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A NEW ERA FOR DESEGREGATION

Danielle Holley-Walker*

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INTRODUCTION

Desegregation is a term from a bygone era. Desegregation recalls the seminal 1954 Supreme Court decision in *Brown v. Board of*

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Education.[1] Desegregation recalls images of the Little Rock Nine, Thurgood Marshall standing triumphantly on the steps of the Supreme Court, and angry parents protesting busing in Boston.[2] For most observers, desegregation is a historical term, a term from the past.

Despite this common perception, nearly two hundred desegregation cases are still pending in federal district courts.[3] Most of these cases were initiated in the 1960s and 1970s and have remained dormant for several decades, but there are early indications that traditional desegregation cases may be in a period of revival. For example, in 2010, in Walthall County, Mississippi, the Civil Rights Division of the United States Department of Justice (DOJ) successfully argued that the local school district was in violation of a 1970 desegregation order.[4] The federal district court found that the school district maintained "segregative" practices that fostered a dual school system, allowing some schools and classrooms to remain racially identifiable as either white or African American.[5] Additionally, in 2007, in Tangipahoa Parish, Louisiana, African-American plaintiffs alleged that the school district continued to violate the Fourteenth Amendment's Equal Protection Clause, in open defiance of the 1965 desegregation order, by failing to hire and promote African-American faculty and administrators.[6] As a result,

1. 347 U.S. 483 (1954). *See generally* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (Random House 2004) (1975) (providing a detailed history of the *Brown* litigation and its aftermath).

2. *See, e.g.*, CARL L. BANKSTON III & STEPHEN J. CALDAS, A TROUBLED DREAM: THE PROMISE AND FAILURE OF SCHOOL DESEGREGATION IN LOUISIANA 42 (2002) (describing white parents and schoolchildren overturning and burning buses intended to bring black schoolchildren to South Boston); MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 150–51 (1992) (displaying the famous picture of Marshall on the steps of the U.S. Supreme Court after his victory in *Brown*); JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM 492–93 (Peter Labella & Bob Greiner eds., 7th ed. 1994) (describing the desegregation of Central High School in Little Rock, Arkansas, under the protection of federal troops).

3. Genevieve Siegel-Hawley, THE INTEGRATION REPORT (June 9, 2010), http://theintegrationreport.wordpress.com/2010/06/09/issue-26/.

4. Spencer S. Hsu, *Mississippi County Schools Ordered to Comply with Desegregation Order*, WASH. POST, Apr. 13, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/04/13/AR2010041302867.html. *See infra* Part II.A.

5. Hsu, *supra* note 4.

6. *See infra* Part II.B.

the parties agreed to a desegregation plan that included the construction of new schools and the creation of new magnet programs.[7] Finally, in Little Rock, Arkansas, the local school district is arguing that the State Board of Education is in violation of a 1989 settlement agreement in a desegregation case by allowing too many resources to be allocated to racially isolated charter schools.[8]

This Article argues that traditional desegregation cases, like the cases mentioned above, should be seen as one important tool in the continuing struggle by many parents, students, and civil rights advocates to achieve racial and socioeconomic integration in our public schools. While it is unlikely that any new desegregation cases will be filed, and the overwhelming majority of the approximately 16,000 school districts in the United States[9] are not under desegregation orders, these orders are still powerful tools in the school districts where they remain. For decades, legal scholars and civil rights litigators have anticipated the end of desegregation, and most have begun to focus on other aspects of education reform, such as accountability, school choice, and school finance reform.[10] But until the last school district is declared unitary, civil rights advocates should examine these cases and take a proactive approach to insuring that states and school districts have fulfilled every aspect of desegregation orders. A vigilant and proactive approach to the remaining desegregation cases can potentially influence racial

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7. The Associated Press, *Judge OKs Tangipahoa School Desegregation Plan*, WWLTV.COM (Mar. 5, 2010, 9:16 AM), http://www.wwltv.com/news/Judge-OKs-Tangipahoa-school-desegregation-plan-86581717.html.

8. Kelly Dudzik, *Attorney Thinks Charter Schools Violate Desegregation Agreement*, FOX16.COM (July 24, 2009, 8:34 AM), http://www.fox16.com/news/story/Attorney-thinks-charter-schools-violate/7xcJSeHFX0WZQgFFDW1LJw.cspx. *See infra* Part II.C.

9. James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 145 (2007).

10. *See id.* at 132 (stating that racial integration has been off of the agenda of most school districts for several decades and that modern education reform efforts focus on battles over school funding, school choice, and improving student achievement); *see also* KEVIN BROWN, RACE, LAW AND EDUCATION IN THE POST-DESEGREGATION ERA: FOUR PERSPECTIVES ON DESEGREGATION AND RESEGREGATION 6 (2005) (arguing that we have entered a Post-Desegregation Era due to resegregation, the termination of desegregation decrees, and limitations on the use of racial classification in student assignment); Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2418 (2004) (arguing that emerging educational reform litigation focuses on student academic achievement and not race).

integration and student achievement in both the directly affected school districts and the broader landscape of American schools.

In Part I of the Article, I provide an overview of the history of traditional desegregation cases. Traditional desegregation cases include those cases filed in the decades after *Brown* against states and local school districts to address violations of the Fourteenth Amendment's Equal Protection Clause. I trace the progress of desegregation cases from their high watermark in the late 1960s and early 1970s in which the Supreme Court strongly supported desegregation, to the Supreme Court's decision in *Milliken v. Bradley* ("*Milliken I*"),[11] which many scholars argue signaled the end of any meaningful desegregation.[12] Part I also highlights the trilogy of 1990s Supreme Court decisions that led to an era of resegregation in America's public schools.

Part II turns to recent activity in traditional desegregation cases. I highlight the three recent cases from Mississippi, Louisiana, and Arkansas as examples of the use of desegregation cases to combat racial isolation, support the hiring of minority teachers and administrators, argue for additional resources for impoverished schools, and stem the growth of racially isolated charter schools.

In Part III, I present the normative case for the revitalization of traditional desegregation cases. I argue that desegregation cases present a unique avenue to improve public schools. In order to make this case, I provide an overview of the three dominant strands of education reform over the last twenty-five years: accountability, school choice, and school finance reform.[13] These education reform movements embody several core values, including a focus on learning outcomes and student achievement, as well as an emphasis on adequacy and the goal that all children acquire basic knowledge in a limited number of subjects, such as reading and math.[14] I argue that promotion of these values has taken the focus off the broader public education values of promoting a broad base of knowledge that helps

11. 418 U.S. 717 (1974).
12. *See infra* note 36 and accompanying text.
13. *See infra* Part III.A.1–3.
14. *See infra* Part III.A.4.

to prepare students to be responsible citizens in our democracy.[15] I also argue that the emphasis on adequate education has replaced the notion that public schools should provide equal educational opportunity to all children.[16]

I then argue that desegregation cases serve a unique function in the current landscape of education reform, primarily because desegregation cases promote the concept of educational equality.[17] Desegregation cases allow for school districts to continue using race-conscious remedies to improve educational opportunity.[18] Desegregation cases also foster a continuing public dialogue on the role that the lingering effects of historic racial discrimination play in the ongoing challenges in our public schools.[19]

I. A BRIEF HISTORY OF DESEGREGATION LITIGATION

In 1954, the Supreme Court in *Brown I* declared that racially "[s]eparate educational facilities are inherently unequal."[20] The road to *Brown* was a long one, and along the way, the litigation strategy of those promoting integration shifted and evolved.[21] Many scholars

15. *See infra* Part III.A.4.
16. *See infra* Part III.A.4.
17. *See infra* Part III.B.
18. *See infra* Part III.B.
19. *See infra* Part III.B.
20. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 495 (1954). Many scholars have examined the history of *Brown* and its Supreme Court progeny. *See, e.g.*, Stephen J. Caldas & Carl L. Bankston III, *A Re-Analysis of the Legal, Political, and Social Landscape of Desegregation from* Plessy v. Ferguson *to* Parents Involved in Community Schools v. Seattle School District No. 1, 2007 BYU EDUC. & L.J. 217 (2007) (discussing the Supreme Court desegregation cases); Kimberly Jenkins Robinson, Resurrecting the Promise of Brown: Understanding and Remedying How the Supreme Court Reconstitutionalized Segregated Schools, 88 N.C. L. REV. 787 (2010); Daniel P. Tokaji, *Desegregation, Discrimination and Democracy:* Parents Involved*'s Disregard for Process*, 69 OHIO ST. L.J. 847 (2008).
21. *See* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1955, at 144–46 (1987) (arguing that the NAACP's strategy evolved and adapted based on new developments). *See also* Jack M. Balkin, *What* Brown *Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1559 (2004) (stating that the NAACP's litigation strategy succeeded because it "appeals to elite values"); Genna Rae McNeil, *Before* Brown*: Reflections on Historical Context and Vision*, 52 AM. U. L. REV. 1431, 1441–44 (2003) (describing the political and historical developments preceding *Brown*, including the emergence of African-American lawyers who developed the ultimately successful strategy); Stephen Yeazell, Brown*, the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1980–81 (2004) (explaining the two competing versions of the NAACP's litigation strategy, with some historians arguing that the campaign was highly strategic and others

have argued that one of the failings of *Brown*, in terms of creating long-term, sustainable, racially integrated schools, was the Supreme Court's failure to craft a remedy for de jure segregation in the opinion.[22] In the 1955 *Brown v. Board of Education* decision (*Brown II*), the Supreme Court vaguely decreed that desegregation be done with "all deliberate speed."[23] This decree led to a decade of massive resistance by Southern states, which refused to make any real effort to desegregate the public schools.[24] By 1964, only 2.14% of black students in the South attended desegregated schools.[25]

The Civil Rights Act of 1964 provided needed resources to increase the pace of school desegregation litigation.[26] Then, in 1968, the Supreme Court signaled its impatience with massive resistance in *Green v. County School Board*.[27] Justice Brennan admonished Southern school districts for their failure to comply with the letter and spirit of *Brown*, and he provided a new strategy for implementing *Brown*.[28] *Green* placed the fate of desegregation in the hands of the federal district courts.[29] District courts were to evaluate whether school districts were able to create a "unitary" school system in which schools were no longer identified along racial lines.[30] There were clear measurements for unitary status, including the racial composition of staff, school resources, and of course, the student body.[31]

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arguing that it was driven by case selection).

22. *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, 180 (2005) (arguing that the Supreme Court's delay in providing a roadmap for implementation of *Brown* was damaging to the ultimate goal of desegregation); Linda S. Greene, *From* Brown *to* Grutter, 36 LOY. U. CHI. L.J. 1, 10–11 (2004).

23. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955).

24. See BROWN, *supra* note 10, at 174; Mark Tushnet, *Public Law Litigation and the Ambiguities of* Brown, 61 FORDHAM L. REV. 23, 24 (1992) (describing passive and massive resistance efforts that lasted for nearly a decade without Supreme Court intervention).

