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A National Lesson on the Dereliction and Declension of Educational Equality: The Cautionary Tale of California Charter Schools

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INTRODUCTION

American students are being educated in segregated and unequal schools more than ever since *Brown v. Board of Education*[1] struck down the separate-but-equal doctrine.[2] In California, black and Latino students have faced decades of segregated and unequal education.[3] Indeed, California is the most segregated state in the nation—it has the lowest share of blacks in white schools than any other state.[4] Los Angeles, which might be considered a progressive city, is the "most residentially segregated large metropolitan area in the U.S. in terms of the even distribution of Latinos and whites."[5] Professor Irving Joyner notes that *Brown v. Board of Education* has become

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

2. *See generally* CHARLES T. CLOTFELTER, AFTER *BROWN*: THE RISE AND RETREAT OF SCHOOL DESEGREGATION (2011) (concluding that while interracial contact increased in the decade after *Brown*, various factors prevented a larger increase); JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991) (examining the gap in school resources between the rich and poor); Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083 (2014) (analyzing racial constraints on school choice); Chinh Q. Le, *Racially Integrated Education and the Role of the Federal Government*, 88 N.C. L. REV. 725 (2010) (critiquing the role the federal in school integration); Leland Ware & Cara Robinson, *Charters, Choice, and Resegregation*, 11 DEL. L. REV. 1 (2009); Gary Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge*, CIV. RTS. PROJECT (Jan. 2009), https://perma.cc/8GHX-CFYC (showing that the segregation statistics from enrollment data submitted to the National Center for Education Statistics reflects an increase in racial segregation of African American and Latino students in public schools).

3. *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); Crawford v. Bd. of Educ., 551 P.2d 28 (Cal. 1976); Gary Orfield & Jongyeon Ee, *Segregating California's Future: Inequality and its Alternative 60 years after* Brown v. Board of Education, CIV. RTS. PROJECT (May 2014), https://perma.cc/66JY-XK2f.

4. *See generally* Orfield & Ee, *supra* note 3 (calculating the percentage of blacks in white schools in California).

5. *Id.* at 25.

"an empty victory"[6] for many, which ultimately led to the "non-education of African-American students."[7] Research reveals that minorities face a disadvantage in instruction and learning because of an "overall pattern of inequitable distribution" of resources.[8] This speaks to the ineffectiveness of education reforms, such as school finance litigation and desegregation cases, in adequately equalizing educational opportunities.[9]

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6. Irving Joyner, *Pimping* Brown v. Board of Education*: The Destruction of African-American Schools and the Mis-Education of African-American Students*, 35 N.C. CENT. L. REV. 160, 191 (2013).

7. *Id.* at 197; *see also* Sonia R. Jarvis, Brown *and the Afrocentric Curriculum*, 101 YALE L.J. 1285 (1992) (arguing that implementing a curriculum focused on raising self-esteem and academic performance in black students is consistent with *Brown*).

8. Derek W. Black, *Taking Teacher Quality Seriously*, 57 WM. & MARY L. REV. 1597, 1634 (2016); *see also* Ethan Hutt & Aaron Tang, *The New Education Malpractice Litigation*, 99 VA. L. REV. 419 (2013) (proposing an "education malpractice" claim students can have against chronically ineffective teachers); William S. Koski, *Teacher Collective Bargaining, Teacher Quality, and the Teacher Quality Gap: Toward a Policy Analytic Framework*, 6 HARV. L. & POL'Y REV. 67 (2012) (presenting an analytical framework to assess proposed teacher employment and collective bargaining reforms); Jenny DeMonte & Robert Hanna, *Looking at the Best Teachers and Who They Teach: Poor Students and Students of Color are Less Likely to Get Highly Effective Teaching*, CTR. FOR AM. PROGRESS, 2 (Apr. 11, 2014), http://perma.cc/7NGB-3ZWN.

9. *See* Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 508 (2014) ("Although public education is often the largest appropriation in state budgets, funding disparities between high- and low-poverty school districts persist, even in states in which courts have mandated full funding."); *see also* Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375 (1997) (discussing generally failures of desegregation in public schools in America and how school choice may may address some of those failures); John H. Blume et al., *Education and Interrogation: Comparing* Brown *and* Miranda, 90 CORNELL L. REV. 321 (2005) (analyzing similarities between *Brown* and *Miranda* in their historical significance and integration into American culture); Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIAMI L. REV. 577 (2009) (suggesting there are other ways to achieve equal educational opportunities for minority students than pursuing a racially diverse student body); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249 (1999) (illustrating the connection between the failure to desegregate schools and socioeconomic isolation); Benjamin Michael Superfine, *The Promises and Pitfalls of Teacher Evaluation and Accountability Reform*, 17 RICH. J.L. & PUB. INT. 591 (2014) (critiquing laws aimed at enhancing teacher evaluation and accountability); Richard Miyasaki, Comment, *Asleep at the School-Bus Wheel: The Success and Failure of School Desegregation in San Jose Unified School District and How to Save It*, 45 GOLDEN GATE U. L. REV. 149 (2015 (examining the history segregation in San Jose schools); Nipun Kant, *Teachers, School Spending, and Educational Achievement: Toward a New Wave of School Quality Litigation*, YALE L. SCH. LEGAL SCHOLARSHIP REPOSITORY (2014), https://perma.cc/S82V-UZCY (arguing that a new legal claim against inequitable and inadequate distribution of teacher quality may be available).

Another such ineffective reform is charter schools, which have led to segregated education and inequities.[10] However, a few scholars have argued that maybe minority parents view segregated charter schools as a "virtue rather than a vice"[11] for their children and so they are choosing charter schools over public schools.[12] Though, the parents might be doing so with incomplete information about charter schools, which stymies informed choices.[13] Even with ill-informed choices, "[t]he charter school movement has been a major *political* success, but it has been a *civil rights* failure."[14] Nonetheless, the choice campaign to steer families to charter schools continues because the use of "choice" in the campaign language has a "sanitizing effect on inequality."[15]

The 1983 publication of *A Nation at Risk*[16] was the impetus for an aggressive focus on standardized testing, accountability, and other reforms

10. *See* James, *supra* note 2, at 1111; Orfield & Ee, *supra* note 3, at 35; Jane Tanimura, Note, *Still Separate and Still Unequal: The Need for Stronger Civil Rights Protections in Charter-Enabling Legislation*, 21 S. CAL. REV. L. & SOC. JUST. 399, 413 (2012) (arguing that the charter school movement has failed to racial problems in the public school system); *Multiple Choice: Charter School Performance in 16 States*, CTR. FOR RES. ON EDUC. OUTCOMES, STAN. UNIV. (2009), https://perma.cc/NCZ5-AKQP.

11. James, *supra* note 2, at 1117.

12. *See* Jarvis, *supra* note 7 (arguing that some parents want to send their children to schools with Afrocentric curriculums); Nancy Levit, *Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, 2005 U. ILL. L. REV. 455 (2005) (examining the impulse towards resegregation in public schools through school choice); Sarah Rivkin Smoler, Comment, *Centric Charter Schools: When Separate May Be Equal*, 10 NW. J.L. & SOC. POL'Y 319 (2015) (tracing the emergence and development of centric charter schools, specifically in Chicago).

13. *See* Barnes, *supra* note 9, at 2377–78; Courtney A. Bell, *All Choices Created Equal? The Role of Choice Sets in the Selection of Schools*, 84 PEABODY J. OF EDUC. 191 (2009) (discussing why parents choose certain schools over others); Genevieve Siegel-Hawley & Erica Frankenberg, *Does Law Influence Charter School Diversity? An Analysis of Federal and State Legislation*, 16 MICH. J. RACE & L. 321, 337 (2011) (explaining that for parents with limited resources, choosing a school can be challenging); Erica Frankenberg & Genevieve Siegel-Hawley, *Equity Overlooked: Charter Schools and Civil Rights Policy*, C.R. PROJECT 1, 4 (Nov. 2009), https://perma.cc/L5VN-6NFX (discussing factors like social networks, language barriers, and socioeconomic status, that limit parents' decisions in school choice).

14. Erica Frankenberg et al., *Choice Without Equity: Charter School Segregation and the Need for Civil Rights Standards*, CIV. RTS. PROJECT 1, 1 (Jan. 2010), https://perma.cc/GU3V-UWY5 (emphasis added).

15. James, *supra* note 2, at 1086. For a discussion of choice programs and their constitutionality, see Joseph O. Oluwole & Preston C. Green, III, *School Vouchers and Tax Benefits in Federal and State Judicial Constitutional Analysis*, 65 AM. U. L. REV. 1335 (2016).

16. *See* Joseph O. Oluwole & Preston C. Green, III, *Charter Schools: Racial-Balancing Provisions and* Parents Involved, 61 ARK. L. REV. 1, 2–3 (2008) [hereinafter *Racial-Balancing*] (internal quotation marks omitted) (citing David Gardner et al., Nat'l Comm'n on Excellence in Educ., *A Nation at Risk: The Imperative for Educational Reform*, U.S. DEP'T

that have distracted from the specific needs of minority students.[17] However, subgroup data tracking on standardized tests and other reforms has spotlighted educational deficiencies for minority subgroups.[18] Standardized testing and accountability reforms, such as the No Child Left Behind Act and the Race to the Top program, have been partly responsible for promoting the charter school movement as a solution to poor public school and student performance.[19] Despite this focus on standardized testing, accountability, and choice, students continue to underperform and racial achievement gaps have become a staple of the American education system.[20]

EDUC. 1, 5 (April 1983), https://perma.cc/736D-TQVV) ("Secretary of Education T.H. Bell established the [National Commission on Excellence in Education] to conduct an eighteen-month study in order to determine ways to improve the quality of education in the nation, given the widespread public perception that something is seriously remiss in our educational system. The report . . . entitled *A Nation at Risk*.").

17. *See generally* Christopher B. Knaus, *Still Segregated, Still Unequal: Analyzing the Impact of No Child Left Behind on African American Students* in THE STATE OF BLACK AMERICA 2007: PORTRAIT OF THE BLACK MALE 105 (2007); Betheny Gross & Paul T. Hill, *The State Role in K-12 Education: From Issuing Mandates to Experimentation*, 10 HARV. L. & POL'Y REV. 299 (2016) (critiquing programs implemented by states and the federal government in public education); Arah N. Shumway, *Teacher Tenure Reform in Wyoming: Bad Teachers Left Behind*, 15 WYO. L. REV. 45 (2015) (analyzing the affect NCLB and teacher tenure have on student success); Benjamin M. Superfine & Jessica J. Gottlieb, *Teacher Evaluation and Collective Bargaining: The New Frontier of Civil Rights*, 2014 MICH. ST. L. REV. 737 (2014) (recommending ways for teachers' unions to work towards providing more equal and high-quality educational opportunities for all students); Joseph P. Viteritti, *The Federal Role in School Reform: Obama's "Race to the Top,"* 87 NOTRE DAME L. REV. 2087 (2012).

18. Black, *supra* note 8 at 1642–46; *see* Hutt & Tang, *supra* note 8 at 447–49; Nation's Report Card, *National Achievement Level Results*, NAT'L ASSESSMENT OF EDUC. PROGRESS (2015), https://perma.cc/SPE7-3WB4.

19. *See* Brooke Finley, *Growing Charter School Segregation and the Need for Integration in Light of Obama's Race to the Top Program*, 52 SAN DIEGO L. REV. 933, 937–44 (2015) (discussing the Race to the Top program); Danielle Holley-Walker, *A New Era for Desegregation*, 28 GA. ST. U. L. REV. 423, 445–52 (2012) (discussing No Child Left Behind).

20. *See* Shavar D. Jeffries, *Mandated Mediocrity: Modernizing Education Law by Reducing Mandates and Increasing Professional Discretion*, 23 CORNELL J.L. & PUB. POL'Y 45, 62–69 (2013); Viteritti, *supra* note 17; Pascal D. Forgione, Jr., *Achievement in the United States: Progress Since A Nation At Risk?*, NAT'L CTR. FOR EDUC. STATISTICS (April 3, 1998), https://perma.cc/Z7DD-58SC (examining trends in student performance since the 1970s); F. Cadelle Hemphill et al., *Achievement Gaps: How Hispanic and White Students in Public Schools Perform in Mathematics and Reading on the National Assessment of Educational Progress,* NAT'L CTR. FOR EDUC. STATISTICS (June 2011), https://perma.cc/Z7DD-58SC;; Kant, *supra* note 9; Nation's Report Card, *A First Look: 2013 Mathematics and Reading,* NAT'L CTR. FOR EDUC. STATISTICS, (Nov. 2013), https://perma.cc/NQ4N-CZWD; Alan Vanneman et al., *Achievement Gaps: How Black and White Students in Public Schools Perform in Mathematics and Reading on the National Assessment of Educational Progress* NAT'L CTR. FOR EDUC. STATISTICS (July 2009), https://perma.cc/E975-Z92L.

