BROWN'S LEGACY: THE EVOLUTION OF EDUCATIONAL EQUITY

Rachel F. Moran[*]

According to the late Sheldon Messinger, "there are two laws of social science: (1) deep down, everyone everywhere is basically the same; (2) it takes all kinds."[1] This observation captures the dilemma of sameness and difference that has plagued educational policy-making in general, and the quest for educational equity in particular.[2] That is, should we try to assimilate all children to the same model of educational success, or should we expect children to be different and embrace a pluralist vision in which there are diverse paths to achievement?

This dilemma is a relatively recent one in public education, emerging most clearly after World War II. In the early years of the American republic, public instruction was rudimentary at best, and reformers devoted themselves to consolidating a system of common schools.[3] Given the country's fledgling identity and expanding economy, the emerging common school focused heavily on socialization for citizenship and preparation for work. Indeed, Noah Webster called for a "Federal Catechism" to teach youth about republican principles of self-governance.[4] Still, sectionalism remained a powerful influence, and state and local officials took on the primary responsibility for developing a coherent system of public education.[5] State constitutions set forth specific requirements for educational bureaucracies, mandating state boards of education, state school taxes, county school superintendents, and attendance periods.[6] As historians David Tyack, Thomas James, and Aaron Benavot observe, these state constitutions "contained more bureaucratic detail and less republican rhetoric, suggesting that as schooling

---

* Robert D. and Leslie-Kay Raven Professor of Law, University of California at Berkeley (Boalt Hall).

1. Martin Krygier, *Walls and Bridges: A Comment on Philip Selznick's The Moral Commonwealth*, 82 CAL. L. REV. 473, 476 (1994) (book review).

2. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 19-21, 23-40 (1990).

3. *See* David B. Tyack, *Ways of Seeing: An Essay on the History of Compulsory Schooling*, 46 HARV. EDUC. REV. 355, 359-61, 373 (1976).

4. DAVID TYACK ET AL., LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954, at 23 (1987).

5. *Id.* at 31-42, 54-63; *see also* Tyack, *supra* note 3, at 373-76.

6. TYACK ET AL., *supra* note 4, at 56-58.

became more institutionalized, structure became more urgent than philosophy."[7]

During this time, the judiciary addressed questions of educational equity by preserving private alternatives for linguistic and cultural minorities who faced indoctrination and oppression in public schools. In the early 1900s, large numbers of immigrants arrived to work in burgeoning centers of industry. The common school became part of the mission of Americanization, especially by promoting the acquisition of English.[8] During World War I, demands for full-scale assimilation intensified, and some states passed legislation demanding that all students, whether in private or public schools, receive instruction entirely in English. These statutes threatened private institutions, typically Catholic, that served non-English-speaking immigrants by providing native-language instruction.[9] In three cases decided in the 1920s, the United States Supreme Court relied on the Due Process Clause to find that parents have a right to bring up children as they see fit by choosing private school options. Similarly, the Court held that private schools and teachers enjoy the economic liberty to compete by offering meaningful alternatives to public instruction.[10] These decisions signaled clearly and consistently that the private sector could be a haven for linguistic and cultural pluralism.

After World War II, there was a growing demand for equity in public schools, particularly among Blacks newly empowered by their war experience and dissatisfied with a history of segregation and unequal education.[11] In contrast to the World War I years, when immigrants took refuge in the private sector, Blacks demanded that government be held accountable for acts of subordination and exclusion. Blacks wanted their fair share of public resources, and opting for private instruction did not force officials to bear responsibility for racial segregation and stratification. The quest for educational equity after World War II dramatically transformed the federal role in promoting access and fairness, a shift that grew out of the campaign for school desegregation. No longer would state and local governments enjoy the discretion to set their own educational policies, so long as private schools

---

7. *Id.* at 57.

8. DAVID B. TYACK, THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION 180-81 (paperback ed. 1974).

9. David B. Tyack, *The Perils of Pluralism: The Background of the* Pierce *Case*, 74 AM. HIST. REV. 74, 75 (1968).

10. Farrington v. Tokushige, 273 U.S. 284, 298 (1927) (Hawaii); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (Oregon); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (Nebraska).

11. *See* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 71-73 (1988).

remained free to serve parents and students with distinct values. Instead, to advance a national commitment to equity and inclusion, the federal government would intrude in unprecedented ways on state and local prerogatives to shape public instruction.[12]

In this essay, I will describe three key phases of the post-World War II push for educational equity. The first grows out of the campaign for school desegregation, which was rooted in demands for racial justice and educational opportunity. Efforts to achieve racial equality in the schools eventually degenerated into legal formalism because of the Supreme Court's unwillingness to confront the realities of residential segregation. Aware of the limitations of racial reforms, activists turned to the second phase of school reform. They focused on fiscal equity and demanded that schools be funded fairly, regardless of the wealth of students and districts. When this ideal fell prey to political wrangling and popular disagreement, advocates began to emphasize efficiency rather than distributive justice. To ensure efficiency, policy-makers relied on bureaucratic managerialism, a careful accounting of educational inputs and outputs. Because managerial techniques alone could not redress recurring problems of school underfunding, yet another phase of reform emerged. This phase seeks to escape the seemingly endless controversies that plague the public sector by privatizing education through charter schools, vouchers, and subcontracting agreements with private industry. After reviewing these three phases of school reform, I will reflect on what can be done to keep the norm of educational equity a meaningful part of contemporary law and policy. In particular, I will explore a recent California initiative that demands that all children have a meaningful opportunity to learn.

I. THE SCHOOL DESEGREGATION CAMPAIGN: FROM RACIAL EQUALITY TO NON-DISCRIMINATION

Beginning in the 1950s, Blacks began a sustained campaign to desegregate the public schools through litigation in the federal courts.[13] These efforts culminated in the United States Supreme Court's celebrated decision

---

12. STEPHEN K. BAILEY & EDITH K. MOSHER, ESEA: THE OFFICE OF EDUCATION ADMINISTERS A LAW 1-36 (1968).

13. *See* J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, at 23-24 (1979). For an in-depth account of the school desegregation litigation campaign in the 1940s and 1950s, see RICHARD KLUGER, SIMPLE JUSTICE 258-747 (Vintage Books 1977) (1976).

in *Brown v. Board of Education*, which held that "separate educational facilities are inherently unequal" when imposed by law.[14] Because of the need to achieve unanimity and generate public support, the *Brown* decision drew on several key arguments to appeal to diverse constituencies. Writing for the Court, Chief Justice Earl Warren invoked a constitutional commitment to protect Blacks from racial discrimination, but he also emphasized the critical importance of education in ensuring full participation in American society. As a result, when *Brown* was decided, it could have been viewed as a race case or as an education case.[15]

Brown became a race case for several reasons. First, immediately after the Court announced its decision, the ensuing backlash made race the centrally important factor in resisting demands for equality. In her autobiography, Melba Pattillo Beals, one of the Little Rock Nine who integrated Central High School, describes the reactions to *Brown* among Blacks and Whites in Arkansas.[16] When Melba's junior high school teacher announced the Court's decision in class, the mood was more anxious than jubilant.[17] One of Melba's classmates asked warily, "Does this mean we have to go to school with white people?"[18] On her way home from school that day, Melba encountered a White man who chased her and tried to rape her as he shouted that "I'll show you niggers the Supreme Court can't run my life."[19] Melba wrote in her diary that day: "I have to keep up with what the men on the Supreme Court are doing. That way I can stay home on the day the Justices vote decisions that make white men want to rape me."[20] Melba was targeted for violence not because she wanted a quality education, but because she was Black. The Court's timidity in requiring remedies allowed this resistance to persist over a long period, thereby cementing *Brown*'s identity as a race case.[21]

Second, in a series of per curiam decisions, the Court cited *Brown,* without elaboration, as authority for striking down segregation in settings as

---

14. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) [*Brown I*].

