a society seeks to become. These normative judgments are necessarily derived from cultural priorities, as there are no value-neutral ways of determining educational philosophy. Similarly, the translation of these first-order values into pedagogy and curriculum is likewise culturally based.⁷⁰ Because pedagogy and curriculum are designed to serve

69. See Richard Shaull, *Foreword* to PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 16 (Myra Bergman Ramos trans., Continuum 1999) ("There is no such thing as a neutral educational process. Education functions as either an instrument which is used to facilitate the integration of the younger children into the logic of the present order and bring about conformity to it, or it becomes the practice of freedom.") (internal quotations omitted); see also Jacques Derrida, *Where a Teaching Body Begins and How It Ends* (Denise Egéa-Kuehne trans.), in *REVOLUTIONARY PEDAGOGIES* 83, 85 (Peter Pericles Trifonas, ed., 2000) ("There is no neutral or natural place in teaching.").

70. See Henry A. Giroux, *Postmodern Education and Disposable Youth*, in *REVOLUTIONARY PEDAGOGIES*, *supra* note 69, at 174, 177-78 ("[T]he overriding purpose of schooling is, in large part, to prepare students to take their place in the corporate order.") (internal

fundamental philosophical values, the cultured nature of the philosophy necessarily informs the pedagogical and substantive means of achieving it. Pedagogy and curriculum, moreover, are intrinsically informed by culture, as the choice of teaching methodologies and substantive content themselves presuppose value judgments about the appropriate ways of imparting knowledge and the appropriate kinds of knowledge to impart.⁷¹

In addition, the substantive content of educational philosophy assumes students possess the capacity to achieve the philosophy's purposes.⁷² A proportional relationship therefore exists between a society's judgments about the existential standing of its students and the normative ambition pursued in its educational philosophy. For example, a philosophy premised on the development of critical-thinking skills presupposes that pupils possess the capacity for such independent thinking. Conversely, a determination that students in general, or some identifiable subset of students, are incapable of achieving the kind of critical thinking a society might otherwise desire induces less demanding philosophical objectives.

The substance of educational philosophy, and its presuppositions about individual capacity, is particularly salient because education shapes individual identity. Education instills in students society's social, cultural, and political priorities and, in the process, structures the way in which the educated imagine their possibilities.⁷³ This result is inevitable given the

quotations omitted); see also Michael W. McConnell, *Education Disestablishment: Why Democratic Values Are Ill-Served by Democratic Control of Schooling*, in MORAL AND POLITICAL EDUCATION 104 (Stephen Macedo & Yael Tamir eds., 2002) ("Collective judgments about the ideological and philosophical content of the curriculum must be made; dissenters must either allow their children to be educated according to precepts they dispute or finance the alternative from their own resources.").

71. See, e.g., Michael W. Apple, *The Shock of the Real: Critical Pedagogies and Rightist Reconstruction*, in REVOLUTIONARY PEDAGOGIES, *supra* note 69, at 225, 226 ("[I]t is still clear that no analysis of education can be fully serious without placing at its very core a sensitivity to the ongoing struggles that constantly shape the terrain on which education operates.").

72. See JEROME BRUNER, THE CULTURE OF EDUCATION 46-47 (1996) ("Teaching, in a word, is inevitably based on notions about the nature of the learner's mind. Beliefs and assumptions about teaching, whether in a school or in any other context, are a direct reflection of the beliefs and assumptions the teacher holds about the learner."); see also Gloria Ladson-Billings, *Who Will Survive America? Pedagogy as Cultural Preservation*, in POWER/KNOWLEDGE/PEDAGOGY: THE MEANING OF DEMOCRATIC EDUCATION IN UNSETTLING TIMES 289, 294 (Dennis Carlson & Michael W. Apple eds., 1998) (providing that teachers' beliefs about students' capacity often defines degree of student learning); Wendy D. Puriefoy, *The Education of Democratic Citizens: Citizen Mobilization and Public Education*, in INSTITUTIONS OF AMERICAN DEMOCRACY: THE PUBLIC SCHOOLS, *supra* note 15, at 235, 249 (discussing extent to which predicate beliefs about student capacity define educational ambition).

73. See, e.g., Jaroslav Pelikan, *General Introduction: The Public Schools as an Institution of American Constitutional Democracy* to INSTITUTIONS OF AMERICAN DEMOCRACY: THE PUBLIC SCHOOLS, *supra* note 15, at xiii, xviii ("Not only is character shaped by the dynamics of

presuppositions about competency implicit in any educational philosophy. Students are taught consistent with philosophical goals themselves reflecting assumptions about their capacity. Thus, in almost circular fashion, the predicate judgments motivating an educational philosophy generate corresponding consequences for individual identity. It is in this context that education theorists have concluded that children are not merely taught in school, but are constructed.⁷⁴

In sum, educational philosophy presupposes students possess the capacity to achieve the philosophy's ambition. Educational philosophy, simultaneously, encompasses normative judgments about those competencies valued by a particular culture. At its core, educational philosophy reflects cultural judgments about the purposes of education and the capacity of students to achieve those purposes. Moreover, because education necessarily shapes self-conception, student identity reflects those assumptions about capacity implicit in any educational philosophy.

B. Stigma Undermines the Capacities Enabling Education.

Social stigma challenges the assumptions enabling prevailing educational philosophies. As theorized by sociologist Erving Goffman, stigma refers to a trait that is so deeply discrediting in the eyes of society that those possessing it are viewed as less than human.⁷⁵ Stigma refers not to a characteristic simply held in disrepute, but signifies a characteristic perceived with such ignobility as to challenge the existential status of its bearers.⁷⁶ The challenge posed by stigma is stark:

The person bearing the [stigmatized] attribute is not only disliked but socially dehumanized, a devalued individual whose ability to participate as a full citizen in society is fundamentally compromised by the negative meanings associated with his or her

[participation in a school community]; but both the image of the self and the understanding of how a society functions . . .").

74. BRUCE GOLDBERG, *WHY SCHOOLS FAIL* 6 (1996). Education of course is not the sole mechanism through which individual identities are shaped—undoubtedly family, religious, and communitarian dynamics are also at work. But education is uniquely important in framing identity.

75. See R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 817 (2004); see also ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 3 (First Touchstone ed., Simon & Schuster 1986) (1963) (“[The stigmatized individual] is thus reduced in our minds from a whole and usual person to a tainted, discounted one.”); see also Jennifer Crocker et al., *Social Stigma*, in 2 *THE HANDBOOK OF SOCIAL PSYCHOLOGY*, (Gilbert et al. eds., 1998) 504, 504 (“Thus, the person who is stigmatized is a person whose social identity, or membership in some social category, calls into question his or her full humanity — the person is devalued, spoiled or flawed in the eyes of others.”).

76. See, e.g., GOFFMAN, *supra* note 75, at 3.

[stigmatized] status. In essence, a . . . stigmatized person becomes socially spoiled, dishonored, and reduced in our minds from a whole and usual person to a tainted, discounted one.⁷⁷

The stigmatized thus bear a characteristic that society perceives as inconsistent with, if not antithetical to, prevailing conceptions of humanity. The stigmatized are not merely perceived as different, or even alien; they are regarded as occupying a qualitatively distinct existential plane.

While many kinds of stigmas operate at this level, I focus here on the preeminent form of social stigma in the United States: racial stigma. This is not because race is exclusively relevant, but because it is prototypically relevant given its uniquely broad and longstanding legacy in this country. While racial stigma has long been the subject of scholarly inquiry,⁷⁸ recent work by Glen Loury and R.A. Lenhardt, both building on Goffman, have further clarified its meaning.⁷⁹ Lenhardt's discussion is particularly pertinent given her focus on stigma's legal implications.

1. *A Short History of Racial Stigma in the United States*

Racial stigma concerns the extent to which skin color—or more precisely, in the American context, dark skin color—has been so thoroughly dishonored as to unsettle the humanity of disfavored races.⁸⁰ The development and reification of racial stigma in this country is largely attributable to the racial character of American slavery. Unlike many versions of slavery practiced historically, American slavery was defined principally by race.⁸¹ As such, blackness became the marker of slavery; whiteness, by contrast, the sign of freedom. Owing to the racial pedigree of American slavery, bondage was permanent: along with their physical traits, Black children inherited a racial debt they had no capacity to repay.

77. Lenhardt, *supra* note 75, at 818 (internal quotations and citations omitted).

78. See, e.g., Nancy Cantor & Walter Mischel, *Prototypes in Person Perception*, in 12 *ADVANCES IN EXPERIMENTAL PSYCHOLOGY* 3, 52 (Leonard Berkowitz ed., Academic Press 1979); GOFFMAN, *supra* note 75.

79. GLEN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* (2002); Lenhardt, *supra* note 75.

80. See, e.g., Peter McLaren et al., *Labeling Whiteness: Decentering Strategies of White Racial Domination*, in *LABELING: PEDAGOGY AND POLITICS* 203, 206-207 (Glenn M. Hudak & Paul Kihn eds., 2001); JOHN P. JACKSON, JR. & NADINE M. WEIDMAN, *RACE, RACISM AND SCIENCE: SOCIAL IMPACT AND INTERACTION* 21-22 (Rutgers Univ. Press, 2005).

81. See, e.g., JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 32 (Alfred A. Knopf, Inc., 7th ed. 1994); *RACE, RACISM AND SCIENCE: SOCIAL IMPACT AND INTERACTION*, *supra* note 80, at 7 (“In fairly short order in the New World blackness and slavery became associated. To be black was to be a slave and to be a slave was to be black.”).

As such, racial stigma reconciled any perceived dissonance between America's democratic rhetoric and slavery's dehumanizing reality. Blackness signaled existential incompetence and thus undermined the very premises underlying human claims to vindicable rights.⁸² In fact, racial stigmatization was so complete that slavery was deemed not only logically consistent with liberal democratic values, but even a moral obligation. The assessment of an authority no less than the United States Supreme Court is illustrative:

[Black people] had [long] been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might be justly and lawfully reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was . . . regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.⁸³

The *Dred Scott* analysis is a textbook description of stigma's anatomy. Black people were not regarded as fundamentally human, but were "beings" of a qualitatively distinct and "inferior order."⁸⁴ The disconnect between White humanity and Black inhumanity was plain: Blacks "had no rights which the white man was bound to respect" and, as such, could "be justly and lawfully reduced to slavery for [their] benefit."⁸⁵ But what is perhaps most illuminating is stigma's reflexivity. The defamed character of Black people was axiomatic, a foundational truism defining prevailing thinking about the world. The stigmatized status of Blackness was a social fact. As such, Americans reacted to it habitually, just as they did the laws of gravity.

Racial stigma, moreover, was both a cause and an effect of slavery. While pre-existing disparaging notions of Black humanity fueled slavery, the institution itself fortified racial stigma. As discussed by Orlando Patterson, slavery represented the "permanent, violent domination" and

82. See generally HADLEY ARKES, *NATURAL RIGHTS AND THE RIGHT TO CHOOSE* 72-86 (2002) (theorizing that rights claims depend on the existential status of putative rights-bearers).

83. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857).

84. *Id.*

85. *Id.*

dishonoring of slaves' personhood.⁸⁶ Slavery did not represent simply an exploitive labor relationship; slavery embodied a social and cultural caste privileging the master over the slave.⁸⁷ Glen Loury, further explained that "[t]his [was] a parasitic relationship within the social body: [m]asters derive honor from their virtually unlimited power over slaves, who are radically marginalized because their very social existence is wholly dependent on relations with their masters."⁸⁸ Intrinsic to slavery is the social honoring of the master, the dishonoring of the slave, and the reification of that hierarchy through culture and custom. Slavery is inherently stigmatizing. And because American slavery was defined in racial terms, the stigma of slavery and the stigma of race operated interdependently.⁸⁹

In addition, from the inception of the American experience, racial stigma was entrenched in the very ordering of society. One quarter of America's population was defined by stigma while the social identity of Whites was correspondingly defined and distorted as well.⁹⁰ Because slavery played a primary role in the country's social, cultural, economic, and political life, racial stigma was embedded in the foundation of American democracy.

Given its entrenched character, it is unsurprising that the legacy of racial stigma outlived slavery's formal demise. Stigma was the predicate for *de jure* and *de facto* segregation throughout the nation.⁹¹ For almost a century after the end of slavery, racial stigma continued to fuel legal and extralegal measures restricting the existential possibilities of Black Americans.⁹² The civil-rights movement was fought primarily to uproot the continued legacy of White supremacy and its legal and institutional concomitants. While civil-rights successes led to the removal of many formal barriers to equal opportunity, the underlying fact of White supremacy and racial stigma—though no longer granted explicit, public

86. ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 13 (1982).

87. *Id.* at 5.

88. LOURY, *supra* note 79, at 68-69; *see also* PATTERSON, *supra* note 86, at 96 ("What was real was the sense of honor held by the master, its denial to the slave, its enhancement through the degradation of the slave, and possibly the slave's own feeling of being dishonored and degraded.").

89. LOURY, *supra* note 79, at 69.

90. *See e.g.*, Crocker et al., *supra* note 75 at 508-09.

91. *See, e.g.*, Eugene C. Holmes, *A Philosophical Approach to the Study of Minority Problems*, 38 J. OF NEGRO EDUC. 196, 199-200 (1969).

92. *See generally* LEON F. LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW* (1998).

sanction—continue to encumber social interactions and the status of Black Americans and others.⁹³

2. *The Cognitive Dimension of Racial Stigma*

The continued salience of racial stigma is due not only to the entrenched character of explicitly racialized thinking in American society, but also the cognitive functioning of stigma. Longstanding social science reveals that human beings seek to classify information and attach meaning to classifications on the basis of visible clues.⁹⁴ Human beings crave information with which to rationalize and contextualize their social interactions, and physical characteristics provide readily available grounds for classification.⁹⁵ These classifications seek to reconcile new information with pre-existing scripts, which themselves comprise composites of prior experiences with and cultural understandings about that information. Classifications, whether informed by physical or other characteristics, are thus means by which individuals regularize social relations. As such, classification is one of the most basic forms of human cognition.⁹⁶

Importantly, classification represents a cognitive rather than a purposeful act.⁹⁷ Classificatory cognition simply describes the way individuals think about the world and the information they encounter.⁹⁸ It is not predicated on conscious value judgments about the ideal constitution of things.⁹⁹ In fact, individuals might wish that matters differed from the implications of their classifications, but their capacity to conceptualize such

93. See, e.g., Crocker, *supra* note 75 at 511 (“Most children in the United States learn as early as the age of three years to devalue people with dark skin color.”); Christopher A. Brace, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 692 (2005) (discussing current implications of stigma-informed thought rooted in slavery and Jim Crow).

94. LOURY, *supra* note 79 at 17 (“Information-hungry human agents—in making pragmatic judgments, to be sure, but also as a necessity for survival—will notice visible, physical traits presented by those whom they encounter in society: their skin color, hair texture, facial bone structure, and so forth.”).

95. *Id.*

96. *Id.*; see, e.g., David L. Hamilton & Tina K. Troler, *Stereotypes and Stereotyping: An Overview of the Cognitive Approach*, in PREJUDICE, DISCRIMINATION, AND RACISM 127, 128 (John F. Dovidio & Samuel L. Gaertner eds., 1986); see also Crocker et al. *supra* note 75 at 508 (“Social stigma is ubiquitous. In every society, some individuals are stigmatized.”);

97. LOURY, *supra* note 79 at 17; Tristin Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 96-98 (2003).

98. See, e.g., Crocker et al., *supra* note 75 at 511 (providing that stigma-based stereotypes often “are held so widely that they are identified not as stereotypes, but as ‘facts.’”).