In order to rectify inequities in segregated schools, educational strategy must again focus on providing equal educational opportunities even where schools are segregated. We must make equal access to high-quality teachers[21] a civil rights issue as research shows that high-quality instruction is integral to effective learning for minorities.[22] Professor William Koski reports that "[s]tudy after study has confirmed that teachers with the least experience and those without credentials are concentrated in poor and minority schools."[23] The "unequal access is sufficiently pervasive that

21. Teacher quality is based on student learning and growth data as well as observations of instruction as measured in teacher evaluations systems. *See generally* Laura McNeal, *Total Recall: The Rise and Fall of Teacher Tenure*, 30 HOFSTRA LAB. & EMP. L.J. 489 (2013) (proposing ways for schools to maintain teacher rights while also providing space for school districts to remove ineffective teachers); Superfine, *supra* note 9 (examining recent laws aimed at enhancing teacher evaluation and accountability); Elizabeth Powell, Comment, *The Quest for Teacher Quality: Early Lessons from Race to the Top and State Legislative Efforts Regarding Teacher Evaluations*, 62 DEPAUL L. REV. 1061 (2013) (arguing the need for effective strategies that better identify and increase teacher effectiveness); Daniel Katz, *New York Evaluations Lose in Court*, DANIEL KATZ BLOG (May 11, 2016), https://perma.cc/URZ2-HWCS (describing how a New York court recognized problems with the "Value Added Modeling" method to evaluate teachers). The use of student data has been criticized, however, as "a statistical black box which no rational educator or fact finder could see as fair, accurate or reliable." *Id.*; *see also* Todd A. DeMitchell et al., *Teacher Effectiveness and Value-Added Modeling: Building a Pathway to Educational Malpractice?*, 2012 BYU EDUC. & L.J. 257 (2012); Regina Umpstead et al., *The New State of Teacher Evaluation and Employment Laws: An Analysis of Legal Actions and Trends*, 322 EDUC. LAW. REP. 577, 586 (2015). Since student data as a measure of teacher quality fails to account for factors beyond the teacher's control, high-quality teachers could be discouraged from working in minority schools due to concerns about those factors. Xiaoxia Newton et al., *Value-Added Modeling of Teacher Effectiveness: An Exploration of Stability Across Models and Contexts*, 18 EDUC. POL'Y ANALYSIS ARCHIVES, No. 23, at 19–20 (2010); *see also* Arah N. Shumway, *Teacher Tenure Reform in Wyoming: Bad Teachers Left Behind*, WYO. L. REV., 15, 45 (2015). Such concerns linger in addition to the traditional difficulty minority schools have attracting and retaining highly-quality teachers. *See, e.g.*, Charles T. Clotfelter et al., *Teacher Mobility, School Segregation, and Pay-Based Policies to Level the Playing Field* (CALDER, Working Paper No. 44, 2010); Clement (Kirabo) Jackson, *Student Demographics, Teacher Sorting, and Teacher Quality: Evidence From the End of School Desegregation* (Cornell, Univ., School of Industrial and Labor Relations, Working Paper No. 78, 2009).

22. DeMonte & Hanna, *supra* note 8; Brian Rowan et al., *What Large-Scale, Survey Research Tells Us About Teacher Effects on Student Achievement: Insights from the Prospects Study of Elementary Schools*, 104 TCHRS. C. REC. 1525 (2002); Superfine, *supra* note 9; Laura Goe, *The Link Between Teacher Quality and Student Outcomes: A Research Synthesis*, NAT'L COMPREHENSIVE CTR. FOR TCHR. QUALITY (Oct. 2007), https://perma.cc.ZZ5U-TL7F.

23. Koski, *supra* note 8, at 74; *see also* Heather G. Peske & Kati Haycock, *Teaching Inequality: How Poor and Minority Students are Shortchanged on Teacher Quality*, EDUC. TRUST 1 (June 2006), https://perma.cc/6QYG-AU8K (describing teacher distribution nationally).

scholars argue that it depresses overall national achievement."[24] Teachers in minority schools also face unequal pay and fewer resources relative to their counterparts in white schools.[25] Further, minority schools need equal access to curriculum and instruction resources, reasonable class sizes, facilities, and other educational inputs in order to have equal educational opportunities.[26]

Over the years, courts have played a critical role in minority students' quest for equal educational opportunities:

> In the seven decades since *Brown* abolished state-imposed racial segregation in schools, courts have played a role in education reform in the United States. This role has included imposing desegregation decrees, upholding affirmative action programs, upholding alternatives to public education and school choice programs, restructuring special education, and striking down school financing schemes.[27]

However, courts have been increasingly reticent to intervene in educational equality issues.[28] The judicial retreat from the equal education

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24. Black, *supra* note 8, at 1609.

25. *See* Scott Baker, *Testing Equality: The National Teacher Examination and the NAACP's Legal Campaign to Equalize Teachers' Salaries in the South, 1936-63*, 35 HIST. EDUC. Q. 49 (1995); Koski, *supra* note 8; Devin R. Bates, Comment, *Do Teacher Pay for Performance Schemes Advance American Education? What Education and Business Can Learn From Each Other in the Education Reform Movement*, 7 WM. & MARY BUS. L. REV. 547 (2016).

26. *See, e.g.*, BRINGING EQUITY BACK: RESEARCH FOR A NEW ERA IN AMERICAN EDUCATIONAL POLICY (Janice Petrovich & Amy Stuart Wells, eds. 2005); Max Ciolino, *The Right to an Education and the Plight of School Facilities: A Legislative Proposal*, 19 U. PA. J.L. & SOC. CHANGE 107 (2016); Molly Robertson, *Blaming Teacher Tenure is Not the Answer*, 44 J.L. & EDUC. 463 (2015); Lyanne Prieto, Note, *"Shocking the Conscience" or Suffering as Scapegoats?: Why the* Vergara *Opinion Misinterpreted the Role that Teachers and Tenure Play in Disadvantaging Poor and Minority Students*, 17 RUTGERS RACE & L. REV. 85 (2016); Harold Berlak, *Race and the Achievement Gap*, RETHINKING SCHS., Summer 2001, at 10; Alan B. Krueger & Diane M. Whitmore, *Would Smaller Classes Help Close the Black-White Achievement Gap?* (Princeton Univ., Working Paper No. 451, 2001), https://perma.cc/D3UR-DMSC; Julian R. Betts et al., *Equal Resources, Equal Outcomes? The Distribution of School Resources and Student Achievement in California*, PUB. POL'Y INST. OF CAL. (2000), https://perma.cc/EJ5T-MAH7; Grover J. "Russ" Whitehurst & Matthew M. Chingos, *Class Size: What Research Says and What it Means for State Policy*, BROOKINGS INST. (May 11, 2011), https://perma.cc/PPY7-A6BZ.

27. Michele Aronson, Comment, *The Deceptive Promise of* Vergara*: Why Teacher Tenure Lawsuits Will Not Improve Student Achievement*, 37 CARDOZO L. REV. 393, 400–02 (2015) (internal citations omitted).

28. *See generally* Joseph O. Oluwole & Preston C. Green, III, *Harrowing Through Narrow Tailoring: Voluntary Race-Conscious Student-Assignment Plans,* Parents Involved *and* Fisher, 14 WYO. L. REV. 705 (2014) (discussing how courts have increasingly been unwilling to support educational equality measures such as race-conscious student assignment plans); *see also* Black, *supra* note 8; Jim Hilbert, *School Desegregation 2.0: What is Required*

reform scene is grounded in the judiciary's reliance on deferential legal standards in review of reform initiatives, hampering efforts of civil rights advocates.[29] This creates the need for a more viable standard that advocates can rely upon in promoting equal educational opportunities. Besides, "[s]tate courts have been reluctant to take decision-making authority away from districts, and federal courts have been reluctant to centralize decision-making at the federal level at the expense of states and districts."[30] This judicial disengagement has only furthered a separate-but-unequal era.

While public schools were segregated during the separate-but-equal era, the governing legal standard required schools to maintain equality in resources between black and white schools.[31] Also, black communities exercised control over their schools during the separate-but-equal era. The current charter school push in California threatens local control as well as equality between minority schools and white schools. This portends, for minorities, a legal situation worse than *Plessy v. Ferguson*.[32] While *Plessy* legally sanctioned segregation, it also demanded equality of education for minorities. Some black scholars believe that part of *Brown*'s legacy has been inequality and loss of local control.[33] Even when lauding *Brown*, some minorities view it as a case that forced them to be "totally removed from any direct involvement in how their children would be educated"—something they enjoyed and lived before *Brown*.[34]

The erosion of judicial remedies for minorities seeking equal education opportunities today makes a return to the separate-but-equal legal standard appealing. After all, students could at least use this standard to demand

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to Finally Integrate America's Public Schools, 16 NW. J. HUM. RTS. 92 (2018); Jim Hilbert, *Restoring the Promise of* Brown*: Using State Constitutional Law to Challenge School Segregation*, 46 J.L. & EDUC. 1 (2017).

29. Vanessa L. Coleman, *The Erosion of* Brown I *&* II *and Court Legitimized Re-Segregation of Public Schools*, 9 S.J. POL'Y & JUST. 95 (2015); Girardeau A. Spann, *Good Faith Discrimination*, 23 WM. & MARY BILL RTS. J. 585 (2015); Perry A. Zirkel, *Case Law for Performance Evaluation of Public School Professional Personnel: An Update*, 314 EDUC. L. REP. 1 (2015).

30. Note, *Education Policy Litigation as Devolution*, 128 HARV. L. REV. 929, 931 (2015); *see* Erwin Chemerinksy, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597 (2003) (calling out the Supreme Court for being a large reason for today's resegregation).

31. Preston C. Green, III et al., *Achieving Racial Equal Educational Opportunity Through School Finance Litigation*, 4 STAN. J. CIV. RTS. & CIV. LIBERTIES 283, 290–92 (2008).

32. Plessy v. Ferguson, 163 U.S. 537 (1896).

33. *See, e.g.*, Joyner, *supra* note 6, at 168–79 (discussing *Brown*'s impact on African-American communities and schools).

34. *Id.* at 191.

equality even when schools are segregated, as continues under judicially-sanctioned de facto segregation. This fight for equality is even more glaring, given that the United States Supreme Court has unequivocally stated that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[35]

This Article is based on a review of the arguments of some scholars that a return to *Plessy* would generally best serve minority students.[36] Part I of this Article presents the judicial trend of deference to school decisions, providing little to no recourse in current jurisprudence for racial educational inequalities. This Part also reveals the failure of school finance litigation to take race into account, thus furthering the lack of racial equality. Part II discusses the *Plessy v. Ferguson*[37] separate-but-equal doctrine as a means for promoting racial equality. Part III discusses charter school segregation in California and the need for racial equality. The California segregation is a cautionary note for other states. As research shows, California "[b]lack and Latino students are strongly concentrated in schools that have far lower quality, according to state Academic Performance Index (API) ratings."[38] Part IV highlights the threat to local control over local schools in California as "rogue charter authorizers" expand into minority districts, and nonprofits like Eli and Edythe Broad Foundation seek to enroll half of Los Angeles' public school students in charter schools. It argues that states should consider retaining local control by preventing outside charter authorizers from invading minority communities that did not authorize them with school sites, resource centers, and satellite campuses. If such invasion is not prevented, minority districts may be oversaturated with charter schools, thus taking money away from public schools as money follows the student. Part V presents the conclusion.

I. THE EMERGENCE OF JUDICIAL DEFERENCE AND CONSEQUENT LACK OF RECOURSE FOR RACIAL EDUCATIONAL EQUALITY

Part I of this Article presents the judicial trend of deference to school decisions that has emerged since the judicial engagement of *Brown v. Board*

35. *Brown I*, 347 U.S. 483, 493 (1954).

36. *See, e.g.*, Rick Guzman, Comment, *An Argument for a Return to* Plessy v. Ferguson*: Why Illinois Should Reconsider the Doctrine of "Separate but Equal" Public Schools*, 29 N. ILL. U. L. REV. 149 (2008); Joyner, *supra* note 6.

37. *Plessy*, 163 U.S. 537.

38. Orfield & Ee, *supra* note 3, at 3.

of Education,[39] leaving racial educational inequalities little to no judicial remedies. This section also reveals the failure of school finance litigation to take race into account, thus furthering the lack of racial equality. Additionally, it discusses the *Vergara v. State of California*[40] decision, which continued the deferential trend, disappointing advocates who sought equality through teacher tenure litigation.

A. Desegregation and Devolution of Judicial Engagement

1. Brown I and II with the Liberty of "All Deliberate Speed"[41]

Brown I was a seminal decision as it was the first case to question the validity of the separate-but-equal doctrine since *Plessy*. Indeed, in *Brown I*, the United States Supreme Court declared that the separate-but-equal doctrine violated the United States Constitution's Equal Protection Clause.[42] The Court could have followed precedent and deferred to the local districts in the case continuing equalization of the segregated facilities, curriculums, teacher qualifications and salaries, and other factors. Instead, in ruling that segregated education was "inherently unequal," the Court chose to look at segregation through social justice lenses while relying on policy, psychological, and empathetic arguments about the plight of minority students.[43] The Court reasoned that segregated education creates a sense of inferiority in minority students that could do lasting damage.[44] Additionally, the Court explained that an integrated education is so vital to ensuring that children of all races grow up to be culturally responsive and productive citizens equipped to function in our democratic society.[45]

In a sense, *Brown I* was a call for equality particularly since the Court found inequality inheres in separateness.[46] Thus, post-*Brown I*

39. *Brown I*, 347 U.S. 483.

40. Vergara v. State, 209 Cal. Rptr. 3d 532 (Cal. Ct. App. 2016).

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

42. The United States Constitution's Equal Protection Clause provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

43. *Brown I*, 347 U.S. at 495.

44. *Id.* at 494. Contrast that with *Plessy v. Ferguson* where the Court stated that "[l]aws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power." Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

45. *Brown I*, 347 U.S. at 493.

