"Law Is Coercion": Revisiting Judicial Power to Provide Equality in Public Education

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I. INTRODUCTION

This article is an attempt to start a conversation about where we find ourselves in the plight to help our most challenged public schools. It is not intended to be a comprehensive solution to the problem, but rather a hard look at how, after decades of many efforts, we are further away from the equal education contemplated by the United States Supreme Court's historic decision in *Brown v. Board of Education*.[1] This article does not desire to simply cast blame for the failures of our children, but to send a reminder that, as Frederick Douglass would say, we can hardly have "rain without thunder and lightning."[2]

Change always comes slow in the educational setting because of the great power education creates in the most ordinary human beings.[3] There are too many stories to repeat about the transformational power of education in the lives of those who had little hope otherwise.[4] Even our financial

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

2. Frederick Douglass, Speech on West India Emancipation, Delivered at Canandaigua (Aug. 4, 1857), *in* TWO SPEECHES BY FREDERICK DOUGLASS, at 22, 22 (Rochester, N.Y., C.P. Dewey 1857).

3. Legendary educator Dorothy Height once said: "The surest path to success is through education in a society increasingly based in science and technology. Education is key." DOROTHY IRENE HEIGHT, OPEN WIDE THE FREEDOM GATES 295 (2003).

4. For a discussion on the self-education of Booker T. Washington's youth, see BOOKER T. WASHINGTON: UP FROM SLAVERY 18-22 (William L. Andrews ed., 1996). In his noted autobiography, Washington wrote, "I determined, when quite a small child, that,

priorities currently indicate that much of our resources are dedicated to public education. Our taxation and spending in this regard provides ample confirmation.[5]

Since *Brown* and its companion sequel *Brown II*,[6] our society has struggled with pervasive inequality in our public schools.[7] In recent decades, the achievement gap continued to grow between the majority population and minority groups, particularly African Americans.[8] Gone are the days of massive resistance such as that seen in Little Rock, Arkansas in 1957.[9]

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if I accomplished nothing else in life, I would in some way get enough education to enable me to read common books and newspapers." *Id.* at 18. For a discussion on the educational background of W.E.B. Dubois, the renowned civil rights leader and the first African American to win a doctoral degree from Harvard, see DAVID LEVERING LEWIS, W.E.B. DUBOIS: BIOGRAPHY OF A RACE 1868–1919, at 26-149 (1993). Dubois was born during the peak of Reconstruction in 1868, a time when the educational resources for the newly freed slaves were limited. In his book, Dr. Lewis described the Fisk Free Colored School that opened in early 1866 on the site of a Union Army hospital near Nashville, Tennessee as "narrow, windowless frame buildings jammed into a small rectangle near Chattanooga depot." *Id.* at 56. Illustrating the demand for education, Dr. Lewis wrote: "Two hundred ex-slaves, men, women, and children, came to learn to read, write, and count on the first day. By February, six hundred clamored for instruction. A year later, a thousand a day were being spelled . . . ." *Id.* at 56-57. Examples such as these leave little doubt that African Americans anxiously embraced educational opportunity as soon as the legal barriers to those opportunities were removed.

5. As a matter of federalism, I must concede that public education in grade school is largely a matter of local concern. I am aware of the long-standing principle that the federal government generally avoids controlling local officials in the exercise of power in areas where state governments are competent to act. However, a federal court may "police the ways in which the state governments control [that power], assuring the observance by the states of certain minimum standards regarded as essential in any free society." HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 169 (1994).

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

7. *See* A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1017-18 (1992) ("*Brown* changed the moral tone of America; by eliminating the legitimization of state-imposed racism it implicitly questioned racism wherever it was used.").

8. One writer has commented:

> We have arrived at a point where closing the black-white gap will only be possible by allowing black students to spread their wings and compete with their peers of other races. Trying to accomplish this by letting them in under the bar and reconditioning them in college gives the appearance of being an alternate solution, but thirty years of programs of this kind have shown us conclusively that this will not solve the problem—because the lag persists.

JOHN H. MCWHORTER, LOSING THE RACE: SELF-SABOTAGE AND BLACK AMERICA 254 (2000).

9. The late Robert R. Wright, a co-founder of the University of Arkansas at Little Rock Bowen School of Law, suggested that a by-product of the desegregation battle in

During those times, federal courts issued aggressive orders to get school districts to follow the letter of the law.[10]

Following *Cooper v. Aaron*,[11] the federal courts took several decades to make clear their orders would be respected by compelling local officials to do more than they were willing to do to spread education fairly among the populous. Officials in Little Rock were encouraged by the presence of the military to obey a desegregation order in the greatest post-Civil War "law is coercion" show of power in United States history.[12]

However, by the mid-1990s, the United States Supreme Court had changed its posture toward desegregation by limiting much of the coercive power of the federal courts. In a series of cases, leading ultimately to *Missouri v. Jenkins*,[13] the Court struck down certain court-ordered remedies designed to attract non-minority students.[14] The *Jenkins* decision drastically

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Little Rock, which required the closing of schools in black neighborhoods that could be integrated, "has been at least one of the causative factors for the rise of crime and the organization of gangs in cities throughout the U.S." Robert R. Wright, *On Its Anniversary: A Look Back at* Brown v. Board of Education, ARK. LAW., Summer 1994, at 51, 51. He reasoned that "[w]hen schools are closed in black neighborhoods, one of the major anchors for the black community has been eliminated." *Id.* Although it is difficult to quarrel with the notion that a school can anchor a community, a school alone cannot provide the healthy balance required for a thriving community. Economic stability, decent housing, and a sense of hopefulness also contribute. Indeed, efforts to desegregate should not be unfairly blamed for problems in a community that were caused by other factors, including the flight of many middle-class citizens from the urban centers, which left behind fewer businesses, a reduced tax base, and, in general, a less desirable community for those who simply could not afford to leave. *See* LAWRENCE M. MEAD, THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA 57 (1992) ("Black neighborhoods seem impoverished today not so much because they are segregated, as because most blacks with jobs have moved out.").

