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# MIDDLE-INCOME PEERS AS EDUCATIONAL RESOURCES AND THE CONSTITUTIONAL RIGHT TO EQUAL ACCESS

DEREK W. BLACK\*

**Abstract:** Concentrated poverty in public schools continues to be a leading determinate of the educational opportunities that minority students receive. Since the effective end of mandatory desegregation, advocates have lacked legal tools to address it. As an alternative, some advocates and scholars have attempted to incorporate the concerns of concentrated poverty and racial segregation into educational litigation under state constitutions, but these efforts have been slow to take hold. Thus, all that has remained for students in poor and minority schools is the hope that school finance litigation could direct sufficient resources to mitigate their plight. This Article offers another solution. Rather than simply importing concepts from federal desegregation into school finance, this Article articulates a unique theory of equal access to middle-income peers that is solidly grounded in state constitutional and school finance principles. In particular, it conceptualizes middle-income students as one of the educational resources that school districts allocate. As such, school finance principles of strategic and equitable distribution of resources apply. This theory is narrower than others and would not directly challenge segregation that exists between districts, but its narrowness is its doctrinal strength. Moreover, an empirical study of district-level practices reveals that conventional wisdom may have underestimated the level of inequality that occurs within districts. The racial inequality in access to middle-income peers within districts is vast and corresponds with dramatic shifts in achievement gaps, a core indicator of constitutional violations in school finance litigation.

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\* © 2012, Derek W. Black, Associate Professor of Law and Director of the Education Rights Center, Howard University School of Law. I would like to thank Dean John Charles Boger for supporting me with research assistants during my visit at the University of North Carolina School of Law. Joanne Campbell, in particular, provided invaluable assistance, without which I would have surely spent an additional year or more on this project. Vasanth Sridharan and Rais Akbar, interns with the Education Rights Center, also assisted in the early stages of developing this study. I would like to thank Richard Kahlenberg for his comments on an earlier draft.

## INTRODUCTION

Mandatory racial desegregation has almost run its course,<sup>1</sup> voluntary desegregation is subject to significant constitutional limits,<sup>2</sup> and school finance litigation is caught between progressive legal doctrine and empty state coffers.<sup>3</sup> Unfortunately, none of these efforts has come close to reaching its full potential before experiencing a serious setback.<sup>4</sup> Schools are as racially segregated today as they were four decades ago,<sup>5</sup> and predominantly poor and minority schools routinely receive thousands of dollars less per pupil than their suburban counterparts.<sup>6</sup> In short, today's schools are both segregated and unequal.<sup>7</sup> Given the severity of today's segregation and inequality, a racial achievement gap between whites and minorities equivalent to two years of learning by the eighth grade is not entirely surprising.<sup>8</sup> What is surprising is the dearth of policy and legal solutions to the problem.

Over the last decade, scholars have called for a "fourth wave" of school finance litigation that would combine racial desegregation and school finance into a single movement.<sup>9</sup> The idea has been that racial

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<sup>1</sup> Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1158–59 (2000) (recounting, as early as 2000, the various indicators that desegregation had come to an end, but empirically demonstrating that numerous consent decrees were still in place and enforced).

<sup>2</sup> See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 710–11 (2007).

<sup>3</sup> See John Dayton et al., *Brother, Can You Spare a Dime? Contemplating the Future of School Funding Litigation in Tough Economic Times*, 258 EDUC. L. REP. 937, 954 (2010) (“[C]ourts will face very difficult challenges in attempting to bridge the growing gap between constitutional ideals and fiscal realities if the General Assembly lacks public support and sufficient resources to fund remedies for school funding inequities and inadequacies.”).

<sup>4</sup> See Derek W. Black, *The Fatal Flaws of Education Reform: Causal Gaps and Doctrinal Incoherence* 2–3 (unpublished manuscript) (on file with author).

<sup>5</sup> GARY ORFIELD & CHUNGMEI LEE, *THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., BROWN AT 50: KING’S DREAM OR PLESSY’S NIGHTMARE?* 19 tbl.7 (2004) (showing a resegregation of schools back to 1970s levels).

<sup>6</sup> Ross Wiener & Eli Pristoop, *How States Shortchange the Districts That Need the Most Help*, in *FUNDING GAPS* (Educ. Trust, D.C.), Jan. 1, 2006, at 5, 7 tbl.4.

<sup>7</sup> Robert A. Garda, Jr., *Coming Full Circle: The Journey from Separate but Equal to Separate and Unequal Schools*, 2 DUKE J. CONST. L. & PUB. POL’Y 1, 53 (2007) (arguing that the distinction between *Plessey v. Ferguson*’s enforced segregation and today’s voluntary segregation “will not make a practical difference to our students, however, as our separate schools will continue to produce disparate educational opportunities for our poor and minority students” and concluding that school finance litigation, for instance, will counteract it).

<sup>8</sup> See NAT’L CTR. FOR EDUC. STATISTICS, *THE CONDITION OF EDUCATION 2009*, App. A, at 153 tbl.A-12-2, 157 tbl.A-13-2 (2009).

<sup>9</sup> See, e.g., Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1355–56 (2004); James E. Ryan, *Schools, Race, and*

and/or poverty isolation deprives students of their state constitutional right to an equal or adequate education.<sup>10</sup> As of yet, however, this theory has been slow to spread beyond the one court opinion that recognized it in 1996.<sup>11</sup> In fact, only a handful of advocates have even attempted to pursue integration through school finance claims.<sup>12</sup> Although the incorporation of integration into state-based concepts of equity or adequacy could potentially resolve some of the limitations desegregation experienced in federal court,<sup>13</sup> the strategy may attempt to prove too much. Including racial diversity within the concept of an equal or adequate education could effectively mean that schools across the board must be integrated. Even if the right was merely to a diverse environment rather than the racial balance typically pursued in federal desegregation,<sup>14</sup> an affirmative right to diversity under state constitutions would have a wider reach than federal desegregation, as an affirmative right would apply to all racial isolation regardless of its legal cause or geographic location. The practical result of an affirmative right to diversity or a prohibition on poverty isolation would be significant desegregation across school district lines.<sup>15</sup> In these respects, state-based integration claims would challenge the institutional authority and capacity of state courts at a level approaching that of federal desegregation.<sup>16</sup> These realities, although not a legitimate basis alone for courts to reject the claims, may have dissuaded integration theories in school finance litigation.

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*Money*, 109 YALE L.J. 249, 307–10 (1999); Christopher E. Adams, Comment, *Is Economic Integration the Fourth Wave in School Finance Litigation?*, 56 EMORY L.J. 1613, 1642 (2007).

<sup>10</sup> Ryan, *supra* note 9, at 308.

<sup>11</sup> Sheff v. O'Neill, 678 A.2d 1267, 1270–71 (Conn. 1996); see Goodwin Liu, *The Parted Paths of School Desegregation and School Finance Litigation*, 24 LAW & INEQ. 81, 82–83 (2006).

<sup>12</sup> See Hoke Cnty. Bd. of Educ. v. State, 599 S.E.2d 365, 397 (N.C. 2004); Paynter v. State, 797 N.E.2d 1225, 1226–27 (N.Y. 2003); *Sheff*, 678 A.2d at 1271; Class Action Complaint at 13–14, NAACP v. Minnesota, No. 27-CV-95-014800 (Minn. Dist. Ct. Sept. 19, 1995) [hereinafter NAACP Complaint].

<sup>13</sup> See, e.g., Milliken v. Bradley, 418 U.S. 717, 744–45 (1974) (limiting desegregation to school district boundaries); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 205–06 (1973) (limiting desegregation remedies to acts of intentional segregation).

<sup>14</sup> See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25–28 (1971) (indicating that statistical disparities from the overall district average are a starting point of analysis, and affirming the reassignment of students to different schools through altered attendance zones).

<sup>15</sup> See, e.g., *Sheff*, 678 A.2d at 1290–91; see also Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495, 495–96 (2010).

<sup>16</sup> See James K. Gooch, *Fenced In: Why Sheff v. O'Neill Can't Save Connecticut's Inner City Students*, 22 QUINNIPIAC L. REV. 395, 438–40 (2004) (discussing how practicalities, particularly crossing the school district boundary, has created serious opposition to the remedy in *Sheff*).

Not all integrative approaches to school finance, however, would necessarily confront these practical limitations or require significant expansions of precedent. In particular, this Article articulates a constitutional right to equal access to middle-income peers that operates most directly at the school district level and carries with it significant conceptual precedent. The theory is not that students can compel a state or school district to create racially or socioeconomically integrated environments where they would not otherwise exist, but that past school finance decisions provide a basis on which to constrain the distribution of middle-income students within individual school districts. This constitutional right flows from four basic principles, three of which already find solid support. First, although routinely referred to as school finance litigation because additional funding has been the primary remedy litigants have requested, the core holdings in school finance litigation establish constitutional guarantees of equal and quality educational opportunity that are about far more than money.<sup>17</sup> In fact, the constitutional violation in most cases is not funding inequity itself, but the substantive and outcome-based inequities that can result from funding inequity.<sup>18</sup> Second, constitutional duties to deliver a quality or an equal education extend to districts in addition to states.<sup>19</sup> To reason otherwise would afford districts wider constitutional latitude than states, even though the primary constitutional power and duty itself is vested with the state. Third, educational constitutional duties include an obligation of strategic and equitable resource distribution.<sup>20</sup> Courts have recognized that an abundance of resources will not guarantee equitable or quality educational opportunities without a careful and fair distribution of those resources. This principle is embodied in the very language of some states' educational clauses.<sup>21</sup>

The final conceptual step in a constitutional right to middle-income peers, however, is not as simple as the first three. It requires a

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<sup>17</sup> See *Sheff*, 678 A.2d at 1290–91; *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989) (defining the substance of the constitutional right as an adequate education and describing it in noneconomic terms).

<sup>18</sup> See, e.g., *Leandro v. State*, 488 S.E.2d 249, 254 (N.C. 1997).

<sup>19</sup> See *infra* notes 100–127 and accompanying text.

<sup>20</sup> See, e.g., *Rose*, 790 S.W.2d at 189 (requiring an “efficient” school system); *Hoke Cnty.*, 599 S.E.2d at 388–90 (requiring strategic allocation of resources); *Tenn. Small Sch. Sys. v. McWherter*, 894 S.W.2d 734, 738–39 (Tenn. 1995) (sanctioning the state’s mandate of fiscal responsibility on local districts); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979) (prohibiting resource waste and duplication and mandating efficiency).

<sup>21</sup> See KY. CONST. § 183 (mandating that the state “provide for an efficient system of common schools throughout the state”).

reorientation in thinking about educational resources and segregation. Legally relevant educational resources tend to be conceptualized as those things schools can buy, develop, or create that have positive impacts on educational outcomes.<sup>22</sup> This conceptualization is overly narrow and ignores reality. Schools enjoy any number of important resources that they do not and cannot buy, such as the communities, public services, partnerships, and private industries surrounding them that support the educational environment. The more important and direct noneconomic resource, however, is a school district's middle-income students. Common sense and social science indicate that students learn not only from their teachers, but also from their peers.<sup>23</sup> Middle-income peers (and their parents), in particular, bring a host of experiences, outside learning, and high expectations to schools that positively impact other students in their schools.<sup>24</sup> The percentage of middle income students in a school can be more important to the educational achievement of all students in that school than any other resource or factor.<sup>25</sup> Students, regardless of their individual socioeconomic status or race, achieve at higher levels in predominantly middle class schools and at lower levels in predominantly poor schools.<sup>26</sup> In short, although not a traditional resource that schools can buy, middle-income students are an invaluable resource that exerts significant influence on the achievement of all students.

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<sup>22</sup> Such a conceptualization is evident through courts' use of "cost out" studies to design remedies. William S. Koski, *Courthouses vs. Statehouses?*, 109 MICH. L. REV. 923, 939 (2011) (reviewing ERIC A. HANUSHEK & ALFRED A. LINDSETH, *SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING ACHIEVEMENT PUZZLE IN AMERICA'S PUBLIC SCHOOLS* (2009)); Benjamin Michael Superfine, *New Directions in School Funding and Governance: Moving from Politics to Evidence*, 98 KY. L.J. 653, 664–67 (2009).

<sup>23</sup> RICHARD D. KAHLBERG, *ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE* 47–76 (2001).

<sup>24</sup> *Id.* at 49–58; Myron Orfield, *Choice, Equal Protection, and Metropolitan Integration: The Hope of the Minneapolis Desegregation Settlement*, 24 LAW & INEQ. 269, 273 (2006).

<sup>25</sup> See JAMES S. COLEMAN ET AL., *DEP'T OF HEALTH, EDUC., & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY* 21–22 (1966).

<sup>26</sup> *Id.* at 302–10; KAHLBERG, *supra* note 23, at 6; UNC CTR. FOR CIVIL RIGHTS, *THE SOCIOECONOMIC COMPOSITION OF THE PUBLIC SCHOOLS: A CRUCIAL CONSIDERATION IN STUDENT ASSIGNMENT POLICY* 1–4 (2005) [hereinafter *SOCIOECONOMIC COMPOSITION OF THE PUBLIC SCHOOLS*], available at <http://www.law.unc.edu/documents/civilrights/briefs/charlottereport.pdf>; Geoffrey D. Borman & Maritza Dowling, *Schools and Inequality: A Multi-level Analysis of Coleman's Equality of Educational Opportunity Data*, 112 TCHRS. C. REC. 1201, 1201–02 (2010); McUsic, *supra* note 9, at 1355–56; Laura B. Perry & Andrew McConney, *Does the SES of the School Matter? An Examination of Socioeconomic Status and Student Achievement Using PISA 2003*, 112 TCHRS. C. REC. 1137, 1137–38 (2010).

Yet, reorienting the concept of educational resources to include middle-income students, by itself, is not enough. Courts must also reorient their perception of poverty and racial segregation. Poverty and racial segregation today are perceived as inevitable, beyond the control of states and districts, and natural.<sup>27</sup> Of course, it is true that school districts have almost no control over the total number of middle-income and poor students in their districts, but they have complete control over the assignment of those middle-income and poor students who are enrolled in their districts. Conventional wisdom over the past two decades, however, has been to ignore this basic fact and the problem of segregation within districts because the most extreme and extensive segregation exists between districts.<sup>28</sup> Although conventional wisdom may be correct in its assessment of inter-district segregation, it does not follow that segregation within districts is not occurring or serious.<sup>29</sup>

To the contrary, this Article's empirical study of access to middle-income peers reveals that many school districts have the capacity to expose all students to middle-income environments, but instead deny minorities of the experience. Interestingly, the study also uncovers a pattern of many other school districts doing the opposite by providing minority students equal access to middle-income environments. The fact that this inequality of access is occurring within the confines of individual school districts, but not others, demonstrates that the current racially and socioeconomically isolated nature of many districts is not inevitable. Rather, districts are making choices about how they distribute valuable resources—too often to the disadvantage of minorities.

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<sup>27</sup> See, e.g., *Freeman v. Pitts*, 503 U.S. 467, 494–95 (1992); *Thomas Cnty. NAACP v. City of Thomasville Sch. Dist.*, 299 F. Supp. 2d 1340, 1358 (M.D. Ga. 2004); see also Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1661–62 (1995) (“[R]ace derives much of its power from seeming to be a natural or biological phenomenon or, at the very least, a coherent social category. For whites, residential segregation is one of the forces giving race a ‘natural’ appearance . . . . The appearance that this is ‘the way things are’ . . . tends to make prevailing patterns of race, ethnicity, power, and the distribution of privilege appear as features of the natural world.”); John A. Powell & Stephen M. Menendian, *Remaking Law: Moving Beyond Enlightenment Jurisprudence*, 54 ST. LOUIS U. L.J. 1035, 1095 (2010) (reasoning that old decisions such as *Milliken v. Bradley* have legitimized segregation).

<sup>28</sup> See Sean F. Reardon & John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990–2000*, 81 N.C. L. REV. 1563, 1575–80 (2003) (discussing the gravity of interdistrict school segregation and its relationship to housing segregation); see also CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* 73 tbl.A2.3 (2004) (estimating that sixty-nine percent of segregation in metropolitan areas is due to segregation between districts).

<sup>29</sup> Reardon & Yun, *supra* note 28, at 1575–81 (indicating that the full extent of school segregation is not attributable to residential or inter-district segregation, as student assignment policies exacerbate the problem).

Consistent with the literature, this unequal access to middle class peers also appears to have consequences for minority students' academic achievement. After identifying the varying levels of equitable and inequitable access, this Article takes the next step and analyzes whether racial inequality in access to middle-income peers correlates with any change in the racial achievement gap. It finds that, in general, those districts with the most inequitable access for minorities also have the largest achievement gaps, whereas districts that provide minorities the most equitable access have the smallest achievement gaps. Thus, this empirical evidence not only forces a reorientation of how one perceives racial inequality in student assignments, but suggests that a widespread pattern of segregative student assignments and large achievement gaps persists that would otherwise be inconsistent with a constitutional right to equal access to middle-income peers.

This Article proceeds in three parts. Part I recounts past efforts to assert segregation-related claims within the context of school finance litigation and precedent, as well as the scholarly theories supporting and urging the expansion of these efforts.<sup>30</sup> Part I concludes by distinguishing these past efforts from this Article's theory and explaining the legal and practical advantages of pursuing intra-district claims of unequal access to middle-income peers.<sup>31</sup> Part II offers a full and detailed explanation of the legal precedent and social science evidence that would establish a constitutional right to equal access to middle-income peers.<sup>32</sup> Part III describes the methodology and results of this Article's empirical analysis of racially unequal access to middle-income peers and its correlation with changes in the racial achievement gap.<sup>33</sup> The Article concludes by urging that courts and advocates take the relatively small step of ensuring equal treatment in regard to one of school districts' most vital resources.

## I. PAST CHALLENGES TO POVERTY AND RACE SEGREGATION

The doctrinal intersection between state constitutional rights to education and the problem of concentrated poverty is relatively underdeveloped by courts and scholars. To the extent courts and scholars have addressed the issue at all, they have addressed it only in regard to segregation between districts, not within them, and the analysis has

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<sup>30</sup> See *infra* notes 34–92 and accompanying text.

<sup>31</sup> See *infra* notes 34–92 and accompanying text.

<sup>32</sup> See *infra* notes 93–255 and accompanying text.

<sup>33</sup> See *infra* notes 256–301 and accompanying text.



been preliminary in most respects. A review of the litigation and literature, however, is helpful in identifying the challenges of pursuing integration theories through state constitutions and why past efforts have not yet spread widely. For both practical and doctrinal reasons, these prior theories have faced an uphill battle. But a theory of equal access to middle-income peers within school districts is distinct from these past efforts in key respects. First, by definition, this Article's theory does not challenge historical school district lines, which have proven to be sticking points elsewhere. By focusing on current intra-district patterns, this Article avoids important political, practical, and legal impediments. Second, recognizing a right to equal access to middle-income peers does not require the large expansion of precedent that other theories might. Rather, it arguably only requires the application of existing precedent to current decisions and patterns within districts. In short, notwithstanding the past, this Article offers a viable strategy for addressing certain forms of segregation through state educational rights.

#### A. *Litigation Strategies and Outcomes*

Racial segregation and concentrated poverty have previously been addressed almost exclusively through federal school desegregation litigation.<sup>34</sup> In most school districts, racial desegregation also led to socioeconomic desegregation.<sup>35</sup> As a result, pursuing separate legal theories to address socioeconomic segregation on its own was never a pressing concern, particularly during the period when courts were receptive to racial desegregation claims.<sup>36</sup> Changes in federal law, however, eventually limited advocates' ability to pursue racial desegregation claims.<sup>37</sup> In the 1973 case *Keyes v. School District No. 1*, the U.S. Supreme Court held that plaintiffs must establish intentional segregation to justify school desegregation remedies.<sup>38</sup> The significance of this requirement only grew as time passed and the connection between current segregation

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<sup>34</sup> See *infra* notes 35–69 and accompanying text.

<sup>35</sup> Much of the academic benefit of racial desegregation was attributable to the fact that it tended to also reduce the socioeconomic isolation of minority students. See generally GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY (2005), available at [http://bsdweb.bsdl.org/district/EquityExcellence/Research/Why\\_Segreg\\_Matters.pdf](http://bsdweb.bsdl.org/district/EquityExcellence/Research/Why_Segreg_Matters.pdf) (exploring school and student segregation by poverty and how it relates to racial inequality); GARY ORFIELD, MUST WE BUS? SEGREGATED SCHOOLS AND NATIONAL POLICY 69 (1978).

<sup>36</sup> See ORFIELD, *supra* note 35, at 69.

<sup>37</sup> See *Keyes*, 413 U.S. at 208–10.

<sup>38</sup> See *id.*

and past discrimination became less clear.<sup>39</sup> Moreover, the problem existed from the outset in many northern districts where schools were never segregated by law.<sup>40</sup>

In 1975, two years after *Keyes*, the Court in *Milliken v. Bradley* held that, absent substantial evidence of intentional efforts to segregate students between school districts, school desegregation remedies cannot extend beyond the boundaries of the primary offending school district.<sup>41</sup> The result of these two decisions was to leave untouched any segregation that could not be precisely connected to intentional discrimination by schools and to protect the rapidly increasing segregation between districts that resulted as whites fled inner-city school districts to escape desegregation.<sup>42</sup> Nonetheless, desegregation orders were effective in dramatically increasing integration for two decades in many districts, but the withdrawal of federal mandates starting in the late 1980s allowed even those districts to “re-segregate” to levels that resemble those of the late 1960s when desegregation had begun in earnest.<sup>43</sup>

The period of federal limitations on desegregation coincided with the increase in state-based theories of educational equity. In fact, desegregation advocates were instrumental in early school finance litigation, as some believed that equality of funding was as important as racial integration, if not more.<sup>44</sup> School finance claims, however, were not predicated on race. They were based on securing resources for disadvantaged students and districts in general, of which minority students and districts are only a subset.<sup>45</sup> The point was to reform state finance structures, not local school district boundaries or school attendance zones. Thus, racial integration as a remedy was almost entirely irrelevant to school finance litigation. As racial desegregation became more untenable in federal court, however, desegregation advocates began to consider how they might utilize and build on the success of school finance

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<sup>39</sup> See, e.g., *Pitts*, 503 U.S. at 498–99; see also James S. Liebman, *Desegregating Politics: “All-Out” School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1513–17 (1990).

<sup>40</sup> See *Keyes*, 413 U.S. at 218–19.