46. Guzman, *supra* note 36, at 151.

desegregation litigation sought equality as an element of desegregation though the search for equality was not as expressly stated as under the separate-but-equal doctrine. While the Court found segregation unconstitutional in *Brown I*, it postponed the remedial decision (desegregation decrees) until *Brown v. Board of Education (Brown II)*[47] to allow the parties to brief the court about appropriate decrees in light of complex diverse local conditions.[48] Ultimately, in *Brown II*, the Court ruled that schools must desegregate with "all deliberate speed."[49] Given the flexibility in this desegregation decree, school districts took liberty with the "deliberate" component of the decree, often avoiding or delaying desegregation without fully providing equality.[50]

2. Retreat to School Choice—The Refuge for White Flight

Prince Edward County, Virginia, for example, defied the desegregation decree by refusing to enroll minorities.[51] The state constitution was also amended to authorize public funds for students to attend private or public schools.[52] This was the forerunner of school choice and it was designed to allow white students who did not want to attend school with black students to transfer. This is similar to what researchers Erica Frankenberg, Genevieve Siegel-Hawley, Jia Wang, and Gary Orfield observed generally in the West, including California, where they found "signs of white flight from regular public schools" to charter schools as the minority population in regular public schools has increased.[53]

In *Griffin v. County School Board of Prince Edward County*, the Supreme Court confronted a freedom-of-choice scheme that included state repeal of compulsory attendance, incentivizing the establishment of private schools through tax credits, and tuition grants for students to explore their choice of schools.[54] Rather than desegregate, Prince Edward County closed its public schools and the white students then attended segregated white private schools; this left minorities with limited opportunities for private schools.[55] The United States Supreme Court disregarded the school district's plea for judicial abstention, highlighting the urgent need for judicial

47. *Brown II*, 349 U.S. 294 (1955).

48. *Id.* at 298–99; *Brown I*, 347 U.S. at 495.

49. *Brown II*, 349 U.S. at 301.

50. *See* Cooper v. Aaron, 358 U.S. 1 (1958); Crawford v. Bd. of Educ., 551 P.2d 28 (Cal. 1976).

51. Griffin v. Cty. Sch. Bd., 377 U.S. 218 (1964).

52. *Id.* at 221.

53. Frankenberg et al., *supra* note 14, at 30.

54. *Griffin*, 377 U.S. 218.

55. *Id.* at 222–23.

intervention and pent up frustration at the delay tactics.[56] Specifically, the Court stated that "the issues here imperatively call for decision now . . . . There has been *entirely too much* deliberation and not enough speed in enforcing the constitutional rights which we held in *Brown v. Board of Education*."[57]

The Court noted that the choice program had merely furthered segregation and denial of equal educational opportunities for minorities—the same situation currently existing with California charter schools—in violation of the Equal Protection Clause.[58] The Court frowned on the use of public funds to support segregated choice schools and emphasized that "relief needs to be quick and effective."[59] Further, the Court stated emphatically that "[t]he time for mere 'deliberate speed' has run out."[60] Indeed, the choice programs post-*Brown* were originally conceived as a subtle and, at times overt, attempt to avoid desegregation.[61] Erica Frankenberg and her colleagues point out that today "charters serve as havens for white flight from public schools."[62]

In striking down the choice program in *Griffin*, the Court stated that courts have significant power to provide remedies to promote desegregation.[63] This trend continued in *Green v. County School Board of New Kent County*[64] where the Supreme Court ruled that a school choice program

> is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the

56. *Id.* at 225, 229.

57. *Id.* at 229 (emphasis added).

58. *Id.* at 232.

59. *Id.*

60. *Id.* at 234.

61. Frankenberg & Siegel-Hawley, *supra* note 13; David Hinojosa & Karolina Walters, *How Adequacy Litigation Fails to Fulfill the Promise of Brown [But How It Can Get Us Closer]*, 2014 MICH. ST. L. REV. 575 (2014); Joyner, *supra* note 6; Siegel-Hawley & Frankenberg, *supra* note 13.

62. Frankenberg et al., *supra* note 14, at 5; *see also* Civil Rights Project, *Choice Without Equity: Charter School Segregation and the Need for Civil Rights Standards*, CIV. RTS. PROJECT (Jan. 2010), https://perma.cc/J8D7-F34U (recording the racial composition of California charter schools).

63. *Griffin*, 377 U.S. at 231–33.

64. Green v. Cty. Sch. Bd., 391 U.S. 430 (1968).

> continuing duty to take whatever action may be necessary to create a unitary, nonracial system.[65]

Unfortunately, charter schools today have become a "sacred talisman" despite the rampant segregation, with little to no judicial recourse. This is a far cry from the days of *Green*. In that case, the school district created "a plan by which every student, regardless of race, may 'freely' choose the school he will attend" as part of its effort to achieve unitary status.[66] The Supreme Court ruled that the choice program could not be an end in itself; instead, it must be evident that the program is part of a good faith effort to desegregate.[67] The Court emphasized that choice programs would not be upheld if there were more efficacious means to address segregation more promptly.[68] The Court upbraided the choice program in *Green* for delaying desegregation, and for shifting to students and parents, through the guise of choice, the responsibility *Brown* imposed on schools to desegregate.[69] Thus, the Court was willing to intervene to strike down a choice program that furthered segregation and the concomitant inequalities. The Court ruled that schools needed to achieve racial equality in facilities, faculty, staff, student body, extracurricular activities, and transportation.[70] These are the "*Green* factors" and segregated charter schools today should strive to ensure equality on these factors even in the absence of judicial enforcement.

On the same day it decided *Green*, the Supreme Court again emphasized in *Monroe v. Board of Commissioners, City of Jackson, Tennessee*[71] that school choice programs (referred to as "free transfer plans" in the case) must enhance desegregation rather than further segregation or delay desegregation. In that case, the Court criticized the choice program for allowing white and black students to retreat "to the comfortable security of the old, established discriminatory pattern."[72] Accordingly, the Court

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65. *Id.* at 440 (internal quotation marks omitted) (citing Bowman v. Cty. Sch. Bd., 382 F.2d 326, 333 (4th Cir. 1967) (concurring opinion)); *see also* Bd. of Educ. v. Dowell, 498 U.S. 237, 246 (1991) ("Courts have used the terms 'dual' to denote a school system which has engaged in intentional segregation of students by race, and 'unitary' to describe a school system which has been brought into compliance with the command of the Constitution.").

66. *Green*, 391 U.S. at 437.

67. *Id.* at 439–40.

68. *Id.* at 440–41.

69. *Id.* at 441–42.

70. *Id.* at 435–36; *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18–19 (1971) (highlighting the *Green* factors); Joseph O. Oluwole & Preston C. Green, III, *Charter Schools Under the NCLB: Choice and Equal Educational Opportunity*, 22 ST. JOHN'S J. LEGAL COMMENT. 165, 169 (2007).

71. Monroe v. Bd. of Comm'rs, 391 U.S. 450 (1968).

72. *Id.* at 459.

ordered the school district to develop alternative solutions that would accelerate desegregation.

On the same day, the Court also struck down the choice plan in *Raney v. Board of Education of Gould School District*[73] because, after three years, no white student had enrolled in a black school and 85% of black students were still in black schools.[74] The Court viewed the choice program as a tactic designed to place the burden on parents to further desegregation rather than school authorities where it rightly belonged.[75] Additionally, the Court empowered the district court to retain jurisdiction until the district created a plan that addressed segregation speedily.[76]

3. Expanded Judicial Remedial Power

Advancing the *Green* factors, the Supreme Court, in *Swann v. Charlotte-Mecklenburg Board of Education*,[77] warned that a prima facie Equal Protection Clause violation will be established if the racial identity of a school can be easily determined by looking at its facilities' quality, staff and faculty racial distribution, and sports organization.[78] Additionally, the Court ruled that school officials do not have to be colorblind when assigning teachers to schools.[79] Further expanding judicial power, the Court declared that "[w]hen school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly non-discriminatory assignments."[80]

The *Swann* Court held that if school authorities fail to develop a plan that would effectively ensure desegregation, courts could use a variety of remedies.[81] These remedies included limited use of quotas as a starting point in remedying past discrimination, as well as interdistrict remedies, such as busing, changes in attendance zones, and pairing of noncontiguous school zones.[82] The Court declared that "[i]f school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district

73. Raney v. Bd. of Educ., 391 U.S. 443 (1968).
74. *Id.* at 443.
75. *Id.* at 447–48.
76. *Id.* at 449.
77. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).
78. *Id.* at 18–19; *see also* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 201 (1973).
79. *Swann*, 402 U.S. at 19.
80. *Id.* at 28.
81. *Id.* at 25–31.
82. *Id.*

court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[83]

The Court also urged lower courts to closely scrutinize one-race schools or predominantly one-race schools to ensure that the racial composition is not due to past or present discrimination.[84] A year later, in *Wright v. Council of Emporia*,[85] the Court extended judicial remedial powers after a choice program failed to lead to meaningful change.[86] Specifically, in spite of the choice program, white students failed to attend black schools; only 98 of 2,510 black students attended white schools, and the faculty was wholly segregated.[87] Moreover, the Court empowered lower courts to block a unit of a segregated school district from creating a new district as long as de jure segregation remained.[88] In this, the Court blocked creation of a choice district for white students.

4. Deflating Judicial Latitude

The following year after *Wright*, the Court reexamined the judicial power of redress in segregation cases in *Keyes v. School District No. 1, Denver*.[89] In *Keyes*, the district was accused of intentional segregation in some parts of the school system through gerrymandering attendance zones, strategically locating school buildings, manipulating school sizes, and using mobile classrooms to evade desegregation.[90] The Court ruled that where intentional segregation is found in a meaningful part of a school system, a court's desegregation order could encompass the entire school system, unless school officials show that segregation in other parts of the school system were not due to intentional acts.[91] However, in requiring intentionality, the Court also took away the remedial latitude of courts. Thus began the journey toward judicial retreat from desegregation enforcement. This was further evident in *Pasadena Board of Education v. Spangler*,[92]

83. *Id.* at 15. In this, the Court broadened judicial authority.

84. *Id.* at 25–27.

85. Wright v. Council of Emporia, 407 U.S. 451 (1972).

86. *Id.*

87. *Id.* at 455.

88. *Id.* at 460–66; *see also* United States v. Scot. Neck Bd. of Educ., 407 U.S. 484 (1972) (holding similarly about a choice program). The Supreme Court found in *Scotland Neck* that the district's choice plan "produced very little actual desegregation." *Id.* at 485–486. Further, the Court observed that, if allowed, the new district would be a "refuge for white students." *Id.* at 489 (internal quotation marks and citations omitted).

89. Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973).

90. *Id.* at 191–95.

91. *Id.* at 207, 211–13.

92. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).

when the Supreme Court chided a district court for overstepping its authority in mandating yearly readjustment of attendance zones as a segregation remedy for demographic fluxes.[93]

Then in *Board of Education of Oklahoma City Public Schools v. Dowell*,[94] the Court declared that courts can dissolve desegregation decrees if a school district has eliminated vestiges of discrimination as practicable as possible, even when segregated schools persist.[95] This judicial willingness to retreat from desegregation enforcement continued in *Freeman v. Pitts*[96] as the Court ruled that lower courts can incrementally withdraw oversight over various *Green* factors before the district has attained full unitary status. The Court also gave courts discretion to refuse to "order further remedies in the area of student assignments where racial imbalance is not traceable, in a *proximate* way, to constitutional violations."[97]

In addition, the Court held that while courts can order remedies for de jure segregation, schools are under no obligation to remedy de facto segregation, or resegregation because they are caused by private residential choices (unless it is demonstrated that the state or school authorities engineered the demographic patterns).[98] The *Freeman* Court also ruled that, "[a]s the *de jure* violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system."[99] This represents another example of judicial disengagement, as the Court had earlier ruled in *Keyes* that time remoteness was not a viable defense if de jure segregation effects linger.[100]

In *Crawford v. Board of Education of the City of Los Angeles*,[101] the Supreme Court diminished states' responsibility for remedying segregation in ruling that, if a state chooses to do more than required under the Equal Protection Clause, the state can also opt to backtrack since it is a self-imposed obligation.[102] In dissent, Justice Marshall expressed displeasure

93. *Id.* at 434–35.

94. Bd. of Educ. v. Dowell, 498 U.S. 237 (1991).

95. *Id.* at 249–51.

96. Freeman v. Pitts, 503 U.S. 467 (1992).

97. *Id.* at 491 (emphasis added).

98. *Id.* at 490–91.

99. *Id.* at 496. "Where resegregation is a product not of state action but of private choices, it does not have constitutional implications." *Id.* at 495.

100. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 210–11 (1973).

101. Crawford v. Bd. of Educ., 458 U.S. 527 (1982).

102. *Id.* at 527.

that the Court's decision placed "yet another burden in the path of those seeking to counter the effects of nearly three centuries of racial prejudice."[103]

Both *Milliken v. Bradley*[104] and *Missouri v. Jenkins*[105] are notable for taking away the authority of courts to order interdistrict remedies for intradistrict segregation. In *Milliken*, Justice Douglas disagreed with the majority's rejection of interdistrict remedies, warning that it "will likely put the problems of the blacks and our society back to the period that antedated the 'separate but equal' regime of *Plessy v. Ferguson*."[106] Nevertheless, the Court rejected plaintiffs' request to include surrounding suburban districts in their desegregation order as an attempt to attract white students from those districts to the desegregating district.[107] It reasoned that since those suburban districts were not involved in the de jure desegregation violations of the defendant districts, courts have no power to include them in any remedy.[108] On the other hand, courts can impose interdistrict remedies if "racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation."[109]

These interdistrict rules also apply to magnet programs, and presumably choice programs, designed to attract students from surrounding districts as part of desegregation efforts.[110] Professor Osamudia James aptly captures the fallacy and illusion of school choice, even in *Milliken*:

> *Milliken* stands out as a notable example of choice in education, not because it affirmed an explicit school-choice policy, but because it further protected the choices of privileged parents to escape to the suburbs and ultimately avoid participation in state-ordered remedies to dismantle the segregated system that had conferred racial privilege on them. While protecting those choices, the Court ignored the absence of choice among poor parents and families within the city, who had little ability to move to the suburbs, and who were left with precious few options, given that both remediation of de facto segregation and interdistrict remedies were unavailable.[111]

Weakening of judicial remedial recourse continued in *Missouri v. Jenkins* when the Court ruled that the judiciary could not mandate the state to keep funding remedial quality education in segregated districts simply

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103. *Id.* at 562–63 (Marshall, J., dissenting).