15. Rachel F. Moran, *Foreword—Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond*, 8 LA RAZA L.J. 1, 5 (1995).

16. MELBA PATTILLO BEALS, WARRIORS DON'T CRY: A SEARING MEMOIR OF THE BATTLE TO INTEGRATE LITTLE ROCK'S CENTRAL HIGH (1994).

17. *Id.* at 22.

18. *Id.*

19. *Id.* at 25-27.

20. *Id.* at 27-28.

21. *See* Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) [*Brown II*] (authorizing the federal district courts to implement remedies "with all deliberate speed," thereby endorsing a policy of gradualism).

diverse as municipal golf courses, public beaches, and public transportation.[22] By doing so, the Court implied that *Brown* was a precedent about race in which the educational context played little or no role. In addition, in requiring school desegregation remedies, the Court made racial balance the *sine qua non* of successful compliance and treated other factors as secondary. *Green v. County School Board*,[23] *Swann v. Charlotte-Mecklenburg Board of Education*,[24] and guidelines formulated by the Department of Health, Education, and Welfare[25] identified a number of remedial criteria for federal courts to consider in determining whether a school district was unitary, that is, whether it had eliminated the vestiges of past discrimination. At the top of the list was making student assignments to achieve racial balance as well as using faculty and staff assignments to integrate the workforce. Along with these factors were measures of educational quality: teacher qualifications, per-pupil expenditures, transportation, physical facilities, and extracurricular activities.[26] In the lower courts, experts devoted themselves to tweaking the numbers to promote racial balance.[27] By correlating desegregation with achievement results, these experts accepted the view that academic improvement would occur as a byproduct of integrating the schools.[28] The

---

22. Gayle v. Browder, 352 U.S. 903 (1956) (per curiam) (buses), *aff'g* 142 F. Supp. 707 (M.D. Ala. 1956); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses), *aff'g* 220 F.2d 386 (4th Cir. 1955); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam) (municipal golf courses), *vacating and remanding*, 223 F.2d 93 (5th Cir. 1955).

23. Green v. County Sch. Bd., 391 U.S. 430 (1968).

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

25. The guidelines were adopted to enforce the provisions of the Civil Rights Act of 1964. United States Office of Education, Department of Health, Education, and Welfare, General Statement of Policies under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools (1965); United States Office of Education, Department of Health, Education, and Welfare, Revised Statement of Policies for School Desegregation Plans under Title VI of the Civil Rights Act of 1964 (1966). The 1965 guidelines were "relatively mild," but the 1966 guidelines took a much tougher stance on the imperative of pupil integration. *See* WILKINSON, *supra* note 13, at 104.

26. For a sense of how these factors have worked in recent unitariness cases, see *Freeman v. Pitts*, 503 U.S. 467 (1992), and *Board of Education v. Dowell*, 498 U.S. 237 (1991).

27. See James E. Ryan, *What Role Should Courts Play in Influencing Educational Policy?: The Limited Influence of Social Science Evidence in Modern Desegration Cases*, 81 N.C. L. REV. 1959, 1665-68 (2003) (arguing that in the early school desegration cases, social scientists were permitted to address neither the causes of segregation nor the costs and benefits of desegregation; experts were limited to implementing remedies that would maximize racial balance).

28. *See* Betsy Levin & Philip Moise, *School Desegregation Litigation in the Seventies and the Use of Social Science Evidence: An Annotated Guide*, 39 LAW & CONTEMP. PROBS. 50, 132-33 (1975) (noting that social scientists did not play a significant part in establishing a constitutional violation but instead primarily contributed to the development and implementation of desegregation remedies); Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS. 57, 61 (1978) (noting that social scientists presumed that

heavy emphasis on racial balance set the stage for failure, as White flight into suburbs and private schools increasingly undercut any hope of meaningful integration.[29]

At this point, the Court might have accorded greater weight to quality education and achievement as an alternative to racial balance, thereby preserving *Brown*'s viability as an equity initiative. Instead, the Justices signaled in numerous ways that they were not in the business of enforcing standards of educational quality. In *San Antonio Independent School District v. Rodriguez*, the Court stated unequivocally that equal access to education is not a fundamental right under the Constitution.[30] Because delivery of educational services remained primarily a state and local matter, students could not demand strict scrutiny of educational inequities in federal court.[31] The Court determined that parents and students instead must seek redress through state and local political processes.[32] One year later, *Milliken v. Bradley* made plain that racial balance in the student body was of foremost importance in desegregation cases.[33] At the same time, the decision made this goal increasingly unattainable by insulating White suburban districts from participating in desegregation of predominantly non-White urban schools.[34] Even when the Court confronted the impossibility of desegregation in *Milliken II*, compensatory education was regarded as a second-best remedy to be used when racial balance could not be achieved.[35] Together, the *Milliken* decisions thwarted *Brown*'s legacy as a race case and devalued its significance as an education case.

Finally, in *Missouri v. Jenkins*, the Court refused to require improved scores on achievement tests in order to declare a district unitary.[36] According

---

school desegregation would work to the advantage of Blacks based on "the most feeble of policy research").

29. David J. Armor, *White Flight and the Future of School Desegregation*, *in* SCHOOL DESEGREGATION: PAST, PRESENT, AND FUTURE 187, 196-97, 213-15, 223-25 (Walter G. Stephan & Joe R. Feagin eds., 1980); *see also* Betsy Levin, *School Desegregation Remedies and the Role of Social Science Research*, 42 LAW & CONTEMP. PROBS. 1, 8-25 (1978) (describing the range of judicial responses to White flight in formulating desegregation decrees).

30. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-35 (1973).

31. *See id.* at 44.

32. *Id.* at 40-44. The Court left open the possibility that a right to minimum access to education might be constitutionally protected. *Id.* at 36-37. *See also* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 460-61 (1988) (refusing to find an equal protection violation when a student did not suffer an absolute deprivation of education).

33. Milliken v. Bradley, 418 U.S. 717, 737-41 (1974) [*Milliken I*].

34. *Id.* at 744-45.

35. Milliken v. Bradley, 433 U.S. 267, 289-90 (1977) [*Milliken II*].

36. Missouri v. Jenkins, 515 U.S. 70, 101 (1995).

to *Jenkins*, the state and the district were required to address only the adverse impact on achievement due to prior *de jure* segregation and only to the extent practicable.[37] Poor test results for non-White students could be due to "numerous external factors beyond the control of the [school district] and the State."[38] The judicial imposition of "academic goals unrelated to the effects of legal segregation unwarrantably postpones the day when the [school district] will be able to operate on its own."[39] Along with *Rodriguez* and *Milliken*, *Jenkins* made clear that *Brown* was primarily a case about racial desegregation, not educational quality. Moreover, when racial balance could not be achieved, the Court was unwilling to become a super school board simply to improve achievement for non-White students.

Having identified *Brown* as a race case, the Court then reduced its goal of racial equality to a formalistic rule of non-discrimination. Residential segregation remains a fact of life in America, one that the federal courts have been reluctant to address.[40] Coupled with the Court's deference to local autonomy and neighborhood school policies, housing patterns make racial balance difficult to achieve in desegregation litigation, and they make resegregation inevitable once school districts are declared unitary. School desegregation has become a tenuous and temporary remedy, as federal judges terminate decrees that seem little more than an ongoing exercise in futility.[41] Once the decrees draw to a close, students enjoy protection only from invidious official discrimination. Under this principle of colorblindness, a government agency must largely ignore race except when doing corrective justice for past wrongs.[42] After decades of litigation, schools remain racially identifiable, but persistent patterns of segregation and stratification are beyond legal scrutiny because they reflect government inertia and indifference, rather than intentional wrongdoing.[43] By emphasizing formal compliance with the

---

37. *Id.*

38. *Id.* at 102.