99. See, e.g., *id.*

a different world is undermined by the strength of their cognitions.¹⁰⁰ Cognition thus refers to the meaning individuals give the information they encounter; it is a form of translation by which the human mind converts the foreign into the ordinary.¹⁰¹ In short, this kind of cognition is unthinking: individuals perfunctorily reach the classifications by which they understand their social interactions.¹⁰²

At the same time, the values individuals ascribe to these reflexively drawn classifications derive largely from socially transmitted signals.¹⁰³ Human beings do not operate in a contextual vacuum; they are socialized into a cultural and historical context. The American context is one challenged by a long history of stigma-informed racialized thinking, and that context provides the ethos in which individuals cognitively encounter each other.¹⁰⁴ While the most virulent manifestations of this ethos have been tempered by legal prohibitions on explicit racial subordination, these formal remedies cannot eliminate the longstanding, pejorative social and cultural meanings produced by racial stigma.¹⁰⁵ This social setting frames

100. *See id.* at 511-12 (providing that pervasive stereotypes “may be so familiar, and so overlearned because of repeated exposure, that they can be easily, perhaps even automatically accessed, even by people who do not consciously endorse or agree with them”).

101. *See, e.g.,* LOURY, *supra* note 79 at 17-18 (“One of the ways that we generate and store social information is to classify the persons we encounter . . . so we can better know what it is to be expected from those with whom we must deal, but about whom all too little can be discerned.”); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 337 (1987) (“All humans tend to categorize in order to make sense of experience. Too many events occur daily for us to deal successfully with each one on an individual basis; we must categorize in order to cope.”).

102. *See* Crocker et al., *supra* note 75, at 512, 515; GOFFMAN, *supra* note 75, at 2 (noting that the social identity attributed to the stigmatized is often not even conscious to the perceiver until there is an active question as to whether that identity will be realized); S.L. Gaertner & J.F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION, AND RACISM, *supra* note 96, at 62 (providing that given the extent to which racial stereotypes and attitudes inform socialization, individuals of all races, including African-Americans themselves, “almost unavoidably possess negative feelings and beliefs about Blacks”); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1216-17 (1995) (arguing that social cognition theory teaches that “intergroup discrimination” is both unintentional and unconscious. It occurs spontaneously as an unwanted artifact of normal cognitive functions and can be corrected, if at all, only through further deliberate mental effort).

103. *See* Lenhardt, *supra* note 75, at 827 (“As common as the tendency to label or categorize is, however, how we come to value or devalue things—in this case racial difference—is generally not a ‘natural’ or internally driven phenomenon. The meaning we attach to particular categories largely comes from external sources. That is, the social and historical context in which we find ourselves largely accounts for the value systems we employ at an individual level in categorizing difference.”).

104. *See, e.g., id.* at 826-28.

105. *See, e.g.,* LOURY, *supra* note 79, at 69.

individual cognitive interactions and thus precipitates racialized thinking and associations even when an individually is normatively opposed to such thinking.¹⁰⁶ In these ways, racial stigma operates at a cognitive level beyond an individual's conscious understanding of their racial thinking.

3. *Racial Stigma Generates Ontological Harm.*

Racial stigma injures the stigmatized in several ways. Most pertinent are stigma's ontological harms: the extent to which stigma challenges minorities' basic existential status. As recently summarized by Professor Lenhardt, racial stigma causes two kinds of ontological harm most relevant here: first, once internalized, it compromises self-regard and, second, it generates an uncertain social identity. In challenging minorities' most basic human capacities, these injuries undermine minorities' intellectual, cultural, and social standing. In so doing, these harms also impede the ability of stigmatized minorities to participate fully in society's civic, cultural, and political life.¹⁰⁷ Such "citizenship harms," using Lenhardt's terminology,¹⁰⁸ are inevitable. Stigma distinctly marks its targets as less than human and that social signal necessarily affects the way in which others perceive and engage them.¹⁰⁹ These harms, moreover, not only affect the stigmatized, as a class, in ways that distinguish them from others, but also produce varying effects in individuals.

The internalization of stigma's challenge to existential capacity is perhaps stigma's most debilitating consequence.¹¹⁰ When internalized, the stigmatized accept stigma's messages about their inferiority.¹¹¹ Moreover,

106. Crocker et al., *supra* note 75, at 512, 515; see Gaertner & Dovidio, *supra* note 102, at 62 (providing that, given the extent to which racial stereotypes and attitudes inform socialization, individuals of all races "almost unavoidably possess negative feelings and beliefs about Blacks").

107. Lenhardt, *supra* note 75, at 836, 839-43.

108. *Id.* at 812.

109. See, e.g., Crocker et al., *supra* note 75, at 511.

110. See, e.g., Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 26 (Amy Gutmann ed., 1994) (providing that internalized stigma, what Taylor terms misrecognition, "can inflict a grievous wound, saddling its victims with a crippling self-hatred. Due recognition is not just a courtesy we owe people. It is a vital human need."); see also Crocker et al., *supra* note 75, at 511-12 (discussing internalization of stigma); Theresa Perry, *Achieving in Post-Civil Rights America: The Outline of a Theory*, in YOUNG GIFTED, AND BLACK: PROMOTING HIGH ACHIEVEMENT AMONG AFRICAN-AMERICAN STUDENTS 87, 105 (Theresa Perry et al. eds., 2003) (discussing challenges of internalized stigma for African-Americans).

111. See Hamilton & Trolier, *supra* note 96, at 150 (discussing "self-fulfilling" feedback effects of stigma); see also LOURY *supra* note 79, at 26-27 (outlines the logic of self-confirming stereotypes: first, "rational statistical inference in the presence of limited information," second, "feedback effects on the behavior of the individuals" due to the expectation that such inferences will be made about them and third, "mutually confirming beliefs and behaviors"); Crocker et al.,

the cognitive acceptance of one's own insufficiency generates conduct reflective of that self-perception. This triggers a vicious cycle where stigma's rationality is reinforced, fueling stigma's continued propagation. Ontological harm is thus both a cause and an effect of stigma: stigma injures the stigmatized by signaling their existential insufficiency, and that insufficiency, once internalized, precipitates conduct that itself sustains stigmatization. As such, internalized stigma is uniquely incapacitating. It causes the stigmatized to believe in and identify with their own inferiority, and thus undermines the capacities vital to defending against stigma.

In addition, stigma also threatens a social schizophrenia concerning racial minorities' identity. Goffman explained that stigma imposes a "virtual social identity," comprised of the characteristics society attributes to and expects of the stigmatized.¹¹² This virtual identity contrasts with an individual's actual identity—the range of attributes actually possessed by that individual. Because of this dissonance, the stigmatized are in a constant struggle to reconcile their virtual and actual selves.¹¹³ Similar to internalized stigma, this injury causes the stigmatized to be uncertain about their capacity and thus their intellectual, social, and cultural standing.

Significantly, while these harms generally describe the injuries produced by stigma, the way stigma actually affects individuals varies. First, the stigmatized do not simply suffer stigmatic injury passively. Aware of the destructive consequences of diminished social notions of minority capacity, many families affirmatively seek to instill in their children the sense of self-worth vital to defending against stigmatic injury.¹¹⁴ Cultural and social institutions also play a critical role.

supra note 75, at 536 (discussing self-fulfilling relationship of stigma and poor academic performance for African-Americans).

112. GOFFMAN, *supra* note 75, at 2; Lenhardt, *supra* note 75, at 818; *see also* LOURY, *supra* note 79, at 64-65, (providing that the virtual identity can subsume actual identity given the significance attributed to race; the observer may lose the incentive to discern actual identity believing that that members of racial groups are homogenous).

113. Long before sociologists developed the concept of stigma, W.E.B. DuBois offered what remains, perhaps, the most incisive analysis to date of this struggle:

It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his two-ness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 2 (Kessinger Publ'g 2004) (1903).

114. *See, e.g.*, LAWRENCE OTIS GRAHAM, *OUR KIND OF PEOPLE: INSIDE AMERICA'S BLACK UPPER CLASS* (2000); Brown-Scott, *supra* note 61, at 10-12; Cheryl L. Wade, *When Judges are Gatekeepers, Democracy, Morality, Status, and Empathy in Duty Decisions (Help From Ordinary Citizens)*, 80 MARQ. L. REV. 1, 32-33 (1996) (discussing role of "churches, fraternities, sororities, community centers, and other social organizations" in promoting esteem and educational achievement).

Churches, civic groups, community organizations, professional associations, local newspapers and radio, particularly in the African-American community, have a long history of specifically inculcating in children personal self-esteem and cultural pride.¹¹⁵ The degree to which individuals have access to and avail themselves of these resources, as well as the degree to which these resources are effective in mitigating stigma's effects, are highly variable.

Individuals, moreover, also cope differently with stigma. Some reflexively attribute negative outcomes to prejudice in ways that often overstate stigma's actual influence.¹¹⁶ Others limit their social interactions only to members of stigmatized groups—deeming relationships across the stigma line too psychologically dangerous.¹¹⁷ Others simply disengage from the activity in which stigma presents itself, essentially finding stigma too distorting to the integrity of the implicated activity to justify continued commitment.¹¹⁸ These categories merely illustrate a range of individual responses to stigma. While stigma affects the stigmatized as a class in ways that distinguish them from others, it simultaneously affects individuals differently in light of familial, cultural, and social background.

4. *Stigmatic Harm Undermines Education.*

Stigma undermines educational achievement. Like stigmatic harm generally, stigma affects educability both internally and externally. Internalized stigma uniquely damages identity and self-esteem. Stigma challenges the existential status of its victims and, once internalized, leads them to identify with their own incapacity. Such internalized stigma is intensely harmful to education. Jean Aronson's findings are illustrative: "The beliefs that children create and develop and hold to be true about themselves are vital forces in their success or failure in all endeavors, and of particular relevance . . . their success or failure in school."¹¹⁹ When the

115. See, e.g., GRAHAM, *supra* note 114; C. ERIC LINCOLN & LAWRENCE H. MAMIYA, THE BLACK CHURCH IN AFRICAN-AMERICAN EXPERIENCE 1-20 (1990); Brown-Scott, *supra* note 61, at 10-12; Wade, *supra* note 114, at 32-33.

116. See Crocker et al., *supra* note 75, at 521.

117. See *id.*

118. See *id.*

119. Frank Paires & Dale H. Schunk, *Self and Self-Belief in Psychology and Education: A Historical Perspective*, in IMPROVING ACADEMIC ACHIEVEMENT: IMPACT OF PSYCHOLOGICAL FACTORS ON EDUCATION 3 (Joshua Aronson ed., 1999); see also JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 178-79 (Oxford University Press 1996) (1994) ("[O]ne's culture constitutes (contributes to) one's identity. Therefore slighting one's culture, persecuting it, holding it up for ridicule, slighting its value, etc., affect members of that group . . . particularly. . . if it has the imprimatur of one's state."); CARTER G. WOODSON, THE MISEDUCATION OF THE NEGRO 84 (African Am. Images 2000) ("If you make a

stigmatized doubt their capacity, educational under-performance is self-fulfilling.¹²⁰ Because of this internalized stigma, it is unsurprising that many young African-Americans, for example, regard educational success as a form of “acting white;” stigma has so thoroughly discredited their self-perception that educational achievement is perceived as a foreign pursuit.¹²¹

In addition to the acute and potentially irremediable damage to educational capacity caused by internalized stigma, external forms of stigma-influenced conduct also undermine minorities’ educability. This results not only from the stigma-informed prejudice—both conscious and cognitive—inhabiting individual members of the school community, but also the way in which stigma-informed thought influences institutional conduct.¹²² At a threshold level, public schools simply expect and demand less of minority children.¹²³ These diminished expectations reflect stigmatized notions of student capacity. This general ethos of diminished expectation is evident in a range of school contexts, but is particularly discernible in curricular requirements,¹²⁴ student tracking,¹²⁵ discipline,¹²⁶

man feel that he is inferior, you do not have to compel him to seek inferior status, for he will seek it for himself.”).

120. See, e.g., Crocker et al., *supra* note 75, at 538; see also Claude Steele, *Stereotype Threat and African American Student Achievement*, in *YOUNG GIFTED, AND BLACK: PROMOTING HIGH ACHIEVEMENT AMONG AFRICAN-AMERICAN STUDENTS*, *supra* note 110, at 111, 116-20 (discussing specific effects of “stereotype threat” on stigmatized minorities’ educational performance); Jason W. Osborne, *Race and Academic Disidentification*, 89 J. OF EDUC. PSYCHOL. 728, 732 (1997) (discussing results of studies indicating educational impediments posed by internalized stigma).

121. See, e.g., Crocker et al., *supra* note 75, at 529-30, 535 (discussing extent to which stigma causes Black students to associate educational success with Whites); see also Osborne, *supra* note 120, at 732 (1997) (demonstrating empirical data that stigma causes Black students to dis-identify with educational achievement).

122. See, e.g., Crocker et al., *supra* note 75, at 535 (“[D]evaluation of the stigmatized in school can also take a more ‘climatic’ form. Prejudice and stereotypes can be held very weakly, even resisted by individuals in a collective (e.g. a school), yet through their coordination of the entire collective’s behavior toward the stereotyped group, they can profoundly affect its experience.”).

123. See, e.g., Martin Haberman, *Urban Education: The State of Urban Schooling at the Start of the 21st Century*, EDNEWS, Nov. 1, 2004, available <http://www.ednews.org/articles/591/1/URBAN-EDUCATION-THE-STATE-OF-URBAN-SCHOOLING-AT-THE-START-OF-THE-21-ST-CENTURY/Page1.html>

(“[I]n the urban districts serving culturally diverse students in poverty, these broad [educational] missions are frequently narrowed down to ‘getting a job and staying out of jail.’”).

124. See, e.g., JEAN ANYON, *GHETTO SCHOOLING: A POLITICAL ECONOMY OF URBAN EDUCATIONAL REFORM* 9-12 (1997) (citing research showing that “instruction in inner city schools is often based on cognitively low-level, unchallenging, rote material.”); JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA’S SCHOOLS* 75-76 (1990) (providing that book-keeping and cosmetology classes often replace math courses in inner-city schools); R. Edmunds, *Effective Education for Minority Pupils: Brown Confounded or Confused*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 109 (D. Bell ed. 1980) (discussing

and special-education referral and classification.¹²⁷ Discriminatory treatment in each of these areas is inextricably linked to the ontological consequences of stigma.

These internal and external harms are exacerbated by the antithesis between the identity-forming character of education and the identity-damaging character of stigma. Because stigma imposes a spoiled “virtual social identity,” the stigmatized must develop identities independent of those engendered by stigma in order to protect their self-regard. This requires the stigmatized to develop means of affirming actual identities and disclaiming stigma-derived virtual identities. Education is inextricably linked to this struggle because education itself generates identity. But when education reinforces stigma, the stigmatized are doubly injured. They are not only distanced from the tools enabling a robust defense against stigma, but they are also affirmatively instructed in such a way that reinforces the very ontological harms requiring remedy.

