

ACHIEVING EQUALITY OF EDUCATIONAL OPPORTUNITY IN THE WAKE OF JUDICIAL RETREAT FROM RACE SENSITIVE REMEDIES: LESSONS FROM NORTH CAROLINA

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INTRODUCTION

Racial discrimination in education was not, and some will argue still is not, an accident. Jim Crow education was designed, implemented, and upheld by the state. Racial discrimination was an integral part of American public education and was the intentional result of discriminatory laws and practices. However, since the middle of the last century, laws, court rulings, and the policies of the state—along with many heroic efforts by private citizens—have eliminated the formal legal architecture of educational discrimination. The epochal *Brown v. Board of Education*¹ decision is, of course, the most influential court decision in the struggle for educational equality.

Legal segregation has been outlawed for five decades.² Consequently, overt racial discrimination has largely disappeared from public schools.³ Literacy and median years of schooling are comparable among blacks and whites, multicultural curricula are used widely, and overtly racist material has been purged from schools.⁴ Nevertheless, troubling racially correlated disparities in educational processes and outcomes exist today—almost fifty years

1. 347 U.S. 483 (1954).

2. Although *Brown* and its progeny banned *de jure* segregation, since the late 1980s, *de facto* resegregation has been increasing. See John T. Yun & Sean F. Reardon, Trends in Public School Segregation in the South, 1987-2000 (Aug. 30, 2002) (unpublished paper presented at the Resegregation of Southern Schools Conference University of North Carolina at Chapel Hill, on file with the American University Law Review) (describing multiple methods of measuring segregation that indicate segregation, on average, is still increasing in the South at the state and district levels); GARY ORFIELD & NORA GORDON, THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 2 (2001) (arguing that recent statistics and Supreme Court decisions have allowed for an intensification of segregation in the 1990s), available at http://www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf (on file with the American University Law Review); GARY ORFIELD & JOHN YUN, THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, RESEGREGATION IN AMERICAN SCHOOLS 6 (June 1999) (citing Supreme Court cases from the 1990s that limited the impact of *Brown* and prompted litigation seeking to end desegregation), available at http://www.civilrightsproject.harvard.edu/research/deseg/Resegregation_American_Schools99.pdf (on file with the American University Law Review).

3. See David Armor et al., *The Outlook for School Desegregation*, in SCHOOL DESEGREGATION IN THE 21ST CENTURY 323-24 (Christine Rossell et al. eds., 2002) (suggesting that future school desegregation will be voluntary rather than mandatory).

4. See Adam Gamoran, *American Schooling and Educational Inequality: A Forecast for the 21st Century*, 74 SOC. EDUC. 135, 136 (2001).

after the *Brown* decision.⁵ While contemporary racial disparities in education are not always due to racial discrimination, most of them can be traced either to current social policies and educational practices or to the vestiges of the dual systems that scarred the American educational landscape.

In this Essay, I report my main conclusions from a review of the social scientific literature on contemporary racial discrimination in education.⁶ To illustrate some of the more general conclusions from that review, I draw from my fifteen-year-long study of school reform and educational equality in North Carolina, especially my case study of the Charlotte-Mecklenburg Schools.⁷ I also report findings from a

5. See, e.g., David J. Hoff, *Gap Widens Between Black and White Students on NAEP*, EDUC. WK., Sept. 6, 2000, at 6-7 (discussing thirty years of statistics showing that the academic achievement gap between white and minority students narrowed through the 1980s but has since continued to widen despite overall improvement in academic achievement). See generally JAY R. CAMPBELL ET AL., U.S. DEP'T OF EDUC., NAT'L CENTER FOR EDUC. STATISTICS, NAEP 1999 TRENDS IN ACADEMIC PROGRESS: THREE DECADES OF STUDENT PERFORMANCE 31-40 (compiling various statistics qualifying and comparing student achievement among white, black, and Hispanic students), available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2000469> (on file with the American University Law Review).

6. See Roslyn Arlin Mickelson, *When Are Racial Disparities in Education the Result of Racial Discrimination? A Social Science Perspective*, 105 TCHRS. C. REC. 1052-1086 (forthcoming Aug. 2003).

7. Roslyn Arlin Mickelson, *Subverting Swann: First- and Second-Generation Segregation in the Charlotte-Mecklenburg Schools*, 38 AM. EDUC. RES. J. 215 (2001) [hereinafter Mickelson, *Subverting Swann*]. The historical significance of the Charlotte-Mecklenburg School District rests upon its legacy as the first district to use mandatory cross town busing and explicit racial goals as the rationale for student assignments to schools, adjusting faculty and staff ratios at each school, and pairing schools in racially distinct neighborhoods as remedies to segregation. See *Swann v. Charlotte-Mecklenburg Schools*, 402 U.S. 1, 22-31 (1971); Jack Boger, *A Quick Look at the Remedial Responsibilities Under the Federal Constitution for School Districts Found to Have Practiced De Jure, or Intentional Segregation of their Public Schools—And At Judicial Consideration of the Relation Between Continuing School Segregation and Private Housing Choices in Formerly Segregated School Districts* (May 2, 2002) (unpublished manuscript, on file with the American University Law Review).

From roughly 1974 to 1992, CMS used mandatory busing to achieve a racial balance of approximately forty percent black and sixty percent white students in each of its schools. See generally DAVISON DOUGLAS, *READING, WRITING AND RACE* 141 (1995). Although the city's desegregated schools were once a source of civic pride, the broad social and political coalition supporting desegregation began to crumble in the late 1980s. *Id.* at 184. On a mounting wave of discontent among suburban newcomers, civic and business leaders began to pressure the schools to end busing for desegregation. See Carol Axtell Ray & Roslyn Arlin Mickelson, *Corporate Leaders, Resistant Youth, and School Reform in Sunbelt City: The Political Economy of Education*, 37 SOC. PROBS. 178, 181 (1990).

Most of the mandatory busing plan was replaced by other desegregation strategies in 1992. Charlotte-Mecklenburg Schools, Minutes of the School Board Meeting (Mar. 31, 1992) (unpublished, on file with the American University Law Review). Most notable was a program of controlled choice among magnet schools whereby each magnet school sought an enrollment that was forty percent black and sixty percent white and other ethnic groups. *Id.* See also Roslyn Mickelson, Committee of

comparative study of student achievement in three North Carolina urban counties: Mecklenburg, Forsyth, and Wake—home to the Charlotte-Mecklenburg Schools (“CMS”), the Winston-Salem/Forsyth County Schools (“WS/FCS”), and the Wake County Public Schools System (“WCPSS”), respectively. The findings suggest possible directions for lawyers, educators, social scientists, and citizens working to eliminate racial and ethnic discrimination in education in the wake of judicial withdrawal from race-sensitive remedies. I organize this Essay around the five core conclusions I gathered from my review of the social science literature and the empirical findings from my fifteen-year-long study of school reform in North Carolina.

25: Pupil Assignment Subcommittee Report (Apr. 1994) (unpublished, on file with the American University Law Review). A white family eventually challenged the use of racial guidelines for magnet school admissions and sued the district to end the use of race-conscious policies of any kind. See *Capacchione v. Charlotte-Mecklenburg Sch.*, 57 F. Supp. 2d 228, 229 (W.D.N.C. 1999). Soon after filing the lawsuit, the Capacchione family moved from Charlotte, North Carolina to Torrance, California. To sustain the lawsuit’s viability, several other white families joined suit as plaintiff intervenors. *Capacchione v. Charlotte-Mecklenburg Bd. of Educ.*, 179 F.R.D. 505, 506 (W.D.N.C. 1998).

Shortly after the Capacchione family filed its lawsuit, the original black plaintiffs, perceiving the lawsuit as a threat to the *Swann* ruling, intervened by reactivating their original case against CMS. Two young black families with children currently enrolled in CMS, the Belk and the Collins families, joined the *Swann* plaintiffs. Because the two lawsuits mirrored each other—white plaintiffs requesting a declaration of unitary status and blacks plaintiffs requesting a thorough implementation of the original *Swann* order to desegregate—the judge consolidated the actions and the case became known as *Belk v. Charlotte-Mecklenburg Board of Education*. 233 F.3d 232 (4th Cir. 2000). In 1999, I served as an expert witness for the defendant, the Charlotte-Mecklenburg Schools, in the consolidated *Belk* and *Capacchione* cases.

In September 1999, the court declared CMS unitary, holding that the school district had eliminated the dual system and its vestiges to the extent that it is practicable. See *Capacchione*, 57 F. Supp. 2d at 257. The trial judge enjoined the school system from using race in any future operations of the school system, and awarded the white plaintiffs attorneys’ fees and nominal monetary compensation for damages to their constitutional rights suffered under the school system’s use of a race-conscious magnet lottery. *Id.* at 294.