<sup>41</sup> *Milliken*, 418 U.S. at 752–53.

<sup>42</sup> Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1469–70 (2003).

<sup>43</sup> ORFIELD & LEE, *supra* note 5, at 19 tbl.7.

<sup>44</sup> RICHARD F. ELMORE & MILBREY WALLIN McLAUGHLIN, REFORM AND RETRENCHMENT: THE POLITICS OF CALIFORNIA SCHOOL FINANCE REFORM 35–36 (1982); see also Christopher R. Lockard, *In the Wake of Williams v. State: The Past, Present, and Future of Education Finance Litigation in California*, 57 HASTINGS L.J. 385, 387 (2005) (noting the work of Derrick Bell, a former desegregation attorney, on early school finance litigation).

<sup>45</sup> Ryan, *supra* note 9, at 252.

precedent in state court.<sup>46</sup> State-based theories could potentially free desegregation advocates of the problems of proving intentional discrimination and securing desegregation remedies across districts.<sup>47</sup>

The first and most important of these attempts culminated in the 1996 Connecticut Supreme Court case *Sheff v. O'Neill*.<sup>48</sup> In *Sheff*, the plaintiffs made two distinct but interrelated arguments: first, that de facto segregation violated the state constitution's guarantee of equal educational opportunity; and second, that the economic and racial segregation in the state deprived students of an adequate education.<sup>49</sup> The court held that racial segregation, whether intentional or de facto, violated students' rights to equal educational opportunities, but it rejected the argument that poverty and racial isolation deprived students of an adequate education, finding that the plaintiffs had not properly argued or established the latter point in the lower courts.<sup>50</sup> Nothing in the court's opinion, however, was inconsistent with recognizing that segregation deprives students of an adequate education in the future. Regardless, the holding in *Sheff* was encouraging for those considering similar efforts in other states, but litigation elsewhere has ultimately been limited and produced mixed results. Only two other significant litigation efforts have proceeded, and only one has led to a published opinion.<sup>51</sup>

The next effort following *Sheff* was in Minnesota. In 1995, in *NAACP v. Minnesota*, the plaintiffs filed a complaint that squarely focused on the barriers to an adequate education created by concentrated poverty and racial segregation, forcing the issue that *Sheff* avoided.<sup>52</sup> The plaintiffs emphasized that "68 percent of Minneapolis students were

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<sup>46</sup> SUSAN EATON, *THE CHILDREN IN ROOM E4: AMERICAN EDUCATION ON TRIAL* 88–91 (2007).

<sup>47</sup> See Saiger, *supra* note 15, at 513–14 (describing *Sheff* as overcoming the school district boundary problem that *Milliken* created); Gayl Shaw Westerman, *The Promise of State Constitutionalism: Can It Be Fulfilled in Sheff v. O'Neill?*, 23 HASTINGS CONST. L.Q. 351, 384–86 (1996).

<sup>48</sup> 678 A.2d 1267 (Conn. 1996).

<sup>49</sup> *Id.* at 1302 (Borden, J., dissenting).

<sup>50</sup> *Id.* at 1289 (majority opinion).

<sup>51</sup> Plaintiffs in one other instance intervened in a school finance case and claimed among other things that resegregation in Charlotte, North Carolina was impeding their ability to obtain a sound basic education, but the trial court never took any action in regard to the claim. Second Amended Complaint by Plaintiff-Intervenors CMS Students and Charlotte-Mecklenburg NAACP at 3–5, *Hoke Cnty. v. Charlotte-Mecklenburg Bd. of Educ.*, No. 95 CVS 1158 (Wake Cnty. Sup. Ct. Sept. 30, 2005), available at <http://www.law.unc.edu/documents/civilrights/briefs/2ndamendedcomplaint.pdf>; see also *Paynter*, 797 N.E.2d at 1225; NAACP Complaint, *supra* note 12, at 2, 9–15.

<sup>52</sup> NAACP Complaint, *supra* note 12, at 2, 9–15.

students of color and 66 percent were eligible for free or reduced-price lunch, compared with a statewide population that was 14 percent minority and 26 percent FARM eligible.”<sup>53</sup> Plaintiffs also cited research that indicated “low-income students were twice as likely to achieve at high levels if they attended suburban schools” to substantiate their claim that segregation in Minneapolis schools was inhibiting their ability to obtain an adequate education.<sup>54</sup> A settlement between the parties, however, preempted the Minnesota courts from reaching the merits of the claim.<sup>55</sup>

The Minneapolis litigation was followed by similar litigation that made it to New York’s highest court in 2003. In *Paynter v. State*,<sup>56</sup> the plaintiffs argued that the high-poverty concentration in Rochester City School District led to widespread academic failure in contrast to the surrounding districts, and that this failure demonstrated students were receiving inadequate educational opportunities.<sup>57</sup> This time, unlike *Sheff* and *NAACP*, the state’s highest court issued a decision directly addressing whether the harms of concentrated poverty deprive students of an adequate education.<sup>58</sup> New York’s highest court found that “allegations of academic failure alone, without allegations that the State . . . [does not] provide minimally acceptable educational services, are insufficient to state a cause of action under the Education Article [of New York’s Constitution].”<sup>59</sup> The court’s opinion, however, should not be read in isolation because, on the same day that it rejected the claims in *Paynter*, the court upheld a school finance claim on behalf of New York City’s predominantly poor and minority students in *Campaign for Fiscal Equity, Inc. v. State*.<sup>60</sup>

The claims in *Campaign for Fiscal Equity* were distinct from *Paynter*. The claim of inadequate education in *Campaign for Fiscal Equity* was primarily premised on insufficient financial support from the state, which allowed the plaintiffs to meet the court’s required showings of both inadequate inputs and outputs, and the interconnection between

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<sup>53</sup> KAHLBERG, *supra* note 23, at 175; see NAACP Complaint, *supra* note 12, at 2, 9–15.

<sup>54</sup> Adams, *supra* note 9, at 1644; see NAACP Complaint, *supra* note 12, at 2, 9–15.

<sup>55</sup> KAHLBERG, *supra* note 23, at 176; Settlement Agreement Between Named Plaintiffs in *NAACP v. Minnesota* and *Xiong et al. v. Minnesota* and the State of Minnesota, May 16, 2000 (on file with author). Yet, the settlement did give Minneapolis students the opportunity to attend the suburban schools. KAHLBERG, *supra* note 23, at 176.

<sup>56</sup> *Paynter*, 797 N.E.2d at 1227.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1229.

<sup>59</sup> *Id.*

<sup>60</sup> 801 N.E.2d 326, 340 (N.Y. 2003).

the two.<sup>61</sup> New York's highest court has tended to conceptualize inputs as tangible resources such as buildings, books, teachers, and services.<sup>62</sup> Finance claims fall squarely within this approach. The claim in *Paynter* was premised on the concentration of poverty created by school district boundaries and the inadequate education that accompanies it, not on a traditional input deprivation.<sup>63</sup> Consequently, the court interpreted their claims as implicating demographic patterns that are disconnected from state policy or resources.<sup>64</sup> Even if the plaintiffs established inadequate education in Rochester, they did not connect the inadequacy to a resource deprivation attributable to the state.<sup>65</sup> The most favorable reading of the case is that the court's rejection of the claim in *Paynter* speaks more to the precise nature and limits of the constitutional right to education in New York rather than a conceptual rejection of the plaintiffs' claim.<sup>66</sup> The less favorable reading is that the court was implicitly rejecting the conceptual underpinnings of the claim, but simply used the factual distinctions from *Campaign for Fiscal Equity* to reach the desired result.<sup>67</sup>

The lessons to take from these three cases are not entirely clear. *Sheff* is the only case to generate positive judicial precedent. Some conclude that the holding is not easily transferrable to other states because the court's theory was tied to an idiosyncratic constitutional clause.<sup>68</sup> Yet, others have minimized the importance of any idiosyncrasy in Connecticut's constitution and pointed out that other states have sufficiently similar constitutions to justify expansion of *Sheff's* theory.<sup>69</sup> Either way, the two subsequent attempts to replicate *Sheff* failed to produce a positive precedential opinion. The settlement in Minnesota was a practical victory for the plaintiffs, but not a lasting principle. One could also distinguish easily enough the outcome in *Paynter* based on its factual and precedential context, but one is still left in the position of asking a court to recognize a claim that no other court previously has. The fact that so few litigants have attempted to replicate these cases' theories or distinguish their outcomes is, in part, an unfortunate testament to this reality.

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<sup>61</sup> *Id.* at 332 n.3.

<sup>62</sup> *Id.* at 331–32.

<sup>63</sup> *Paynter*, 797 N.E.2d at 1227.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1229.

<sup>66</sup> *See id.* at 1229–31.

<sup>67</sup> *See id.*

<sup>68</sup> *See infra* notes 88–91 and accompanying text.

<sup>69</sup> *See Ryan, supra* note 9, at 252.

### B. Scholarly Theories

Scholars and policy advocates have been far more apt than courts to explore socioeconomic integration theories. On the policy side, Richard Kahlenberg has been the most visible proponent, arguing that the increases in academic achievement that coincided with racial integration were primarily a result of the socioeconomic integration that accompanied racial integration, and that socioeconomic integration is more legally defensible than racial integration.<sup>70</sup> Thus, socioeconomic integration might be both educationally and legally preferable. Others have made similar or related arguments.<sup>71</sup> For some, however, the allure may be the potential to indirectly pursue voluntary racial desegregation without being subject to equal protection strict scrutiny, with the key word being voluntary.<sup>72</sup> At least in some instances, these theories are not about a right to racial or socioeconomic integration, but about defending voluntary desegregation.<sup>73</sup> In short, the existence of poverty isolation does not implicate a legal wrong.

Another body of scholarship, in contrast, situates the problem of poverty concentration within the context of state constitutional rights to an adequate or quality education. Shortly after the decision in *Sheff*, James Ryan argued that advocates should pursue a fourth wave of school finance litigation.<sup>74</sup>

[I]nstead of arguing for equalized or adequate resources, school “finance” plaintiffs should consider arguing for socioeconomic or racial integration, or both. Relying on the social

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<sup>70</sup> See, e.g., RICHARD D. KAHLENBERG, THE CENTURY FOUND., RESCUING *BROWN V. BOARD OF EDUCATION*: PROFILES OF TWELVE SCHOOL DISTRICTS PURSUING SOCIOECONOMIC SCHOOL INTEGRATION 3–5 (2007); Richard D. Kahlenberg, *Socioeconomic School Integration*, 85 N.C. L. REV. 1545, 1546–47 (2007).

<sup>71</sup> See, e.g., Eboni S. Nelson, *The Availability and Viability of Socioeconomic Integration Post-Parents Involved*, 59 S.C. L. REV. 841, 849 (2008); 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, 283–84 (2009); Jacob E. Meusch, Note, *Equal Education Opportunity and the Pursuit of “Just Schools”: The Des Moines Independent Community School District Rethinks Diversity and the Meaning of “Minority Student,”* 95 IOWA L. REV. 1341, 1365 (2010).

<sup>72</sup> See, e.g., Robert A. Garda, Jr., *The White Interest in School Integration*, 63 FLA. L. REV. 599, 645–49 (2011); Nelson, *supra* note 71, at 843–44.

<sup>73</sup> See, e.g., Robinson, *supra* note 71, at 283 (“[G]overnments should be given wide latitude to adopt race-neutral efforts to avoid racial isolation and create diverse schools . . . .”); Kristi L. Bowman, *A New Strategy for Pursuing Racial and Ethnic Equality in Public Schools*, 1 DUKE F. FOR L. & SOC. CHANGE 47, 66–68 (2009) (discussing the possibility of using socio-economic status to continue voluntary desegregation efforts).

<sup>74</sup> Ryan, *supra* note 9, at 307–10.

science evidence that demonstrates the short- and long-term benefits of socioeconomic and racial integration, plaintiffs should be able to formulate an argument that racial and socioeconomic integration are necessary components of a student's constitutional right to an equal or adequate education.<sup>75</sup>

Ryan further emphasized that this move might be necessary if students are to actually receive equal and adequate educational opportunities because additional resources alone in high-poverty, racially isolated districts are likely to be insufficient.<sup>76</sup> Five years later, Molly McUsic, reflecting on the fiftieth anniversary of *Brown v. Board of Education*,<sup>77</sup> staked out a similar theory, arguing that school finance should serve as a continuation of *Brown's* legacy.<sup>78</sup> Like Ryan, she indicated that socioeconomic integration or the alleviation of concentrated poverty is necessary and, thus, a part of the affirmative right to education under state constitutions.<sup>79</sup> Since then other scholars have seconded Ryan and McUsic's point and, in some instances, delved deeper into the details and implications of such a claim.<sup>80</sup> As indicated above, however, this scholarly fervor has not yet been vindicated.

### C. *The Legal and Practical Distinctions of Intra-District Poverty Segregation*

Although relevant, the previous theories and attempts to use state constitutional law to address segregation are conceptually distinct from this Article's theory. In particular, the litigation efforts and scholarship are largely, if not exclusively, premised on securing inter-district desegregation,<sup>81</sup> whereas this Article proceeds on the narrower basis of intra-district poverty desegregation. Because more segregation exists be-

<sup>75</sup> *Id.* at 308.

<sup>76</sup> *Id.*

<sup>77</sup> 347 U.S. 483 (1954).

<sup>78</sup> McUsic, *supra* note 9, at 1335.

<sup>79</sup> *Id.*

<sup>80</sup> Liu, *supra* note 11, at 101–06 (calling for a synthesis of school finance litigation and desegregation); Orfield, *supra* note 24, at 330–33; Adams, *supra* note 9, at 1639–42; Angela Ciolfi, Note, *Shuffling the Deck: Redistricting to Promote a Quality Education in Virginia*, 89 VA. L. REV. 773, 799–822 (2003); Julie Zwibelman, Note, *Broadening the Scope of School Finance and Resource Comparability Litigation*, 36 HARV. C.R.-C.L. L. REV. 527, 529–30 (2001) (arguing that school finance litigation should broaden its scope and including desegregation as a point of focus); see also Aaron Jay Saiger, *School Choice and States' Duty to Support "Public" Schools*, 48 B.C. L. REV. 909, 969 (2007) (arguing that state educational clauses include the right of parents to choose to send their children to public schools other than those in their neighborhood).

<sup>81</sup> See, e.g., Gooch, *supra* note 16, at 396–98; Orfield, *supra* note 24, at 273–76; Saiger, *supra* note 15, at 516–27.

tween school districts than within them,<sup>82</sup> inter-district desegregation is both a preferable and necessary component to addressing the needs of many students attending high-poverty schools. But inter-district desegregation carries with it any number of practical and legal challenges that are minimized or nonexistent with intra-district claims.<sup>83</sup>

On the practical side, intra-district desegregation, by definition, entails a smaller and more compact geographic area. Thus, a district has a far less tenable basis for arguing that desegregation is infeasible or impracticable.<sup>84</sup> In addition, school district boundaries, although arbitrary on some level, are often long-standing, and the demographic populations of the districts are largely a result of demographic shifts that occurred independently and long after districting.<sup>85</sup> Neither the boundaries, nor the demographics shifts within them, are necessarily related to any recent state education policy.<sup>86</sup> Thus, as a matter of perception, district lines bear the imprimatur of tradition and neutrality.

In contrast, student assignment policies and boundaries within districts are constantly in flux.<sup>87</sup> As a result, a legal remedy that affects intra-district policies would seem far less radical or disruptive than an inter-district remedy. Likewise, because intra-district boundaries are subject to perpetual change and debate, the active role the school system plays in deciding where students attend school is far more obvious, whereas the demographic differences between school districts can appear to be a function of private choices rather than current public policy. This is not to suggest that the state lacks responsibility for its decisions to maintain historical school district boundaries, but only that the perception of state and local policy is different.

This Article's theory is, likewise, doctrinally distinct from others. First, neither the positive decision in *Sheff*, nor the negative one in *Paynter*, is directly applicable to this Article's theory of intra-district poverty segregation. *Sheff* is not controlling nor clearly analogous in so

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<sup>82</sup> Reardon & Yun, *supra* note 28, at 1573–74.

<sup>83</sup> The history of racial desegregation has plainly demonstrated a reluctance on the part of the courts to order interdistrict desegregation. *See, e.g., Milliken*, 418 U.S. at 752–53 (limiting desegregation to school district boundaries).

<sup>84</sup> For instance, the Court in *Milliken v. Bradley* focused on the complexity of school finances and local responsibility issues that would arise if students were crossing boundaries, as well as transportation burdens. *Id.* at 741–43.

<sup>85</sup> *See Saiger, supra* note 15, at 499–501.

<sup>86</sup> *See id.* *But see Evans v. Buchanan*, 393 F. Supp. 428, 438–40 (D. Del. 1975) (finding that the state had recently reorganized its school districts in a way that increased segregation).

<sup>87</sup> *See Saiger, supra* note 15, at 536–38.



far as the claim there is tied to a unique constitutional clause.<sup>88</sup> Its constitution provides, “No person shall be denied the equal protection of the law *nor be subjected to segregation or discrimination . . . because of . . . race [or] . . . ancestry . . .*,”<sup>89</sup> which the court interpreted to prohibit both intentional and unintentional school segregation.<sup>90</sup> This rationale is potentially applicable to at least two other state constitutions, but may not be to others.<sup>91</sup>

Second, constitutional idiosyncrasies aside, the focus on intra-district segregation simply implicates a different legal analysis and structure. Foremost, this Article does not conceptualize the constitutional problem as segregation *per se*, but as inequitable resource distribution. Where a district is predominantly poor, a constitutional violation would not arise from the fact that all of its schools are predominantly poor. In effect, the district would only be constitutionally charged with fairly utilizing the resources it has, and middle-income students are not one of them. But in districts that have a significant percentage of middle-income students, the system has an existing resource that it chooses how to allocate each year. These districts would be constitutionally responsible for equitably allocating these resources, which means avoiding the overconcentration of poor or middle-income students in particular schools. Thus, this Article does not tackle the problem of demographic shifts within states, between districts, or even the increase in poverty levels in a district as a whole. It takes poverty or wealth at the district level as a given and potentially beyond the district’s control. But this Article’s theory draws a constitutional distinction in regard to those middle-income and poor students enrolled in a district because these students

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<sup>88</sup> John C. Brittain, *Why Sheff v. O’Neill Is a Landmark Decision*, 30 CONN. L. REV. 211, 217–18 (1997); Rachel F. Moran, *Milo’s Miracle*, 29 CONN. L. REV. 1079, 1096 (1997); Alicia L. Mioli, Note, *Sheff v. O’Neill: The Consequence of Educational Table-Scraps for Poor Urban Minority Schools*, 27 FORDHAM URB. L.J. 1903, 1909 (2000) (“Integrationists have hailed *Sheff* as a landmark decision because of its unique qualities. . . . *Sheff* is the only school segregation case in force today that is based on state law, rather than federal law. Second, *Sheff* mandated an interdistrict remedy that is now nearly impossible in federal desegregation cases.”).

<sup>89</sup> CONN. CONST. art. I, § 20 (amended 1974, 1984) (emphasis added).

<sup>90</sup> *Sheff*, 678 A.2d at 1282–83.

<sup>91</sup> New Jersey and Hawaii’s constitutions also contain segregation prohibitions. HAW. CONST. art. I, § 9 (amended 1978) (guaranteeing that no citizen shall be “segregated [in the military] because of race, religious principles, or ancestry”); N.J. CONST. art. I, ¶ 5 (“No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.”); see also Bernard K. Freamon, *The Origins of the Anti-Segregation Clause in the New Jersey Constitution*, 35 RUTGERS L.J. 1267, 1311–24 (2004).

are within the district's control. Their existence or nonexistence cannot be blamed on the state or third parties. Recognizing that they are a crucial resource in the delivery of adequate or equal educational opportunities, the district would be constitutionally bound to refrain from policies that offer these resources to one group of students but not others.<sup>92</sup>

Of course, this rationale could extend upward to a state's districting policies, but the clarity of the inequity and the concept of resource distribution are less obvious when one moves beyond the district. The point of challenging intra-district poverty segregation is to show that it is not inevitable and, thus, it is universally problematic. Moreover, challenging this segregation does not require a grand theory of a state's responsibility or even poverty concentration as a per se violation of constitutional norms. It only requires acknowledging that districts must treat students within their borders equally in regard to constitutional or affirmative rights—a concept so basic and accepted that, after the Court announced *Brown v. Board of Education*, it has often warranted no judicial analysis at all.

## II. A CONSTITUTIONAL RIGHT TO EQUAL ACCESS TO MIDDLE-INCOME PEERS

A constitutional right to equal access to middle-income peers follows from three relatively simple and largely uncontested principles in school finance law. First, students have a right to educational opportunities that lead to positive outcomes.<sup>93</sup> Funding, albeit important, is relevant only because of its indirect effects on this right. Second, local school districts' responsibility for delivering educational opportunities is not obviated or diminished by a state's ultimate responsibility for funding, monitoring, or structuring education.<sup>94</sup> Third, like a state's responsibility to equitably or adequately fund and support education at the district level, districts have a responsibility to equitably or adequately distribute the resources they receive from the state.<sup>95</sup> Within this framework, one need only recognize that middle-income peers are one of a district's resources to establish a constitutional right to equitable access to middle-income peers.

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<sup>92</sup> See *infra* notes 96–173 and accompanying text.

<sup>93</sup> See *infra* notes 96–127 and accompanying text.

<sup>94</sup> See *infra* notes 100–127 and accompanying text.

<sup>95</sup> See *infra* notes 128–173 and accompanying text.

A. *The Right to Equitable and Quality Educational Opportunities,  
Not Just Money*

The remedy sought in state constitutional education litigation has almost uniformly been additional funding for local school districts.<sup>96</sup> But additional funding is not an end in and of itself. Funding is relevant only because it can purchase the critical inputs, such as teachers and curricula, which are necessary to offer students an equal educational opportunity or some qualitative level of education.<sup>97</sup> The ultimate issue is whether students are receiving the appropriate constitutional education,<sup>98</sup> which can be jeopardized through any number of state and local school policies, only one of which is financing.<sup>99</sup> For instance, the state can just as easily deprive students of a quality education by adopting an out-dated curriculum that focuses on the skills needed for an agrarian society as it can by inadequately funding a modern curriculum. Thus, the constitutional right to an education places not only financial obligations on the state, but various other duties that are necessary to ensure students receive equal educational opportunities or a quality education.

