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SCHOOL FUNDING:
INEQUALITY IN DISTRICT FUNDING AND THE
DISPARATE IMPACT ON URBAN AND MIGRANT
SCHOOL CHILDREN

*Rachel R. Ostrander**

I. INTRODUCTION

Today schools are more segregated than at any point in our recent history, and it is largely due to problems with the disparity of funding between districts. While migrant, low income, and inner city urban families are entrapped in lower funded schools because of low property values in those areas, the demographic of students becomes increasingly homogenous, and more affluent families move to better communities with better schools and more resources, creating an urban-migrant dilemma in education. While this is not the intended outcome, it is nonetheless the de facto outcome. So why is this de facto segregation occurring and why is the school funding disparity issue not being challenged? The answer is that it *is* being challenged, but the progress towards adequacy is slow and courts are not equipped to implement meaningful changes.

This paper will examine why our efforts to remedy the urban-migrant problem have failed, and what we can do about this problem moving forward. We will determine the exact problem, define it, examine the possible remedies through the lens of how parallel problems are addressed under the law, and develop a model for solving the urban-migrant problem in the future.

Every child has the right to an adequate and proper education, and it is worth thinking about how we can fix this system to provide the very basic necessities for every child in school to meet the goals of the educational system. I will

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discuss the possible alternatives to the traditional constitutional challenges, including looking at possible remedies through federal statutory law, which could be implemented under the spending or commerce clauses rather than through changes from within the administrative system.

II. UNDERFUNDING IS LEADING TO CONTINUED SEGREGATION AND INADEQUATELY PREPARED CITIZENS.

Schools are more segregated today than at any time within the last 40 years, and the problem is only getting worse. While the population of Latino and black children in schools has increased dramatically since the 1960's, this population of students is increasingly segregated into their own districts because of the low cost of property in these primarily urban and migrant areas. This is effectively creating further economic and racial segregation in our education system.¹ Evidencing this is the strong correlation between educational segregation and residential segregation.² These predominantly urban or migrant schools, or "low schools", meaning low funded and underachieving schools concentrated in urban and migrant areas, contribute to a host of other inequality problems. Experienced and well-credentialed teachers choose not to teach in these low paying districts that lack funding, and as a result talent moves to the districts that receive more funds. As the problem of funding disparity grows so does this unequal distribution of resources in schools, raising the question whether children are being adequately educated.

To achieve a more equal system of education, the low schools need to have resources allocated to them, otherwise opportunity disparity will continue to increase. Without an adequate education, students in low schools face an extremely difficult, uphill battle to become productive members of society. Schools, located in urban and migrant areas will continue to be

¹ GARY ORFIELD & CHUNGMEI LEE, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES, 4 (2007). (noting that students in intensely segregated (90–100%) minority schools are more than four times as likely to be in predominantly poor schools).

² *Swann v. Charlotte-Mecklenburg Bd. of Edu.*, 402 U.S. 1, 7 (1971) (noting that racially segregated schools leads to segregated housing); see also *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 437–38 (1968); *Milliken v. Bradley*, 433 U.S. 267 (1977).

low because they are primarily funded based on property values.³ The disparity between these schools and others will grow as inadequately educated people will remain in the same geographic areas with low property values and send their children to underfunded schools.

In *Brown*, the Court relied on compulsory school attendance laws and the fact that education requires substantial financial investment in our nation's education system as support to find that education is among the most important functions of state and local governments. The Court commented that education is the foundation of good citizenship and is vital in the formation of cultural values.⁴ Without a proper education, children will be inadequately prepared to participate in professional life. The Court stated that, "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."⁵ While the Court failed to recognize education as being a fundamental right, they did recognize its unparalleled importance as a government function. Similar to the assertion made in *Brown*, in one of the most commonly cited cases on educational funding disparity, Kennedy wrote, "The [n]ation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all."⁶ Schools are the institutions that teach our children democratic ideals, enable our children to be successful and productive citizens, and teach them moral and community responsibility.⁷ The government plays a fundamental role in ensuring that every child receives an education that meets these standards, and states have the primary power of regulating schools.

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

⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁵ *Id.*

⁶ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782 (2007).

⁷ *Bd. of Educ. v. Pico*, 457 U.S. 853, 909 (1982) (Rehnquist, J., dissenting) (the government, through its role in education, influences impressionable children in the development of their social values and knowledge); *Plyer v. Doe*, 457 U.S. 202, 221 (1982) (noting "the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child."). See, e.g., *Ambach v. Norwich*, 441 U.S. 68, 76–78 (1979); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29–30 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972); *Brown*, 347 U.S. at 493.

III. SHARED RESPONSIBILITY FOR THE SCHOOL FUNDING SYSTEM HAS LED TO A LACK OF ACCOUNTABILITY.

Responsibility for improving schools is shared between local communities, states, and the federal government. This sharing of responsibility without clearly defined areas of influence results in a lack of accountability for actions and policy that hurt schools. States inspect the school sites, supervise the implementation of standards, and implement policies regarding mandatory attendance, and examine teachers and students through testing and observation.⁸ State regulations must not violate the state constitution or federal mandates.⁹ The community has a major interest in promoting involvement in and support of their schools, and it is their responsibility to be responsive to the needs of schools within their community. While states retain primary financial responsibility for school, through local taxing and school districts, the federal government has taken on an increasingly prominent role in funding and policy making.¹⁰ Congress has the power “to lay and collect Taxes, Duties, Imports and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States.”¹¹ However, local taxes make up the predominant portion of school funds. This convolution of responsibility in funding the school system leads to a lack of accountability therein.

Under the Tenth Amendment of the U.S. Constitution, the powers that are not specifically delegated are reserved for the states. State constitutions lay out the duties of the state with regards to what constitutes a proper and adequate education. States are responsible for funding their educational systems, and standards for doing so vary among the states. The question of the adequacy of education is interpreted in different ways under varying state laws. Some interpret adequate education

⁸ *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925).

