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## The Common School Before and After *Brown*: Democracy, Equality, and the Productivity Agenda

*In Brown's Wake: Legacies of America's Educational Landmark*

BY MARTHA MINOW

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**INTRODUCTION**

In recent years, economic forces of global magnitude have placed the substance and value of education in the national spotlight. With jobs for college graduates in short supply, political pundits and news commentators have placed different estimates on the worth of a college degree and the continued utility of the liberal arts.<sup>1</sup> Economists tie specific educational factors to future income. A high school diploma, we are told, can translate into an additional \$300,000 in lifetime salary.<sup>2</sup> A highly effective kindergarten teacher likewise carries a value-added benefit of \$320,000, the additional income that a classroom of today's students may earn over the course of their collective careers.<sup>3</sup> This frenzy over outcomes has heightened public fears and influenced attitudes and behavior. Educated parents rush to enroll their preschoolers in Chinese immersion programs to enhance future career options. As the documentary film *Waiting for "Superman"* dramatically portrays, poor and working class parents agonize over lotteries that may or may not offer their children admission to academically challenging charter schools, run by private organizations with public funds.<sup>4</sup>

Current federal and state policy initiatives, along with local practices, both mirror and energize this bottom-line mentality. States feverishly compete for federal funds that used to be allocated according to student need, buying into a strict regime of testing, standards, and accountability as they "race to the top."<sup>5</sup> The federal Secretary of Education assures us that "[i]nvesting in this new kind of education will sustain the country's economy" and will even prevent a recurrence of the present economic crisis.<sup>6</sup> Local school officials use all of the tools in their power to raise standardized test scores, the talisman of academic success. Parents worry that their children will be left behind. Teachers worry that their jobs are on the line.

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1. See, e.g., Nancy Cook, *The Death of Liberal Arts*, NEWSWEEK, Apr. 5, 2010, <http://www.newsweek.com/blogs/jobbed/2010/04/05/the-death-of-liberal-arts.html>; Ramesh Ponnuru, *The Case Against College Education*, TIME, Feb. 24, 2010, <http://www.time.com/time/nation/article/0,8599,1967580,00.html>.
  2. Gary Fields, *The High School Dropout's Economic Ripple Effect*, WALL ST. J., Oct. 21, 2008, at A13.
  3. David Leonhardt, *The Case for \$320,000 Kindergarten Teachers*, N.Y. TIMES, July 28, 2010, at A1.
  4. WAITING FOR "SUPERMAN" (Electric Kinney Films 2010).
  5. Race to the Top Fund, 74 Fed. Reg. 59,688, 59,813 (Nov. 18, 2009).
  6. Arne Duncan, *Through the Schoolhouse Gate: The Changing Role of Education in the 21st Century*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 293, 303 (2010).

To be sure, no one would deny the connection between education and economic success or the value of quality schooling. The fact that education is critical to the individual and to the nation is irrefutable. Holding schools accountable for student learning is unquestionable. Yet, listening to the constant drumbeat of quantitative outcomes and productivity, one senses that schooling has taken a definitive turn from the distant and not-so-distant past. Lost in this narrative is a concern for developing responsible citizens (the goal of early school reformers) and for providing equal opportunities based on individual student differences (the goal of modern-day civil rights activists).

For common-school crusaders a century and a half ago, the purpose of mass compulsory schooling was political. Facing the challenges of nationalization, industrialization, and immigration in a relatively young republic, they believed that education should impart the understandings and principles necessary for democratic citizenship.<sup>7</sup> Though today's challenges have shifted to globalization and post-industrialization, we are now witnessing another wave of mass migration, while schools still play a crucial role in preparing an even more religiously and racially diverse group of students for democratic participation.