10. *See Civil Rights 101: School Desegregation and Equal Educational Opportunity*, LEADERSHIP CONF., http://www.civilrights.org/resources/civilrights101/desegregation.html (last visited Feb. 1, 2015) (discussing the activity of the federal courts in the aftermath of *Brown*).

11. 358 U.S. 1 (1958).

12. *See* E. CULPEPPER CLARK, THE SCHOOLHOUSE DOOR: SEGREGATION'S LAST STAND AT THE UNIVERSITY OF ALABAMA 140 (1993) ("The shock of Little Rock made people wonder what price the nation would have to pay to desegregate the South, district by district, fight by fight . . . .").

13. 515 U.S. 70 (1995).

14. *See id.* at 100. One critic of *Brown* observed that "[i]n basing the *Brown* doctrine in a sweeping decision purely within the purpose and function of public school education, the courts committed a beneficent act analogous to freeing long-term convicts from prison without adequate resources to survive in the free world." HAROLD CRUSE, PLURAL BUT EQUAL: A CRITICAL STUDY OF BLACKS AND MINORITIES AND AMERICA'S PLURAL SOCIETY 67-68 (1987). Another skeptic commented that he was troubled by any suggestion that the problem of addressing "the damaging effects of segregation . . . can be

reduced the power of the federal courts to intervene in local school decisions.[15] Much was written about the decision at the time.[16] Some scholars, like me, predicted that the decision would lead to a stalemate amongst members of local school boards trying to achieve the goals of desegregation in K–12 education.[17] I wrote that the decision would serve as a disincentive for bold approaches to providing a quality education.[18] In my view, the *Jenkins* decision was little more than an ideological split that had factionalized the court since the

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corrected by the simple expedient of appropriately mixing Black and White bodies." Michael A. Middleton, Brown v. Board*: Revisited*, 20 S. ILL. U. L.J. 19, 21 (1995). Professor Middleton further remarked that the pursuit of integration with "myopic zeal, may hamper the development of potentially effective remedies for the lingering effects of segregation." *Id.* The observations of Middleton and Cruse are valid to a point; however, any failure of integration is more attributable to the blatant resistance to its implementation than to any structural failure of the *Brown* opinion.

15. *See Jenkins*, 515 U.S. at 74-76 (discussing the ruling of the federal district court). In earlier litigation, a federal district court ordered the State of Missouri, which had been held responsible for the continuing segregation in the Kansas City, Missouri School District, to offset the costs of desegregation using planned expenditures in the district. When the case first reached the Court in 1990, Justice Kennedy noted these planned expenditures included:

> [H]igh schools in which every classroom will have air conditioning, an alarm system, and 15 microcomputers; a 2,000-square-foot planetarium; greenhouses and vivariums; a 25-acre farm with an air-conditioned meeting room for 104 people; a Model United Nations wired for language translation; broadcast capable radio and television studios with an editing and animation lab; a temperature controlled art gallery; movie editing and screening rooms; a 3,500-square-foot dust-free diesel mechanics room; 1,875-square-foot elementary school animal rooms for use in a zoo project; swimming pools; and numerous other facilities.

Missouri v. Jenkins, 495 U.S. 33, 77 (1990) (Kennedy, J., concurring). In fact, the educational plan the district court had ordered exceeded the local school district's budget, and the Court held the district court's ruling exceeded the taxing authority of the federal courts. *See id.* at 37 (majority opinion).

16. Not all scholars have agreed that the right to attend desegregated schools is limited in remedial scope to only those remedies that take effect within the school district. *See* Norman C. Amaker, Milliken v. Bradley*: The Meaning of the Constitution in School Desegregation Cases*, 2 HASTINGS CONST. L.Q. 349, 359 (1975) (noting that the dissenters' argument in *Milliken* reasonably recognized that under the Fourteenth Amendment "school district boundaries may give way . . . if that is required to prevent state denial of equal educational opportunity to black children").

17. *See* Jose Felipe Anderson, *Perspectives on* Missouri v. Jenkins*: Abandoning the Unfinished Business of Public School Desegregation "With All Deliberate Speed,"* 39 HOW. L.J. 693, 695 (1996).

18. *See id.* ("It is my hope that those decision makers who are attempting to continue efforts to desegregate will not be discouraged by the Supreme Court's most recent reduction of the power of the federal courts to advance efforts to achieve desegregated education.").

early 1970s, a time when busing to achieve racial balance was squarely a part of the national discussion about equal education.[19] The Warren Court began to take a more conservative posture, and the Court had struggled for at least a decade to find the best option to resolve the massive resistance to *Brown*'s original desegregation order.[20] During this time, a more aggressive Court and some lower federal courts utilized the full extent of their judicial power to make defiant states comply with the educational mandate announced in *Brown*.[21] This made it clear to local officials that defiance of a federal court order was no small matter because it threatened the very integrity of the judiciary.