⁹ U.S. CONST. amend. X, (the powers not specifically delegated to the federal government are reserved for the states); *See also Epperson v. State of Arkansas*, 393 U.S. 97, 104 (1968) (by and large, public education in our nation is committed to control of the state and local authorities).

¹⁰ Philip K. Porter & Michael L. Davis, *The Value of Private Property in Education: Innovation, Production, and Employment*, 14 HARV. J.L. & PUB. POL’Y 397, 413–16 (1991).

¹¹ U.S. CONST. art. 1, §8.

to mean education shall be adequate as an institution; others interpret it as meaning that the state has a duty to provide an adequate education for every individual child within the state.¹² State constitutions may hold education to a higher standard than “adequate”, and many do. While a state can mandate that an education be adequate or even above adequate, the state constitutions do not provide guidance as to *how* this will be achieved. State constitutions do not mandate specific requirements for minimum funding, and that is a function left to state legislatures in creating a budget. When standards are not met, court decisions may mandate that additional funds must be provided in order to achieve adequate education within a state, but only after a challenge has been made to the system, and a court in that case has upheld the decision.¹³ However, it has been problematic for the courts to enforce the right to an adequate education once a violation has been found.¹⁴ With the responsibility for funding education spread among communities, states, and the federal system it is difficult to hold one party accountable.

IV. RECENT TRENDS TOWARD USING OUTCOMES BASED DATA TO DETERMINE FUNDING THREATENS TO EXACERBATE INEQUALITIES BETWEEN DISTRICTS.

Education is becoming focused on educational outputs as a measure of adequacy. Our system of education is constantly adopting new standards, and with each new set of adopted standards there is great hope for big change in those outputs. While outcomes based assessment remains much contested; some people support it on the premise that it is unfair to reward those schools that are low performing.¹⁵ This is true,

¹² Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814 n.138 (1985) (citing provisions).

¹³ *San Antonio Indep. Sch. Dist.*, 441 U.S. at 43 (Justice Powell notes the difficulty of specifying the goals of a system of public education); See generally Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 412–14 (1999) (describing the emergence of definitions of an adequate education in school finance litigation).

¹⁴ See generally Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001) (arguing that differences between positive and negative rights make positive rights difficult to enforce and that empirical evidence shows no improvement in the plight of the poor in those states recognizing positive rights).

¹⁵ See generally FREDERICK M. HESS & MICHAEL J. PETRILLI, NO CHILD LEFT

even with the new implementation of the federally suggested *Common Core Mathematics and English Educational Standards*, which have been adopted by forty-three states and territories.¹⁶ When we look at *Common Core* compared to previous standards set by the *No Child Left Behind Act*, both rely on standardized tests to measure the quality of output in the system.¹⁷ *Common Core* has been criticized because it specifies what students should know, but not a means to get there, an often heard criticism of *No Child Left Behind*.¹⁸ The disconnect between deciding what needs to be achieved and how to achieve it is a fundamental problem of our system. Schools with fewer resources have fewer options, and face more challenges when expensive technology and quality educators are required for achievement.

Under the new standards, critics who initially praised the standards for freeing school children and teachers of the burden of standardized testing are now saying that the amount of actual testing and time students will spend taking tests will be much greater, even hours of testing at the elementary level. The tests will also require technological skills that many schools do not have access to teach because of limited resources. The tests, though different in character, will serve the same function that they had under *No Child Left Behind*, making the new schema of outputs based testing with *Common Core* unchanged, if not potentially *more* burdensome.¹⁹ This outcomes based assessment process assumes that resource reallocation, as a reward for achieving a high test score, will help flatten out statistically significant differences in student

BEHIND: PRIMER 4–6, 23–25, 124–26 (2006) (summarizing various criticisms of *No Child Left Behind*).

¹⁶ *Forty-Nine States and Territories Join Common Core Standard Initiative*, NAT'L GOVERNORS ASS'N. http://www.nga.org/cms/home/news-room/news-releases/page_2009/col2-content/main-content-list/title_forty-nine-states-and-territories-join-common-core-standards-initiative.html (last updated June 1, 2009).

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

¹⁸ Kathleen Porter-Magee, *The Truth About Common Core*, NAT'L REV. ONLINE (Apr. 3, 2013), <http://www.nationalreview.com/articles/344519/truth-about-common-core-kathleen-porter-magee>.

¹⁹ Common Core Assessments: *More Tests, But Not Much Better*, FAIRTEST. <http://fairtest.org/common-core-assessments-factsheet> (last updated Sep. 3, 2013).

educational outcomes such as grades, test scores, and attainment.

No Child Left Behind essentially required states (as a condition of federal funding for education) to establish standards for educational outcomes, test students for the attainment of those outcomes, and achieve test scores that met the standards they had adopted.²⁰ Under the *Common Core*, it is hopeful that the system for establishing educational outcomes will become more uniform and more easily understood by the states. However, this is unclear because some states are working together to develop assessments and others are still working independently.²¹ Some children have been more expensive for states to educate than others, and it is unclear whether any adoption of uniform standards could potentially change that fact. This is especially true of migrant and urban children who are concentrated into low schools, who currently receive less funding and who are statistically performing poorly on standardized assessments due to their highly divergent backgrounds and language barriers, as tests are given in English only.²²

Common Core boasts that the new test will contain fewer standardized questions and instead be focused on measuring a student's ability to critically think. In order to implement such a test, various groups have been working to create Internet- and computer-based examinations. These examinations will likely be extremely costly to implement because of the move from paper exams to ones requiring computers for students, hurting low urban and migrant schools the most.²³

²⁰ *No Child Left Behind Act of 2001*, Pub. L. No. 107-110, 115 Stat. 1425.

²¹ *Education Insider: Common Core State Standards and Assessment Coalitions*, WHITEBOARD ADVISORS, <http://www.whiteboardadvisors.com/research/education-insider-common-core-standards-and-assessment-coalitions> (Sep. 9, 2010); *Smarter Balanced Assessment Consortium*, <http://www.smarterbalanced.org/> (last visited Sep. 15, 2014); Common Core State Standards Initiative, *Standards in Your States*, <http://www.corestandards.org/standards-in-your-state/> (last visited Sep. 15, 2014).