104. Milliken v. Bradley, 418 U.S. 717 (1974).

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

106. *Milliken*, 418 U.S. at 759 (Douglas, J., dissenting). This has proven to be the case in various parts of the country. *See* Guzman, *supra* note 36.

107. *See Jenkins*, 515 U.S. at 76–77; *Milliken*, 418 U.S. at 757 (Stewart, J., concurring).

108. *Milliken*, 418 U.S. at 757 (Stewart, J., concurring).

109. *Id.* at 745 (majority opinion).

110. *See id.* at 717; *Jenkins*, 515 U.S. at 70.

111. James, *supra* note 2, at 1092–93.

because student achievement in those districts were at or below the national standards.[112] Moreover, the Court ruled that the judiciary has no remedial power to mandate across-the-board pay increases for teachers in efforts to improve the lure of the desegregating district.[113] The Court also disentangled racial balancing from desegregation, noting that desegregation does not require racial balancing; thus, one-race schools or virtually one-race schools are constitutional as long as they are not segregated due to government action.[114] As legal author Jane Tanimura notes, "By the 1990s federal courts were virtually powerless to remedy segregation."[115]

5. The Quick Demise of Voluntary Race-Conscious Plans

With the Supreme Court constricting the path to judicial decrees as a remedy for segregation, school districts interested in continued desegregation adopted voluntary race-conscious student assignment plans designed to reflect the district's racial composition. The Supreme Court, however, limited the use of such plans by recognizing only two compelling interests under strict scrutiny standard for use of race in the education context.[116] These interests are (1) student diversity and (2) remedy of past intentional discrimination if the district has not achieved unitary status.[117] This diversity, however, does not encompass racial balance.

In *Parents Involved*, where the Seattle School District as well as the Jefferson County Public Schools used race-conscious measures to promote diverse student bodies, the Court stated that "[r]acial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'"[118] Instead, constitutional use of diversity is limited to consideration of race as one of various factors in student assignments.[119] The Court relied on Justice Powell's plurality

112. *Jenkins*, 515 U.S. at 100–01.

113. *Id.* at 110–14.

114. *See id.* at 116–17 (Thomas, J., concurring); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); *Milliken*, 418 U.S. at 765–90.

115. Tanimura, *supra* note 10, at 404.

116. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); *see also* Tanimura, *supra* note 10, at 408 ("While the cases of the 1970s and 1990s limit how federal courts can remedy school segregation, Parents Involved additionally limits how elected school boards can remedy it.").

117. *See, e.g.*, *Parents Involved*, 551 U.S. at 720–22.

118. *Id.* at 732 (plurality opinion).

119. *Id.* at 722–23, 793; *see also id.* at 798–99 (Stevens, J., dissenting); Joseph O. Oluwole & Preston C. Green, III, *Grating Race-Conscious Student Assignment Plans in the Cauldron of* Parents Involved v. Seattle School District, 56 WAYNE L. REV. 1655 (2010) [hereinafter *Grating*].

opinion in a higher education case, finding "diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[120] Thus, today, elementary and secondary schools can similarly only use race as a plus factor in student assignments, not as a dispositive factor.

Even after a compelling interest in diversity is shown, pursuant to the narrow tailoring prong of the strict scrutiny test, the school must ensure that students are not individually typed by race. Further, diversity cannot be conceptualized as simply binary racial categories such as "white/nonwhite."[121] Additionally, to satisfy strict scrutiny, the school district must show that it seriously considered, in good faith, race-neutral alternatives before it adopted the race-conscious plan.[122] Even then, courts are not allowed to simply accept the district's showing; instead, they must conduct a searching review to ensure that there is indeed no viable race-neutral alternative.[123] While the Supreme Court has indicated that districts do not have to exhaust race-neutral alternatives before choosing a race-conscious plan, this searching review requirement suggests otherwise.

The Court also rejected the suggestion that voluntary race-conscious plans should be subject to a more lenient standard than strict scrutiny simply because such plans are for beneficial purposes, such as promoting diversity.[124] The Court emphasized that all distributions of benefits or benefits based on race must be subject to strict scrutiny because racial classifications are "simply too pernicious."[125] Most recently, the Supreme Court ruled that neither the United States Constitution nor Court precedent give the judiciary authority to overturn voter-passed state constitutional amendments banning affirmative action in public education.[126] The weakened judicial oversight and investment in desegregation has fueled segregated charter schools.[127]

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120. *Bakke*, 438 U.S. at 315; *see* Gratz v. Bollinger, 539 U.S. 244, 270–76 (2003); Grutter v. Bollinger, 539 U.S. 306, 322–25 (2003).

121. *Parents Involved*, 551 U.S. at 723.

122. *Id.* at 735 (plurality opinion); *Grutter*, 539 U.S. at 339.

123. *See* Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2414 (2013).

124. *See Parents Involved*, 551 U.S. at 722–23; *Grutter*, 539 U.S. at 379–80 (Rehnquist, C.J., dissenting).

125. *Parents Involved*, 551 U.S. at 720.

126. Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary, 134 S. Ct. 1623, 1630–38 (2014).

127. *See Racial-Balancing*, *supra* note 16, at 15–21. This is not surprising because charter schools are governed by the desegregation precedents.

With the majority of almost 200 desegregation cases stalled in the judicial system for so many decades,[128] it is time to look for an alternate solution. Some form of judicial intervention or decree, rather than voluntary plans or desegregation litigation, might be the more viable solution going forward. Hence, the need for a standard such as the separate-but-equal doctrine that courts can use as an anchor to enforce, at minimum, equality. As discussed next, school finance litigation has not been the expected solution.

B. School Finance Litigation and Deference

1. Early Optimism in School Finance Litigation

School finance litigation is designed to secure additional funding for schools, or substantial funding equality, in order to promote equal educational opportunity.[129] The first attempt to promote equal educational opportunity through school finance litigation was in California in *Serrano v. Priest*,[130] where plaintiffs claimed that the unequal funding of the state's school districts was unconstitutional under the United States Constitution's Equal Protection Clause.[131] As early as 1855, there was discrimination in school funding with the state law requiring allocation of the State School Fund based on the census of white children.[132] However, for most of California history, schools were funded through local taxes, creating significant per-pupil disparities across districts based on property value differences and tax rate variations.[133] The Supreme Court of California held that, since the state school financing system created substantial disparities among school districts, the system "invidiously discriminate[d] against the poor."[134] Furthermore, the court ruled that classifications that discriminate against the poor must be invalidated unless the government satisfies the strict scrutiny standard of review by showing that the classification is narrowly

128. Holley-Walker, *supra* note 19, at 424, 433 n.3.

129. *See* Aronson, *supra* note 27, at 401–06.

130. Serrano v. Priest (*Serrano I*), 487 P.2d 1241 (Cal. 1971).

131. *Id.* at 1244.

132. Charles Wollenberg, Mendez v. Westminster: *Race, Nationality and Segregation in California Schools*, 53 CAL. HIST. Q. 317, 317 (1974).

133. Margaret Weston, *Just the facts: Financing California's Public Schools*, PUB. POL'Y INST. OF CAL. (Nov. 2011), https://perma.cc/WGZ4-86YL. The state share has surpassed the local share due to reforms after successful school finance litigation in the *Serrano* cases. *See generally id.*; STEPHEN J. CARROLL ET AL., CALIFORNIA'S K-12 PUBLIC SCHOOLS: HOW ARE THEY DOING?, (2005) (ebook) (describing California schools' population, resources, and scores to others around the nation).

134. *Serrano I*, 487 P.2d at 1244.

tailored to a compelling interest.[135] In order to qualify for strict scrutiny review, a fundamental right must be infringed or discrimination must involve a suspect class.[136] The court determined that wealth is a suspect class and education a fundamental right; thus, under either strand of the strict scrutiny standard, the school financing system was deemed unconstitutional under the United States Constitution.[137]

2. The Rise of Pessimism in School Finance Litigation

The United States Supreme Court first reviewed the constitutionality of school financing systems in *San Antonio Independent School District v. Rodriguez*.[138] In that case, the plaintiffs challenged Texas's system for funding local public schools through property taxes as an inequitable system that hindered equal educational opportunity in violation of the Equal Protection Clause.[139] The Supreme Court ruled that education was not a fundamental right under the federal constitution and wealth was not a suspect classification.[140] Therefore, rational basis review rather than strict scrutiny applied.[141] Under this standard, courts will uphold a school financing system if it is rationally related to a legitimate purpose.[142] In this case, the Court found the legitimate interest to be the local control of education as manifest in the local property taxation system for funding local schools.[143] Disappointingly, the Court so concluded despite the inequality evident in the fact that the ten wealthiest districts each raised $610 per student from over $100,000 each in taxable property per student compared to the four poorest districts each raising $63 per student from less than $10,000 each in taxable property per student.[144] The poor districts consequently found it difficult to hire highly-qualified teachers.[145]

At the core of rational basis review is judicial deference. This deference is evident in the Court's decision to uphold the school financing system against constitutional challenge. It is likewise evident in the Court declaration that "[w]e are unwilling to assume for ourselves a level of

135. *Id.* at 1250–55.

136. Jerry R. Parkinson, *The Use of Competency Testing in the Evaluation of Public School Teachers*, 39 U. KAN. L. REV. 845, 875 (1991).

137. *Serrano I*, 487 P.2d at 1263.

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

139. *Id.* at 5–6.

140. *Id.* at 55.

141. *Id.* at 44–45.

142. *Id.* at 55.

143. *Id.* at 54.

144. *Id.* at 74–75 (Marshall, J., dissenting).

145. Hinojosa & Walters, *supra* note 61, at 597–98.

wisdom superior to that of legislators, scholars, and educational authorities in 50 States, especially where the alternatives proposed are only recently conceived and nowhere yet tested."[146] In all, the Supreme Court adopted a race-neutral approach to school finance litigation in applying the rational basis deference standard.[147] Justice Marshall protested the Court's decision, characterizing it as a "retreat from our historic commitment to equality of educational opportunity."[148]

3. Searching for a School Finance Silver Lining in State Constitutions

After the United States Supreme Court rejected use of the Equal Protection Clause for redress of educational inequality perpetuated through the school finance system, those seeking equal educational opportunities looked to state constitutions. This was done through equity litigation under the state's equal protection provision or adequacy litigation under the state's education provision that obligates the state to provide public education.[149] Equity litigation aimed for equal per-pupil expenditures in all districts to ensure that district wealth was not a determinant of educational opportunity.[150] Adequacy litigation focused on education output rather than

146. *Rodriguez*, 411 U.S. at 55.

147. *Racial-Balancing*, *supra* note 16, at 42–45.

148. *Rodriguez*, 411 U.S. at 71 (Marshall, J., dissenting).

149. *See* Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995); Hinojosa & Walters, *supra* note 61, at 596–628; William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597 (1994). The distinction between the two forms of school finance litigation was astutely elucidated in an adequacy case where the court stated that "[t]he essential issues in this case are quality and equality of education [adequacy litigation]. The issue is not, as insisted by the defendants and intervenors, equality of funding [equity litigation]." Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 156 (Tenn. 1993). Here is another way to look at adequacy litigation and equity litigation: "Equality of educational opportunity has been thought to require equal spending per pupil or spending adjusted to the needs of differently situated children. Adequacy has been understood to require a level of spending sufficient to satisfy some absolute, rather than relative, educational threshold. In practice, however, many courts interpreting their states' constitutional obligations have fused the equality and adequacy theories." Weishart, *supra* note 9, at 477. In this article, equity litigation and adequacy litigation are used synonymously to refer to equal educational opportunity for minority students.

150. *See* Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977); ANNA LUKEMEYER, COURTS AS POLICYMAKERS: SCHOOL FINANCE REFORM LITIGATION (2003); Aronson, *supra* note 27, at 425.

the funding input.[151] While adequacy litigation was relatively more successful than equity litigation, neither has had meaningful sustained impact on minority education.[152]

Subsequent to *San Antonio Independent School District*, the California Supreme Court again reviewed the state's school financing system in *Serrano v. Priest*.[153] Unlike *Serrano I*, which involved a challenge under the federal constitution, *Serrano II* examined whether the state constitution provided a remedy to those denied equal educational opportunities under the school financing system.[154] The court found the system unconstitutional because education is a fundamental right under the state constitution and wealth is a suspect class.[155]

While both adequacy and equity litigation have led to some reforms in school financing systems and consequent funding of education,[156] minority students are still searching for the fruits of the efforts.[157] The key deficiency arises from the failure of school finance litigation to address racial disparities, as litigants have been forced to rely on district wealth as the suspect class element of local property tax variations. California voters also passed Proposition 13, which limited property tax rates and annual property tax increases. [158] This proposition constricted the ability to fund equal educational opportunities in schools.[159] The United States Supreme Court upheld Proposition 13 in *Nordlinger v. Hahn*, stating that it was best to defer to the state pursuant to the rational basis standard.[160]

"Both the post-*Brown* desegregation litigation and the state funding litigation that followed suffered from a common problem: the courts were troubled by the antidemocratic nature of dictating education policy and

151. *See* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212–16 (Ky. 1989); Aronson, *supra* note 27, at 405–06; Koski, *supra* note 8, at 88–89 (discussing the effects of budget-based layoffs).