25. BROWN, *supra* note 10, at 174.

26. *Id.*

27. *See* Tushnet, *supra* note 24, at 24.

28. Green v. Cnty. Sch. Bd., 391 U.S. 430, 438–39 (1969).

29. *Id.* at 436, 439.

30. *Id.*

31. *Id.* at 435.

In *Swann v. Charlotte-Mecklenburg Board of Education*,[32] the Supreme Court provided further guidance to district courts and school districts on the requirements of desegregation plans:

> If school authorities fail in their affirmative obligations under [*Brown*], judicial authority may be invoked . . . .
>
> . . . .
>
> . . . As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary schools system.[33]

The clear pro-desegregation guidance of the Supreme Court led to a significant success. By 1972, 36.4% of black students in the South attended schools that were majority white, and this number reached 43.5% in 1988.[34]

The Supreme Court began to impose limitations on desegregation efforts in the mid-1970s. In *Milliken v. Bradley* ("*Milliken I*"),[35] the Supreme Court stymied urban desegregation efforts by limiting desegregation remedies across school district lines without specific findings of inter-district constitutional violations.[36] The Court stated the following:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing cross-district remedy, it must

32. 402 U.S. 1 (1971).
33. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15–16 (1971).
34. BROWN, *supra* note 10, at 177.
35. 418 U.S. 717 (1974).
36. *See* James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2052 (2002); Gary Orfield & Chungmei Lee, *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies*, UCLA CIVIL RIGHTS PROJECT, 8 (Aug. 2007), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf ("The *Milliken* decision could be seen as the return of the doctrine of 'separate but equal' for urban school children in a society where four of five Americans live in metropolitan areas.").

> first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district.[37]

Milliken I proved to be a "dramatic blow" to American school integration: "Since the overwhelming majority of suburban school districts had only recently been created, few of these school systems would be included in desegregation orders. Thus, the general rule was that a desegregation remedy would stop at the boundary of the offending school district."[38]

The early 1990s brought a new spate of Supreme Court cases that signaled what many thought was a turning point, or even the end of desegregation cases.[39] In *Board of Education v. Dowell*,[40] *Freeman v. Pitts*,[41] and *Missouri v. Jenkins*,[42] the Supreme Court explained how defendants could attain unitary status and signaled its willingness to attribute ongoing racial disparities in some school districts to demographic factors, such as white flight to the suburbs, instead of attributing ongoing racial disparities to a constitutional violation.[43] The Supreme Court also permitted school districts to be given partial unitary status.[44] Due to these cases, in the past two decades an increasing number of school districts have achieved unitary status.[45]

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37. *Milliken I*, 418 U.S. at 744–45.

38. BROWN, *supra* note 10, at 211; *see also* Heise, *supra* note 10, at 2430–31 (stating that *Milliken* effectively brought desegregation to a close).

39. See Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1158 (2000) (arguing that Supreme Court cases in the 1990s were one of five factors that seemed to indicate the end of desegregation litigation).

40. 498 U.S. 237 (1991).

41. 503 U.S. 467 (1992).

42. 515 U.S. 70 (1995).

43. Parker, *supra* note 39, at 1162–74. See Missouri v. Jenkins, 515 U.S. 70, 102 (1995) (noting that factors that are not the result of de jure segregation should not factor into the remedial calculus); *see also* BROWN, *supra* note 10, at 213–14 (describing the backgrounds and holdings of all three cases).

44. *See* Freeman v. Pitts, 503 U.S. 467, 490–91 (1992) (holding that federal courts can relinquish supervision of desegregation orders in incremental stages where partial unitary status has been achieved and that the courts may not order remedies in cases where racial imbalance cannot be traced to a constitutional violation).

45. *See* Orfield & Lee, *supra* note 36, at 5 (noting that resegregation took hold in the early 1990s after the Supreme Court's decisions in *Dowell*, *Freeman*, and *Jenkins*); BROWN, *supra* note 10, at 222 (noting that since 2000, approximately forty-five school districts have attained unitary status).

Many predicted these cases would be the death knell for desegregation, and there was a well-documented increase in resegregation following these cases.[46] Resegregation is the notion that schools are becoming more racially isolated, instead of racially integrated.

> Resegregation which took hold in the early 1990s after three Supreme Court decisions [*Dowell*, *Freeman*, and *Jenkins*] from 1991 to 1995 limiting desegregation orders, is continuing to grow in all parts of the country for both African Americans and Latinos and is accelerating the most rapidly in the only region that has been highly desegregated—the South.[47]

One key aspect of resegregation is the transformation of the racial demographics of American schools since the civil rights era. In the late 1960s, white students made up 80% of public school enrollment.[48] As of 2005, white students make up only 57% of the enrollment, with Latino students at 20%, black students at 17%, and Asian students at 8%.[49] Whites, blacks, and Latinos all experience racial isolation in their schools. The average white student attends a school that is 77% white, while the average black student attends a school that is 52% black, and the average Latino student attends a school that is 55% Latino.[50] These numbers are of concern for several reasons. "Few highly segregated minority schools have middle class student bodies. Typically students face double segregation by race/ethnicity and by poverty. These schools differ in teacher quality, course offerings, level of competition, stability of enrollment, reputations, graduation and many other dimensions."[51] Furthermore,

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46. See Gary Orfield & Chungmei Lee, Brown *at 50: King's Dream or* Plessy*'s Nightmare?*, THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY 18 (Jan. 2004), http://www.eric.ed.gov/PDFS/ED489168.pdf (linking an increase in segregation in the 1990s to the three Supreme Court cases between 1991 and 1995 that limited school desegregation).
47. Orfield & Lee, *supra* note 36, at 5.
48. *Id.* at 15.
49. *Id.*
50. *Id.* at 24.
51. *Id.* at 18.

racially integrated schools have been shown to have significant benefits for children of all races.[52]

Most school districts experience a drastic decline in levels of integration after the district is granted unitary status.[53] For example, in Charlotte, North Carolina, the average black student attended a school that was 51% white in 1991; now, two decades after the end of the desegregation order, the average black student attends a school that is 76% nonwhite.[54] In Dekalb County, Georgia, almost two decades after unitary status, the average black student attends a school that is 95% nonwhite.[55] These statistics indicate that desegregation orders are a cornerstone of efforts to prevent resegregation.

Despite the uptick in resegregation, there was not a wholesale movement by defendants to seek unitary status.[56] This may have been caused by a lack of resources on the part of defendants or the assessment that while the desegregation order was still technically in effect, the order was not having any actual impact on the defendant.[57]

During the last decade, there has been some significant movement in desegregation cases at the district court level. The DOJ began to request updates from defendants, specifically as to whether the defendants believed they had complied with the desegregation order.[58] In cases where the federal government believed the defendant was in compliance, the DOJ would begin unitary status proceedings in the district court.[59]

Even with this affirmative move to end some desegregation cases, there are still a significant number of pending desegregation cases.

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52. *See id.* at 6 (noting that the National Academy of Education concluded that the best scientific evidence supports the benefits of integration).

53. Orfield & Lee, *supra* note 36, at 42. The Civil Rights Project documents the decrease in integration in sixteen school districts that have gained unitary status. *Id.*

54. *Id.* at 43.

55. *Id.*

56. See Parker, supra note 39, at 1189 (concluding that few defendants sought unitary status after Dowell).

57. *Id.* at 1208.

58. *See* Danielle Holley-Walker, *After Unitary Status: Examining Voluntary Integration Strategies for Southern School Districts*, 88 N.C. L. REV. 877, 887–90 (2010) (discussing the role of the DOJ in cases where school districts have achieved unitary status since 2004).

59. *Id.* at 887–88.

The DOJ is the plaintiff of record in approximately two hundred desegregation cases that remain open in the federal district courts.[60]

In 2007, the Supreme Court held in *Parents Involved in Community Schools v. Seattle School District No. 1* (*PICS*) that a school district may not use voluntary integration plans to remedy past intentional discrimination unless the school district is still subject to a court-ordered desegregation decree.[61] With this restriction, traditional desegregation orders have taken on greater significance. Desegregation orders may be the most potent method to racially integrate schools, and the desegregation cases are dwindling in number.

II. RECENT DEVELOPMENTS IN DESEGREGATION CASES

In recent years, there has been significant activity in a handful of desegregation cases. Many of these cases have remained dormant for decades, but these pending cases are now being used to combat resegregation, gain additional resources for impoverished school districts, and challenge the growing influence of charter schools.

A. The Role of the Federal Government

The federal government will likely be the decisive factor in determining whether there is a new era in desegregation cases.[62] One

60. Siegel-Hawley, *supra* note 3.

61. Parents Involved in Cmty. Sch. (*PICS*) v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720–22 (2007). *See also* Jonathan Fischbach, Will Rhee & Robert Cacace, *Race at the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation After* Parents Involved in Community Schools, 43 HARV. C.R.-C.L. L. REV. 491, 494 (2008) (arguing that "the *PICS* majority concluded that the Fourteenth Amendment imposes radically different conditions on the use of race-based policies to combat de facto segregation in school systems not subject to mandatory desegregation . . . and de jure segregation in school systems still governed by desegregation orders"). In the *PICS* dissent, Justice Breyer argued that the line between de jure and de facto segregation has not always dictated the remedies to be employed by school districts to repair the damage of racial discrimination. *See PICS*, 551 U.S. at 820–23 (Breyer, J., dissenting).

62. This article focuses primarily on the work of the DOJ, but other executive-branch agencies play a key role in any effort to improve public schools, including the ongoing effort to further school integration. *See generally* Lia Epperson, *Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 146 (2008) (examining the role of the Department of Education's Office for Civil Rights in integration efforts).

of the reasons that desegregation litigation has failed to have a significant impact in recent history is that "over the past forty years, under no administration, Democratic or Republican, has DOJ taken a thoughtful, transparent, comprehensive, and strategic approach to its school desegregation docket."[63] Due to the federal government's role as plaintiff in a large number of the remaining desegregation cases and the historic lack of attention to these cases, if desegregation cases are going to become reinvigorated, the federal government will have to take a leading and strategic role in the process.

The history of the federal government's role in desegregation cases is complex and has had more twists and turns than a mystery novel.[64] Mirroring the broader history of desegregation itself, the federal government took almost no steps to initiate school desegregation litigation in the ten years following *Brown*.[65] Federal involvement in desegregation cases took off after the passage of the Civil Rights Act of 1964, specifically Title IV, which authorized the Attorney General to begin desegregation litigation against states and school districts after receiving a written complaint from private individuals, and Title VI, which prohibited racial discrimination in programs that received federal money.[66] In the 1960s the federal government brought approximately six hundred administrative proceedings and over five hundred lawsuits against school districts and states to force desegregation.[67] President Nixon's administration was the end of these aggressive initiatives and kicked off the next several decades of neglect (sometimes benign, at other times intentional) of the traditional desegregation cases.[68]

After the election of President Barack Obama, there have been questions about the approach that the DOJ and other federal agencies

63. Chinh Q. Le, *Racially Integrated Education and the Role of the Federal Government*, 88 N.C. L. REV. 725, 759 (2010).