39. *Id.*

40. *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 186-216 (1993).

41. *See* Freeman v. Pitts, 503 U.S. 467 (1992); Bd. of Educ. v. Dowell, 498 U.S. 237 (1991). *See generally* Gary Orfield, *Turning Back to Segregation*, *in* DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 1, 19-22 (1996).

42. Recently, the Court has endorsed the use of racial preferences in affirmative action programs in public higher education. Grutter v. Bollinger, 539 U.S. 306 (2003). However, the implications of the case for race-conscious policies in elementary and secondary education remain unclear. *See* Goodwin Liu, Brown, Bollinger, *and Beyond*, 47 HOW. L.J. 705, 752-59 (2004).

43. *See* Gary Orfield, *Segregated Housing and School Resegregation*, *in* DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 291, 302-22 (1996).

rule of law, colorblindness does little to alleviate entrenched racial subordination.[44] Officials must treat all children the same, even when their circumstances are profoundly different.[45]

Formalism should not be discounted as a completely empty rhetoric. Even after the evolution of *Brown* from a quest for racial equality to a rule of colorblindness, non-Whites enjoy significant protections from discrimination. Statutes mandating segregation are unimaginable today, and this remains an important part of *Brown*'s legacy in shielding individuals from racial oppression. Yet, *Brown* functioned not just as a shield but as a sword. The school desegregation cases used the law to reframe the public discourse about race.[46] *Brown*'s implementation was stymied until Congress enacted the Civil Rights Act of 1964 and authorized vigorous enforcement efforts by federal civil rights agencies.[47] This political support was a product not just of the Court's declaration of constitutional values, but also of an ongoing political struggle to turn symbol into reality. As a result, Americans were able to envision new racial utopias, and having glimpsed these expanded horizons, some reformers necessarily grew restive under a regime of formalism that prefers abstract rules to real equality. When desegregation increasingly appeared to be a legal dead end, advocates considered new ways of framing educational equity claims.[48]

---

44. *See generally* PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 60-65 (1978).

45. Indeed, Janet Ward Schofield has shown how a commitment to colorblindness has affected classroom practice in ways that make race a taboo topic and can defeat the purposes of interracial schooling. Janet Ward Schofield, *The Colorblind Perspective in School: Causes and Consequences*, *in* MULTICULTURAL EDUCATION: ISSUES AND PERSPECTIVES 247, 253-55, 259-60 (James A. Banks & Cherry A. McGee Banks eds., 4th ed. 2001).

46. Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 844-47 (describing how the colorblind integrationist ethic epitomized by *Brown* came to frame American race relations in the 1960s, thus marginalizing other perspectives); Adam Cohen, *The Supreme Struggle*, N.Y. TIMES, Jan. 18, 2004, § 4A (Education Life), at 22 (noting *Brown*'s powerful impact on the civil rights movement even when efforts to implement educational reform were stymied).

47. WILKINSON, *supra* note 13, at 102-08; GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 51-52 (1991) (showing dramatic increase in school desegregation following 1964 Civil Rights Act).

48. I am not able to discuss here the ways in which other groups drew on *Brown* to illuminate their own histories of educational exclusion. However, there is no doubt that another part of *Brown*'s legacy is its impact on women, English language learners, and the disabled, among others.

II. FROM FISCAL EQUITY TO BUREAUCRATIC MANAGERIALISM

Aware that race-based remedies alone would fail to bring about equal educational opportunity, reformers turned their attention to fiscal equity. In contrast to the desegregation campaign, which focused on federal courts, advocates of fiscal fairness launched their efforts in state court. In 1971, the California Supreme Court issued a groundbreaking decision in *Serrano v. Priest*.[49] There, the plaintiffs had asserted that California's system of school finance generated unconstitutional disparities in per-pupil expenditures.[50] Because schools were funded through local property taxes, wealthy districts with high property values could generate substantially more revenue to support public education than could poor districts with low property values.[51] The plaintiffs claimed that under the state's equal protection clause, wealth was a suspect classification and education a fundamental right.[52] According to the plaintiffs, a system that discriminated in providing educational services based on property values should trigger strict judicial scrutiny.[53] Under this test, the system could not pass muster because alternative systems of school finance would not create such stark differences based on wealth among districts.[54]

Agreeing with the plaintiffs, the California high court determined that relying on local property taxes to fund public schools discriminated on the basis of wealth and served no compelling state interest.[55] Although *Serrano* focused heavily on normative claims about the relevance of wealth and the central importance of education, it also embraced a particular philosophy of fair taxation, one in which wealthy school districts must share resources with poor ones.[56] This image of civic responsibility is at odds with another model of taxation in which parents are consumers who choose public school districts as service providers. When parents generate the "fee" for these services through local taxes, the revenues should remain within the district as part of an implicit contract with local property owners.[57]

---

49. Serrano v. Priest, 487 P.2d 1241 (1971).
50. *Id.* at 1244-45.
51. *Id.* at 1245.
52. *Id.* at 1250, 1255.
53. *Id.* at 1250.
54. *Id.* at 1244-45.
55. *Id.* at 1250-63.
56. *See id.* at 1260-63.
57. Robert Berne & Leanna Stiefel, *Concepts of School Finance Equity: 1970 to the Present*, *in*

Serrano's ideal of fiscal equity suffered several immediate blows. Two years after the California decision, the United States Supreme Court rejected the same arguments in the *Rodriguez* case.[58] In *Rodriguez*, students and parents in Texas contended that under the federal Equal Protection Clause, the local property tax system was unconstitutional because of the substantial disparities in per-pupil expenditures that resulted.[59] Building on the logic of *Serrano*, the plaintiffs claimed that wealth was a suspect classification and that education was a fundamental right, but the Court rejected both arguments.[60] As a result, the Justices applied a lenient "rational relation" test and found that Texas could rationally adopt a local property tax system to accomplish the legitimate purpose of financing its schools.[61]

Despite the Supreme Court's rebuff, the California court remained committed to its interpretation of the state constitution. After the court clarified the scope and implementation of its mandate in *Serrano II*,[62] the California legislature responded by adopting a school finance system that would equalize spending.[63] One year later, California voters went to the polls to express their dissatisfaction with judicially mandated tax reform.[64] Property values had skyrocketed in the state, and taxes had risen commensurately.[65] No longer able to capture the revenues for the benefit of their own children, Californians were not willing to shoulder this burden.[66] Proposition 13, a popular initiative that rolled back property taxes and capped their increase, passed by a landslide.[67] As a result, the state had to generate revenues for schools through other sources. School funding dropped dramatically, and California's vaunted public education system plummeted from the top ten to

---

NATIONAL RESEARCH COUNCIL, EQUITY AND ADEQUACY IN EDUCATION FINANCE 7, 10-11 (1999).

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

59. *See id.* at 4-6.

60. *Id.* at 18-40.

61. *Id.* at 44, 55. Later, the Texas system was successfully challenged under the state constitution. Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989) [*Edgewood I*]. What followed were a series of legislative reforms and judicial assessments of their constitutionality. Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491 (Tex. 1991) [*Edgewood II*]; Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489 (Tex. 1992) [*Edgewood III*]; Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717 (Tex. 1995) [*Edgewood IV*]. For a thorough discussion of the Texas litigation, see J. Steven Farr & Mark Trachtenberg, *The* Edgewood *Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607 (1999).