A three-judge panel of the Fourth Circuit Court of Appeals overturned the lower court’s unitary decision in November 2000. See *Belk*, 233 F.3d at 266 (vacating the lower court’s decision regarding the unitary school system with respect to “student assignment, facilities, transportation and student achievement”). Almost a year later, the full Fourth Circuit Court of Appeals, sitting *en banc*, reversed the three-judge panel and affirmed the lower court’s 1999 unitary decision. See *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 335 (4th Cir. 2001) (affirming the district court’s decision that the school system’s effort to integrate complied with the judicial mandate). The court’s majority voted that the race-conscious magnet plan was not unconstitutional. *Id.* at 397. Absent a constitutional violation, the white plaintiffs were not entitled to attorneys’ fees or compensatory damages. *Id.* at 413.

The U.S. Supreme Court denied the black plaintiffs’ *certiorari* petition on the issue of unitary status. *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 535 U.S. 986 (2002). The Court also denied the white plaintiffs’ *certiorari* petition regarding the issue of attorneys’ fees. *Capacchione v. Charlotte-Mecklenburg Bd. of Educ.*, 535 U.S. 986 (2002).

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They are:

First: Some of the most widespread and harmful sources of racially disparate educational processes and outcomes are racially segregated schools and classrooms segregated by tracking;

Second: Even though the courts have retreated from racially sensitive remedies, state actors still can make policy choices that address race and class disparities in educational processes and outcomes;

Third: Equity-based policies—for example, those utilizing socioeconomic diversity as a basis for school assignment—are a promising strategy because they do not employ racial prescriptions or sacrifice excellence on the altar of equality;

Fourth: Racial discrimination in social institutions and the larger American culture shapes the attitudes and actions of people of color. Thus, the race gap in academic outcomes reflects not only the structural barriers to equality, but it is also due to the choices and actions of minority students—what social scientists refer to as the exercise of their human agency. Human agency itself is shaped by the racialized structure of opportunity youths encounter. Contemporary structural barriers to equality and the historical legacy of racism also affect minority youth;

Fifth: Because discrimination in education is intimately connected to discrimination in other social institutions, we cannot expect to alleviate the former without concomitant efforts to eliminate the latter.

I. FIRST LESSON: RACE DISCRIMINATION EXISTS AND IS HARMFUL TO ACADEMIC OUTCOMES

Racial discrimination in education arises from actions of individuals or institutions, attitudes and ideologies, or processes that systematically treat students from racial/ethnic groups in a disparate and/or inequitable way.⁸ One way to conceptualize the dynamics that generate discrimination is to discuss them in terms of inputs (processes) and outputs (outcomes). While processes and outcomes are analytically distinct, they are two faces of the discrimination coin. We can see discrimination in educational outputs, such as the race gap in achievement and other school outcomes, and in educational inputs, such as the organization and operation of public schools.

8. See James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C.L.R. 1659, 1662 (2003) (suggesting that social science definitions of racial discrimination in education have limited influence on judicial decisions in desegregation cases).

A. *Outputs*

I begin this subsection with a discussion of discriminatory educational outputs because they are more intuitively and empirically obvious than inputs. In Section B, I present social science research on how education processes and organizational structures—what I refer to as inputs—generate the discriminatory outputs described in this subsection.

Although the social science research is vast, in most areas pertaining to the outcomes of racial discrimination in education the research record is consistent and clear. Racially correlated disparities in K-12 outcomes are evident in grades, test scores, retention and dropout rates, graduation rates, identification for special education and gifted programs, extracurricular and co-curricular involvement, and discipline rates.⁹

In general, whites and Asians tend to score higher on tests than blacks, Latinos, or American Indians.¹⁰ Trend data from the National Assessment of Educational Progress (“NAEP”) results suggest that across the age 9, 13, and 17 cohorts, race gaps in math, reading, and science test scores were the smallest in the 1980s.¹¹ Although in the 1990s the gaps grew, they were smaller than in the 1970s.¹² SAT results reflect similar patterns. The College Board reports that average SAT verbal scores are highest among whites (at 529 points) and lowest among blacks (at 433 points); average SAT mathematics scores are highest among Asians (566—whites average 531) and lowest among blacks (426).¹³

9. Critics of race sensitive remedies like mandatory desegregation argue that social class differences among racial groups are at the root of the racially correlated disparities in school outcomes. See Armor et al., *supra* note 3 (arguing that, by and large, the source of racial disparities in educational outcomes are not school system practices or vestiges of dual educational systems, but social class differences among the races). However, most current reviews of recent large-scale empirical studies conclude that, at most, socioeconomic background explains thirty-three percent of the race gap in education. Larry V. Hedges & Amy Nowell, *Changes in the Black-White Gap in Achievement Test Scores*, 72 SOC. EDUC. 111, 111 (1999); see also Larry V. Hedges, *Black-White Test Score Convergence Since 1965*, in THE BLACK-WHITE TEST SCORE GAP 161-67 (Christopher Jencks & Meredith Phillips eds., 1998) (reporting findings related to the impact of socioeconomic factors on race differences in academic achievement).

10. Asians' scores in mathematics on average exceed those of whites and whites' outperform Asians in English. See, e.g., COLLEGE BOARD, NATIONAL REPORT, COLLEGE BOUND SENIORS 6 tbl.4-1 (2001) (providing the SAT scores from 2001 separated by race and ethnicity), available at <http://www.collegeboard.com/sat/cbsenior/yr2001/pdf/NATL.pdf> (on file with the American University Law Review); see also CAMPBELL, *supra* note 5, at 31-40.

11. CAMPBELL, *supra* note 5, at 31-40.

12. *Id.*; see also Gamoran, *supra* note 4, at 137; Hedges & Nowell, *supra* note 9, at 120 tbl.1.

13. See COLLEGE BOARD, *supra* note 10, at 6 (providing the 2001 SAT scores by

Since the 1970s, dropout rates have declined among whites and blacks but not among Latinos.¹⁴ Blacks are more likely than whites to repeat a grade,¹⁵ and are more likely to be placed in special education programs, especially in school systems operating under court orders to desegregate.¹⁶

B. Inputs

What are the processes that generate these racial disparities in outputs? The social science and educational research literatures indicate that there are a number of school organizational features and educational dynamics that generate the discriminatory outcomes through racially differentiated access to optimal opportunities to learn. The empirical evidence available indicates racial and ethnic minorities are less likely than whites to have access to the highest quality educational inputs. Inputs include access to challenging curricula and instruction,¹⁷ fair tests and testing practices,¹⁸ fair discipline rates and punishments,¹⁹ fair identification for special education and gifted programs,²⁰ financial resources,²¹ human resources²² (especially licensed and experienced teachers instructing in their areas of expertise),²³ race and social class diversity in schools and classrooms,²⁴ and motivated, high achieving classmates who create an academic climate that sustains high achievement for all students.²⁵

self-reported race or ethnicity).

14. See ROBERT M. HAUSER ET AL., UNIVERSITY OF WISCONSIN-MADISON, INSTITUTE FOR RESEARCH ON POVERTY, HIGH SCHOOL DROPOUT, RACE-ETHNICITY, AND SOCIAL BACKGROUND FROM THE 1970S TO THE 1990S, at 5-6, 17-20 (2001) (compiling data from the October Current Population Surveys to quantify the discrepancies of dropout rates based on race), available at <http://www.ksg.harvard.edu/inequality/Summer/Summer01/papers/Hauser01.pdf> (on file with the American University Law Review).

15. CAMPBELL, *supra* note 5, at 31-40.

16. See Tamela McNulty Elite, *Special Education or Racial Segregation: Understanding Variation in the Representation of Black Students in Educable Mentally Handicapped Programs*, 43 SOC. Q. 579, 579, 594-95 (2000).

17. Richard D. Kahlenberg, *An Unambitious Legacy: The Presidential Commission on Educational Resource Equity*, EDUC. WK., Feb. 21, 2001, at 28.

18. GARY NATRIELLO ET AL., SCHOOL DISADVANTAGED CHILDREN: RACING AGAINST CATASTROPHE 101-02 (1990).

19. *Id.* at 115.

20. *Id.* at 155.

21. *Id.* at 192-93.

22. *Id.*

23. Kahlenberg, *supra* note 17, at 28.

24. *Id.* at 29.

25. *Id.* at 28.

1. *School racial composition*

Arguably, the most pervasive and harmful contemporary manifestation of educational discrimination is *de facto* segregation. Racially isolated minority schools, especially in urban and rural areas, frequently are also resource-poor schools where low performing, low income students are taught disproportionately by inexperienced and less qualified teachers. Across America, students who attend resource-poor schools are disproportionately members of minority groups.²⁶ Given the system of public school financing, which is largely dependent upon property taxes, and in view of the racial segregation in public and private housing markets,²⁷ it is not surprising that there are striking race (and class) differences in school revenues and related opportunities to learn.²⁸

26. See, e.g., Jeanne Brooks-Gunn et al., *Poor Families, Poor Outcomes: The Well-Being of Children and Youth*, in CONSEQUENCES OF GROWING UP POOR 4-5 (Greg Duncan & Jeanne Brooks-Gunn eds., 1997) (indicating that minority groups are more likely to grow up poor and continue to live in poverty than white people); Kevin J. Payne & Bruce J. Biddle, *Poor School Funding, Child Poverty, and Mathematics Achievement*, EDUC. RESEARCHER, Aug.-Sept. 1999, at 7 (emphasizing the enormous disparity in school funding between wealthy and impoverished communities and the effects of such disparities on mathematics achievement).