64. *See generally id.* at 733–57 (providing a comprehensive history of the role of the federal government in efforts to racially integrate America's public schools).

65. *Id.* at 734.

66. *Id.* at 735.

67. *Id.* at 737.

68. *See id.* at 738–57 (detailing the federal government's role from Presidents Nixon to George W. Bush); *see also* Ryan & Heise, *supra* note 36, at 2053 (noting that President Nixon strongly opposed busing and promoted the concept of neighborhood schools).

will play in the continuing struggle to racially integrate America's public schools.[69] The current Civil Rights Division of the DOJ has publicly expressed a commitment to enforcing the traditional desegregation orders in cases in which the United States is a plaintiff. The Civil Rights Division recently stated, "The enforcement of the Equal Protection Clause and Title IV in school districts is a top priority of the Justice Department's Civil Rights Division."[70]

An important indication of the DOJ's renewed commitment to desegregation cases is the recent activity in a desegregation case in Walthall County, Mississippi. The Walthall County school system was ordered to desegregate in 1970.[71] In the 1970 desegregation order, the district court enjoined the school district from:

> [D]iscriminating against any student on the basis of race or color in the operation of the Walthall County School District and failing or refusing to immediately terminate the operation of a dual system of schools based on race and to operate, now and hereafter, a single, non-racial unitary system of public schools.[72]

In 2007, the DOJ sought information from the school district about whether the district was in compliance with the 1970 Order.[73] After receiving the school district's responses, the DOJ alleged that the district was in violation of the desegregation order.[74] The DOJ

69. *See* Le, *supra* note 63, at 757–60 (describing the Obama Administration's efforts to advance the goal of racially integrated education).

70. Press Release, Dept. of Justice, Justice Department Granted Order to Ensure Students in Walthall County, Mississippi, Have Equal Opportunities (Apr. 13, 2010), *available at* http://www.justice.gov/opa/pr/2010/April/10-crt-400.html.

71. Order, United States v. Mississippi, No. 70-4706 (S.D. Miss. Aug. 11, 1970) [hereinafter 1970 Order]. "Walthall County is located in southern Mississippi on the Louisiana border." In the 2007-2008 school year, the school district served 2,546 students, of which 64.1% were African American and 34.8% were white. Memorandum of Law in Support of United States' Motion For Further Relief at 3–4, United States v. Mississippi, No. 70-4706 (S.D. Miss. Dec. 21, 2009) [hereinafter Memorandum of Law].

72. United States' Motion For Further Relief at 1, United States v. Mississippi, No. 70-4706 (S.D. Miss. Dec. 21, 2009) [hereinafter United States' Motion] (citing 1970 Order, *supra* note 71). The United States' Memorandum of Law in Support of the Motion for Additional Relief contains a detailed history of the litigation. *See generally* Memorandum of Law, *supra* note 71.

73. United States' Motion, *supra* note 72, at 2.

74. *Id.*

asserted that the school district allowed approximately three hundred students a year to complete intra-district transfers.[75] Most of these students were white students who sought to transfer out of their assigned residential zoned school to another school in the district that is predominately white.[76] These transfers allowed one group of schools to become "racially identifiable" white schools, while the student enrollment in other schools became predominately black.[77]

The DOJ also alleged that the school district administrators clustered "disproportionate numbers of white students into designated classrooms" at three schools, creating "segregated, all-black classrooms at each grade level."[78]

The school district declined to file a response to the DOJ's allegations, and the district court entered a finding that the evidence supported the DOJ's allegations.[79] The district court concluded that the school district was in violation of the 1970 Order and ordered the school district to deny all requests for intra-district transfers, except in limited circumstances.[80] The district court further ordered the school district to "cease using race in the assignment of students to classrooms in a manner that results in the racial segregation of students."[81]

A further indication of the DOJ's seeming renewal of its commitment to the desegregation docket is the ongoing monitoring provisions the DOJ sought in the Walthall County case. Upon the DOJ's request, the district court ordered the school district to annually report the numbers of intra-district transfers and the racial demographics in classrooms.[82] This signaled the DOJ's intention to

75. *Id.*

76. *Id.* The students sought to transfer to Salem Attendance Center. This school serves grades K-12. *See* Memorandum of Law, *supra* note 71, at 1.

77. Order at 2–3, United States v. Mississippi, No. 70-4706 (S.D. Miss. Apr. 13, 2010) [hereinafter 2010 Order].

78. *Id.* at 3.

79. *Id.* at 2–3. The DOJ sought to enter into a consent decree with the school district that would have stopped the intra-district transfers and the race-based classroom assignments. The school districts refused to enter into the consent decree and offered no alternative plan. *See* Memorandum of Law, *supra* note 71, at 2–3.

80. 2010 Order, *supra* note 77, at 2–4.

81. *Id.* at 6.

82. *Id.* at 6–7.

closely oversee the school district's efforts to comply with the most recent court order.

The DOJ cited the threat of resegregation as its primary reason for reactivating the Walthall County, Mississippi, desegregation case: "More than 55 years after *Brown v. Board of Education*, it is unacceptable for school districts to act in a way that encourages or tolerates the resegregation of public schools."[83]

Of course, the renewed activity of the DOJ and private plaintiffs to enforce desegregation orders may also spur school districts to actively attempt to close the pending cases. As noted by Wendy Parker, many school districts are aware they are still under a desegregation order, but many districts do not actively seek to have the cases terminated.[84]

B. The Role of Private Plaintiffs

There are also indications that in desegregation cases with private plaintiffs, there may be a renewed effort to enforce desegregation orders.

This renewed interest of private plaintiffs is evident in the ongoing desegregation case in Tangipahoa Parish, Louisiana.[85] Considering the centrality of football to Southern culture,[86] it may come as no surprise that a dispute over the hiring of a high school football coach led to the first significant activity in decades in a desegregation case in Tangipahoa Parish.[87] The 1965 desegregation case was filed by private plaintiffs who were represented by lawyers from the NAACP Legal Defense Fund.[88]

The plaintiffs alleged that the failure of the school district to hire an African-American football coach was "a classic example of how those in control of the Tangipahoa Parish School System have

83. Dept. of Justice, *supra* note 70.
84. Parker, *supra* note 39, at 1159–60.
85. Tangipahoa Parish is located in Eastern Louisiana, near Baton Rouge.
86. *See generally Friday Night Lights* (NBCUniversal & DirecTV 2006-2011).
87. *See* Plaintiffs' Motion for Further Relief and Evidentiary Hearing in Re: Alden Foster at 1, Moore v. Tangipahoa Parish Sch. Bd., 594 F.2d 489 (5th Cir. 1979) (No. 65-15556) (E.D. La. May 23, 2007).
88. *See* Moore v. Tangipahoa Parish Sch. Bd., 594 F.2d 489 (5th Cir. 1979).

historically ignored and refused to respond to their responsibility under the Fourteenth Amendment to eliminate all vestiges of racial discrimination in the public school system."[89] In particular, the plaintiffs argued that without the ongoing supervision of the district court in the desegregation case, the school district continued to engage in a historical pattern of racial discrimination against black teachers and administrators.[90] The plaintiffs urged the district court to resume an active role via the desegregation case and to provide oversight for the hiring decisions of the school district.[91] The plaintiffs also insisted that the burden was on the school district to demonstrate that its actions were not racially discriminatory, due to the judgment that the school district violated the Equal Protection Clause.[92]

In the wake of their initial Motion for Further Relief, the plaintiffs filed additional motions, requesting the court make findings and enter orders related to student transfers and compose interracial committees to locate qualified minority faculty members.[93] After an extensive evidentiary hearing, the district court ordered the hiring of an African-American football coach and it ordered the defendant school district to draft a consent order to address other issues, such as student transfers.[94]

Almost two years after that order, and after countless negotiations between the parties in consultation with the court's compliance officer, the district court issued a comprehensive order to address the "conditions and facets of the operations of the school system in which additional remedial efforts are needed and for which judicial

89. Plaintiffs' Request for Compliance Officer Investigation at 1, *Moore*, 594 F.2d 489 (No. 65-15556) (E.D. La. June 7, 2007).

90. *Id.* at 1–2. The question of the treatment of black faculty and administrators has been an ongoing point of contention in the litigation. *See Moore*, 594 F.2d at 491 (recounting the history of lawsuits by black teachers related to the desegregation process).

91. Plaintiffs' Request for Compliance Officer Investigation at 5–6, *Moore*, 594 F.2d 489 (No. 65-15556) (E.D. La. June 7, 2007).

92. *Id.* at 6.

93. *See* Plaintiffs' Motion for Further Relief in Re: "Majority to Minority Transfers" at 1–2, *Moore*, 594 F.2d 489 (No. 65-15556) (E.D. La. Aug. 20, 2007).

94. Order at 1–2, *Moore*, 594 F.2d 489 (No. 65-15556) (E.D. La. Mar. 24, 2008).

supervision should continue."[95] The district court focused on several areas: student assignment, administrative and faculty assignments, and implementation of the order.[96]

The recent activity in the Tangipahoa Parish case provides a window into the potential future of traditional desegregation litigation. These cases require ample financial and time resources for plaintiffs. These cases may lay dormant for a substantial time; often, there must be an event to precipitate the commitment of resources to pursue the essential reopening of the case. The scope of the court oversight is potentially broad and may impact a diverse number of topics.

In lean economic times, a desegregation case may provide a unique opportunity to allocate additional resources to impoverished school districts and minority students.