Finally, although these harms affect the stigmatized, as a class, in ways that distinctly impede education, they also affect individual children differently. As discussed above, children have varying levels of access to familial, social, and cultural resources that help contradict stigma. These resources counter stigma’s pejorative messages with correspondingly affirmative ones. Depending on the availability and quality of these resources, children will be differently affected by stigma’s educational costs. Those with the weakest defenses are more likely to bear the full brunt of stigma’s negative educational effects. Conversely, those with the strongest defenses are less likely to internalize stigma’s ontological

ways that low curricular and teacher expectations impede academic performance of Black students).

125. The discriminatory tracking of Black students into remedial classes, and the corresponding tracking away from advanced classes, reflects stigmatized cognitions of the intellectual and academic potential of Black students. *See, e.g.,* Brown, *supra* note 59, at 47-48.

126. Racially discriminatory discipline reflects notions that the stigmatized are predisposed to behaviors inconsistent with social norms. Different punishments for comparable infractions suggest that breaches committed by the stigmatized are more dangerous than others. *See, e.g.,* ADVANCEMENT PROJECT & HARVARD CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE, vi-ix (2000) *available at* http://www.civilrightsproject.harvard.edu/research/discipline/exec_summary.pdf.

127. Discriminatory special-education referrals and classifications especially illustrate stigma’s ontological challenge. Special-education classification signals disabilities inhibiting children from advancing educationally to the same degree as others. This corresponds to stigma’s signal about minorities’ capacity. *See, e.g.,* HARVARD CIVIL RIGHTS PROJECT, RACIAL INEQUITY IN SPECIAL EDUCATION, (June 2002), *available at* http://www.civilrightsproject.harvard.edu/research/specialed/IDEA_paper02.php (showing African-Americans are up to four times more likely to be classified as mentally retarded or emotionally disturbed).

consequences and are more likely to succeed educationally. In fact, some children not only believe self-assuredly in their own capacity—a radical act in a stigmatized environment—but also believe they have the ability, by dint of their own extraordinary achievement, to negate the predicate supporting stigma.

In addition to their varying levels of access to resources that help defend against stigma, children also cope differently with stigma. For example, some children shirk personal responsibility for failure and automatically blame prejudice for their undesirable educational outcomes.¹²⁸ This knee-jerk disavowal of culpability, motivated by a perception that stigma inevitably corrupts performance evaluation, undermines the motivation to achieve that is indispensable to educational performance. Other children might define their educational potential strictly by standards gleaned from intra-group observation. Such artificially narrow benchmarks are especially problematic in disproportionately segregated and poor urban districts. In these communities, as described above, only a minority of students even graduate from high school and only a small subset of them attend, much less graduate from, post-secondary schools. This predicate provides minorities little reason to believe ambitiously in their own potential. The synthetically low standards of some stigmatized children reinforce stigma's messages about their capacity.

Perhaps most insidious, some children dis-identify with educational achievement altogether. Such disassociation might result, as suggested above, from an internal sense of incapacity to perform educationally. But it might also result from a perception that stigma has stripped schooling of integrity. Some stigmatized children detach themselves entirely from education: the dropout option. While others remain in school but dismiss its value: the under-achiever option. A recent study, for example, showed that Black twelfth-graders correlated educational performance with their self-esteem at significantly lower rates than their White peers.¹²⁹ When stigma triggers disassociation, the consequences could not be more damaging: the stigmatized either leave the educational system entirely or marginalize its relevance to their future. Like excessive prejudice-blaming and artificial intra-group comparison, dis-identification and stigma are mutually reinforcing. Disassociation produces the very educational failures that fuel stigma.

These represent a range of individual responses to stigma, which vary depending on a child's age and socio-economic status. Coping responses,

128. Crocker et al., *supra* note 75, at 521.

129. Osborne, *supra* note 120, at 732.

additionally, are fluid and overlapping, both with one another and the quality of a child's capacity-affirming defenses. Stigma, in short, harms the stigmatized collectively in ways that uniquely obstruct their education. But just as important, it affects individual children in varied ways reflecting the diversity of their experiences.

For these reasons, schools need the flexibility to respond to the unique class and individual ways stigma impedes education. Public schools' structural constraints, however, negate this flexibility. As discussed below, public schools, particularly those serving stigmatized minorities, are characterized by a bureaucratic uniformity in which across-the-board rules remove school-based discretion to tailor services to student needs. At best, this neglect perpetuates those existential harms undermining education; at worst, by failing to specifically account for and mitigate these harms, it exacerbates them. In either event, these institutional limitations preempt the responsiveness necessary to effectively serve the unique educational needs of stigmatized minorities.

IV. The Institutional Limitations on Public Schools' Ability to Effectively Serve Stigmatized Minorities' Educational Needs

A stifling web of mandates governs public schools and effectively removes discretion from local officials to chart schools' philosophic, curricular, and pedagogic direction. This bureaucracy is not coincidental. It is intrinsic to political authority and thus intrinsic to traditional public schools—particularly urban schools disproportionately serving stigmatized minorities. This uniformity denies the flexibility needed to respond both to the distinctive class-wide and individual needs of minorities. The problem is not the merit of any particular rule but the body of rules themselves: bureaucracy requires uniformity while minorities' needs demand flexibility.¹³⁰

The political weakness of stigmatized minorities exacerbates the costs of bureaucratic uniformity. This weakness impedes minorities' ability to obtain rules that reflect their needs. While the effectiveness of any rule-based approach is limited by its neglect of individual variation, rules systematically focused on counteracting stigma's educational consequences could nonetheless lessen stigma's harmful effects. But the concomitants of minorities' stigmatized status produce political weakness, which, in turn, precludes minorities from obtaining bureaucratic rules broadly reflective of their needs. Specifically, minorities are in the minority, relatively poor,

130. Cf. WILSON, *supra* note 5, at 339 ("A rule is a general statement prescribing how a class of behaviors should be conducted. Using a general statement to produce an individualized result is almost a contradiction in terms.").

and subject to a stigma that impedes their ability to ally with otherwise like-minded groups. The inter-relationship of public schools' disposition toward rulemaking, and minorities' political weakness, embeds ineffectiveness into the foundation of public schooling.

This Part will describe the rigid, rule-bound reality of public schools. Next, it will demonstrate that bureaucratic uniformity is not accidental, but is fundamental to public schools' institutional context. Finally, this Part will show that stigmatized minorities are politically weak, and therefore unable to extract educational policies from public schools systematically responsive to their needs.

A. Public Schools Are Highly Bureaucratic—Particularly Those Serving Stigmatized Minorities.

Public schools are heavily bureaucratic. They operate in a maze of mandates that largely dictate their philosophic, curricular, and pedagogic direction.¹³¹ These mandates derive principally from three sources: (1) directives codified in federal, state, or local law, (2) collective-bargaining rules, and (3) compliance-related obligations—principally documentary and judicial mandates—derivative of the first two sources.

Federal regulation of public schools, for most of the past fifty years, has been discrete in scope but robust in depth. Yet, in the past twenty years, federal oversight has expanded into broad substantive matters.¹³² Federal oversight traditionally concerned the equitable education of racial minorities, women, children with disabilities, and the poor. The Supreme Court's decisions in the *Brown* line of cases, along with civil-rights statutes

131. See PAUL S. GROGAN & TONY PROSCIO, *COMEBACK CITIES: A BLUEPRINT FOR URBAN NEIGHBORHOOD REVIVAL* 176, 223-224 (Westview Press 2000); JEFFREY C. HENIG ET AL., *THE COLOR OF SCHOOL REFORM: RACE, POLITICS, AND THE CHALLENGE OF URBAN EDUCATION* 29, 274 (third prtg. 2001); WILBUR RICH, *BLACK MAYORS AND SCHOOL POLITICS: THE FAILURE OF REFORM IN DETROIT, FARY, AND NEWARK* 9, 13, 203-208 (1996); see also JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, & AMERICA'S SCHOOLS* 58 (1990) ("The public world of educational practice is a world of rules imposed on the schools by local, state, and federal authorities."); FREDERICK M. HESS, *AM. ENTER. INST. & MARTIN R. WEST, BROOKINGS INST., A BETTER BARGAIN: OVERHAULING TEACHER COLLECTIVE BARGAINING IN THE 21ST CENTURY* 6 (2006), available at <http://www.ksg.harvard.edu/pepg/PDF/Papers/BetterBargain.pdf> ("[C]ollective bargaining agreements hamstring reform efforts in significant ways . . ."); Common Good, *Law and Public Education: The Paralyzing Effects of Excessive Bureaucracy* <http://cgood.org/schools-reading-cgpubs-factsheets-7.html> (last visited Mar. 6, 2007) [hereinafter *Common Good, Effects of Excessive Bureaucracy*] ("The nearly endless bureaucratic rules in America's schools prevent teachers and school administrators from effectively creating learning environments.").

132. Corcoran & Goertz, *supra* note 15, at 35. Given the absence of direct regulatory authority over local education, Congress has used its Spending Clause power to entice state compliance with federal education priorities.

enacted in the mid-1960s, spurred significant federal intervention into school affairs on desegregation and gender-equity matters.¹³³ Similarly, the Education for All Handicapped Children Act of 1975—subsequently re-codified as the Individuals with Disabilities Education Act (“IDEA”)—allowed for federal micro-management of the process and substance of special education. Title I of the Elementary and Secondary Education Act of 1965 (“ESEA”) also regulated, albeit in a less constraining way, the kind of education available to the poor.¹³⁴ Collectively, federal intervention in these areas is substantial,¹³⁵ as national directives override local discretion on fundamental issues of student placement, tracking, discipline, and finances.¹³⁶

Special-education regulation, in particular, is disproportionately constraining. Over twenty percent of public-school funding, for example, is devoted to special education, even though less than thirteen percent of students are classified as having special needs.¹³⁷ This disparity in funding derives in large part from compliance with federal mandates.¹³⁸ Not only does federal law specify the goal of a “free appropriate public education” for children with disabilities, but it also micro-manages means.¹³⁹ Each school must develop a defined “Individualized Education Program” (IEP) and comply with scores of procedural and substantive mandates.¹⁴⁰ Among

133. Aaron Jay Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 875-876 (2006).

134. Corcoran & Goertz, *supra* note 15, at 34-36.

135. *Id.*; Saiger, *supra* note 133, at 875-876 n.92.

136. CHUBB & MOE, *supra* note 131, at 10, 150; Corcoran & Goertz, *supra* note 15, at 34-35; Saiger, *supra* note 133, at 875-876 n.92.

137. CATO HANDBOOK FOR CONGRESS: POLICY RECOMMENDATIONS FOR THE 108TH CONGRESS, 306-307 (Edward H. Crane & David Boaz eds., 2003) available at <http://www.cato.org/pubs/handbook/hb108/hb108-29.pdf> [hereinafter CATO HANDBOOK]; Saiger, *supra* note 133, at 869-870. Moreover, eighty-four percent of superintendents complain that mandated special-education spending diverts disproportionate amounts of school spending away from general-education budgets. Press Release, Pub. Agenda, Politics and Bureaucracy, Not Lack of Funding, are Chief Irritants for Superintendents and Principals (Nov. 14, 2001), available at http://www.publicagenda.org/press/press_release_detail.cfm?list=38 [hereinafter Pub. Agenda, Politics and Bureaucracy].

138. CATO HANDBOOK, *supra* note 137, at 307.

139. See 20 U.S.C. § 1412(a)(1) (2006).

140. EDUC. LAW CTR., THE RIGHT TO SPECIAL EDUCATION IN NEW JERSEY: A GUIDE FOR ADVOCATES 18-23 (2004), available at http://www.edlawcenter.org/ELCPublic/Publications/PDF/Rights_SpecialEducation_Guide.pdf (noting, for example, mandates specifying the individuals who must attend an IEP meeting; when and where the meeting can occur; the language the meeting is to be conducted in; notice requirements; particular ways students are to participate in IEP development; statement of how the student’s progress toward annual goals will be measured; and a statement of how the parent or guardian is to be informed of his or her child’s

other things, the IEP must be developed by a prescribed child study team (“CST”) whose membership is determined by federal law;¹⁴¹ the CST must meet and evaluate children according to specified timeframes;¹⁴² and schools must provide services in the “least restrictive environment” as defined by federal law.¹⁴³ Parents, moreover, must also be provided a due-process hearing before an administrative-law judge if they disagree with the IEP.¹⁴⁴ Compliance with special-education mandates is a principal source of federal interference with school-level discretion.¹⁴⁵

In addition to these areas of traditional concern, the federal government has expanded its regulatory purview over the last two decades. Beginning in the 1980s—prompted largely by the publication of the seminal *A Nation at Risk* report, which chronicled the decreasing international competitiveness of American students—the federal government began raising its qualitative expectations of student performance.¹⁴⁶ The 1988 amendments to the ESEA required states to set minimum performance standards for low-income students in schools receiving ESEA funds. The Improving America’s Schools Act of 1994, and its successor, the No Child Left Behind Act of 2001 (“NCLB”), extended this approach to all schools and broadened the scope of regulated subject matter. NCLB is the culmination of the past two decades of increasing federal regulation of public schools. It requires states to meet more rigorous academic standards, implement annual testing in specified grades, ensure schools employ “highly qualified” teachers, and initiate federally defined accountability regimes.¹⁴⁷

progress towards annual goals). The notion of an *Individualized Education Program*, the terms of which are micro-managed by federal law, is ironic to say the least.

141. 34 C.F.R. § 300.344 (2006).

142. 34 C.F.R. § 300.343 (2006).

143. 20 U.S.C. § 1412(a)(5) (2006); 34 C.F.R. § 300.130 (2006).

144. 20 U.S.C. § 1415 (2006); 34 C.F.R. § 300.500-517 (2006).

145. CATO HANDBOOK, *supra* note 137, at 305

146. Corcoran & Goertz, *supra* note 15, at 35.

147. *Id.* at 35-36. NCLB’s accountability mandates are especially micro-managing. The statute requires that all students in specified grade levels meet specified performance standards, 20 U.S.C. § 6516(a)(4) (2006); that all students in disaggregated demographic groups also meet these standards, *id.* § 6311(b)(3)(C)(xiii); that states label schools as failing when insufficient numbers of students meet these benchmarks, *id.* § 6316(b)(1)(A) (2006); that local schools allow students in failing schools to transfer to non-failing schools, *id.* § 6316(b)(1)(E)(i); that schools undergo federally prescribed “corrective action” when failing to meet specified benchmarks for three years, *id.* § 6316(b)(7)(C)(iv); and that schools undergo wholesale “restructuring” which may include reopening the school as a public charter school, *id.* § 6316(b)(7)(C)(iv)(VI); replacing all or most of the school staff, *id.* § 6316(b)(7)(C)(iv)(I); or state takeover of the school when failing to meet specified benchmarks for six years. *id.* § 6316(b)(8)(B)(i-v).