62. Serrano v. Priest, 557 P.2d 929 (Cal. 1976) [*Serrano II*].

63. A.B. 65, 1977 Assem. Reg. Sess. (Cal. 1977).

64. William A. Fischel, *How* Serrano *Caused Proposition 13*, 12 J.L. & POL. 607, 617 (1996).

65. *See id.* at 618-19.

66. *Id.*

67. *Id.* at 612.

the bottom ten in per-pupil expenditures.[68] *Serrano*'s impulse to equalize appeared to result in leveling down rather than up, a sobering reminder of de Tocqueville's warning that the price of equality in a democratic society can be mediocrity.[69]

Given these setbacks, reformers turned to adequacy lawsuits that sought only the amount of state support necessary to guarantee minimum access to education.[70] Adequacy claims were designed to establish a modest floor for funding, rather than demand that funding be equalized. Advocates hoped that adequacy arguments would be consistent with judicial restraint, proportionate to the political will, and acceptable to the general public.[71] Yet, even the push for adequacy proved contentious, as experts debated whether money really matters and, if so, how much.[72] As this debate made clear, a focus on money necessarily leads to concerns about efficiency, concerns that can eclipse equity claims.

In the quest for efficiency, bureaucratic managerialism has offered a way to rationalize expenditures on schools through either accounting or accountability. Both approaches borrow from the business world by likening education to a production process and monitoring it to prevent waste.[73] An

---

68. PETER SCHRAG, FINAL TEST: THE BATTLE FOR ADEQUACY IN AMERICA'S SCHOOLS 78 (2003).

69. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 628-32 (J.P. Mayer ed., George Lawrence Trans., Anchor Books 1969) (1835).

70. The shift to an adequacy approach began in New Jersey. Robinson v. Cahill, 303 A.2d 273 (N.J. 1973) [*Robinson I*]; Robinson v. Cahill, 306 A.2d 65 (N.J. 1973) [*Robinson II*]; Robinson v. Cahill, 335 A.2d 6 (N.J. 1975) [*Robinson III*]; Robinson v. Cahill, 339 A.2d 193 (N.J. 1975) [*Robinson IV*]; Robinson v. Cahill, 355 A.2d 129 (N.J. 1976) [*Robinson V*]; Robinson v. Cahill, 358 A.2d 457 (N.J. 1976) [*Robinson VI*]; Robinson v. Cahill, 360 A.2d 400 (N.J. 1976) [*Robinson VII*]. Since then, some other courts have adopted a similar approach. *See*, *e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993); Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997); Abbeville County Sch. Dist. v. South Carolina, 515 S.E.2d 535 (S.C. 1999).

71. Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 166-70 (1995).

72. *See*, *e.g.*, JAMES C. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY (1966); ERIC A. HANUSHEK, THE FAILURE OF INPUT-BASED SCHOOLING POLICIES (2002); ALLAN R. ODDEN & LAWRENCE O. PICUS, SCHOOL FINANCE: A POLICY PERSPECTIVE (3d ed. 2004); Eric A. Hanushek, *Assessing the Effects of School Resources on Student Performance: An Update*, 19 EDUC. EVALUATION & POL'Y ANALYSIS 141, 154 (1997); Lawrence O. Picus, *Does Money Matter in Education? A Policymaker's Guide*, *in* SELECTED PAPERS IN SCHOOL FINANCE 1995 (NCES 97-536, 1995), *available at* http://nces.ed. gov/pubs97/web/97536.asp.

73. Berne & Stiefel, *supra* note 57, at 11-12; Bess Altwerger & Steven L. Strauss, *The Business Behind Testing*, 79 LANGUAGE ARTS 256, 257-60 (2002); Peter Sacks, *Turning Schools Into Profit Centers*, EDUC. WEEK ON THE WEB (Jan. 8, 2003), *at* http://www.edweek.org/ew/ewstory.cfm?slug=16sacks.h22&keywords=sacks; Steven A. Holmes, *School Reform: Business Moves In*, N.Y. TIMES, Feb. 1, 1990, at D1.

accounting approach examines input measures, tracking expenditures as a form of investment in educational production. Expenses associated with different inputs are disaggregated and assessed to determine whether they are being deployed efficiently.[74] By contrast, an accountability approach emphasizes output measures so that quality control can be introduced into the educational system. This method compartmentalizes skills so that the outcomes of the educational process can be measured and evaluated. While efforts to equalize school funding trigger debates over whether money matters, accountability systems lead to a different battle of the experts, one that focuses on the technology of testing. In particular, policy-makers want assurances that output measures are reliable, valid, and unbiased.[75]

One might expect that accounting and accountability systems are related, but in fact, there is relatively little research linking specific inputs to particular outcomes.[76] Instead, a focus on inputs can highlight structural problems of inadequate resources, while outcome measures typically mask these difficulties by emphasizing individual factors such as student motivation and teacher effort.[77] Because rural schools and poor, predominantly non-White urban schools are systematically underfunded, politicians have preferred to use accountability measures without any detailed accounting of inputs. Recently, there have been some proposals to use testing requirements to press for an adequate public education. Poor outcomes then would become the basis for demanding additional school resources.[78] So far, these efforts have not yet translated from scholarly imaginings into binding legal precedent. However, with the widespread adoption of high-stakes testing under the No Child Left Behind Act,[79] some districts are filing challenges based on the failure to provide resources sufficient to meet expectations for academic performance.[80]

---

74. Berne & Stiefel, *supra* note 57, at 11.

75. NATIONAL RESEARCH COUNCIL, HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION 71-83 (Jay P. Heubert & Robert M. Hauser eds., 1999).

76. SCHRAG, *supra* note 68, at 215-19 (describing the controversy over class size reduction and whole-school reform but noting the surprising agreement regarding the benefits of highly qualified teachers).

77. *See generally* ALFIE KOHN, THE CASE AGAINST STANDARDIZED TESTING: RAISING THE SCORES, RUINING THE SCHOOLS 38-41 (2000).

78. *See*, *e.g.*, Maurice R. Dyson, *Leave No Child Behind: Normative Proposals to Link Educational Adequacy Claims and High Stakes Assessment Due Process Challenges*, 7 TEX. F. C.L. & C.R. 1, 57-60, 67-71 (2002).

79. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

80. Sam Dillon, *Some School Districts Challenge Bush's Signature Education Law*, N.Y. TIMES,

These lawsuits illustrate the limits of bureaucratic managerialism. It depends on a set of prescribed administrative routines, rules that ensure a regularized, predictable process. Because of the complexity of schooling problems, bureaucratic rules proliferate. Their proliferation overwhelms officials and blunts a sense of the underlying organizational mission. Accountability systems, for example, rely on high-stakes testing to improve teaching methodologies and student performance. The learning process itself remains a black box, so if tests fail to change patterns of achievement, the only recourse is to refine the technology of testing. Rather than improve academic performance, efforts to perfect the test can simply intensify protests that differences in access to education are being ignored.

Just as courts can succumb to an empty formalism, school bureaucracies can focus on the application of standards while neglecting their real-life consequences.[81] This neglect of actual consequences eventually undermines the managerial regime. Teachers, students, and parents chafe under abstract and rigid rules that are neither responsive, individually tailored, nor sensitive to context. Accountability systems presume that equity will be a byproduct of efficiency, but much depends on how many resources are made available and how they are distributed among schools. A scientific testing process cannot postpone indefinitely the recognition of gross inequalities in opportunity. Indeed, to the extent that testing is designed to close the achievement gap, the initiative seems increasingly disingenuous as the tests themselves track profound and persistent disparities in social, economic, political, and cultural capital.[82]

Inherent tensions between inadequate resources on the one hand and aspirations for uniformly high performance on the other create instability in the managerial process. States with rigorous testing requirements often "dumb them down" in the face of alarmingly high and politically unacceptable rates of failure while retaining the rhetoric of world class standards. Lenient requirements are presented as more demanding than they are.[83] Statistical

---

Jan. 2, 2004, at A1.