C. Desegregation and School Choice

Frustration with school choice initiatives, particularly the proliferation of charter schools, may also provide an impetus for private plaintiffs to seek to enforce desegregation orders. Traditional desegregation cases may become a battleground for concerns about racial isolation in charter schools and the broader debate between "integrationists" and "reformists." The ongoing desegregation litigation in Little Rock, Arkansas, provides an instructive example of the way desegregation and school choice come into tension. In 1982, the Little Rock School District ("LRSD") filed suit against the Pulaski County Special School District ("PCSSD"), the North Little Rock School District ("NLRSD"), the State of Arkansas, and the State Board of Education.[97] These three school districts are all located in Pulaski County, Arkansas, the most populated metropolitan area in the state.[98] LRSD prevailed in the lawsuit, with a finding that the state and the school districts acted concurrently in

95. Order at 1, *Moore*, 594 F.2d 489 (No. 65-15556) (E.D. La. Mar. 4, 2010).
96. *Id.* at 2, 19, 26.
97. Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1, 778 F.2d 404, 408 (8th Cir. 1985).
98. *Id.*

engaging in segregative practices across school district lines.[99] The Eighth Circuit concluded that:

> The defendant school districts have acted concurrently and independently to perpetuate the interdistrict problem of school segregation. The long legacy of inferior schools for blacks in PCSSD and NLRSD . . . induced many blacks to attend school in LRSD, often with a subsidy from PCSSD or NLRSD. PCSSD . . . has perpetuated segregation through school siting and student assignment, unequal apportionment of the transportation burden between the races, failure to meet staff hiring goals, overclassification of black pupils in special education programs, and failure to cultivate the full participation of black students in the educational process.[100]

The court further found that the state and PCSSD engaged in practices that created and perpetuated housing segregation in Little Rock, further contributing to racially segregated schools across all three districts.[101] The school districts urged the court not to find inter-district violations in the wake of the Supreme Court's decision in *Milliken I*.[102] The Eighth Circuit rejected the comparison to *Milliken I*, finding that Pulaski County had a history of state-imposed segregation, inter-district transfers, boundary changes, and housing discrimination that were not part of the record in *Milliken I*.[103]

These findings of inter-district constitutional violations led to a 1989 settlement agreement between the parties ("1989 Settlement Agreement").[104] The key features of the settlement agreement were: that all three school districts would "permit and encourage voluntary

99. *Id.* at 427.
100. *Id.* at 427–28.
101. *See id.* at 423–27.
102. *Little Rock Sch. Dist.*, 778 F.2d at 428.
103. *Id.* at 428–29.
104. Memorandum Brief in Support of Motion to Enforce 1989 Settlement Agreement at 3–6, Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1, 778 F.2d 404 (8th Cir. 1985) (No. 82-866) (E.D. Ark. May 19, 2010) [hereinafter Memorandum Brief]. The LRSD has been found unitary and was released from its obligations under the desegregation plan. *Id.* at 8, 17.

majority-to-minority inter-district transfers;"[105] the designation of "inter-district schools" that would maximize the participation of students from all three districts and have an ideal racial balance of 50% black and 50% non-black; the creation of additional magnet schools with racial balancing goals to encourage voluntary inter-district transfers; and the infusion of state funds to create these schools and fund transportation for inter-district transfers.[106]

In May 2010, the LRSD filed a motion seeking enforcement of the 1989 Settlement Agreement.[107] LRSD alleges that the State Board of Education has violated the agreement by authorizing "the uncontrolled inter-district movement of students in Pulaski County by its *unconditional* approval of open-enrollment charter schools in Pulaski County."[108] The Arkansas Charter Schools Act of 1999 gives the State Board of Education the authority to approve applications for open enrollment charter schools.[109] The Act specifies that for school districts under desegregation orders, the "State Board of Education shall carefully review the potential impact of an application for a public charter school on the efforts of a public school district or public school districts to comply with court orders and statutory obligations to create and maintain a unitary system of desegregated public schools."[110] LRSD alleges that the State Board of Education has failed to properly apply this portion of the Charter Schools Act.[111]

LRSD alleges that the State Board of Education has approved essentially two groups of charter schools that violate the 1989 Settlement Agreement. "No excuses" charter schools have been approved for operation within the boundaries of LRSD.[112] These charter schools have almost exclusively black enrollment and are

105. *Id.* at 6.
106. *Id.* at 7–8.
107. Motion to Enforce 1989 Settlement Agreement at 1, *Little Rock Sch. Dist.*, 778 F.2d 404 (No. 82-866) (E.D. Ark. May 19, 2010).
108. Memorandum Brief, *supra* note 104, at 2.
109. *Id.* at 18.
110. *Id.* at 19 (citing ARK. CODE ANN. § 6-23-106(a) (1999)).
111. *Id.* at 20.
112. *Id.* at 58.

high-poverty schools.[113] The plaintiffs allege that these "no excuses" charter schools are racially isolated and will likely suffer from the trends seen in other high-poverty schools, such as a lack of highly qualified teachers and administrators and a lack of parental involvement.[114]

The State Board of Education has also approved a group of "magnet charter schools" in Pulaski County.[115] The plaintiff argues that these schools do not meet the racial balance goals of the 1989 Settlement Agreement because white students are overrepresented, and that these schools are "draining non-black students and high performing students from the traditional public schools in Pulaski County."[116] The plaintiff is requesting that the district court enjoin the approval of any additional open enrollment charter schools in Pulaski County and any increase in the enrollment of existing charter schools.[117]

This latest development in the Little Rock desegregation case is an important moment in the history of traditional desegregation cases. As the UCLA Civil Rights Project demonstrates, the debate surrounding race and charter schools has been ongoing over the last few decades as charter schools have risen in popularity. Now, through the prism of a traditional desegregation case, a district court will have the opportunity to explicitly decide whether charter schools drain high-achieving students from the traditional public school systems and whether authorizing large numbers of charter schools encourages patterns of racial segregation.

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113. *Id.*

114. Memorandum Brief, *supra* note 104, at 58.

115. *Id.* at 62.

116. *Id.* Several school districts in Georgia recently lost a lawsuit against the state, the Georgia Department of Education, and the Georgia Charter Schools Commission. The school districts alleged that state funding for charter schools is unconstitutional and the charter schools drain monetary resources from traditional public schools. Jeff Bishop, *Judge Rules from State on Georgia Charter Schools*, TIMES-HERALD (Newnan, Ga.), May 7, 2010, http://www.times-herald.com/local/judge-rules-for-state-on-ga—charter-schools-576543.

117. Memorandum Brief, *supra* note 104, at 94–95.

III. WHY WE NEED A NEW ERA OF DESEGREGATION

The goal of Part III is to make the normative case for a new era in traditional desegregation cases. Plaintiffs in pending traditional desegregation cases should re-examine those cases and, where appropriate, argue that the desegregation orders in those cases be enforced. The vigorous enforcement of desegregation orders is desirable in both practical and rhetorical ways. The practical benefits include providing an avenue for additional resources for minority and high-poverty schools, having a direct, race-conscious method of challenging resegregation and racial isolation, and providing an alternative method for equal educational opportunity beyond socioeconomic integration plans and school finance cases. The broader, rhetorical benefits of vigorous desegregation enforcement include the ability for plaintiffs and civil rights advocates to make positive arguments for the benefits of racial integration and highlight ongoing racial disparities in our public schools. The successful conclusion of desegregation cases is also a part of the broader landscape of structural reform litigation. If desegregation litigation is ultimately successful in various school districts, it will provide a valuable blueprint for other struggling structural reform litigation, such as prison reform litigation.

A. The Current Landscape of Education Reform

Desegregation is not a focal point of current public school reform in the United States. Instead, education reform efforts over the last quarter-century have focused on accountability, school choice, and school finance.[118]

118. *See* DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION 15 (2010) (stating that currently, the leading education-reform ideas are choice and accountability).

1. New Accountability

Many scholars trace the current era in education reform back to the 1983 report, *A Nation at Risk: The Imperative for Educational Reform*.[119] The report was authored by the National Commission on Excellence in Education, a panel formed at the request of then-Secretary of Education, Terrel Bell.[120] The report recommended "stronger high school graduation requirements; higher standards for academic performance and student conduct; more time devoted to instruction and homework; and higher standards for entry into the teaching profession and better salaries for teachers."[121] The findings from *A Nation at Risk* received significant public attention, and in its aftermath, almost every state formed a task force or a commission to study school reform.[122]

By the early 1990s, the results and direction of these reform efforts were becoming clear. States began to focus on adopting performance standards for students, requiring standardized testing to assess whether these goals were being met, reporting the testing outcomes to the public, and implementing consequences for schools and school districts where students did not meet the performance standards.[123] These reforms have become known as "New Accountability."[124] The hallmark of New Accountability is that schools and school districts

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119. *See* WILLIAM HAYES, ARE WE STILL A NATION AT RISK TWO DECADES LATER? vii (2004) (stating that there is "widespread agreement" among education historians that *A Nation at Risk* was instrumental in creating the recent education reform movement); MARIS A. VINOVSKIS, FROM A NATION AT RISK TO NO CHILD LEFT BEHIND: NATIONAL EDUCATION GOALS AND THE CREATION OF FEDERAL EDUCATION POLICY 17 (2009) (noting that *A Nation at Risk* and other education reports of the mid-1980s launched a first wave of education reform that was followed by a second wave focused on school structure and student outcomes).

120. HAYES, *supra* note 119, at 11–14.

121. RAVITCH, *supra* note 118, at 25.

122. *Id*. at 31. *See also* Martin R. West & Paul E. Peterson, *The Politics and Practice of Accountability*, *in* NO CHILD LEFT BEHIND? THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY 1, 6 (Paul E. Peterson & Martin R. West eds., 2003) (arguing that *A Nation at Risk* pushed the nation towards accountability by putting education reform on state political agendas).

123. James Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 230 (2003). *See also* Aaron Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 873 (2006) (noting that accountability reforms rely on standards, assessments, and escalating sanctions).

124. Liebman & Sabel, *supra* note 123, at 229–30.

are evaluated on their student educational outcomes, and those outcomes are measured almost exclusively by standardized tests.[125]

At present, New Accountability is most closely associated with the 2002 federal education law, No Child Left Behind (NCLB).[126] Under NCLB, states are required to adopt reading and math standards, test students annually to assess the students' progress towards proficiency in math and reading, and finally to hold schools accountable if students are failing to make adequate yearly progress (AYP) towards proficiency.[127] The accountability designations under NCLB include "needs improvement," "corrective action," and "restructuring."[128] These designations call for escalating sanctions, including making supplemental education services available and allowing students to transfer schools.[129] Restructuring is the most drastic of the accountability measures, requiring that schools which fail to make AYP for more than four consecutive years be faced with a series of sanction options including: school closure, firing of teachers and administrators, conversion to a charter school, or any other major restructuring of school governance.[130] As of the 2007-2008 academic year, over 3,500 schools were in restructuring under NCLB.[131]

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125. *Id.* at 230. *See also* Andrew Rudalevige, *No Child Left Behind: Forging a Political Compromise*, *in* NO CHILD LEFT BEHIND? THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY 23, 25 (Paul E. Peterson & Martin R. West eds., 2003) ("Accountability in education has been described as a 'tripod' made up of standards, tests that measure whether those standards have been reached, and penalties or rewards linked to performance on the tests.").

126. No Child Left Behind Act, 20 U.S.C. §§ 6301-7941 (2006).

127. *Id.* § 6301(1) (stating that quality educations are attained by "ensuring that high-quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned with challenging State academic standards so that students, teachers, parents, and administrators can measure progress against common expectations for student academic achievement"); *id.* § 6311(b)(2)(A) ("Each State plan shall demonstrate that the State has developed and is implementing a single, statewide State accountability system that will be effective in ensuring that all local educational agencies, public elementary schools, and public secondary schools make adequate yearly progress as defined under this paragraph.").

128. *See* Rudalevige, *supra* note 125, at 26 (explaining the various NCLB accountability categories and sanctions).

129. *See* 20 U.S.C. § 6316 (requiring that parents be informed if a school fails to meet AYP and that students be allowed to transfer and have the option of supplemental education services); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. Rev. 932, 933–34 (2004) (arguing that NCLB accountability provisions may produce negative outcomes, including the lowering of academic standards and increasing racial segregation in classrooms).