As generally is the case with government regulation of public schools,¹⁴⁸ federal regulation disproportionately affects urban districts serving stigmatized minorities. For example, special-education regulation is particularly micro managing. As discussed above, the racially stigmatized are uniquely vulnerable to special-education classification, as stigma tracks the messages concerning student capacity implied by classification. It is thus unsurprising that African-American students constitute seventeen percent of the total student population, yet comprise thirty-three percent of students diagnosed as mentally retarded.¹⁴⁹ In fact, a Black student is nearly three times more likely to be labeled mentally retarded than his White peer.¹⁵⁰ Because minority children are disproportionately educated in urban districts, this translates into disproportionate special-education obligations for urban schools.¹⁵¹

Special-education obligations, as discussed, are merely one aspect of the federal puzzle. Urban districts also face extraordinary regulatory obligations under other federal mandates. Oversight under NCLB is uniquely burdensome. Given NCLB's intensive mandates on improved performance—not only for schools overall, but identified demographic groups, including racial and ethnic minorities—urban schools face the full brunt of NCLB's mandates.¹⁵² In addition, because urban districts are economically disadvantaged, they rely more than other districts on

148. *Infra* Part IV.C.

149. Daniel J. Losen & Gary Orfield, *Introduction* to RACIAL INEQUITY IN SPECIAL EDUCATION, at xvi (Daniel J. Losen & Gary Orfield eds., 2002).

150. *Id.* at xix; *see also id.* at xx (“Black students are 2.88 times more likely than Whites to be labeled mentally retarded and 1.92 times more likely to be labeled emotionally disturbed.”).

151. JAY G. CHAMBERS ET AL., SPECIAL EDUC. EXPENDITURE PROJECT, HOW DOES SPENDING ON SPECIAL EDUCATION STUDENTS VARY ACROSS DISTRICTS? 1 (2002), available at <http://www.csef-air.org/publications/seep/national/AdvRpt2.pdf> (providing that local education agencies spend approximately ninety percent more to educate special education students than for students without any special needs); *see, e.g.*, Frederick M. Hess, *Courting Backlash: The Risks of Emphasizing Input Over School Performance*, 6 VA. J. SOC. POL'Y & L. 11, 39 (1998) (explaining that, in 1999, school officials in Washington, D.C. devoted twenty-five percent of the district's budget to special education, even though only ten percent of its students received special education services); Priscilla Pardini, *Special Education: Promises and Problems*, RETHINKING SCHOOLS, Spring 2002, http://www.rethinkingschools.org/archive/16_03/Prom163.shtml (noting Milwaukee Public Schools spent fourteen percent of its budget on special education).

152. For example, urban districts comprise twenty-seven percent of Title I schools, but represent forty-two percent of the schools identified for improvement under NCLB. CTR. ON EDUC. POLICY, NCLB: URBAN SCHOOL DISTRICTS ARE TAGGED FOR IMPROVEMENT AT HIGHER RATES THAN SUBURBAN OR RURAL SCHOOLS 1 (June 2005), available at <http://www.cep-dc.org/nclb/NCLBpolicyBriefs2005/CEPPB1web.pdf>. Title I schools are those that receive federal funds under Title I of NCLB's predecessor, the Elementary and Secondary Education Act. *Id.*

federally subsidized grants to support education services.¹⁵³ These federal grants invariably include a body of regulations that inhibit local discretion in pursuit of federal goals.¹⁵⁴ In all of these ways, the discretion-removing tendencies of federal regulation are exacerbated in urban districts.

Although federal oversight is substantial, state and local laws produce most bureaucratic constraints on public schools.¹⁵⁵ These mandates span the range of a district's educational responsibilities: graduation requirements;¹⁵⁶ curricular offerings and pedagogical methodologies,¹⁵⁷ which textbooks may be used,¹⁵⁸ how student achievement is assessed,¹⁵⁹ length of the school day and school year;¹⁶⁰ terms of teacher and administrator certification;¹⁶¹ terms of tenure protection;¹⁶² and class size

153. See, e.g., HENIG ET AL., *supra* note 131, at 252; RICH, *supra* note 131, at 13.

154. RICH, *supra* note 131, at 13 (providing that "control is increasingly abdicated to the state bureaucracy and a variety of grant driven programs of the federal government.").

155. Corcoran & Goertz, *supra* note 15, at 33-43; see also HENIG ET AL., *supra* note 131, at 252 ("States in particular impose a detailed regulatory network on local districts.").

156. See, e.g., Corcoran & Goertz, *supra* note 15, at 37; HENIG ET AL., *supra* note 131, at 253; Herbert J. Walberg, *Real Accountability*, in *OUR SCHOOLS & OUR FUTURE: ARE WE STILL AT RISK?* 305, 306-17 (Paul E. Peterson ed., 2003)

157. DAVID T. CONLEY, *WHO GOVERNS OUR SCHOOLS: CHANGING ROLES AND RESPONSIBILITIES I* (2003); Corcoran & Goertz, *supra* note 15, at 37-38; Walberg, *supra* note 156, at 309 (discussing state regulation of public-school curriculum); ELAINE WALKER, *EDUCATIONAL ADEQUACY AND THE COURTS: A REFERENCE HANDBOOK* 131, 155-56 (2005).

158. See Matthew Bender & Co., *Statutes Regulating School Curriculum on the Selection of Textbooks, Instructional, Library, or Resource Materials*, 7R1 Education Law § 10, tbl. 10 (2006).

159. Walberg, *supra* note 156, at 309 (discussing standardized-test requirements throughout the country and alignment of state-mandated curriculum requirements with tests).

160. Corcoran & Goertz, *supra* note 15, at 37.

161. Chaim Karczag, *Undermining Teacher Quality: The Perverse Consequences of Certification*, in *EDUCATIONAL FREEDOM IN URBAN AMERICA: BROWN V. BOARD AFTER HALF A CENTURY* 109, 110-13 (David Salisbury & Casey Lartigue, Jr. eds., 2004). State laws, moreover, dictate the substantive content of certification, requiring candidates to attend pre-approved post-baccalaureate programs, and take pre-determined courses. *Id.* Certification, however, is weakly linked to student achievement. See, e.g., GREENE, *supra* note 66, at 61-70 (2005); Karczag, *supra*, at 119 ("[T]here is little evidence linking teacher certification to student achievement."). Even worse, growing evidence suggests certification lowers teacher quality by deterring talented candidates. See Howard Fuller & George A. Mitchell, *A Culture of Complaint*, *EDUC. NEXT*, Summer 2006, at 18, 21 ("Inflexible staffing rules . . . undermine the ability of urban schools to hire and keep the best possible teachers." (internal quotations omitted)); Richard Riley, Sec'y, U.S. Dep't of Educ., *New Challenges, A New Resolve: Moving Education into the 21st Century* (Feb. 16, 1999), available at <http://www.ed.gov/Speeches/02-1999/990216.html> ("Too many potential teachers are turned away because of the cumbersome process that requires them to jump through hoops and lots of them."). *But see* Mary Diez, *In Defense of Regulation*, in *CHOICE AND COMPETITION IN AMERICAN EDUCATION* 43-45 (Paul E. Peterson ed., 2005) (noting that teacher certification "has served its basic purpose" in ensuring teacher competency and that a well-designed program could improve teacher quality).

and student-teacher ratios, among others.¹⁶³ While states vary on the density of regulation, bureaucratic micro-management is an irreducible feature of contemporary public schooling.¹⁶⁴

In addition, as is the case concerning federal regulation, state oversight is particularly high-handed in urban districts.¹⁶⁵ States uniquely impose on urban districts especially constraining mandates on curriculum and pedagogy. Among these are requirements that urban districts use consultant-driven programs that dictate on a class-by-class and sometimes minute-by-minute basis precisely what and how teachers instruct their students.¹⁶⁶ States also impose on urban districts singular limitations on finances and operations, substantially limiting the discretion of urban

162. HENIG ET AL., *supra* note 131, at 252-53; HESS & WEST, *supra* note 131, at 27; *see also* Frederick M. Hess and Martin R. West, *Strike Phobia: School Boards Need to Drive a Harder Bargain*, EDUC. NEXT, Summer 2006, at 41 [hereinafter Hess & West, *Strike Phobia*] (reporting that all but five states have laws granting teachers tenure after three or fewer years on the job). Moreover, almost eighty percent of superintendents and roughly seventy percent of principals report that they need more authority to remove ineffective teachers. Pub. Agenda, Politics and Bureaucracy, *supra* note 137.

163. Class Size Matters, State and Local Efforts Across the Nation to Reduce Class Size, <http://www.classsizematters.org/Stateandlocalefforts.html> (last visited Mar. 5, 2007); Education Week, Class Size, <http://www.edweek.org/rc/issues/class-size/?levelId=1000> (last visited Mar. 5, 2007); *see, e.g.*, GREENE, *supra* note 66, at 50-51 (discussing attempts in Florida and New York to reduce class sizes statewide).

164. *See, e.g.*, WALKER, *supra* note 157, at 156 (“State departments of education have traditionally relied upon the use of regulations to bring about conformity to state education policies and to influence practice in the field.”).

165. GROGAN & PROSCIO, *supra* note 131, at 176 (discussing “immovable, unresponsive, and draconian mandates” applicable to urban public schools); HENIG, *supra* note 131, at 257-66 (discussing incessant, externally driven state reform efforts in urban districts); RICH, *supra* note 131, at 13 (providing, concerning urban schools, that “administrative sovereignty is lost . . . to the state bureaucracy and a variety of grant-driven programs of the federal government”); WALKER, *supra* note 157, at 131, 155 (high-needs districts more likely to be subject to regulation); Haberman, *supra* note 123 (discussing “endless stream of regulations and funding mechanisms” applicable to urban districts).

166. WILLIAM G. OUCHI, MAKING SCHOOLS WORK: A REVOLUTIONARY PLAN TO GET YOUR CHILDREN THE EDUCATION THEY NEED 76-78 (2003) (describing the lock-step approach of Open Court, a reading program adopted by the states of California & Texas, as well as numerous districts and schools around the country); Success for All Foundation, FAQ’s, <http://www.successforall.net/middle/sfa.htm> (last visited Mar. 5, 2007) (explaining how the Success for All program is currently used in more than 1,300 schools in over 500 school districts); Success for All Foundation, Middle School, <http://www.successforall.net/middle/sfa.htm> (last visited Mar. 5, 2007) (describing how the Success for All program provides teachers with detailed lesson plans, all necessary student materials, assessment tools, instructional strategies, and student and teacher goals); *see also* Abbott v. Burke, 153 N.J. 480, 604-05 (1998) (“heartedly” endorsing New Jersey’s adoption of the Success for All program for urban districts). *But c.f.* Haberman, *supra* note 123 (noting urban-district vulnerability to consultant-driven programs).

administrators to allocate resources to uses locally preferred.¹⁶⁷ Even more, states target urban districts for wholesale takeover of particular administrative functions and, in some cases, the entirety of district operations.¹⁶⁸ School takeover is the logical extension of the growing micro-management of urban schools.

Moreover, although their discretion is circumscribed by federal and state mandates, urban-district central offices represent another source of bureaucracy. Given the size of urban districts, central offices prescribe numerous rules that further remove discretion from school-level officials. These rules largely implement federal and state mandates, but they also codify district-wide administrative policies.¹⁶⁹ The diversity and density of state and local mandates impose a virtual “straitjacket” on urban-district officials.¹⁷⁰ According to a former New York City schools Chancellor:

If I want to get things done, like instituting a longer school day, I have to go get the Governor’s signature, the mayor’s signature, the commissioner [of education’s] signature, the board of regent’s signature Do you understand how much of my life I could spend here just getting those stars in alignment?¹⁷¹

State and local oversight simply deprive school-based officials in urban districts of meaningful discretion.

167. OUCHI, *supra* note 166, at 90-92 (explaining tendency of state politicians to dictate budgetary obligations at the school level, removing the power to make such decisions from local school administrators); LYDIA SEGAL, *BATTLING CORRUPTION IN AMERICA’S PUBLIC SCHOOLS* 89-93 (2004) (demonstrating that in most large school districts, budget decisions are largely dictated by government mandates).

168. Corcoran & Goertz, *supra* note 15, at 48 (describing trend in local school governance, especially in the urban context, to centralize school operations); OUCHI, *supra* note 166, at 57 (describing trend in many schools to remove the power from principals to make even basic staffing decisions); *see, e.g., Abbott*, 153 N.J. at 498-501 (describing ways in which commissioner of New Jersey’s Department of Education may dictate, *inter alia*, a school’s curriculum, staff assignment, and expenditures).

169. *See, e.g., SEGAL, supra* note 167, at 89-93 (discussing district rules on budgeting and finances).

170. Matthew Miller, a journalist who followed the travails of the Los Angeles district’s superintendent for several months used this precise term. Matthew Miller, *The Super*, WASH. MONTHLY, June 2001, available at <http://www.washingtonmonthly.com/features/2001/0106.miller.html> (“A big-city superintendent . . . operates in a straitjacket . . .”); *see also* HENIG ET AL., *supra* note 131, at 28 (“Local school districts are not autonomous and independent. They function within a broader federal system in which most formal power ultimately rests with the states.”); RICH, *supra* note 131, at 214 (providing, concerning urban districts serving stigmatized minorities, that “[t]he governing school boards are not free to introduce new curriculum or to change personnel policies” given state-law micro-management); Pub. Agenda, Politics and Bureaucracy, *supra* note 137 (“[Superintendents and principals] are convinced that strong leadership can transform schools . . . but politics and bureaucracy just eat away at them.”).

171. Rebecca Winters, *Is Superintendent . . . A Job for a Super Hero*, TIME, Feb. 7, 2000, available at <http://jcgi.pathfinder.com/time/magazine/article/0,9171,996011-2,00.html>.

Furthermore, while federal, state, and local mandates preempt meaningful school-level discretion to tailor substantive educational services to student needs, collective-bargaining rules achieve the same result concerning operations. Collective-bargaining agreements, often in excruciating detail, specify the terms and conditions of employment for principals and teachers and thus greatly restrict the capacity of local administrators to manage schools effectively. Among other things, collective-bargaining agreements: (1) define tenure protections, specifying detailed procedural and regulatory rules governing principal and teacher accountability;¹⁷² (2) impose lockstep compensation requirements, forcing principals and teachers to be paid exclusively on the basis of specified credentials and years of experience; (3) mandate rigid job-assignment and transfer rules, precluding administrators from allocating staff to their best use; (4) and prescribe mechanical limitations on teacher evaluation, preventing principals from flexibly shaping assessment criteria to serve student needs.¹⁷³

As with statutory and administrative mandates, collective-bargaining directives are particularly rigid in urban districts, containing stultifying procedures and lockstep rules on seemingly every aspect of school governance. Many urban-district union contracts span hundreds of pages and are supplemented by thousands of additional pages in appendices and addenda.¹⁷⁴ These mandates constrain school officials on bread-and-butter

172. For example, it took one California school district thirteen years and \$312,000 to fire one teacher for incompetence. James Payne, *The Agony of Public Education*, 5 INDEP. REV. 265, 272. Additionally, only twenty-four percent of superintendents and thirty-two percent of principals report that they have enough autonomy to reward outstanding teachers and staff; only twenty-eight percent of superintendents and thirty-two percent of principals report that they have sufficient authority to remove ineffective teachers; and fifty-six percent of teachers believe that the tenure system should be changed to facilitate the removal of bad teachers. Common Good, *Effects of Excessive Bureaucracy*, *supra* note 131.

173. HESS & WEST, *supra* note 131, at 30-32 (discussing agreements prohibiting principals from considering student performance on standardized tests in evaluating teachers); Hess & West, *Strike Phobia*, *supra* note 162, at 43 (discussing lock-step teacher salaries based on length of service, not quality of performance); OUCHI, *supra* note 166, at 57-58 (explaining inflexible top-down staffing rules that impede a principal's ability to effectively manage his or her school).