In *Jenkins*, a sharply divided Court once again confronted the problem of what courts can compel local school districts to do in order to eliminate the problem of past discrimination.[22] By weakening the power of the federal courts to order aggressive remedies, the Court clearly indicated its intent to abandon its commitment to desegregating public schools. Still, racial and economic patterns of discrimination persist. The late Justice

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19. Busing was among the more controversial remedies. *See* Joel B. Teitelbaum, Comment, *Issues in School Desegregation: The Dissolution of a Well-Intentioned Mandate*, 79 MARQ. L. REV. 347, 364 (1995) ("[B]using is seen [by the Court] as the best way to properly desegregate racially divided schools, albeit with some limitations. Not surprisingly, an intense argument has arisen among the public as to whether busing is, in fact, a proper method of integrating students.").

20. Court-ordered desegregation in many states was met with blatant resistance, judicial hostility, and legislative evasion. *See* Alexander M. Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193, 203-08 (1964). Many states resisted desegregation by attempting to destroy the local public school system. One prominent example occurred in Macon County, Alabama, where in 1963, then-Governor George Wallace solicited state employees for financial assistance to begin a private school called the "Macon Academy." FRED D. GRAY, BUS RIDE TO JUSTICE: CHANGING THE SYSTEM BY THE SYSTEM 212 (1995). Wallace "encouraged white residents to boycott the public schools in Macon County and to send their children to the newly formed, private, all-white Macon Academy." *Id.*

21. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) ("If 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 court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

22. *See* Missouri v. Jenkins, 515 U.S. 70, 83 (1995). Prior to *Jenkins*, Chief Justice Rehnquist had displayed a long-standing inclination to strike down desegregation plans that attempted to remedy shifts in population and housing patterns. *See, e.g.*, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436 (1976) (holding an order requiring annual readjustment of attendance zones so that no school would have a majority-minority student population exceeded the district court's authority).

Thurgood Marshall commented in 1955 that he was aware the "all deliberate speed" remedial formula would likely signal problems ahead.[23] However, he stated, "I sure as hell never imagined we'd get to this sad state of affairs."[24]

II. HISTORY

Before pondering the failing condition of urban education too deeply, one must examine the history of grade school education in the United States. Education of young people largely began as a privilege, available only to those who could afford to pay. Although in our nation's early history some suggested that public education was important for all of its citizens,[25] very little was done to make this dream a reality for most inhabitants of the United States. Private and religious schools were made available to those who had both the finances and the leisure to have their children enjoy the privilege.[26] During the 1800s, some primary schools were opened to a slightly larger range of children.[27] The demands of the Industrial Revolution, however, forced the education of many children into the home or local churches.[28] In the early 1900s, the philosophy that education should be linked to citizenship grew in popularity. Reformers like John Dewey believed linking citizenship and collective moral sensibility to grade school education was necessary to grow a strong and vibrant society.[29] These ideas caught on, and local jurisdictions,

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23. CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL 249-250 (1993). Chief Justice Earl Warren also voiced considerable surprise at the amount of resistance that the *Brown* decision encountered. *See* EARL WARREN, THE MEMOIRS OF EARL WARREN 290 (1977) ("The Court expected some resistance from the South. But I doubt if any of us expected as much as we got.").

24. ROWAN, *supra* note 23, at 250 (internal quotation mark omitted).

25. Thomas Jefferson believed that public schools should be provided so average citizens could be informed and productive members of American society. *See* JOEL SPRING, THE AMERICAN SCHOOL 1642–1985: VARIETIES OF HISTORICAL INTERPRETATION OF THE FOUNDATIONS AND DEVELOPMENT OF AMERICAN EDUCATION 39-40 (1986).

26. *See id.* at 11.

27. *Id.* at 19.

28. *See id.* at 149-59 (discussing the dramatic shift in American education during this time).

29. *See* JOHN S. BRUBACHER & WILLIS RUDY, HIGHER EDUCATION IN TRANSITION: AN AMERICAN HISTORY: 1636–1956, at 283 (1958) ("Progressive education, inspired by the pragmatic philosophy of John Dewey, also stressed the significance of motivating studies by showing their instrumental usefulness in solving current problems.").

through local school boards, began to spend a higher percentage of tax dollars on grade school education.[30] Unfortunately, there was great educational disparity in the availability of such resources for children of minority groups—particularly African Americans.[31] The disparities resulted in glaring differences between the educational opportunities provided to white students and the opportunities available to minority students.[32] In rural communities, particularly in the South, children were needed for planting and harvest, so the idea of providing a full-time education to those children was economically inconvenient. Economic concerns resulted in some of the daunting inequities that appeared in places like Clarendon County, South Carolina, which caught the interest of early civil rights litigators who sought equal education for the children of former slaves.[33] Only

30. *See* Richard W. Lindholm, *Financing Public Education and the Property Tax*, 29 AM. J. ECON. & SOC. 33, 35-36 (1970) (discussing the rise of property taxes as a means of financing public education). The importance of strong primary education cannot be overstated in a democratic society. As described by the Court in *Brown*: "It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954). Near the turn of the century, the New Hampshire Supreme Court observed that public education is a "means of protecting the state from the consequences of ignorant and incompetent citizenship." Fogg v. Bd. of Educ. of Union Sch. Dist. of Littleton, 82 A. 173, 175 (N.H. 1912).

31. Comparable educational funding for blacks is not a new problem. Historically, state governments could not even be trusted to fairly distribute federal education funds. Experience with some state allocations has shown that when such funds were distributed to black schools during legally mandated segregation, "frequently either the funds for Negro schools [were] diverted in part to white schools or the local support of Negro schools [was] reduced." *See* GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 1271 n.21 (1944).