In the mid-twentieth century, the Supreme Court's landmark decision in *Brown v. Board of Education*<sup>8</sup> laid the foundation for broadening the mission of schools; the Court's goals moved beyond political interests to include a child-centered social view where equal educational opportunity, and the government's obligation to provide it, became the national mantra. As the federal government became increasingly involved in education policy, however, a backlash began to mobilize. This was prompted in part by glaring achievement gaps between white and racial-minority students, by opposition to court-ordered busing to achieve racial integration, and by controversies over bilingual classes and mainstreaming of children with disabilities.<sup>9</sup> Those concerns, heightened by fears of growing competition from across the globe, carried education to the present day when testing and accountability are the rallying cries for reform. In today's education discourse, the political and social purposes of schooling appear largely eclipsed by seemingly more pressing

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7. ROSEMARY C. SALOMONE, *VISIONS OF SCHOOLING: CONSCIENCE, COMMUNITY, AND COMMON EDUCATION* 14 (2000).

8. 347 U.S. 483 (1954).

9. See PATRICIA ALBJERG GRAHAM, *SCHOOLING AMERICA: HOW THE PUBLIC SCHOOLS MEET THE NATION'S CHANGING NEEDS* 158 (2005).

economic interests aimed at creating human capital to compete in a global economy.<sup>10</sup>

Set against these ongoing developments, Martha Minow's new book, *In Brown's Wake*,<sup>11</sup> is a timely and sobering reminder that education is not simply about the global marketplace. The book addresses *Brown's* impact on education rights across a wide range of student differences and group identities and touches on themes implicitly related to the purposes of schooling. In this Review, I use the framework of *Brown's* legacy to examine more explicitly those purposes. In doing so, I both widen Minow's lens and, at the same time, narrow it. On the first count, I situate *Brown* more definitively in the broad historical evolution of the common school. On the second, I look more critically at the federal government's growing control and oversight of a system initially designed to preserve state and local autonomy over schooling. I survey historic moments, from mid-nineteenth-century interests in nation building, to mid- to late-twentieth-century concerns with equalizing opportunities beyond individual differences, to current economic and global pressures. I begin with the common school's early history and then move on to *Brown's* dramatic impact on the federal role in education, the apparent retreat from equal educational opportunity, the current accountability and testing movement, and the implications for American schooling.

Guided in part by initiatives announced subsequent to the publication of *In Brown's Wake*, I maintain that today's productivity agenda falls short in fulfilling *Brown's* dual promise: (1) to break down barriers that impede equal opportunity (a well-developed theme of the book) and (2) to preserve democratic government and the nation's political standing as a world leader (a point that the literature has heretofore underaddressed). With a less sanguine view than Minow's on equality's enduring force, I conclude that we risk sacrificing one *Brown* legacy for another. While abandoning equal opportunity as an overarching principle, we are moving toward a more assertive federal role with a one-size-fits-all view of schooling that, in reality, undercuts post-*Brown* guarantees to an appropriate and meaningful education and may, in the end, more deeply divide students by race and social class.

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10. See David Tyack, *School for Citizens: The Politics of Civic Education from 1790 to 1990*, in *E PLURIBUS UNUM?* 331, 362 (Gary Gerstle & John Mollenkopf eds., 2001).

11. MARTHA MINOW, *IN BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK* (2010).

## I. *IN BROWN'S WAKE*

For more than a half-century, scholars from a mix of disciplines have dissected the Court's decision in *Brown*. What did equality mean as the Justices saw it then? What has it come to mean over the years?<sup>12</sup> Martha Minow now adds to that vast store of scholarship, providing a thoroughly researched and panoramic view of the ways in which the decision has influenced education law and policy across indices of race, national origin, wealth, disability, gender, religion, and sexual orientation. A leading legal academic known for her foundational work in feminist jurisprudence and current dean of the Harvard Law School, she has spent the past three decades both as an advocate for equality-based school reforms and as a scholar mining the depths of *Brown's* equality mandate across the educational terrain.<sup>13</sup>