B. *Educational Responsibility Extends to the Local Level*

Although most states bear the ultimate responsibility for educational failures,<sup>100</sup> local school districts are also responsible for supporting and delivering a constitutional education. States delegate extensive responsibilities to school districts, including financial, staffing, and implementation decisions.<sup>101</sup> States are responsible for setting up an educational structure and monitoring local activities, but the daily and practical aspects of delivering a constitutional education rest within the purview and discretion of school districts.<sup>102</sup> The misguided exercise of

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<sup>96</sup> See Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1074–75 (1991).

<sup>97</sup> See Ryan, *supra* note 9, at 308 (arguing that the right to an adequate or equal education encompasses far more than just money); James E. Ryan, Essay, Sheff, *Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 532 (1999).

<sup>98</sup> See, e.g., *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 666 (N.Y. 1995); *Hoke Cnty. v. State*, 599 S.E.2d 365, 373 (N.C. 2004).

<sup>99</sup> See Ryan, *supra* note 9, at 253–54.

<sup>100</sup> See Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1527 (2007) (noting plaintiff victories against the state in over half of the states).

<sup>101</sup> See Aaron Jay Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 864–67 (2006) (discussing the extensive delegation of duties to school districts).

<sup>102</sup> See *id.*

school district discretion can just as easily lead to inadequate education as state funding shortfalls and misguided state policy.

School finance litigation, at the broadest level, has been a battle between states and school districts over educational responsibilities.<sup>103</sup> Traditionally, education was treated as almost solely the responsibility of local districts, and it was against this backdrop that most school finance litigation was brought.<sup>104</sup> School districts and students have attempted to shift this paradigm, uniformly arguing that, although the practical responsibility for delivering education rests with the district, the constitutional and ultimate responsibility for education rests with the state.<sup>105</sup> States have responded by either rejecting the argument outright or asserting that the state has the authority to delegate extensive responsibility to districts.<sup>106</sup> In effect, even if the state is constitutionally responsible, it has discretion in how it discharges this responsibility, including promoting local control of education.<sup>107</sup> Regardless, the relevant point is that the litigation has been unilateral, focusing almost exclusively on the extent to which state constitutions place limits and obligations on the state. Courts have devoted only passing attention to any residual or inherent school district responsibility, either assuming that districts are carrying out their responsibilities appropriately or ignoring the issue altogether.<sup>108</sup>

This unilateral focus, however, is a result of practical, not legal, realities. School finance litigation has primarily been brought by institutional stakeholders, rather than students or states.<sup>109</sup> The reasons are relatively obvious. School districts and teachers have more access to the

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<sup>103</sup> See Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 328 (1991).

<sup>104</sup> Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 781 (1992); see McUsic, *supra* note 103, at 332; see also, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49–50 (1973).

<sup>105</sup> See Gregory C. Malhoit & Derek W. Black, *The Power of Small Schools: Achieving Equal Educational Opportunity Through Academic Success and Democratic Citizenship*, 82 NEB. L. REV. 50, 52 (2003).

<sup>106</sup> See, e.g., *Idaho Schs. for Equal Educ. Opportunity v. State*, 976 P.2d 913, 914–15 (Idaho 1998) (attempting to assert a third-party complaint against local school officials for failing to properly allocate funds).

<sup>107</sup> See *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1152 (Mass. 2005) (Marshall, C.J., concurring) (“[T]he education clause leaves the details of education policymaking to the Governor and the Legislature.”); *Hoke Cnty.*, 599 S.E.2d at 390–91 (finding that although the state was constitutionally responsible, it still retained discretion as to how to rectify violations and structure education).

<sup>108</sup> See *infra* note 129 and accompanying text.

<sup>109</sup> See James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 451–55 (1999) (noting the number of districts suing states in various cases).

necessary resources to initiate litigation than students, and their suits are naturally going to be against the state. Students theoretically have reason to sue both school districts and states, but student plaintiffs have come from under-resourced districts and have tended to perceive that the primary need is more resources from their state.<sup>110</sup> In effect, their claims are on behalf of their districts. Finally, the states have no motivation to sue anyone (other than the federal government), as they have the legislative capacity to produce any educational arrangement they see fit within their jurisdictions.<sup>111</sup> Given these practical realities, the absence of explicit judicial focus on the constitutional duties of districts is not evidence that the duties do not exist.

More importantly, constitutional duties necessarily reside with school districts, regardless of the courts' holdings in regard to states. First, where the state has primary or ultimate constitutional responsibility for education, it still carries out that responsibility through districts and delegates certain responsibilities to them. Court holdings placing the ultimate responsibility on states recognize that states have some responsibility and cannot simply shift all responsibility onto districts,<sup>112</sup> but they generally refrain from endorsing the broader principle that districts have no responsibility at all.<sup>113</sup> Second, even if districts have no independent constitutional responsibility, districts exercise delegated state responsibility.<sup>114</sup> In this respect, the distinction between state and

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<sup>110</sup> See Robert H. Tiller, *Litigating Educational Adequacy in North Carolina: A Personal Account of Leandro v. State*, 488 S.E.2d 255 (N.C. 1997), 83 NEB. L. REV. 893, 899 (2005) (discussing school finance litigation by individual students against the state and the fact that the court did not limit the evidence to the plaintiffs, but rather allowed evidence regarding the entire district).

<sup>111</sup> Once drawn into the litigation, states do, however, have the motivation to assert counterclaims against local districts. See, e.g., *Idaho Schs.*, 976 P.2d at 922 (rejecting State's attempt to file third party complaint against district superintendants).

<sup>112</sup> See Opinion of the Justices (Reformed Public School Financing System), 765 A.2d 673, 676 (N.H. 2000) ("The State may not shift any of this constitutional responsibility to local communities."); see also *Rebell*, *supra* note 100, at 1485–86.

<sup>113</sup> See, e.g., *Hoke Cnty.*, 599 S.E.2d at 388–90; *Tenn. Small Sch. Sys. v. McWherter (McWherter II)*, 894 S.W.2d 734, 738–39 (Tenn. 1995) (recognizing that the state could impose some responsibility on districts); see also NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., AN HISTORICAL OVERVIEW OF REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION, BY STATE: FISCAL YEARS 1990–2002, at 65–66 tbl.3.e (2007), available at <http://nces.ed.gov/pubs2007/2007317.pdf> (presenting data that reveals districts in almost every state retain responsibility for a significant portion of educational funding).

<sup>114</sup> See TEX. CONST. art. VII, § 3 (granting the legislature power to delegate taxing authority to school districts); *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1272 (Wyo. 1995) (indicating that the state has the power to delegate authority to districts so long as the constitutional mandates of education are met).

local responsibility is one of form, not function. Regardless of who is primarily responsible, an obligation to provide education operates at both the state and district levels. If a state has a responsibility to raise funds for schools and deliver them to school districts, school districts are responsible for expending those funds toward the benefit of public education. A school district's failure to do so might implicate the state, but it would implicate the district as well.

Third, with the exception of separation of powers concerns, those school finance claims against the state that have been rejected have been premised on the constitutionality of educational systems where localism dominates,<sup>115</sup> not the notion that no educational responsibility exists at all. Courts have held that the state has discharged its constitutional duty by creating, funding, and extending discretion to local districts.<sup>116</sup> The courts sanction this method of carrying out the state's constitutional duty even though it produces significant variances among districts,<sup>117</sup> but this rationale does not extend a blank check to the districts. Unless one assumes that transferring constitutional duties to local districts grants districts authority without any corresponding responsibility or that the transfer extinguishes the rights that would otherwise flow from the constitutional duty, students presumably have educational rights that can be asserted against districts.

Absent such assumptions, the primary question would not be whether local districts incur constitutional responsibility, but rather what limits constrain districts in the exercise of delegated constitutional authority. Of course, those limits proscribed by state statute would control, as districts cannot exercise authority that is not granted to them.<sup>118</sup> But absent relevant statutory limits, a district would presumably have some discretion, just as the state would have had discretion if it had retained primary control over education.<sup>119</sup> This discretion, however, is

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<sup>115</sup> See, e.g., *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1196 (Ill. 1996); *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va. 1994).

<sup>116</sup> See *Edgar*, 672 N.E.2d at 1178.

<sup>117</sup> See, e.g., *Olsen v. State*, 554 P.2d 139, 148 (Or. 1976) (finding that a finance system did not violate the equal protection or education clauses of the Oregon Constitution because the it sets a minimal standard, whereby the state is in compliance "if the state requires and provides for a minimum of educational opportunities . . . and permits the districts to exercise local control over what they desire, and can furnish, over the minimum"); *Scott*, 443 S.E.2d at 142-43.

<sup>118</sup> See, e.g., *Campbell Cnty.*, 907 P.2d at 1272 ("It must also be accepted, however, that the framers did not prohibit a local *role* but left the nature and scope of that local role to the discretion of the legislature.").

<sup>119</sup> See, e.g., *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 776, 778 (Tex. 2005) (acknowledging that article VII, section 1 of the Texas Constitution

not open-ended. Textually inherent limits would still exist on both the state's and local districts' exercise of discretion. For instance, even the most lenient of educational clauses impose a duty on the state to deliver education.<sup>120</sup> Thus, like the state, a local district exercising delegated power would be constitutionally bound to build and maintain schools and offer relevant instruction within them.

Fourth, other constitutional clauses would operate to constrain local districts in ways that they would not constrain the state. For instance, courts have held that equal protection imposes few limits on legislatures in states where the relevant education clause grants the legislature extensive freedom to delegate authority or promote localism.<sup>121</sup> The discretion embodied in the education clause supersedes state equal protection limits. The same reasoning, however, would not logically extend to districts. Because districts lack explicit or primary constitutional authority in regard to education,<sup>122</sup> there is no independent authority that would supersede the limits equal protection would otherwise place on inequalities. Even where a state delegates power or extends discretion to districts, this delegation would not include the authority to treat schools or students arbitrarily or unequally within districts.<sup>123</sup> States made analogous attempts during racial desegregation and the U.S. Supreme Court

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“commits to the Legislature, the most democratic branch of the government, the authority to determine the broad range of policy issues in providing for public education,” but reiterating that “[t]his duty is not committed unconditionally to the legislature’s discretion, but instead is accompanied by standards”).

<sup>120</sup> See, e.g., *Edgar*, 672 N.E.2d at 1190 (recognizing that the constitution imposes an educational duty on the state, but finding that it is not for the courts to define the qualitative contours of that duty); *Scott*, 443 S.E.2d at 142 (rejecting plaintiffs’ claim against the state, but acknowledging that the Virginia “Constitution does mandate that the General Assembly provide for a system of free public schools throughout the Commonwealth, and the General Assembly has provided for such a system”).

<sup>121</sup> See *Edgar*, 672 N.E.2d at 1193–96; *McDaniel v. Thomas*, 285 S.E.2d 156, 168 (Ga. 1981).

<sup>122</sup> See, e.g., *Campbell Cnty.*, 907 P.2d at 1272 (indicating that the constitution does not create a local role in education, but rather leaves that question to the legislature). Colorado is an exception to this general rule. Its constitution vests explicit independent educational authority in local districts. E.g., COLO. CONST. art. IX, § 15. Other constitutions also require districts to raise funds, although this is not the equivalent of educational authority that supersedes that of the state. E.g., WIS. CONST. art. X, § 4.

<sup>123</sup> See, e.g., *McDuffy v. Sec’y of the Exec. Office of Educ.*, 615 N.E.2d 516, 548 (Mass. 1993) (“While it is clearly within the power of the Commonwealth to delegate some of the implementation of the duty to local governments, such power does not include a right to abdicate the obligation imposed on magistrates [the executive branch] and Legislatures placed on them by the Constitution.”).

struck them down as clearly unconstitutional.<sup>124</sup> In short, although a state can delegate its powers to districts, it cannot authorize them to violate the state or federal constitution.<sup>125</sup> Because districts lack primary constitutional responsibility over education, they also lack the full discretion that responsibility affords and the equal protection leniency it might afford in some states.

Finally, although not expansive or particularly substantive, some constitutions place explicit constitutional responsibility on school districts. For instance, some state constitutions set minimum and/or maximum tax rates that local districts may impose for education.<sup>126</sup> District discretion in these states is clearly constrained within these benchmarks. Similarly, in implementing their constitutional duties, almost all state legislatures have enacted complex statutory frameworks that obligate school districts in various educational aspects, from textbook and curriculum selection to educational quality, teacher hiring, and district management.<sup>127</sup> In short, in addition to the forgoing implicit responsibilities, local districts also have explicit educational responsibilities that rest solely with them.

### C. *The Resource Distribution Principle*

The manner in which state and local school districts allocate their resources is as important as the amount of resources they have.<sup>128</sup> States and school districts with abundant funds and resources can still fail to

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<sup>124</sup> See *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218, 225 (1964) (striking down the state's delegated authority to districts to close public schools and fund private tuition instead).

<sup>125</sup> The Supreme Court has enforced the same principle at the federal level, holding that Congress lacks the power to authorize states or localities to violate the U.S. Constitution. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 210–11 (1987) (holding that Congress cannot induce states to violate the Constitution); *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969) (“Congress may not authorize the States to violate the Equal Protection Clause.”).

<sup>126</sup> See ARK. CONST. art. XIV, § 3, amended by ARK. CONST. amend. 74 (setting a base mill rate of twenty-five for school districts); ME. CONST. art. VIII, pt. 1, § 1 (mandating local districts make provisions for schools); see also *Bd. of Educ. of City Sch. Dist. of Cincinnati v. Walter*, 390 N.E.2d 813, 825 (Ohio 1979) (noting that the State had, pursuant to the constitution, imposed a funding floor at 20 mills); *McLennan v. Aldredge*, 159 S.E.2d 682, 685–86 (Ga. 1968) (discussing 1945 amendments to the constitution that set minimum and maximum mill rates).

<sup>127</sup> See, e.g., N.C. GEN. STAT. § 115C (2009); VA. CODE ANN. § 22.1-253.13:1 (West 2006); see also Martha I. Morgan et al., *Establishing Education Program Inadequacy: The Alabama Example*, 28 U. MICH. J.L. REFORM 559, 568–71 (1995) (discussing Alabama's legislative and administrative structure for education).

<sup>128</sup> See, e.g., *Hoke Cnty.*, 599 S.E.2d at 388–89 (discussing the State's and local districts' responsibility to strategically allocate resources).



provide equal or adequate opportunities if those funds are spent on the wrong services or distributed to the wrong places.<sup>129</sup> Likewise, a district might have just enough resources but still fail to deliver a constitutional education because it does not make the best strategic choices of how to use those resources. In effect, the state may have done its part to make a constitutional education possible, but the district can take action that inhibits the delivery of the appropriate education. Even though the state might have the ultimate responsibility to correct such a district, the constitutional failure occurs at the district level and the solution is not more funding for the district, but better allocation of existing resources. Of course, it is also possible that failures occur at both the state and district levels. The state might provide inadequate funds and a district might make matters worse by poorly allocating those resources. In short, constitutional rights to education require that educational systems adhere to effective distributional mechanisms and principles.<sup>130</sup>

This distributional requirement at the state level is relatively obvious in school finance litigation. For instance, equity litigation is inherently premised on the notion that the state must structure its finance system in a way that affords all school districts equal access to resources.<sup>131</sup> To the extent that inequitable distribution affects educational opportunity, it is facially problematic in states where education is a fundamental right or students have a right to equal educational opportunity.<sup>132</sup> When courts uphold equity claims, the state is forced to allocate larger sums of money to poor school districts and less to others<sup>133</sup> or, in the case of Texas, to recapture funds from wealthy districts and give them to poorer districts.<sup>134</sup>

Strategic distribution of resources is not necessarily required in adequacy claims because states are theoretically free to waste all the money they see fit and permit vast inequality, so long as no one's education falls below the qualitative benchmark.<sup>135</sup> But as a practical matter,

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<sup>129</sup> See *Abbott v. Burke*, 575 A.2d 359, 377–82 (N.J. 1990) (discussing the variance in how efficiently districts use their funds and the problem it creates in determining whether money matters); William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 615 (1994).

<sup>130</sup> See *infra* notes 131–173 and accompanying text.

<sup>131</sup> See Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. MICH. J.L. REFORM 493, 497–98 (1995).

<sup>132</sup> See *id.* at 504–13 (discussing the scrutiny applied to inequities when education is a fundamental or protected right).

<sup>133</sup> See, e.g., *Serrano v. Priest*, 226 Cal. Rptr. 584, 601 (Ct. App. 1986).

<sup>134</sup> *Edgewood Indep. Sch. Dist. v. Meno*, 893 S.W.2d 450, 486 (Tex. 1995).

<sup>135</sup> 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, 562–63 (2006).

states under adequacy mandates must also adhere to strategic distribution. Although many students may need very little additional support to obtain an adequate education, others have special needs or face barriers that require the educational system to respond with supplemental monetary, curricular, or service supports.<sup>136</sup> Because states lack the lavish resources to both waste resources on some students and fund the special needs of others, states are forced to redistribute larger per-pupil expenditures or supplemental funds to poorer districts and districts with large proportions of at-risk students.<sup>137</sup> The failure to do so would present not only a problem of adequacy, but equity, as the system is effectively providing one set of students an adequate education while denying it to others.<sup>138</sup>

Although less obvious, the constitutional dimensions of distributional decisions are no less applicable at the school district level. Where courts have enforced a distributional principle against the state, there is no reason why the state would be permitted to accomplish indirectly through districts what it cannot accomplish directly itself.<sup>139</sup> Likewise, even were the state not implicated by local actions, a school district should not be free to create inequalities that the state could not. To permit as much would make the quality and quantity of the state's allocation irrelevant and completely contingent on district whims. This would invert the constitutional structure and make districts superior to the state.

The same rationale might also apply in states where courts have rejected equity claims against the state.<sup>140</sup> Courts in those states may

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<sup>136</sup> Rebell, *supra* note 100, at 1480.

<sup>137</sup> See Campaign for Fiscal Equity, Inc. v. State (*Fiscal Equity III*), 801 N.E.2d 326, 348–49 (N.Y. 2003); DeRolph v. State, 728 N.E.2d 993, 1014–15 (Ohio 2000).

<sup>138</sup> See Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1406 (2010) (arguing that federal equal protection is implicated when states are providing one set of students an adequate education but are denying it to others); see also Koski & Reich, *supra* note 135, at 562–65.

<sup>139</sup> The U.S. Supreme Court has made this point clear in regard to the relationship between Congress and the states, holding that Congress is prohibited from using its spending power to encourage others to engage in unconstitutional actions. See, e.g., *Dole*, 483 U.S. at 210–11 (holding that Congress cannot induce states to violate the Constitution). The Court has, likewise, recognized exceptions to the state actor doctrine and prohibited discrimination by private actors when their activity was intertwined with government or replicated government functions. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724–25 (1961).

<sup>140</sup> See Martin R. West & Paul E. Peterson, *The Adequacy Lawsuit: A Critical Appraisal*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* 1, 4–7 (Martin R. West & Paul E. Peterson eds., 2007) (listing the states where equity claims have failed).

relieve the state of equitable resource distribution, but it does not follow that they also relieve local districts. The state's legitimate end of fostering local control, which is the justification for allowing inequalities,<sup>141</sup> is far different from a single school district treating schools and students within it unequally. First, autonomy and inequality at the school level is not necessary for local control. Sufficient local control would presumably exist as a result of the state delegating educational power to the districts. States have never argued, nor have any other parties suggested, that local control necessitates school level control. Second, a delegation of authority to districts contemplates variance between districts, not schools. Thus, inequalities that are a consequence of delegation to districts fall squarely within a constitutional scheme, whereas school level inequalities would not.

These local distributional and allocation decisions are so central to state education rights that some courts have explicitly emphasized school districts' distributional responsibility. North Carolina offers a leading example. In 1999, in *Leandro v. State*, the North Carolina Supreme Court held that students have a right to a sound basic education,<sup>142</sup> and defined the right as including qualitative knowledge in various academic subjects sufficient to prepare students to participate and compete in society and work.<sup>143</sup> The court then remanded the case for a determination of whether students were receiving this education.<sup>144</sup> In a second opinion, the court evaluated whether students were receiving a sound basic education by focusing on three distinct aspects of the education system: outputs, inputs, and delivery mechanisms. Outputs included, but were not limited to, standardized test scores, graduation rates, college attainment, and remediation needs.<sup>145</sup> Inputs included teachers, curricular programs, and funding.<sup>146</sup> Delivery mechanisms referred to how the state and school districts allocate and dispense the resources they have.<sup>147</sup> In effect, the court evaluated whether the educational system is effectively using its resources to provide students with a sound basic education.<sup>148</sup>

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<sup>141</sup> See, e.g., *Kukor v. Grover*, 436 N.W.2d 568, 585 (Wis. 1989) (holding that disparities in funding of local school districts do not violate the right to a public education because the principle of local control that produces the disparities is constitutionally based).

<sup>142</sup> 488 S.E.2d 249, 254 (N.C. 1997).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 261.

<sup>145</sup> *Hoke Cnty.*, 599 S.E.2d at 381.

<sup>146</sup> *Id.* at 389.

<sup>147</sup> *Id.* at 388–89.

<sup>148</sup> *Id.*

The court ultimately found that the state was providing insufficient resources for students to receive a sound basic education, but the court also agreed with the trial court “that neither the State nor . . . [the Hoke County School System] are strategically allocating the available resources to see that at-risk children have the equal opportunity to obtain a sound basic education.”<sup>149</sup> Consequently, the court directed both the state and school districts to “conduct self-examinations of the present allocation of resources and to produce a rational . . . , comprehensive plan which strategically focuses available resources and funds towards meeting the needs of all children, including at-risk children[,] to obtain a sound basic education.”<sup>150</sup> This directive potentially implicates every local and state policy bearing upon the quality of education, whether it is the more obvious funding priorities of a district or the more subtle decisions regarding the way in which a district assigns its teachers to schools or determines which students will have access to schools that provide particular resources and opportunities.