32. *See, e.g.*, CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF *BROWN V. BOARD OF EDUCATION* 63 (2004) ("[A student] brought suit claiming that Boston had intentionally developed and maintained a racially segregated public school system, citing racial discrimination with respect to the allocation of instructional materials and resources, and maintained a pattern of lower instructional expenditures in schools attended by black children. . . . Because of the overwhelming data in favor of the plaintiffs . . . Judge Garrity handed down a 152-page opinion in favor of the black children and parents.").

33. *See* Briggs v. Elliott, 98 F. Supp. 529 (E.D.S.C. 1951) (challenging "separate but equal" policy in Clarendon County schools), *vacated*, 342 U.S. 350 (1952). Significantly, the legal challenge to the segregated schools in rural Clarendon County was later consolidated with *Brown*. *See Brown*, 347 U.S. at 486-88 n.1 (noting *Briggs*). Limited support for the education of African American children had begun much earlier. After the Civil War, the Freedman's Bureau was established to "compensate" for years of legally enforced ignorance at a rate of about $1.25 per person. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S

a fraction of the spending for white schools was allocated to education for African American children and, even then, only for the time when they were not expected to be in the fields.[34] Urban centers such as Baltimore did a bit better in providing some education, but there were still hints of glaring inequity.[35]

As higher education became a national focus, those disparities were sustained in the allocation of resources provided for African Americans to achieve education beyond high school. It is arguable that the demand for college-educated African Americans fell far short of the demand for white citizens; it was in this context that a campaign began to try to provide some equity in higher education.[36] It is noteworthy that in southern states, African Americans could not enroll in a single state-sponsored university attended by white students.[37]

III. WHY HAVE SCHOOLS FAILED?

The tradition of white flight from urban centers has been characterized by decaying infrastructure and the loss of the industrial might of large cities.[38] The urban unrest of the late

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STRUGGLE FOR EQUALITY 51 (1975). The Bureau managed to operate about 4000 small schools across the South, serving approximately 250,000 people of all ages who were attempting to acquire some education after generations of bitter bondage. *Id.* By 1870, however, the Bureau was dismantled and its efforts to aid freed slaves were mostly abandoned. *Id.*

34. *See* ANTHONY LEWIS, PORTRAIT OF A DECADE: THE SECOND AMERICAN REVOLUTION 20 (1964) ("In 1915 South Carolina spent $23.76 on the average white child in public school, [but only] $2.91 on the average Negro child. As late as 1931 six southeastern states (Alabama, Arkansas, Florida, Georgia, North and South Carolina) spent less than a third as much per Negro public-school pupil as per white child."); *see also* ARNOLD ROSE, THE NEGRO IN AMERICA 117 (1948) ("[T]he average annual salary for the Negro public school teacher in the 17 states with compulsory segregation laws was $601 in 1940. The corresponding figure for white teachers was $1,046.").

35. *See* Ralph L. Pearson, *The National Urban League Comes to Baltimore*, 72 MD. HIST. MAG. 523, 527 (1977) (noting higher student-teacher ratios in the city's all-black schools during the mid-1930s).

36. For an outstanding survey of the litigation that led up to *Brown v. Board of Education*, see generally KLUGER, *supra* note 33.

37. *See, e.g.*, Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 349-50 (1938) (holding that the refusal to admit a black student to the all-white University of Missouri School of Law violated equal protection when no other equal facility for African American existed in the state).

38. One scholar has insightfully commented:

> In the promotion of social rights today, it is important to appreciate that the poor and the working classes of all racial groups struggle to make ends meet, and even the middle class has experienced a decline in its living standard. Indeed, Americans across racial and class boundaries worry about

1960s[39] discouraged much of the retail industry to follow its customers to the suburbs.[40] Crime,[41] drugs,[42] and despair followed. This trend has cost us all dearly as a nation, and it is repeated in almost every urban center in the nation.[43] It is a fair

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> unemployment and job security, declining real wages, escalating medical and housing costs, the availability of affordable child care programs, the sharp decline in the quality of public education, and crime and drug trafficking in their neighborhoods.

WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 204 (1996).

39. Dr. Martin Luther King, Jr. was assassinated on April 4, 1968 in Memphis, Tennessee. A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR., at xix (James Melvin Washington ed., 1986). During 1963, he had occasion to comment on school desegregation and the *Brown* decision:

> The Negro had been deeply disappointed over the slow pace of school desegregation. He knew that in 1954 the highest court in the land had handed down a decree calling for desegregation of schools "with all deliberate speed." He knew that this edict from the Supreme Court had been heeded with all deliberate delay. At the beginning of 1963, nine years after this historic decision, approximately 9 percent of southern Negro students were attending integrated schools. If this pace were maintained, it would be the year 2054 before integration in southern schools would be a reality.

Id. at 520. Former New York Senator and United States Attorney General Robert Kennedy was assassinated on June 5, 1968. *Robert F. Kennedy*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, http://www.jfklibrary.org/JFK/The-Kennedy-Family/Robert-F-Kennedy.aspx (last visited Feb. 1, 2015). Before his death, Kennedy was a key proponent of progressive policies, including America's desegregation effort. *See id.* As Attorney General, he pledged to press forward to desegregate the country's public schools. TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63, at 414 (1988).