The book explores a number of themes, including the tension between separation and integration, the nuances of sameness and difference, the utility and limits of social science evidence, the federal role in education, the equity arguments supporting parental choice broadly conceived, and *Brown's* influence on the law of foreign countries. Minow walks us through the pre- and post-*Brown* landscape, introducing us to key political and legal actors and the equally bold, but unsung, plaintiffs who transformed education in the mold of equality. Along the way, we meet activists, like W.E.B. DuBois, who strove tirelessly to upend Jim Crow laws in the South. We also encounter the efforts of lawyers like Charles Hamilton Houston, former dean of Howard Law School, who along with Justice Thurgood Marshall helped design and implement the legal strategy that, case by case, culminated in the *Brown* decision.<sup>14</sup>

We come upon plaintiffs like Kinney Kinmon Lau—a young boy born in Hong Kong whose lawsuit against the San Francisco school system dramatically influenced federal law and education programming on behalf of

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12. See, e.g., DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976); GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1997); *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION* (Jack M. Balkin ed., 2001).

13. See, e.g., *JUST SCHOOLS: PURSUING EQUALITY IN SOCIETIES OF DIFFERENCE* (Martha Minow, Richard A. Shweder & Hazel Rose Markus eds., 2008); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990).

14. MINOW, *supra* note 11, at 13-16.

English language learners.<sup>15</sup> We also meet federal judges like J. Skelly Wright, whose decision striking down ability-tracking in the District of Columbia schools<sup>16</sup> inspired subsequent litigation<sup>17</sup> and legislation<sup>18</sup> and hastened the end of the exclusion of children with disabilities from mainstream schooling.<sup>19</sup> We encounter distinguished scholars and dedicated advocates like Michael McConnell who, building on the equality norm from prior case law, tenaciously worked at laying the constitutional groundwork for extending *Brown's* legacy to the expressive rights of religious students in public schools and to the allocation of government funds to families whose children attend religious schools.<sup>20</sup>

Dean Minow goes further into two areas typically overlooked in the commentary on equality in general and *Brown* in particular. Her discussion on the rights of American Indian and Native Hawai'ian students is especially insightful. The checkered history of educational policies for both groups underscores the tension between the dangers of sorting individuals into separate schools by identity and the beneficial effects of group-based remedies on group affirmation and mobilization. Equally enlightening is her discussion of *Brown's* influence on equal educational opportunities for minorities in countries like Northern Ireland, South Africa, and the Czech Republic. Whether invoked explicitly by judges or used by advocates as a persuasive argument, the decision, with its core doctrine that separate education is "inherently unequal," remains an inspirational bulwark against unjust treatment of children around the globe. Her conclusion that *Brown* "now belongs to the world" is ripe for further examination.<sup>21</sup>

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15. See *Lau v. Nichols*, 414 U.S. 563 (1974); MINOW, *supra* note 11, at 37.

16. See *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

17. See, e.g., *Pa. Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971).

18. See Education Amendments of 1974, Pub. L. No. 93-380, § 614(d), 88 Stat. 484 (requiring "procedures to insure that, to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped . . ."); Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355 (codified as amended at 29 U.S.C. § 794 (2006)).

19. MINOW, *supra* note 11, at 71.

20. MINOW, *supra* note 11, at 85-87; see, e.g., Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1 (1985); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000). For examples of the Supreme Court's receptivity to such arguments, see *Zelman v. Simmons-Harris*, 536 U.S. 639, 662-63 (2002); and *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001).

21. MINOW, *supra* note 11, at 187.

What most strikingly sets this book apart from many others is the author's objective eye. With each chapter, she impressively refrains from turning the discussion into a liberal polemic or a disheartening diatribe on the failure of *Brown* to dismantle segregated schooling or to create a racially integrated society. Throughout the book, including her discussion on social science evidence to support social integration,<sup>22</sup> she evenhandedly presents the pros and cons of each issue without betraying her progressive stripes or compromising her commitment to equal opportunity for all students, particularly the least advantaged. She realistically measures the progress made while noting the tasks left undone and the obstacles that remain in the way. Moreover, she does not summarily dismiss controversial concepts, like single-sex schooling or school choice (including vouchers and charter schools) as merely driven by political conservatives through equality's back door. To her credit, she acknowledges the equality arguments supporting such initiatives while recognizing problems in their implementation.