27. Nancy A. Denton, *The Persistence of Segregation*, in IN PURSUIT OF A DREAM DEFERRED: LINKING HOUSING AND EDUCATION POLICY 95-99 (John A. Powell et al. eds., 2001).

28. Whether money matters for school outcomes is a longstanding debate dating back at least to the Coleman Report's finding that funding is not closely related to achievement. See JAMES S. COLEMAN ET AL., U.S. DEP'T OF HEALTH EDUC. & WELFARE, NATIONAL CENTER FOR EDUCATIONAL STATISTICS, EQUALITY OF EDUCATIONAL OPPORTUNITY 290-92 (1966). Some skeptics remain unconvinced that money matters. See, e.g., Eric A. Hanushek, *Assessing the Effects of School Resources on Student Performance: An Update*, 19 EDUC. EVALUATION & POL'Y ANALYSIS 141, 141 (1997) (discussing evidence supporting claims that there is no correlation between school funding and academic achievement); Eric A. Hanushek, *A More Complete Picture of School Resource Policies*, 66 REV. EDUC. RES. 397, 407 (1996) (concluding that the way in which funding is used is a more important factor in achievement than how much funding is available); Eric A. Hanushek, *Money Might Matter Somewhere: A Response to Hedges, Laine, and Greenwald*, EDUC. RESEARCHER, May 1994, at 8 (commenting that increased funding of schools is not an effective solution for education reform).

A growing body of research establishes that money *does* matter and that where and how the money is spent is also extremely important. See Ronald F. Ferguson, *Can Schools Narrow the Black-White Test Score Gap?*, in THE BLACK-WHITE TEST SCORE GAP, *supra* note 9, at 368; Rob Greenwald et al., *The Effect of School Resources on Student Achievement*, 66 REV. EDUC. RESEARCH 361, 384 (1996) (concluding that the correlation between academic achievement and school resources is significant enough to warrant attention); Larry V. Hedges et al., *Money Does Matter Somewhere: A Reply to Hanushek*, EDUC. RESEARCHER, May 1994, at 10 (noting that the debate involving school resources and academic achievement has moved from the position that there is no correlation to the discussion of how interrelated the two variables are); Larry V. Hedges et al., *Does Money Matter? A Meta-Analysis of Studies of the Effects of Differential School Inputs on Student Outcomes*, EDUC. RESEARCHER, Apr. 1994, at 13 (arguing that a thorough analysis of the relation between school resources and academic achievement leads to the conclusion that the two are positively related).

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Students in predominantly minority schools have access to fewer Advanced Placement classes than students in majority white schools.²⁹ Compared to students in racially balanced schools, students in schools comprised primarily of blacks, Latinos, and Native Americans are more likely to have fewer educational materials and teacher resources, a weaker academic press, and greater concentrations of poor, homeless, limited English-speaking, and immigrant students.³⁰

Human resources, such as high-quality, accredited teachers who instruct in their area of expertise in small classes, are directly related to school finances.³¹ Other less tangible human resources—such as active involvement of parents; stable, motivated peers who value achievement and share knowledge with classmates; and a school climate imbued with high expectations—are indirectly related to a school's funding level through the racial and socioeconomic status composition of communities.³² Thus, because of racial segregation, minority students have less access to the classroom and social conditions that maximize their opportunities to learn. By limiting minority students' access to optimal conditions for learning, racial segregation contributes to the race gap in educational outcomes.

Recent empirical research offers further evidence of the harm of segregation, not only to minorities, but to whites as well.³³ My own

29. See, e.g., Harry Pachón & Maya Federman, *Addressing Institutional Inequities in Education: The Case of Advanced Placement Courses in California*, in BRINGING EQUITY IN (Janice Petrovich & Amy Stuart Wells eds., forthcoming 2003) (on file with the American University Law Review).

30. See Jennifer Van Hook, *Immigration and African American Educational Opportunity: The Transformation of Minority Schools*, 75 SOC. EDUC. 169, 187-88 (2002); Natriello, *supra* note 18, at 14-16; Kahlenberg, *supra* note 17, at 28.

31. Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POL'Y ANALYSIS ARCHIVES (2000) (discussing the correlation between qualified teachers and academic achievement), available at <http://epaa.asu.edu/epaa/v8n1> (on file with the American University Law Review). See generally Richard M. Ingersoll, *The Problem of Underqualified Teachers in American Secondary Schools*, EDUC. RESEARCHER, Mar. 1999, at 26-35 (discussing the difficulties of retaining qualified teachers); Hamilton Lankford et al., *Teacher Sorting and the Plight of Urban Schools: A Descriptive Analysis*, EDUC. EVALUATION & POL'Y ANALYSIS, Spring 2002, at 55 (evaluating data collected in the state of New York and concluding that the most qualified teachers tend to work in schools that pay higher salaries).

32. See Kahlenberg, *supra* note 17, at 28.

33. See Mickelson, *Subverting Swann*, *supra* note 7, at 243 (demonstrating that segregated education harms the educational outcomes of both black and white students who experience it); Shelly Brown, *High School Racial Composition: Balancing Excellence and Equity*, Presentation at the Annual Meeting of the American Sociological Association 18 (Aug. 1999) (on file with the American University Law Review) (using a nationally representative data set to show that all ethnic and racial groups achieve better in high schools with student body compositions between ten percent and forty percent black and Latino); Carl Bankston III & Stephen J. Caldas, *Minority African American Schools and Social Injustice: The Influence of De Facto Segregation on Academic Achievement*, 75 SOC. FORCES 535, 553

survey research in Charlotte revealed that even when I controlled for prior achievement, gender, family background, effort, track placement, and a host of other school and family factors, the longer blacks and whites learned in racially identifiable black elementary schools and tracked classrooms in secondary school, the worse their academic outcomes.³⁴

There is also mounting data showing the positive academic effects of desegregated learning environments. Comparing NAEP scores over time, Grissmer and his colleagues concluded that the significant increase in academic achievement of black students in some states and not in others was due, in part, to desegregation in the more successful states.³⁵ In their independent reviews of the empirical literature on diversity's effects on learning, Hawley and Hallinan conclude that students who learn in schools that have students from different races and ethnicities are likely to gain an education superior to that of students who do not have this opportunity.³⁶

It is ironic, then, that just as the empirical evidence of the academic benefits of desegregation is beginning to accumulate, several recent federal court decisions have concluded that contemporary manifestations of school segregation are not evidence of dual systems. For example, the Charlotte-Mecklenburg School System was declared unitary in 1999.³⁷ In fall 2002, the district began to operate under its Family Choice Plan, a neighborhood schools-based pupil assignment plan.³⁸ An examination of the shifting racial

(1997) (using data from across the state of Louisiana, the authors showed that high school achievement for all students is negatively affected by racial segregation).

34. See Mickelson, *Subverting Swann*, *supra* note 7, at 241, 243.

35. See generally DAVID W. GRISSMER ET AL., *STUDENT ACHIEVEMENT AND THE CHANGING AMERICAN FAMILY* (1994) (demonstrating that reductions in both family poverty and levels of segregation had positive effects on minority student achievement from roughly 1960 through the mid-1980s).

36. See Willis Hawley, *Diversity and Educational Quality 1* (Mar. 28, 2002) (unpublished manuscript, on file with the American University Law Review) (contending that students in diverse environments enhance their understanding of other cultures, improve problem-solving skills, and sharpen interpersonal relationships); Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 742 (1998) (concluding that recent studies demonstrate that diversity in schools provides important educational opportunities for both minority and white students). Several of the amici briefs in *Grutter* support these conclusions. See, e.g., Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, Brief of Lt. Gen. Julius W. Becton, Jr., et al., as Amici Curiae in Support of Respondents, Brief of the American Educational Research Association, et al., as Amici Curiae in Support of Respondents, Brief of the American Sociological Association, et al., as Amici Curiae in Support of Respondents, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (Nos. 02-241, 02-516).

37. See *Capacchione v. Charlotte-Mecklenburg Sch.*, 57 F. Supp. 2d 228 (W.D.N.C. 1999).

38. On April 3, 2001, the CMS school board adopted the Family Choice Student

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composition of CMS schools between the 2001-2002 and the 2003-2004 school years suggests the rapid pace of resegregation in the district.