130. RAVITCH, *supra* note 118, at 97–98; VINOVSKIS, *supra* note 119, at 175 (explaining the restructuring sanctions and noting that many states attempted to use loopholes to avoid labeling schools

The Obama Administration has made accountability a central part of its education policy. Under the American Recovery and Reinvestment Act, the United States Department of Education has passed new regulations that require states to identify their persistently low-performing schools.[132] In the Obama Administration's proposed changes to NCLB, the administration removes the goal of proficiency in reading and math by 2014 but continues to include accountability measures such as allowing "failing" schools to be converted to charter schools.[133]

2. *School Choice*

Another dominant strand in the school reform efforts of the last quarter-century has been school choice. The concept of school choice encompasses a broad number of different policy ideas, including the creation of magnet schools and charter schools, and the availability of school vouchers.[134] School choice "can be defined broadly as educational policies and practices that allow a student to attend a school other than his or her neighborhood school."[135]

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as in need of restructuring).

131. RAVITCH, *supra* note 118, at 105. According to a Center for Education Policy study, the restructuring designation rarely makes any impact in terms of helping schools improve student achievement. *Id.* Ravitch also notes that most states choose the most ambiguous standard for restructuring, which allows schools to undergo "any major restructuring of the school's governance," and hence avoid converting schools to charter schools or employing private school management. *Id.* at 98.

132. Press Release, Cal. Dep't of Educ. (Mar. 8, 2010), *available at* http://www.cde.ca.gov/nr/ne/yr10/yr10rel27.asp.

133. U.S. DEP'T OF EDUC., A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 12 (2010). While the Obama plan for reauthorization of NCLB does continue to emphasize accountability, the administration also proposes increasing an emphasis on success and reward as part of federal accountability measures. "State accountability systems will be asked to recognize progress and growth and reward success, rather than only identify failure." *Id.* at 9.

134. *See generally* James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 Yale L.J. 2043, 2063–78 (discussing the "shape" of school choice by looking at magnet schools, charter schools, and school vouchers).

135. Kevin Brown, *The Supreme Court's Role in the Growing School Choice Movement*, 67 OHIO ST. L.J. 37, 57 (2006).

a. Magnet Schools

Many school choice options, such as magnet schools, developed in the late 1960s as a method of promoting racial integration.[136] Magnet schools are schools that typically pick an academic focus, such as math and sciences or the performing arts, to attract students from across a city or even across school district lines.[137] Magnet schools played a key role in desegregation. For many years desegregation resources focused on the funding of magnet school programs.[138] "As reliance on other desegregation strategies has gradually diminished, magnet schools have emerged as the principal means upon which school systems—particularly larger, urban school systems—now rely to advance *Brown's* vision of equal, integrated public education."[139]

Despite this reliance on magnet schools as a desegregation mechanism, the schools' effectiveness in promoting racial integration may be waning due to a lack of funding and other factors.[140] One study by the Department of Education concluded that magnet schools receiving federal grant money have "made only modest progress in reducing minority group isolation."[141]

The current activity in pending desegregation cases reflects this increasingly muddled connection between magnet schools and desegregation. There are indications that some plaintiffs in desegregation cases may begin to view magnet schools as an obstacle to increasing racial integration and equality. In *Tangipahoa Parish School Board*, the plaintiffs opposed the concept of additional schools and magnet schools as the primary response to the school

136. *See id.*

137. *See id.*

138. *See id.* (stating that magnet schools are a key choice-based effort to create high-quality, desegregated schools).

139. Erica Frankenberg & Chin Q. Le, *The Post Parents Involved Challenge: Confronting Extralegal Obstacles to Integration*, 69 OHIO ST. L.J. 1015, 1045–46 (2008).

140. *See id.* at 1046 (arguing that, other than lack of funding, demographic changes and the "steady erosion of their desegregative purpose" are other factors that diminish the effectiveness of magnet schools as a tool for racially integrating schools).

141. Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 341 (2009).

district's ongoing constitutional violation.[142] The plaintiffs argued that, "[t]he plan submitted by the defendants is not a desegregation plan but a massive building plan devoid of any meaningful desegregation analysis. The school board's plan is a camouflage that seeks to maintain certain one-race schools into perpetuity."[143] Despite the plaintiffs' opposition, the district court accepted the school board's desegregation plan that relies on the construction of additional elementary schools and the creation of additional magnet programs.[144]

Having magnet schools included as part of the desegregation plan does provide an opportunity for court and community oversight to insure that the magnet programs are being implemented with a desegregative purpose. *Tangipahoa Parish School Board* also provides a blueprint for other plaintiffs in similar desegregation cases to offer concrete alternatives to magnet schools.[145]

b. Charter Schools

Charter schools are another example of how school choice and desegregation may collide.[146] Charter schools are publicly funded schools that have greater autonomy as to curriculum, staffing, and school policy.[147] Charter schools are based on the idea that this autonomy will create more opportunity for policy innovation and encourage additional commitment from parents, students, and

142. *See* Plaintiffs' Motion for Further Relief and Evidentiary Hearing at 1–2, Moore v. Tangipahoa Parish Sch. Bd., 594 F.2d 489 (5th Cir. 1979) (No. 65-15556) (E.D. La. May 23, 2007) [hereinafter Plaintiffs' Motion].

143. Plaintiffs' Response to Compliance Officer's Recommendations at 3, Moore v. Tangipahoa Parish Sch. Bd., 594 F.2d 489 (5th Cir. 1979) (No. 65-15556) (E.D. La. May 18, 2009).

144. Order, *supra* note 95, at 1–2.

145. *See* Plaintiffs' Motion, *supra* note 142, at 1–2.

146. *See generally* Adai Tefera, Genevieve Siegel-Hawley & Erica Frankenberg, *School Integration Efforts Three Years After* Parents Involved, UCLA CIVIL RIGHTS PROJECT, 9–10 (June 28, 2010), http://civilrightsproject.ucla.edu/legal-developments/court-decisions/school-integration-efforts-three-years-after-parents-involved/teferea-school-integration-three-years-after.pdf (noting that some school districts are reluctant to accept more federal money for the creation of charter schools due to potential conflict with desegregation goals).

147. Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753, 764–65 (2000).

administrators.[148] Charter schools have been hailed as an important alternative to the traditional public school system. Every presidential administration since the early 1990s has made charter schools a central part of federal education policy.[149] States have also championed charter schools, with over forty states and the District of Columbia having a charter school law.[150] Charter schools are also central to the landscape of urban schools, with some urban school districts, such as New Orleans and Baltimore, having a large number of their overall public schools in the charter format.[151]

Civil rights organizations continue to voice their concern about the racial isolation that exists in many of our nation's charter schools.[152] In a recent report, the UCLA Civil Rights Project/ProyectoDerechosCiviles concluded that "charter schools are more racially isolated than traditional public schools in virtually every state and large metropolitan area in the nation."[153] The study notes that charter schools have a higher percentage of African-American students than traditional public schools and that 70% of these students attend "intensely segregated minority charter schools (which enroll 90-100% of students from under-represented minority backgrounds)."[154] In ten states, mostly in the West, white students

148. *See id.*

149. *See* Le, *supra* note 63, at 775–76; Joseph O. Oluwole & Preston C. Green III, *Charter Schools: Racial Balancing Provisions and* Parents Involved, 61 ARK. L. REV. 1, 5 (2008).

150. Oluwole & Green, *supra* note 148, at 4.

151. James Ryan and Michael Heise describe the urban location of most charter schools as an indication that charter schools are symbols of a failing traditional public school system where parents demand alternatives. "Suburbanites seem much less interested in charter schools, which undoubtedly has to do with the fact that suburban residents are generally more satisfied with their public schools than are urban residents and thus see less of a need for alternatives." Ryan & Heise, *supra* note 134, at 2077. *See also* DANIELLE HOLLEY-WALKER, OUR PROMISE: ACHIEVING EDUCATIONAL EQUALITY FOR AMERICA'S CHILDREN 263–65 (Maurice R. Dyson and Daniel B. Weddle, ed., 2009).

152. *See* Michelle McNeil, *Civil Rights Groups Call for New Federal Education Agenda*, EDUCATION WEEK (July 27, 2010, 12:18 PM), http://blogs.edweek.org/edweek/campaign-k-12/2010/07/civil_rights_groups_call_for_n.html?cmp+clp-edweek (noting that seven civil rights groups requested that the Secretary of Education dismantle parts of his education agenda, including the expansion of charter schools).

153. Erica Frankenberg, Genevieve Siegel-Hawley, & Jia Wang, *Choice Without Equity: Charter School Segregation and the Need for Civil Rights Standards*, UCLA CIVIL RIGHTS PROJECT, 4 (Jan. 2010), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenberg-choices-without-equity-2010.pdf.

154. *Id.*; *see also* Goodwin Liu & William L. Taylor, *School Choice to Achieve School Desegregation*, 74 FORDHAM L. REV. 791, 801 (2005) (citing various studies that demonstrate that

make up a higher percentage of the students in charter schools than in the traditional public schools, and these states also have high percentages of nonwhite students.[155] "Charter schools in some of the most diverse states may be as [sic] a less diverse alternative for white students."[156] Just as importantly, the report notes that charter school proponents cite school improvement as the main justification for charter school expansion, but there is little discussion of the impact of charter schools on racial diversity.[157]

These concerns about racial isolation in charter schools come at the same time that the federal government continues to promote charter schools as a centerpiece of school reform efforts.[158] For the last several decades, the federal government has promoted the expansion of charter schools.[159] Charter schools have been promoted as having the potential to offer poor students a high-quality alternative to the traditional public school system and to allow teachers and administrators the opportunity to utilize innovative curriculum and school policies.[160] Charter schools have also become a central part of accountability legislation, like NCLB, because charter schools are incorporated as an option for schools that fail to meet yearly standards.[161]

One prominent civil rights scholar, John A. Powell, has identified this conflict as a struggle between "integrationists" and "reformists."[162] Integrationists support racial integration either as a means of producing greater educational outcomes or serving broader

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charter schools currently do not help to reduce racial or socioeconomic isolation).

155. Frankenberg et al., *supra* note 152, at 31.

156. *Id.*

157. *Id.* at 80.

158. *See* U.S. DEP'T OF EDUC., A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 37 (2010) (stating that the Obama Administration's proposal for reauthorization of the Elementary and Secondary Education Act will provide grants to fund the creation and expansion of charter schools); *see also* Frankenberg et al., *supra* note 152, at 5 (arguing that the Obama Administration is promoting the growth of charter schools so they "should take immediate action to reduce segregation in charter schools").

159. *See* Oluwole & Green, *supra* note 149, at 5.

160. *See* Brown-Nagin, *supra* note 147, at 764.

161. TODD ZIEBARTH, EDUC. COMM'N OF THE STATES, STATE POLICIES FOR SCHOOL RESTRUCTURING 1 (2004), *available at* http://www.ecs.org/clearinghouse/57/02/5702.pdf.