81. *See* NONET & SELZNICK, *supra* note 44, at 64-65.

82. *See, e.g.*, PETER SACKS, STANDARDIZED MINDS: THE HIGH PRICE OF AMERICA'S TESTING CULTURE AND WHAT WE CAN DO TO CHANGE IT 106-16 (1999); Rachel F. Moran, *Sorting and Reforming: High-Stakes Testing in the Public Schools*, 34 AKRON L. REV. 107, 116-17 (2000); Brenda J. Townsend, *"Testing While Black": Standards-Based School Reform and African-American Learners*, 23 REMEDIAL & SPECIAL EDUC. 222, 224-27 (2002); Angela Valenzuela, *The Significance of the TAAS Test for Mexican Immigrant and Mexican American Adolescents: A Case Study*, 22 HISP. J. BEHAV. SCI. 524, 524-25, 534-37 (2000).

83. *States Rethink Standards*, 187 AM. SCH. BD. J. 11 (2000).

reports are tweaked and even distorted to create educational miracles unfounded in fact.[84] Ironically, bureaucratic managerialism is thwarted in its central quest for regularity and predictability, precisely because it makes process primary and treats the real-world context and consequences as secondary. Because of inherent tensions between equity and efficiency, bureaucratic managerialism, as typified by high-stakes testing, can degenerate into a failed, incomplete, or even cynical initiative.

III. FROM PUBLIC CONTROVERSY TO PRIVATIZATION

The difficulties associated with bureaucratic managerialism have not deterred advocates of efficiency. Instead, they assert that even when government borrows business principles, bureaucracies are too inept or too corrupt to implement them properly.[85] This market-oriented perspective presumes that public schools are simply service providers with no special obligations that distinguish them from private institutions. Equity advocates, however, insist that public education is uniquely responsible for promoting broad access to opportunity. Although privatization has met with fierce opposition, the No Child Left Behind Act takes a small step from bureaucratic managerialism toward a market-based approach. When low-performing schools do not meet mandated standards, students are given the chance to transfer to another public school or purchase private tutoring.[86] Rather than fix a failing institution, the Act offers students more choices, though they are clearly quite constrained.[87]

---

84. SACKS, *supra* note 82, at 143-51. *See generally* Diana Jean Schemo & Ford Fessenden, *A Miracle Revisited: Measuring Success; Gains in Houston Schools: How Real Are They?*, N.Y. TIMES, Dec. 3, 2003, at A1; James Traub, *The Way We Live Now: 12-21-03; True and False*, N.Y. TIMES, Dec. 21, 2003, § 6 (Magazine), at 13 (citing evidence that the Houston school system, on which the No Child Left Behind Act was modeled, has not improved to the extent previously claimed); Michael Winerip, *On Education; The 'Zero Dropout' Miracle: Alas! Alack! A Texas Tall Tale*, N.Y. TIMES, Aug. 13, 2003, at B7.

85. *See* JOSEPH MURPHY, THE PRIVATIZATION OF SCHOOLING: PROBLEMS AND POSSIBILITIES 161-62 (1996). *See generally* Lewis D. Solomon, *Edison Schools and the Privatization of K-12 Public Education: A Legal and Policy Analysis*, 30 FORDHAM URB. L.J. 1281, 1334-35 (2003) (discussing free market critique of government programs, which argues that they are captured by bureaucratic interests).

86. 20 U.S.C. §§ 6316(b)(1)(E)(i), (e)(1) (2002).

87. *See generally* Brian P. Marron, *Promoting Racial Equality Through Equal Educational Opportunity: The Case for Progressive School-Choice*, 2002 BYU EDUC. & L.J. 53, 83-85 (noting that the Act originally provided for a $1500 voucher for children in failing public schools, but this market-driven approach was significantly modified during the legislative process).

The push for privatization has taken a variety of forms. Perhaps most salient is the use of charter schools and vouchers to empower consumers and stimulate educational innovation. Because charter schools remain public and are therefore subject to state oversight, they have been less controversial than voucher plans that allow students to attend private schools with public funds.[88] Although critics have alleged that vouchers undermine the public school system, courts have primarily been concerned with whether sectarian institutions should be eligible to receive voucher payments. Generally, the United States Supreme Court has upheld programs that channel state monies to parochial schools through parent and student choice but has struck down direct fund transfers.[89] As a result, state and local educational agencies enjoy considerable latitude to include parochial schools among voucher options, even when substantial state dollars ultimately reach sectarian institutions.

In addition to charter schools and vouchers, privatization initiatives include contracts that delegate management of public schools to private companies like the Edison Project[90] and Education Alternatives, Inc. The hope here is that private management will make better use of scarce resources than public bureaucracy, generating educational gains for children. In the

---

88. *See* Robert C. Bulman & David L. Kirp, *The Shifting Politics of School Choice*, *in* SCHOOL CHOICE AND SOCIAL CONTROVERSY 36, 52-62 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).

89. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (validating a program that provided tuition aid for students to attend public or private school based on parents' choice as it was neutral with respect to religion); Agostini v. Felton, 521 U.S. 203 (1997) (validating a federal program that provides instruction to disadvantaged children by government employees at parochial schools); Bd. of Educ. v. Grumet, 512 U.S. 687 (1994) (finding that a law designating a Hasidic enclave as a separate school district improperly delegated political power to a religious group in violation of the Establishment clause); Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986) (allowing state vocational rehabilitation assistance for blind persons to be provided to a student attending a Christian college); Mueller v. Allen, 463 U.S. 388 (1983) (finding that tax deductions for school expenses primarily benefitting parents of children attending parochial schools valid as it only provided indirect support to parochial schools through parent choice); Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (finding that a tuition reimbursement program and tax benefit provisions for parents of children attending nonpublic schools violated the Establishment Clause). *But cf.* Locke v. Davey, 124 S. Ct. 1307 (2004) (upholding a ban on the use of publicly funded scholarships to pursue a devotional degree, but noting that scholarships could be used to attend pervasively sectarian institutions under state law). For a discussion of the Court's treatment of education vouchers, see Jesse H. Choper, *Federal Constitutional Issues*, *in* SCHOOL CHOICE AND SOCIAL CONTROVERSY, *supra* note 88, at 235; Stephen D. Sugarman, *School Choice and Public Funding*, *in* SCHOOL CHOICE AND SOCIAL CONTROVERSY, *supra* note 88, at 111, 127.