[Table 1 here

Assignment Plan for the 2002-2003 school year. CHARLOTTE-MECKLENBURG SCHOOLS, BOARD RESOLUTION 2001 (Apr. 3, 2001), at <http://www.cms.k12.nc.us/studentassignment03-04/boardresolution2001.asp> (on file with the American University Law Review). The Plan's key features include: (a) maximum stability of school assignments over a student's educational career; (b) guaranteed school assignment near the family's home if the parents so choose; (c) guaranteed options to choose enrollment in high performing schools for students in schools with concentrations of low-income students (so long as seats are available in the high performing schools); (d) magnet school choices among a variety of themes; and (e) maximum utilization of all school seat capacities. In another resolution adopted in July 2001, the board pledged to ensure equity across all schools. CHARLOTTE-MECKLENBURG SCHOOLS, BOARD RESOLUTION 2002-2003 (July 31, 2001), at <http://www.cms.k12.nc.us/studentassignment02-03/boardresolution02-03.asp> (on file with the American University Law Review); CHARLOTTE-MECKLENBURG SCHOOLS, STUDENT ASSIGNMENT METHODOLOGY, at <http://www.cms.k12.nc.us/studentassignment02-03/methodology.asp> (last modified Aug. 5, 2002) (on file with the American University Law Review).

Table 1 presents the changing demographics of the Charlotte-Mecklenburg School District in the first and second years of post-unitary status. Between the 2001-2002 and the 2003-2004 school years 21.4% fewer elementary schools and 14.7% fewer high schools will be racially balanced; 3.2% more elementary schools and 10.7% more high schools will be racially identifiable black; 18.2% more elementary schools, 4.5% more middle schools, and 4% more high schools will be racially identifiable white.³⁹ Middle schools break the pattern of resegregation; 3% more will be racially balanced while 7.4% fewer middle schools will be racially identifiable black in fall 2003, but 4.5% more will be racially identifiable white.

Figure 1 shows the intersection of race and social class in the eighty CMS elementary schools. The figure is based on the results of parents' school selections for the 2003-2004 academic year, the second year of the Family Choice Plan. Reading left to right, the graph shows that student populations with the highest percent white are also those with the lowest percent of students on subsidized lunches. Although the frequent association between concentrations of minority student and concentrations of low-income students is well known, Figure 1 graphically portrays this association in the Charlotte-Mecklenburg Schools. When the rapid resegregation data in Table 1 are juxtaposed with the race/poverty concentration data in Figure 1, we can see how current CMS pupil assignment policies create the institutional and organizational framework for racially-correlated educational inequities.

39. Following CMS's long-standing practice, I consider an elementary school whose black proportion of the population is greater than 15% above the school district's black proportion of the population as racially isolated black; a school with a black proportion of the population less than 15% below the school district's black proportion of the population as racially isolated white; all other elementary schools are considered racially balanced or desegregated schools. I use similar standards for secondary schools, a standard more conservative than CMS's practice of considering schools greater than 50% black to be racially isolated black, and less than 35% black to be racially isolated white.

For my analyses of within-school segregation of secondary school academic courses, I draw upon a $\pm 15\%$ bandwidth standard and consider a classroom to be racially isolated black if the black proportion of students in that classroom exceeds that school's black proportion of the students by 15%; a classroom with a black proportion of the population less than 15% below that school's black population as racially isolated white; and I consider all other classrooms to be racially balanced.

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—FIGURE 1 HERE—

2. Tracking

Although I do not present evidence in this Essay of the frequency and consequences of classroom segregation, it is important to mention that school segregation occurs both at the school and classroom levels. Most American schools organize instruction (especially in secondary schools) into racially-identifiable tracks.⁴⁰ Because tracking can undermine the potential benefits of policies such as busing, which are designed to eliminate school segregation, some courts have ruled that it is unconstitutional for school districts to use tracking and ability grouping specifically to circumvent desegregation at the school level.⁴¹

Even in racially-balanced schools, blacks, Latinos, and Native Americans are disproportionately found in lower tracks where curricula and instructional practices are weaker.⁴² Not only are blacks

40. Elsewhere, I present evidence of the extent and harmful effects of tracking on achievement, and how the practice undermined the desegregation plan's capacity to improve black students' performance in the Charlotte-Mecklenburg Schools. See Mickelson, *Subverting Swann*, *supra* note 7, at 230. The extensive research on the effects of tracking demonstrates the harmful effects of the practice. See SAMUEL LUCAS, TRACKING INEQUALITY: STRATIFICATION AND MOBILITY IN AMERICAN HIGH SCHOOLS (1999); JEANNIE OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY (1985) [hereinafter OAKES, KEEPING TRACK]; JEANNIE OAKES ET AL., MULTIPLYING INEQUALITIES: THE EFFECT OF RACE, SOCIAL CLASS, AND TRACKING ON OPPORTUNITIES TO LEARN MATHEMATICS AND SCIENCE (1990) [hereinafter OAKES ET AL., MULTIPLYING INEQUALITIES]; ANNE WHEELOCK, CROSSING THE TRACKS: HOW "UNTRACKING" CAN SAVE AMERICA'S SCHOOLS 9 (1992); S.R. Lucas & M. Berends, *Sociodemographic Diversity, Correlated Achievement, and De Facto Tracking*, 75 SOC. EDUC. 328 (2002); Jeannie Oakes, *More than Misapplied Technology: A Normative and Political Response to Hallinan on Tracking*, 67 SOC. EDUC. 84 (1994) [hereinafter Oakes, *Misapplied Technology*]; Mindy Laura Kornhaber, *Equitable Identification for Gifted Education and the Theory of Multiple Intelligences* (1996) (unpublished Ph.D. dissertation, Harvard University) (on file with the American University Law Review); Jeannie Oakes et al., paper presented at the National Institute for Science Education Conference, *Coursetaking and Achievement in Math and Science: Inequalities that Endure and Change I* (May 2000) [hereinafter Oakes et al., *Coursetaking*] (on file with the American University Law Review). For an alternative perspective on the effects of tracking on academic performance see Chen-Lin C. Kulik & James A. Kulik, *Effects of Ability Grouping on Secondary School Students: A Meta-analysis of Evaluation Findings*, 19 AM. EDUC. RESEARCH J. 45 (1982); James A. Kulik & Chen-Lin Kulik, *Effects of Ability Grouping on Student Achievement*, 23 EQUITY & EXCELLENCE 22 (1987).

41. See, e.g., *Hobson v. Hansen*, 269 F. Supp. 401, 406-07 (D.C. Cir. 1967) (finding that in a school system under court ordered desegregation the institution of a new system of tracking in order to insulate white students from learning with minority students was unconstitutional because it prevented blacks and disadvantaged students from obtaining the same high quality education available to white and affluent students); *People Who Care v. Rockford Bd. of Educ.*, 851 F. Supp. 905, 912-15 (N.D. Ill. 1994) (affirming the lower court's decision to grant an injunction to end the Rockford School District's tracking program because it "created racially identifiable classrooms, provided unequal opportunities to learn and served no remedial function for minority students").

42. See generally LUCAS, *supra* note 40 (arguing that although formal tracking practices have been eliminated by and large, informal practices have similar harmful

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and other ethnic minorities more likely than whites to be assigned to lower tracks, research also indicates that comparably-able blacks and whites learn in different tracks. Students in higher tracks learn more because they are exposed to broader curricula, better teaching, and more highly motivated classmates.⁴³ There is widespread agreement among social scientists that a critical component of the race gap in achievement is the relative absence of black students in higher-level courses and their disproportionate enrollment in lower-level ones.⁴⁴

This set of findings, especially those detailing the harmful effects of segregation and tracking, are particularly important given the imprudent critique of desegregation reflected in Justice Clarence

outcomes); OAKES, KEEPING TRACK, *supra* note 40, at 2-5 (critiquing the practice of ability grouping and tracking for reproducing educational inequality by race and social class while not contributing to learning); Oakes, *Misapplied Technology*, *supra* note 40, at 67 (showing that in contrast to theory, tracked classrooms do not necessarily separate students by ability; rather, tracking tends to separate them by race and social class); KEVIN C. WELNER, LEGAL RIGHTS, LOCAL WRONGS: WHEN COMMUNITY CONTROL COLLIDES WITH EDUCATIONAL EQUITY (2001) (chronicling the experiences that court-ordered "detracking" had on four school districts); Hallinan, *supra* note 36 (summarizing social science findings that indicate educational diversity stimulates the social processes in schools that positively affect student academic outcomes); Lucas & Berends, *supra* note 40 (demonstrating under which circumstances tracking correlates with students' social class and ethnicity in addition to student's academic potential); Mickelson, *Subverting Swann*, *supra* note 7, at 217 (demonstrating how gradual school-level resegregation and classroom-level segregation by tracking and ability grouping in the Charlotte-Mecklenburg Schools undermined *Swann's* potential to eliminate race gaps in opportunities to learn); Oakes et al., *Coursetaking*, *supra* note 40, at 6 (reporting that social class and racial background continue to predict math and science track placement despite years of reforms designed to break this association).