²² See, e.g., *Montoy v. Kansas*, No. 99-C-1738, 2004 WL 1094555, at 12 (Kan. 2004) (noting that the most expensive students to educate are those at poor or at risk schools, English as a second language learners, and racial minorities).

²³ Kathleen McGrory, *For Common Core, a new challenge—from the left*, MIAMI HERALD, (Aug. 24, 2013), <http://www.miamiherald.com/2013/08/24/3583858/for-common-core-a-new-challenge.html>.

Additionally, not much has changed with the outcomes based funding system under the “Federal Race to the Top” grant system. Schools with higher performance will receive a greater allocation of funding. And access to these grants is dependent on participation in the *Common Core Scheme*.²⁴ Low Schools, with heavy urban-migrant problems will likely continue to be among the least funded, as low performing on outcomes based assessments. While a test to measure a child’s ability to critically think is certainly better than one focused on finding the correct answer, it is not a step away from outcomes based testing when funds are still conditioned on performance. Because low performance results in less funding, low performing schools receive less funds. The low performing schools are the ones with predominant urban and migrant demographics, full of children who face particular difficulties and require more support. As these schools lose funding for low performance, it becomes even more difficult for these schools to perform well. It is a self-perpetuating cycle. The problem is perpetuated because children are not able to gain access to critical funding needed to adequately educate them and to enable higher performance. This is the urban-migrant problem in a nutshell. This leaves deficiencies in the quality of education that these children will receive under *Common Core Standards* and possibly other outputs based assessment models for determining funding.

While there is no test that can measure the real knowledge level of children, standardized tests encourage teachers to “teach[] to the test” in order to attain high test scores instead of focusing on what students really understand.²⁵ It is not

²⁴ Press Release, U.S. Department of Education, President Obama, U.S. Secretary of Education Duncan Announce National Competition to Advance School Reform (July 24, 2009), <http://www2.ed.gov/news/pressreleases/2009/07/07242009.html>; Geoffrey H. Fletcher, *Race to the Top: No District Left Behind*, 37 T. H. E. JOURNAL, (ISSUE)10,17–18 (2010); *Fulfilling the Promise of the Common Core State Standards: Moving from Adoption to Implementation to Sustainability*, ASCD (last visited Mar. 19, 2014), <http://educore.ascd.org/resource/Download/1d60f46d-b786-41d1-b059-95a7c4eda420>.

Although states were not required to adopt the Common Core State Standards to compete for Race to the Top dollars, they were at an advantage if they did so. The initiative’s scoring system awarded additional points to states for promising to adopt those standards by August 2, 2010. Many of the states—41 in total—that applied for Race to the Top funds promised in their applications to adopt the Common Core State Standards.

²⁵ Derrick Darby, *Slaying the Inequality Villian in School Finance: Is the Right*

contested that using such assessments has its useful place in the education process; however, holding the results of a standardized test as the ultimate determining factor for measuring achievement and quality of education only leads to an increase in the disparity in funding of schools and does not address the real problem with our education system. Those children most affected, those who are low performing on these tests and who face difficulties because of the homogenization of schools in urban and migrant areas, stand to lose funding if their standardized test scores do not meet the goals of *Common Core*.

One of the biggest criticisms of *Common Core* has been that, like *No Child Left Behind*, it ignores important cultural differences in the education process. This is most significantly felt in areas populated heavily by minorities, like migrant and inner city urban communities.²⁶ Under *No Child Left Behind*, both inner city schools and migrant schools were negatively impacted by outcomes based determinative funding.²⁷ It has been alternatively suggested that standardized testing would be more properly applied to focus on examining which outcomes are evidence of inequitable or inadequate funding.²⁸ It is highly counterproductive to punish the schools who need the most help, and encourage teachers to engage in practices like “teaching to the test” while simultaneously withholding essential funding from these already disadvantaged children.

The *Elementary and Secondary Education Act* (ESEA) was established to study low performing schools where students are predominantly members of racial minorities and make recommendations to help them become more successful. ESEA made education a priority of the federal government.²⁹ Studies

to *Education the Silver Bullet?* 20 KAN. J.L. & PUB. POL’Y 351, 380 (2001).

²⁶ Marion Brady, *Eight problems with common core standards*, WASHINGTON POST, August 8, 2012, http://www.washingtonpost.com/blogs/answer-sheet/post/eight-problems-with-common-core-standards/2012/08/21/821b300a-e4e7-11e1-8f62-58260e3940a0_blog.html.

²⁷ See, e.g., Joshua Williams, Note, *The “War on Education”: The Negative Impact of the No Child Left Behind Act on Inner-City Public Schools, Students, and Teachers*, 11 J. GENDER RACE & JUST. 573, 586–91 (2008).

²⁸ See, e.g., *DeRolph v. State*, 677 N.E.2d 733, 745 (Ohio 1997) (noting low performance on proficiency evaluations to be evidence supporting the finding that schools lacked sufficient funds with which to educate their students).

²⁹ *Elementary and Secondary Education Act*, Pub. L. No. 89–10, 79 Stat. 27 (1965) (noting that inequalities in educational inputs are not the best predictors of

under ESEA have revealed that analyses of per pupil expenditures are not the best way to predict student achievement.³⁰ This shows that schools that receive additional funds because of their high test outcomes do not necessarily achieve more. Other studies have shown that the most telling predictors of a student's aptitude to achieve are students' family background and the parents' level of education.³¹ Parents who raise their families in urban and migrant areas generally have the lowest level of education, highest levels of poverty, and cannot meaningfully contribute to the education of their child. This puts urban and migrant children at an educational disadvantage. Facilitating racial inclusion within schools is essential to expose these children to different opportunities and experiences that their parents are not able to provide. This makes diversity essential to achieving adequate education levels across the board, if the goal is to produce productive members of democratic society. By keeping low schools low funded, the homogenization of schools is unlikely to change.