On single-sex schools and classes, she recognizes the limitations of social science evidence in justifying the separation of students by sex given the "politicized context" of the research and lack of a perfect control setting for comparison.<sup>23</sup> Examples of these defects include: (1) that many studies suffer from selection bias, failing to account for parental involvement and socioeconomic status; (2) that research findings typically come from other countries, thus calling into question their applicability to the United States; and (3) that researchers tend to have a bias for or against the concept being tested.<sup>24</sup> Minow further raises concerns that single-sex programs can revive outmoded gender stereotypes.<sup>25</sup> Reported practices, like encouraging girls to write about wedding dresses and boys about hunting, understandably invite litigation.<sup>26</sup> Despite these reservations, she concludes that such programs are worthy of experimentation when offered as a voluntary alternative to coeducation.<sup>27</sup>

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22. *Id.* at 146–62.

23. *Id.* at 155.

24. *Id.* at 63.

25. *Id.* at 65.

26. See Emily Richmond, *Single-Sex Classes Being Praised on Many Levels: Jury Still Out. But Some Educators Already Convinced of Benefits*, LAS VEGAS SUN, July 19, 2009, available at <http://www.lasvegassun.com/news/2009/jul/19/single-sex-classes-being-praised-many-levels/>; Elizabeth Weil, *Teaching to the Testosterone*, N.Y. TIMES, Mar. 2, 2010, § 6 (Magazine), at 38.

27. MINOW, *supra* note 11, at 66.

On the matter of school choice, though a measured supporter, Minow warns against the potential for families to use choice options to self-segregate and for school officials to facilitate that result. She suggests that regulations might temper those tendencies.<sup>28</sup> And while she cautions that government vouchers to attend religious schools can promote social segregation, she notes that under some circumstances they also promote greater diversity, as in the case of inner-city Catholic schools that enroll substantial numbers of non-Catholic students, many of them racial minorities.<sup>29</sup> On the other hand, though she recognizes that accommodating religious beliefs and activities in public schools can prove divisive, she also understands that such accommodations avoid the isolation of many religiously affiliated schools, inducing religious observers into the mainstream.<sup>30</sup>

In a similar vein, she evaluates ethnically themed schools which, critics claim, “balkanize American identity.”<sup>31</sup> She gives the example of the Twin Cities International Elementary and Middle Schools in Minnesota, serving mainly students from Somali immigrant families. If viewed as transitional institutions, she says, such schools provide opportunities for parents to pass on their traditions to their children and for their children to intermingle with others while developing skills in two languages.<sup>32</sup>

Minow skillfully navigates the muddy waters of sameness and difference in her discussion of single-sex schooling and bilingual education. Here she demonstrates how extending the sameness/difference dichotomy beyond race has both challenged the original homogeneity of the common school and strained the contours of equality. Though a central objective of the Court’s holding in *Brown* was to eradicate the notion that race signified any inherent differences between people, gender continues to be viewed as a marker of real and natural differences.<sup>33</sup> While the origins of sex differences in aptitudes and attitudes (whether biological or culturally conditioned) are highly debatable,<sup>34</sup>

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28. *Id.* at 135.

29. See JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* 109-30 (1978) (arguing that school choice can promote racial integration); JOSEPH P. VITERITTI, *CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY* (1999) (arguing that school choice promotes equal educational opportunity for economically disadvantaged children).

30. MINOW, *supra* note 11, at 90.

31. *Id.* at 46.

32. See *id.*

33. *Id.* at 33.

34. Cf. ROSALIND BARNETT & CARYL RIVERS, *SAME DIFFERENCE: HOW GENDER MYTHS ARE HURTING OUR RELATIONSHIPS, OUR CHILDREN, AND OUR JOBS* (2004) (discounting such

differences in language and culture for English language learners are definitively social and incontestable. Minow demonstrates that it remains controversial whether the “separate is inherently unequal” doctrine applies with equal force to single-sex<sup>35</sup> and bilingual programs<sup>36</sup> as it does to racial segregation.