43. See generally HUGH MEHAN ET AL., CONSTRUCTING SCHOOL SUCCESS: THE CONSEQUENCES OF UNTRACKING LOW ACHIEVING STUDENTS 5-7 (1996); Jomills H. Braddock & Marvin P. Dawkins, *Ability Grouping, Aspirations, and Attainments*, 62 J. NEGRO EDUC. 324, 335 (1993); Merilee K. Finley, *Teachers and Tracking in a Comprehensive High School*, 57 SOC. EDUC. 233 (1984); Adam Gamoran & Robert D. Mare, *Secondary School Tracking and Educational Inequality: Compensation, Reinforcement, or Neutrality?*, 94 AM. J. SOC. 1146 (1989); Maureen T. Hallinan, *Sociological Perspectives on Black-White Inequalities in American Schooling*, SOC. EDUC., Special Issue (2001); Oakes et al., *Coursetaking*, *supra* note 40, at 7; Robert E. Slavin, *Achievement Effects of Ability Groups in Secondary Schools: A Best-Evidence Synthesis*, 60 REV. EDUC. RES. 471, 484 (1990); Report from William Darity, Jr., Domini Castellino, & Karolyn Tyson to the North Carolina Department of Public Instruction, *Increasing Opportunity to Learn via Access to Rigorous Courses and Programs: One Strategy for Closing the Achievement Gap for At-Risk and Ethnic Minority Students* (May 2001) (on file with the American University Law Review).

44. See THE BLACK-WHITE TEST SCORE GAP; *supra* note 9; LUCAS, *supra* note 40; Mickelson, *Subverting Swann*, *supra* note 7; OAKES ET AL., MULTIPLYING INEQUALITIES, *supra* note 40; Oakes, *Misapplied Technology*, *supra* note 40; WHEELLOCK, *supra* note 40. Even some of the harshest critics of race sensitive remedies to educational inequality acknowledge existence of racially correlated tracking and its contribution to the race gap in educational outcomes. Armor et al., *supra* note 3, at 321-33 (summarizing the corpus of the editors' research on the effects of desegregation on academic outcomes of students, schools, and communities).

Thomas's opinion in *Missouri v. Jenkins*, "It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior."⁴⁵

Thomas's critique erroneously reduces desegregation merely to relocating children's bodies into different schools—and classrooms—in order to achieve some sort of racial balance; that is, the nonsensical notion that desegregation enhances opportunities to learn via proximity to phenotypic diversity among classmates. As this review of the empirical social science literature indicates, and the amici briefs in *Grutter v. Bollinger* demonstrate,⁴⁶ the actual mechanisms by which desegregated education enhances outcomes relate directly to human and material resource scarcity in segregated minority environments. Because of the political power of middle-class white parents to ensure that in the K-12 schools their children attend there are the human and material resources optimal for learning, minority children learning in desegregated environments have greater access to these resources. The social science and educational literatures' critique of segregated schooling—and the racial discrimination in education that it reflects—does not rest on the absence of white children in racially isolated black classrooms or schools, but in the relative absence of the crucial resources those white children's middle-class parents demand and receive for their offspring.

II. SECOND LESSON: POLICY CHOICES STILL MATTER

If there is no difference between segregated and desegregated learning environments, the withdrawal of the courts from desegregation efforts will be of little consequence for academic outcomes. Conversely, if the racial composition of learning environments matters (as I argued in the previous section), and if the withdrawal of the courts undercuts efforts to maintain diversity, such withdrawal will likely result in adverse academic consequences. State actors have the authority to attempt to ameliorate, accommodate, eliminate, or ignore these adverse consequences if they so choose.⁴⁷

45. 515 U.S. 70, 114 (1995) (Thomas, J., dissenting).

46. See amici briefs cited *supra* note 36.

47. Roslyn A. Mickelson, *Children on the Streets of the Americas: Implications for Social Policy and Educational Practice*, in CHILDREN ON THE STREETS OF THE AMERICAS: HOMELESSNESS, EDUCATION AND GLOBALIZATION IN THE UNITED STATES, BRAZIL AND CUBA 271-81 (Roslyn A. Mickelson ed., 2000) (demonstrating this theoretical point by comparing the social conditions, educational opportunities, and state policies regarding street and homeless children in the United States, Brazil and Cuba); Pamela B. Walters, *Educational Access and the State: Historical Continuities and*

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The types of social and educational policies implemented in response to racial discrimination in education can make a difference in how schools allocate inputs. For example, what a racially diverse school system does after a court orders mandatory desegregation is critical to the equality of educational opportunities for all students. This is an important issue to consider because of the growing number of instances of judicial withdrawal from desegregation cases.⁴⁸

The post-unitary Charlotte-Mecklenburg School System is a case in point. As Table 1 and Figure 1 indicated, the apparent immediate consequence of judicial withdrawal from CMS is an acceleration in the concentration of low socioeconomic status minority children in central city schools, an increase in the concentration of whites and middle class children in suburban schools, and a decline in the percent of racially balanced schools.

The effect these demographic shifts have on academic achievement will depend upon the types of policies and practices the superintendent implements. For example, the district is rapidly growing and will have to site, build, and staff new schools, as well as redraw boundaries for existing ones. The administration faces important choices regarding where to build new schools, how students will be assigned to them, and how fiscal and human resources are allocated throughout the system.

III. THIRD LESSON: SOCIOECONOMIC DIVERSITY CONTRIBUTES TO EDUCATIONAL EQUITY

Whether decisions of state actors ignore, exacerbate, or alleviate the consequences of judicial withdrawal from race sensitive remedies to growing educational inequality—like the resegregation that CMS is experiencing—will depend upon the kinds of policies and practices these actors enact at the school district and state levels. Social and educational policies *can* address the emerging race and class isolation

Discontinuities in Racial Inequality in American Education, SOC. EDUC., Special Issue, 2001, at 35 (arguing that the state is responsible for racial inequalities in education and efforts to ameliorate them).

48. See *Capacchione v. Charlotte-Mecklenburg Sch.*, 57 F. Supp. 2d 228, 293-94 (W.D.N.C. 1999) (finding that the Charlotte-Mecklenburg School District no longer had a dual-system, thereby dissolving the thirty-year-old desegregation order). See also *Freeman v. Pitts*, 503 U.S. 467, 468-69 (1992) (listing several factors that a district court may consider when determining whether to order an incremental withdrawal of a mandated desegregation plan); *Bd. of Educ. of Okla. Pub. Sch. v. Dowell*, 498 U.S. 237, 238 (1991) (holding that a district court should look at whether a school board complied with the desegregation plan in good faith and whether past *de jure* segregation had been eliminated to the extent practicable when determining whether to dissolve a desegregation injunction).

in CMS and elsewhere across the nation.⁴⁹

Equity-minded state actors confront many difficulties when they fashion policies to address the concentration of low income, poor performing, and minority students in certain schools. One major source of their difficulty is the tenor of school reform since the Reagan administration introduced a more conservative ideological underpinning to public policy. Beginning in the 1980s, public discourse on school reform shifted from concerns for equity to quality; from group rights in education to individual rights; from entitlement to choice.⁵⁰ Market-inspired reformers charged that the Great Society's push for equality was responsible for the decline in the quality in American schools.⁵¹ These early arguments

49. See generally CONSEQUENCES OF GROWING UP POOR, *supra* note 26 (arguing that the educational and social needs of poor children only grow as they get older, and unless communities invest in early intervention strategies for these children the social and educational consequences will be catastrophic); NATRIELLO ET AL., *supra* note 18 (1990) (arguing that concentrating poor, low achieving minority students in certain schools makes it exceedingly difficult and expensive to meet the children's educational needs); Kevin Payne & Bruce Biddle, *Poor School Funding, Child Poverty, and Mathematics Achievement*, 28 EDUC. RESEARCHER (1998) (demonstrating through properly analyzed international comparisons of math achievement that U.S. math performance is bimodal, and that middle class students in well funded schools score at the top of the rankings while poor children in poorly-funded schools score near the bottom); Valerie E. Lee & David T. Burkam, *Inequality at the Starting Gate: Social Background and Achievement at Kindergarten Entry* (Apr. 22, 2002) (Report to the Economic Policy Institute, on file with the American University Law Review) (showing that not only do poor children enter school less prepared to learn than affluent peers, but the schools in which they are enrolled are also weaker in terms of human, material, and curricular resources than suburban schools).

50. See generally MICHAEL W. APPLE, *EDUCATING THE "RIGHT" WAY: MARKETS, STANDARDS, GOD, AND INEQUALITY* (2001) (arguing that contemporary educational critiques and the reforms flowing from them are grounded in neoconservative and neoliberal conceptions of education and the state); RECONSTRUCTING THE COMMON GOOD IN EDUCATION (Larry Cuban & Dorothy Shipps eds., 2000) (presenting a collection of historical essays about strengths and challenges of public schooling built around the principles of the common good); J. PETROVICH, *BRINGING EQUITY BACK* (J. Petrovich & A.S. Wells eds., forthcoming 2003) (introducing a collection of research that demonstrates how equity-minded school reforms during the last three decades have been more efficacious than critics claim); KENNETH J. SALTMAN, *COLLATERAL DAMAGE: CORPORATIZING PUBLIC SCHOOLS—A THREAT TO DEMOCRACY* 33 (2000) (arguing that neoconservative market-based approaches to school reform are not only ineffective in the long run, but many of them are actually harmful to students, schools, and the nation as a whole).