Choice legislation, such as the *Magnet Schools Assistance Program*, has proven to be "most effective when coupled with sufficient funding, an understanding of current racial demographics, and an acknowledgement of the complexities of persistent racial segregation and disparities in education."³² This strongly suggests that the link between demographics and sufficient funding is a central issue to adequacy of education. Inclusion cannot be achieved without adequate funding in order to provide resources in low urban-migrant schools, making funding a central issue for these particular schools. Educational and social science literature suggests that adequacy of education needs to be addressed at the societal level.³³

unequal student achievement).

³⁰ *Id.*

³¹ JAMES S. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY 22 (U.S. Dept. of Health, Education, and Welfare, Office of Education 1966). (Concluding that "socioeconomic factors bear a strong relation to academic achievement").

³² Lia Epperson, *Equality Dissonance: Jurisprudential Limitations and Legislative Opportunities*, 7 STAN. J. CIV. RTS. & CIV. LIBERTIES 213, 236 (2011).

³³ Derrick Darby, *Slaying the Inequality Villain in School Finance: Is the Right to Education the Silver Bullet?*, 20 KAN. J.L. & PUB. POL'Y 351, 370-76 (2001).

Educational outcomes are dramatically affected by exogenous factors, such as a student's family background and neighborhood environment. [. . .] Health and cognitive effects of poverty, teacher perceptions of student ability, teacher expectations, [and] student expectations of discrimination in the labor market a[re] factors shaping educational outcomes. [. . .][T]hen it is also clear that merely recognizing a right to education will not suffice.³⁴

Addressing problems of societal discrimination and poverty are central to attacking the issues surrounding the adequacy of education, and keeping schools with urban and migrant children who face these challenges impoverished only adds to the problem.

V. CHALLENGING FUNDING AS DE FACTO DISCRIMINATION IS LIKELY TO BE MORE EFFECTIVE WHERE A NEGATIVE IMPACT ON SELF-IDENTITY CAN BE PROVEN.

The standard of review for cases challenging school funding systems asks whether the policies at issue are rational to serve the government's legitimate interest? That narrow tailoring analysis requires the court to understand the scope and availability of less restrictive alternatives.³⁵ Cases have focused on the correlation between funding and educational achievement generally, and whether the funding process enables schools to meet state standards.³⁶ Adequate funding is not the only factor relevant for a district to meet state educational standards, as we discussed above, but admittedly it is an important one. Without basic necessities for students and classrooms, it is impossible for students to learn. What these basic necessities are, in fact, is what is at issue in many challenges. Some necessities are obvious. Every student needs paper, pencils, and a desk, but other necessities are not so obvious. *Brown* seems to suggest that protection of student self-image is one of the "basic necessities" of education, and that it

³⁴ *Id.*

³⁵ *Parents Involved*, 551 U.S. at 784 (Kennedy, J., concurring).

³⁶ Derrick Darby, *Slaying the Inequality Villain in School Finance*, 20 KAN. J.L. & PUB. POL'Y at 353 (noting that decreasing the disparities and inadequacies in education funding will not necessarily improve educational outcomes).

is impacted by disparity.³⁷

Beginning in the 1970s, state school financing systems began to be challenged on equal protection bases, with divergent outcomes among the cases and little meaningful change toward a system that offers equality of opportunity to all students.³⁸ The equity-based litigation has been criticized as having inherent limits, because it examines only the relative levels of financing between districts, and because it is unlikely that districts will work together to relieve disparity.³⁹ Because of the limited success of these challenges, relatively poor districts began to be challenged on other constitutional grounds, recognizing a constitutionally protected right to education as fundamental.⁴⁰

Courts have traditionally recognized two kinds of racial discrimination at law. The first category of discrimination applies to policies that are discriminatory on their face, for example in *Strauder v. West Virginia*, the policy at issue excluded black men from serving on juries. This policy was deemed ‘facially discriminatory’ because the Fourteenth Amendment of the U.S. Constitution guarantees a right to have a jury of your peers, and it was directly contrary to that right.⁴¹ In addition to facial discrimination, the court recognizes de facto discrimination. This is discrimination in effect, raising equal protection issues. This was the persuasive argument in *Brown*, where it was successfully shown that the students were developing a negative self-identity through the separate but equal policy. Separate but equal was not an area in which courts were willing to intervene⁴² until a disparate impact on human identity could be shown. When a damaging effect on the psyche was shown in *Brown*,⁴³ the Court ruled that separate

³⁷ *Brown*, 347 U.S. at 495.

³⁸ *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971); see also *Robinson v. Cahill*, 287 A.2d 187 (N.J. 1972) (challenging finance system on equal protection grounds).

³⁹ See *Palmer v. Thompson*, 403 U.S. 217, 227 (1971) (holding that closing a public swimming pool was a permissible response to a lower court judgment invalidating enforced segregation of the pool).

⁴⁰ Perry A. Zirkel & Jacqueline A. Kearns-Barber, *A Tabular Overview of the School Finance Litigation*, 197 ED. L. REP. 21 (2005) (noting that the outcomes of school finance litigation in each state vary greatly).

⁴¹ *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880).

⁴² *Plessy v. Ferguson*, 163 U.S. 537, 547 (1896).

⁴³ *Brown*, 347 U.S. at 495.

but equal was not adequate. By examining this evolution in desegregation cases, we can better understand what the current challenges to school funding disparity are lacking. As suggested above, racial demographics and funding requirements to achieved adequacy are linked. If, like in the *Brown* cases, a similar disparate and negative self-image could be shown by the implementation of school funding policies, indicating a psychological impact on minority children in low schools, where the demographic composition is also urban or migrant minority children, perhaps we could achieve a more meaningful court decision holding that funding disparity does not result in equal education.