152. *See* LUKEMEYER, *supra* note 150; John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351 (2004); *see also* Weishart, *supra* note 9 ("Part of the problem is the growing reluctance of state courts to continue to supervise school finance cases and consistently intervene in budgetary considerations thought properly reserved for the political branches, especially during times of economic downturn.").

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

154. *Id.* at 949–50. California's equal protection clause states that "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws." CAL. CONST. art. I, § 7(a).

155. *Serrano II*, 557 P.2d at 951.

156. *See* Koski, *supra* note 8, at 88–89.

157. *See* Prieto, *supra* note 26, at 94.

158. CAL. CONST. art. 13A, § 1(a) (1978); Prieto, *supra* note 26, at 92–93.

159. CAL. CONST. art. 13A, § 1(a); Prieto, *supra* note 26, at 92–93.

160. Nordlinger v. Hahn, 505 U.S. 1, 17–18 (1992).

funding decisions from the bench, and retreated from that role."[161] Thus, those pursuing equal educational opportunities looked for an alternative litigation strategy—one that courts would not perceive as a judicial dictate of policy but rather as devolution of policy from state to district control.[162] This alternative approach took the form of a constitutional challenge to state tenure and dismissal statutes in California in a bid to give local districts more control[163] over teachers in the pursuit of equal educational opportunities for minorities.[164]

C. *Vergara, Teacher Tenure Litigation, and Deference*

1. Renewed Judicial Engagement?

In 2014, it appeared that the judiciary would once again use its powers to enforce educational equality when Los Angeles County Superior Court Judge Treu held California's tenure and dismissal statutes unconstitutional for denying minorities equal educational opportunities.[165] The plaintiffs

161. Note, *supra* note 30, at 937–38.

162. *Id.* at 938.

163. In relation to the challenged statutes, this local devolution was intended to play out as follows:

> In California, rather than granting teachers permanent employment status within two years, districts could exercise discretion over whether to retain teachers; rather than follow state-mandated steps for dismissing teachers, they could follow their own Due Process Clause-compliant approaches; and rather than lay off teachers in reverse order of seniority, they could develop their own prioritization processes. Districts could, by policy or contract, adopt employment terms similar to those previously imposed at the state level, or they could provide different terms.

Id. at 942.

164. *Id.* at 938–39. An interesting point of note is that most school finance cases in their pursuit of educational resources failed to include teachers even though teachers have been identified as the most important input within the school; and despite the fact that teacher salaries typically represent the largest budget item for schools. *See* Black, *supra* note 8, at 1626–27. Further, Professor Black reports that a "review of the [school finance litigation] victories reveals four different responses to the issue of teachers: avoidance, oversimplification, flawed analysis, and focused attention. The first three categories consume nearly the entirety of the case law, with the fourth representing the outliers." *Id.* at 1627.

165. Vergara v. State, No. BC484642, 2014 WL 6478415 at *5 (Cal. Super. Ct. 2014), *rev'd*, 209 Cal. Rptr. 3d 532 (Cal. Ct. App. 2016); *see also* Jacqueline A. Meese, Note, *Expectations of the Exemplar: An Exploration of the Burdens on Public School Teachers in the Absence of Tenure*, 19 CUNY L. REV. 131, 137–40 (2015). Judge Treu was the first judge in the country to find such a violation in tenure and dismissal statutes. Aronson, *supra* note 27, at 395. The statutes challenged were the Permanent Employment Statute, Dismissal Statutes and the Last-In-First-Out law (tenure laws). CAL. EDUC. CODE §§ 44929.21(b), 44934, 44938, 44944, 44955 (West 2018); *Vergara*, 2014 WL 6478415, at *2. For a discussion of other cases, see Regina Umpstead et al., *An Analysis of State Teacher Evaluation*

brought a state equal protection claim arguing that the tenure and dismissal statutes deprived them of equal educational opportunities because minority schools disproportionately received grossly ineffective teachers. Judge Treu ruled that the statutes "impose a real and appreciable impact on students' fundamental right to equality of education and that they impose a disproportionate burden on poor and minority students."[166] The court recognized that

> the most vulnerable students, those attending high-poverty, low-performing schools, are far more likely than their wealthier peers to attend schools having a disproportionate number of underqualified, inexperienced, out-of-field, and ineffective teachers and administrators. Because minority children disproportionately attend such schools, minority students bear the brunt of staffing inequalities.[167]

Since the court determined that a fundamental right to education was implicated, it applied strict scrutiny. It concluded that the state had no compelling reason for its tenure and dismissal statutes that resulted in a disproportionate impact on the education of minorities.[168] The court reasoned that the statutes made it difficult to provide minority students high-quality teachers because teachers were tenured after two years, which was too brief to fully evaluate teacher quality and that the time, as well as cost, to dismiss grossly ineffective teachers was burdensome to schools.[169] The dance of lemons also led principals in search of improved teacher quality to transfer their lower-quality tenured teachers to minority schools since the dismissal process was too cumbersome.[170] Additionally, the court ruled that minority students were denied equal educational opportunity because, in reduction-in-force situations, the school was forced to retain ineffective tenured teachers over more effective probationary teachers.[171] The court did not dictate policy; rather, it ruled that the current laws could not be enforced thus devolving control to the local districts.[172]

Laws Enacted in Response to the Federal Race to the Top Initiative, 286 EDUC. L. REP. 795 (2013).

166. *Vergara*, 2014 WL 6478415, at *4. Critics argued there was "no direct evidence of a causal relationship between teacher tenure and education inequity." Ellen Henrion, Note, *We Have to Do Better: Attacking Teacher Tenure is Not the Way to Solve Education Inequity*, 81 MO. L. REV. 537, 559 (2016).

167. *Vergara*, 2014 WL 6478415, at *7.

168. *Id.* at *5.

169. *Id.*

170. *Id.*

171. *Id.*

172. *See* Note, *supra* note 30, at 940 ("The court did not order the state to pass any particular law, nor did it order districts to adopt any policies in the absence of compliant state

There was a lot of excitement about Judge Treu's decision. For example, author Michele Aronson characterized it as a "landmark" decision.[173] Judge Treu's decision "substantiate[d] the premise that any state policy that systematically and substantially impedes educational opportunity—whether financially or otherwise—is unconstitutional."[174] The victory, however, was fleeting.

2. Entrenching Deference: Closing Tenure and Dismissal Statutes as Remedial Doors

The court of appeals reversed Judge Treu's decision finding that the legislature was entitled to deference in the tenure and dismissal statutes because they served a legitimate purpose.[175] The court ruled that "statutes relating to education are provided a presumption of constitutionality, and doubts are resolved in favor of a finding of validity."[176] Furthermore, in order to establish constitutional deficiency, the plaintiffs had to show that the statutes in question actually caused grossly ineffective teachers to be assigned to minority students.[177] Because the equal protection challenge to the statutes was a facial challenge, the court ruled that the plaintiffs could show this in one of two ways: either the statutory text mandated the disproportionate assignment of students; or the assignment was inevitable in light of the statute.[178] As the court noted, it was evident that the statutory text did not provide for assignment of grossly ineffective teachers to minority students.[179] As such, the only premise for plaintiffs to succeed was to show the inevitability of the disproportionate assignment. This required plaintiffs to show that "*any* implementation of the statutes inevitably resulted in the consequential assignment of disproportionately high numbers of grossly inefficient teachers to schools predominantly serving low-income and minority []students."[180]

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legislation. It ruled only that the continued enforcement of these state-level laws would violate the state constitution.").

173. Aronson, *supra* note 27, at 395; *see also* Michael J. DeJianne, Comment, *The Right to Education: Reconciling Teacher Tenure and the Current State of Public Education,* 46 SETON HALL L. REV. 333, 352–54 (2015) (arguing the California appellate court should uphold Judge Treu's ruling).

174. Black, *supra* note 8, at 1602.

175. Vergara v. State, 209 Cal. Rptr. 3d 532, 553–58 (Cal. Ct. App. 2016).

176. *Id.* at 550.

177. *Id.* at 557–58.

178. *Id.*

179. *Id.* at 554–57.

180. *Id.* at 555–56 (emphasis added).

The court found that the legislature allowed local administrators to have discretion on teacher assignments, and these assignments were made at the local level based on local policies, collective bargaining agreements, and teacher preferences.[181] Therefore, any challenge to the inequitable assignment of teachers must be at the local level rather than the statutory level. Accordingly, the court deferred to the legislature, affording no remedies to the minority students; despite the fact that the court conceded that "[t]he evidence also revealed deplorable staffing decisions."[182]

In determining that local decision-making, rather than the statutory scheme, caused the disproportionate assignment, the court conveniently used proximate causation rather than but-for causation, which allowed the court to restrict what would pass muster as statutory causation.[183] This decision effectively precludes minority students from seeking equal protection remedies for disproportionate assignments of grossly ineffective teachers based on California's tenure and dismissal statutes and this continues the judicial pattern of deference.

With entrenched judicial deference foreclosing various avenues for minorities in segregated schools, including charter schools, to seek judicial remedy, we must look for yet another avenue. Next, this Article presents the separate-but-equal doctrine as such an avenue.

II. SEPARATE-BUT-EQUAL DOCTRINE

Part II discusses the *Plessy* decision as well as the various legal standards that emerged of the separate-but-equal era, which lasted from *Plessy* until *Brown I*.[184]

A. The Emergence of the Separate-But-Equal Era

Plessy held state law requiring separate-but-equal passenger train coaches for minorities and whites constitutional.[185] The Court ruled that while states had the prerogative to separate the races, they were constitutionally obligated to provide equality.[186] Concededly, *Plessy* was a

181. *Id.* at 556–58.

182. *Id.* at 558.

183. *Id.* at 554–57.

184. *See, e.g.*, Joseph A. Greenaway, Jr., *The Promise of America*, 37 CARDOZO L. REV. 1167 (2016).

185. Plessy v. Ferguson, 163 U.S. 537, 541–51 (1896); *see generally* Sheldon Novick, *Homer Plessy's Forgotten Plea for Inclusion: Seeing Color, Erasing Color-Lines*, 118 W. VA. L. REV. 1181 (2016) (discussing the background story of the *Plessy* litigation strategy).

186. Brown I, 347 U.S. 483, 488 (1954); *Plessy*, 163 U.S. at 544–51; *see also* Green, III et al., *supra* note 31, at 290–97.

railroad case, but the Court extended the separate-but-equal doctrine to education in *Cumming v. Richmond County Board of Education*.[187] The Supreme Court affirmed the separate-but-equal doctrine in *Gong Lum v. Rice* when it ruled that a Chinese American student was not denied her Equal Protection rights when she was denied admission to a white school and required to attend a black school with equal facilities to that of white schools.[188]

After *Plessy*, the judiciary generally made concerted efforts to enforce the equality requirement of the separate-but-equal doctrine, encouraging lawsuits in the quest for equal educational opportunities.[189] For as Justice Marshall eloquently stated, "even before this Court recognized its duty to tear down the barriers of state-enforced racial segregation in public education, it acknowledged that inequality in the educational facilities provided to students may be discriminatory state action as contemplated by the Equal Protection Clause."[190]

B. Is There Place for Equality in the Separate-But-Equal Doctrine?

Due to the failure of school desegregation jurisprudence to address racial issues in funding and the failure of school finance jurisprudence to address issues of race, the separate-but-equal doctrine could provide a means for ensuring that black and Latino resources are equal to those in white districts. Author Rick Guzman observes that "many African-American and minority students would in many ways be better-off under the doctrine of 'separate but equal' than under today's watered-down interpretation of the Court's landmark decision in *Brown v. Board of Education*, which struck down 'separate but equal' as unconstitutional."[191] With de facto desegregation out of remedial reach of both the judiciary and voluntary school action, and without a Supreme Court ruling allowing remedy of de

187. Cumming v. Cty. Bd. of Educ., 175 U.S. 528 (1899).

188. Gong Lum v. Rice, 275 U.S. 78, 79–87 (1927).

189. *See, e.g.*, McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637 (1950); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Gonzales v. Sheely, 96 F. Supp. 1004 (D. Ariz. 1951); MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH (1992); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (First Vintage Books ed., 2004); JERROLD M. PACKARD, AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW (2002); Jeanne M. Powers, *On Separate Paths: The Mexican American and African American Legal Campaigns Against School Segregation*, 121 AM. J. EDUC. 29 (2014); Jeanne M. Powers & Lirio Patton, *Between* Mendez *and* Brown*:* Gonzales v. Sheely *(1951) and the Legal Campaign Against Segregation*, 33 L. & SOC. INQUIRY 127 (2008).

190. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 84 (1973).