Other courts have been less prescriptive than North Carolina, but similarly emphasize the importance of local distributional and allocation decisions. For instance, the Tennessee Supreme Court upheld the plaintiffs’ school finance claim against the state, but acknowledged that significant responsibility still fell on the districts.<sup>151</sup> The court indicated that the state could impose “funding and management responsibilities upon counties, municipalities, and school districts, within their respective constitutional powers” and, in such cases, those districts would be prohibited from mismanagement, indifference, or incompetence that undermined “the constitutional mandate of substantial equality of opportunity.”<sup>152</sup>

Another category of states implicitly includes the duty to strategically utilize resources within the very definition of the right to education. Although the distributional and allocation points are not as clearly stated as in North Carolina, these states define the right to education in such a way that it would border on implausible to exclude distributional and allocation principles from the right.<sup>153</sup> In particular, some educa-

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<sup>149</sup> *Id.* at 388 (alteration in original) (quoting the trial court).

<sup>150</sup> *Id.* at 389 (alteration in original) (quoting the trial court).

<sup>151</sup> *Tenn. Small Sch. Sys. v. McWherter (McWherter I)*, 851 S.W.2d 139, 140–41 (Tenn. 1993).

<sup>152</sup> *Id.* at 141.

<sup>153</sup> See *infra* notes 158–173 and accompanying text.

tion clauses mandate an “efficient” education.<sup>154</sup> In total, twenty-two states fall into this category.<sup>155</sup> The dictionary definition of “efficient” offers straightforward meanings, which include “performing or functioning in the best possible manner with the least waste of time and effort” and “satisfactory and economical to use.”<sup>156</sup> Courts have interpreted their constitutional language consistent with such definitions.<sup>157</sup>

Two of the leading cases on point come from West Virginia and Kentucky. In 1979, in *Pauley v. Kelly*, the West Virginia Supreme Court found that the constitutional phrase “efficient” commanded that “the education system be absolutely complete, attentive to every detail, extending beyond ordinary parameters. . . . [I]t must produce results without waste.”<sup>158</sup> In addition, the court indicated the constitutional language required that a quality education be delivered “economically.”<sup>159</sup> Although the lawsuit was against the state, the court’s reasoning also encompassed local school districts’ actions.<sup>160</sup> The court noted that many other courts “have required specific actions by local boards to bring them to compliance with the constitutional mandate” and that state action that failed to ensure local compliance had likewise “been declared unconstitutional.”<sup>161</sup> In setting the standard for West Virginia, the court concluded that, in addition to quality instruction and facilities, the constitutional mandate requires “careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency.”<sup>162</sup> In short, the court’s definition of efficiency includes not just the duty to fund and support schools, but to ensure they run well and to maximize the impact of the resources they have, which, of course, would entail strategic allocation and distribution at the state and local levels.

The Kentucky Supreme Court, in 1989, defined its constitutional mandate of efficiency similarly in *Rose v. Council for Better Education*.<sup>163</sup> The Court ultimately held and broadly stated:

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<sup>154</sup> See KY. CONST. § 183 (“The General Assembly shall, by appropriate legislation, provide an efficient system of common schools throughout the state.”).

<sup>155</sup> See William E. Thro, Commentary, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 EDUC. L. REP. 19, 23–24 (1993).

<sup>156</sup> *Efficient Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/efficient> (last visited Jan. 10, 2012).

<sup>157</sup> See *infra* notes 158–173 and accompanying text.

<sup>158</sup> 255 S.E.2d 859, 874 (W. Va. 1979).

<sup>159</sup> *Id.* at 877.

<sup>160</sup> *Id.* at 874.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 877.

<sup>163</sup> 790 S.W.2d 186, 210 (Ky. 1989).

The General Assembly must not only establish the [qualitatively adequate educational] system, but it must monitor it on a continuing basis so that it will always be maintained in a constitutional manner. The General Assembly must carefully supervise it, so that there is no waste, no duplication, no mismanagement, at any level.<sup>164</sup>

The prohibition on waste and duplication necessarily demands strategic resource allocation, and the extension of this prohibition to all levels of education necessarily includes school districts.<sup>165</sup>

It is important to note that, although the foregoing cases and the basic language of efficiency might dictate local distributional responsibilities, the precise wording of a state's education clause has not always been determinative of its substantive meaning.<sup>166</sup> In adequacy cases in particular, courts, notwithstanding the fact they were addressing various different constitutional phrases, have reached essentially the same conclusion regarding the substantive effect of their educational clauses.<sup>167</sup> These courts have concluded that the constitution's intent is to offer a quality education that prepares students for later educational, civic, and employment opportunities and duties,<sup>168</sup> regardless of whether the underlying constitutional language guarantees a thorough, minimal, adequate, uniform, or efficient education.<sup>169</sup> Yet, the willingness of courts

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<sup>164</sup> *Id.* at 211.

<sup>165</sup> In reaching this conclusion, the court considered "foreign cases, along with our constitutional debates, Kentucky precedents and the opinion of experts." *Id.* at 210. It seemed to rely heavily on two expert witnesses. *Id.* One expert opined that an efficient education is "a three part concept. First, the system should impose no financial hardship or advantage on any group of citizens. Further, local school districts must make comparable tax efforts. Second, resources provided by the system must be adequate and uniform throughout the state. Third, the system must not waste resources." *Id.* The other expert also opined that an efficient system of schools is one that is "properly managed." *Id.* at 211.

<sup>166</sup> William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1659-60 (1989).

<sup>167</sup> Compare *Rose*, 790 S.W.2d at 212 (holding that the constitutional mandate to "provide an efficient system of common schools throughout the state" guarantees students an adequate education), with *Leandro*, 488 S.E.2d at 254 (holding that the constitutional language of "a right to the privilege of education" and "the duty of the State to guard and maintain that right" guarantees students a sound basic education), and *Fiscal Equity III*, 801 N.E.2d at 328 (holding that the constitutional mandate to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated" guarantees students a sound basic education).

<sup>168</sup> See *supra* notes 112-127 and accompanying text.

<sup>169</sup> See Paul L. Tractenberg, *Education*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 241, 293 n.137 (G. Alan Tarr & Robert F. Williams eds., 2006) ("[D]isembodied parsing of constitutional terminology may be of limited or no value.").

to underplay the exact language in their constitution has generally coincided with expanding rather than limiting education rights. It is, thus, far less clear that a court would disregard a constitutional directive that benefits students.

More importantly, the mandate of efficient education is, in key respects, less ambiguous than other educational mandates. As to substantive and qualitative meanings of constitutional phrases, all constitutional iterations of education stand in relatively the same position because the quality and content that is necessary to prepare students for work, citizenship, and daily life is a moving target contingent on context. Thus, in regard to substantive qualitative guarantees, “efficient” may be no more definite than high quality, adequate, or thorough.<sup>170</sup> But as to administrative and structural components—what one might call procedural or non-substantive aspects of education—efficient has a definiteness that is missing in other phraseologies. In fact, the phraseologies often ignore this side of education altogether. As the dictionary definitions above suggest, the core consensus meanings of efficient speak to these procedural aspects. Moreover, this distinction helps synthesize the judicial opinions in those states interpreting their mandates of efficiency. Those states that have refused to follow West Virginia and Kentucky’s lead appear to have done so not because efficiency is ambiguous in regard to procedural aspects of education, but because it is ambiguous as to substance.<sup>171</sup> Once one narrows the definitional inquiry of educational efficiency, its mandate of strategic resource utilization would seem largely beyond dispute.

In sum, states and local districts have a constitutional duty to distribute resources so as to eliminate inequities and inadequacies in educational opportunity. This concept is logically inherent in equity claims, as their central premise is an illegitimate allocation of resources amongst districts. In adequacy claims, the concept is a practical necessity because available educational resources are limited and must be focused in a way that prevents the most disadvantaged schools and students from falling below qualitative thresholds. And regardless of whether plaintiffs have proceeded under equity or adequacy claims, the concept is embedded in the very language of constitutions that man-

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<sup>170</sup> *Edgar*, 672 N.E.2d at 1184–85 (arguing that the term efficient is not unambiguous and defining it differently than other jurisdictions); *Hornbeck v. Somerset Cnty. Bd. of Educ.*, 458 A.2d 758, 770 (Md. 1983) (indicating that the word efficient is susceptible to more than one meaning). *But see Rose*, 790 S.W.2d at 212.

<sup>171</sup> *See Edgar*, 672 N.E.2d at 1184–85; *Hornbeck*, 458 A.2d at 770.

date an “efficient” education.<sup>172</sup> Both court opinions and straightforward dictionary definitions indicate as much.<sup>173</sup>

#### D. *The Final Link*

The foregoing principles would potentially implicate a host of educational policies beyond financing.<sup>174</sup> For the purposes of this Article, the most important application is in regard to local student assignment policies, particularly those that result in racially unequal access to middle-income peers. But as noted earlier, the recognition of a constitutional right to equal access to middle-income peers requires one additional conceptual step that, although alluded to by one court, no court has yet made.<sup>175</sup> That step is to establish the connection between an adequate or equal educational opportunity and racially equitable access to middle-income peers. This connection can be conceptualized through four interrelated, yet distinct, factual predicates. First, assigning high proportions of poor students to particular schools creates resource and other barriers that impede the ability of students in those schools to obtain a quality education and deny them equal opportunity. Second, middle-income students or environments are themselves resources or inputs, just like money, which are essential to obtaining quality educational opportunities. Thus, under an equity or adequacy theory, the state must consciously and fairly manage these crucial resources. Third, the cost of delivering adequate or equal educational opportunities in schools with concentrated poverty far exceeds the cost of delivering adequate or equal opportunities in middle-income schools. In times of economic crisis, local school districts and states are highly unlikely to have sufficient resources to fund constitutionally adequate opportunities in high-poverty schools. And in times of both prosperity and crisis, high-poverty schooling is economically inefficient.

Finally, although courts have yet to make any of the three conceptual connections between constitutional educational opportunities and the distribution of middle-income peers, several courts have paid specific attention to the prevailing circumstances of poor academic achievement in districts with high concentrations of poor and at-risk students, treating those circumstances as *prima facie* evidence of inadequate edu-

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<sup>172</sup> See *Edgar*, 672 N.E.2d at 1184–85; *Hornbeck*, 458 A.2d at 770.

<sup>173</sup> It also bears noting that some of these inequalities might be equally prohibited under federal law, depending on their causes. See Black, *supra* note 138, at 1350–51.

<sup>174</sup> See Ryan, *supra* note 9, at 296–307.

<sup>175</sup> See *supra* notes 22–27 and accompanying text.



cation and recognizing the existence of constitutional violations in these districts.<sup>176</sup> A search for the root cause of these violations would inevitably lead to the foregoing conceptualizations of access to middle-income peers. The following Sections discuss each of these points in full.

### 1. Harms of Racial and Poverty Isolation

The educational harms that minority students suffer as a result of attending school in racial isolation are well documented. African-American students' achievement on the National Assessment of Educational Progress lags twenty-seven scaled points behind whites in reading and thirty-one points in math.<sup>177</sup> This achievement gap is equivalent to two to three years of learning.<sup>178</sup> Thus, African-American eighth graders are earning scores equivalent to sixth-grade white students. Research indicates that much of this achievement gap is not based on race itself, but is largely attributable to the fact that predominantly minority schools are also overwhelmingly high-poverty schools,<sup>179</sup> and high-poverty schools depress the academic achievement of students who attend those schools.<sup>180</sup> It is not just that a student's individual demographic characteristics make him or her less likely to succeed; rather, high-poverty schools have a negative impact on a student's educational outcomes regardless of the student's individual socioeconomic status.<sup>181</sup>

In at least six major academic categories, predominantly poor and minority schools cause harm or deliver inferior educational opportunities to students. First, students in predominantly poor and minority

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<sup>176</sup> See *infra* notes 238–255 and accompanying text.

<sup>177</sup> THE CONDITION OF EDUCATION, *supra* note 8, App. A, at 153 tbl.A-12-2, 157 tbl.A-13-2.

<sup>178</sup> CHRISTOPHER LUBIENSKI & SARAH THEULE LUBIENSKI, NAT'L CTR. FOR THE STUDY OF PRIVATIZATION IN EDUC., CHARTER, PRIVATE, PUBLIC SCHOOLS AND ACADEMIC ACHIEVEMENT: NEW EVIDENCE FROM NAEP MATHEMATICS DATA 5 (2006), available at [http://www.ncspe.org/publications\\_files/OP111.pdf](http://www.ncspe.org/publications_files/OP111.pdf) (explaining how to interpret achievement gaps on the NAEP); THE CONDITION OF EDUCATION, *supra* note 8, App. A, at 153 tbl.A-12-2, 157 tbl.A-13-2.

<sup>179</sup> See ANURIMA BHARGAVA ET AL., NAACP LEGAL DEF. & EDUC. FUND, INC. & THE CIVIL RIGHTS PROJECT, STILL LOOKING TO THE FUTURE: VOLUNTARY K–12 SCHOOL INTEGRATION 14 (2008); Derek W. Black, *In Defense of Voluntary Desegregation: All Things Are Not Equal*, 44 WAKE FOREST L. REV. 107, 117–18 (2009); Ryan, *supra* note 9, at 272–75.

<sup>180</sup> See COLEMAN ET AL., *supra* note 25, at 21–22; KAHLENBERG, *supra* note 23, at 47; SOCIOECONOMIC COMPOSITION OF THE PUBLIC SCHOOLS, *supra* note 26, at 1–4; McUsic, *supra* note 9, at 1355–56.

<sup>181</sup> See COLEMAN ET AL., *supra* note 25, at 302–10; KAHLENBERG, *supra* note 23, at 62; SOCIOECONOMIC COMPOSITION OF THE PUBLIC SCHOOLS, *supra* note 26, at 1–4; Borman & Dowling, *supra* note 26, at 1201–02; McUsic, *supra* note 9, at 1355–56; Perry & McConney, *supra* note 26, at 1137–38.

schools tend to receive a generally low-quality curriculum and have unequal access to high-level curricular offerings.<sup>182</sup> Second, even though research shows teacher quality is closely linked to student achievement,<sup>183</sup> students in predominantly poor and minority schools tend to have limited access to highly qualified teachers.<sup>184</sup> As a general matter, these schools find it extremely difficult to attract high-quality teachers. Even when they do secure quality teachers, predominantly poor and minority schools find it difficult to retain them.<sup>185</sup> The best teachers often leave high-poverty, high-minority schools as soon as they obtain sufficient experience.<sup>186</sup> Predominantly poor and minority schools are then forced to replace the departing teachers with inexperienced and less qualified teachers.<sup>187</sup> Consequently, predominantly poor and minority schools suffer from exceptionally high teacher turnover.<sup>188</sup> The

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<sup>182</sup> See RUTH B. EKSTROM ET AL., *EDUCATION AND AMERICAN YOUTH* 57–60 (1988); Jeannie Oakes et al., *Curriculum Differentiation: Opportunities, Outcomes, and Meanings*, in *HANDBOOK OF RESEARCH ON CURRICULUM* 570, 570–608 (Philip W. Jackson ed., 1992).

<sup>183</sup> See generally Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 *EDUC. POL'Y ANALYSIS ARCHIVES*, no. 1, 2000 at 1, available at <http://epaa.asu.edu/ojs/article/viewFile/392/515> (finding teacher quality to be strongly related to student achievement based on fifty state survey and National Assessment of Educational Progress).

<sup>184</sup> See STEPHEN CARROLL ET AL., RAND CORP., *THE DISTRIBUTION OF TEACHERS AMONG CALIFORNIA'S SCHOOL DISTRICTS AND SCHOOLS*, at xx–xxii (2000); SUSANNA LOEB & MICHELLE REININGER, THE EDUC. POLICY CTR. AT MICH. STATE UNIV., *PUBLIC POLICY AND TEACHER LABOR MARKETS: WHAT WE KNOW AND WHY IT MATTERS*, at i–iv (2004); DANIEL P. MAYER ET AL., U.S. DEP'T OF EDUC., *MONITORING SCHOOL QUALITY: AN INDICATORS REPORT 10–14* (2000), available at <http://nces.ed.gov/pubs2001/2001030.pdf>; Charles T. Clotfelter et al., *Who Teaches Whom? Race and the Distribution of Novice Teachers*, 24 *ECON. EDUC. REV.* 377, 391 (2005); Catherine E. Freeman et al., *Racial Segregation in Georgia Public Schools, 1994–2001*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 148, 157–59 (John Charles Roger & Gary Orfield eds., 2005); Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: Why It Persists and What Can Be Done*, *BROOKINGS REV.*, Spring 1998, at 24, 26 (1998), available at [http://www.brookings.edu/articles/1998/spring\\_education\\_jencks.aspx](http://www.brookings.edu/articles/1998/spring_education_jencks.aspx) (“Predominantly white schools seem to attract more skilled teachers than black schools.”); Steven G. Rivkin et al., *Teachers, Schools, and Academic Achievement*, 73 *ECONOMETRICA* 417, 450 (2005); Jay Mathews, *Top Teachers Rare in Poor Schools*, *WASH. POST*, Sept. 10, 2002, at A5 (discussing the dearth of high quality teachers in low income schools).

<sup>185</sup> See Eric A. Hanushek et al., *Why Public Schools Lose Teachers*, 39 *J. HUM. RESOURCES* 326, 337 (2004).

<sup>186</sup> See *id.*; see also BARNETT BERRY & ERIC HIRSCH, CTR. FOR TEACHING QUALITY, *RECRUITING AND RETAINING TEACHERS FOR HARD-TO-STAFF SCHOOLS 2* (2005) (identifying recruiting and retention problems in high-poverty, low-performing schools); SUSAN MOORE JOHNSON ET AL., HARVARD GRAD. SCH. OF EDUC., *WHO STAYS IN TEACHING AND WHY: A REVIEW OF THE LITERATURE ON TEACHER RETENTION 9–10* (2005).

<sup>187</sup> See Hanushek, *supra* note 185, at 347–52.

<sup>188</sup> See ERICA FRANKENBERG, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., *SEGREGATION OF AMERICAN TEACHERS 25–31* (2006), available at [http://campaignforethnicstudies.pbworks.com/f/segregation\\_american\\_teachers12-06.pdf](http://campaignforethnicstudies.pbworks.com/f/segregation_american_teachers12-06.pdf) (revealing that teacher dissatisfac-

lack of continuity in their teaching staff itself, likewise, negatively impacts schools.<sup>189</sup>

Money alone cannot easily fix the problem of teacher staffing at predominantly poor and minority schools because the problem is not simply one of money.<sup>190</sup> Rather, the racial and socioeconomic characteristics of schools significantly influence where teachers decide to teach.<sup>191</sup> Those teachers with options—who tend to be high-quality teachers—generally will not voluntarily choose to teach in high-minority, high-poverty schools.<sup>192</sup> Of course, money is not entirely irrelevant, but absent huge salary increases, teachers will still prefer schools with fewer numbers of poor and minority students.<sup>193</sup> And, in any event, very few predominantly poor and minority school systems have the resources to offer such huge salary increases. In fact, it is not unusual for predominantly poor and minority school districts to have less money to attract teachers than surrounding school districts.<sup>194</sup> In short, predominantly poor and minority schools are seriously disadvan-

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tion tends to rise as the percentage of minority students in a school rises, making it more likely that teachers will leave); EDUC. TRUST, THEIR FAIR SHARE, HOW TEXAS-SIZED GAPS IN TEACHER QUALITY SHORTCHANGE LOW-INCOME AND MINORITY STUDENTS 6 (2008), available at <http://www.edtrust.org/sites/edtrust.org/files/publications/files/TXTheirFairShare.pdf> (illustrating teacher turnover is consistently higher in the highest-poverty and highest-minority Texas school districts); SOCIOECONOMIC COMPOSITION OF THE PUBLIC SCHOOLS, *supra* note 26, at 4–6.

<sup>189</sup> See FRANKENBERG, *supra* note 188, at 42–44.

<sup>190</sup> See Jane L. David, *Teacher Recruitment Incentives*, EDUC. LEADERSHIP, Apr. 2008, at 84, 85–86.

<sup>191</sup> See Susanna Loeb et al., *How Teaching Conditions Predict Teacher Turnover in California Schools*, 80 PEABODY J. EDUCATION 44, 65 (2005); Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L. REV. 1, 35–37 (2008). See generally Benjamin Scafidi et al., *Race, Poverty, and Teacher Mobility* (Ga. State Univ. Sch. of Policy Studies Research Paper Series, Working Paper 06-51, 2005), available at [http://aysps.gsu.edu/publications/2006/downloads/ScafidiSjoquist\\_RacePovertyTeacherMobility.pdf](http://aysps.gsu.edu/publications/2006/downloads/ScafidiSjoquist_RacePovertyTeacherMobility.pdf) (finding that teachers are more likely to leave high-poverty schools that also have a high proportion of minorities).

<sup>192</sup> See ALLIANCE FOR EXCELLENT EDUC., IMPROVING THE DISTRIBUTION OF TEACHERS IN LOW-PERFORMING HIGH SCHOOLS 7 (2008), available at [http://www.all4ed.org/files/TeachDist\\_PolicyBrief.pdf](http://www.all4ed.org/files/TeachDist_PolicyBrief.pdf) (indicating that several states already have incentive pay for low-performing schools, but pay increase alone is insufficient to attract teachers); Hanushek, *supra* note 185, at 350–51 (finding that a ten percent salary increase would be necessary for each increase of ten percent in minority student enrollment to induce white females to teach in the school).

<sup>193</sup> See ALLIANCE FOR EXCELLENT EDUC., *supra* note 192, at 7; Hanushek, *supra* note 185, at 350–51.

<sup>194</sup> See, e.g., EDUC. TRUST-WEST, CALIFORNIA'S HIDDEN TEACHER SPENDING GAP: HOW STATE AND DISTRICT BUDGETING PRACTICES SHORTCHANGE POOR AND MINORITY STUDENTS AND THEIR SCHOOLS 1 (2005), available at <http://www.edtrust.org/west/publication/californias-hidden-teacher-spending-gap-how-state-and-district-budgeting-practices-0>.

tagged in securing one of the most important resources: highly qualified teachers.<sup>195</sup>

Third, unequal access to teachers and curriculum has the natural result of negatively impacting student achievement. Students in predominantly poor and minority schools routinely achieve much lower than students in predominantly white schools.<sup>196</sup> For instance, a study of Charlotte-Mecklenburg schools in North Carolina showed that, even controlling for factors such as a student's family background, prior achievement, peer effects, and self-reported academic effort, students who spent more time in predominantly minority elementary schools had lower standardized test scores and grade point averages in middle and high school.<sup>197</sup> Likewise, Wake County, North Carolina's study of its own schools revealed similar achievement failures in those schools with the highest levels of poor students,<sup>198</sup> which also strongly correlates with race in Wake County. These examples are the norm. As one judge noted, more than eighty percent of the lowest performing school districts in North Carolina are predominantly minority.<sup>199</sup>

Fourth, the depressed achievement of students in predominantly poor and minority schools has compounding long-term effects as well. The graduation rates in these schools are alarmingly low. On average, only four out of ten students graduate on time in the nation's predominantly poor and minority high schools.<sup>200</sup> For instance, in 2004–2005 in Baltimore City Schools, a high-poverty and high-minority school system, only one-third of the students graduated on time.<sup>201</sup> Moreover, lower graduation rates hold true regardless of a student's individual race or wealth.<sup>202</sup> These low graduation rates are partly attributable to students

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<sup>195</sup> See Darling-Hammond, *supra* note 183, at 31–33 (finding that teacher quality and student achievement are closely linked).