162. *See* John A. Powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655, 656–60 (2001).

values such as the promotion of tolerance and good citizenship.[163] Reformists also believe in educational equity and outcome improvement, but they advocate school reform without regard to issues of racial or economic disparity.[164]

The concern over charter schools and their possible conflict with desegregation goals is being played out in the recent developments in the Little Rock desegregation case.[165] The district claims that charter schools are "draining non-black students and high performing students" from the traditional public schools.[166] The charter school movement has become increasingly identified with privatization, deregulation, and providing alternatives for failing traditional public schools.[167]

c. School Vouchers

School voucher programs "provide vouchers that can be used at private schools, including religious schools . . . ."[168] These programs have been implemented in only a few cities and states including Milwaukee, Cleveland, and Florida.[169] Proponents of school vouchers, including some segments of the African-American community, argue that vouchers provide an alternative to failing schools and give parents the opportunity to choose effective schools for their children, similar to wealthy parents.[170] Opponents of school vouchers argue that pouring public money into private schools may drain the public schools of resources, and that public money being

163. *Id.* at 657–58.
164. *Id.* at 658.
165. *See infra* Part II.C.
166. *See* Memorandum Brief in Support of Motion to Enforce 1989 Settlement Agreement at 62, Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1, 778 F.2d 404 (8th Cir. 1985) (No. 82-866) (E.D. Ark. May 19, 2010).
167. *See* DIANE RAVITCH, *supra* note 118, at 227–28 (discussing association of school choice with school closures, privatization and market-based theory).
168. Ryan & Heise, *supra* note 134, at 2078.
169. *Id.* Some of the voucher programs that were implemented have been found unconstitutional. For example, the Colorado Supreme Court struck down a school voucher program. Robert Garda, *Coming Full Circle: The Journey from Separate but Equal to Separate and Unequal*, 2 DUKE J. CONST. L. & PUB. POL'Y 1, 79–80 (2007).
170. *See* Ryan & Heise, *supra* note 134, at 2082–83.

transferred to parochial schools is a First Amendment concern.[171] Some suburban opponents also fear that vouchers will allow minority and poor children to enter their schools.[172] Due to their limited adoption and use, school vouchers will not likely promote increased racial integration of the public schools and will likely not be seen as a desegregative tool.[173]

3. *School Finance Reform*

Beyond school choice, school finance reform has also been an important strand of recent education reform movements. After the U.S. Supreme Court's 1973 decision in *San Antonio Independent School District v. Rodriguez*,[174] in which the Court determined that education was not a fundamental right under the Federal Constitution, school reform advocates filed lawsuits under state constitutions to argue for more equality in school funding.[175] In states from New Jersey to South Carolina, these lawsuits have been successful in winning determinations that students have a right to education under the state constitution.[176] The intransient hurdles in

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171. *Id.* at 2081-82.

172. *Id.*

173. *See* Garda, *supra* note 169, at 80–82 (noting that there are many political and market roadblocks that may keep vouchers from spreading, but a properly constituted voucher program has the potential to foster integration; acknowledging that voucher programs in cities such as Milwaukee have had no impact on integration); Michael Heise, *Choosing Equal Educational Opportunity: School Reform, Law, and Public Policy*, 68 U. CHI. L. REV. 1113, 1130 (2001) (proposing that arguments that vouchers will increase racial isolation in public schools may prove to be well-founded, but there is not enough empirical data to make that conclusion); Robert K. Vischer, *Racial Segregation in American Churches and Its Implications for School Vouchers*, 53 FLA. L. REV. 193, 194 (2001) (arguing that the expansion of voucher programs would likely increase segregation in the American public school system).

174. 411 U.S. 1 (1973). There were also school finance cases prior to the Supreme Court's decision in *Rodriguez*. For example, plaintiffs successfully challenged the California school finance system in *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

175. *See generally* Denise Morgan, *The New School Finance Litigation: Acknowledging that Race Discrimination in Public Education is More than Just a Tort*, 96 NW. U. L. REV. 99, 135–38 (2001) (detailing school finance litigation in various states including California and New Jersey); James E. Ryan, *Schools, Race, and Money*, 109 YALE L. J. 249, 268 (1999) (describing the history of school finance litigation).

176. *See* James E. Ryan and Thomas Saunders, *Foreword to Symposium on School Finance Litigation: Emerging Trends or New Dead Ends?*, 22 YALE L. & POL'Y REV. 463, 469–70 & n.14 (2004); *see generally* Alexandra Greif, *Politics Practicalities, and Priorities: New Jersey's Experience Implementing the Abbott V Mandate*, 22 YALE L. & POL'Y REV. 615 (2004) (discussing school finance litigation in New Jersey).

the state school finance litigations have proven to be crafting effective remedies.

In many states and school districts, school finance litigation was the form of school equity litigation that followed traditional desegregation cases.[177] In the late 1960s and early 1970s, some civil rights advocates believed that traditional desegregation was no longer going to be effective, so they sought out new types of reform litigation.[178] In the most recent wave of school finance litigation, plaintiffs typically argue that a provision in the state constitution guarantees public school education, and that the state's school funding scheme violates that basic state constitutional guarantee.[179] Since 1970, courts in over half the states have found that the state's school funding system does not satisfy the state constitution, under either the equal protection clause or the education clause of the state constitution.[180]

Despite the success for plaintiffs in these cases, many school equity advocates have expressed frustration with the ability of school finance cases to create equal educational opportunity. Similar to school desegregation cases, school finance reform cases are subject to politics, especially in the implementation of any remedies to address the state constitutional violations. For example, in the first

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177. *See* Ryan *supra* note 174, at 264–66 (describing the connection between school desegregation and school finance cases).

178. *See* Lauren A. Wetzler, *Buying Equality: How School Finance Reform and Desegregation Came to Compete in Connecticut*, 22 YALE L. & POL'Y REV. 481 (2004); *see also* Peter D. Enrich, *Race and Money, Courts and Schools: Tentative Lessons from Connecticut*, 36 IND. L. REV. 523, 524–25 (2003) (noting that after efforts for education reform under the Federal Constitution stalled in the early 1970s, activists turned to school finance litigation under state constitutions).

179. Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 104–15 (1995) (describing the shift from arguments for equality in school financing to adequacy). *See* Ryan, *supra* note 174, at 268 (describing the third wave of school finance litigation beginning in 1989 with suits under state constitutions arguing that students are entitled to an adequate education). Most scholars divide school finance litigation into three waves. *Id.* at 266. The first wave of school finance litigation is marked by arguments that a state's education funding system violates the federal Equal Protection Clause. *Id.* This wave ended when the Supreme Court rejected this argument in *San Antonio v. Rodriguez*. *Id.* The second wave cases were cases in which the plaintiffs argued for equity in school funding on the basis of a state's equal protection clause. *Id.* at 266–67. The third wave cases are "adequacy" suits focused on state education clauses and argued for adequate funding for basic education, instead of equal funding. *Id.* at 268. *See also* Morgan, *supra* note 174, at 143 (arguing that the school finance cases fall under two theories of justice: distributive justice and corrective justice).

180. *See* Enrich, *supra* note 176, at 525.

Connecticut school finance case, *Horton v. Meskill* (*Horton I*),[181] after the courts found that the state constitution violated the state education clause and state equal protection clause, they left it to the executive and legislative branches to craft a solution.[182] The lawsuit ultimately did not end the disparities in expenditures between "property-poor and property-rich districts."[183] This failure to achieve equalization has been attributed to "weak political will and extensive deal-making."[184] Another barrier to school finance litigation creating equal educational opportunity is the difficulty in crafting and implementing effective remedies.[185]

School finance cases are also subject to significant racial politics.[186] James Ryan has said "the evidence offers further proof that one must understand the dynamics of race relations and school desegregation in order to understand fully the limits and dynamics of school finance reform."[187] Specifically, Ryan argues that school finance cases demonstrate that predominately minority school districts are more likely to face funding problems, whereas integrated school districts are likely to have better financial situations.[188]

181. 376 A.2d 359 (Conn. 1977).

182. *See* Wetzler, *supra* note 176, at 488–89.

183. *Id.* at 491; *see also* Enrich, *supra* note 176, at 541 (noting that *Horton* did reduce the funding gaps between rich and poor districts, but there are still significant disparities).

184. *See* Wetzler, *supra* note 176, at 491; *see also* Enrich, *supra* note 176, at 541 (explaining that many of the legislative reforms to address funding inequities in Connecticut were less effective because they were scaled back by the legislature).

185. *See* William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 562–65 (2006) (explaining the difficulty in defining equity and the remedies that meet this goal); *see generally* Michael A. Rebell & Robert L. Hughes, *Efficacy and Engagement: The Remedies Problem Posed By* Sheff v. O'Neill—*and a Proposed Solution*, 29 CONN. L. REV. 1115 (1997) (discussing the Connecticut Supreme Court's difficulties crafting remedies in the *Sheff* litigation).

186. *See* James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 433 (1999); *see also* Bryan L. Adamson, *The H'aint in the (School) House: The Interest Convergence Paradigm in State Legislatures and School Finance Reform*, 43 CAL. W. L. REV. 173, 186 (2006) (discussing studies of school finance litigation that demonstrate that the public often views legislative education reform efforts through a racial lens regardless of the kind of education reform); Yohance C. Edwards & Jennifer Ahern, Note, *Unequal Treatment in State Supreme Courts: Minority and City Schools in Education Finance Reform Litigation*, 79 N.Y.U. L. REV. 326, 360–61 (2004) (concluding that race, school district setting, and the number of plaintiff school districts are important variables in the outcome of school finance litigation).

187. Ryan, *supra* note 184, at 434.

188. *Id.*

Predominately minority districts are also less successful as plaintiffs in school finance litigation.[189] Civil rights advocates also claim that the school finance cases do little to decrease racial isolation, and may have been a barrier to effectively implementing desegregation orders because the finance cases focused state resources on equalization of funding instead of desegregation.[190] In Connecticut, a group of plaintiffs concluded that the *Horton* litigation did little to address the racial and economic isolation of urban districts, and so they filed a separate lawsuit, *Sheff v. O'Neill*, to specifically challenge persistent racial disparities in the state school system.[191]

While some school finance litigation has been successful based on challenges to state constitutions, the U.S. Supreme Court found in *San Antonio Independent School District v. Rodriguez*[192] that there is no federal right to education.[193] That means the resources of the federal government, which have been such a powerful tool for desegregation cases, are not an important factor in the pursuit of school finance litigation.[194] Reliance on state constitutions also leaves a patchwork of rights for students across state lines.[195]

4. Themes in Current Education Reform Efforts

What are the dominant themes that emerge from these education reform efforts? The accountability movement, which has become perhaps the most dominant aspect of education reform in the wake of NCLB, focuses almost exclusively on student learning outcomes and

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189. *Id.* at 433.