40. The problem of "white flight" has made local efforts to achieve schools with a balanced racial makeup much more difficult. Professor Stephen L. Carter cogently explained the phenomenon in this way:

> Imagine a spectrum of white students, each with a slightly different tolerance for integration. As the first black students arrive in a formerly segregated school, the white students with the smallest tolerance for integration leave the school. This increases the proportion of black students, which means that the white students with the next smallest tolerance for integration leave. . . . This goes on until the only white students left are those who either cannot leave or possess an infinite tolerance for integration—not likely a substantial number.

STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 234 (1991).

41. *See* Peter B. Edelman, *Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697, 1698-99 (1993) ("Homicides occur in every major city at a rate unprecedented in recent times. Gangs operate in the inner city with seeming impunity.").

42. *See id.* at 1698 ("The life of the urban poor is fraught with the most severe effects of the violence and drug abuse that are omnipresent in every city.").

43. *See* WILSON, *supra* note 38, at 11 ("In 1959, less than one-third of the poverty population in the United States lived in metropolitan central cities. By 1991, the central cities included close to half of the nation's poor."). The financial challenges of cities have become so desperate that Detroit, once a Mecca of urban success, recently declared

assertion that there is not a more difficult job in the United States than mayor of a large city.[44] All of these challenges are great, and it is unrealistic to continue to treat the type of educational structure needed in these urban settings the same as those in well-taxed, well-financed suburban school districts.[45]

Treating school systems that are so dissimilar as if they were the same sets children up for failure. Urban schools may need more security to protect both students and teachers, which strains the number of other educational resources they can then provide. These schools also must offer remedial training so students can eventually achieve their appropriate grade-level proficiency, particularly during the difficult middle school years, and the federal courts must involve themselves to ensure this is provided. School systems cannot be encouraged to provide sanitized versions of quality based upon standardized test scores alone. Accountability and assessment are important tools to help meet the needs of the students, but states and local school boards must be held accountable for actual learning, not penalized simply because they are fighting an uphill battle. Officials must provide targeted resources where they can do the most good. As a society, we must compel our elected officials to address educational inequities linked to racial discrimination, particularly in light of the changing demographics of our nation.[46] The excuse that it is just too hard to do should not be one we tolerate as a society.

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bankruptcy. Tina Susman & Matt Pearce, *Out of Money, Detroit Calls It Quits*, L.A. TIMES (July 19, 2013), http://articles.latimes.com/2013/jul/19/nation/la-na-0719-detroit-bankruptcy-20130719.

44. *See* Edelman, *supra* note 41, at 1739.

45. Commentators have described the kind of taxing power used by the federal courts to control schools as "the greatest example of judicial usurpation of legislative power and is contrary to federalism and federal-state comity." Robert H. Freilich & David G. Richardson, *Returning to a General Theory of Federalism: Framing a New Tenth Amendment United States Supreme Court Case*, 26 URB. LAW. 215, 232-33 (1994). Furthermore, the complex problems faced by the poor still are at the heart of our deteriorating public education system. *See* Edelman, *supra* note 41, at 1723. It is now apparent to some "that poverty is closely intertwined with issues of discrimination on the basis of race and other minority status, and gender." *See id.* at 1698 (reviewing poverty statistics and discussing the continuing plight of the poor, including rates of unemployment, violence, drug abuse, crime, and teen pregnancy).

46. *See* Sam Roberts, *Projections Put Whites in Minority in U.S. by 2050*, N.Y. TIMES, Dec. 18, 2009, at A23 ("[I]f immigration were to merely slow, rather than stop, non-Hispanic whites, who now account for nearly two-thirds of the population, would become a minority by 2050 . . . . If the pace of immigration increases, that benchmark could be reached as early as 2040.").

IV. CAN FEDERAL JUDICIAL POWER STILL BE USED AS COERCION?

Maryland's higher education system has a long and interesting history with racial issues. Although much of the nation has toiled to achieve equal opportunity in education, Maryland has a special place in such controversies. The most recent dispute that landed in federal court involved a lawsuit filed by an organization founded to support the state's historically black colleges and universities (HBCUs) in *Coalition for Equity and Excellence in Maryland Higher Education v. Maryland Higher Education Commission*.[47] United States District Judge Catherine C. Blake issued the ruling in the case, which raised important questions about federal judicial power.[48]

In *Coalition for Equity and Excellence*, plaintiffs challenged the allocation of certain popular academic programs to historically white institutions and alleged the Maryland Higher Education Commission unfairly financed the state's HBCUs.[49] The suit was brought by individual students, alumni, and others who complained Maryland had engaged in unequal treatment at campuses like Morgan State University and Bowie State University.[50] The dispute led to a six-week trial in early 2012.[51] In October of that year, Judge Blake heard extensive oral arguments from the parties regarding the evidence.[52]

The plaintiffs seized on a strategy reminiscent of one first used by Charles Hamilton Houston and Thurgood Marshall in the 1930s[53]—they built their case on the inequality in higher

47. *See* 977 F. Supp. 2d 507 (D. Md. 2013).

48. *Id.* at 510-11. Often, school districts refuse to meet their constitutional obligation to desegregate until a district court orders them to do so. It is for that reason that the United States Supreme Court has recognized the broad equitable powers of the federal courts to remedy past discrimination. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).

49. *See Coalition for Equity & Excellence*, 977 F. Supp. 2d at 511-12.

50. *Id.* at 512. The summary of Judge Blake's ruling that follows is largely adapted from one presented in the Baltimore Afro-American newspaper in an opinion article I authored shortly after the judicial decision was issued. *See* Jose F. Anderson, *Judge Blake Issued a Bold, Risky and Wise Opinion*, BALT. AFRO-AMERICAN (October 23, 2013), http://www.afro.com/judge-blake-issued-a-bold-risky-and-wise-opinion/.