<sup>196</sup> See, e.g., Russell W. Rumberger & Gregory J. Palardy, *Does Resegregation Matter?: The Impact of Social Composition on Academic Achievement in Southern High Schools*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?*, *supra* note 184, at 127, 137–39.

<sup>197</sup> Roslyn Arlin Mickelson, *Segregation and the SAT*, 67 OHIO ST. L.J. 157, 157 (2006); Roslyn Arlin Mickelson, *Subverting Swann: First- and Second-Generation Segregation in the Charlotte-Mecklenburg Schools*, 38 AM. EDUC. RES. J. 215, 220 (2001).

<sup>198</sup> WAKE CNTY. PUB. SCH. SYS., E&R REPORT NO. 01.21, *THE EFFECT OF SCHOOL POVERTY CONCENTRATION IN WCPSS 4 fig.1* (2001), available at [http://www.wcpss.net/evaluation-research/reports/2001/0123\\_Poverty.pdf](http://www.wcpss.net/evaluation-research/reports/2001/0123_Poverty.pdf).

<sup>199</sup> Letter from Howard E. Manning, Jr., N.C. Superior Court Judge, to June St. Clair Atkinson, State Superintendent, and Howard N. Lee, Chairman State Bd. of Educ. (Mar. 3, 2006) (on file with author).

<sup>200</sup> BHARGAVA, *supra* note 179, at 19.

<sup>201</sup> *Id.* at 19 tbl.3.

<sup>202</sup> See CHRISTOPHER B. SWANSON, URBAN INST. EDUC. POLICY CTR., *WHO GRADUATES IN THE SOUTH?* 2 (2005); CHRISTOPHER B. SWANSON, URBAN INST. EDUC. POLICY CTR.,

in predominantly poor and minority schools having lower success on graduation exams,<sup>203</sup> but many students in these schools drop out before they even take the graduation exam. Simply attending a predominantly poor and minority school makes a student significantly more likely to drop out of high school.<sup>204</sup>

Fifth, attending a predominantly poor and minority school tends to limit students' access to later opportunities in higher education and employment. Students from predominantly minority schools are less likely to matriculate to college and four-year universities.<sup>205</sup> Likewise, those who do not pursue higher education also have less access to social networks that are crucial to securing jobs.<sup>206</sup> As a general matter, racially integrated middle-income schools have the inverse effect of predominantly poor and minority schools on graduation and matriculation rates.<sup>207</sup> In sum, high-poverty, predominantly minority schools expose students of all races and socioeconomic classes to serious educational harms that make it far more likely than not that they will receive a constitutionally deficient education. Where these high-poverty schools result from student assignment policies within the district, rather than the

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WHO GRADUATES? WHO DOESN'T? A STATISTICAL PORTRAIT OF PUBLIC HIGH SCHOOL GRADUATION, CLASS OF 2001, at 31–34 (2004).

<sup>203</sup> CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., RACIAL SEGREGATION AND EDUCATIONAL OUTCOMES IN METROPOLITAN BOSTON 6–9 (2004) (noting that in metropolitan Boston, only sixty-one percent of tenth-grade students in high-poverty, high-minority schools passed the English/Language Arts graduation test in the 2002–2003 school year compared to ninety-six percent of students attending low-minority, low-poverty schools); Kathryn M. Borman et al., *Accountability in a Post-Desegregation Era: The Continuing Significance of Racial Segregation in Florida's Schools*, 41 AM. EDUC. RES. J., 605, 612 (2004) (examining achievement differences on Florida's graduation exam).

<sup>204</sup> See Robert Balfanz & Nettle E. Legters, *Locating the Dropout Crisis: Which High Schools Produce the Nation's Dropouts?*, in DROPOUTS IN AMERICA: CONFRONTING THE GRADUATION RATE CRISIS 57, 62–63 (Gary Orfield ed., 2004).

<sup>205</sup> JOSEPH B. BERGER ET AL., THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., RACE AND THE METROPOLITAN ORIGINS OF POSTSECONDARY ACCESS TO FOUR YEAR COLLEGES: THE CASE OF GREATER BOSTON 19–21 (2004), available at <http://www.eric.ed.gov/PDFS/ED489181.pdf>; Robert Teranishi et al., *Opportunity at the Crossroads: Racial Inequality, School Segregation, and Higher Education in California*, 106 TCHRS. C. REC. 2224, 2243–44 (2004).

<sup>206</sup> See Derek Black, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923, 953 (2002) (“Attending racially diverse schools opens up social networks to racial minorities, which often lead to additional job opportunities. As these benefits increase, they will perpetuate themselves naturally, and further integrate the job market and social networks.”).

<sup>207</sup> See BHARGAVA, *supra* note 179, at 17–20; Eric M. Camburn, *College Completion Among Students from High Schools Located in Large Metropolitan Areas*, 98 AM. J. EDUCATION 551, 557–60 (1990).

overall poverty of the district itself, the constitutional allocation principles discussed in the previous Section are directly implicated.<sup>208</sup>

## 2. Middle-Income Students as a Resource

Although high-poverty schools can undermine students' education, predominantly middle-income schools bring affirmative benefits to the learning environment. The crucial ingredient in the success of middle-income schools is the students who attend them. Middle-income students themselves are thus an educational resource. The quality of a student's educational experience can be as dependent on his peers as it is on his teachers, the quality of his school building, or the substance of his curriculum. First, students depend heavily upon one another for their learning.<sup>209</sup> They study together, teach one another, and compete against one another, raising the academic bar.<sup>210</sup> Due to the opportunities they receive outside of school, middle- and high-income students tend to bring more educational capital to school and, thus, elevate the learning of those around them.<sup>211</sup> Second, middle-income students come from families that tend to have higher academic expectations for their children.<sup>212</sup> When these students are the majority in a school, the students create a culture of high achievement that benefits everyone.<sup>213</sup> Third, middle-income students' parents tend to place high expectations on school officials and hold them accountable.<sup>214</sup> As a result, these schools are more effective than others.<sup>215</sup> Fourth, as the previous Section suggests, those resources that are important to learning—high-quality teachers, leadership, curriculum, fi-

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<sup>208</sup> See *supra* notes 128–173 and accompanying text.

<sup>209</sup> See KAHLBERG, *supra* note 23, at 48–58.

<sup>210</sup> See *id.* See generally Douglas N. Harris, *How Do School Peers Influence Student Educational Outcomes? Theory and Evidence from Economics and Other Social Sciences*, 112 TCHRS. C. REC. 1163 (2010) (developing a theory of group-based contagion whereby the dominant group sets the tone and expectations for others).

<sup>211</sup> See KAHLBERG, *supra* note 23, at 48–58.

<sup>212</sup> See *id.*; Osamudia R. James, *Business as Usual: The Roberts Court's Continued Neglect of Adequacy and Equity Concerns in American Education*, 59 S.C. L. REV. 793, 807 (2008); see also Rita E. Mahard & Robert L. Crain, *Research on Minority Achievement in Desegregated Schools*, in THE CONSEQUENCES OF SCHOOL DESEGREGATION 103, 122–23 (Christine H. Rossell & Willis D. Hawley eds., 1983).

<sup>213</sup> See KAHLBERG, *supra* note 23, at 48–58.

<sup>214</sup> *Id.*; Mahard & Crain, *supra* note 212, at 122–23.

<sup>215</sup> See KAHLBERG, *supra* note 23, at 48–58; McUsic, *supra* note 9, at 1355–56.

nancing, and facilities—all tend to exist when the majority of a school's students are middle income.<sup>216</sup>

In sum, although not a resource in the traditional sense of an input that a school can buy, the intangible benefits that middle-income students bring to the learning environment make them a vital resource. In fact, as the experience of socioeconomically isolated schools demonstrates, middle-income students are a resource that schools cannot easily afford to go without. The data and social science on this point is relatively clear.<sup>217</sup> Middle-income parents instinctively recognize this and jockey to enroll their children in solidly middle-income schools or, at least, middle-income classes if they cannot secure a middle class school.<sup>218</sup> Thus, the conceptual hurdle is not recognizing the importance of middle-income peers, but recognizing that they are an educational resource, just as are teachers, facilities, and books. The primary difference is that school systems cannot generate middle income-students, but they nonetheless make decisions through their student assignment policies regarding those middle-income students they do have. Once student assignments are understood as resource allocations, they should be subject to the same distributional, management, and equity principles that state constitutions require for money and other resources.

### 3. The Expense and Inefficiency of Racial and Socioeconomic Isolation

Delivering education in schools with concentrated poverty is economically inefficient. It is, of course, possible for poor and minority students to obtain a quality education in high-poverty schools. In fact, a small but high-profile contingent of predominantly poor and minority

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<sup>216</sup> See JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* 15, 169, 171, 173 (2010).

<sup>217</sup> See MICHAEL J. PUMA ET AL., U.S. DEP'T OF EDUC., *PROSPECTS: FINAL REPORT ON STUDENT OUTCOMES* 12 (1997) ("School poverty depresses the scores of all students in schools where at least half of the students are eligible for subsidized lunch, and seriously depresses the scores when over 75 percent of students live in low-income households.").

<sup>218</sup> See Jennifer Jellison Holme, *Buying Homes, Buying Schools: School Choice and the Social Construction of School Quality*, 72 HARV. EDUC. REV. 177, 201–03 (2002); Jeannie Oakes, *Can Tracking Research Inform Practice? Technical, Normative, and Political Considerations*, EDUC. RESEARCHER, May 1992, at 12, 14 (indicating middle-income parents lobby to get their children into high ability group classes). See generally Elizabeth L. Useem, *Middle Schools and Math Groups: Parents' Involvement in Children's Placement*, 65 SOC. EDUCATION 263 (1992) (finding that parents with college degrees are more likely to have their children placed in upper-level mathematics courses than those without degrees).

schools defy the odds and achieve at high levels.<sup>219</sup> But delivering a quality education to students under these circumstances can cost far more per pupil than it otherwise would.<sup>220</sup> First, because poor students are already at-risk of academic failure and that risk is further increased by attending a high-poverty school, these schools need the best, not the worst teachers.<sup>221</sup> Yet as discussed earlier, teachers are predisposed against teaching in these schools and, thus, it costs significantly more to lure high-quality teachers to high-minority, high-poverty schools.<sup>222</sup> Second, for various practical reasons, high-poverty schools cost more to keep safe than other schools.<sup>223</sup> Third, the need for intensive instructional and social service programs tends to be significantly higher in high-poverty schools.<sup>224</sup>

Federal legislation and studies explicitly recognize this reality. The federal government estimates that the cost of educating low-income students is approximately forty percent more than middle-income stu-

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<sup>219</sup> The most widely publicized today are the Harlem Children's Zone charter schools and KIPP charter schools. See generally PATRICIA J. KANNAPEL & STEPHEN K. CLEMENTS, PRICHARD COMM. FOR ACADEMIC EXCELLENCE, *INSIDE THE BLACK BOX OF HIGH-PERFORMING HIGH-POVERTY SCHOOLS* (2005) (recounting one state's attempt to identify the common elements of successful high-poverty schools). These schools largely seem to be operating in a similar fashion to middle-income schools. *Id.* at 28–29. There are, however, so few of these high-performing, low-income schools because replicating their environment elsewhere has been elusive.

<sup>220</sup> See Adams, *supra* note 9, at 1627–31; Ryan, *supra* note 9, at 256–58; (questioning whether money alone can deliver adequacy in concentrated poverty); Heather Schwartz, *Housing Policy Is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland*, in *THE FUTURE OF SCHOOL INTEGRATION: SOCIOECONOMIC DIVERSITY AS AN EDUCATION REFORM STRATEGY* 27, 52–53 (Richard D. Kahlenberg ed., 2012) (discussing empirical findings that integration reforms were more academically and cost effective than programmatic interventions in high-poverty schools); see also Marco Basile, *The Cost Effectiveness of Socioeconomic Integration*, in *THE FUTURE OF SCHOOL INTEGRATION*, *supra*, at 127, 150. In North Carolina in particular, research strongly suggests that more resources and more effective use of existing resources will be needed to offset the effects of schools with higher levels of segregation among minority students. See generally CHARLES L. THOMPSON ET AL., CAROLINA INST. FOR PUB. POLICY, *NORTH CAROLINA HIGH SCHOOL RESOURCE ALLOCATION STUDY* (2008) (discussing chronically low-performing high schools, which also tend to be predominantly minority schools).

<sup>221</sup> Charles Clotfelter et al., *High-Poverty Schools and the Distribution of Teachers and Principals* 4 (Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Research, Working Paper No. 1, 2007), available at [http://www.caldercenter.org/PDF/1001057\\_High\\_Poverty.pdf](http://www.caldercenter.org/PDF/1001057_High_Poverty.pdf).

<sup>222</sup> See *supra* notes 177–199 and accompanying text.

<sup>223</sup> See Michelle Parthum, Note, *Using Litigation to Address Violence in Urban Public Schools*, 88 WASH. U. L. REV. 1021, 1031–37 (2011) (discussing the various disciplinary and safety challenges that high-poverty urban schools face).

<sup>224</sup> See Weiner & Pristoop, *supra* note 6, at 6 (discussing low-income students' need for supplemental resources); see also Campaign for Fiscal Equity v. State (*Fiscal Equity I*), 719 N.Y.S.2d 475, 490 (Sup. Ct. 2001).



dents,<sup>225</sup> and that the per-pupil costs rise exponentially as both the percentage and overall number of poor students in a district increases.<sup>226</sup> Federal funding for low-income students, however, only offsets a portion of these additional costs. The fact that so many state supreme courts have found that their education finance systems are providing inequitable or inadequate funds to students in such districts is persuasive evidence that states are either unwilling or unable to devote the resources necessary to offset the negative effects of the segregated education.<sup>227</sup> Moreover, the remedies in several of these cases have recognized the higher costs in high-poverty districts and driven additional resources to these districts.<sup>228</sup> Of course, socioeconomically integrated schools must also provide supplemental services for at-risk children, but they do not bear the other, sometimes exponentially, higher costs that are associated with high-poverty schools.<sup>229</sup>

The higher cost of educating students in concentrated poverty presents both constitutional and practical problems. As a practical matter, the unfortunate truth is that districts and states rarely have the resources or the will to fund quality education in high-poverty school districts.<sup>230</sup> The prospects are even worse during times of economic crisis. Currently, schools across the board are experiencing dwindling local revenues and huge cuts in their state funding<sup>231</sup> While some jurisdictions may have the capacity to raise taxes or absorb the losses without affecting educational quality, property-poor districts' capacity to generate revenue tends to be maxed out even during times of prosperity,

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<sup>225</sup> Education Finance Incentive Grant Program § 1125(A), 20 U.S.C. § 6337 (2006) (setting the standard for whether low-income schools are fairly funded as whether they receive a forty percent funding increase adjustment); NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *INEQUALITIES IN PUBLIC SCHOOL DISTRICT REVENUES* 62 (1998) (identifying forty percent as the appropriate adjustment for low-income students).

<sup>226</sup> See 20 U.S.C. §§ 6335(c)(1)(B), (c)(2)(B), 6337(d)(1)(A), (B) (2006).

<sup>227</sup> See *Rebell*, *supra* note 100, at 1500–05 (summarizing the litigation results).

<sup>228</sup> See, e.g., *Abbot v. Burke*, 710 A.2d 450, 457–58 (N.J. 1998).

<sup>229</sup> *Adams*, *supra* note 9, at 1630–31.

<sup>230</sup> See, e.g., *SOCIOECONOMIC COMPOSITION OF THE PUBLIC SCHOOLS*, *supra* note 26, at 6–7; see also *Wiener & Pristoop*, *supra* note 6, at 6 (detailing the funding gaps in 2006, well before the current economic crisis arose).

<sup>231</sup> See NICHOLAS JOHNSON ET AL., *CTR. ON BUDGET & POLICY PRIORITIES, AN UPDATE ON STATE BUDGET CUTS* (2011), available at <http://www.cbpp.org/cms/index.cfm?fa=view&id=1214>; Erik A. Hanushek, *Cry Wolf! This Budget Crunch Is for Real*, *EDUC. WK.*, May 19, 2010, at 32, 40; Lesli A. Maxwell, *K–12 Cuts Loom Again as States' Fiscal Woes Continue: With Budget Gaps Growing, About Half Expect K–12 Cuts*, *EDUC. WK.*, Mar. 3, 2010, at 15, 18; Sam Dillon, *Gates Urges School Budget Overhauls*, *N.Y. TIMES*, Nov. 19, 2010, at A21; Tamar Lewin & Sam Dillon, *With Revenue Cut, Schools Are Warning of Huge Layoffs*, *N.Y. TIMES*, Apr. 21, 2010, at A12.

and, thus, they have no excess to draw upon or cut during a crisis.<sup>232</sup> In fact, one study suggests that there has never been a systemic funding of the full costs of educating students in high-poverty schools.<sup>233</sup> Economic hardship may inevitably force them to diminish the quality of their educational offerings below already insufficient levels.<sup>234</sup> In short, the practical reality has been a choice between just two options: providing poor and minority students an adequate education within an integrated environment, or offering them an inadequate education elsewhere. Unfortunately, the frequent choice is a segregated education devoid of the resources necessary for full adequacy, yet still more expensive than integrated education.

The economic cost of educating students in high-poverty schools when other options are available raises constitutional concerns as well. Most obviously, courts in leading cases like *Rose* and *Pauley* specifically prohibit waste and inefficiency,<sup>235</sup> which are directly implicated by shouldering higher education costs just to maintain poverty or wealth concentrations. The same rationale would tend to follow in states with rigorous concepts of equity, as the state could be required to justify funding variances between districts. Of course, many state constitutions do not entail a rigorous concept of efficiency or equity.<sup>236</sup> Thus, if all schools were delivering adequate or equal educational opportunities, the cost or waste associated with doing so might be excusable. In effect, the ends might justify the means. Yet, circumstances where school systems are so flush with resources that they can deliver adequate or equal outcomes amidst rampant waste and inefficiency are hard to imagine on any consistent basis. For instance, geographic and transportation circumstances might make the cost of deconcentrating poverty higher than simply shouldering the full cost of delivering a constitutional edu-

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<sup>232</sup> See NAT'L RESEARCH COUNCIL, MAKING MONEY MATTER: FINANCING AMERICA'S SCHOOLS 46–47 (Helen F. Ladd & Janet S. Hansen eds., 1999); see also *McWhorter I*, 851 S.W.2d at 143 (stating that “[b]ecause of lack of fiscal capacity, there is little the poor school districts can do to offset” the loss of revenue that has resulted from economic activity moving to regional centers).

<sup>233</sup> Wiener & Pristoop, *supra* note 6, at 7 tbl.4.

<sup>234</sup> Advocates are already alleging as much. See, e.g., David Harrison, *New Budget Cuts Threaten School Funding Settlements*, STATELINE (Dec. 6, 2010), <http://www.stateline.org/live/details/story?contentId=533003> (discussing the problems that diminished educational funds create for complying with a past state finance settlement); Anthony Ramirez, *Further Cuts Spur Fear of Lawsuits*, LAS VEGAS SUN, Nov. 23, 2010, at A1 (discussing the potential for a lawsuit in Nevada as a result of education cuts).

<sup>235</sup> *Rose*, 790 S.W.2d at 211; *Pauley*, 255 S.E.2d at 874.

<sup>236</sup> See Thro, *supra* note 155, at 23–24.

cation in concentrated poverty,<sup>237</sup> but this would be an exception to the rule, which a district presumably must establish, rather than the general rule itself. In sum, when students attend schools in concentrated poverty out of administrative convenience, historical practice, or other less defensible reasons, the financial waste involved runs counter to an efficient use of educational resources and makes delivering a quality and constitutional education highly unlikely.

#### 4. High-Poverty Schooling and Failure as Prima Facie Evidence

Although no court has yet taken the conceptual step suggested above, courts have routinely paid particular attention to high-poverty school districts and treated the circumstances that tend to arise in them as prima facie evidence of a constitutional violation.<sup>238</sup> These courts have not recognized the constitutional dimensions of the distributional decisions that lead to high-poverty schools (as they may assume these school conditions are natural or inevitable),<sup>239</sup> but these courts have been quick to recognize the negative educational outcomes in high-poverty schools as representing a constitutional violation. Thus, a relatively fine line separates courts' evidentiary focus from the conceptual step articulated above. Courts need only distinguish high-poverty schooling that is inevitable from high-poverty schooling that is created. Then the courts' focus can move behind the seemingly obvious unconstitutional outcomes to the unconstitutional distributional decisions that are less obvious, but lead to the outcomes.

One of the key prevailing facts in high-poverty school districts that has drawn courts' attention is their dropout rate. Several courts have treated an extremely high dropout rate as prima facie evidence of inadequate or inequitable educational opportunities.<sup>240</sup> As one state supreme court wrote:

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<sup>237</sup> For instance, the geographic distance between some communities and schools can make the transportation costs and commuting time high enough that integrative assignment policies are inefficient.

<sup>238</sup> See *infra* notes 239–255 and accompanying text.

<sup>239</sup> See Martha R. Mahoney, *What's Left of Solidarity? Reflections on Law, Race, and Labor History*, 57 *BUFF. L. REV.* 1515, 1586–87 (2009); Parker, *supra* note 1, at 1177; Powell & Menendian, *supra* note 27, at 1095.

<sup>240</sup> See *Montoy v. State*, 112 P.3d 923, 934 (Kan. 2005); see also *Hancock*, 822 N.E.2d at 1168 (Greaney, J., dissenting) (stating that the lower court “examined a number of objective criteria used by the department [of education] as indicators of education program quality”); *Neeley*, 176 S.W.3d at 767–69, 787, 789; *Fiscal Equity I*, 719 N.Y.S.2d at 520 (“In sum, City public school students’ graduation/dropout rates and performance on standardized tests demonstrate that they are not receiving a minimally adequate education.”).