190. Wetzler, *supra* note 176, at 519 ("[R]ace can influence school finance reform: When racial isolation necessitates desegregation litigation, the desegregation is likely to be purchased, and where resources are limited, may come to compete with funds needed to fix an inequitable or inadequate system of school finance.").

191. *See* Enrich, *supra* note 176, at 543; *see also* John C. Brittain, *Why* Sheff v. O'Neill *Is a Landmark Decision*, 30 CONN. L. REV. 211, 213–14 (1997) (noting that *Sheff* and its progeny blended school finance equity theory with a theory similar to traditional desegregation cases); Rachel F. Moran, *Milo's Miracle,* 29 CONN. L. REV. 1079, 1082–84 (1997) (noting that *Sheff* is an example of a state foray into desegregation cases and goes beyond the equity school finance theories).

192. 411 U.S. 1 (1973).

193. *See* Moran, *supra* note 189, at 1090–92 (explaining the legal theories and holding of *Rodriguez*).

194. *See* Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044, 2093–94 (2006) (noting that federal policy has neglected interstate inequality in school funding).

195. *Id.* at 2061–72 (examining inequality in education funding across states).

student achievement, as measured by standardized testing.[196] In the accountability movement, racial integration is not a goal. Instead, emphasis is on closing the racial achievement gap and promoting the idea that all children can learn.[197] There is little discussion of why the racial achievement gap persists and how addressing historic racial inequality might help address the problem.[198] One of the underlying premises of the accountability movement is that the state will educate children where they are, meaning that children in poor, racially isolated schools will be provided a successful standards-based education—even in the face of significant social science evidence to the contrary.[199] "[P]erhaps the greatest flaw of standards-based reform schemes as currently designed and implemented is that they all lack a crucial ingredient: meaningful assurances that all schools—particularly poor and minority schools—possess the educational conditions and resources necessary to teach to—and achieve—the state's high standards."[200]

Furthermore, the standards and accountability movement has not proven to set a high bar for academic achievement. The No Child Left Behind Act and state accountability statutes measure the basic skills students should possess in math and reading, instead of prescribing an aspirational curriculum.[201] This focus on adequacy has also emerged in the school finance cases since the late 1980s.[202] Most

196. *See* Koski & Reich, *supra* note 183, at 577 (describing the goals and characteristics of standards-based and accountability-based reform).

197. *See id.* (noting that the rallying cry of standards-based reform is the notion that all children can learn and that the public should challenge "the soft bigotry of low expectations").

198. *See* Derrick Darby, *Educational Inequality and the Science of Diversity in* Grutter*: A Lesson for the Reparations Debate in the Age of Obama*, 57 U. KAN. L. REV. 755, 764–65 (2009) (acknowledging that racial discrimination continues to play a vital role in accounting for racial disparities in student achievement).

199. *See generally* Roslyn Arlin Mickelson, *Twenty-First Century Social Science on School Racial Diversity and Educational Outcomes*, 69 OHIO ST. L.J. 1173, 1205–13 (2008) (summarizing studies showing that, even while controlling for socioeconomic status and family background, increased school segregation widens the testing score gap between white and black students).

200. Koski & Reich, *supra* note 183, at 582.

201. *See* RAVITCH, *supra* note 118, at 29 (noting that whereas the seminal government report on education, *A Nation at Risk,* envisioned a mandated, national, quality curriculum, NCLB measures only basic skills).

202. *See* Ryan, *supra* note 174, at 268 (noting that the third wave of school finance cases began in 1989 and is characterized by an "an emphasis on adequacy rather than equity").

school finance cases no longer pursue equal funding, but instead funding that will give each child a minimally adequate education.[203]

The other theme that emerges from the current education reform landscape is the notion that education is simply the ability to acquire knowledge in reading, math, and science instead of a broader process of preparing students to become sophisticated and responsible citizens of our democracy.[204] The Supreme Court has said:

> We have recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government," and as the primary vehicle for transmitting "the values on which our society rests." "[A]s . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."[205]

The goals of public education narrow with the focus on adequacy and accountability.

B. A Role for Desegregation Cases in the Education Reform Landscape

My argument is not that all of the current education reform efforts, such as accountability, school choice, and school finance litigation, should be abandoned. Instead, education reformers should recognize that the remaining desegregation cases have a critical role to play in providing better educational opportunity for all students. Traditional

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203. *See id.* ("The claim made, in other words, is not that each student is entitled to equal funding, but rather that all students are entitled to an 'adequate' education and the funds necessary to provide it.").

204. *See* Diane Ravitch & Joseph P. Viteritti, *Introduction* to MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY 1, 5 (2001) (noting that since the late nineteenth century, Americans have relied on schools to transmit democratic values, and that a decrease in civics instruction has weakened students' knowledge about how democratic government works); *see generally* Eli Savit, *Can Courts Repair the Crumbling Foundation of Good Citizenship? An Examination of Potential Challenges to Social Studies Cutbacks in Our Public Schools*, 107 MICH. L. REV. 1269 (2009) (discussing the decrease in social studies in the wake of NCLB and the impact this instruction may have on preparing students for good citizenship).

205. Plyler v. Doe, 457 U.S. 202, 221 (1982) (citations omitted).

desegregation cases offer unique benefits that are currently lost in the education reform landscape. Specifically, traditional desegregation cases have the ability to connect the persistent racial achievement gap with the lingering effects of historic racial discrimination, allow for continuing efforts to use targeted race-conscious measures to improve education for poor students and racial minorities, and use litigation as a means to promote a public dialogue about the ongoing importance of racial integration to our democracy.

1. The Lingering Effects of Historic Discrimination

Despite all of the education reform efforts of the last several decades, there is a persistent racial achievement gap. As noted above, one of the goals of NCLB is to close the achievement gap.[206] The National Assessment of Educational Progress from July 2009 noted that math and scores were higher than in any year since 1990.[207] Despite this progress, white students' scores are on average twenty-six points higher on the assessments on a 0-500 scale.[208]

There are also disturbingly high numbers of racial minorities dropping out of high school. Currently, only 54% of African-American, 51% of Native American, and 56% of Latino students graduate from high school.[209] A recent report, *Yes We Can: The Schott 50 State Report on Public Education and Black Males 2010*, noted that in the 2007-2008 school year, black males graduated from

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206. *See* Thomas J. Kane & Douglas O. Staiger, *Unintended Consequences of Racial Subgroup Rules*, *in* NO CHILD LEFT BEHIND? THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY 152, 152 (Paul E. Peterson & Martin R. West eds. 2003).

207. *See* The Nation's Report Card 2009, *available at* http://nationsreportcard.gov/math_2009/summ.asp (last visited Dec. 31, 2010). The Nation's Report Card gives the public the results of the National Assessment of Educational Progress ("NAEP"). The NAEP is an exam given nationally in various subjects such as reading, math, science, writing, U.S. history, civics, and geography. About The Nation's Report Card, *available at* http://nationsreportcard.gov/about.asphttp://nationsreportcard.gov/about.asphttp://nationsreportcard.gov/about.asp (last visited Sept. 18, 2011).

208. The Nation's Report Card, TUDA Mathematics Report Card 2007, *available at* http://nationsreportcard.gov/tuda_math_2007/m0040.asp (last visited Dec. 31, 2010).

209. *Diplomas Count 2010: Graduation by the Numbers: Putting Data to Work for Student Success*, EDUC. WK., June 10, 2010, at 4, *available at* http://www.edweek.org/ew/articles/2010/06/10/34execsum.h29.html.

high school at a 47% rate in comparison to 78% for white males.[210] In some urban areas, these numbers are even more dismal, with black males graduating from high school at a rate of 24% in Charleston, South Carolina, 25% in Buffalo, New York, and 21% in Pinellas County, Florida.[211]

Why does the racial achievement gap continue to exist in American public schools? Experts often cite several factors, including poverty, lack of parental involvement, and cultural factors.[212] One factor that is sometimes overlooked is the impact of historic racial discrimination and ongoing racial discrimination in our schools.

As Wendy Parker has noted, one stubborn area of ongoing racial disparity is in school faculty composition.[213] Parker notes that in the 157 school districts she studied, racially "[m]atching the teaching staffs to the student body was a hallmark pattern of both de jure and de facto segregated schools . . . ."[214] Parker argues that where de facto segregation has become "acceptable both constitutionally and educationally, . . . integration of both students and teachers is a necessary first step to achieving equal opportunity; without it, the distribution of resources will be unequal."[215] The plaintiffs in the Tangipahoa Parish litigation saw teacher segregation as a lingering effect of prior de jure segregation, and they strongly argued that the desegregation plan should include the protection and promotion of African-American teachers.[216]

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210. MICHAEL HOLZMAN, SCHOTT FOUND. FOR PUB. EDUC., YES WE CAN: THE SCHOTT 50 STATE REPORT ON PUBLIC EDUCATION AND BLACK MALES 1, 28 (2010), *available at* http://www.nyccej.org/wp-content/uploads/2010/08/bbreport1.pdf.

211. *Id. at* 10.

212. *See id.* at 7 (citing watered-down curriculum, lack of access to quality pre-schools, inadequate teacher training, and lack of community/parental engagement as reasons for the poor educational outcomes for African-American males); RAVITCH, *supra* note 118, at 183–84 (criticizing the various studies by economists and other experts who claim that the achievement gap may be closed by employing highly effective teachers).

213. *See* Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L. REV. 1, 19–28 (2008) (presenting an empirical study on the resegregation of teachers in 157 school districts).

214. *Id.* at 16.

215. *Id.* at 5–6.

216. *See supra* Part II.B.

Another ongoing area of racially disparate treatment is in the assignment of students to special education classes and in the imposition of disciplinary actions.[217] There have also been instances of racially discriminatory treatment in extracurricular activities. In one Mississippi school, there was a policy of excluding African-American students from running for leadership positions in the student government.[218]

In school districts that are still under a desegregation order, these cases provide an opportunity to meaningfully challenge ongoing instances of racial discrimination, such as teacher segregation, disproportionate student discipline, and inequality in school resources. This is especially important when other methods for private plaintiffs to challenge racial discrimination in education, such as aspects of Title VI of the Civil Rights Act of 1964, have been limited.[219]

Traditional desegregation cases also provide a crucial opportunity to link ongoing racial disparities with historic racial discrimination. As demonstrated in Walthall County, Mississippi, there are also instances of racially biased student assignment.[220] There is a continuous narrative that can be told about the history of the school system that provides a structural explanation for racial inequality. For example, in the Pulaski County litigation discussed above, the plaintiff has used its Motion to Enforce to recount the racially discriminatory history of both housing and schools and to

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217. *See* Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1336–38 (1995) (noting the significant racial disparities in the assignment of students to special education and arguing that unconscious and structural racism are the causes of the disparity); Russell J. Skiba, Suzanne E. Eckes & Kevin Brown, *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071, 1086–88 (2009/2010) (summarizing studies that conclude that disproportionate numbers of low-income and minority students are subject to expulsions and suspensions).