51. See Report from the National Commission on Excellence in Education, to the United States Department of Education, *A Nation at Risk: The Imperative for Educational Reform* (Apr. 1983) (on file with the American University Law Review) (claiming that other nations such as Japan, Germany, and South Korea are challenging the United States' status in the world because of the mediocrity of American schools). See generally David C. Berliner & Bruce J. Biddle, *THE MANUFACTURED CRISIS* (1994) (providing data and arguments to challenge the Reagan administration's simplistic and often inaccurate characterization of the alleged widespread academic failures of the nation's schools); LOUIS V. GERSTNER ET AL., *REINVENTING EDUCATION: ENTREPRENEURSHIP IN AMERICA'S PUBLIC SCHOOLS*

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foreshadowed contemporary efforts to implement market-inspired educational reforms including high standards, accountability, competition, choice (*i.e.*, magnets, charters, and vouchers), and privatization of educational services. Such market-inspired school reform gained expression in the recent No Child Left Behind legislation with its emphasis on high standards, accurate assessments, accountability, and choice.⁵²

Policies that focus on socioeconomic diversity hold promise for mitigating the high concentrations of low income and minority students in school systems no longer using racial prescriptions for pupil assignment. Some advocates of market-inspired approaches to reform recognize that policies utilizing socioeconomic diversity in school assignments potentially alleviate some of the harmful effects of resegregation on academic outcomes. For example, Armor, Rossell, and Walberg note that school boards can assign students to schools on the basis of nonracial geographic and socioeconomic criteria, and these characteristics could form the basis of a plan to improve desegregation without racial prescriptions.⁵³ They agree that the practice may bring about greater equity, but equivocate as to whether it will also generate educational excellence.

Using socioeconomic status to create diverse schools can enhance equity without sacrificing quality. To substantiate this claim, I turn to another lesson from North Carolina. Since 1992, my colleagues and I have been monitoring race differences in academic achievement in three consolidated urban county-wide school systems: Charlotte-Mecklenburg Schools, Winston-Salem/Forsyth County Schools, and Wake County Public School System. They are demographically similar enough to allow comparisons of their educational policies.⁵⁴ All three operate county-wide consolidated school systems; all have high goals for student achievement; all have racially mixed

(1994) (suggesting that entrepreneurial principles ought to be used to reform American education); DAVID T. KEARNS & DENIS P. DOYLE, *WINNING THE BRAIN RACE: A BOLD PLAN TO MAKE OUR SCHOOLS COMPETITIVE—REVISED AND UPDATED* (1991) (arguing that market principles and business values can rescue America's underperforming schools).

52. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2001) (codified at 20 U.S.C. § 6301).

53. See Armor et al., *supra* note 3.

54. See Stephen S. Smith & Roslyn A. Mickelson, *All that Glitters is Not Gold: School Reform in Charlotte-Mecklenburg*, 22 *EDUC. EVALUATION & POL'Y ANALYSIS* 101, 106 (2000) (comparing the 1991-1995 standardized test scores by race of Mecklenburg, Forsyth, and Wake Counties and demonstrating that, contrary to widespread claims by CMS administrators of that period, CMS did not markedly improve student performance).

populations that are majority white;⁵⁵ all are in urban districts with roughly comparable levels of poverty; and all three operate under North Carolina's ABC standards and accountability system wherein annual achievement is measured by standardized End of Grade (EOG) and End of Course (EOC) tests.⁵⁶

However, the most significant difference among the three is their approach to reform. Charlotte-Mecklenburg and Forsyth emphasize reform agendas that are market-oriented. These approaches are influenced by local business leaders and their values.⁵⁷ The pupil assignment plans are built around parental choice among neighborhood or magnet schools.⁵⁸ Neither CMS nor WS/FCS turns a blind eye to issues of equity but neither district builds its reform efforts with as much attention to equity as does WCPSS.⁵⁹ Instead, the

55. At the time these data were collected, CMS was a majority white district. In 2002, it became a plurality white district.

56. North Carolina's ABC program is an excellent example of the market-inspired reforms. The ABC plan has five strategic priorities: high student performance; safe, orderly, and caring schools; quality teachers, administrators, and staff; strong family, community, and business support; and effective and efficient operation. *ABC's Plus—North Carolina's Strategic Plan for Excellent Schools*, North Carolina Department of Public Instruction (Apr. 10, 1996), at http://www.ncpublicschools.org/accountability/reporting/abc_plan/abcplus.html (last visited June 15, 2003) (on file with the American University Law Review).

Under the ABC plan every student in grades 3-8 takes a standardized, criterion-referenced, end-of-grade test in language and mathematics, or for those in 9-12, an end-of-course test in all core courses. *History of ABC's Program*, North Carolina Department of Public Instruction (Apr. 10, 1996), at <http://www.ncpublicschools.org/abcs/ABCsHist.html> (last visited June 15, 2003) (on file with the American University Law Review). Students receive a scale score for their performance and that scale score is converted to an achievement level of 1 through 4. Achievement levels 1 and 2 indicate a student is not proficient; 3 and 4 indicate proficiency. *Id.* Every school is held accountable for the progress of its students based on changes in annual percent proficient on the EOCs and EOGs. There are two types of performance goals: performance standards and growth standards. *Id.* Performance standards consist of the absolute achievement of students. *Id.* The growth standards are "benchmarks set annually to measure a school's progress." *Id.* Schools and students who chronically fail to meet standards are subject to serious consequences such as reconstitution of schools and failure to graduate for students. *Id.*

57. Roslyn A. Mickelson, *International Business Machinations: A Case Study of Corporate Involvement in Local Educational Reform*, 100 TCHRS. C. REC. 476 (1999) (demonstrating how IBM and other corporations have influenced the direction and content of school reform in CMS and WS/FCS, largely through politics and targeted donations of funding, materials, and volunteers).

58. See sources cited *supra* note 38.

59. *Schools of Choice: Zone Overview*, Winston-Salem/Forsyth County Schools Controlled Choice Plan, at <http://mts.admin.wsfcs.k12.nc.us/prospect/zoneover.html> (last visited June 15, 2003) (on file with the American University Law Review); *2001-2002 Aims and Strategic Goals*, Winston-Salem/Forsyth County Schools Controlled Choice Plan, at <http://mts.admin.wsfcs.k12.nc.us/about/goals.html> (last visited June 15, 2003) (on file with the American University Law Review); *School Overview*, Winston-Salem/Forsyth County Schools Controlled Choice Plan, at <http://mts.admin.wsfcs.k12.nc.us/about/overview.html> (last visited June 15, 2003)

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two other districts rely primarily upon compensatory programs, such as CMS's Equity Plus, to address educational inequities.⁶⁰

WCPSS's operations are much more equity-oriented than the other two counties, with pupil assignment built around diversity in both socioeconomic status and achievement at each school. With few exceptions, no WCPSS school has greater than forty percent free or reduced lunch ("FRL") students and none of the schools have greater than twenty-five percent of students performing below grade level

[Table 2 here](#)

(on file with the American University Law Review); *Equity+ Schools*, Winston-Salem/Forsyth County Schools Controlled Choice Plan, at <http://mts.admin.wsfcs.k12.nc.us/about/equity/equityschools.html> (last visited June 15, 2003) (on file with the American University Law Review); *Goal 2003*, Wake County Public School System 2003, at <http://www.wcpss.net/goal2003/> (last visited June 15, 2003) (on file with the American University Law Review); *Definitions—Student Assignment Process*, Wake County Public School System 2003, at http://www.wcpss.net/2002_student_assign/definitions.html (last visited June 15, 2003) (on file with the American University Law Review); *Basic Facts*, Wake County Public School System 2003, at http://www.wcpss.net/basic_facts.html (last visited June 15, 2003) (on file with the American University Law Review); *FAQs: How is a student selected for a magnet school?* Wake County Public School System 2003, at <http://www.wcpss.net/perl/faqs> (last visited June 17, 2003) (on file with the American University Law Review).

60. See *Equity+ Schools*, *supra* note 59; see also *Policy ADA—Equitable Educational Opportunities*, *supra* note 38 (designating a school as an Equity Plus school if it has high concentrations of low performing and poor students, and proportionately fewer qualified teachers based on their licensure and experience). Equity Plus status means the school receives additional resources, including smaller classes and teacher bonuses.

proficiency.⁶¹ At the same time, WCPSS also has a controlled choice plan that is designed to accommodate both parental choice and equity goals.⁶²

Data comparing achievement in Mecklenburg, Forsyth, and Wake Counties, and the State of North Carolina indicate that diversity does not drive out excellence. The findings also suggest that diversity can improve all students' achievement. Table 2 presents a comparison of changes in the race gap in percent proficient on selected EOC tests in Algebra, Biology, and Economic, Legal, and Political Systems between 1997 to 2002 in the three county-wide school districts and the State of North Carolina. Changes in the gap appear as the school district's slope (second column from the right).⁶³ Algebra offers the most dramatic example of a reduction in the race gap. Between 1997-1998 and 2001-2002 Wake County reduced the race gap in percent proficient in Algebra from 32.0% to 22.4%. This reduction (slope = -2.43) is almost six times greater than CMS's reduction (-.42), and 54% greater than North Carolina's overall reduction in the gap (-1.32).