174. Frederick M. Hess and Andrew P. Kelly, *Scapegoat, Albatross, or What? The Status Quo in Teacher Collective Bargaining*, in COLLECTIVE BARGAINING IN EDUCATION: NEGOTIATING CHANGE IN TODAY'S SCHOOLS (Jane Hannaway & Andrew J. Rotherham eds., 2006); *see, e.g.*, Fuller & Mitchell, *supra* note 161, at 19-20 (describing a recent collective-bargaining agreement in Milwaukee as spanning over 200 pages and containing over 2,000 addenda); Eva Moskowitz, *Breakdown: The Ten-Foot Rule and Other Fine Points of Collective Bargaining in New York City*, EDUC. NEXT, Summer 2006 (describing New York City collective-bargaining agreement of over 600 pages, including addenda).

issues of compensation and evaluation,¹⁷⁵ assignment rights,¹⁷⁶ and tenure.¹⁷⁷ In addition, urban districts confront a menu of stifling work rules on matters spanning the scope of school operations. These rules, for example, limit the number of successive and total hours a teacher can teach;¹⁷⁸ constrain the number of students a teacher instructs;¹⁷⁹ prohibit principals from asking teachers to supervise study halls or participate in after-school programs;¹⁸⁰ restrict the number of lesson plans a teacher can

175. HESS & WEST, *supra* note 131, at 30-32 (discussing agreements prohibiting the consideration of student performance on standardized tests in evaluating teacher performance and agreements delineating detailed procedural, record-keeping, and documentary requirements concerning evaluation); Hess & West, *Strike Phobia*, *supra* note 162, at 41, 43 (providing sample of contract provisions regulating teacher evaluation and the lock-step nature of teacher compensation).

176. Urban districts tend to be characterized by unyielding "voluntary transfer" edicts, empowering senior teachers unilaterally to transfer to another school, even if the receiving school is disinclined to hire the teacher. JESSICA LEVIN ET AL., THE NEW TEACHER PROJECT, UNINTENDED CONSEQUENCES: THE CASE FOR REFORMING THE STAFFING RULES IN URBAN TEACHERS UNION CONTRACTS 8-9 (2005), available at <http://www.tntp.org/files/UnintendedConsequences.pdf>. A recent empirical analysis found that these rules cause urban schools to employ teachers whose qualifications do not comport with the schools' particular needs. *Id.* at 5, 9.

177. Concerning tenure, urban-district tenure rules are so impenetrable that administrators have an exceedingly difficult time terminating even the most incompetent teachers. *See, e.g.*, FREDERICK HESS, REVOLUTION AT THE MARGINS: THE IMPACT OF COMPETITION ON URBAN SCHOOL SYSTEMS 58, 93-94 (2002) (discussing unsuccessful attempts of an urban superintendent to dismiss incompetent teachers, including one who was videotaped reading a newspaper while students were shooting craps in the classroom); THERNSTROM & THERNSTROM, *supra* note 56, at 260 (noting that tenured teachers are protected from removal by union contracts, and state laws and regulations). Indeed, a recent analysis of five representative urban districts revealed that only one of every 18,650 tenured teachers was fired for poor performance. LEVIN ET AL., *supra* note 176, at 18. Tenure rules induce districts to forego disciplinary action, leaving in place ineffective teachers. *Id.* at 17 (explaining that many principals place poorly performing teachers on excess lists, thereby shuffling the teacher from one school to another instead of following through with disciplinary or removal proceedings).

A recent study showed that only .05% of public school teachers were involuntarily removed from their positions in 1997. Mike Antonucci, *Teacher Tenure Reform: Mandate or Mirage*, in A CONSUMER'S GUIDE TO TEACHER QUALITY: OPPORTUNITY AND CHALLENGE IN THE NO CHILD LEFT BEHIND ACT OF 2001, at 1, 1 (2002). Moreover, in a two-year period, the New York City school board, an employer of 72,000 teachers, only sought to terminate three teachers for incompetence. *Id.* Firing three out of 72,000 teachers over a two-year period works out to terminating .0021% of teachers per year. Furthermore, the Los Angeles Unified School District, the second largest in the country, brought only one teacher termination to the final phase of the dismissal process between 1990-1999. *Id.*

178. *See, e.g.*, Moskowitz, *supra* note 174 (discussing a New York City agreement limiting teachers to no more than 2.25 successive hours of teaching and no more than 3.75 hours of total teaching per day).

179. Fuller & Mitchell, *supra* note 161, at 18-19; HESS & WEST, *supra* note 131, at 29-30.

180. HESS & WEST, *supra* note 131, at 29-30; Moskowitz, *supra* note 174.

prepare;¹⁸¹ limit principal review of lesson plans;¹⁸² limit faculty meetings and training to predetermined hours;¹⁸³ cap the number of parent conferences a teacher must hold;¹⁸⁴ and restrict how and how often teachers evaluate student work.¹⁸⁵ These rules paralyze the operational capacity of urban schools to adapt services to the unique challenges their students present.¹⁸⁶ The recent statement of an urban superintendent on union rules is illustrative: “You have Gulliver and the Lilliputians. You’ve got a thousand of these little ropes. None of them in and of [themselves] can hold the system down, but you get enough of them in place . . . and the giant is immobilized.”¹⁸⁷

Finally, correlative to bureaucracy is compliance. To ensure compliance government directs public schools to submit documentation. And, given the extensive scope of governing regulations, this paperwork responsibility is onerous.¹⁸⁸ Similarly, individuals harmed by rule violations often possess legal recourse. Given the proliferation of rules, schools are routinely subject to enforcement actions and derivative court mandates. According to a nationwide survey, half of public school superintendents protest they devote too much time to litigation-related matters.¹⁸⁹ These obligations constitute a bureaucracy of their own, further encumbering school-based discretion. Moreover, because urban schools

181. HESS & WEST, *supra* note 131, at 29-30.

182. Fuller & Mitchell, *supra* note 161, at 20; HESS & WEST, *supra* note 131, at 29-30.

183. Fuller & Mitchell, *supra* note 161, at 20.

184. HESS & WEST, *supra* note 131, at 30.

185. *Id.*

186. The New Teacher Project’s report on the teacher-staffing provisions of urban-district collective-bargaining agreements found that union rules precluded urban schools from hiring and retaining those teachers most capable of meeting the needs of a particular school’s student population. LEVIN ET AL., *supra* note 176, at 8-9, 12-15. Similarly, a recent study of urban school superintendents found that over two-thirds of them cited collective-bargaining rules as a major impediment to school reform. Fuller & Mitchell, *supra* note 161, at 20-21. Moreover, more than half of principals believe that they “are so overwhelmed by day-to-day management, that their ability to provide vision and leadership is stymied.” Pub. Agenda, Politics and Bureaucracy, *supra* note 137. Superintendents also reported that these rules inhibit their effectiveness in meeting student needs. Common Good, Law and Public Education, *supra* note 131.

187. Fuller & Mitchell, *supra* note 161, at 21 (ellipsis in original).

188. Haberman, *supra* note 123; see, e.g., WALKER, *supra* note 157, at 157 (“[R]egulatory unreasonableness [as] a situation in which the means for determining whether a regulatory goal has been attained assumes greater saliency than the goal itself . . . [and] is exemplified by a focus . . . on formalistic, legalistic, standardized inspection processes.”).

189. Public Agenda, Politics and Bureaucracy, *supra* note 131.

face enhanced bureaucracy, they generally confront more inhibiting paperwork responsibilities and judicial dictates.¹⁹⁰

Individually, these layers of mandates—arising from statutory and regulatory mandates, collective bargaining, and compliance obligations—hamstring school-based discretion to adapt services to student needs. Collectively, at least for urban districts serving stigmatized minorities, they functionally eliminate that discretion. Ninety percent of public school superintendents and principals report that bureaucracy deprives them of needed autonomy.¹⁹¹ And almost seventy percent report these mandates inhibit effective education.¹⁹² The challenge here is not the propriety of any particular rule, but the cumulative constraint produced by the body of rules.¹⁹³ From the setting of educational philosophy to the development and implementation of curriculum and pedagogy, bureaucratic rules prescribe the means and ends of public education, sometimes specifying the content and methodology of education practice on a class-by-class basis. Moreover, these rules micro-manage daily operations by dictating uniform standards on compensation, staff evaluation, student assessment, employee tenure, and the quantity of student instruction. Correlative compliance obligations pile on and effectively straitjacket local officials, particularly in urban districts. This body of rules removes flexibility from school-based officials, and produces a one-size-fits-all orientation.

B. Bureaucracy Is Fundamental to Public Schools—Particularly Those Serving Stigmatized Minorities.

The bureaucratic disposition of public schools is not accidental, but is central to political accountability.¹⁹⁴ Political accountability is characterized by two fundamental elements: democratic hierarchy and political uncertainty. As explained below, these factors pull government toward rulemaking, as the removal of local discretion is vital both to the

190. Haberman, *supra* note 123.

191. STEVE FARKAS ET AL., PUB. AGENDA, TRYING TO STAY AHEAD OF THE GAME: SUPERINTENDENTS AND PRINCIPALS TALK ABOUT SCHOOL LEADERSHIP (2001), available at <http://www.publicagenda.com/specials/leadership/leadership1.htm>.

192. *Id.* (showing that sixty-four percent of superintendents and sixty-seven percent of principals claim either that bureaucracy ties their hands entirely or they have to “work around” the system to get things done).

193. Some amount of bureaucracy, of course, is essential to protecting public values and, correspondingly, some rules are more sensible than others. But, as discussed in Part IV.B., political accountability in the schools context is structurally disposed toward the kind of excessive rulemaking described above.

194. CHUBB & MOE, *supra* note 131, at 46-47 (describing deliberate implementation of bureaucracy in part to ensure accountability); WILSON, *supra* note 5, at 344 (providing that the American political system is “biased” toward rulemaking).

imposition of hierarchical democratic values and to insulating current priorities from interference by other government actors. These bureaucratic tendencies are exacerbated in public schools principally due to three additional features of school politics: (1) the monopolistic nature of public schooling, (2) the extent to which the federal and state governments subsidize public schools, and (3) increased public attention over the past twenty-five years on school effectiveness. Finally, stigma exacerbates the bureaucratic pull of these factors, yielding greater degrees of bureaucracy in urban districts disproportionately serving stigmatized minorities. In these ways, the institutional incentives governing public schools induce uniformity.

1. Political Accountability Generally Leads to Bureaucracy.

Public schools are government agencies, created by political authorities to implement public objectives. In fact, their very existence is instrumental: public schools are means of achieving priorities determined politically at a higher level of government.¹⁹⁵ Politics, therefore, “dominates the life of a government organization. Politics determines to what extent the agency is funded; what its purposes are; how many personnel it has; whether it exists at all.”¹⁹⁶ A necessary corollary is the removal of discretion. Government creates agencies to vindicate political objectives, and agencies therefore must be constrained to ensure they serve those objectives.¹⁹⁷ Constraint, therefore, is an essential ingredient of public schooling.¹⁹⁸

This disposition toward constraint leads to dense bureaucracy for several reasons. First, political authorities represent a wide range of interests, and political authorities are predisposed to promulgate rules in order to pacify those interests.¹⁹⁹ Public policy is not determined academically in a vacuum, but is the by-product of a messy struggle among diverse constituencies at multiple levels of government seeking to steer

195. CHUBB & MOE, *supra* note 131, at 45-47; Jonathan Zasloff, *Children, Families, and Bureaucrats: A Prehistory of Welfare Reform*, 14 J.L. & POL. 225, 251-52, 259 (1998).

196. Zasloff, *supra* note 195, at 251.

197. CHUBB & MOE, *supra* note 131, at 46-47; WILSON, *supra* note 5, at 344.

198. HENIG, *supra* note 131, at 252 (“[T]he politics of education comes with strings attached.”); WILSON, *supra* note 5, at 317 (providing that bureaucratic constraints facilitate political objectives).

199. CHUBB & MOE, *supra* note 131, at 46-47; WILSON, *supra* note 5, at 317 (“The political process can more easily enforce compliance with constraints than the attainment of goals.”); *id.* at 366-67; Zasloff, *supra* note 195, at 254.

public priorities in self-serving directions.²⁰⁰ Education policy, therefore, is structurally inefficient—at least to the extent efficiency is defined in terms of student learning.²⁰¹ Education policy does not reflect neutral decision-making about students' educational needs, but embodies a hodgepodge of priorities advanced by those groups best able to attain and wield political authority. Political authorities are disposed to issue rules to satisfy these interests, both because rules provide readily available means of achieving discrete political objectives and because the concreteness of rules permit ready enforcement.²⁰²

Second, democratic hierarchy leads to rulemaking because government authority is highly fragmented, particularly on education matters. Politicians seeking to affect education policy confront a web of government actors. They face the vertical, federalism challenge of harnessing political authority across federal, state, and local government. At each of these levels, competing political authorities possess the ability to interfere with preferred policies. Politicians also face the horizontal, separation-of-powers challenge of harnessing political authority within any given level of government. For example, the President must confront Congress; the governor must do battle with state legislative leaders; the commissioner of education must wrestle with the state board and the governor; the superintendent must accommodate the school board and perhaps municipal government. Political authorities seeking to affect

200. See Linda Babcock & George Lowenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109, 109-10, 116-17 (1997) (analyzing how notions of fairness and public policy are shaped by the goals that competing interests groups seek to achieve); Christo Lassiter, *The New Race Cases and the Politics of Public Policy*, J.L. & POL. 411, 435-36 (1996) (describing public policy as benefit-conferring process that rewards one group over another).

201. See Corcoran & Goertz, *supra* note 15, at 42-43 ("Expansion of the state role in public education has been accompanied by an expansion of the number and types of citizens and organizations seeking to shape education policy decisions, transforming the political structure from a statewide monolith to a fragmented system of education politics."); James Q. Wilson, *Can the Bureaucracy be Deregulated? Lessons from Government Agencies*, in DEREGULATING THE PUBLIC SERVICE: CAN GOVERNMENT BE IMPROVED? 37, 40 (John J. DiIulio, Jr. ed., 1994) [hereinafter Wilson, *Deregulated*] ("Outside forces—elected officials, interest groups, employee organizations, professional associations, the courts, and the media—demand a voice in running the agencies and make that demand effective by imposing rules on them and insisting and insisting that all the rules be enforced all the time."). Public schools, therefore, are not fundamentally designed to vindicate students' educational needs; schools are agents of society. See CHUBB & MOE, *supra* note 131, at 32 ("[P]ublic schools . . . are literally not supposed to provide [students] with the kind of education they might want. The schools are agencies of society as a whole, and everyone has a right to participate in their governance." (emphasis removed)).