218. Chris Kieffer, *Nettleton Changes Race-Specific School Elections*, NE. MISS. DAILY JOURNAL, Aug. 28, 2010.

219. *See* Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (holding there is no private right of action to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act); David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 358 (2004) (noting the limitations on private plaintiffs bringing actions for disparate impact violations under Title VI of the Civil Rights Act).

220. *See supra* Part II.A.

demonstrate the way these past policies continue to impact the school district.[221]

2. *Employing Race-Conscious Remedies*

The education reform efforts such as accountability, school choice, and school finance reform do not ignore race, but if they address race they rely primarily on race-neutral remedies.[222] If we want to improve educational opportunities for minority students, race-conscious efforts are important where they are available.[223] For example, in Connecticut, plaintiffs realized that school finance efforts alone would not be enough to improve opportunity for minority students in urban areas.[224]

Many scholars have raised doubts about whether race-conscious efforts to racially integrate schools are important to the overall goal of greater educational opportunity and improved student outcomes.[225] Racial isolation sends a strong message to minority students that there is ongoing racial hierarchy and racial subordination.[226] Racial isolation can also reinforce racial stigma.

As Professor Michelle Adams argues in a recent article, the topic of school desegregation is central to the broader dialogue about the value of racial integration.[227] Professor Adams argues that the goal of racial integration is under attack.[228] For some conservatives, such as Chief Justice Roberts, promoting racial equality in K-12 schools

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221. *See supra* Part II.C.

222. *See* Koski & Reich, *supra* note 183, at 586–88.

223. Race-neutral efforts also have some advantages over race-conscious remedies, such as avoiding the seemingly inevitable litigation. Kimberly Jenkins Robinson argues that "race-neutral efforts can avoid most of the harms of a racial classification while advancing equal educational opportunity." Robinson, *supra* note 141, at 345.

224. *See* Michael A. Rebell & Robert L. Hughes, *supra* note 185, at 1178.

225. *See* Parker, *supra* note 211, at 5 n.19 (reviewing literature on doubts about whether racial integration is an important goal in education).

226. *See generally* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 830 (2004) (discussing racial stigma as a constitutional harm and the notion that racial stigma exists when racial minorities are socially, politically, and economically at the margins of society).

227. *See* Michelle Adams, *Radical Integration*, 94 CALIF. L. REV. 261, 280–81 (2006).

228. *See id.* at 263–67 (describing current debates about racial equality and whether integration should be seen as an important goal in the struggle for racial equality).

means preventing reverse racial discrimination.[229] For many progressives and African Americans, the issue of race and schools is tied to the question of black identity and black achievement.[230] These observers challenge the assertion that quality schools are equivalent to racially integrated schools and argue that we should begin to focus on creating high-quality schools regardless of their racial makeup.[231]

Professor Adams then argues that there is a need to embrace "radical integration" as a "forward-looking, aspirational view of equality."[232] It is difficult to think of many examples where racial integration is being advocated for in this manner. Traditional desegregation cases provide an opportunity for plaintiffs to make these types of aspirational arguments for racial equality and to see court orders that both acknowledge the history of racial discrimination and provide a blueprint and resources for racially integrated education in the twenty-first century. In the Walthall County desegregation case, the federal government argued for a vision of equality that includes integrated schools and classrooms.[233]

Professor Adams also advocates for the radical integration approach as a way to "highlight[] the deep interdependence between segregation and the maintenance of white supremacy. Within this paradigm, racial segregation is understood as a multifaceted and self-sustaining generator of inequality."[234] We see this theory at work in the Little Rock desegregation case. In the school district's Motion to Enforce the 1989 Settlement Agreement, the school district recounted

229. James E. Ryan, *supra* note 9, at 151.

230. *See id.* at 264–65.

231. *See, e.g.*, Parents Involved in Cmty. Sch. (*PICS*) v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 763 (2007) (Thomas, J., concurring) (giving examples of "black achievement in 'racially isolated' environments"); Bradley W. Joondeph, *Skepticism and School Desegregation*, 76 WASH. U. L.Q. 161, 162 (1998) (noting that many African Americans favor a return to neighborhood schools and are more concerned about the quality of public schools than altering the racial makeup of their schools); Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIAMI L. REV. 577, 605–06 (2009) (arguing that advocates for racial diversity often mistakenly equate diversity with equal educational opportunity).

232. Adams, *supra* note 223, at 272. Professor Adams explains, "[r]adical integration is conceptually distinct from desegregation. Radical integration encompasses the desire to desegregate—that is to disestablish a previously racially separate system[]—and to champion a forward-looking, aspirational vision of equality." *Id.*

233. *See supra* Part II.A.

234. *See* Adams, *supra* note 223, at 276.

the recent history of both residential and inter-district school segregation in Pulaski County.[235] The school district is able to focus on the importance of ending racial isolation, not for the goal of diversity, but instead to address structural inequality.

Furthermore, there has not been significant empirical evidence that racially and socioeconomically isolated schools are able to provide high-quality education for students in those schools.[236] Although desegregation decrees remain in only a small number of school districts, plaintiffs may use these cases as an opportunity to highlight racial isolation and the importance of racial integration as a value.

3. Litigation as a Dialogic Tool

Why is litigation a useful method for public debate on whether racial integration is an important value in our public schools? Litigation provides a unique opportunity to have a public dialogue on the issue of racial integration. Litigation also provides an opportunity to marshal and debate empirical evidence on the role of race in public education.

PICS is an example of litigation providing an opportunity for a broad public dialogue on race in public schools. The party briefs and amicus briefs provided ample empirical evidence about whether avoiding racial isolation may be a compelling government reason for employing race-conscious remedies.[237]

In the Supreme Court opinion, the Justices engage in a debate about the meaning and legacy of *Brown*.[238] This became a key point of disagreement for the Justices in *PICS*.[239] For Chief Justice

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235. *See supra* Part II.C; *see generally* Motion to Enforce 1989 Settlement Agreement, *Little Rock Sch. Dist.*, 778 F.2d 404 (No. 82-866) (E.D. Ark. May 19, 2010).

236. Robinson, *supra* note 141, at 328–30.

237. *Id.* at 327 n.324 (discussing empirical research in the amicus brief on the issue of racial isolation).

238. Heise, *supra* note 10, at 2418 (stating that *Brown's* legacy is muddled and that the aftermath of *Brown* is not encouraging for other litigation-based efforts for education reform); James S. Liebman, *Implementing* Brown *in the Nineties: Political Reconstruction*, *Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 350–52 (1990) (arguing that understanding *Brown* has proven difficult and that the "old" strategy for implementing *Brown* had a better capacity for political reform instead of education reform).

239. Parents Involved in Cmty. Sch. (*PICS*) v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

Roberts, the desegregation cases, beginning with *Brown*, represent the importance of colorblindness:[240]

> Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. . . . For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way "to achieve a system of determining admission to the public schools on a nonracial basis" is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.[241]

Justice Stevens wrote a separate dissent focusing on the legacy of *Brown*. Justice Stevens argued that Chief Justice Roberts' interpretation of *Brown* was devoid of context and history:

> There is a cruel irony in THE CHIEF JUSTICE's reliance on our decision in *Brown* . . . . THE CHIEF JUSTICE fails to note that it was only black schoolchildren who were so ordered [that they could not go to school with white children]; indeed, the history books do not tell stories of white children struggling to attend black schools . . . . THE CHIEF JUSTICE rejects the conclusion that the racial classifications at issue here should be viewed differently than others, because they do not impose burdens on one race alone and do not stigmatize or exclude.[242]

The remaining desegregation cases and their outcome will provide an important opportunity to recapture the legacy of *Brown* and to engage in a public discourse about the continuing racial inequality in our public schools.

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240. James E. Ryan, *supra* note 9, at 151 ("The Chief Justice argues strenuously that colorblindness is most consistent with *Brown* and requires severely restricting, if not prohibiting, racial considerations regardless of the overall goal—whether to include or exclude, segregate or integrate.").

241. *PICS*, 551 U.S. at 747–48 (internal citation omitted).

242. *Id.* at 798–99.

There are also significant limits to litigation, and many of these challenges have been demonstrated in the history of the desegregation cases. Traditional school desegregation cases occupy a special place in the history of American litigation.[243] Scholars have identified desegregation cases as the paradigmatic example of structural reform litigation and public law litigation. According to Professor Owen Fiss:

> Adjudication is the social process that enables judges to give meaning to public values. Structural reform . . . is one type of adjudication, distinguished by the constitutional character of the public values and, even more important, by the fact that it involves an encounter between the judiciary and the state bureaucracies. The judge tries to give meaning to our constitutional values in the operation of these organizations . . . . As a genre of constitutional litigation, structural reform has its roots in the Warren Court era of the 1950s and 1960s and the extraordinary effort to translate the rule of *Brown v. Board of Education* into practice.[244]

As structural reform litigation, the school desegregation cases led the way for other types of lawsuits to reform social institutions, such as prisons, mental health facilities, housing authorities, and police departments.[245]

The role of desegregation cases as a paradigm of structural reform litigation means that the legacy of these cases has broader implications.[246] Is the desegregation docket in the federal district courts seen as a failure? Some have argued that the litigation strategy

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243. Mark Tushnet, *Some Legacies of* Brown v. Board of Education, 90 VA. L. REV. 1693, 1695 (2004) (noting that the decades after *Brown* brought litigation campaigns aimed at death penalty reform, prison reform, and welfare rights); Stephen C. Yeazell, Brown*, The Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1977 (2004) (noting that *Brown* provided a model for social change through litigation).

244. OWEN FISS, THE LAW AS IT COULD BE 3 (2003).

245. *Id.* at 7.

246. *See* Adamson, *supra* note 184, at 185 (noting that the perceived failures of court-ordered desegregation have lingering effects on the ability to distribute financial benefits to minority school districts).

failed.[247] Others have argued that court-supervised desegregation was successful for a short time from the late 1960s to mid-1970s and then began to suffer a series of setbacks that have led to the current climate of resegregation.[248]

A new era of desegregation may redefine the landscape of structural reform litigation by demonstrating the resilience of this form of adjudication. These cases lay dormant for decades, but because of the process of adjudication, specifically the remedy of the injunction, the cases remain a powerful tool for social transformation and racial justice.

The school desegregation cases were a blueprint for many of the other major structural reform litigation movements, including prison reform and reform of mental health institutions.

IV. CONCLUSION

The final chapter of the desegregation cases is now being written. This final chapter is an important moment for both education reform and racial justice. The remaining desegregation cases are a means to help address the lingering effects of past discrimination and to refocus our education reform on equality as a core value.

247. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 42–71 (Benjamin I. Page, ed., 1991) (arguing that courts did not effectively create social change in the desegregation cases).

248. *See* Gary Orfield & Chungmei Lee, *supra* note 46, at 7–8; *see also* Press Release, Harvard Graduate Sch. of Educ. (Jan. 18, 2004), *available at http://www.gse.harvard.edu/news_events/features/2004/orfield01182004.html.*