191. Guzman, *supra* note 36, at 151.

facto segregation based on *Brown*, a de facto separate-but-equal doctrine would help enforce equality.[192]

While *Plessy* mandated substantial equality as the governing standard during the separate-but-equal era, courts relied on three different equality standards in enforcing substantial equality: nominal equality, racial equality, and real equality.[193] The nominal-equality standard allowed segregated schools so long as facilities were substantially equal between the white and minority schools. However, under this standard, the substantial-equality requirement was a nominal victory because it still allowed disparities in funding.[194] The racial-equality lens also allowed states to preserve and continue the funding disparities as long as the state had racially-neutral justification for them.[195] The real-equality standard, however, changed this trend as courts looked for real substantial equality in resources between white schools and minority schools. The courts scrutinized segregated schools for equality in curriculum and instructional resources, libraries, teacher quality, accreditation, teacher salaries, funding, facilities, and other educational inputs.[196]

State ex rel. *Brewton v. Board of Education*[197] relied on the real-equality standard when it found the practice of providing an aeromechanics course at a white school and not at the black school unconstitutional.[198] The court pointed out that the course was taught for three hours a day—a significant part of the student's day—and critical to a career as an airplane mechanic.[199] Since black students did not have the course at their school, they were effectively denied the opportunity to pursue such a career.[200] Accordingly, the court stated that "we think that this course in aeromechanics is so complete and so important in this day and age that its denial would prevent substantial equality."[201]

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192. In other words, in light of the lack of judiciary remedy for de facto segregation (and amidst the continuing de facto segregation), we must ensure equality; that is what this Article means when referencing the de facto-separate-but-equal doctrine.

193. *See Racial-Balancing*, *supra* note 16, at 10–12.

194. *See* Jones v. Bd. of Educ., 217 P. 400 (Okla. 1923).

195. *See* Thompson v. Gibbes, 60 F. Supp. 872 (E.D.S.C. 1945); Turner v. Keefe, 50 F. Supp. 647 (S.D. Fla. 1943).

196. *See* McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Gebhart v. Belton, 91 A.2d 137, 143–52 (Del. 1952); State *ex rel.* Brewton v. Bd. of Educ., 233 S.W.2d 697 (Mo. 1950).

197. *Brewton*, 233 S.W.2d at 699.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

In accord, *Gebhart v. Belton* called for substantial equality after finding real inequality in class sizes, facilities, transportation, teacher salaries, and funding between white and black schools.[202] The court observed that absolute equality is neither required nor practical; only substantial equality is required.[203] The real-equality standard was the linchpin of the heart of the separate-but-equal doctrine that was intended to foster actual substantial equality, though its embrace of segregation was wrong.

Professor Joyner reports that black students actually performed better under the separate-but-equal era than they currently do in the post-*Brown* era.[204] The Supreme Court itself acknowledged in *Brown I* that under the separate-but-equal doctrine, "many [blacks] have achieved outstanding success in the arts and sciences as well as in the business and professional world."[205] Even as the Court declared that separateness was inherently unequal,[206] it observed that the separate-but-equal doctrine had led to or was leading to equality "with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors."[207] Dedicated minorities made "segregated African-American schools into models of academic excellence" grounded in well-qualified and tireless black teachers as well as strong parent involvement and collaboration between home and school with a solid sense of pride in the local schools.[208]

Professor Joyner points out that in North Carolina, for example, under the separate-but-equal doctrine:

> African-American school officials knew that their graduates were equally or better prepared academically than were similarly situated White students and that the biggest problem these students would encounter in the future would be racial bias, prejudice and discrimination from the larger American society. As such, students were imbued with the truism that they had to be three or four times better prepared than the White graduates against whom they would compete for jobs and other economic benefits.[209]

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202. Gebhart v. Belton, 91 A.2d 137, 143–52 (Del. 1952). The United States Supreme Court overturned this case in *Brown I* when it ruled that segregated schooling was unconstitutional even with equality. Brown I, 347 U.S. 483, 495 (1954).

203. *Gebhart*, 91 A.2d at 143.

204. Joyner, *supra* note 6, at 167, 174, 199; *see also* Drew S. Days, III, Brown *Blues: Rethinking the Integrative Ideal,* 34 WM. & MARY L. REV. 53 (1992); Doris Y. Wilkinson, *Integration Dilemmas in a Racist Culture*, SOC'Y, March 1996, at 27, 27–31.

205. *Brown I*, 347 U.S. at 490; *see also* Joyner, *supra* note 6.

206. *Brown I*, 347 U.S. at 495.

207. *Id.* at 492.

208. Joyner, *supra* note 6, at 162, 166–167, 172; *see id.* at 166–167, 172 (discussing the impact of segregation in schools on the African-American community).

209. Joyner, *supra* note 6, at 167.

What has become evident since *Brown* is that "[i]t cannot be said that *Brown* was a panacea for the nation's ills on the issue of equality."[210] Inequality has also been exacerbated by the Supreme Court's alacrity for resource distribution through a "colorblind, race-neutral baseline"[211] rather than the race-conscious approach that would support equal educational opportunities for minorities.[212]

III. THE STATE OF CALIFORNIA SEGREGATION

Part III discusses the state of charter school segregation in California as a cautionary note for other states. California is particularly apropos because, when most people think of segregation, they usually do not think of California. However, California, as a progressive state with segregation, illustrates that segregation can exist anywhere.

A. California: A Cautionary Note for Other States

Many California students are educated in segregated and unequal settings.[213] In the 1800s, the state school superintendent, who wholly supported the state's discriminatory school funding law that used a white-children-only census, stated that schools would be destroyed if racially-integrated education was enforced.[214] He was so opposed to integration that he declared "[t]he great mass of our [white] citizens will not associate in terms of equality with these inferior races; nor will they consent that their children should do so."[215] With like thinking, the legislature enacted a law barring minorities from integrated schools while authorizing separate schools.[216] This continued until the 1870s when black and Indian students were allowed to attend white schools if their community did not have separate facilities for them.[217]

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210. Greenaway, *supra* note 184, at 1183.

211. Spann, *supra* note 29, at 585.

212. *See generally*, Elizabeth A. Campbell & Tanya M. Marcum, *The Search for Equality Through the Rule of Law*, 93 U. DET. MERCY L. REV. 1 (2016) (examining the evolution of preferential treatment).

213. *See* Civil Rights Project, *supra* note 62; Gary Miron et al., *Schools Without Diversity: Education Management Organizations, Charter Schools, and the Demographic Stratification of the American School System*, EDUC. & PUB. INT. CTR. AND EDUC. POL'Y RES. UNIT (Feb. 2010), https://perma.cc/BT7A-7ZD9; Orfield & Ee, *supra* note 3.

214. Wollenberg, *supra* note 132, at 318.

215. *Id.*

216. *Id.*

217. *Id.*

In 1874, the Supreme Court of California emphasized that the separate-but-equal rule governed black students' schooling and thus, black students were entitled to segregated education.[218] Black students eventually gained full rights to attend white schools in 1890, although Indian students continued to face de jure segregation.[219] In fact, the Supreme Court of California held that the segregation of Indian students did not violate the federal and state constitutions as long as the students were provided schools substantially equal to those provided to white students.[220] The Chinese were excluded from education until 1885 due to various prejudicial sentiments, including that of the San Francisco superintendent who deemed them virtually hopeless.[221] Even after the Chinese were allowed to go to school, they were subject to de jure segregation.[222]

School officials justified the segregation of students of Mexican descent with the belief that they had issues with hygiene, contagious diseases, as well as language, cultural, and intellectual inhibitions.[223] In *Westminister School District of Orange County v. Mendez*, the United States Circuit Court of Appeals for the Ninth Circuit ruled that school officials could not segregate students of Mexican descent because state law did not include them in the list of students subject to segregation (this list included Japanese, Chinese, Mongolian, and Indian students).[224] The court, however, noted that the state could enact a law allowing such segregation without violating the Fourteenth Amendment.[225]

Mendez was the first case to successfully challenge segregation in California[226] and it was a strong impetus for the *Brown I* decision seven years

218. Ward v. Flood, 48 Cal. 36 (1874).

219. *See* Wysinger v. Crookshank, 23 P. 54 (Cal. 1890); Wollenberg, *supra* note 132, at 318.

220. Piper v. Big Pine Sch. Dist., 226 P. 926, 929–30 (Cal. 1924); Nicole Blalock-Moore, Piper v. Big Pine School District of Inyo County*: Indigenous Schooling and Resistance in the Early Twentieth Century*, 94 S. CAL. Q. 346 (2012). The court reasoned that the constitutional and statutory authority only guaranteed "[e]quality, and not identity of privileges and rights." *Piper*, 226 P. at 929 (internal quotation marks omitted).

221. Wollenberg, *supra* note 132, at 318.

222. *Id.*

223. *See* Mendez v. Westminister Sch. Dist., 64 F. Supp. 544 (S.D. Cal. 1946); THE ELUSIVE QUEST FOR EQUALITY: 150 YEARS OF CHICANO/CHICANA EDUCATION (Jose F. Moreno ed., 2008); Luis C. Moll, *Mobilizing Culture, Language, and Educational Practices: Fulfilling the Promises of* Mendez *and* Brown, 39 EDUC. RESEARCHER 451 (2010); Vicki L. Ruiz, *South by Southwest: Mexican Americans and Segregated Schooling, 1900-1950*, OAH MAG. HIST., WINTER 2001, 23.

224. *Westminister*, 64 F. Supp., at 544.

225. *Id.*

226. Moll, *supra* note 223, at 451; *see* Wollenberg, *supra* note 132, at 326.

later as some of the same civil rights advocates were involved in both cases.[227] Two months after the *Brown I* decision, Governor Earl Warren[228] signed into law a prohibition of all de jure school segregation in the state.[229] As Professor Lisa Ramos artfully points out, "*Mendez* proved to be a crucial blow to Chicano desegregation struggles across the Southwest."[230]

Historically, the state has seen resistance to desegregation in various cities including Los Angeles, San Francisco, and Pasadena.[231] This has been the case even after the 1963 California Supreme Court mandated local school boards to desegregate.[232] Further, California has had a long history with charter schools and segregation since becoming the second state in the nation to enact charter school legislation in 1992.[233] With neither school finance litigation nor school desegregation jurisprudence addressing the "double bind" of race and poverty, California like many states has failed to ensure racial educational equality even as segregation persists through such educational reform approaches such as charter schools.[234] This is so despite the California Charter School Act's declared purpose to enhance educational opportunities for all students.[235]

Moreover, California requires that petitions to create charter schools include a comprehensive plan for achieving a racial composition in the school that reflects the racial demographics of the school district in which the charter school is located.[236] Presumably charters could be revoked if the school violates this condition; however, this is ostensibly not enforced.[237] Lax, improvident, or ineffective enforcement has allowed segregation to

227. Powers & Patton, *supra* note 189 at 165–66; Lisa Y. Ramos, *Dismantling Segregation Together: Interconnections Between the* Mendez v. Westminister *(1946) and* Brown v. Board of Education *(1954) School Segregation Cases*, 37 EQUITY & EXCELLENCE EDUC. 247, 251–254 (2004).

228. Warren is the United States Supreme Court Chief Justice who wrote for the *Brown I* majority.

229. Moll, *supra* note 223, at 452.

230. Ramos, *supra* note 227, at 248.

231. *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) (Pasadena); Crawford v. Bd. of Educ., 551 P.2d 28 (Cal. 1976) (Los Angeles); Ward v. Flood, 48 Cal. 36 (1874) (San Francisco); Orfield & Ee, *supra* note 3.

232. Jackson v. Pasadena City Sch. Dist., 382 P.2d 878 (Cal. 1963).

233. Frankenberg et al., *supra* note 14, at 9; *History of Charter Schools*, Ill. NETWORK CHARTER SCHS., https://perma.cc/V5E9-CG7R; Orfield & Ee, *supra* note 3.

234. *See generally* Blume et al., *supra* note 9; Miron et al., *supra* note 213; *Grating*, *supra* note 119.

235. CAL. EDUC. CODE § 47601 (West 2018).

236. *Id.* §§ 47605(b)(5)(G); 47605.6(b)(5)(H).

237. *Id.* § 47607(c).

flourish.[238] Besides, California's race-conscious provision might be unconstitutional after the Supreme Court's ruling in *Parents Involved*, concluding that racial balancing is not a compelling interest under the Equal Protection Clause.[239] Additionally, the state's constitution, Proposition 209, hampers remedial action as it precludes race-based preferences: "[t]he State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of . . . public education."[240]

Inequality and segregation have been interlinked in California such that a pervading sense of inequality in California schools for minority students ignited a lawsuit for equal education opportunity in 2000 that resulted in an almost $1 billion settlement.[241] Besides, research found that about 71% of California's charter schools are in non-suburban communities.[242] Furthermore, the "concentration of charter schools in urban areas skews the charter school enrollment towards having higher percentages of poor and minority students."[243] Latino and Black charter school students are often in intensely segregated schools (defined as schools with at least 90% minority enrollment)[244] or predominantly minority schools (defined as schools with at least 50% minority enrollment).[245] Based on their extensive research on segregation, Civil Rights Project researchers Gary Orfield and Jongyeon Ee believe that, in California, "[c]urrent demographic trends make full integration impossible."[246] They also report that the state's charter school system neglects integration.

Given the entrenched segregation consequent to the judicial failure to confront *de facto* segregation, it is time to renew the fight for racial educational equality. In light of the reality of separate schools and educational inequality, courts should, pursuant to the separate-but-equal doctrine, unequivocally make "clear that if whites and [blacks], or rich and

238. *See* Siegel-Hawley & Frankenberg, *supra* note 13.

239. *See Grating*, *supra* note 119, at 1661.

240. CAL. CONST. art. I, § 31(a); *see also* Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary, 134 S. Ct. 1623, 1682 (2014); Miyasaki, *supra* note 9, at 162–71 (discussing Proposition 209).

241. *See* ACLU So. Cal., *Williams v. California* (2004), https://perma.cc/GR5W-AQFJ; First Amended Complaint for Injunctive and Declaratory Relief, Williams v. California, No. 312236 (Cal. Super. Ct. 2000).