51. *Coalition for Equity & Excellence*, 977 F. Supp. 2d at 511.

52. *Id.*

53. *See* Brief of Appellee at 9, Pearson v. Murray, 182 A. 590 (Md. 1935) (No. 53).

education that had taken place in Maryland for decades.[54] In her sixty-page opinion, Judge Blake outlined both the historical challenges in Maryland higher education and the current status of the state's HBCUs. Judge Blake's ruling, going back to 1890, described Maryland's higher education system as operating both an exclusionary and a dual system, which provided inferior schools for its black citizens.[55] She explained that, despite several commission reports and studies throughout the decades that followed the 1930s "separate but equal" litigation,[56] Maryland had failed to solve many of the problems of inequality in education.[57] Judge Blake pointed out that during the 1930s, the state education system was clearly hostile to integration.[58] The system and its leadership even made purchases of schools so black students would not apply for admission to the University of Maryland's main campus at College Park.[59]

Judge Blake ultimately identified program duplication as very harmful to the survival of HBCUs.[60] She also noted the crowding of higher education institutions in the Baltimore area presented additional challenges in the decades since the civil rights movement.[61] In the most attention-grabbing language in the opinion, Judge Blake compared the situation in Maryland as being no better than that in Mississippi two decades ago.[62] Media headlines across the country reported the case as a victory for Maryland's HBCUs.[63]

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54. *See Coalition for Equity & Excellence*, 977 F. Supp. 2d at 513.

55. *See id.* at 513-519.

56. *See id.* at 513-16.

57. *See id.* at 515 ("The problem of duplicative institutions in Baltimore has never been addressed.").

58. *Id.* at 513-14.

59. *Coalition for Equity & Excellence*, 977 F. Supp. 2d at 514.

60. *Id.* at 535.

61. *Id.* at 539.

62. *Id.* at 536.

63. *See, e.g.*, Nick Anderson, *Federal Ruling Likely to Expand Programs at Historically Black Colleges in Maryland*, WASH. POST (Oct. 8, 2013), http://www.washingtonpost.com/local/education/federal-ruling-likely-to-expand-programs-at-historically-black-colleges-in-maryland/2013/10/08/f63832dc-3016-11e3-9ccc-2252bdb14df5_story.html ("The ruling Monday from U.S. District Judge Catherine C. Blake was a partial but significant victory for plaintiffs who sued the state in 2006 on behalf of students from the historically black Morgan State, Bowie State, and Coppin State universities and the University of Maryland Eastern Shore."); Tanzia Vega, *Where White Means Diversity: Maryland's Black Colleges Fight for Equity*, N.Y. TIMES (Feb. 4, 2014), http://www.nytimes.com/2014/02/09/education/edlife/marylands-black-colleges-fight-for-equity.html ("Judge Catherine C. Blake of the United States District Court in Baltimore

Citing statistical disparities in the number of non-minority students attending such institutions, Judge Blake made it clear that Maryland was falling short in its effort to desegregate higher education.[64] During the trial, the leadership from the University System of Maryland "recognize[d] that the state's [HBCUs] ha[d] not been successful at attracting non-African Americans."[65]

The opinion provides an interesting approach for reflection on the proper use of the judiciary's coercive power. Judge Blake found the state did not discriminate in funding, but she questioned the policies on program allocation to the various campuses.[66] However, she noted that the relationship between Salisbury University, a majority-white institution, and the University of Maryland, Eastern Shore, an HBCU, provided a glimmer of hope.[67] Of all the system schools, Judge Blake found the two campuses had done the best job of sharing programs.[68] Of course, the geographical isolation of those campuses made such efforts easier to accomplish.

Significantly, the court did not order money damages for the plaintiffs in the suit.[69] Judge Blake did, however, find that the state system needed to correct what she determined to be an unfair distribution of popular programs.[70] She found that the HBCUs did not receive an adequate share of popular programs that would help strengthen enrollment.[71]

The opinion offered several challenges for the future. Competition from for-profit schools, online training, and other innovations have broadened the choices available to people of all backgrounds.[72] Technology and the educational needs of different disciplines and regions have caused programs to come

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ruled recently that Maryland had allowed traditional universities to unnecessarily duplicate programs offered by black colleges, hurting their ability to attract white students and furthering segregation.").

64. *Coalition for Equity & Excellence*, 977 F. Supp. 2d at 540-42.

65. *Id.* at 522 (internal quotation marks omitted).

66. *See id.* at 535.

67. *See id.* at 541-44.

68. *See id.*

69. *Coalition for Equity & Excellence*, 977 F. Supp. 2d at 544.

70. *Id.*

71. *See id.*

72. *See* David J. Staley & Dennis A. Trinkle, *The Changing Landscape of Higher Education*, EDUCAUSEREVIEW, Jan./Feb. 2011, at 16, 18, *available at* https://net.educause.edu/ir/library/pdf/ERM1110.pdf.

and go, depending on the demand for specialized skills.[73] At the same time, the achievement gap for minority communities has widened,[74] and financial access to higher education has become more difficult for all.[75]

The allocation of scarce public funds for higher education has called for increased scrutiny of all public universities. Judge Blake's invitation for the parties to mediate the dispute was a sound suggestion. Mediation makes sense because the *Jenkins* opinion fundamentally called into question how much power a federal judge may use to solve local problems in the area of education, or whether such a use of judicial power can be a tool for resolving disputes in the public grade school setting. Attempting to settle this issue in a higher education world that is undergoing great change might be like hitting a fast-moving target.[76] Judge Blake's coercive use of judicial power, requiring the state government to recognize years of historical failure to integrate, harkens back to the enforcement of the Little Rock judicial orders in 1957. It remains to be seen whether any reviewing courts or other federal judges will embrace her ruling.