202. WILSON, *supra* note 5, at 317, 331-32, 363-64.

school policy face a diffuse regulatory environment in which actors at multiple levels possess the capacity to derail priorities.²⁰³

Third, beyond the extent to which political authorities possess the capacity to frustrate efforts to impose higher-order values, the same dynamic threatens implementation at the school level. Federal and state politicians, in particular, are far removed from the schoolhouse. Even assuming political authorities across multiple levels of government support particular policies, dissenting school-based staff may obstruct implementation. School-based staff, moreover, may not have the capacity or competency to implement a policy consistent with governing purposes. The ability of local officials to impede implementation of higher-order priorities encourages public authorities to prescribe in specific detail both the substance of these values, and the processes by which they are pursued.²⁰⁴

The concern that other government actors may obstruct higher-order values leads to another cause of public school bureaucracy: political insecurity. The struggle for political authority is permanent.²⁰⁵ In the context of education politics, this struggle is compounded by the place of the school board within the range of federal, state, county, and municipal offices implicated by education policy. The perpetually impending character of the next pertinent election means that authorities face a political environment fraught with instability. Policies for which a political consensus has been obtained as a matter of horizontal or vertical policymaking may be weakened depending on the results of the next election.²⁰⁶ This facilitates bureaucracy because rulemaking reduces the ability of successive regimes to dismantle pre-existing policies.²⁰⁷

At the same time, the desire to preemptively promulgate rules further fuels bureaucracy. Subsequent regimes, seeking to pursue their own policies and having to confront preexisting rules, have incentives to impose their own rules in order to vindicate their new priorities. These new rules, given the new motivations that produced them, often conflict with prior

203. CHUBB & MOE, *supra* note 131, at 39; WILSON, *supra* note 5, at 376-77.

204. WILSON, *supra* note 5, at 376-77.

205. CHUBB & MOE, *supra* note 131, at 29 (“The result [of democratic politics] is a perpetual struggle for the control of public authority. During elections, the various interests struggle to place their partisans in public offices. Between elections, they struggle to influence how officials actually exercise their authority.”).

206. CHUBB & MOE, *supra* note 131, at 42-43.

207. *Id.*; see also WILSON, *supra* note 5, at 241-42 (providing that congressional policymaking “increasingly takes the form of devising elaborate, detailed rules” thereby ensuring continuity of a specific policy agenda).

regulations.²⁰⁸ For public schools, the intersection of political insecurity and bureaucracy contributes to a “policy churn” in which political authorities mandate a continuously changing, and often conflicting, set of policies and accompanying rules.²⁰⁹

The bureaucratic pull of democratic hierarchy and political insecurity apply broadly, albeit to varying degrees, to varied kinds of government agencies.²¹⁰ These criteria are supplemented, in the education context, by principally three additional bureaucracy-producing factors: (1) the monopolistic nature of public education, (2) the increasing funding of local school districts by federal and state government, and (3) elevated political attention to public-school effectiveness. Public schools in virtually every school district in the country enjoy a monopoly on the public subsidy of education services—public education subsidies flow overwhelmingly to schools governed, managed, and operated by political authorities. This leaves politicians without structural reasons to grant individual schools discretion to deviate from prevailing norms.²¹¹ In a government monopoly, political authorities are effectively the sole check on rulemaking. But, as discussed above, the political nature of public authority itself contributes to even larger bureaucracy. Public monopolies, therefore, provide no meaningful restraint on bureaucracy. One analyst of school management said it quite simply: “Bureaucracy flourishes wherever customers have no choice.”²¹²

In addition, regulation is an essential characteristic of government subsidy. The proportion of federal and state subsidies to local districts has grown significantly in the last thirty years.²¹³ Federal and state funding

208. CHUBB & MOE, *supra* note 131, at 42-43; WILSON, *supra* note 5, at 363-64 (providing, given failure of rule-imposing bodies to regularly monitor outputs, that new rules are rarely reconciled with prior rules).

209. HENIG, *supra* note 131, at 280 (using “reform de jour” to describe political process that inundates schools with reform initiatives); FREDERICK M. HESS, SPINNING WHEELS: THE POLITICS OF URBAN SCHOOL REFORM 52 (1999) (describing “policy churn”); CHRIS WHITTLE, CRASH COURSE: IMAGINING A BETTER FUTURE FOR PUBLIC EDUCATION (2005) (describing perpetually shifting school reforms); Haberman, *supra* note 123 (describing the pressure on urban school administrators to try out new curricular programs, many of which are not systematically or carefully evaluated in advance).

210. WILSON, *supra* note 5, at 120-22, 188 (providing that it is the nature of democratic institutions to implement bureaucratic controls).

211. Wilson, *supra* note 201, at 51.

212. OUCHI, *supra* note 166, at 14; *see also* Wilson, *supra* note 201, at 52 (“As long as a school system has monopoly control over public education funds, it will have no incentive to grant autonomy to any of its parts and every incentive to keep them on a short bureaucratic leash.”).

213. Corcoran & Goertz, *supra* note 15, at 34-35; Saiger, *supra* note 133, at 868.

comprises almost sixty percent of school-district funding.²¹⁴ As local districts have increasingly relied upon external government subsidy, they have likewise subjected themselves to external regulation. Regulatory strings invariably accompany government money, and the strings reflect the subsidizing agent's priorities.²¹⁵

Finally, public concern for school effectiveness has increased significantly in the last several decades. The enhanced focus induces political authorities to respond in the best way they know how: regulation. As discussed above, in the aftermath of *Brown* and the civil-rights movement, the federal government assumed a more robust role on education policy. At the same time, state governments' focus on education increased both with the growing federal role, and as advocates sought state remedies to supplement the traditionally discrete focus of federal intervention.²¹⁶ The publication of *A Nation at Risk*, coming at a time of increasing government focus on educational efficacy, spurred government efforts to raise curricular rigor and to increase accountability for outcomes.²¹⁷ States throughout the country responded with burgeoning bodies of rules, seeking to address the intensified focus on educational effectiveness.²¹⁸

Additionally, today's enhanced public focus on education derives from the contemporary importance of education to social mobility.²¹⁹ Education in the information age is simply indispensable to economic and social viability—and the public knows it. Consequently, the public places extraordinary pressure on government to provide high-quality educational services.²²⁰ Because today's international economy is premised largely on human capital, intense public focus on education is a fundamental aspect of

214. Corcoran & Goertz, *supra* note 15, at 41.

215. HENIG, *supra* note 131, at 252 (discussing insuperable connection between government subsidy and government regulation).

216. Corcoran & Goertz, *supra* note 15, at 42-43.

217. CHUBB & MOE, *supra* note 131, at 9-10; Corcoran & Goertz, *supra* note 15, at 36-38; WALKER, *supra* note 157, at 16-18.

218. Corcoran & Goertz, *supra* note 15, at 36-37.

219. See, e.g., RICHARD ROTHSTEIN & TAMARA WILDER, THE MANY DIMENSIONS OF RACIAL INEQUALITY 112 (2005), available at http://devweb.tc.columbia.edu/manager/symposium/files/83_rothstein.pdf; THERNSTROM & THERNSTROM, *supra* note 56, at 73-76.

220. For example, politicians today regularly tie their political fortunes to education reform. See, e.g., George W. Bush, *Foreword* to *No Child Left Behind*, <http://www.whitehouse.gov/news/reports/no-child-left-behind.html> (last visited Mar. 6, 2007); Brookings Institution, *Bloomberg's Education Reforms in New York City: An Assessment*, <http://www.brookings.edu/gs/brown/events/20050601.htm> (last visited Mar. 6, 2007) (noting that Mayor Michael Bloomberg requested and received control over New York City's public schools and his assertion that he would be answerable for the ultimate success or failure to improve the City's schools).

modern politics.²²¹ This intensified focus yields bureaucracy because rulemaking is the primary means by which government authorities effectuate political priorities.²²²

2. *Districts Disproportionately Serving Stigmatized Minorities—Particularly Those Governed by Stigmatized Minorities—Are Uniquely Subject to Bureaucracy.*

While the above-discussed factors instill bureaucracy into the very structure of contemporary public schooling, they apply with even greater force to urban districts serving minorities. As discussed, stigma, in both its cognitive and conscious dimensions, affects institutional responses to the stigmatized, causing institutions to engage the stigmatized in ways reflective of diminished notions of their capacity. This suggests education policymakers are likely to impose special rules on the stigmatized deriving from that status.²²³

In addition, the hierarchical concern about the inclination or capacity of subordinate actors to competently implement favored policies applies particularly to urban districts. The general concern that local officials may frustrate the vindication of higher-order priorities is surely aggravated when local officials are subject to a stigma that challenges their existential capacity. To that extent, public authorities, particularly at the federal and state levels, are likely to be especially skeptical about the capacity of districts administered by minorities to execute favored policies.²²⁴ This increases the general concern with lower-level interference with higher-order policies, and thus uniquely encourages regulation.

Concerning the education-specific precipitants of bureaucracy, stigmatized minorities have fewer viable alternatives to local public schools, and therefore are more vulnerable to the bureaucratic pull of public-school monopolies. White families disproportionately have the resources to opt out of the local public school system either by sending their children to private school or by moving to another district.

221. *See id.*

222. *See supra*, Part IV.A.

223. *See supra* notes 121-125.

224. HENIG, *supra* note 131, at 267-71 (discussing extent to which state regulation invokes perception that Blacks cannot run school districts); RICH, *supra* note 131, at 214 (“Blacks have achieved political control but not the cultural authority to make fundamental changes in educational institutions.”); *see also* JEAN ANYON, *supra* note 124, at 23 (“[S]ocial distance arising in part from lack of common experience and knowledge of each other in people of difference class and racial backgrounds can impair communication, trust, and joint action between reformers and school personnel . . . and can hamper the implementation of educational improvement projects.”).

Conversely, stigmatized minorities are disproportionately poor, lacking the capacity to access private schools or to move to an adjacent district. The relative inability of stigmatized minorities to exit public schooling leaves them particularly vulnerable to excessive bureaucracy.

Similarly, the disproportionate poverty of stigmatized minorities leaves them more susceptible to the regulatory concomitants of external government funding. Urban districts serving stigmatized minorities disproportionately depend on federal and state subsidy.²²⁵ Because rules inevitably accompany government subsidy, urban districts are subject to even greater bureaucracy than their suburban counterparts. According to political scientist Wilbur Rich, who spent several years studying the impediments to effective education in three representative urban districts, “[s]ince school programs are so dependent upon multiple sources of school finance, administrative sovereignty [in urban districts] is lost in the process.”²²⁶

Moreover, given the relationship of stigma and schools’ institutional conditions, stigmatized minorities are more likely to under-perform academically.²²⁷ This fuels bureaucracy both because school under-performance encourages government to act—and government generally acts through regulation—and because the education of stigmatized minorities, at least since *Brown*, is a subject of unique political attention. Simultaneously, the under-performance of stigmatized minorities leaves districts vulnerable to legal challenge—whether under federal and state equal-protection provisions or state adequacy provisions. These challenges lead to judicial mandates, supplementing legislative and administrative ones, which further constrain school-based discretion to respond flexibly to student needs. In these ways, the increased public focus on educational under-performance distinctively applies to districts serving stigmatized minorities.

The institutional disposition toward bureaucracy betrays the flexibility needed to address stigma’s educational effects. This dissonance might be lessened if stigmatized minorities had the political power to implement bureaucratic rules generally responsive to their needs. But even such an approach would be far from ideal. As developed above, discretion-removing rules themselves are the problem. Still, across-the-board rules affirmatively responsive to stigmatic harm, rather than neglectful of it, would likely reduce stigma’s challenge to minorities’ educability. Yet, as discussed below, minorities are poorly positioned to influence public-

225. Corcoran & Goertz, *supra* note 15, at 41.

226. RICH, *supra* note 131, at 13.

227. *Supra*, Part III.

school politics in a systemic way. This ultimately results in bureaucratic rules that generally overlook their particular needs.

C. Stigmatized Minorities Are Unable to Politically Vindicate Their Educational Interests in Public Schools.

Stigmatized minorities are politically weak and therefore unable to achieve policies systematically responsive to their educational needs. This political impotence flows principally from three inter-related sources. First, stigmatized minorities are minorities and as such are destined to lose their share of political battles.²²⁸ This disadvantage is particularly pertinent at the state and federal levels, where education policy increasingly is set. This is especially true for urban districts, whose budgets depend disproportionately on state and federal subsidy. Second, stigmatized minorities are less wealthy than other groups and as a result have a diminished capacity to influence politics through the strategic use of money.²²⁹ Third, and perhaps most troubling, stigmatized minorities are stigmatized, and stigma itself inhibits their ability to participate effectively in the political process.²³⁰

First, stigmatized minorities, at least at the state and federal levels, are numerical minorities and as such are likely to lose more political fights than they win. Elections in the United States, unlike many other democracies, are almost exclusively determined on the basis of majoritarian, "winner take all" principles: candidates win elections by obtaining a bare majority of votes cast.²³¹ As a consequence, numerical minorities, by definition, simply do not have enough votes to direct

228. Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 152 (1976) (arguing that African Americans as a group are disenfranchised, in part, because they are a numerical minority); Elizabeth R. Gerber et al., *Minority Representation in Multimember Districts*, 92 AM. POL. SCI. REV. 127, 129 (1998) (arguing for change to electoral system to remedy functional disenfranchisement of numerical minorities); see also THE FEDERALIST NO. 51 (James Madison) ("If a majority be united by a common interest, the rights of the minority will be insecure.").

229. Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 87-89 (2004); see also Rebecca E. Zietlow, *Giving Substance to Process: Countering the Due Process Counterrevolution*, 75 DENV. U.L. REV. 9, 41 (1997) (emphasizing the need for stigmatized groups to resort to judicial remedies because their lack of economic resources makes the political process largely unresponsive).

230. See, e.g., William E. Adams, Jr., *Is it Animus or a Difference of Opinion? The Problems Caused by the Invidious Intent of Anti-Gay Ballot Measures*, 34 WILLAMETTE L. REV. 449, 462 (1998); Fiss, *supra* note 228, at 152; see also Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1585 (1988) (noting that African Americans, women, disabled, homosexuals, and other disadvantaged groups have historically been excluded from political process).

231. See, e.g., Richard Briffault, *Lani Guinier and the Dilemma of American Democracy*, 95 COLUM. L. REV. 418, 420-421 (1995) (book review).

electoral outcomes on their own; they need other means, generally the strategic use of money or coalition-building, to achieve political outcomes.

The highly fragmented character of education politics exacerbates the political implications of minority status. As discussed above, political authorities at all levels of government determine education policy. Because of the continued high rates of residential segregation, stigmatized minorities tend to disproportionately live in communities populated primarily by other minorities. This development permits racial minorities to constitute numerical majorities in many local jurisdictions, enhancing their ability to influence local politics. But because education policy is heavily determined by policies set by higher political authorities, the inability of stigmatized minorities to influence materially political decision-making at these levels encumbers their ability to realize education policies reflective of their needs.²³² This challenge is particularly pronounced for urban districts because they rely disproportionately on external government funding. Consequently, racial minorities depend substantially on the policymaking of political bodies for which their minority status inhibits their influence.

Second, stigmatized minorities are politically weak given their relatively small amounts of wealth, and derivative limited capacity to influence politics through the strategic use of money. While aggregating large numbers of voters in a particular interest group is one means of influencing politics, so is the ability to use money in pursuit of political aims—whether to support candidates, to influence political opinion, or to facilitate lobbying efforts. This strategy of course turns on the extent to which an interest group has disposable income. Stigmatized minorities have substantially less wealth than Whites, and are therefore disadvantaged concerning the use of money for political purposes. Specifically, as of 1998, the median household wealth was \$10,000 for a Black family, \$3,000 for a Hispanic family, and \$81,700 for a White family.²³³ Income figures are also revealing: in 2001, the median Black household earned \$33,598, the median Hispanic household earned \$34,490, while the median White household earned \$54,067.²³⁴

These stark inequalities dramatically limit minorities' ability to influence political outcomes. First, these inequalities hamstring the extent

232. See RICH, *supra* note 131, at 13 (describing state and federal micro-management of urban-district policy); HENIG, *supra* note 131, at 256 (describing prominent role of state policymaking in urban districts).