[A]n inordinate number of [the district's] students have consistently failed to match the academic performance of their statewide public school counterparts and . . . such failure, measured by their performance while attending [the district's] schools, their dropout rates, their graduation rates [and] their need for remedial help . . . constitute[s] a clear showing that they have failed to obtain a [constitutionally] comports education.<sup>241</sup>

In short, a high dropout rate represents “a systematic weakness . . . in meeting the needs of . . . students.”<sup>242</sup> As indicated earlier, this systematic weakness is most obvious in high-poverty schools. They tend to have alarmingly high dropout rates that exceed those of any other schools.<sup>243</sup> Student assignment policies that operate to starve these schools of the most important resources of high-quality teachers and middle-income students make widespread failure almost certain. In short, high-poverty, high-minority schools almost always include this key indicia of inadequate or inequitable education.

The second area of judicial focus that corresponds with the recognition of middle-income peers as a constitutionally relevant resource is the concentration of at-risk and poor students. Courts have not treated concentrated poverty as a factor within the state's control, but they have treated the existence of concentrated poor kids as tending to raise constitutional concern. North Carolina's Supreme Court, for instance, included within its five major findings and conclusions that “there were an inordinate number of ‘at-risk’ students attending [the district in question]”<sup>244</sup>—a category of students defined elsewhere as including poor and minority students.<sup>245</sup> The court then reiterated the inordinate number of at-risk students and academic failures in the district several times, indicating that the concentration of failure and at-risk students is exactly what demands the attention of the state and school districts to ensure students have the opportunity to receive a sound basic education.<sup>246</sup> A New York court was even more poignant, writing that, “A defining characteristic of the New York City public school system is its

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<sup>241</sup> *Hoke Cnty.*, 599 S.E.2d at 386.

<sup>242</sup> *Id.* at 384.

<sup>243</sup> See BHARGAVA, *supra* note 179, at 21; see also N.C. DEP'T OF PUB. INSTRUCTION, 2006 4-YEAR COHORT GRADUATION RATE BY SCHOOL (2007), <http://www.ncpublicschools.org/docs/newsroom/news/2006-07/byschool-attach4.pdf>.

<sup>244</sup> *Hoke Cnty.*, 599 S.E.2d at 392.

<sup>245</sup> *Id.* at 389 n.16.

<sup>246</sup> See *id.* at 392.

high concentration of students from poor and low income families. . . . The intersection of factors such as students' poverty, immigration status, and limited English language proficiency means that New York City has a high proportion of students 'at risk' for academic failure."<sup>247</sup> The New Jersey Supreme Court took recognition of the importance of concentrated poverty to the next level, specifically tying certain services to the level of concentrated poverty in districts.<sup>248</sup> Other courts have, likewise, recognized the need for particularized remedies in such districts.<sup>249</sup>

Interestingly, while New York and North Carolina's courts were attuned to concentrated poverty, both refused to entertain the intersection of concentrated poverty and failure as giving rise to a distinct claim. In North Carolina, the court did not per se reject the claim "that due to the particular demographics of . . . urban districts, which include many disadvantaged children, . . . [these districts are] entitled to an unequally large per-pupil allocation of state school funds,"<sup>250</sup> but the court concluded that the claim did not warrant independent treatment because it was "repetitious of [the] previous argument that the state must provide all of its children with the opportunity to receive a sound basic education."<sup>251</sup> In effect, if the concentration of at-risk students in urban districts gave rise to additional needs, the state would already be obligated to meet them and no specialized claim is necessary to reach this conclusion. Thus, the predicate inquiry is the same in every dis-

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<sup>247</sup> *Fiscal Equity I*, 719 N.Y.S.2d at 490. The dissenting judge in the lower court properly forecast the appellate court's opinion, writing "children from impoverished families may experience further hurdles if they attend a school filled with similarly disadvantaged children, schools with 'concentrated poverty.'" *Campaign for Fiscal Equity, Inc. v. State (Fiscal Equity II)*, 744 N.Y.S.2d 130, 153 (App. Div. 2002) (Saxe, J., dissenting).

<sup>248</sup> *Abbott*, 710 A.2d at 462–63 (explicitly tying pre-kindergarten and other services to concentrated poverty levels).

<sup>249</sup> *See Montoy v. State*, 138 P.3d 755, 758 (Kan. 2006) ("We noted that the evidence at trial demonstrated the opposite—that the districts with high-poverty, high at-risk student populations are the ones that need help attracting and retaining teachers."); *Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee*, 189 S.W.3d 1, 4 (Ark. 2004). An adequacy study indicated one requirement was

[a]dditional staff members for schools with high concentrations of poverty, to include tutors and "pupil support personnel" added to school faculty for each 100 students qualifying for federal free and reduced-price lunches, with a minimum of one at each school; in addition, each 100 children identified as "English Language Learners" (ELL) generate an additional 0.40 full-time equivalent (FTE) tutor/teacher.

*Huckabee*, 189 S.W.3d at 4.

<sup>250</sup> *Leandro*, 488 S.E.2d at 257.

<sup>251</sup> *Id.*

tract: are students receiving a sound basic education? New York's highest court implicitly reached the same conclusion by rejecting a constitutional claim arising out of Rochester's high-poverty district on the same day it recognized a claim of inadequate education in New York City's high-poverty schools.<sup>252</sup> The difference between the two cases was that the plaintiffs in New York City simply alleged an inadequate education, which would presumably require more funding, while the plaintiffs in Rochester claimed that concentrated poverty itself was a violation.<sup>253</sup>

The astute attention to the problem of high-poverty schooling, yet fine parsing as to whether it gives rise to an independent claim, suggests that courts generally recognize a problem, but may not understand its cause or constitutional relevance. If concentrated poverty merely coexisted with inadequate education without causing it or concentrated poverty was unavoidable in all instances, the approaches of New York and North Carolina's courts would be defensible. Yet neither of these is invariably true. First, as social science reveals, academic barriers do not randomly occur in high-poverty districts; rather, the fact that a school is high-poverty is a primary reason why high-quality teachers pursue opportunities elsewhere.<sup>254</sup> Likewise, the barriers a student encounters due to his own poverty will follow him to any school he attends, but the expectations and rigor placed on his classroom and school as a whole are a result of the poverty level of his school.<sup>255</sup> Second, as this Article's empirical study below reveals, not all concentrated poverty is inevitable. Rather, much concentrated poverty is the result of policies within districts themselves. If these two crucial facts can be impressed upon courts, the distinction between the high-poverty districts representing the conditions of unconstitutional education and high-poverty districts as a cause of unconstitutional education should diminish and open the way to constitutionalizing equal access to middle-income peers.

### III. EMPIRICAL EVIDENCE OF WIDESPREAD VIOLATIONS

School districts and states make resource distribution decisions when they develop student assignment policies. In a district where all schools are middle income, the decision to maintain some schools at eighty percent middle income and others at sixty-five or seventy percent

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<sup>252</sup> See *Paynter*, 797 N.E.2d at 1228–29; *Fiscal Equity III*, 801 N.E.2d at 330–31.

<sup>253</sup> See *Paynter*, 797 N.E.2d at 1228–29; *Fiscal Equity III*, 801 N.E.2d at 330–31.

<sup>254</sup> See *supra* notes 184–195 and accompanying text.

<sup>255</sup> See *supra* notes 205–208 and accompanying text.

is unlikely to present a constitutional problem; nor, in an overwhelmingly poor district is it likely that a constitutional problem arises from assigning slightly larger percentages of middle-income students to a particular school when all of the schools remain predominantly poor.<sup>256</sup> But when a school district concentrates poor students in particular schools when other options are available, it necessarily makes decisions that will create barriers to learning, starves the schools with concentrated poverty of vital resources, and depresses academic achievement therein. Similarly, when an educational system over-concentrates middle-income students in particular schools, it necessarily allocates one of its most valuable resources away from some students and toward other students. As the following Sections demonstrate, decisions of these sorts consistently occur along racial lines, undermining the ability of minority students to receive a sound basic education.<sup>257</sup> Yet from the outset, this Article acknowledges that it paints with a relatively broad brush in dealing with complex questions of student assignment and achievement, and that nuanced and definitive conclusions require study by individuals with statistical expertise far beyond that of the author of this Article. Nonetheless, the results of this Article's study reveal trends of inequity that implicate district level student assignment policies and beg explanations.

### A. *Inquiries and Methodology*

#### 1. Equality of Access

This Article's empirical study examines two issues: first, the extent to which school districts are providing minority students unequal access to middle-income peers; and second, the extent to which this inequality corresponds with larger achievement gaps. In resolving these issues, the study does not attempt to identify an optimum percentage of middle-income students in a school. Rather, it accepts the social science consensus that the socioeconomic demographics of a school matter.<sup>258</sup> By doing so, the study can ask the narrower questions of what school districts do with the middle-income students in their districts and whether those decisions correspond with any changes in achievement gaps. In this respect, this inquiry is distinct from most other studies, as

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<sup>256</sup> Of course, if these distributional choices were based on race, they would violate equal protection. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 209–10 (1973). Thus, this Article's primary purpose is to address racially unequal access that may not be or cannot be shown to be intentional discrimination.

<sup>257</sup> See SOCIOECONOMIC COMPOSITION OF THE PUBLIC SCHOOLS, *supra* note 26, at 9.

<sup>258</sup> See *supra* notes 177–208 and accompanying text.

it accepts rather than questions the level of poverty that exists within a district. This study seeks only to resolve whether the access to the middle-income students that exists within a district is equal.

For instance, consider a district where only thirty percent of the students are middle income. The district can assign students in such a way that white students are more likely than minority students to attend school with these middle-income students. White students might still be in predominantly poor schools, but the average white student might be in a school with forty or forty-five percent middle-income students while the average minority student is in a school with only twenty-five percent middle-income students. This study's methodology, in most instances, would not qualitatively distinguish between this disparity and one that results in a district where all students of all races attend predominantly middle-income schools, but whites attend schools with higher percentages of middle-income students. Rather, the primary distinction this study's methodology would reveal between these districts would be if one district was creating a higher or lower racial disparity in access to existing middle-income peers. In this respect, the study remains neutral as to districts' demographic populations, and focuses squarely on racially equal access. If access to middle-income peers is a key educational resource, then district actions that distribute these resources in a racially unequal manner are the key concern, and just as problematic as funding or staffing a minority school at lower levels than a white school down the road in the same district.

The first step in this Article's methodology for assessing "equality of access" to middle-income peers is to identify the percentage of middle-income students in every school in a given state, which it calculates as the percentage of students in a school that do not qualify for free or reduced lunch. Second, the study identifies the percentage of white, African-American, and Latino students in each school. Third, the study uses school level data to calculate district level average access to middle-income students for Latino, African-American, and white students.<sup>259</sup> Next, the study compares the average access of each of these racial groups and translates it into a percentage.<sup>260</sup> For instance, if the average white student attends a school where fifty percent of his peers are middle income and the average Latino student attends a school where

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<sup>259</sup> The formula for a racial group's average access to middle-income peers is: [(number of students in racial group in school A x percentage of middle-income peers in school A) + (same formula for every school)] / (total number of students in racial group in district).

<sup>260</sup> The formula is: (average African-American access) / (average white access).



only twenty-five percent of his peers are middle income, the Latino student's access to middle-income peers would be fifty percent that of whites. The study calculated the access of Latinos and African Americans separately and found that they tended to experience similar levels of inequality in comparison to whites. Thus, for purposes of efficiency, simplicity, and clarity, the study combines African Americans and Latinos into one group termed "minority" in presenting unequal access.<sup>261</sup> Moreover, this grouping of minority students is consistent with past practices of federal courts,<sup>262</sup> as the relevant disadvantage is most often between minorities and whites rather than between minority groups.

It is important to note, however, this methodology cannot account for segregation that may be occurring at the classroom level. Minority students could be far more socioeconomically segregated than this Article's study suggests because not all students necessarily come into contact or equal contact with the middle-income students who are in their schools.<sup>263</sup> It is not unusual for a minority student to be in a middle class school and still not have much exposure to middle-income students because the student is assigned to classrooms that have high percentages of poor students.<sup>264</sup> Thus, it is altogether possible that some districts that are not represented in this study as providing significantly unequal access are nonetheless creating problematic socioeconomic isolation in their classrooms.<sup>265</sup> But that isolation is not evident because such schools maintain a relatively high level of socioeconomic integration at the school level.

The danger of overlooking important classroom segregation is highest in districts that have only one elementary, middle, or high school. In these districts, this study's methodology would show minority and white students as having the exact same level of access to middle-

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<sup>261</sup> The formula is: (number of African-American and Latino students in School A) x (percentage of middle-income peers in School A) + (same formula for every school in district) / (total number of African-American and Latino students in District) / (number of white students in School A) x (percentage of middle-income students in School A) + (same formula for every school in district) / (total number of white students in district).

<sup>262</sup> See, e.g., *United States v. City of Yonkers*, 833 F. Supp. 214, 221 (S.D.N.Y. 1993) (comparing Latino and African-American test results to those of whites and Asians); *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 379–80 (D. Mass. 2003) (explaining why a desegregation plan that classified students as either white or non-white was appropriate in the city of Lynn).

<sup>263</sup> See Kevin G. Welner, *Tracking in an Era of Standards: Low-Expectation Classes Meet High-Expectation Laws*, 28 HASTINGS CONST. L.Q. 699, 702–03 (2001).

<sup>264</sup> *Id.*; see also *Thomas Cnty. NAACP v. City of Thomasville Sch. Dist.*, 299 F. Supp. 2d 1340, 1354–55 (M.D. Ga. 2004) (finding racial disparities between ability groups).

<sup>265</sup> See Welner, *supra* note 263, at 703–08.

income peers, even though they might not have equal access at the classroom level. Almost all districts, however, have more than one elementary and middle school and, thus, the segregation at the earlier grades is still captured by this data and partially—although not completely—prevents the single high school anomaly from entirely skewing the data. In short, the study can achieve its primary purpose of revealing the general problem of racially unequal access to middle-income peers, but cannot identify its exact contours and may understate inequality in some instances.

## 2. Racial Achievement Gap Changes in Relation to Racially Inequitable Access

The study's second inquiry is whether racially differential access to middle-income peers corresponds with changes in racial achievement gaps on standardized tests. It examines both the achievement gap between whites and African Americans and the achievement gap between whites and Latinos. Nearly every school district in the country has a racial achievement gap, regardless of its integration level.<sup>266</sup> Social science would indicate that a significant portion of this achievement gap is attributable to demographic and local factors beyond the scope of this study.<sup>267</sup> This study does not attempt to examine the role these other factors play and, instead, only attempts to measure the extent to which the achievement gap widens or narrows in districts where minority students have unequal access to middle-income peers. To do so, the study ignores the variation in overall achievement between districts. The fact that a district's student population is high income and high performing, or low income and low performing, should have little effect on the study's results. By ignoring the absolute levels of achievement between districts and instead analyzing the differential achievement of students within a district, the study is able to compare the achievement gap across districts in a way that is less subject to varying

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<sup>266</sup> See NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 8, at 44–51.

<sup>267</sup> See, e.g., Jaekyung Lee, *Racial and Ethnic Achievement Gap Trends: Reversing the Progress Toward Equity?*, EDUC. RESEARCHER, Jan. 2002, at 3, 6 (noting that the conventional factors affecting achievement are socioeconomic and family conditions, youth culture and student behavior, and schooling conditions and practices); Constantinos Papanastasiou, *Internal and External Factors Affecting Achievement in Mathematics: Some Findings from TIMSS*, 26 STUD. IN EDUC. EVALUATION 1, 4–5 (2000) (claiming that external factors affecting achievement include socioeconomic status, educational background, school climate, and language background).

demographics and other factors across districts that affect overall absolute achievement.

For example, only sixty percent of hypothetical District *A*'s white students and fifty percent of its African-American students might be achieving at grade level, whereas ninety percent of hypothetical District *B*'s white students are at grade level and seventy percent of its African-American students. One might assume that District *B* is doing a better job of educating African Americans, but District *A*'s smaller achievement gap suggests this may not be true in all respects. District's *B*'s higher test scores are likely attributable to higher funding, better teachers, or the fact that so many of its students are middle income.<sup>268</sup> Thus, although District *B* has higher scores, its larger achievement gap suggests that it may not be utilizing its resources in a way that promotes racial equity. In contrast, District *B* may not be a high-quality district on any number of measures, but its smaller achievement gap suggests that it is offering students an equal opportunity to benefit from those resources that it does have. In short, this study's methodology treats the fact that one district's overall achievement is lower than another district's due to its demographics or other factors as irrelevant, focusing instead on whether a district's student assignment policies correspond with changes in the racial achievement gap.

### B. Data Selection and Collection

Studying patterns of poverty isolation and racial inequality within districts presents a few challenges. The first problem is the sheer size of the data set. There are over 10,000 school districts, ranging in size from around 1000 students to over 100,000.<sup>269</sup> Some of the relevant data for this study is not in a centralized database and requires pulling data from differing locations.<sup>270</sup> Thus, a national study entails extensive

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<sup>268</sup> See PUMA, *supra* note 217, at 78–79 (analyzing the effect of concentrated poverty on standardized test scores); Darling-Hammond, *supra* note 183, at 32 (“[W]hile student demographic characteristics are strongly related to student outcomes at the state level, they are less influential in predicting achievement levels than variables assessing the quality of the teaching force.”); Rebell, *supra* note 100, at 1476–79 (analyzing the effect money has on educational outcomes).

<sup>269</sup> *Common Core of Data (CCD)*, NAT'L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/ccd/> (last visited Feb. 19, 2012).

<sup>270</sup> Most of the relevant demographic details are in a national database. *Build a Table*, NAT'L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/ccd/bat/> (last visited Feb. 19, 2012). But because the study relies on states tests, it required retrieving data from each individually and state data varied in its usability. For instance, in North Carolina, the achievement gap data was not available in a downloadable format but rather had to be gathered from each

work. The second problem is the variation in district structure. School districts in some states are organized on the county level, whereas other states have school districts that are neighborhood or city based.<sup>271</sup> Differing structures can have a significant and misleading effect on the question of equal access to middle-income peers. Geographically smaller school districts are more likely to have school populations that are both small and demographically homogenous.<sup>272</sup> The converse is true of larger districts.<sup>273</sup> To the extent a school population is small and relatively homogenous, analysis of unequal access may be irrelevant. For instance, if all the students in the district attend the same elementary school, then by necessity they experience the same access. Likewise, regardless of the number of schools in the district, if almost all the students in a district are of one socioeconomic class, there can be no unequal access. If districts with these characteristics were the exceptions rather than the general rule in a state, meaningful analysis of unequal access at the district level could still proceed. But in some states, smaller or community-based school districts are the norm, and significant segregation tends to exist between districts rather than within them.<sup>274</sup> Of course, the inequalities between homogenous districts are still subject to analysis, but that analysis is different in substance and would implicate a different legal analysis than the one forwarded by this Article. In short, this Article's legal analysis is based on unequal distribution of students within districts, which is more prevalent and noticeable in large and diverse school districts.

To ensure a data set manageable in size, this study limits its data collection to a sample (albeit a large sample). To avoid the problem that inter-district segregation would pose, this study intentionally collects data from states where school districts are largely organized at the county level. Most southeastern states follow this pattern.<sup>275</sup> But to test

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district's state report card. See *Search Options*, EDUC. FIRST N.C. SCH. REPORT CARDS, <http://www.ncreportcards.org/src/> (last visited Feb. 19, 2012).

<sup>271</sup> North Carolina's districts are almost all county districts. Thus, the State has only 114 districts. *Build a Table*, *supra* note 270. Conversely, Pennsylvania organizes districts at the community level and has nearly 800. *Id.*

<sup>272</sup> See, e.g., John Charles Boger, *Education's "Perfect Storm"? Racial Resegregation, High Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375, 1424 (2003); Claudia Goldin & Lawrence F. Katz, *Human Capital and Social Capital: The Rise of Secondary Schooling in America, 1910-1940*, 29 J. INTERDISC. HIST. 683, 702 (1999).

<sup>273</sup> Goldin & Katz, *supra* note 272, at 694.

<sup>274</sup> *Id.* at 706-08.

<sup>275</sup> See Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825, 840 tbl.2 (1996). See generally Goldin & Katz, *supra* note 272 (using county level data).

the assumption that intra-district segregation would not be significant enough to provide meaningful comparisons to achievement gap changes in states with small districts, the study also includes states outside of the Southeast that have far more and far smaller districts. In total, this study includes six southeastern states—North Carolina, Alabama, Georgia, Mississippi, South Carolina, and Virginia—and five northeastern and midwestern states—Connecticut, Massachusetts, Michigan, Ohio, and Pennsylvania.<sup>276</sup>

### C. Study Results

Overall, the study revealed a serious problem with racially unequal access to middle-income peers within districts—a problem that stretches across all states. Some districts were providing access that was so unequal it was shocking. In four of the states, there were districts that provided whites twice as much access to middle-income peers as minorities. This is the difference between whites attending a solidly middle-income school, at seventy percent middle-income peers, and minorities attending a solidly poor school, at only thirty-five percent middle-income peers. A few districts even provided whites access that was three to five times that of minorities. The data also revealed that in several states a quarter of the districts were providing access that, although not shockingly unequal, was disparate enough to create qualitatively different experiences for white and minority students. And on the basic question of rough equality, in some states, only about half the districts provided equal access. In short, far too many school districts have student assignment policies that place minority students at educational risk in comparison to whites and, thus, raise serious constitutional concerns.

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<sup>276</sup> In a few districts, the average minority student attended schools that had a higher percentage of middle-income students than the average white. Generally speaking, this higher access for minorities is significant, as it often occurs when the district is almost exclusively poor and minority or predominantly wealthy and almost entirely white. In the former, the average minority might attend a school with five percent middle-income students while the few whites in the district attend a school that is four percent middle-income students. As a practical matter, both racial groups have the same access to middle-income peers, but the study's methodology would indicate a large statistical difference. *See, e.g.*, Chester, PA (Average Minority Access: 12.5%; Average White Access 10.3%; Minority Access Compared to Whites: 121.7%); *see also* Sparta Area Schools, Michigan (Average Minority Access: 60%; Average White Access: 69%; Minority Access Compared to Whites: 110%; Overall Percentage of White Students: 87%).