V. HOW CAN IT APPLY TO K–12?

Over five decades ago, sociologist Kenneth Clark of *Brown v. Board of Education* fame said, "[s]egregation and inferior education reinforce each other."[77] In a somewhat prophetic statement, he predicted:

> Unless firm and immediate steps are taken to reverse the present trend, the public school system in the Northern

73. *See id*. at 24.

74. *See* PAUL E. BARTON, PARSING THE ACHIEVEMENT GAP: BASELINES FOR TRACKING PROGRESS 4 (2003), *available at* http://www.ets.org/Media/Research/pdf/PICPARSING.pdf.

75. D. Bruce Johnstone, *Worldwide Trends in Financing Higher Education: A Conceptual Framework*, *in* FINANCING ACCESS AND EQUITY IN HIGHER EDUCATION 1, 1 (Jane Knight ed., 2009), *available at* https://www.sensepublishers.com/media/403-financing-access-and-equity-in-higher-education.pdf

76. Judge Blake's opinion has had some insightful critique. One commentator thought the encroachment could be considered damaging to a state higher-education system that attempts to maintain its balance because each of its institutions has a separate "mission." *See* George La Noue, *An Antiquated Ruling on Maryland's Historically Black Colleges*, BALT. SUN (Oct. 27, 2013, 8:00 AM), http://articles.baltimoresun.com/2013-10-27/news/bs-ed-hbcu-ruling-20131027_1_maryland-eastern-shore-morgan-state-university-mississippi.

77. KENNETH B. CLARK, DARK GHETTO: DILEMMAS OF SOCIAL POWER 111 (1965).

> cities of America will become predominately a segregated system, serving primarily Negroes. It will, in addition, become a school system of low academic standards, providing a second-class education for underclassed children and thereby a chief contributor to the perpetuation of the "social dynamite" which is the cumulative pathology of the ghetto.[78]

Some writers have insightfully acknowledged that the costs of attending an urban school include not only educational support but healthcare, counseling, remedial programs, hunger programs, higher security costs caused by vandalism, and related issues.[79] Other writers have focused on the disparity between poor and wealthy school districts in terms of delivering a quality education to the student population.[80] Thus far, the United States Supreme Court has been reluctant to hold that education is a fundamental right under the United States Constitution.[81] Furthermore, in *Freeman v. Pitts*,[82] the Court required a plaintiff to show a causal connection between the changing demographics of a community and the racial discrimination that led to segregated schools.[83] In doing so, the Court has made the use of inter-district remedies by a district court nearly impossible.

This article argues that the courts should return to a more active intervention into the conduct of local school boards and state education agencies in order to ensure that equal education is provided to all, regardless of their race, socioeconomic status, or the neighborhood in which they live. Initiatives like the Bush Administration's "No Child Left Behind"[84] and other educational reforms have only paid lip service to the quality of

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78. *Id.* at 112.

79. *See* Christopher E. Adams, Comment, *Is Economic Integration the Fourth Wave in School Finance Litigation?*, 56 EMORY L.J. 1613, 1630-31 (2007).

80. *See* Eric P. Christofferson, Note, Rodriguez *Re-Examined: The Misnomer of "Local Control" and a Constitutional Case for Equitable Public School Funding*, 90 GEO. L.J. 2553, 2553 (2002).

81. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37-38 (1973).

82. 503 U.S. 467 (1992).

83. *See id.* at 496.

84. *See* No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002). "No Child Left Behind," a President George W. Bush educational initiative designed to bring about school accountability, has been roundly criticized as ineffective. *See* LISA GUISBOND ET AL., NCLB'S LOST DECADE FOR EDUCATIONAL PROGRESS: WHAT CAN WE LEARN FROM THIS POLICY FAILURE? 1 (2012), *available at* http://fairtest.org/sites/default/files/ NCLB_Report_Final_Layout.pdf.

education for children who cannot escape inferior public education in challenging school settings. The importance of mandatory public education in our society dictates that we return to a more serious approach to the issue. With so many of our tax dollars devoted to public education,[85] perhaps it is time to recognize an equal public education as a fundamental right and explore sanctions against state and local officials who fail to provide it.

VI. CONCLUSION

Many well-intentioned people have attempted to focus on how to close the achievement gap of minority students. Billions of dollars have been spent on education in general.[86] It is clear that with the task being so difficult,[87] it is necessary for federal courts to compel, if not encourage, local school systems to actually deliver a quality education to those who need it most. I sometimes ponder whether our failure to provide equal education in urban settings despite increased spending has reached a point where we are now determined to spend the money even if society sees no results at all.[88] We have passed the point where those who can afford to get their children a quality education will do so, since society now seems willing to pay the taxes to deliver whatever can be provided to those who cannot escape. Perhaps technology will help provide learning strategies on a more cost-effective and non-discriminatory

85. *See U.S. Education Spending Tops Global List, Study Shows*, CBSNEWS.COM (June 25, 2013, 11:55 AM), http://www.cbsnews.com/news/us-education-spending-tops-global-list-study-shows/ ("The United States spent more than $11,000 per elementary student in 2010 and more than $12,000 per high school student. When researchers factored in the cost for programs after high school education such as college or vocational training, the United States spent $15,171 on each young person in the system—more than any other nation covered in the report.").