233. Edward N. Wolff, *Recent Trends in Wealth Ownership, 1983-1988*, at tbls. 7-8 (Jerome Levy Econ. Institute, Working Paper No. 300, 2000), available at <http://129.3.20.41/eps/mac/papers/0004/0004047.pdf>.

234. LAWRENCE MISHEL ET AL., *THE STATE OF WORKING AMERICA 2002/2003* 278 (2003).

to which stigmatized minorities can financially support candidates of choice.²³⁵ For example, while African-Americans and Hispanics jointly comprise almost twenty-five percent of the population, they account for less than one percent of those who make reportable contributions to federal candidates.²³⁶ Comparable disparities exist in state and local elections.²³⁷ These disparities impede the capacity of candidates preferred by stigmatized minorities to win competitive elections.²³⁸ Moreover, the disparities apply even to those political jurisdictions predominated by stigmatized minorities, because Whites primarily finance elections in these districts too.²³⁹ Stigmatized minorities thus have a reduced capacity to elect candidates of choice; and the responsiveness even of candidates preferred by stigmatized minorities is lessened by the degree to which financial support derives disproportionately from other communities.²⁴⁰

Second, stigmatized minorities have a diminished ability to lobby government effectively for the redress of grievances. Lobbyists are an increasingly important vehicle through which modern interest groups vindicate their political interests. The effectiveness of lobbying efforts depends on the capacity of constituent groups to marshal money in support of political objectives.²⁴¹ Minorities' lack of wealth undercuts their ability to lobby effectively for political outcomes reflective of their needs.

Third, and perhaps most insidious, stigma itself compromises minorities' political agency. Stigma singles out racial minorities as existentially distinct and thus inhibits their ability to associate with non-

235. Spencer Overton, *Racial Disparities and the Political Function of Property*, 49 UCLA L. REV. 1553, 1569-1570 (2002); Terry Smith, *Race and Money in Politics*, 79 N.C. L. REV. 1469, 1510-1514 (2001).

236. See Overton, *supra* note 235, at 1569.

237. *Id.*

238. White predominance of campaign finance, coupled with stigma's role in depressing the support Whites might otherwise provide minority candidates, causes stigmatized-minority candidates to be under-funded compared to their competitors. JOHN THEILMANN & AL WILHITE, *DISCRIMINATION AND CONGRESSIONAL CAMPAIGN CONTRIBUTIONS* 78 (1991); see also Smith, *supra* note 235, at 1474 n.15.

239. ROBERT SINGH, *THE CONGRESSIONAL BLACK CAUCUS: RACIAL POLITICS IN THE U.S. CONGRESS* 125-26 (1998); Robert C. Smith, *Financing Black Politics: A Study of Congressional Elections*, 17 REV. BLACK POL. ECON. 5, 24 (1988).

240. Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 279 n. 26 (1993) (providing that the relative poverty of stigmatized minorities, coupled with private financing of campaigns, "systematically favors white candidates and white interests over minorities" in statewide races and races in majority-white districts).

241. *Id.* at 276-79.

stigmatized groups.²⁴² These associational harms are politically destructive because they frustrate minorities' capacity to align with other interest groups to form majorities on discrete questions.²⁴³ Thus, stigma impedes both the capacity of stigmatized minorities to form political coalitions at the constituent level, and the ability of individual politicians to form policymaking majorities on particular issues.²⁴⁴ As such, stigma undermines the alliance building that is vital to the built-in protections American democracy affords minorities,²⁴⁵ leaving them chronically marginal in the political marketplace and uniquely vulnerable to majoritarian tyranny.²⁴⁶

242. Lenhardt, *supra* note 75, at 846-47 (discussing extent to which stigma causes "citizenship harms," which limit the capacity of the racially stigmatized to "belong" in civil society).

243. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 153 (1980) (providing that, although American democracy depends "on the ability and willingness of various groups to apprehend those overlapping interests that can bind them into a majority on a given issue," racism "blinds us to overlapping interests that in fact exist"); Lenhardt, *supra* note 75, at 846-47 (explaining that the ability of stigmatized groups "to influence decisions and to develop sustained, interest-enhancing relationships with others has been impaired").

244. See Briffault, *supra* note 231, at 1444-45 (discussing "legislative racism" and extent to which it preempts African-American politicians not only from developing cross-racial alliances with White representatives, but also from even influencing the political decision-making of White representatives).

245. See, e.g., THE FEDERALIST NO. 51 (James Madison) (describing ways in which structure of American political system can protect minority interests); Lenhardt, *supra* note 75, at 844-48 (discussing ways in which stigmatized groups experience "citizenship harms").

246. See, e.g., BELL, *supra* note 34, at 471-73; PAUL FRYMER, *UNEASY ALLIANCES: RACE AND PARTY COMPETITION IN AMERICA* 146 (1999); LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 249 (1994). This of course does not mean that stigmatized minorities are never able to obtain political benefits consistent with their needs. First, the social rigidity of stigma is not static; it changes over time as social norms change. Contemporary stigmatization undoubtedly is less stultifying than historical manifestations of stigma, when racial stigma was an explicit, consciously accepted given of American social life. Second, political outcomes consistent with the needs of the stigmatized sometimes overlap with the political desires of Whites. In circumstances of such "interest convergence," to use Derrick Bell's terminology, the political needs of stigmatized minorities benefit as an ancillary consequence of policies principally designed to serve the needs of Whites. DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 59-68 (2004). From this perspective, many of the more prominent positive political developments ostensibly serving the needs of stigmatized minorities—the Civil Rights Acts; the Voting Rights Act; and various Great Society programs—primarily serve majoritarian, rather than minority, needs. DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 51-74 (1987); see also Derrick A. Bell Jr., Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3, 7, 16-17 (1979) (providing that Black political and social progress is achieved only when the gains create a clear benefit to Whites). *But see* JOHN D. GRIFFIN & BRUCE NEWMAN, *RACE, POLITICAL EQUALITY, AND PLURALISM: REPRESENTATION IN BLACK AND WHITE*, available at http://www.nd.edu/~jgriffi1/Race_Rep.pdf (discussing general political weakness of African-Americans, but noting enhanced influence on explicitly racial policies).

In addition to stigma's direct political effects, it also exacerbates the political disabilities linked to minorities' lack of wealth. For much of American history, the law, supported by prevailing social and cultural norms, protected a caste system in which economic capacity was co-extensive with racial identity.²⁴⁷ The legacy of that system reverberates today, both concerning the economic deficit stigmatized children inherit at birth,²⁴⁸ and the continued ways stigma-informed prejudice limits economic opportunity.²⁴⁹ Stigma, in this way, affects the political facility of stigmatized minorities because it spawns the economic inequalities that, in turn, fuel political weakness.

In these ways, stigmatized minorities are weakly positioned to politically achieve education policies systematically reflective of their needs. These intrinsic limitations are conspicuous in the education context. State and federal government, as discussed, set baseline education policies, and minorities are particularly vulnerable to undesirable rulemaking at these levels. The broader the jurisdiction, the more the aggregated effects of minority status, poverty, and stigma restrict stigmatized minorities' political influence. Wilbur Rich, in his study of urban-district politics, found that local African-American officeholders do not have the "authority to make fundamental changes in education institutions"—state mandates, which racial minorities did not have the political ability to change, dictated educational priorities.²⁵⁰

247. See, e.g., Spencer Overton, *But Some Are More Equal: Race, Exclusion and Campaign Finance*, 80 TEX. L. REV. 987, 1004-06 (describing variety of ways in which legal constructs constrained minority economic advancement).

248. See MISHEL ET AL., *supra* note 234 (illustrating that, as of 1998, the average net wealth of a White household was \$320,900, while the average net wealth of a Black household was only \$58,300).

249. Overton, *supra* note 247, at 1021-25 (arguing that political and economic disadvantages continue to exist despite formal prohibition of discrimination). For example, although the Black middle class continues to grow at unprecedented rates, Black college graduates earn significantly less than White college graduates. U.S. Census Bureau, *Income 2000*, <http://www.census.gov/hhes/www/income/income00/inctab10.html> (last visited Mar. 6, 2007) (showing that in 2000, the median income for a Black college graduate is \$40,360, while the median income for a White college graduate is \$51,099). The income differential between Black and White workers results in Black college graduates earning \$500,000 less than White college graduates throughout their careers. DEDRICK MUHAMMAD ET AL., *THE STATE OF THE DREAM 2004*, at 1 (Jan. 15, 2004), available at <http://www.faireconomy.org/press/2004/StateoftheDream2004.pdf>. Over the course of a Black high school graduate's career, he or she would earn \$300,000 less than his or her White counterpart. *Id.* Terry Smith discusses, in addition, how White politicians exploit wealth disparities by subsidizing subtle—and sometimes not-so-subtle—racial appeals that seek to capitalize politically on stigma. Smith, *supra* note 235, at 1475, 1482-91 (discussing White candidates use of the "Willie Horton" motif to exploit politically racial stigma).

250. RICH, *supra* note 131, at 214-16; see also HENIG, *supra* note 131, at 9.

Moreover, even at the local level, minorities' sparse political resources encumber their ability to realize education policies reflective of their needs. Unions, in particular, are highly influential in school-board elections, and local school politics generally, possessing political resources as strong as those of stigmatized minorities are weak.²⁵¹ Urban-district unions are especially well organized. They possess significant numbers of voting members—at least in light of low voter turnout in school-board elections—and have substantial amounts of money to spend on campaigning.²⁵² Largely due to disparities in political resources, union interests are heavily represented on local school boards, especially in urban districts.²⁵³ Thus, when unions negotiate public-school collective-bargaining agreements, they often do so across the table from school-board members the union elected.²⁵⁴ Because stigmatized minorities are politically weak, they are unable to apply sufficient pressure on school boards to countervail union demands. The result is the kind of stultifying work rules discussed above, which grant teachers and other school personnel a range of labor protections that impede school discretion to tailor operations to student needs.

In sum, the concomitants of stigmatized minorities' status preclude them from realizing education policies systematically responsive to stigma. Stigmatized minorities are without sufficient numbers to direct political outcomes. Minorities, moreover, have little disposable income, leaving them without the ability to subsidize the mechanics of obtaining and leveraging political influence. Finally, they are stigmatized, subject to a condition that obstructs their ability to ally with comparably interested groups in pursuing common political goals. Minorities, in these ways, are weakly positioned both to affirmatively shape education politics toward their own ends and to defensively ward off the neglectful, if not hostile, education politics of other interest groups.

251. Of course in local, particularly urban, jurisdictions, many members of the union are stigmatized minorities themselves. But the very purpose of the union is to advocate for members' labor interests, and unions uniformly support lockstep evaluation, compensation, and discipline policies as a means of protecting most members' job status. Union members thus are institutionally disposed to perceive their job protections as consonant with student needs.

252. William A. Galston, *The Politics of Polarization: Education Debates in the United States*, in INSTITUTIONS OF AMERICAN DEMOCRACY: THE PUBLIC SCHOOLS, *supra* note 15, at 57, 72; Hess & West, *Strike Phobia*, *supra* note 162, at 43-44. See generally CHUBB & MOE, POLITICS, *supra* note 131, at 173.

253. See, e.g., Terry Moe, *A Union by Any Other Name* 43-44, EDUC. NEXT, Fall 2001, available at <http://www.educationnext.org/20013/38moe.pdf>.

254. Hess & West, *Strike Phobia*, *supra* note 162, at 43-44.

V. Conclusion: The Need for Institutional Remedies

This Article challenges the failure of courts and advocates considering remedies in school cases to assess whether public schools, as currently constituted, are institutionally aligned with minorities' educational needs. Numerous legal scholars have written about the longstanding failure of public schools to satisfy these norms, but they have overlooked the relationship of public schools' institutional context to the educational consequences of stigma. This Article argues that because stigma attacks the capacities enabling education, services must specifically account for stigma's noxious effects on racial minorities' educability. Stigma distinctively affects minorities' educational fortunes both collectively and individually. As a class, the challenge posed by stigma necessarily affects only the stigmatized. Individually, children have different levels of access to resources combating stigma and also cope variably with stigma. Schools, therefore, need flexibility to respond not only to the unique class-wide harms engendered by stigma but also its particular manifestations in individual children.

Nonetheless, traditional public schools are highly bureaucratic and rule-bound, preempting the flexibility minorities require. This disposition toward uniformity is not coincidental. Rather, it is central to political accountability, especially in urban districts disproportionately serving minorities. Furthermore, because they are minorities, relatively poor, and stigmatized, racial minorities cannot politically obtain bureaucratic rules consistently responsive to their needs. My critique, in sum, contends that public schools are institutionally predisposed toward uniformity, and that this predisposition impedes the flexibility needed to address the unique educational challenges presented by stigma.

The upshot of my analysis is that courts and advocates need to consider the propriety of institutional remedies in cases finding inadequate education for stigmatized minorities. Remedies, to this point, have focused principally on the resources available to public schools, not the institutional constraints on public schools. These traditional remedies usually involve racial integration, school finance, curricular reform, or some combination of the three. Each of these options undoubtedly has positive benefits, but their effectiveness is limited by public schools' institutional limitations.

Appropriate institutional design, however, is a necessary but insufficient condition. The institutional flexibility to meet minorities' unique needs both collectively and individually does not guarantee that schools will wisely use that flexibility. Nor by itself does flexibility ensure quality teachers, adequate resources, or challenging curricula. Still, while institutional structure does not guarantee positive outcomes, it does

structurally dispose schools toward these outcomes. So even though flexibility by itself does not necessitate its wise use, flexibility, an educational imperative for minorities, cannot be used wisely if it is not possessed in the first instance. In fashioning institutional remedies, therefore, courts must start from the foundational principle that stigmatized minorities require schools with the discretion to nimbly craft services to student needs. Because unchecked political accountability yields bureaucratic uniformity, courts necessarily must consider institutional designs that minimize the influence of political decision-making. Then, building on that foundation, courts should also consider additional structural components that induce schools to use discretion optimally to serve minorities' educational needs.

I do not intend this Article to provide a comprehensive analysis of the variety of institutional arrangements responsive to my critique. Multiple options exist, and courts should widely consider potential models in light of local conditions. I also hope others will be interested in further exploring the implications of my argument, and further theorizing responsive institutional approaches. That noted, I nonetheless offer preliminary outlines of two kinds of institutional remedies potentially better suited than the traditional model to minorities' educational needs: charter-schools and private-school choice.

Charters are schools of parental choice in which non-governmental entities are granted contracts to run public schools substantially free from government regulation. Depending on the scope of deregulation, charters might possess sufficient flexibility to adapt services to student needs. Moreover, because charters' institutional design permits non-governmental entities to run public schools, and simultaneously allows parents to leave if they are dissatisfied, the design protects against undue political influence on policymaking. Institutionally, a deregulated charter-school design not only grants the flexibility to adapt services to student needs, but also structurally encourages charters to focus on student rather than political outcomes.²⁵⁵

Furthermore, a well-designed charter model alters the institutional conditions governing traditional public schools by introducing external competition. When that competition reaches critical mass, it induces public schools to more flexibly approach minorities' needs. Competition mitigates the bureaucratic effects of monopoly on traditional public schools, which in turn pushes traditional schools to respond less to political

255. See, e.g., CHESTER E. FINN, JR. ET AL., *CHARTER SCHOOLS IN ACTION: RENEWING PUBLIC EDUCATION* 14-15 (2000).

priorities.²⁵⁶ Because stigmatized minorities have unique educational needs, these incentives, over time, would likely persuade political authorities to grant traditional public schools greater flexibility to respond to student needs.