Education funding disparity is de facto racially discriminatory. The policy, in effect, keeps the low schools poor and segregated. The effect of the current system of determining funding has resulted in the concentration of economically disadvantaged urban and migrant racial minorities into these low performing schools who receive minimal funds. The injustice is all but obvious. However, for wealth-based deprivation, the standard is very difficult to meet, and the court has been unwilling to step in to rule on mere economic issues. To succeed on this kind of challenge, a plaintiff must show that there is an absolute deprivation and that there is no other possible relief where the class of people is defined by their inability to pay (An example is being denied the right to an attorney. There is no substitution for fair representation).⁴⁴ In *San Antonio Ind. School Dist. v. Rodriguez*, they did not meet this high burden. The Court found that students were not being absolutely deprived of an education, only a quality one, and that the class of children was not defined by their inability to pay since education is funded by the state.⁴⁵ One could argue that, based on our discussions above, education is within the nexus of rights provided by the Constitution as essential to upholding the rights explicitly granted under the Constitution. However, the courts have generally held, with few limited exceptions, that this is not so.

Case law has held that education is more akin to the right

⁴⁴ *San Antonio Indep. Sch. Dist.*, 441 U.S. at 35.

⁴⁵ *Id.* at 50.

to food and shelter than fundamental rights.⁴⁶ While education, food, and shelter are highly important, they are not essential, and courts have not held these things as fundamental rights of individuals. Also, courts lack expertise in education, and because of this, they leave it to the states to make their own policies regarding it.⁴⁷ States handled education in their constitutions before the framing of the U.S. Constitution, and there is some evidence that the framers explicitly left it out.⁴⁸ Additionally, *Common Core* has been called a top down takeover of state government, for leaving states very little real choice to adopt the suggested standards.⁴⁹ In *San Antonio*, the Court acknowledged the complex interactions of the myriad of problems with the adequacy of public education, but questioned the demonstrability of a correlation between educational expenditures and the quality of education received.⁵⁰ A question of whether a similar correlation existed between the procedure in question and adequacy of education was raised in *Brown*, which overturned *Plessy v. Ferguson* and the adequacy of “separate but equal.” Up until *Brown*, constitutional arguments had failed, and that case upheld the notion that separate but equal did not violate equal protection nor overcome the rational basis standard set by the Court, which requires that the state have a legitimate interest at stake and that the policy implemented is rationally calculated to achieve its goals. This is the same standard applied to funding disparity issues, but *Brown* emphasized that there could be no rational basis where students’ self-identity was affected.

Education plays an important role in developing democratic citizens who are functional and productive within American society, and this was the foundation of the persuasive argument in *Brown*. It is a sentiment mirrored in the Common Core Standards. Among the justifications for the standards is that the ability to critically think will prepare American

⁴⁶ *Id.* at 59.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Lindsey Burke & Jennifer A. Marshall, *Why National Standards Won't Fix American Education: Misalignment of Power and Incentives*, THE HERITAGE FOUNDATION (May 21, 2010), <http://www.heritage.org/research/reports/2010/05/why-national-standards-won-t-fix-american-education-misalignment-of-power-and-incentives>

⁵⁰ *Id.* at 41–42.

students to be able to compete in a global economy.⁵¹ The fundamental goals of education were undermined by what had been previously held to be a rational means to a legitimate end under the test. And while *Brown* overturned formal inequality in schools, that is discriminatory inequality, it has not eliminated other inequalities within education or alleviated deep-seated racial disparities in achievement.⁵² Now, more than ever, funding disparity issues are taking center stage and being increasingly debated in state courts.⁵³ A student in a low school, from a low property tax area of the country, lives in a “bad neighborhood,” attends a homogenous urban inner city school or a heavily migrant school, and will grow up segregated from others based on income. As we have seen from the *Brown* cases, racial segregation, whether de facto or explicit, results in education levels that make students less adequate to participate in our democratic laissez faire society.⁵⁴ This will unquestionably lead a young person in this position to develop a negative self-image and sense of hopelessness in his future. It is possible that the courts have ignored this fact because adequacy of education is not measured by individual achievement, but on school and district results as a whole. Because the disenfranchised urban and migrant poor are the least likely class to bring a challenge in court,⁵⁵ this point has not been brought up in challenges based on economic disparity in schools. The right individual, or challenge as applied, has not come along.

In *Plyer v. Doe* it was held that children of illegal immigrants, or migrant children, have a right to receive a

⁵¹ *Ready or Not: Creating a High School Diploma That Counts*, ACHIEVE (Dec. 10, 2004), <http://www.achievetest.org/ReadyorNot> (stating that Common Core will provide consistent and clear understanding of what is to be learned, helping teachers to create more prepared students for the real world).

⁵² See, e.g., Grace Kao & Jennifer S. Thompson, *Racial and Ethnic Stratification in Educational Achievement and Attainment*, 29 ANN. REV. SOC. 417 (2003) (describing the persistence and causes of racial and ethnic inequalities in educational achievement and attainment); James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432 (1999).

⁵³ See generally Richard E. Levy, *Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation*, 54 U. KAN. L. REV. 1021, 1025-34 (2006).

⁵⁴ See e.g. AMY STUART WELLS ET AL., BOTH SIDES NOW: THE STORY OF SCHOOL DESEGREGATION'S GRADUATES (2009) (study showing that graduates from racially diverse schools felt better prepared for life in a global society).