## 1. Widespread Differential Access

Minority access to middle-income peers ranged from as low as twenty percent compared to that of whites in one district to equal access in numerous districts. In a few districts, minorities' average access to middle-income peers was actually higher than that of whites. Categorizing districts offers a clearer understanding of this varying access. Table 1 divides school districts into categories based on the amount of access to middle-income peers they offer minorities in comparison to whites. The column labeled "Access Below 50%" would capture, for instance, a district where the average white student attends a school with seventy percent middle-income students and the average minority student attends a school with less than thirty-five percent middle-income students.<sup>277</sup>

State	Access Below 40%	Access Below 50%	Access Below 75%	Access Below 95%	Access Below 100%
Alabama	4.0%	8.0%	18.0%	38.0%	42.0%
Georgia	1.6%	2.7%	12.8%	34.8%	67.4%
Mississippi	0.0%	3.6%	15.3%	36.5%	63.5%
North Carolina	0.0%	0.0%	17.5%	68.4%	87.7%
South Carolina	0.0%	1.2%	8.5%	45.1%	69.5%
Virginia	0.0%	0.8%	3.1%	26.0%	74.0%
Connecticut	0.0%	0.0%	0.6%	13.0%	67.3%
Massachusetts	0.0%	0.0%	1.5%	9.2%	51.7%
Michigan	0.1%	0.5%	1.2%	13.6%	48.5%
Ohio	0.04%	0.6%	33.7%	52.5%	56.1%
Pennsylvania	0.2%	0.2%	1.6%	12.1%	56.3%

Source: See *infra* Apps. A, B.

The "Access Below 40%" and "Access Below 50%" categories represent districts providing drastically unequal access to minorities. Districts providing less than seventy-five percent access, likewise, provide significantly different experiences to minorities and whites, just not necessarily as stark. But as school districts approach 100% access, qualitative characterizations likely become less obvious, as some variation among schools will necessarily exist for practical reasons. This Article treats access at ninety-five percent or higher to be within the normal margin of variance and, thus, equal notwithstanding the small disparity.

<sup>277</sup> See, e.g., Hamilton, OH (Average Minority Access: 35.9%; Average White Access: 72.8%; Minority Access Compared to Whites: 49.35%).

Nonetheless, the study identifies the "Access Below 100%" as its own category because it does represent absolute equality. Interestingly, a quick review of Table 1 suggests states' scores on absolute equity bear little relation to their scores in the lower categories that represent problematic inequality.

The data in Table 1 reveal significant variation across districts and states. All states have significant pockets of unequal access, but the pockets of inequality exist at different tipping points in different states. For instance, Virginia had the second highest percentage of districts providing less than numerically equal access in the South at seventy-four percent, but it ranked the lowest on all the other categories. In contrast, Alabama had the most districts, by a large margin, that were providing minorities less than half of the access of whites. Yet, Alabama also had the most districts that were providing equal or nearly equal access. In short, Alabama appears to have a large number of both good and bad school districts, but fewer in between.

Differences between the regions also existed and sometimes were greater than those within them. Most notably, the northern states have relatively low numbers of unequal access. For instance, in two northern states, Massachusetts and Connecticut, not a single school district provided minorities less than fifty percent access and, in the three other northern states, less than one percent of districts provided less than fifty percent access.<sup>278</sup> Likewise, in four of the five northern states, the percentage of districts providing less than ninety-five percent access was equivalent to the percentage of districts providing less than seventy-five percent access in the South. Thus, although there were significant numbers of districts providing unequal access outside the South, the inequality was less severe than in the South.

These regional differences, although statistically real, may be misleading. As noted earlier, when significant segregation exists between districts, districts tend to be more internally homogenous and inequalities are not fully captured by this study's methodology.<sup>279</sup> A careful review of the data suggests that this is exactly what is occurring in the

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<sup>278</sup> Only one district out of over 600 districts provided less than fifty percent access in Pennsylvania. (Philadelphia City, 37% access). In Michigan, only four out of over 700 districts provided minorities less than fifty percent access. (Vassar Public Schools, 27% access; Grand Rapids Public Schools, 40% access; Saginaw City School District, 43% access; Buena Vista School District, 44% access). In Ohio, only three out of 469 districts provided minorities less than 50% access. (Ohio State School for the Blind, 26%; Lake Local, 39%; Perry Local, 49%).

<sup>279</sup> See Goldin & Katz, *supra* note 272, at 702.

northern states. First, the large number of districts and each district's relatively small size appear to mask inequality in the North. Michigan has the most school districts of any state in the study at 734, and its inequality in access is the lowest or nearly the lowest in every category.<sup>280</sup> Likewise, Massachusetts has 300 districts (even though its geographic size is less than a tenth of the size of Michigan).<sup>281</sup> In the important category "Access Below 95%," Massachusetts's level is the lowest.

Second, when small northern districts are factored out, the difference between the North and South in racially equitable access disappears. For instance, Ohio has 469 school districts, but many are very small and racially homogenous.<sup>282</sup> In fact, only eighty-two of them have minority populations that are sufficiently large enough to report minority student achievement without violating privacy requirements.<sup>283</sup> When viewed at the district level, Ohio's inequality in access is the highest in all but one category in the North, but is lower than southern states in most other categories. Yet if Ohio's access is calculated at the county level, rather than at the district level, Ohio's inequality of access nearly mirrors the South.<sup>284</sup> In fact, calculated at the county level, Ohio would have the most unequal access of any state in the study in the categories of "Access Below 75%," "Access Below 95%," and "Access Below 100%." In short, the higher access in the North is likely attributable to smaller and homogenous districts rather than progressive student assignment policies.

Unfortunately, notwithstanding the foregoing differences in the extent of inequality, a consistent and reoccurring pattern of unequal access stretches across all states, as illustrated in Table 2. In fact, three troubling, but important, patterns arise. First, although relatively small in number, some districts are providing grossly unequal educational environments to minority and white students. For instance, Table 2

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<sup>280</sup> *MME Public Demographic Results—Spring 2010*, MICH. DEP'T OF EDUC., [http://www.michigan.gov/mde/0,4615,7-140-22709\\_35150\\_47475--,00.html](http://www.michigan.gov/mde/0,4615,7-140-22709_35150_47475--,00.html) (click "MME Public Demographic Results—Spring 2010 to open document") (last visited Feb. 25, 2012).

<sup>281</sup> *2008–09 Selected Populations Report*, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC., [http://profiles.doe.mass.edu/state\\_report/selectedpopulations.aspx?year=2009&mode=district&Continue.x=4&Continue.y=7](http://profiles.doe.mass.edu/state_report/selectedpopulations.aspx?year=2009&mode=district&Continue.x=4&Continue.y=7) (last visited Feb. 25, 2012) [hereinafter *Mass Data*].

<sup>282</sup> *Disaggregated School Data—Racial/Ethnic*, OHIO DEP'T OF EDUC., <http://ilrc.ode.state.oh.us/Downloads.asp> (click "Racial/Ethnic" link to download data) (last visited Feb. 25, 2012) [hereinafter *Ohio Data*].

<sup>283</sup> See Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (2006).

<sup>284</sup> At the county level, 1.5% of Ohio districts provide less than 40% access, 4.5% less than 50% access, 28.4% less than 75% access, 59.7% less than 95% access, and 73.1% less than 100% access.



identifies several districts that assign whites to schools where their peers are sixty percent or more middle income, while assigning minorities to schools where the percentage of middle-income students ranks only in the teens or twenties. Within these single districts, whites and minorities attend schools that, by the numbers, bear absolutely no resemblance to one another.

Table 2: Districts Providing the Most Racially Unequal Access

School District	Average White Student's Access to Middle-income peers	Average Minority Student's Access to Middle-income peers	Minority Access as a Percentage of White Access
Atlanta Public Schools (GA)	73.20%	15.00%	20.50%
Mitchell County (GA)	48.80%	11.50%	23.60%
DeKalb County (GA)	66.70%	26.10%	39.10%
Bibb County (GA)	41.30%	17.70%	42.90%
Fulton County (GA)	82.60%	36.00%	43.60%
Hale County (AL)	67.10%	19.60%	29.30%
Marengo County (AL)	46.20%	13.70%	29.80%
Pickens County (AL)	61.30%	23.40%	38.20%
Tuscaloosa City (AL)	112.20%	44.40%	39.60%
Dallas County (AL)	32.80%	13.70%	41.70%
Franklin County (AL)	53.60%	23.30%	43.50%
Monroe County (AL)	51.30%	24.50%	47.80%
Lawrence County (AL)	63.70%	30.40%	47.80%
Philadelphia City (PA)	33.40%	12.50%	37.30%
Mahoning (OH)	66.00%	19.50%	29.60%
Summit (OH)	65.80%	29.50%	44.80%
Hamilton (OH)	72.80%	35.90%	49.40%
Cleveland (MS)	49.00%	21.00%	42.40%
West Jasper (MS)	48.00%	21.00%	43.10%
Greenwood (MS)	33.00%	15.00%	43.80%
Charleston (SC)	69.00%	31.10%	44.80%
Richmond City (VA)	58.40%	26.40%	45.10%

Source: See *infra* Apps. A, B.

Second, about one out of six districts in nearly half of the states provides minorities less than seventy-five percent of the access of whites to middle-income peers. This means that in a typical district, where only a third of the students are poor,<sup>285</sup> whites would attend schools that

<sup>285</sup> Thirty-five percent of students fall below 150% of the national poverty line, which is the typical indicator of low-income status. *Children Below 150% Poverty 2010*, KIDS COUNT DATA CTR., <http://datacenter.kidscount.org/data/acrossstates/Rankings.aspx?ind=46> (last visited Feb. 19, 2012); see also SUSAN AUD ET AL., NAT'L CTR. FOR EDUC. STATISTICS, *THE CONDITION OF EDUCATION 2011*, at 86–89 (detailing the percentage of school-age children living in poverty and the percentage of students by race in high-, middle-, and low-poverty schools).

are solidly middle class while minorities attend schools that are predominantly poor, the tipping point for educational barriers.<sup>286</sup>

Third, in all but five states, one-third to more than one-half of the districts provide minorities with unequal access (below ninety-five percent). In districts that are solidly middle class or predominantly poor, unequal access alone may not produce significant changes in the educational environment, but in all of those districts operating on the margins, inequality in access is enough to make a negative impact on minority students and an opposite impact on white students. In short, an alarmingly large percentage of school districts are placing minority students at educational risk in comparison to whites.

Some districts, however, appear to be doing a good job of equally exposing students to middle-income peers. Surprisingly, at the state level, minority students' exposure to middle-income students in comparison to whites is above ninety percent in all of the states studied except North Carolina and Ohio.<sup>287</sup> In fact, the statewide average access is above ninety-five percent in six of the states.<sup>288</sup> This average is high because more than half of the districts provide equal or better access to minorities in all of the states except two, thus largely counterbalancing, on the statewide average, the inequalities created elsewhere.<sup>289</sup> Yet the fact that so many districts are doing a relatively good job of providing equal access at the school building level makes the student assignment policies in other districts appear even worse. In effect, the large per-

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<sup>286</sup> KAHLENBERG, *supra* note 23, at 39–40 (explaining that researchers have defined high-poverty schools as those where fifty percent of students or more are eligible for free or reduced-price meals because students in these schools have far lower test scores than similar students in schools with smaller concentrations of poor students); MICHAEL J. PUMA ET AL., U.S. DEP'T OF EDUC., PROSPECTS: THE CONGRESSIONALLY MANDATED STUDY OF EDUCATIONAL GROWTH AND OPPORTUNITY: THE INTERIM REPORT 77 exh.1.51 (1993) (demonstrating a precipitous decline in student performance once the percentage of poor students reaches fifty percent); PUMA, *supra* note 217, at 12 ("School poverty depresses the scores of all students in schools where at least half of the students are eligible for subsidized lunch, and seriously depresses the scores when over 75 percent of students live in low-income households.").

<sup>287</sup> North Carolina (Average Minority Access Compared to Whites: 88.7%); Ohio (Average Minority Access Compared to Whites: 87.5%).

<sup>288</sup> Massachusetts (95.2%); Virginia (95.6%); Connecticut (97.9%); Michigan (96.5%); Pennsylvania (96.7%); Mississippi (95.4%).

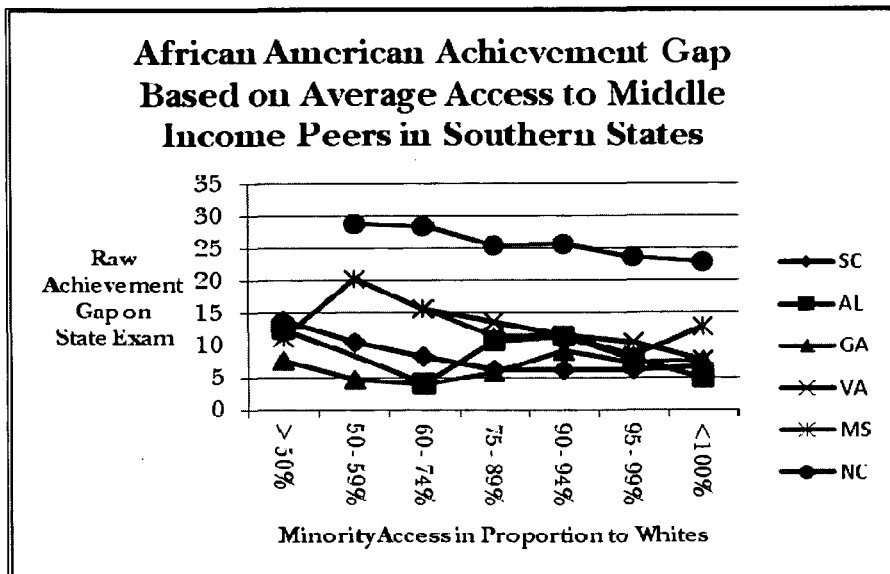
<sup>289</sup> Unfortunately, the percentage of districts providing equal access or better may be overstated in northern states in particular, where there are far more specially created school districts that cater to unique or small student populations and there is but one school in the district. Alternative schools for students who have been suspended are but one example. This study attempted, where appropriate and possible, to exclude special purpose school districts.

centage of districts providing equal access demonstrates, consistent with this Article's argument, that racially unequal access to middle-income peers is far from inevitable.

## 2. Lower Access and Higher Achievement Gaps

Social science stresses the importance of access to middle-income peers because of the effect this access generally has on achievement.<sup>290</sup> The data in this study suggest that this principle holds true in the states analyzed. As a general matter, those districts with a racially equitable distribution of middle-income students tend to have smaller achievement gaps (as measured by the percentage of students achieving at or above grade level on the states' end-of-year standardized tests). Those with the least racially equitable distribution of middle-income students tend to have larger achievement gaps. Figures 1 and 2 graph the achievement gap between whites and African Americans based on the level of access that minorities experience in comparison to whites in their district.<sup>291</sup>

Figure 1:

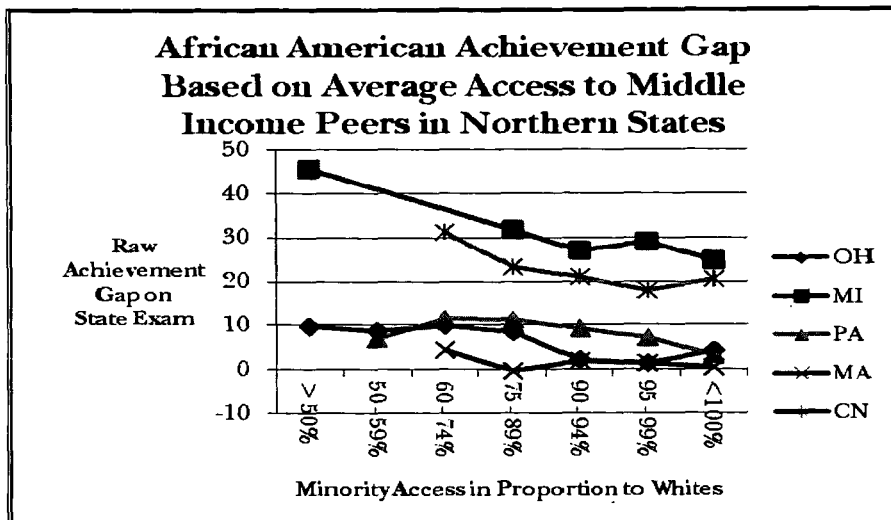


<sup>290</sup> See McUsic, *supra* note 9, at 1355-56.

<sup>291</sup> It is important to note that the number of districts represented in these charts is smaller than the number of districts in the previous tables because the achievement gap could not be calculated in several districts due to the unavailability of achievement data. Presumably the minority populations were too small for the districts to release the data.

Looking at the southern states, every state except Georgia and Mississippi shows a dramatic drop in the racial achievement gap from the districts with the most inequitable distribution to those with equitable distribution. Mississippi, however, is still consistent with the overall trend if one compares Mississippi's "50–59%" access group to its equal access group ("<100%"). Between these categories, the achievement gap drops from 20.4 raw percentage points to 13 points. The nonconforming achievement gaps in Mississippi's outlier districts would appear to be a result of demographic and data anomalies in a few districts, rather than an exception to the overall trend.<sup>292</sup>

Figure 2:



<sup>292</sup> In particular, Mississippi only has five districts providing less than fifty percent access to minorities. Those districts, however, are overwhelmingly poor and minority. For instance, Greenwood School District is eighty-four percent poor and whites are only seven percent of the student population. Thus, although whites have more access to middle-income peers than minorities, they still attend schools that are predominantly poor and predominantly minority. *Official Net Membership—First Month Enrollment (September)*, MISS. DEP'T OF EDUC., <http://orshome.mde.k12.ms.us/ors/ComblIndex2010.html#pupil> (last visited Mar. 6, 2012).

It is also worth noting that the achievement gap drop in Mississippi would be even larger were it not for anomalous districts that happen to provide minorities more access than whites. Mississippi has two districts where minorities are exposed to middle-income peers at twice the rate of whites. In those two districts, however, the actual percentage of middle-income peers in the average minority student's school is only eight percent and for whites it is only three percent. Thus, although the minority access is double that of whites, both groups attend schools that are more than ninety percent poor, and the real world difference is but a couple of middle-income students in each school. If the districts at this end of the spectrum were excluded, the achievement gap would drop from 20.4 to 8.5.

Figure 2 illustrates that the northern states replicate the same general trend as the southern states, with the achievement gap shrinking as equitable access to middle-income peers increases. The only inconsistencies in this pattern are predictable. In particular, two northern states—Connecticut and Ohio—experience a significant uptick in the achievement gap once access for minorities increases beyond equitable (where minorities experience greater access than whites). These upticks, like the one in Mississippi, correspond with unusual demographic populations in particular districts and/or insufficient data points in a particular category of districts. In Ohio, for instance, there are only three counties with valid data sets where minorities' access is greater than whites, and two of those counties have extremely small minority populations.<sup>293</sup> A very large achievement gap in the third skews the achievement gap upward, and that district is overwhelmingly poor and minority.<sup>294</sup> In effect, just a few white students in this single school district skew the average for the entire state. Similarly, in Connecticut, the presence of an enormous achievement gap in just a single school district that is almost entirely white and middle income produces an unreliable variation in the achievement gap.<sup>295</sup> Finally, some other minor deviations from the overall trend (of achievement gaps shrinking as access to middle-income peers becomes more equitable) exist in the North, but they appear anomalous. For instance, Pennsylvania's overall trend is consistent with other states. Its increase in the achievement gap between the "50–59%" category and the "60–69%" category is attributable to the very small number of districts that fall into these categories

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<sup>293</sup> Ohio's achievement gap was calculated at the county level because the achievement gap was only available about a quarter of the time when calculated at the district level. The three counties referenced above the line are Medina, Warren, and Fairfield. Medina's minority population is only 1.2% of the total, and Warren's is only 3.5%. See *Ohio Data*, *supra* note 282. Such a small minority population may have other negative effects on achievement. Diversity studies, in particular, have focused on isolating effects for small groups and the need for a critical mass. See *Grutter v. Bollinger*, 539 U.S. 306, 319–20 (2003).

<sup>294</sup> The achievement gap in Medina was 16.6, whereas in the other two districts there was no achievement gap for African Americans. See *Ohio Data*, *supra* note 282. In fact, African Americans slightly outperformed whites. See *id.* It is also worth noting that minorities, at only 1.2% of the population in Medina, were a small group in actual numbers (just over 300 total students). See *id.* When those students are spread across a few schools and several grades, very small fluctuations in the scores of individual students could affect the achievement gap metric. See *id.*

<sup>295</sup> See, e.g., Sterling, CN (16.8% Poor; 98% White; African-American-White Achievement Gap 34.8); Chester, PA (98% Minority; 88% Poor; Minority-White Achievement Gap: 26.5). The achievement gap in the other district providing minorities equal or better access was only 6.3% and well below districts providing inequitable access.

and the fact that some of them experience the same demographic anomalies discussed above.<sup>296</sup> Although access disparities nonetheless exist in these districts, it is not particularly meaningful if one considers that the difference in one of the representative districts is between attending a school with fifteen percent and seven percent middle-income peers, which is negligible at best. This study's methodology, however, just so happens to identify such districts as supplying heightened access to minorities. In short, although a few anomalies exist, they are explainable, and the pattern of unequal access and heightened achievement gaps holds true in the North as well as the South.

This pattern is particularly significant given the premise that smaller and homogenous northern school districts would mask or make intra-district inequality less relevant. As noted above, northern district characteristics did appear to decrease the identifiable instances of inequality in comparison to the South. But the smallness and homogeneity of northern districts was far from sufficient to eliminate inequality altogether or prevent relevant comparisons between achievement gaps across districts and regions. To the contrary, the instances of inequality were stark at times and reveal that the tendency toward inequality of access to middle-income peers is strong enough that it transcends otherwise important variables. These results only reinforce this Article's constitutional focus on intra-district inequality, not just in the South, but across all regions.