In fact, many charters schools, though still in their infancy,²⁵⁷ have already exploited their institutional flexibility in service of student needs. Some charters use longer school days and school years; some focus their curriculum in specialty areas where students are struggling; some implement merit-pay systems; some focus on the challenges facing discrete student populations; some use larger class sizes given uncompromising commitments to teacher quality; and some fire teachers immediately for failed student performance.²⁵⁸ These adaptations merely illustrate the diverse ways charters have sought to meet student needs. Significantly, even at this early stage, charters have exploited this flexibility to produce significant improvements in stigmatized minorities' academic performance.²⁵⁹

On the debit side, not all charter-school laws are created equal. In many states, charters' institutional design is not all that different from traditional public schools. In these systems, only political agencies may grant or renew charter applications, and only political agencies are responsible for oversight. These designs depend principally on political

256. Empirical work thus far is somewhat inconclusive on the particular effects of charter schools on the functioning of traditional public schools. *Compare, e.g.,* CAROLINE M. HOXBY, HOW CHOICE AFFECTS THE ACHIEVEMENT OF PUBLIC SCHOOL STUDENTS 9-16 (2001), available at http://post.economics.harvard.edu/faculty/hoxby/papers/choice_sep01.pdf (finding charter schools precipitate improved student outcomes in traditional public schools) with HELEN F. LADD, MARKET-BASED REFORMS IN URBAN EDUCATION, 7-9 (2000), available at http://archive.epinet.org/real_media/010111/materials/Ladd.pdf (finding inconclusive research on spillover effects of charter schools on traditional schools). This is substantially attributable both to the fact that charter programs, comparatively, serve very small numbers of students—and thus present weak competitive threats—and that, as discussed below, wide variation exists in charter-school designs. Concerning this latter issue, only depoliticized designs are likely to produce the institutional incentives I describe here.

257. Charters, about a decade old, serve merely 1.5% of students attending public schools. See CAROLINE M. HOXBY, ACHIEVEMENT IN CHARTER SCHOOLS AND REGULAR PUBLIC SCHOOLS IN THE UNITED STATES: UNDERSTANDING THE DIFFERENCES 3 (2004), available at http://post.economics.harvard.edu/faculty/hoxby/papers/hoxbycharter_dec.pdf.

258. See, e.g., BRYAN C. HASSEL, THE CHARTER SCHOOL CHALLENGE: AVOIDING THE PITFALLS, FULFILLING THE PROMISES 75-104 (1999); BILL TRIANT, AUTONOMY AND INNOVATION: HOW DO MASSACHUSETTS CHARTER SCHOOL PRINCIPALS USE THEIR FREEDOM? (2001), available at <http://www.edexcellence.net/foundation/publication/publication.cfm?id=18&pubsubid=67&doc=pdf>.

259. See HOXBY, *supra* note 257; see also Jay Matthews, *High Scores Fail to Clear Obstacles to KIPP Growth*, WASH. POST, Jan. 31, 2006, at A10 (discussing extraordinary results of stigmatized minorities in charter-school network characterized by a substantially longer school day, school week, and school year than traditional schools).

oversight and, given my critique, are likely to re-distribute to charters much of the bureaucratic micro-management applicable to traditional public schools. This precise result is evident in many states, where increasing state mandates have impeded charter schools' capacity to adapt their services to student needs.²⁶⁰

Moreover, even states granting charters substantial freedom from regulation impose prohibitive barriers to entry. States generally grant charters merely a fraction of the per-pupil funding afforded traditional public schools. For example, one recent study showed charters receive twenty-two percent less per-pupil funding than traditional schools.²⁶¹ Even worse, states generally exclude charters from facilities funding, forcing charters not only to lease or purchase a schoolhouse on the open market, but to do so using the already reduced per-pupil subsidy. In contrast, traditional public schools generally receive both a free school building and state funding for capital needs. Institutional and resource burdens restrain charter-school effectiveness, either inhibiting the flexibility needed to meet student needs, or impeding schools' ability to exploit flexibility by starving them of needed resources.²⁶²

Thus, in considering remedies, courts should evaluate whether charters' institutional design permits the flexibility needed to meet minorities' needs. Institutional designs that rely less on political accountability are more likely to produce this flexibility. Some of the key features of an appropriate institutional design include: (1) the ability of multiple non-governmental authorities to grant, renew and monitor charters; (2) a charter term significantly longer than the often-used five-year period; and (3) strictly limited government regulation.²⁶³ In addition to these institutional ingredients, effective models also grant charters

260. See, e.g., LOUANN BIERLEIN PALMER & REBECCA GAU, CHARTER SCHOOL AUTHORIZING: ARE STATES MAKING THE GRADE? 1-2 (June 2003), available at http://www.edexcellence.net/doc/Auth03Exec_Summary.pdf; see also Robert J. Martin, *Rigid Rules for Charter Schools: New Jersey as a Case Study*, 36 RUTGERS L.J. 439, 443 (2005).

261. THOMAS FORDHAM INSTITUTE, CHARTER SCHOOL FUNDING: INEQUITY'S NEXT FRONTIER 1-2 (2005), available at <http://www.edexcellence.net/doc/Charter%20School%20Funding%202005%20FINAL.pdf>.

262. See, e.g., HOXBY, *supra* note 257 ("Charter school students are more likely to have a proficiency advantage if their state has a strong charter school law that gives the schools autonomy and that ensures that charter schools get funding equal to at least 40 percent of the total per-pupil funding of regular public schools.").

263. See, e.g., CTR. FOR EDUC. REFORM, THE SIMPLE GUIDE TO CHARTER SCHOOL LAWS: A PROGRESS REPORT 1-26 (Jeanne Allen & Anna Varghese Marcucio eds., 2005), available at http://www.edreform.com/_upload/simple_guide.pdf (discussing need for charter models to include multiple chartering authorities, school autonomy, and exemptions from collective bargaining); see also THOMAS FORDHAM INSTITUTE, *supra* note 261, at 1-2, 21-23 (discussing various charter authorizing models).

adequate and stable funding.²⁶⁴ At any rate, courts can manipulate these structural elements to adapt the model to fit local conditions and discrete concerns.

Concerning the limitation on government regulation, I would suggest limiting mandates principally to educational outcomes—whether children achieve the competitive and civic competencies driving state Education Clauses—and a small set of procedural mandates, principally anti-discrimination prohibitions and vital health-and-safety rules. These limited mandates, however, would not be the only form of oversight. The non-governmental chartering agencies and, perhaps even more importantly, parents themselves through the exercise of choice, also possess significant oversight responsibilities.²⁶⁵ The chartering agencies may impose across-the-board mandates reflecting essential priorities, but the relatively apolitical nature of these agencies, coupled with parental choice, structurally encourages these agencies to impose only those rules necessary to effectively meet student needs. This institutional design diversifies oversight in an effort to promote flexibility while permitting discrete, limited rules on essential public commitments.

Practically, courts considering charter remedies have a few options. At least forty states have laws authorizing charter schools.²⁶⁶ Courts in these states should first evaluate the structure of their states' design. If the design permits the flexibility needed to meet minorities' needs and eliminates prohibitive barriers to entry, courts should consider compelling districts to turn a relevant number of traditional schools into charters.²⁶⁷ If, on the other hand, courts face charter designs too limiting to allow needed flexibility, courts should consider compelling districts to turn a critical mass of traditional schools into charters, but with designs amended to ensure flexibility and optimal ability to exploit flexibility in the service of student needs. As discussed above, this might include orders giving non-governmental entities authority to grant charters, extending the length of charter contracts, and removing regulatory constraints governing charters.

264. See *CTR. FOR EDUC. REFORM*, *supra* note 263, at 1-26.

265. Sensible choice depends significantly on access to accurate information about school quality. States generally publish school report cards and other information on school performance and conditions. Courts of course can require defending states to supplement these efforts as necessary in individual cases.

266. See *HOXBY*, *supra* note 257, at 3.

267. Although such a judicial remedy would be unprecedented—primarily because, as discussed above, courts have neglected institutional limitations on public schools ability to serve minorities—it is not unprecedented as a policy matter. NCLB currently requires “restructuring” for schools failing to meet prescribed performance standards for six years; among other things, this “restructuring” may include turning a traditional school into a charter school. See 20 U.S.C. § 6316(b)(8)(B)(i-v) (2006).

Finally, courts in states without charter laws should nonetheless consider forcing school boards to turn traditional schools into charters. In the special-education context, for example, courts have required governments to contract with or reimburse external providers when public schools have proven incapable of effectively delivering services.²⁶⁸

A second institutional remedy courts should consider is private-school choice. A private-school choice remedy would permit minorities to attend private schools with the public subsidy otherwise available for traditional-school attendance. Private schools are free from all but the most critical forms of government oversight, and therefore have more institutional flexibility than charters to adapt school policy to student needs. Moreover, because private schools are essentially unaccountable to political agencies—even to the quasi-governmental authorities characterizing a liberal charter design—the private-school model is the most institutionally depoliticized design available. In addition, for reasons discussed above concerning charter schools, the availability of private choice also alters public schools' institutional environment. As increasing numbers of students attend private schools, the incentives governing public-school policymaking shift closer toward student needs and away from political ones. In fact, there already is evidence that school-choice remedies, significantly because of private schools' institutional flexibility, more effectively serve the educational needs of stigmatized minorities than traditional public schools.²⁶⁹ And this is in a context where the efficacy of choice programs is limited by poor funding and constrained student eligibility. Private schools participating in choice programs receive small per-pupil subsidies, often receiving amounts even less than charter schools receive. And current programs generally permit only insubstantial numbers of students to participate.²⁷⁰

268. See, e.g., *Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985).

269. See, e.g., GREENE, *supra* note 66, at 147-56 (analyzing competing empirical studies on school choice and finding highest-quality studies show consistent improvements, especially for African-American students). But see, e.g., U.S. GEN. ACCOUNTING OFFICE, *SCHOOL VOUCHERS: PUBLICLY FUNDED PROGRAMS IN CLEVELAND AND MILWAUKEE* (2001), available at <http://www.gao.gov/new.items/d01914.pdf> (last visited Mar. 6, 2007) (finding no meaningful improvement in performance outcomes of students participating in voucher programs).

270. Only a handful of voucher programs exist. See, e.g., David Salisbury, *What Does a Voucher Buy? The Cost of Private Schools in Six Cities*, in *EDUCATIONAL FREEDOM IN URBAN AMERICA: BROWN V. BOARD AFTER HALF A CENTURY*, *supra* note 161 (describing how Cleveland, Milwaukee, Washington, D.C., New York City, and Dayton, Ohio have implemented voucher programs); see also Fla. Dept. of Educ., *Opportunity Scholarship Program*, <http://www.floridaschoolchoice.org/Information/OSP/> (describing small Florida voucher program recently struck down by the Florida Supreme Court). And these programs are small in scope, generally limited to serving small percentages of students.

I would not suggest that a private-school choice remedy necessarily include private schools of whatever sort. Government subsidizes education to achieve public purposes, and the autonomy of private schools must be restrained as necessary to ensure satisfaction of these goals. Just as I would advocate minimal government regulation of educational outcomes and narrow procedural matters for charter schools, I would also propose similar regulation of private schools participating in a choice remedy. In individual cases, courts and advocates should consider additional rules that reflect local conditions and essential priorities. But these mandates should be few and narrow. After all, over-regulation is the root problem. And courts should remember that parents themselves, through the choice to enter and exit, provide ongoing oversight.²⁷¹

In considering the propriety of a private-choice model, courts must consider the available supply of private schools willing to participate in the remedial scheme. Particularly in urban districts disproportionately serving minorities, substantial numbers of private schools seem willing to join adequately funded choice programs in which government regulation is unobtrusive. Courts must evaluate local conditions—mindful that suppliers gravitate to opportunity—in evaluating the propriety and scope of a private-choice remedy. Further, because charters and private-choice are compatible, courts should consider blending or combining these approaches in fashioning locally responsive institutional remedies.

I anticipate several criticisms of these two approaches, and offer preliminary responses. Many argue that charters or private-choice schools exacerbate racial segregation. This claim is misplaced for two reasons. First, the segregation critique, focused on inputs, is incidental: institutional remedies place no structural limitation on the demographic profile of student bodies. Integration is as compatible with these alternative institutional approaches as the traditional one.

Second, there is little evidence on the merits that a charter or private-choice remedy would worsen segregation; if anything, these remedies would likely lessen it. Because of stark residential segregation, coupled with school assignment by neighborhood, public schools are currently highly segregated.²⁷² Assignment policies unlinked to residence, like charters and school choice, are more likely to facilitate integration.²⁷³

In addition to the integrationist critique, some claim charters and private-choice programs promote a civic balkanization inconsistent with

271. See *supra* note 265 on role of government in ensuring parental access to reliable information.

272. See *supra* note 41 and accompanying text.

273. See, e.g., GREENE, *supra* note 66, at 201-16.

the socialization values purportedly served by traditional public schools. It is doubtful, however, that traditional public schools, particularly given acute racial and economic segregation, effectively serve these interests.²⁷⁴ In fact, it may be that public schools' general shortcomings in educating students also apply to their success in inculcating civic values.²⁷⁵ Likewise, neither charters nor private schools are incapable of achieving these goals. In fact, these schools may be more effective on this issue given their comparative success in achieving educational goals.²⁷⁶

Ultimately, it is not my intent here to advance any particular institutional design as the principal arrangement responsive to my critique. Charter-school and private-school choice models are simply two possibilities, and each category permits numerous permutations to account for context-specific factors. In individual cases, courts and advocates should evaluate institutional design in light of local conditions and the nature of the case-specific predicate concerning the incompatibility of traditional public-school designs and minorities' particular educational needs. Rather, I offer a general overview of the educational consequences of stigma, public schools' disposition toward bureaucratic uniformity, and minorities' political inability to systematically influence school bureaucracies. The degree to which these elements encumber the ability of a specific school district to effectively educate minorities turns on the facts of individual cases. Similarly, the kinds of responsive institutional designs turn on these case-specific facts.

Rather than offering a definitive remedial account, this Article asserts that public schools' institutional design is incompatible with stigmatized minorities' educational entitlements. This contribution radically inverts the ways courts have approached remedies for minorities in education cases. Courts and advocates currently focus on re-ordering the resources available to public schools, but overlook institutional dynamics governing the way public schools use those resources in service of minorities' educational needs. This Article shows the necessity of considering institutional design, encouraging courts and advocates to craft remedies likely to structurally enable effective education for minorities. Until we account institutionally for stigmatized minorities' educational needs, the promise of *Brown* will remain unfulfilled.

274. See, e.g., GROGAN & PROSCIO, *supra* note 131, at 215-16 (discussing ways children are sorted politically, economically, and culturally in public schools).

275. See, e.g., Joseph Viterriti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 192 (1996); GROGAN & PROSCIO, *supra* note 131, at 215-16.

276. See, e.g., Viterriti, *supra* note 275, at 184-86.