⁵⁵ James E. Ryan, *Supra* note 52.

public education just as any other child. They are perhaps the most impacted by the problem of educational funding disparity. This Quasi Suspect Class, the Court has held, is subject to a slightly higher standard than the rational basis scrutiny we have discussed above. Intermediate scrutiny, under the Equal Protection Clause, applies to those who are invidiously discriminated against and who possess some kind of unchangeable, immutable characteristic.⁵⁶ Illegal aliens do not qualify for intermediate scrutiny because of their lack of citizenship. They have the possibility to become citizens and they are here illegally, so they do not fit the traditional strict scrutiny test. However, courts have recognized that their children should not suffer for their parents' wrongdoings.⁵⁷ The court has recognized that the children of illegal immigrants are not themselves responsible for their illegal status and that this qualifies them as a quasi-suspect class, subject to an intermediate level of scrutiny. Justice Ruth Bader Ginsburg, concurring in *Grutter v. Bollinger*, observed: "[I]t remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities."⁵⁸ If these migrant students are among those most dramatically adversely affected by the current funding schemes within states they should certainly prevail in a challenge using the successful arguments in *Brown*, where only a rational basis test applied. If a challenge were to be brought on behalf of a migrant child, for their individual harm, it should be able to succeed on a case of negative self-identity because they are a class subject to a heightened level of intermediate scrutiny.

VI. COURTS ARE INADEQUATE TO SERVE THE ROLE OF FACILITATING IMPLEMENTATION OF ORDERED REMEDIES.

Under the Wilson Administration, in the 1920's, Administrative bodies were set up to give oversight to critical areas of American life that require special protections, as a delegation of legislative power. The purpose was to create a more efficient mechanism for oversight with a specific focus.⁵⁹

⁵⁶ *Plyer*, 457 U.S. at 244.

⁵⁷ *Id.* at 249.

⁵⁸ *Grutter v. Bollinger*, 539 U.S. 306, 346 (2003).

⁵⁹ See generally R. J. Pestritto, "The Progressive Origins of the Administrative

But these administrative agencies, such as the Department of Education, have been criticized as comingling the traditional separation of judicial, legislative, and executive functions of our government.⁶⁰ Courts have taken on roles for enforcement and oversight on their changes and face political pressure from within the agency itself.⁶¹ We have seen from the discussion above that this framework has resulted in shortcomings within the education system.

If education is so important to upholding our democratic ideals, take notice that school desegregation policies of the twentieth century have also highlighted the democratic and civic importance of a racially inclusive education.⁶² Nonetheless, local control and funding of schools tends to exacerbate inequalities in educational quality and achievement.⁶³ In the wake of *Brown*, for example, the independence of local school districts limited the ability of courts to achieve desegregation through ‘inter-district’ remedies. In *Milliken v. Bradley*, the Court created “an insurmountable burden” to desegregation by requiring district courts to find that cities and their surrounding suburbs violated the Constitution before including their school districts in desegregation efforts.⁶⁴ Progress toward improvement is often slow at best, and the court is unwilling to take the role of enforcement apart from examining whether an adequate effort is underway.

There have been many challenges to the mechanism of school funding, but none of them have been quite successful in bringing about change in the system of school finance. Historically, a “leave it to the legislature” approach has been favored. Courts review whether regimes for school financing comply with state requirements, and when change is ordered it is generally left to the legislature to determine how it should be

State: Wilson, Goodnow, and Landis,” *Social Philosophy and Policy*, Vol. 24, Issue 1 (January 2007), pp. 16–54.

⁶⁰ *Federalist No. 47*, p. 324 Thomas Jefferson; *Notes on the State of Virginia*, Query XIII: “The Constitution of the State, and Its Several Charters,” paragraph 4.

⁶¹ *Id.*

⁶² AMY STUART WELLS ET AL *Supra* note 54.

⁶³ *Id.*

⁶⁴ *Milliken*, 418 U.S. at 719–20 (holding that a court must find that district lines were drawn for the purpose of segregation before awarding an interdistrict remedy).

carried out. However, in administering a court remedy, enforcement has been ineffective in individual cases. Monitoring how the funds are to be distributed and how the effect of the remedy is to be measured are problematic.⁶⁵ It is easy to enforce a right when damage is merely economic, but where the remedy is less quantitative and tangible, courts are not able to take in an effective role of enforcement. As courts take on the role of enforcement themselves, they become inefficient. The role of the court is narrow, and using courts to implement change is often something not taken up by their function.

We can look to Massachusetts as an example for how successful challenges to funding are taken up by the court on review. In Massachusetts, the commonwealth is obligated under the state constitution to “provide all public school students with an ‘adequate’ education.”⁶⁶ Whether the state was living up to its constitutional obligation was the issue in *McDuffy*, where the court found evidence indicating that students in less affluent school districts had significantly fewer educational opportunities and lower educational quality than in the more affluent school districts. These deficiencies were numerous and widespread. Here, the court found inadequacy with the district financing system, and ordered that the state take steps to equalize funding disparity between districts.⁶⁷ More than ten years later the court reviewing the *McDuffy* decision, stated that

[T]he Commonwealth has a duty to provide an education for *all* its children, rich and poor, in every city and town of the Commonwealth at the public school level, and that this duty is designed not only to serve the interests of the children, but, more fundamentally, to prepare them to participate as free citizens of a free State to meet the needs and interests of a republican government, namely the Commonwealth of Massachusetts.⁶⁸

⁶⁵ See generally Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001) (arguing that differences between positive and negative rights make positive rights difficult to enforce and that empirical evidence shows no improvement in the plight of the poor in those states recognizing positive rights).

⁶⁶ MASS. CONST. pt. 2, cl. 5 § 2

⁶⁷ *McDuffy v. Sec’y of Exec. Office of Educ.*, 415 Mass. 545, 555 (1993).

⁶⁸ *Id.* at 548.

The court here found that progress toward adequacy could only be described as slow at best. This highlights the most significant problem, how we implement meaningful change once a violation is found, and the courts' inadequacy to serve as that oversight mechanism for such change.

Since the courts' review function has been limited to assuring meaningful movement in the right direction through periodic status checks, in *McDuffy*, they upheld that some progress was better than none at all. But what of the children who suffer an inadequate education on the state's path to achieving adequacy in education? Ten years had passed between the challenge and the state's minimal progress toward equalization, resulting in a decade of inadequately educated children. Where funding is found to be inadequate, improvement has been painfully slow. Similar to the desegregation cases, courts have not been willing to take an active role. The traditional constitutional and state challenges under the Equal Protection Clause have failed, leaving the issue for the legislature to decide.