90. Due to poor profits and declining share prices, the Edison Project recently was sold to Florida's pension fund for $182 million. Marc Caputo, *Edison School Accepts Buyout; Stockholders Approve the State Pension Fund's Purchase of Edison Schools, A Company that Runs Schools Like Businesses but Has Never Made a Profit*, MIAMI HERALD, Nov. 13, 2003, *available at* http://www.miami.com/mld/miamiherald/news/7252063.htm.

short run, private companies often subsidize the purchase of computers and improvements to facilities. To meet their bottom lines and make profits in the long run, the companies reject union contracts with teachers and rely on standardized curricula.[91] To date, the verdict is out on these efforts with respect to both their financial viability and their educational payoff. Companies have struggled to turn profits on modest per-pupil reimbursements, and achievement data have not consistently demonstrated marked improvement.[92]

Finally, some privatization initiatives generate revenue for cash-strapped public institutions by capitalizing on students as a captive market. For instance, school officials can sign an exclusive contract with Pepsi so that it is the only soda pop sold in the cafeteria. Or, officials can allow advertisers to place billboards on the athletic field.[93] These contracts do not alter educational practices but instead simply augment support for underfunded public schools. In that sense, the contracts hardly seem to qualify as educational reform at all. Recently, some agreements have come under scrutiny as opportunistic and harmful to children. For instance, the California legislature restricted the sale of "junk food" in cafeterias because of a nationwide epidemic of obesity among schoolchildren.[94]

A somewhat different school-based contract offers goods and services in exchange for the chance to expose students to advertisements. Channel One is perhaps the best example. Public schools must ensure that teachers show Channel One's broadcast on current events in a prescribed number of classrooms for a specified number of days. The broadcast includes advertisements targeted at a youth market. In exchange, the schools receive curricular material (that is, the public events information) and, more

---

91. Solomon, *supra* note 85, at 1293-95, 1303-05, 1312-14.

92. *See*, *e.g.*, CAROL ASCHER ET AL., HARD LESSONS: PUBLIC SCHOOLS AND PRIVATIZATION 43-59 (1996); Peter Schrag, *"F" is for Fizzle; The Faltering School Privatization Movement*, AM. PROSPECT, May-June 1996, at 67; Lewis D. Solomon, *The Role of For-Profit Corporations in Revitalizing Public Education: A Legal and Policy Analysis*, 24 U. TOL. L. REV. 883, 909-13 (1993).

93. *See* Alex Molnar, SPONSORED SCHOOLS AND COMMERCIALIZED CLASSROOMS: SCHOOLHOUSE COMMERICALIZING TRENDS IN THE 1990'S, *at* http://www.asu.edu/educ/epsl/CERU/Annual%20reports/cace-98-01.htm (Aug. 1998).

94. California Childhood Obesity Prevention Act, 2003 Cal. Stat., ch. 415, § 4 (SB 677), codified at CAL. EDUC. CODE §§ 49431-49431.5 (Deering 2004); *see also* Melissa Healy, *War on Fat Gets Serious; From Statehouse to Courtroom, the Fight Against Obesity Gains Momentum. And Now the Feds Are Jumping on the Bandwagon*, L.A. TIMES, Jan. 3, 2004, at A1; J.M. Hirsch, *At School Lunches, Students Aren't Always Well Served; Not on the Menu: Bureaucratic and Financial Obstacles*, WASH. POST, Jan. 11, 2004, at A8.

importantly, the equipment to show it.[95] Here, too, private enterprise attempts to capitalize on students as a captive market, but Channel One would argue that the benefit of the educational goods and services it provides far outweighs the minor cost of a few advertisements each day.[96] So far, court challenges have been few, but at least one judge has held that students cannot be compelled to watch Channel One.[97]

Like bureaucratic managerialism, privatization in its most benign version promises that greater efficiency will promote equity as a byproduct. Because the marketplace deploys resources in an optimal fashion, the disadvantaged arguably will enjoy improved access to education.[98] This presumptive superiority of private alternatives has been reinforced not just by theories of competition, but also, ironically, by some historical experiences with equity reform. During the school desegregation campaign, Whites fled not only to suburbs but also to private schools. By voting with their feet, affluent White parents sent a clear message that market alternatives were more appealing than failing public schools.[99] Next, during the push for fiscal equity, experts conducted studies on whether money matters. Among the prominent findings was that even private schools with limited resources, particularly Catholic institutions, produced better results than public schools.[100] Finally, the willingness to consult business executives and to adopt business principles in initiatives like high-stakes testing suggests that the private sector holds the answers to America's public school crisis.[101]

In fact, privatization is not always a threat to norms of equity and inclusion. As America's experience during World War I demonstrates, private schools can be a haven for children fleeing an assimilationist curriculum. The

---

95. Christine M. Bachen, *Channel One and the Education of American Youths*, 557 ANNALS 132, 133 (1998).

96. *See id.* at 133-34; *see also* Lisa M. Spenny, *Commercialism in New York Public Schools: State Versus Local Control*, 5 ALB. L.J. SCI. & TECH. 339, 340-43 (1996).

97. Dawson v. E. Side Union High Sch. Dist., 34 Cal. Rptr. 2d 108, 129 (Cal. App. 1994). However, Channel One has survived legal challenges in Tennessee, New Jersey, and North Carolina. Wallace v. Knox County Bd. of Educ., 1 F.3d 1243, (6th Cir. 1993); N.J. Educ. Ass'n v. Bd. of Educ. of Trenton, 652 A.2d 172 (N.J. 1994); North Carolina v. Whittle Communications, 402 S.E.2d 556 (N.C. 1991). At least two state legislatures acted to ban Channel One from public classrooms. N.Y. COMP. CODES R. & REGS. tit. 8, §§ 23.1-23.2 (1997); R.I. GEN. LAWS § 16-38-6 (2003).

98. *See generally* Carol Ascher, *"... And It Still Is News": The Educational Inequalities that Have Brought Us Vouchers*, 1998 ANN. SURV. AM. L. 205, 212-14.

99. *See supra* note 29 and accompanying text.

100. JAMES S. COLEMAN & THOMAS HOFFER, PUBLIC AND PRIVATE HIGH SCHOOLS: THE IMPACT OF COMMUNITIES 92-95 (1987).

101. *See supra* note 73 and accompanying text.

freedom to choose alternative instruction promotes pluralism and protects distinct ways of life.[102] Yet, the condition of public education has changed since the early 1900s. After World War II, public schools were expected to account for and accommodate difference in promoting equal educational opportunity. As a result, critics allege that privatization is a flight from public responsibility.[103] In particular, as racial diversity and income inequality grow, market models leave growing segregation and stratification unrecognized and unremedied.[104]

Rather than address the specifics of the learning process, privatization characterizes students and parents as consumers who purchase goods and services from the schools. In contrast to a managerial strategy that monitors the production process, privatization initiatives parse and aggregate personal preferences. Once parents and students are empowered to assert their preferences, they generate collective market pressures that reward successful schools and weed out failing ones. The assumption that these pressures will make the classroom better depends upon parents and students getting the information and resources to exercise real market power.[105] Those concerned about equity worry that poor, non-White students will have the same experience in the educational market as they have elsewhere: They will be cut off from the information and buying power that enable them to make real choices. Yet, when the poor and disadvantaged wind up with an inferior educational product, they will be blamed for being bad consumers.[106] Critics fear that by ignoring inequality, market models simply reinforce the status quo, "institutionaliz[ing] disprivilege" by "diminish[ing] the law's capacity to grasp the realities of power."[107]

IV. MAKING EDUCATIONAL EQUITY A PART OF THE PUBLIC DISCOURSE IN DIFFICULT TIMES: CALIFORNIA AND THE OPPORTUNITY TO LEARN INITIATIVE

The evolution of educational equity since *Brown* shows that even the most hopeful of social justice initiatives, the school desegregation campaign,

---

102. *See supra* notes 8-10 and accompanying text.

103. *See* Solomon, *supra* note 85, at 1328-30.

104. *Id.*

105. *See id.* at 1332-33.

106. *See generally* Betsy Levin, *Race and School Choice*, *in* SCHOOL CHOICE AND SOCIAL CONTROVERSY, *supra* note 88, at 266, 279-83.