86. Kevin P. McJessy, *Contract Law: The Proper Framework for Litigating Educational Liability Claims*, 89 NW. U. L. REV. 1768, 1787 (1995).

87. *See* Sabrina Tavernise, *Poor Dropping Further Behind Rich in School*, N.Y. TIMES, Feb. 10, 2012, at A1 (discussing published reports that document the widening achievement gap between the rich and poor).

88. Clearly, throwing money at problems will not solve all of them; however, the lack of financial resources remains an obstacle to providing an equal education to all. As one observer has noted, although we may not always get what we pay for, "[w]hat seems equally clear . . . is that we surely cannot get that which we adamantly will not pay for. . . . Children have become the disputed but uncared-for objects of a contentious politics over federalism." Jane Maslow Cohen, *Competitive and Cooperative Dependencies: The Case for Children*, 81 VA. L. REV. 2217, 2235 (1995).

basis.[89] This is not to suggest that minority students or other disadvantaged communities are not capable of meeting educational challenges. Indeed, it is because I believe many who have been denied the opportunity could have achieved different outcomes, and now I am passionately arguing for greater tools of accountability. Equal protection should not be based on whether one can overcome their economic environment or circumstances.[90] We simply cannot allow local officials to intentionally or unintentionally deny basic access to the most important component of success in our society.

History demonstrates that parents will work hard to provide private education, relocate to find a suitable education, and fund charter schools to ensure a quality education, if they have the resources to do so. My concern is not for those people. If equal protection means anything, it should mean that those who cannot help themselves to a quality education should have an equal opportunity to acquire it.[91] The fact that one is trapped in poverty, whether it is urban or rural, should not mean that they are doomed to an *inferior* education because they cannot buy a *superior* one. I think that is what the federal courts should be watching. Reluctance by a local government to make this dream a reality cannot be simply thrown to the side as another inconvenient spending or budgetary issue. The reality is that equal educational opportunity should have been designated a fundamental right a long time ago. Without it, the children of the poor stand little chance of being able to enter the productive

89. *See* HEIGHT, *supra* note 3, at 295.

90. The practice of school busing may illustrate this point. By 1990, forced busing had an already declining impact on American school boards. The Justice Department, however, counted about 600 school districts that were still under federal court control at that time. DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 365 (1992). During an oral argument in the 1990s, then-Solicitor General Kenneth Starr argued that if a neighborhood was segregated because of housing patterns, the schools would remain segregated. *Id.* at 366. The general counsel of the NAACP Legal Defense Fund, Julius Chambers, argued: "[H]ousing patterns in the city were caused in part by the old system of segregation. Therefore, the busing cannot end until the city itself is integrated." *Id.* at 366-67. The NAACP did not prevail in this litigation. *See* Bd. of Educ. of Okla. City v. Dowell, 498 U.S. 237 (1991).

91. Thurgood Marshall once commented: "[A]ny baby born in the United States, even if he is born to the blackest, most illiterate, most unprivileged Negro in Mississippi, is, merely by being born and drawing his first breath in this democracy, endowed with the exact same rights as a child born to a Rockefeller." MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 5 (1994) (quoting a speech by Marshall).

working society of our country,[92] dooming them to prisons or lifetimes on welfare rolls. Such outcomes dishonor our nation's proud heritage of opportunity through education. Federal courts should be used to support educational plans that ensure schools get the resources they need to provide students with the tools for success. That might require an unorthodox combination of services and resources. If a school needs drug-treatment resources, additional after-school meals, parental training classes, or other holistic services to provide better education outcomes for our children, then that should be part of the profile that a federal court would enforce. Magnet schools and freedom of choice plans alone cannot serve the need. I recognize that it took decades for courts to comply with the simple moral order to admit students to schools on a nonracial basis.[93] I do not suggest this task will be easy. To turn our back on this challenge would defy any reasonable notion of equal protection in education. Since I believe "law is coercion,"[94] we should use the law to hold firm to our ideals of equality and opportunity and put some teeth into the words "with liberty and justice for all."

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92. *See* F. MICHAEL HIGGINBOTHAM, GHOSTS OF JIM CROW: ENDING RACISM IN POST-RACIAL AMERICA 169-70 (2013) (providing an insightful discussion on the structural economic and racial disparities that currently exist in our nation).

93. As one commentator put it:

> Even if we were to determine that racial mixing is not itself an important goal, there is growing evidence that socio-economic class rather than race causes the difference in educational achievement. If class does matter and students from lower socio-economic backgrounds suffer more educational disadvantage than their middle and upper class peers, to the extent that so many more minority students than non-minority students are poor, minority students suffer disproportionately. Therefore, mixing socio-economic classes invariably means mixing races, a potential catalyst for better education for poor students and, therefore, better education for minority students.

See Marilyn V. Yarbrough, *Still Separate and Still Unequal*, 36 WM. & MARY L. REV. 685, 693 (1995) (footnote omitted).

94. At the time of the showdown at Little Rock's Central High School in 1957, *Webster's New World Dictionary of the American Language* provided one definition of "law": "The system of courts in which such rules are referred to in defending one's rights, securing justice, etc." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 828 (college ed. 1957). It defined the word "coerce" as "to restrain or constrain by force especially by legal authority." *Id.* at 283. *Webster*'s defined "coercion" as "[t]he power to coerce." *Id.* What would judicial review be if it did not contain the power to constrain or to require compliance by court decree?