242. *Get the Facts: Measuring Up: What is the State of Charter Schools in California?*, NAT'L ALLIANCE FOR PUB. CHARTER SCHS. (2016), https://perma.cc/J6HT-YKM4.

243. Frankenberg et al., *supra* note 14, at 57 (citation omitted).

244. *Id.*

245. Michael A. Boozer et al., *Race and School Quality since* Brown v. Board of Education, BROOKINGS PAPERS: MICROECONOMICS, 1992, at 269, 277.

246. Orfield & Ee, *supra* note 3, at 4.

poor, are to be consigned to separate schools, pursuant to whatever policy, the minimum the Constitution will require and guarantee is that for their objectively measurable aspects these schools be run on the basis of real equality."[247] While the California Supreme Court has ruled that the state "has no duty to ensure prudent use of the equalized funds by local administrators," the state constitution imposes on the state the obligation to provide statewide education that is "open on equal terms to all."[248] This obligation could be enforced going forward through a judicially-recognized de facto-separate-but-equal doctrine.[249] In the meantime, the local control that the courts have used to rationalize deference in the post-*Brown* era has actually fueled minorities' loss of local control as charter schools, which they have no control over, infiltrate their communities.

IV. LOSS OF LOCAL CONTROL AND ROGUE AUTHORIZERS

Part IV describes the possible loss of local control over local schools if "rogue authorizers" continue to spread as has happened in California. Such loss of control is also facilitated through proposed charter school takeovers of public schools and the consequent enrollment of substantial numbers of public school students. This Part argues that it is important for the state to retain local control by preventing outside charter authorizers from invading minority communities that did not authorize them with resource centers and satellite sites. If such invasion is not prevented, it could result in minority districts being oversaturated with charter schools and the concomitant public school loss of students and funds.[250]

A. Losing Control to Rogue Authorizers

Prior to 2002, California law placed no geographical limits on the operation of charter schools; thus a single charter school, for instance, could operate several school sites beyond the boundaries of the authorizing school district.[251] Unfortunately, with multiple sites of charter schools sometimes located very far from the authorizer, there was very little oversight and some

247. Hobson v. Hansen, 269 F. Supp. 401, 496 (D.D.C. 1967).
248. Butt v. State, 842 P.2d 1240, 1247–48 (Cal. 1992).
249. *See* footnote 192 discussing the de facto-separate-but-equal doctrine.
250. *See* Siegel-Hawley & Frankenberg, *supra* note 13.
251. Cal. Sch. Bds. Ass'n v. State Bd. of Educ., 113 Cal. Rptr. 3d 550 (Cal. Ct. App. 2010).

charter schools engaged in abuse of public funds and other violations of law.[252]

After media reports and a criminal investigation shined a spotlight on the abuse, in 2002, the state amended its charter school law to mandate location of charter schools within the authorizing district with limited exceptions.[253] The amended law provides in pertinent part:

> A petition for the establishment of a charter school shall identify a single charter school that will operate within the geographic boundaries of that school district. A charter school may propose to operate at multiple sites within the school district if each location is identified in the charter school petition.[254]

The law also requires those petitioning to start a charter school to include in their facilities description the intended location of the school.[255]

The statutory exception to the location requirement allows a charter school to operate one additional site outside the school district:

> (5) A charter school that is unable to locate within the jurisdiction of the chartering school district may establish one site outside the boundaries of the school district, but within the county in which that school district is located, if the school district within the jurisdiction of which the charter school proposes to operate is notified in advance of the charter petition approval, the county superintendent of schools and the Superintendent are notified of the location of the charter school before it commences operations, and either of the following circumstances exists:
>
> (A) The school has attempted to locate a single site or facility to house the entire program, but a site or facility is unavailable in the area in which the school chooses to locate.
>
> (B) The site is needed for temporary use during a construction or expansion project.[256]

The location requirement as well as the exceptions also apply to charter petitions approved on appeal by a county board of education or the state board of education on appeal.[257] In such cases, the charter school location is the district that denied the charter petition that is the basis of the appeal.[258] Charters of schools that fail to comply with the location law can be

252. *See id.* at 550; Sharon Higgins, *Gateway Academy*, CHARTER SCH. SCANDALS BLOG, https://perma.cc/HQU9-75L8; Mario Koran, *A Guide to the Latest Charter School Showdown*, VOICE OF SAN DIEGO (July 21, 2016), https://perma.cc/62QF-66Q2.

253. *Cal. Sch. Bds. Ass'n*, 113 Cal. Rptr. 3d at 554.

254. CAL. EDUC. CODE § 47605(a)(1) (West 2018).

255. *Id.* § 47605(g).

256. *Id.* § 47605(a)(5).

257. *Id.* §§ 47605(a)(5), 47605(j)(1), 47605.1(a), 47605.1(e).

258. *Id.* § 47605.1(a)(2).

revoked.[259] Several of these charter school satellite sites are broadly advertised on billboards and movie theatres targeting vulnerable students and operated out of office parks and shopping malls.[260]

Charter schools and authorizers have been accused of exploiting the location law. For instance, Newhall School District claimed that, amidst financial and enrollment distress, Acton-Agua Dulce Unified School District turned to charter authorizations to improve its financial state.[261] Newhall School District alleged that Acton-Agua Dulce Unified School District authorized new charter schools to operate outside its own district but within the county to preclude competition for its own students, despite the fact that other districts (including Newhall School District) had rejected these charter schools or were investigating them for failure to comply with the law.[262] Newhall School District further alleged that Acton-Agua Dulce Unified School District charged the charters oversight and other fees as a revenue source in excess of statutory limits.[263] Additionally, Newhall School District claimed that Acton-Agua Dulce Unified School District approved a charter petition even though the petition did not specify the proposed in-district location or the other district where an additional site would be located.[264] The charter school then opened a site in Newhall School District without notifying the district, as statutorily required.[265]

The trial court ruled that Acton-Agua Dulce Unified School District's plan to use the charter authorizations for revenue contravened the state's charter school law.[266] The court also found that Acton-Agua Dulce Unified School District violated the charter school law by failing to determine, prior to the charter petition approval: (i) if the charter school notified Newhall

259. Cal. Sch. Bds. Ass'n v. State Bd. of Educ., 113 Cal. Rptr. 3d 550 (Cal. Ct. App. 2010).

260. *See* Maureen Magee, *Charter Challenges Appellant Ruling to State Supreme Court*, SAN DIEGO UNION TRIB., (Nov. 29, 2016), https://perma.cc/2WJT-NUAY; Valerie Strauss, *Why California's Charter School Sector is Called 'The Wild West,'* WASH. POST (Sept. 28, 2016), https://perma.cc/HBF4-LJRA [hereinafter *Wild West*].

261. *See* Notice of Ruling on Petition for Writ of Mandate at 6, Newhall Sch. Dist. v. Acton-Agua Dulce Unified Sch. Dist., No. BS149061 (Cal. Super. Ct. 2014); Newhall School District v. Acton-Agua Dulce Unified School District *and Albert Einstein Academy for Letters, Arts and Sciences*, CAL. CHARTER SCHS. ASS'N, https://perma.cc/FW5C-VGJJ [hereinafter Cal. Charter Schs. Ass'n]; Lyria Boast et al., *Authorizer Shopping: Lessons from Experience and Ideas for the Future*, NAT'L ASS'N CHARTER SCH. AUTHORIZERS (2016), https://perma.cc/XYH9-L6BR.

262. Notice of Ruling on Petition for Writ of Mandate, *supra* note 261, at 5–7.

263. CAL. EDUC. CODE § 47613 (West 2018) (setting statutory limits on fees for supervisorial oversight).

264. Notice of Ruling on Petition for Writ of Mandate, *supra* note 261, at 5–7.

265. *Id.*

266. *Id.* at 26; Cal. Charter Schs. Ass'n, *supra* note 261.

School District of its intent to locate there; and (ii) if the charter school was unable to locate within Acton-Agua Dulce Unified School District.[267]

Although the court refused to close the charter school as Newhall School District requested, it set aside the charter petition approval.[268] It remanded the case for Acton-Agua Dulce Unified School District to conduct fact-finding on the two issues without any revenue motive.[269] While Newhall School District appealed the ruling, Acton-Agua Dulce Unified School District approved a new charter petition compliant with the law to replace the one challenged.[270] Since the challenged charter was surrendered, the appellate court determined the case was moot.[271] Even though a mere substitution of charters occurred, a legally-compliant petition simply replaced the challenged petition for a school located in Newhall School District.[272]

Another California law that charter schools have exploited in expanding their reach into various communities is the law that allows charter schools to establish resource centers for non-classroom-based (independent study) programs in neighboring districts if two conditions are satisfied: (i) the resource center is only used for students enrolled in the charter school's independent study; and (ii) the majority of the charter school's students and its main educational program are located in the school's home county.[273] This justifiably drew the ire of local districts as they saw resource centers infiltrate their districts. Anderson Union High School District, for example, sued a charter school (Shasta Secondary Home School) for locating a resource center of a charter school approved by an adjacent district (Shasta Union High School District) within Anderson Union High School District.[274] The trial court ruled that the resource center was legal as a site for independent study students (non-classroom-based study).[275] The appeals court reversed, ruling that while state law is silent on whether independent-study charter schools can locate resource centers in other districts within their home county, the law authorizes them to locate resource centers in

267. Notice of Ruling on Petition for Writ of Mandate, *supra* note 261, at 30.

268. *Id.* at 30–31.

269. *Id.* at 31.

270. Newhall Sch. Dist. v. Acton-Agua Dulce Unified Sch. Dist., No. B260731, Cal. App. Unpub. LEXIS 6124, at *2 (Cal. Ct. App. Aug. 25, 2015).

271. *Id.*

272. *Id.*

273. CAL. EDUC. CODE § 47605.1(c) (West 2018).

274. Anderson Union High Sch. Dist. v. Shasta Secondary Home Sch., 208 Cal. Rptr. 3d 564 (Cal. Ct. App. 2016); Magee, *supra* note 260.

275. *Anderson Union High Sch. Dist.*, 208 Cal. Rptr. 3d at 569.

neighboring counties or within their authorizing district.[276] The Supreme Court of California denied the Shasta Secondary Home School's request to review the case, leaving the appeals court decision as the final disposition.[277]

Several other districts sent cease-and-desist letters to charter schools operating resource centers in their districts.[278] Black and Latino students constitute over 46% of students in these resource centers statewide.[279] This number, however, is likely to grow as these centers target poor and minority students.

B. The Corruption of Rogue Authorizers

Corruption has attended some of the location exploitations. For instance, in 2016, Mountain Empire Unified School District superintendent pled guilty to felony charges for collecting, for personal use, 5% of oversight fees of charter schools the district authorized.[280] All except one of the charter schools his district authorized were non-classroom based schools located in other districts.[281] Some of the charters his district authorized then retained the services of his personal charter school consulting business.[282] It was also reported that Julian Union Elementary School District, a district with less than 300 students, has received $1,542,552 in oversight fees from authorizing charter schools run by three corporations operating several sites outside of Julian with about 3,000 students.[283] Grossmont Union High School District, San Diego Unified School District, and Sweetwater Union High School District have filed suit against Julian Union Elementary School District and Julian Charter School for their loss of students and funds as well as oversight concerns about the sites Julian Charter School located in their districts.[284]

In yet another case, *San Diego Unified School District v. Alpine Union School District and Albert Einstein Academy for Letters, Arts and*

276. *Id.* at 579; Magee, *supra* note 260.

277. Appellate Court Case Information, CAL. CTS. (Aug. 18, 2018), https://perma.cc/MCX8-YA6A.

278. Koran, *supra* note 252.

279. Magee, *supra* note 260.

280. *See Wild West*, *supra* note 260.

281. Magee, *supra* note 260.

282. *Id.*

283. *Wild West*, *supra* note 260.

284. Magee, *supra* note 260; Koran, *supra* note 252; Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief, Grossmont Union High Sch. Dist. v. Julian Union Sch. Dist., No. 37-2015-00033720-CU-WM-CTL (Cal. Super. Ct. 2015); Register of Actions Notice, Sweetwater Union High Sch. Dist. v Julian Union Elementary Sch. Dist., No. 37-2015-00021033-CU-MC-CTL (Cal. Super. Ct. 2015).

Sciences,[285] the trial court ruled that the Alpine Union School District failed in its duty when it approved a charter petition for a charter school operating within San Diego Unified School District which had not approved the school.[286] Contrary to California Education Code section 47605(a)(1), Alpine Union School District failed to require the charter school to specify, in its petition, a single charter school to operate within Alpine Union School District.[287] One could speculate that Alpine Union School District either was negligent or turned a blind eye to the specification requirement in reviewing the petition. Either way, there is a lingering question about oversight deficiency and how that could, in the end, lead to missed cases of abuse as charter schools expand into minority districts.

With an opportunity to capitalize on the lack of adequate oversight, charter schools could engage in exploitative "authorizer shopping," aimed at finding an authorizer that could allow them to operate with relative impunity even if the school has a prior history of poor performance or financial irregularities.[288] Even the National Association of Charter School Authorizers has expressed opposition to such authorizer shopping.[289] Senate Bill 1434 was introduced in California to provide opportunities for established charter authorizers to have expanded charter school authorization power over charter schools operating beyond their boundaries.[290] Fortunately, the bill ultimately did not become law as it would have codified the practice of exploiting the charter school location law as well as authorizer shopping.