Table 3 presents changes in the size of the race gap in percent proficient in EOG mathematics and reading for the same school systems over the same period of time. While these results are less dramatic, they parallel the EOC findings where scores have improved for all students in all three districts and the State of North Carolina. All three districts and the state have narrowed the race gap, but Wake County has left the others behind. While improving the scores of blacks and whites across almost every subject area and grade, Wake has narrowed the achievement gap substantially more than the other districts. CMS also makes consistent progress in boosting overall

61. Walter Sherlin, Remarks at the Seminar on Racial and Ethnic Diversity at University of North Carolina-Charlotte (Mar. 18, 2003) (on file with the American University Law Review).

62. In a personal communication on Mar. 18, 2003, Dr. Karen Banks, Assistant Superintendent for Evaluation and Research, described WCPSS's approach to achieving equity and excellence. In addition to the social class and academic achievement criteria for school assignments, the district has a single goal through which all discussions are filtered: ninety-five percent of students will perform at grade level proficiency. Resources are realigned and reallocated to that goal, and schools are allowed to adapt programs to the needs of their children. New resources are directed to the school level where they are spent on direct services to children.

63. The slope is an ordinary least squares (OLS) regression coefficient. Tables 2 and 3 are adapted from Kerry I. Hudgins' investigation of market-inspired and equity-inspired reforms in North Carolina. Kerry I. Hudgins, *The Effects of Market-Inspired and Equity-Inspired School Reforms: A Comparison of Academic Outcomes in Three North Carolina School Systems* (2003) (unpublished MA Thesis, University of North Carolina at Charlotte) (on file with author).

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scores and reducing the race gap, but not as much as Wake County Schools. Forsyth lags behind both CMS and WCPSS.

Table 3 here

Wake County's accomplishments are relevant to the larger debates about the best direction for school reform: equity or market-oriented reforms; education as public good or as a private good; excellence or equity.⁶⁴ Contrary to the fears of those who maintain that any emphasis on equity will undermine efforts to enhance educational quality, Wake suggests that districts can attend to enhancing educational equity without sacrificing the quality of their children's education.

IV. FOURTH LESSON: RACISM IN AMERICAN SOCIETY AFFECTS
MINORITY STUDENTS' ACHIEVEMENT ATTITUDES AND BEHAVIORS

So far in this Essay I have stressed how schools' institutional arrangements may contribute to the race gap in academic achievement. Racial discrimination in schools and in the larger society influences who attends higher quality schools, what students learn and by whom they are taught, how schools are financed and staffed, and how opportunities to learn are allocated within schools. While accurate, this structural analysis of the origins of the race gap in educational outcomes is incomplete. It leaves out human agency: what about the contributions of minority students' own actions to the race gap? Minority students are not merely passive objects of

64. See sources cited *supra* note 50.

institutional forces. In fact, racial privileges and disadvantages expressed in cultural forms and institutional arrangements, both inside and outside of schools, affect minority students' attitudes and behaviors in ways that contribute to their under-performance. I say this not to blame the victims of racial discrimination but to maintain that students' behavior must be understood as reflecting, refracting, and reacting to the social contexts of their lives.⁶⁵ By inserting the human agency of students of color into my description of the processes that create their under-performance, I seek to show how social structure and human agency interact in the creation of action.

Let us consider two theories that have been advanced to explain the black-white race gap in educational outcomes: Claude Steele's stereotype threat⁶⁶ and John Ogbu's oppositional cultural framework.⁶⁷ Both theories place the human agency of black students at the core of the portion of under-performance attributable to student behaviors. At the same time, both theories acknowledge the influence of school and societal institutional racism in the creation of the race gaps.

Steele argues that achievement-oriented blacks who fear a less-than-perfect performance will validate racist stereotypes of black intellectual inferiority, exercise their agency, and disidentify with academic achievement in response to a race cue prior to testing.⁶⁸ What transforms their fear that, given their full effort to achieve,

65. LINWOOD H. COUSINS, ACTING "BLACK" AND EMBRACING EDUCATION: TEMPORAL AND SPATIAL FACTORS IN THE ACADEMIC ETHOS OF BLACK HIGH SCHOOL STUDENTS (forthcoming 2004) (manuscript on file with the American University Law Review). See also Carla O'Connor, *Making Sense of the Complexity of Social Identity in Relation to Achievement: A Sociological Challenge in the New Millennium*, 74 SOC. EDUC., Special Issue, at 159 (2001) (arguing that in order for social scientists to fully account for differences in academic achievement, they must incorporate into their models the complexity of racial, ethnic, gender, and social class factors that contribute to students' social identity).

66. See Claude M. Steele & Joshua Aaronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, in THE BLACK-WHITE TEST SCORE GAP, *supra* note 9, at 401, 422-26; Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST, June 1997, 613 (reporting experimental research with African Americans about the negative effects on achievement of spotlight anxiety triggered by racial stereotype cues).

67. See, e.g., John U. Ogbu & Herbert D. Simons, *Voluntary and Involuntary Minorities: A Cultural-Ecological Theory of School Performance with Some Implications for Education*, 29 ANTHROPOLOGY & EDUC. Q. 155, 177-79 (1998) (describing the development of oppositional cultural frameworks among involuntary minority students); see also JOHN U. OGBU, BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB: A STUDY OF ACADEMIC DISENGAGEMENT (2003) (discussing the gap in academic performance between black and white students in the well-integrated upper middle-class community of Shaker Heights, Ohio, and the contribution of black students' own oppositional cultural frameworks to that disparity).

68. Steele, *A Threat in the Air*, *supra* note 66, at 620-24.

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anything less than a brilliant performance will validate the stereotype of black intellectual inferiority and smear The Race?

Alternatively, Ogbu maintains that black adolescents are subject to the oppositional cultural norms of their peers, which developed in response to a history of racial oppression by whites and white-dominated institutions such as the public school system.⁶⁹ Accordingly, some black teens avoid public behaviors associated with academic achievement in order to maintain solidarity with their social group and avoid being accused of “acting white.”⁷⁰ Black students may also choose to stifle their own academic achievement for fear that behaviors such as studying for exams, doing homework, speaking standard English, or answering questions in class will, in the eyes of their peers, be seen as compromising their black identity.⁷¹ What leads some black students to construct public displays of academic effort as threats to their social identity as black people?

The answer to these questions is racial discrimination, manifested in the collective historical experience of blacks in America since slavery. This history includes decades of lynchings and dual school systems, and, more recently, racist stereotypes such as those advanced in the best-selling *The Bell Curve*,⁷² or in the former U.S. Senate majority leader’s wistful yearning for the Dixiecrat Party’s segregationist agenda.⁷³ In schools, the chilly isolation of the lily white top academic tracks of most high schools and flagship university campuses signals the “otherness” of blacks, Latinos, and Native Americans.

69. Ogbu & Simons, *supra* note 67, at 177-79.

70. *Id.* at 177-79.

71. *Id.* at 178.

72. See generally RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994) (contending that cognitive ability (as measured by IQ tests) is fixed, largely inherited, and immutable, and that whites have higher intelligence than blacks, that the wealthy have higher IQs than the poor, and that higher cognitive ability causes school success and affluence while lower cognitive ability causes poverty, crime, and school failure).

73. See Thomas B. Edsall, *Lott Decried For Part of Salute to Thurmond; GOP Senate Leader Hails Colleague’s Run As Segregationist*, WASH. POST, Dec. 7, 2002, at A6 (referring to former Senate Majority Leader Trent Lott’s remarks at the 100th birthday party for former segregationist and 1948 Dixiecrat Party presidential nominee, Senator Strom Thurmond: “I want to say this about my state: When Strom Thurmond ran for president, we voted for him. We’re proud of it. And if the rest of the country had followed our lead, we wouldn’t have had all these problems over all these years, either”).

V. FIFTH LESSON: SCHOOLS ARE INSEPARABLE FROM OTHER SOCIAL INSTITUTIONS

Lawyers, educators, social scientists, and citizens working to develop collaborative strategies to address racial, ethnic, and social class inequalities in educational opportunities must consider “the weight of the historical and social scientific evidence that there is no impermeable membrane between schools and the larger society.”⁷⁴

Racial inequality in education is the result of complex, dynamic processes that cumulate over time. For example, historical and contemporary housing policies have contributed to segregated neighborhoods.⁷⁵ Because students are generally assigned to schools in their neighborhoods, housing policies also contribute to segregated schools.⁷⁶ Similarly, school finance policies that are based on property values create vastly different funding bases for urban, suburban, and rural school districts.⁷⁷ Most minority students tend to be concentrated in low performing, poorly financed schools because of these school finance, housing, and pupil assignment practices.