107. NONET & SELZNICK, *supra* note 44, at 44.

can devolve into formalism over time. Keeping the dream of justice alive is demanding because fairness cannot be captured in a set of formal prescriptions or bureaucratic rules. As Philippe Nonet and Philip Selznick explain, a responsive law, one that openly cares about results and not just rules and process, is a high-risk strategy.[108] By encouraging participation and blurring the line between law and politics, responsive law "may invite more trouble than it bargained for, foster weakness and vacillation in the face of pressure, and yield too much to activist minorities."[109] Little wonder, then, that at each stage of school reform, lofty ideals have been converted into formal rules and bureaucratized procedures, strategies that reduce risk by emphasizing the purity of legal process and distinguishing law from politics.[110]

Brown succeeded in envisioning new norms of justice in part because the times were propitious. The post-World War II years were prosperous ones, the United States had been anointed the leader of the free world, and the hypocrisy of fighting Nazism while countenancing Jim Crow segregation at home was transparent.[111] By contrast, advocates today face an uphill battle in making their claims for justice heard. Nationwide, the economy has faltered, leading to a battle over scarce public resources in which the disadvantaged typically come up short.[112] America's leadership of the free world has focused on the instantiation of democratic process, that is, regime change. Current foreign policy emphasizes the benefits of the rule of law in fighting oppression, and with respect to race, domestic security measures have mainly triggered concerns about racial profiling and demands for non-discrimination, or colorblindness.[113] The rhetoric of colorblindness in turn has made it increasingly difficult to acknowledge the ongoing reality of racial discrimination and segregation.[114] Efforts to use poverty rather than race to define disadvantage have met with limited success. The fiscal equity campaign, which sought to shift the focus from race to wealth, has floundered

---

108. Id. at 7, 77-78.

109. *Id.* at 7.

110. *See id.* at 5-7.

111. *See* Dudziak, *supra* note 11, at 66-70, 80-102.

112. *See generally* FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL (1977).

113. For a general sense of this debate, see DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002); Michael Kinsley, *Discrimination We're Afraid To Be Against*, 12 RESPONSIVE COMMUNITY 64 (2001/2002); Peter H. Schuck, *Context is Everything with Racial Profiling*, L.A. TIMES, Jan. 27, 2002, at M6.

114. Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind*," 44 STAN. L. REV. 1, 43-46 (1991).

and itself fallen prey to bureaucratic managerialism that substitutes rules and process for the struggle to define substantive justice.

Given these conditions, it seems unlikely that advocates today can launch a crusade with the kind of broad and affirmative vision that underlay *Brown*. Yet, this observation is not intended as a message of defeat, for there is much that still can be done to keep *Brown*'s legacy alive. Reformers must continue to remind Americans that formalism and bureaucratic managerialism have failed to address deep-rooted educational inequalities based on race and wealth. As an example of how to build on *Brown* in difficult times, I turn now to the "opportunity to learn" movement in California. This movement is designed to counter the imperative of bureaucratic managerialism as epitomized by high-stakes testing. In contrast to the fiscal equity campaign, which defined inputs in dollar terms, advocates of an opportunity to learn emphasize classroom conditions. At its core, an opportunity to learn means that each public school student will enjoy a meaningful chance to prepare to meet state standards. This chance requires access to qualified teachers, up-to-date textbooks, and rigorous curricula in a safe and healthy school environment.[115]

The opportunity to learn movement in California builds on earlier efforts to advance educational equity. Proponents have learned that judicial edicts are an important starting point, but standing alone, they do not make change happen. A centerpiece of the opportunity to learn movement has been a lawsuit in state court, but this litigation was supplemented extensively by legislative proposals, academic reports, and some public outreach through press releases and a website dedicated to the case. The lawsuit, *Williams v. California*,[116] was filed in 2000 on the anniversary of the *Brown* decision.[117] Brought on behalf of a class of poor and non-White children, the complaint alleged that the state educational system fails to provide all students with qualified teachers, necessary books and materials, and acceptable facilities.[118] The litigation relied on the state constitution, state statutes, and Title VI of the Civil Rights Act of 1964 to challenge the denial of equal educational opportunity and a basic education.[119]

---

115. SCHRAG, *supra* note 68, at 85-87.

116. Williams v. California, no. 312236 (Cal. App. Dep't Super. Ct. filed May 17, 2000).

117. SCHRAG, *supra* note 68, at 97.

118. Plaintiffs' First Amended Complaint for Injunctive and Declaratory Relief at 21-22, Williams v. California, no. 312236 (Cal. App. Dep't Super. Ct. Aug. 14, 2000).

119. *Id.* at 22-23.

In framing claims about an opportunity to learn, advocates relied heavily on educational research about the classroom conditions necessary for effective access to the curriculum. For example, Policy Analysis for California Education (PACE), directed by professors at Berkeley, Davis, and Stanford, worked with the Hewlett Foundation on opportunity to learn issues.[120] Jeannie Oakes, a professor at the University of California at Los Angeles (UCLA) and director of the Institute for Democracy, Education, and Access, organized a consortium of researchers to assist attorneys in the *Williams* case.[121] Moreover, through UC ACCORD, a multi-campus project housed at UCLA, she linked opportunity to learn issues to college eligibility, identifying the conditions in schools and classrooms that contribute to successful pursuit of higher education.[122] Finally, Professor Oakes developed an indicators project, which enables policy-makers, parents, students, and the general public to identify how particular schools are performing and whether they afford an opportunity to learn.[123]

The burden of data collection is, of course, enormous. Consequently, opportunity to learn advocates tried to shift this obligation to public officials. In 2003, Senator John Vasconcellos introduced SB 495, a bill designed to create an opportunity to learn index.[124] Under the bill's provisions, the California Quality Education Commission would design an index including, among other things:

> the number of fully and properly credentialed teachers employed at the school, the number of classrooms in which teachers are not fully and properly credentialed, the availability of adequate and appropriate instructional materials, the physical condition and maintenance of school facilities, the extent to which pupil population exceeds facility capacity, the availability of counseling and academic advising, and the availability and

---

120. *See*, *e.g.*, Julie Maxwell-Jolly, Opportunity to Learn–Review of History, Alternative Conceptions, and Evidence (PACE paper prepared for joint conference with the Hewlett Foundation held on October 10, 2003).

121. SCHRAG, *supra* note 68, at 108. For information about the expert testimony assembled on behalf of the plaintiffs in the *Williams* case, see Jeannie Oakes, *Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for* Williams v. State of California, 43 SANTA CLARA L. REV. 1305 (2003). The website for the *Williams* case can be found at http://www.decentschools.org/experts.ph.

122. Jeannie Oakes, Critical Conditions for Equity and Diversity in College Access: Informing Policy and Monitoring Results (Dec. 6, 2003), *at* http://ucaccord.gseis.ucla.edu/research/indicators/pdfs/criticalconditions.pdf.

123. CALIFORNIA OPPORTUNITY INDICATORS PROJECT, *at* http://ucaccord.gseis.ucla.edu/indicators/index.html (last visited Apr. 12, 2004).

124. SB 495, 2003-04 Sen. Reg. Sess. (Cal. 2003).

> adequacy of high-quality postsecondary preparatory, vocational education, and honors courses for pupils in secondary educational grades.[125]

The California legislature passed the bill, but Governor Gray Davis, already recalled in a popular election, vetoed it as one of his last acts before leaving office.[126] Nevertheless, the bill demonstrated the success of opportunity to learn advocates in enlisting legislative support.