C. *Treacherous Parallel School Districts*

Despite all of these notable concerns borne of weak oversight, some nonprofits are championing a form of charter school takeover of public schools—a move journalist Michael Janofsky appropriately describes as operation of "the equivalent of a parallel school district."[291] The Eli and Edythe Broad Foundation and other nonprofits, for instance, advocate for charter schools to take over 50% of the student enrollment within the Los

285. Minute Order, San Diego Unified Sch. Dist. v. Alpine Union Sch. Dist., No. 37-2014-00021153-CU-MC-CTL (Cal. Super. Ct. 2014), https://perma.cc/B3E7-5RJH.

286. *Id.* at 6–7.

287. *Id.* at 5.

288. Boast et al., *supra* note 261, at 6; Newhall Sch. Dist. v. Acton-Agua Dulce Unified Sch. Dist., No. B260731, Cal. App. Unpub. LEXIS 6124 (Cal. Ct. App. Aug. 25, 2015).

289. Boast et al., *supra* note 261, at 4.

290. S. 1434, 2016 Leg., Reg. Sess. (Cal. 2016).

291. Michael Janofsky, *Zimmer Accuses Broad Charter Plan of Strategy to 'Bring Down' LAUSD*, LA SCH. REP. (Sept. 22, 2015), https://perma.cc/5EPF-H9UJ.

Angeles Unified School District by 2023.[292] They base this advocacy on the purported success of charter schools operated by three charter school organizations in which the Broad Foundation has invested $75 million, ignoring other evidence showing inconsistent charter school performance.[293] The nonprofits, working through Great Public Schools Now, plan to raise $490 million to achieve their goal, which includes adding 130,000 students to charter schools in Los Angeles Unified School District.[294] Currently, the nation's largest charter school program is in Los Angeles Unified School District, where about 16% of the district's students are in charter schools.[295] If the nonprofits' goal is realized, it means that control over the education of 50% of the district's students would be divested from locals and into the hands of charter management organizations or education management organizations which might not be locally-based or operated.

Indeed, the plan has been criticized as an effort to "do away with democratically controlled, publicly accountable education in LA."[296] Danger of widespread loss of local control lurks as advocates of the takeover do not plan to stop with the Los Angeles Unified School District; they believe they are creating a model for other cities.[297] While not unequivocally opposing the Great Public Schools Now proposal, three nonprofits—Weingart Foundation, California Community Foundation, and the California Endowment—have written a letter to the Broad Foundation as well as the Los Angeles Unified School District expressing concern, and the need to protect family and community voice.[298] In his sharp critique of the takeover plan, Peter Greene of the Curmudgucation notes:

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292. Grace Smith, *Charter School Advocates Propose to Enroll Half of LAUSD Students in 8 Years*, EDUC. NEWS (Sept. 24, 2015), https://perma.cc/A5LX-WT3V.

293. *See* RON W. ZIMMER ET AL., CHARTER SCHOOLS IN EIGHT STATES: EFFECTS ON ACHIEVEMENT, ATTAINMENT, INTEGRATION, AND COMPETITION (2009) (ebook) (providing research on charter schools in several geographic locations); *Wild West*, *supra* note 260; Craig Clough, *Charters with Broad Support Show Only a Mixed Return on Investment*, LA SCH. REP. (Sept. 30, 2015), https://perma.cc/HP4B-GK6L; Frankenberg et al., *supra* note 14, at 13–17.

294. Larry Kaplan & Ruth McCambridge, *3 Local Foundation Heads Try to Intervene In Broad Foundation LAUSD Plan*, NONPROFIT Q. (Nov. 20, 2015), https://perma.cc/SU2B-9XDL; *see* Smith, *supra* note 292.

295. Smith, *supra* note 292.

296. Peter Greene, *LA Plan to Crush Public Education*, CURMUDGUCATION (Sept. 22, 2015), https://perma.cc/3RCL-GZMQ.

297. *The Great Public School Now Initiative*, L.A. TIMES, Sept. 21, 2015, https://perma.cc/7425-TTSU; Greene, *supra* note 296.

298. Kaplan & McCambridge, *supra* note 294. (Letter mentioned in article on file with Campbell Law Review).

> This is not just about educational quality (or lack thereof), or just about how to turn education into a cash cow for a few high rollers—this is about a hamhanded effort to circumvent democracy in a major American city. There's nothing in this plan about listening to the parents or community–only about what is going to be done to them by men with power and money.[299]

In addition to the loss of local control, the takeover would also threaten the district's financial stability, reduce charter school accountability, and make it more difficult to educate remaining students who are most in need.[300] Research shows that several of the state's charter schools already have in place discriminatory admission policies or practices that make choice an illusion, defanging parents of their right to genuinely control their children's education.[301] Steve Zimmer, president of the Los Angeles Unified School Board, believes that the takeover plan would victimize minority students who are already facing double segregation of poverty and race, undermining their academic success.[302] We need to heed Diane Ravitch's cautionary note, in her critique of the aggressive push for school choice, if we are to retain local control of education:

> [T]he scary part is that our public schools have never before been subject to such a sustained assault on their very foundations. Never before were there so many people, with such vast resources, intent on dismantling public education. What does this mean for the future of public education? What does it mean for our democracy?[303]

Local control should not be sacrificed for expediency. As the United States Supreme Court has held, "local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages experimentation, innovation, and a healthy competition for educational excellence."[304]

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299. Greene, *supra* note 296.

300. Kaplan & McCambridge, *supra* note 294.

301. Victor Leung & Roxanne H. Alejandre, *Unequal Access: How Some California Charter Schools Illegally Restrict Enrollment*, ACLU (2016), https://perma.cc/D3P9-3GTT.

302. Janofsky, *supra* note 291; *see* Deirdre Fulton, *Confidential Charter School Memo Blasted as 'Outline for a Hostile Takeover,'* COMMON DREAMS (Sept. 23, 2015), https://perma.cc/8KUY-2DVN.

303. Valerie Strauss, *Ravitch: Billionaires (and Millionaires) for Education Reform*, WASH. POST (Nov. 15, 2011), https://perma.cc/J65G-3EGD.

304. Milliken v. Bradley, 418 U.S. 717, 742 (1974) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973)).

D. Fraud, Waste, and Abuse

With loss of local control sometimes comes fraud, waste, and abuse of funds by charter school authorizers and administrators (beyond the corruption in location exploitations discussed earlier). The United States Department of Education Office of the Inspector General has found significant charter school mismanagement of funds.[305] The California state auditor, for instance, found "a particularly egregious example" in the Cato School of Reason Charter School (Cato) operator, which "registered and collected millions of taxpayer dollars for students who were actually attending private schools."[306] Additionally, the state's Fiscal Crisis and Management Assistance Team determined that Oak Hills Charter School might have misrepresented its enrollment numbers.[307] Los Angeles Unified School District found ABC Charter Middle School accounting, reporting, and cash management wanting due to deficient oversight by the charter school board and administrators.[308] Further, a mayor of Hesperia, California, a councilman, as well as a California Charter Academy founder, were indicted for misappropriation of public funds ($5.5 million) from the charter school network.[309]

There are so many more examples of such misappropriation and waste.[310] If rogue authorizers spread, there is no reason to believe waste, fraud, and abuse will not follow, depriving minority students of much-needed funds that could support equal educational opportunities. When coupled with lax or null charter school oversight, the most vulnerable population are minority students who are the targets of these schools. After all, as Civil Rights Project researchers Gary Orfield and Jongyeon Ee point out, there has emerged in California, "an entirely new system of highly segregated charter schools" and racial educational inequality has become an

305. U.S. Dep't of Educ., *Inspector General's Semiannual Report to Congress*, No. 60 (May2010), https://perma.cc/KM8C-E2WV.

306. The Ctr. for Popular Democracy & Alliance to Reclaim our Schools, *The Tip of the Iceberg: Charter Schools Vulnerabilities to Waste, Fraud, and Abuse*, 5 (Apr. 2014), https://perma.cc/FX6D-4TCY; *see* Press Release, FBI, Philadelphia Division, *Head of Charter School Pleads Guilty to Fraud Charges* (Aug. 13, 2013), https://perma.cc/8VVB-YR5U.

307. The Ctr. for Popular Democracy & Alliance to Reclaim our Schools, *supra* note 306, at 5–6.

308. *Id.*

309. *Id.* at 17.

310. *See generally* The Ctr. for Popular Democracy & Alliance to Reclaim our Schools, *supra* note 306; Blume et al., *supra* note 9; Michael Alison Chandler, *Judge Upholds Revocation of Charter for D.C.'s Community Academy*, WASH. POST (Apr. 16, 2015), https://perma.cc/TUC8-Y62U; U.S. Dept. of Educ., *supra* note 305.

accepted and axiomatic norm.[311] Regrettably, the lack of stringent oversight, and its consequent impact on minorities, could be compounded in the fact that the average yearly charter closure rate is 2.7% compared to annual growth of 8.8%.[312] This threatens the state's charter school system for the Supreme Court of California has warned: "It is, thus, the very control and oversight by public officials that legitimize charter schools. If monitoring and enforcement are, in reality, either lax or nonexistent, then the entire statutory scheme governing charter schools is called into question."[313]

CONCLUSION

Recently, a state appeals court ruled that California's constitutional right to an education does not guarantee a certain educational quality or minimum funding level.[314] This is a scary thought for children as well as civil rights supporters who would like to see more educational equity in quality and funding. Like other cases discussed earlier herein, which limited remedies for minority students, and in light of continued segregation, this ruling affirms the need for a new clarion call as the vehicle for the next push for equality: a clarion call for equality amidst Court-sanctioned de facto segregation. This is a modified separate-but-equal doctrine that is best characterized as a de facto-separate-but-equal doctrine.[315] This equality must be in key areas of quality education such as teacher salaries, highly-effective teachers, facilities, curriculum, professional development, pedagogical and teacher support.

The fact that courts are increasingly deferential to educational authorities amplifies this need. As Professor Black notes, "When students' constitutional right to education is in question, courts—more than any other government actor—must engage and protect the right, notwithstanding the challenges that doing so involves."[316] Courts must remember that "[i]n the

311. Orfield & Ee, *supra* note 3, at 5.

312. *Get the Facts*, *supra* note 242.

313. Cal. Sch. Bds. Ass'n v. State Bd. of Educ., 113 Cal. Rptr. 3d 550, 571 (Cal. Ct. App. 2010); *see Wild West*, *supra* note 260.

314. Campaign for Quality Educ. v. State, 209 Cal. Rptr. 3d 88 (Cal. Ct. App. 2016).

315. Indeed, and understandably, the words separate but equal remind one of the segregative practices of the *Plessy* era. In no way does this article call for that. Instead, it calls for enforcement of a new type of separate-but-equal doctrine called de facto-separate-but-equal doctrine. This de facto-separate-but-equal doctrine posits that, since we have Court-sanctioned de facto segregation in schools, we must ensure equality in those schools as long as those schools remain separate. We cannot afford to wait until the judiciary changes its mind about de facto segregation before ensuring the equality of resources for existing segregated school; the futures of students of color cannot wait.

316. Black, *supra* note 8, at 1603.

absence of such judicial intervention, the complexity of educational problems too often serves as a convenient excuse for legislative inaction that, in effect, condones inequality and inadequacy."[317]

The separate-but-equal doctrine might provide the way forward for "[t]oday, the precedential value of the Court's landmark *Brown v. Board of Education* decision amounts to little more than a promise that no state may return to a system of legally required school apartheid."[318] Rather than de jure separate-but-equal standard championed in *Plessy*, we need a standard based in today's reality—de facto separate but equal. This fight for equality is urgent and heightened in the Civil Rights Project/Proyecto Derechos Civiles' report that, for instance, "[t]he opportunity to integrate all or most Californians in predominantly or even significantly white schools has long since passed."[319] As research and policy analysts Jenny DeMonte and Kaitlin Pennington aptly declare, "[h]aving access to a great education should not be determined by a child's ZIP code, race, or income."[320]

The judiciary needs to be more involved to protect minorities' right to equal educational opportunity. In light of current judicial deferential trends, "civil rights groups and advocates for poor and minority children . . . suspect that states will neglect disadvantaged children unless they are under strong [judicial] pressure."[321] Finally, we must keep in mind that, beyond the private benefits to minority students, there are also public benefits. Improving the educational achievement of minority students would provide significant boost to the United States economy through increased productivity, taxable income, and GDP.[322] If nothing else does, this should make us join together in all communities to improve equal educational opportunities for all.

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317. *Id.*

318. Guzman, *supra* note 36, at 188.

319. Orfield & Ee, *supra* note 3, at 35.

320. Jenny DeMonte & Kaitlin Pennington, *Access to Effective Teaching is the New Measure of Equity*, CTR. FOR AM. PROGRESS (June 27, 2014, 9:16 AM), https://perma.cc/K4AT-QHX5.

321. Gross & Hill, *supra* note 17, at 326.

322. *See* Aronson, *supra* note 27; Eric A. Hanushek, *The Economic Value of Higher Teacher Quality*, 30 ECON. EDUC. REV. 466 (2011); Powell, *supra* note 21; Annie Lowrey, *Big Study Links Good Teachers to Lasting Gain*, N.Y. TIMES, Jan. 6, 2012, at A1; Raj Chetty et al., *The Long-Term Impacts of Teachers: Teacher Value-Added and Student Outcomes in Adulthood* (Nat'l Bureau of Econ. Research, Working Paper No. 17699, 2011), https://perma.cc/V8HL-TUCX; Byron G. Auguste et al., *The Economic Cost of the U.S. Education Gap*, MCKINSEY & COMPANY (June 2009), https://perma.cc/JG9G-KZFX.