Figures 1 and 2 reveal a troubling overlap between unequal access and achievement gaps, but they do not fully reveal how large the downward trend in the achievement gap is when minority students receive equal access. In Massachusetts, for instance, the average achievement gap between African Americans and whites, as measured on the state standardized exam, is generally very low across districts.<sup>297</sup> Thus, the gap does not have far to fall, and the drop of 4.1 points does not visually appear large. Yet, as illustrated in Table 3, a 4.1 point drop in the achievement gap from the districts providing the least equitable access to middle-income peers to districts providing the most equitable access represents an 88.8% drop. In other words, the achievement gap is more than cut in half. In fact, a similarly drastic drop in the achieve-

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<sup>296</sup> Only four districts are in the "50-59%" category in Pennsylvania (Erie: 54.12%; Hazelton: 54.25%; Upper Darby: 58.4%; Steel Valley: 59.85%). And Erie, for instance, is eighty percent poor and majority white. Its black-white achievement gap is only 5.5 points, notwithstanding racially unequal access to middle-income peers, presumably because students of all races are attending overwhelmingly poor schools.

<sup>297</sup> *Mass Data*, *supra* note 281.

ment gap occurs in all of the states except Georgia. In seven states, the achievement gap drop between inequitable-access districts and equitable-access districts is more than fifty percent, cutting the achievement gap in half. Why Georgia's African-American-White achievement gap does not significantly fall is not entirely clear,<sup>298</sup> but interestingly Georgia's Latino-White achievement gap does drastically drop in these same districts. In fact, the achievement gap for Latinos entirely disappears at the point that they receive equal access to middle-income peers, and Latinos begin to outperform whites when they have more access to middle-income peers than whites.<sup>299</sup>

Table 3: Change in African-American Achievement Gap Between Districts Providing the Most Equitable and Least Equitable Access

State	Raw Decline in Achievement Gap	Percentage of Change/Decline
Alabama	7.5	59.8%
Georgia	0.007	0.1%
Mississippi*	11.9	58.3%
North Carolina	6	20.7%
South Carolina	7.3	51.4%
Virginia	8.1	51.3%
Connecticut	10.8	34.5%
Massachusetts	4.1	88.8%
Michigan	20.7	45.5%
Ohio	5.4	56.1%
Pennsylvania	3.6	52.1%

\* Those few districts providing less than fifty percent access and those providing 100% or more access were excluded from Mississippi's calculations in this table for the reasons discussed previously regarding the mathematical and demographic anomalies. The comparison in this table includes all of the districts in between.  
Source: See *infra* Apps. A, B, C.

Although the foregoing analyses makes inequalities and achievement gaps within states and districts clear, comparisons between states are not obvious because each state uses its own exams and sets its own threshold for what constitutes passing.<sup>300</sup> For instance, in Georgia over

<sup>298</sup> As noted above the line, Georgia's achievement gap includes two spikes and two drops. Thus, if one compares districts providing less than fifty percent access to those providing less than ninety percent, there is a significant drop in the achievement gap. The same is true if one compares those districts providing ninety to ninety-five percent access to those providing more access. Why there is a significant spike from those providing less than ninety percent access to those providing more is unclear.

<sup>299</sup> In the districts with the least access, the gap is 7.2, but falls to 4.5, 2.5, 3.2, 2, 2.5 and -1.75 in the districts with more access. This drop amounts to more than 100%.

<sup>300</sup> See RYAN, *supra* note 216, at 241 (discussing how state standards for passing distort perceptions of academic success).

ninety percent of students pass or achieve at grade level on the end-of-year exams, but in Connecticut the number is just over fifty percent.<sup>301</sup> All of the foregoing charts are subject to these fluctuations because they categorize districts by the amount of middle-income peer access they provide and then ask what the average achievement gap is in those districts.

By first identifying the districts with the largest achievements gaps and then calculating the average access in those districts, that problem is eliminated. The results, nonetheless, remain consistent with prior analyses. Those districts with the largest achievement gaps also have the least equitable access to middle-income peers, and those with the smallest achievement gaps have the most equitable access to middle-income peers. In fact, while this method effectively eliminates the huge shifts, the trend itself is more uniform and consistent than the foregoing analyses.

Table 4: Average Access Based on Achievement Gap Quartiles

State	Access in Bottom Quartile (Largest Achievement Gap)	Access in Second Quartile	Access in Third Quartile	Access in Top Quartile (Smallest Achievement Gap)
Alabama	86	90	104	98
Georgia	94	88	93	94
Mississippi	88	88	91	92
North Carolina	83	84	87	99.5
South Carolina	86	97	92	93
Virginia	90	87	93	97
Connecticut	91	89	94	98
Massachusetts	91	94	96	95
Michigan	94.8	95	98	100
Ohio	92	70	64	92
Pennsylvania	94.7	93	96	98

Source: See *infra* Apps. A, B, C.

Table 4 divides districts into quartiles based on their district-wide achievement gaps. The districts with the largest achievement gaps provide less access than the districts with the smallest achievement gap in every state but Ohio. North Carolina's differential is the most drastic, as those counties with the largest achievement gaps, on average, provide minority students access that is only eighty-three percent of what whites receive, while those districts with the smallest achievement gaps provide

<sup>301</sup> Georgia (White Pass Rate: 97%; African-American Pass Rate: 90%); Connecticut (White Pass Rate: 63%; African-American Pass Rate: 43%).



minority students access that is almost equivalent to that of whites (99.5 percent). In fact, the districts with the smallest achievement gap in seven of eleven states provide minorities access that is ninety-five percent or higher. In the remaining four states, access for minorities still well exceeds ninety percent in districts with the smallest achievement gaps. Looking at the other end of the achievement gap spectrum, those districts with the smallest achievement gaps are providing access, on average, that is below ninety-five percent that of whites. In short, equality of access, which this Article treats as ninety-five percent or more access, serves as a nearly uniform dividing line between districts with the highest and lowest achievement gaps.

Dividing districts by the quartile method used above clearly breaks districts out into rank order within the state, but a methodology based on quartiles can produce both huge and miniscule variations in the achievement gap that are not consistent across quartiles. For instance, those districts in the quartile with the largest achievement gaps in North Carolina had gaps ranging from 51.6% to 30.7%, whereas the achievement gaps in the middle two quartiles ranged from 30.5% to 25.1% and 25.1% to 20.7%.

Table 5: Average Access on Standard Deviations in Achievement Gap

State	More Than One Standard Deviation Above the Average Achievement Gap Score (Largest Gap)	Between the Average Achievement Gap Score and One Standard Deviation Above	Between One Standard Deviation Below and the Average Achievement Gap Score	Less Than One Standard Deviation Below the Average Achievement Gap Score (Smallest Gap)
Alabama	86	92	103	96
Georgia	90	92	92	99
Mississippi	87	89	92	90
North Carolina	88	85	89	111
South Carolina	74	95	93	91
Virginia	96	93	96	98
Connecticut	92	89	95	98
Massachusetts	92	89	96	92
Michigan	91	97	99	103
Ohio	77	63	86	92
Pennsylvania	99	95	97	98

Source: See *infra* Apps. A, B, C.

Table 5 groups districts based on their standard deviation from the statewide average achievement gap, eliminating the problem of random variations within the quartiles (although it also has the potential to result in small groups). The standard deviation model reveals some minor differences in individual states from the quartile method in Ta-

ble 4, but overall the results are largely the same, with access at or above ninety-two percent representing a dividing line between districts with the highest and lowest achievement gaps.

In summary, this Article's study of ten states revealed reoccurring instances of racially inequitable access to middle-income peers. In some instances, the inequitable access was so extensive that it amounted to white students attending predominantly middle-income schools and minorities attending predominantly poor schools. In most other instances, the inequity was still large enough to expose white and minority students to significantly different peer environments. This inequity is not inevitable, but rather is likely a result of deliberate school assignment policies, given that a substantial portion of districts in each state represent the opposite paradigm and provide minorities and whites equal access to middle-income peers. Although a more sophisticated analysis would be necessary to specifically identify the cause, the varying levels of inequity in access also coincided with varying racial achievement gaps. Consistent with other social science studies, this Article's study found that in all states but one the largest achievement gaps exist in districts that provide the least equitable access to middle-income peers, and the size of the achievement gap falls as access becomes more equitable. Equal access alone does not coincide with the elimination of the achievement gap, but it coincides with drastic reductions in the gap. The achievement gap dropped by approximately fifty percent or more in seven of the eleven states.

#### CONCLUSION

Efforts to promote racial and socioeconomic equity through student assignments have largely come to an end in federal court and only amounted to a few—albeit important—cases in state courts. The problems in federal court are tied to relatively well-settled negative precedent, but the same is not true in regard to state claims. The failure of a movement to emerge in state court may be more the result of perception and strategy than doctrine and reality. Insofar as advocates and theorists have sought to use state constitutions as a way to avoid federal doctrinal problems or simply replicate federal claims in state court under a new name, state-based theories of integration may confront the same political and practical limitations they would in federal court. Thus, although the theory of these integration claims may be valid in some states, it is no surprise that most advocates and the few courts that have heard the cases have been tepid.

A halting past, however, does not foreclose the future of state constitutions as an engine of racial equity in student assignments. Rather, it highlights the need for claims that are distinct from traditional integration and conceptually grounded in school finance precedent. This Article's theory of equitable access to middle-income peers entails both. It is distinct in that equitable access to middle-income peers focuses on segregation within districts rather than between them and does not necessarily challenge historical district boundaries. Thus, it avoids many of the political and administrative complications that have undermined prior advocacy. Also, the focus on school-level segregation provides factually distinct circumstances. Local assignment policies fluctuate over time and involve conscious decisions, whereas state-level policy regarding districts is more static.<sup>302</sup> A more compelling set of facts naturally arises with the former.

A theory of equal access to middle-income peers proceeds at the district level, however, not simply to distinguish itself; it proceeds at the district level because it is there that it finds analytical and precedential strength. Courts may be quick to excuse inequalities that are beyond the control of districts,<sup>303</sup> but they are far less willing to overlook those inequalities within districts' control. Some inequalities that stem from the fact that a district is predominantly poor or minority may be largely beyond the control of local school districts. But other inequalities within a district are often a result of district and school policies and, thus, are neither natural nor inevitable. Access to middle-income peers falls in this latter category of inequalities that are within districts' control.

Once one understands that middle-income students are one of the many resources districts distribute, the equitable and strategic distribution of resources that school finance precedent has forced on schools and districts is directly implicated. Of course, no court has yet explicitly conceptualized middle-income students as resources, but a review of social science literature, as well as the differing academic achievement that accompanies exposure to middle-income peers, proves the concept to be true. Courts already intuit this notion, heavily scrutinizing and condemning the prevailing poor performance of districts with concentrated poverty. And parents already act on it, often flocking to schools based more on the socioeconomic status of the students who

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<sup>302</sup> This, however, is not to say that states have not acted to change district boundaries in ways that increase segregation. *See, e.g.*, *Evans v. Buchanan*, 393 F. Supp. 428, 438–40 (D. Del. 1975).

<sup>303</sup> *Evans v. Buchanan*, 416 F. Supp. 328, 352–53 (D. Del. 1976) (ordering inter-district desegregation remedy due to government manipulation of enrollment patterns).

attend them than the characteristics of the school facility or the particular staff who teach in them. Once explicit legal analysis catches up to reality and intuition, state constitutional education precedent will squarely apply.

This final step cannot occur soon enough. Far too many districts are depriving minority students of equal access to a key educational resource that will significantly affect their academic achievement. No silver bullets exist in education and much about student achievement is beyond the control of states, districts, and schools. Thus, simply providing equal access will not obliterate these outside factors. But equal access can significantly mitigate their effects. No less than basic equality principles and state constitutional precedent demand as much.

## APPENDICES

Appendix A: Enrollment Data Sources	
State	Source
Alabama	2008–2009 Alabama High School Graduation Exam, ALA. ST. DEP'T OF EDUC., <a href="http://www.alsde.edu/Accountability/Accountability.asp">http://www.alsde.edu/Accountability/Accountability.asp</a> (last visited Feb. 28, 2012).
Connecticut	2000–2010 Public School Enrollment by Resident Town, CONN. ST. DEP'T OF EDUC., <a href="http://sdeportal.ct.gov/Cedar/WEB/ct_report/EnrollmentDT.aspx">http://sdeportal.ct.gov/Cedar/WEB/ct_report/EnrollmentDT.aspx</a> (last visited Feb. 28, 2012).
Georgia	2009 Enrollment by Race/Ethnicity, Gender and Grade Level (PK–12), GA. DEP'T OF EDUC., <a href="http://app3.doe.k12.ga.us/owsbin/owa/fte_pack_ethnicsex.entry_form">http://app3.doe.k12.ga.us/owsbin/owa/fte_pack_ethnicsex.entry_form</a> (last visited Feb. 28, 2012).
Massachusetts	2008–09 Selected Populations Report, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC. (ESE), <a href="http://profiles.doe.mass.edu/state_report/selectedpopulations.aspx?year=2009&amp;mode=district&amp;Continue.x=4&amp;Continue.y=7">http://profiles.doe.mass.edu/state_report/selectedpopulations.aspx?year=2009&amp;mode=district&amp;Continue.x=4&amp;Continue.y=7</a> (last visited Feb. 28, 2012).
Michigan	MME Public Demographic Results—Spring 2010, MICH. DEP'T OF EDUC., <a href="http://www.michigan.gov/mde/0,4615,7-140-22709_35150_47475--,00.html">http://www.michigan.gov/mde/0,4615,7-140-22709_35150_47475--,00.html</a> (last visited Feb. 28, 2012).
Mississippi	2008–2009 Official Net Membership—First Month Enrollment (September), MISS. DEP'T OF EDUC., <a href="http://orshome.mde.k12.ms.us/ors/CombIndex2010.html#pupil">http://orshome.mde.k12.ms.us/ors/CombIndex2010.html#pupil</a> (last visited Mar. 6, 2012).
North Carolina	Disaggregated Performance Data for 2008–2009, N.C. PUB. SCH., <a href="http://accrpt.ncpublicschools.org/docs/disag_datasets/">http://accrpt.ncpublicschools.org/docs/disag_datasets/</a> (click link to download zip file) (last visited Feb. 28, 2012).
Ohio	2008–2009 Disaggregated School Data—Racial/Ethnic, OHIO.GOV, <a href="http://ilrc.ode.state.oh.us/Downloads.asp">http://ilrc.ode.state.oh.us/Downloads.asp</a> (last visited Feb. 28, 2012).
Pennsylvania	2009–10 School Level Math and Reading PSSA Results—School Totals, PA. DEP'T OF EDUC., <a href="http://www.portal.state.pa.us/portal/server.pt/community/school_assessments/7442/2009_-">http://www.portal.state.pa.us/portal/server.pt/community/school_assessments/7442/2009_-</a> (last visited Feb. 28, 2012).
South Carolina	2009 State Report Card, S.C. ST. DEP'T OF EDUC., <a href="http://ed.sc.gov/data/report-cards/2009/index.cfm">http://ed.sc.gov/data/report-cards/2009/index.cfm</a> (click each individual district to obtain data) (last visited Mar. 6, 2012).
Virginia	2008–2009 Fall Membership Reports, VA. DEP'T OF EDUC., <a href="http://www.doe.virginia.gov/statistics_reports/enrollment/fall_membership/index.shtml">http://www.doe.virginia.gov/statistics_reports/enrollment/fall_membership/index.shtml</a> (last visited Feb. 28, 2012).

Appendix B: Poverty Data Sources	
State	Source
Alabama	<i>2008–2009 Alabama High School Graduation Exam</i> , ALA. ST. DEP'T OF EDUC., <a href="http://www.alsde.edu/Accountability/Accountability.asp">http://www.alsde.edu/Accountability/Accountability.asp</a> (last visited Feb. 28, 2012).
Connecticut	<i>2008–2009 Students Eligible for Free/Reduced Price Lunch</i> , CONN. ST. DEP'T OF EDUC., <a href="http://sdeportal.ct.gov/Cedar/WEB/ct_report/StudentNeedDTViewer.aspx">http://sdeportal.ct.gov/Cedar/WEB/ct_report/StudentNeedDTViewer.aspx</a> (last visited Feb. 28, 2012).
Georgia	<i>2009 Free and Reduced Price Meal Eligibility</i> , GA. DEP'T OF EDUC., <a href="http://app3.doe.k12.ga.us/owsbin/owa/fte_pack_fr1001_public.entry_form">http://app3.doe.k12.ga.us/owsbin/owa/fte_pack_fr1001_public.entry_form</a> (last visited Feb. 28, 2012).
Massachusetts	<i>2008–09 Selected Populations Report</i> , MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC. (ESE), <a href="http://profiles.doe.mass.edu/state_report/select edpopulations.aspx?year=2009&amp;mode=district&amp;Continue.x=4&amp;Continue.y=7">http://profiles.doe.mass.edu/state_report/select edpopulations.aspx?year=2009&amp;mode=district&amp;Continue.x=4&amp;Continue.y=7</a> (last visited Feb. 28, 2012).
Michigan	<i>2008–09 Free and Reduced Lunch Counts</i> , MICHIGAN.GOV, <a href="http://www.michigan.gov/cepi/0,4546,7-113-21423_30451_36965--,00.html">http://www.michigan.gov/cepi/0,4546,7-113-21423_30451_36965--,00.html</a> (last visited Feb. 28, 2012).
Mississippi	<i>2008–2009 Official Net Membership—First Month Enrollment (September)</i> , MISS. DEP'T OF EDUC., <a href="http://orshome.mde.k12.ms.us/ors/CombIndex2010.html#pupil">http://orshome.mde.k12.ms.us/ors/CombIndex2010.html#pupil</a> (last visited Mar. 6, 2012).
North Carolina	<i>Dissaggregated Performance Data for 2008–2009</i> , N.C. PUB. SCH., <a href="http://accrpt.ncpublicschools.org/docs/disag_datasets/">http://accrpt.ncpublicschools.org/docs/disag_datasets/</a> (click link to report to download zip file) (last visited Feb. 28, 2012).
Ohio	<i>2009–2010 Disaggregated Data—Economic Status</i> , OHIO.GOV, <a href="http://ilrc.ode.state.oh.us/Downloads.asp">http://ilrc.ode.state.oh.us/Downloads.asp</a> (last visited Feb. 28, 2012).
Pennsylvania	<i>2009–10 School Level Math and Reading PSSA Results—School Totals</i> , PA. DEP'T OF EDUC., <a href="http://www.portal.state.pa.us/portal/server.pt/community/school_assessments/7442/2009">http://www.portal.state.pa.us/portal/server.pt/community/school_assessments/7442/2009</a> - (last visited Feb. 28, 2012).
South Carolina	<i>2009 State Report Card</i> , S.C. ST. DEP'T OF EDUC., <a href="http://ed.sc.gov/data/report-cards/2009/index.cfm">http://ed.sc.gov/data/report-cards/2009/index.cfm</a> (last visited Mar. 6, 2012).
Virginia	<i>National School Lunch Program (NSLP) Free and Reduced Price Eligibility Report—by School Divisions 2008–2009</i> , VA. DEP'T OF EDUC., <a href="http://www.doe.virginia.gov/support/nutrition/statistics/index.shtml">http://www.doe.virginia.gov/support/nutrition/statistics/index.shtml</a> (last visited Feb. 28, 2012).

Appendix C: Achievement Gap Data Sources	
State	Source
Alabama	2008–2009 Alabama High School Graduation Exam, Math Scores, ALA. ST. DEP'T OF EDUC., <a href="http://www.alsde.edu/Accountability/Accountability.asp/">http://www.alsde.edu/Accountability/Accountability.asp/</a> (last visited Feb. 28, 2012).
Connecticut	2008–2009 CMT Math G8 Achievement Test, eMETRIC, <a href="http://solutions1.emetric.net/cmtpublic/Default.aspx">http://solutions1.emetric.net/cmtpublic/Default.aspx</a> (last visited Mar. 8, 2012).
Georgia	2009 Georgia High School Graduation Test (Percent Passing in Math Scores), ST. OF GA., <a href="http://archives.gadoe.org/ReportingFW.aspx?PageReq=211&amp;PID=61&amp;PTID=67&amp;CTID=217&amp;SchoolId=ALL&amp;T=0">http://archives.gadoe.org/ReportingFW.aspx?PageReq=211&amp;PID=61&amp;PTID=67&amp;CTID=217&amp;SchoolId=ALL&amp;T=0</a> (last visited Mar. 8, 2012).
Massachusetts	2009 MCAS High School Exit Tests: District Results, MASS.GOV, <a href="http://www.doe.mass.edu/mcas/results.html?yr=2009">http://www.doe.mass.edu/mcas/results.html?yr=2009</a> (last visited Feb. 28, 2012).
Michigan	MME Public Demographic Results—Spring 2010, MICH. DEP'T OF EDUC., <a href="http://www.michigan.gov/mde/0,4615,7-140-22709_35150_47475--,00.html">http://www.michigan.gov/mde/0,4615,7-140-22709_35150_47475--,00.html</a> (click “MME Public Demographic Results —Spring 2010” to download file) (last visited Feb. 28, 2012).
Mississippi	2008/2009 Subject Area Testing Program, MISS. DEP'T OF EDUC., <a href="http://orshome.mde.k12.ms.us/ors/assessment/2009/index.html#nclb">http://orshome.mde.k12.ms.us/ors/assessment/2009/index.html#nclb</a> (last visited Feb. 28, 2012).
North Carolina	State/LEA and School Test Performance 2008–2009, N.C. PUB. SCH., <a href="http://accrpt.ncpublicschools.org/docs/disag_datasets/">http://accrpt.ncpublicschools.org/docs/disag_datasets/</a> (last visited Feb. 28, 2012).
Ohio	2009–2010 Disaggregated School Data—Racial/Ethnic, OHIO.GOV, <a href="http://ilrc.ode.state.oh.us/Downloads.asp">http://ilrc.ode.state.oh.us/Downloads.asp</a> (last visited Feb. 28, 2012).
Pennsylvania	2009–10 School Level Math and Reading PSSA Results—School Totals, PA. DEP'T OF EDUC., <a href="http://www.portal.state.pa.us/portal/server.pt/community/school_assessments/7442/2009_-">http://www.portal.state.pa.us/portal/server.pt/community/school_assessments/7442/2009_-</a> (last visited Feb. 28, 2012).
South Carolina	EOCEP (End-of-Course Examination Program)—2008–2009, S.C. ST. DEP'T OF EDUC., <a href="http://ed.sc.gov/data/eocep/index.cfm">http://ed.sc.gov/data/eocep/index.cfm</a> (last visited Feb. 28, 2012).
Virginia	Virginia Assessment Results, VA. DEP'T OF EDUC., <a href="https://p1pe.doe.virginia.gov/datareports/assess_test_result.do">https://p1pe.doe.virginia.gov/datareports/assess_test_result.do</a> (last visited Feb. 28, 2012).