Davis's veto of a bill creating an opportunity to learn index was consistent with his response to the *Williams* lawsuit. During his administration, the litigation was hard-fought and protracted, and settlement negotiations proved fruitless.[127] The state successfully argued that it was responsible only for failures in monitoring California's public educational system, not for specific violations in local schools.[128] After the voters replaced Davis with Governor Arnold Schwarzenegger, a dramatic change occurred. Davis had spent millions to oppose the lawsuit, but Schwarzenegger felt that fighting the case "was a huge mistake" and "outrageous," particularly when the plaintiffs were "right in the first place."[129] As plaintiffs' counsel explained in the notice of proposed settlement: "From the start, the new administration manifested a determination to deal with problems in public education and to settle this litigation."[130]

In August 2004, the parties announced a formal settlement contingent on successful enactment of a package of legislative proposals and court approval.[131] Some provisions would allocate money for textbooks and building repairs, others would create systems for monitoring and accountability, and still others would address the need for qualified teachers according to the timetable and terms of the No Child Left Behind Act.[132] In

---

125. *Id.*

126. Peter Schrag, *On Education, Gray Davis Leaves as He Came In*, SCRIPPS HOWARD NEWS SERVICE, Oct. 22, 2003.

127. SCHRAG, *supra* note 68, at 103-08.

128. Memorandum of Points and Authorities in Support of Motion for Final Approval of Settlement at 9, Williams v. California, No. 312236 (Cal. App. Dep't Super. Ct. Dec. 2, 2004), *available at* http://www.decentschools.org/settlement/MPAFinApprovSA.pdf.

129. Jennifer Radcliffe, *Arnold to Meet Suit Demands; Governor Pushes to Get Textbooks to Neediest Schools in L.A.*, DAILY NEWS OF L.A., Aug. 14, 2004, at N4; James Sterngold, *Governor Announces School Suit Settlement; State Will Boost Spending to Improve Education Quality*, S.F. CHRON., Aug. 14, 2004, at B1.

130. Notice of Proposed Settlement at 4-5, Williams v. California, No. 312236 (Cal. App. Dep't Super. Ct. Aug. 13, 2004), *available at* http://www.decentschools.org/settlement.php.

131. Nanette Asimov, *Big Win for Run-Down Schools Brings Hope; Landmark Accord Still Must Be OK'd by Judge in S.F.*, S.F. CHRON., Aug. 12, 2004, at B1; Sterngold, *supra* note 129.

132. SB 550, 2003-04 Sen. Reg. Sess. (Cal. 2004); AB 1550, 2003-04 Assem. Reg. Sess. (Cal. 2004);

addition, the settlement reflected a commitment to phasing out by 2012 the shortened school year used at some overcrowded schools.[133] In keeping with Schwarzenegger's educational philosophy, the settlement preserved local control while recognizing state responsibility for the public schools.[134] At the end of September, Schwarzenegger signed the bills into law,[135] and in December, the plaintiffs sought judicial approval of the settlement package, which was valued at an estimated one billion dollars.[136]

The plaintiffs' lead counsel hailed the settlement as "a watershed moment for public education in California. . . . Fifty years after *Brown*, the dream will no longer be deferred."[137] Yet, other observers have expressed reservations about the settlement's prospects for fulfilling *Brown*'s promise. Although all see the agreement as a significant step forward, its heavy emphasis on systems of monitoring, reporting, and accountability led Jack O'Connell, the state superintendent of public instruction, to comment that the settlement "relies heavily on bureaucratic solutions."[138] Others worried that the resources will prove inadequate to meet the tremendous needs of low-performing schools in California.[139] Finally, there were concerns that the settlement does not do enough to recruit and retain good teachers for the neediest students.[140] As long-time political commentator Peter Schrag summed up the situation:

> California, a high-cost state with high academic standards, has been trying to run its schools on the cheap for a generation. The governor deserves credit for getting past this dead-end lawsuit. But until he's willing to provide real money and real reform, this settlement is only a bright promise.[141]

SB 6, 2003-04 Sen. Reg. Sess. (Cal. 2004); AB 3001, 2003-04 Assem. Reg. Sess. (Cal. 2004).

133. AB 1550, 2003-04 Assem. Reg. Sess. (Cal. 2004).

134. AB 825, 2003-04 Assem. Reg. Sess. (Cal. 2004).

135. Press Release, Office of the Governor, Governor Schwarzenegger Signs Landmark Education Reforms Into Law (Sept. 29, 2004), *available at* http://www.governor.ca.gov/state/govsite/gov-pressroom-main.jsp (follow link to press releases).

136. Memorandum of Points and Authorities in Support of Motion for Final Approval of Settlement, *supra* note 128, at 16.

137. Press Release, ACLU of Southern California, ACLU and State of California Settlement in Historic Williams Education Lawsuit, (Aug. 13, 2004), *available at* http://www.aclu-sc.org/News/Releases/2004.

138. Nanette Asimov, *Landmark Deal Reached for State's Poor Schools; 1 Million Low-Income Students to Get Equal Access to Good Facilities and Textbooks*, S.F. CHRON., Aug. 11, 2004, at A1; Duke Helfand & Cara Mia DiMassa, *State, ACLU Settle Suit on Education*, L.A. TIMES, Aug. 11, 2004, at B6.

139. Asimov, *supra* note 131.

140. Peter Schrag, *Flawed School Settlement Still a Step Forward for California*, SACRAMENTO BEE, Aug. 18, 2004.

141. *Id.*

At the outset, the opportunity to learn movement focused on the classroom and refused to treat learning as a black box.[142] In this way, reformers have returned to *Brown*'s roots by remembering that the original decision was every bit as much about education as it was about race. At the same time, the movement was tailored to the times, adopting a format of measuring and monitoring inputs that has been legitimated by the rise of bureaucratic managerialism. By emphasizing classroom-level resources, opportunity to learn reformers hoped to avoid an empty formalism that subjects children to the same standards when their scholastic resources are profoundly different.[143] Despite this initial insistence on a responsive law, the settlement agreement already reveals the difficulties of remaining sensitive to real-world constraints and classroom context. As critics suggest, the opportunity to learn movement may already be succumbing to the exigencies of resource constraints and the imperatives of bureaucratic managerialism. Only time will tell whether the opportunity to learn, like earlier educational reform initiatives, becomes a promise that is more formal than real.

CONCLUSION

Law promises justice, whether or not it is just. As Philippe Nonet and Philip Selznick observe, there may be a belief that "[s]ubstantive justice is derivative, a hoped-for by-product of impeccable method."[144] Yet over time, the tension between procedural and substantive justice must be confronted. In a society committed to fairness, but marked by profound disagreement about what it means, a purely procedural requirement of logic and consistency will not suffice. The true moralist must have the capacity to tolerate ambiguity, be attentive to context and particulars, and accept normative complexity in a pluralistic society.

Arguably none of the iterations of educational equity has been able to resist the allure of formalism and proceduralism as guarantors of fairness. Each has sought refuge in clear-cut, measurable indices, whether they be racial balance, school finance formulas, or testing standards. The more that universal rules have been developed, the less attention has been paid to the real-world circumstances of particular children and classrooms. This tendency has much to do with legalization and the rule of law. A promise of formal

142. Oakes, *supra* note 121, at 1302.
143. *Id.*
144. NONET & SELZNICK, *supra* note 44, at 67.

fairness reflected in procedural justice, after all, is not an insignificant protection against oppression. Even so, formalism and proceduralism do not advance the pursuit of justice in a broad sense, and these shortcomings can leave idealistic reformers disappointed and disillusioned. Indeed, for the disgruntled, efficiency in the private sector may appear to offer more in the way of opportunity than a public school system mired in rules and procedures that fail to account for insufficient resources and inadequate access.

Despite the limitations of earlier generations of educational reform, advocates will continue to innovate in the quest for a responsive law, one that balances centralized control and universal rules with a respect for the local and the particular. Only a responsive law can reconcile the dilemma of sameness and difference by permitting us to recognize both common aspirations and deep divides. There can be no bright-line rules and simple formulas for fairness in a complex world. The goal of equal educational opportunity remains elusive fifty years after *Brown*. Yet, *Brown*'s legacy reminds us that at its very best, law offers not just a promise of justice but the means to imagine it fully realized.