Finally, the Supreme Court’s failure in *San Antonio Independent School District v. Rodriguez* to recognize education as a fundamental right under the U.S. Constitution requires fiscal equity advocates to address inequalities in funding for public schools through litigation at the state level.⁷⁸ Suits in states such as New Jersey,⁷⁹ New York,⁸⁰

74. Mickelson, *supra* note 6, at 1112.

75. See, e.g., Meredith Lee Bryant, *Combating School Resegregation Through Housing: A Need for a Reconceptualization of American Democracy and the Rights It Protects*, in IN PURSUIT OF A DREAM DEFERRED: LINKING HOUSING & EDUCATION POLICY, *supra* note 27, at 49, 57-58 (describing instances in Chicago, Yonkers, Baltimore, and Dallas where courts found that city governments contributed heavily to segregation through the implementation of housing policies and decisions).

76. See John A. Powell, *Living and Learning: Linking Housing and Education*, in IN PURSUIT OF A DREAM DEFERRED: LINKING HOUSING & EDUCATION POLICY, *supra* note 27, at 18-19 (John A. Powell et al. eds., 2001) (urging policymakers to take greater notice of the relationship among segregated private housing, public housing policies, and segregation in education).

77. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 7 (1973) (finding that there is no fundamental right to education contained in the Constitution and that discrimination in education resulting from disparate property tax bases does not violate the Equal Protection clause of the Fourteenth Amendment).

78. *Id.* at 35.

79. See *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998) (challenging the disparity in funding between school districts as a violation of state constitutional standards mandating a thorough and efficient education for all students).

80. See *Campaign for Fiscal Equity v. N.Y.*, 655 N.E.2d 661, 663 (N.Y. 1995) (upholding causes of action under the Education Article of the State Constitution and Title VI of the Civil Rights Act of 1964 in a suit alleging that the state’s underfunding of public schools had a disparate impact on minority children); see generally Andrew A. Washburn, Comment, *Campaign For Fiscal Equity v. New York: A Template For Education Transformation in New York*, 49 *BUFF. L. REV.* 489 (2001).

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California,⁸¹ and North Carolina⁸² have dealt precisely with this issue. However, as the *Abbott v. Burke* cases illustrate, even when the plaintiffs prevail, decades may pass before the remedies actually reach students.⁸³

Another example comes from the intersection of high stakes testing and school racial segregation. Students in low performing schools are more likely than students in higher performing schools (who tend to be white and middle class) to spend large portions of classroom time on “kill and drill” to raise their own and their school’s standardized test scores.⁸⁴ The corollary is true as well: students in under-performing schools spend less time on broader and deeper curriculum coverage in social studies, science, and the arts, and in activities that develop higher-order thinking skills.⁸⁵ This unintended consequence means minority students are likely to receive fewer opportunities to develop higher-order thinking skills or to be exposed to richer curricula compared to those in racially balanced, diverse, or majority white schools.

81. See *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (finding California’s system of school financing that relied on local property taxes violated the Fourteenth Amendment’s equal protection clause because it created enormous disparities in revenues available for educating students living in wealthy and poor communities).

82. See *Leandro v. State*, 488 S.E.2d 249, 259-61 (N.C. 1997) (asserting that North Carolina provided constitutionally inadequate school funding to low income communities).

83. In 1990, after several years of litigation, the New Jersey Supreme Court deemed the state’s Public School Education Act to be a violation of the New Jersey Constitution’s guarantee of a “thorough and efficient” public education because it failed to address poorer urban school districts’ “special disadvantages” and assure that such districts receive “substantially equivalent” expenditures as wealthier districts. *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990). Despite such a strong holding, the court did not approve specific requirements to remedy this constitutional violation until 1998, in which time the children in these disadvantaged schools advanced through over half of their public education. *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998).

84. See Alfie Kohn, *Standardized Testing and Its Victims* (Sept. 27, 2000) (describing how testing pressures have reduced educational quality in schools serving low-income children by placing a greater emphasis on low-level drills aimed at teaching to the tests), available at <http://www.alfiekohn.org/teaching/edweek/staiv.htm> (on file with the American University Law Review).

With the passage of the No Child Left Behind Act of 2001, we can expect this trend to increase. Pub. L. No. 107-10, 115 Stat. 1425 (codified at 20 U.S.C. § 6301). The No Child Left Behind Act of 2001 (“NCLBA”) places a significant weight on standardized testing and imposes penalties on low-performing schools. Lisa A. Brown, *No Child Left Behind Act*, TEX. BAR J., Jan. 2003, at 68. For a state and its school districts to receive federal assistance through the federal Elementary and Secondary School Act, designed largely to assist at-risk students, it must comply with the NCLBA. *Id.*

85. See, e.g., Linda Darling Hammond, *Creating Standards of Practice and Delivery For Learner-Centered Schools*, 4 STAN. L. & POL’Y REV. 37, 46 (1992) (urging that cognition and intelligence be broadly developed in schools by employing a broad range of teaching methods and activities).

As a result, those who attend segregated minority schools are less likely to score well on the high stakes tests. Educators use elementary test scores as one of the criteria for placing students in secondary school math, science, and English classes. When students who have attended segregated minority elementary schools transition to middle school, they are more likely to enroll in lower tracks compared to their peers who attended racially balanced elementary schools.⁸⁶ In lower level tracks, once again, they receive less challenging curricula and are less likely to encounter pedagogy that stimulates higher order thinking skills. Because their middle school track placement is critically important for students' test scores and grades, this cycle of lower track, poorer performance is likely to repeat when they transition from middle school to high school.⁸⁷

CONCLUSION

Valerie Lee observes that we cannot hold schools responsible for the racial and class disparities in school readiness that are evident as soon as kindergartners walk through the classroom doors.⁸⁸ But, she maintains, the educational system is responsible for the fact that initial race and class disparities grow rather than diminish with each year children attend school.⁸⁹ Even though *Brown* eliminated the formal legal architecture of discrimination in education, racial barriers to equality of educational opportunity continue to influence educational outcomes. The race gap in achievement testifies to their durability.

The corpus of social science research on racial discrimination in education offers several lessons for educators, civil rights activists, lawyers, and citizens seeking to achieve equality of educational opportunity without race sensitive remedies. First, some of the most widespread and harmful sources of racially disparate educational opportunities are racially segregated schools and classrooms. Empirical research demonstrates the harm to all students from segregated educational environments and the benefits for all from diverse ones.

86. Mickelson, *Subverting Swann*, *supra* note 7, at 239-41.

87. My prior research provides an empirical demonstration of this trajectory. See generally Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence From the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513 (2003); Roslyn Arlin Mickelson, *The Effects of Segregation and Desegregation on African American Middle School Students' Academic Achievement* (2003) (unpublished manuscript, on file with author); Mickelson, *Subverting Swann*, *supra* note 7, at 238-42.

88. Lee & Burkam, *supra* note 49.

89. *Id.*

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The second point is that policy counts. State actors have the power to craft social and educational policies that alleviate, ignore, or exacerbate the consequences of judicial retreat from race sensitive remedies. From North Carolina, we have learned that in the absence of conscious policies for generating diversity, stability, fairness, and quality across all schools in a local school district (or state), schools will resegment in ways that make it very hard to achieve equality of educational opportunities. Less than two years after being declared unitary, resegregation in Charlotte-Mecklenburg Schools is creating a multi-tiered system with low performing schools enrolling high concentrations of racial minority and low income students on the bottom tier, and high performing schools enrolling high concentrations of white and middle class students on the top tier. Absent equity-minded policies designed to undermine resegregation, the middle tier of racially and socioeconomically diverse, academically successful schools will be smaller in the 2003-2004 school year than it was in the 2002-2003 school year.⁹⁰

Third, state actors can make policy choices that address disparities in educational processes and outcomes without using racial prescriptions. Once again, North Carolina is instructive. The comparative data I have presented suggests that equity-based policies, such as those utilizing socioeconomic status or student achievement, are promising because they neither employ proscribed racial remedies nor sacrifice excellence on the altar of equality.

Finally, because discrimination in education is intimately connected to discrimination in other social institutions, educational equity advocates cannot expect to alleviate the former without concomitant efforts to eliminate the latter. To believe we can achieve one without the other is a chimera, akin to believing you can successfully clean the air on one side of a screen door.⁹¹ That said, any effort at social change must start somewhere. Addressing

90. Justice Scalia's dissent in *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003), suggests that young children, or in his words the "people three feet shorter and twenty years younger than the full-grown adults at the University of Michigan Law School," acquire the life lesson of diversity in "institutions ranging from Boy Scout troops to public-school kindergartens." *Id.* at 2349. To the extent that Justice Scalia's observation is accurate, public kindergartens—and by logical extension other grades in public schools—must be diverse. Even though he surely did not invite them to do so, educators, policy-makers, and citizens may consider Justice Scalia's comments to be opportunity to revisit desegregation and other race sensitive remedies for inequalities in public K-12 schools.

91. *See generally* JEAN ANYON, *GHETTO SCHOOLING: A POLITICAL ECONOMY OF URBAN EDUCATIONAL REFORM* 168 (1997) (employing a similar metaphor to make the same theoretical point regarding failed school reform in Newark, N.J.).

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persistent barriers to equality of educational opportunities in our public schools is an excellent place to begin.