VII. STRONG LEGISLATIVE ACTION WOULD BE A BETTER HOPE
FOR THE FUTURE, AS THE CURRENT ATTEMPTS FOR CHANGE
HAVE BEEN INEFFECTIVE.

It is established that there are problems facing the educational system and school financing systems as it applies to urban and migrant children. The court has proved to be inadequate in implementing remedies for those challenging the system. We have discussed the type of challenge that would be likely to prevail within the current construct of law, but we have only touched on the possible legislative actions that could be taken. We have seen that the system for funding is complex and is governed at the federal, state, and local levels by various statutes, regulations, and policies leading to a lack of accountability within the administrative system itself. Perhaps the best hope for substantial and lasting change lies within our democratic process of legislation outside of that system.

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

education.⁶⁹ The biggest obstacle for change from this angle is that responsibility lies with the American population to demand it. With the effects of the problems so heavily concentrated into migrant communities and in urban inner cities, the American public in general is largely unaware of the gravity of the problem and thus unlikely to press the issue with their legislatures. This is especially true of the disenfranchised poor, the urban, migrant community.

While there has not been any real change implemented following the constitutional challenges which have been brought in the past, there is hope in pursuing change through overriding statutory law if the demand were made.⁷⁰ We can use the model of desegregation for guidance on how to achieve meaningful change in the school finance structure through legislative action, as we have herein by close examination of those challenges. In early desegregation era cases, it is important to note that it was not until statutes were enacted to support the changes mandated by court decisions that meaningful change was seen in the desegregation effort in the South. This was largely due to the fact that courts played a minimal role in *effecting* a lasting policy remedy.⁷¹ In *Brown*, the Court clearly outlawed state-sanctioned racial segregation in education, but following the decision there was little real world effect without legislative follow up. Similar to the challenges to funding disparity and the effect on migrant and urban populations, as we will see in the *McDuffy* example, the Court was also left to monitor the progress of the mandated changes in the *Brown* era with little meaningful effect. In those early desegregation cases, local districts that wanted to eliminate segregation lacked any tools or roadmap for doing so, and were weak in the face of staunch political opposition. Those remedial rulings allowed school districts to proceed at a sluggish pace in removing firmly entrenched barriers to educational opportunity for minorities.⁷² This is mirrored in the

⁶⁹ *Cnty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787–98 (2007) (Kennedy, J., concurring).

⁷⁰ GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?*, 42–71 (1991) (arguing that power of courts to affect social change is limited to circumstances not present in the desegregation context).

⁷¹ Mark Tushnet, *Some Legacies of Brown v. Board of Education*, 90 VA. L. REV. 1693, 1694 (2004).

⁷² *Brown*, 349 U.S. at 301.

school finance litigation case of *McDuffy v. Secretary of Executive Office of Education*. Without a firm push from the courts to see real change through legislative action, it is unlikely that it will occur absent the crucial statutory law mandating it. If we take a lesson from history, we can see that courts will continue to be an inadequate means to change the system without legislative follow up to create policies effecting those changes, even when the right cases are brought.

The primary motivating factor for political change is accountability. As we have examined above, the convolution of responsibility for the regulation of education has failed to create an accountable source for our education policy under the administrative system. Congress has the critical ability to enforce its policies through legislation, and vests the responsibility for their enforcement in the electorate. Currently, national legislation on public education in the United States is extremely decentralized. School districts are predominantly responsible to develop policies through their own departments.⁷³ Because predominate responsibility for policy places accountability on school boards, the local level school districts are able to adapt to address their unique needs. This local policy creation and enforcement is also what hinders real change for those schools that most need it. Without critical resources to implement change via funding from the state and federal government, and without input from educator expertise, districts cannot effect change on their own.

One resource for districts to look to as they seek to formulate policies addressing the particular needs of urban and migrant school children is *The Technical Assistance for Student Assignment Plans Program*, which assists in “preparing, adopting, or modifying, and implementing student assignment plans to avoid racial isolation and resegregation . . . and to facilitate student diversity.”⁷⁴ School districts, “use these grant funds to seek assistance and expertise from student assignment specialists, demographers, community relations specialists, facility and other planners, or curriculum specialists and . . . specialists and consultants from academia,

⁷³ BRUCE D. BAKER ET AL., *IS SCHOOL FUNDING FAIR?* 37 (2010).

⁷⁴ *Technical Assistance Support for Student Assignment Plans Program*, OFFICE OF SCHOOL SUPPORT AND TECHNOLOGY PROGRAMS, <http://www2.ed.gov/programs/tasap/index.html> (last modified June 21, 2009).

non-profit organizations, civil rights organizations, and the private sector.”⁷⁵ Following the *Brown* decision, and prior to the passage of national legislation, the vast majority of African American students in southern states still attended fully segregated schools.⁷⁶ Absent the funds to develop policies with the help of experts, districts face a serious disadvantage as they seek to address critical problems through policy making. While local districts can formulate policy, it is critical that they also have the funds to implement these policies in the most effective way.

Legislation, which addressed the desegregation issues following the decisions in the *Brown* cases, turned out to be the most effective means to achieve mandated changes from the courts. The national legislature is a logical body to coordinate these efforts because there is a benefit of scale, the ability to create measurable requirements for funding across the board. The national legislature has the unique ability to seek expert help (advice) and implement mandatory change in a uniform way across the states.⁷⁷ Now, with the implantation of *Common Core Standards* through federal legislation, we can hope that the increased uniformity will translate to more progress toward change, though that it is not an absolute solution in itself to the problem without adequate funding. The government could regulate education finance to address this problem through the Commerce or Spending Clause of Article 1 Section 8 of the Constitution.

The Commerce Clause grants deference to branches of government seeking to regulate the flow of commerce.⁷⁸ Government has discretion to regulate things in the flow of commerce as it relates to channels or goods of Commerce,⁷⁹ instrumentalities of Commerce, or things bearing a substantial relation to interstate commerce. When the court considers which things bear a substantial relation to interstate

⁷⁵ *Id.*

⁷⁶ GARY ORFIELD AND JOHN T. YUN, *RESEGREGATION IN AMERICAN SCHOOLS*, 12 (1999).

⁷⁷ Epperson, *supra* note 32, at 237.

⁷⁸ U.S. CONST. art. 1, § 8, cl. 3 (Congress shall have power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes).

⁷⁹ *Gibbons v. Ogden*, 22 U.S. 1, 2 (1824).

commerce, they look at whether the action to be regulated is inherently commercial or is itself an economic transaction.⁸⁰ The racial segregation of restaurants has been recognized as falling within Congress' scope of regulation under the commerce clause,⁸¹ and could be extended to schools if the federal government so chooses as long as the limits of the prescribed regulation were judicially enforceable.

Recognizing education as bearing a substantial relationship to interstate commerce is only one solution. It could still be argued that education was delegated to the states through the Tenth Amendment. Congress could choose to regulate education finance through its power to tax and spend under the Spending Clause. Under the 10th Amendment, powers not granted to the federal government are reserved for the states;⁸² however, Article 1 Section 8 also grants the federal government the ability to offer funds for purposes that serve the public good⁸³ as long as states retain a meaningful choice in whether to accept the funds through participation.⁸⁴ States are bound by the conditions of acceptance if they want to get the funds being offered. Regulations may encompass all of the operations of an entity, any part of which is extended federal financial assistance. This broad general prohibition covers "race, color, and national origin," which has become important in schools.⁸⁵ The only problem with choosing to regulate under the Spending Clause is that policies must leave room for states to make a choice whether to adopt the regulation in order to receive funds, and many states could opt out. If states opt out, there

⁸⁰ *Heart of Atlanta Motel v. US*, 379 U.S. 241, 247–48 (1964) (regulating discrimination policy is an intra state activity that affects commerce, as it is inherently economic).

⁸¹ *Katzenbach v. McClung*, 379 U.S. 294, 299–300 (1964) (congressional authority under the Civil Rights Act of 1964 gives deference to federal legislation for policy to eliminate racial segregation in restaurants).

⁸² U.S. CONST. amend. X.

⁸³ U.S. CONST. art. 1, § 8, cl. 1 (gives the federal government of the United States its power of taxation. Component parts of this clause are known as the General Welfare Clause).

⁸⁴ *New York v. US*, 505 U.S. 144, 146 (1992) (holding that the Take Title provision of New York's Low Level Radio Active Waste Policy Amendments Act 1985 is unconstitutional because it does not give the states a meaningful choice to adopt and undermines accountability by forcing it onto the state).

⁸⁵ *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987) (where the federal government withheld 5% for states that don't raise the drinking age. They can do this. If the voters don't like it they can keep them in check through elections).

would still remain a lack of uniformity among them.

Whichever way Congress chooses to regulate the education finance system, the approach should consider the needs of low schools in urban and migrant areas and their particular disadvantages. A more uniform and less disparately impacting system should govern, perhaps one that does not base funding on property values or test scores. This is a critical area where *Common Core* falls short. While *Common Core* does create a more uniform system for testing and assessment, it does little to remedy the problems related to funding. Education reform will not be effective without the influence of communities and teacher expertise at the local level to inform policy makers of the unique issues schools face. If reform is simply a collaborative effort between the three statewide branches of government, it cannot work as we have seen by the example of *No Child Left Behind*. “A school reform strategy that works for an entire state will draw on the expertise and involvement of a diverse group of stakeholders including school boards, school administrators, teachers, teachers’ unions, parents, community leaders, and local businesses to address the individual needs and values of a local community.”⁸⁶ Because legislatures have the benefit of seeking expertise, this would likely be the best approach to address the specific challenges that urban and migrant areas face in how to provide for these low schools and help them to meet achievement requirements. Legislative action, while slow moving and tedious, is likely to be more swift and efficient than placing the burden on courts to oversee implementation of their own decisions, as this is exactly what the legislature was set up to do and the courts were not.

VII. CONCLUSION

It might be most appropriate for the federal government to step in and broadly regulate education funding through extensive education reform where disparity has found to negatively impact the adequacy of education. We have seen that lower funded schools are often in low property tax areas with high minority populations, and this has led to continuing

⁸⁶ Quintin A. Palfrey, *The State’s Role in Fulfilling Brown’s Promise*, 8 MICH. J. RACE & L. 1, 44 (2002).

de facto segregation in schools through the finance structure. Migrant and inner city urban districts have been most affected. While adequacy of funding continues to be challenged in courts, we have seen that the role of the courts in dealing with these problems has been largely unsuccessful in bringing change. There has been little real or meaningful change, because courts have been the mechanism primarily responsible for measuring progress of mandated changes and they have been willing to accept minimal efforts by states that move at a sluggish pace toward adequacy. Though funding is not the only obstacle for school improvement, often in low urban and migrant schools, it is a very important one. Courts, while not holding education to be a fundamental right, have recognized the great importance that education plays in developing our democratic citizens and preparing the next generation to be productive members of society, and it is thus critical that policy is matched by appropriate funding in order for our education system to operate efficiently. In the administrative process, where accountability is spread across the board, adequacy of education has fallen short.

We have looked extensively at the example of segregation and the movement from court decisions to legislative action in order to move progress forward. We have looked at the parallels in success and shortcomings of past desegregation, and examined the various challenges and approaches that federal legislation could take to move forward. I have proposed we follow the same model to address education funding disparity. If we expect to remain the free democratic nation that we always have been, with great influence the world over, we will need adequately educated citizens and the problems of the urban and migrant populations must be addressed. It is time for our electorate to recognize that the problems of the low migrant and urban schools affect all of us as American citizens and demand our legislature effect real and meaningful change within the school finance structure. The courts have already begun to see the pressing need for change, and without legislative action, court decisions alone cannot accomplish meaningful progress toward equality of opportunity for all school children.