Minow’s arguments on integration and separation are similarly nuanced, though her repeated references to the “integration ideal” that flows from *Brown* can be confusing, especially to the uninformed reader. Given the racial politics of that day, particularly in the South, the Court reasonably did not impose a legal mandate for affirmative racial mixing but rather viewed integration as an aspirational vision for the future. Nonetheless, she rightly laments *Brown*’s failure to achieve racial integration in the schools.<sup>37</sup> And though she expresses some reservation over Richard Kahlenberg’s argument for socioeconomic integration,<sup>38</sup> she recognizes that this may be the most viable option given the Supreme Court’s retreat from even voluntary race-based remedies.<sup>39</sup> She further concedes that integration is not the only way to achieve equal opportunity in the case of certain groups like students with disabilities.<sup>40</sup>

I depart from Dean Minow—and this goes to the central thesis of this Review—with regard to her optimistic belief in the equality ideal as a predominant force driving current education policy. I suspect that some education observers would question her recurring affirmations that equal opportunity remains the “established,”<sup>41</sup> “undisputed”<sup>42</sup> goal and “settled

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differences); ROSEMARY C. SALOMONE, *SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING* 103 (2003) (recognizing that many observed differences—though not all—are culturally conditioned, and suggesting that innate differences are enhanced by cultural factors); LEONARD SAX, *WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES* 29 (2005) (arguing for sex-based biological differences on the basis of brain scans).

35. MINOW, *supra* note 11, at 67; *see, e.g.*, Jesse Ellison, *The New Segregation Debate*, NEWSWEEK, June 22, 2010, [www.newsweek.com/2010/06/22/the-new-segregation-debate.html](http://www.newsweek.com/2010/06/22/the-new-segregation-debate.html).

36. MINOW, *supra* note 11, at 47.

37. *Id.* at 32.

38. RICHARD D. KAHLENBERG, *ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE* (2001).

39. *See* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (prohibiting the use of student racial identities in school assignments to achieve racial balance absent a finding of official intent to discriminate); MINOW, *supra* note 11, at 126, 152-53.

40. MINOW, *supra* note 11, at 78.

41. *Id.* at 27.

42. *Id.* at 147.

touchstone<sup>43</sup> of American schooling. Looking at the facts as she presents them, one is likely to find a disconnect between the rhetoric of equality and the reality of policy and practice. Continued achievement gaps between minority and white students, differences in the quality of education afforded the middle class and the poor, and parental enthusiasm for inner-city charter schools as an escape from failing public schools all point in that direction. As Jack Balkin noted a decade ago, “By the end of the century, the principle of *Brown* seems as hallowed as ever, but its practical effect seems increasingly irrelevant to contemporary public schooling.”<sup>44</sup> Ten years later, as I will discuss, even the rhetoric seems to be growing dimmer in the push toward testing, accountability, and productivity.

The book could have more effectively teased out that reality had it directly and more fully discussed how the gradual shift since the mid-1970s from equal access to equal outcomes threatens to undermine the equity-based reforms that lie at the core of *Brown*'s legacy. It is true that Minow addresses market-driven rationales for school choice.<sup>45</sup> She also mentions the federal No Child Left Behind Act (NCLB) several times in passing.<sup>46</sup> She notes the problems with high-stakes tests, especially for English language learners,<sup>47</sup> and for students with disabilities though she supports the use of tests as accountability measures.<sup>48</sup> She briefly acknowledges that the Obama Administration “focuses on school improvement, not racial integration,”<sup>49</sup> without further elaboration or judgment. Yet these points seem isolated and merely peripheral to her overall discussion. Admittedly, this may be a tall order for a book of already such ambitious scope. And, concededly, some of the most controversial federal initiatives now debated in the press started emerging as the book went to press. That being said, eight years of NCLB provide perspective and a rich store of

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43. *Id.* at 31.

44. Jack M. Balkin, *Brown as Icon*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID*, *supra* note 12, at 8.

45. MINOW, *supra* note 11, at 117-18; see JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990); Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* 123 (Robert A. Solo ed., 1955).

46. See, e.g., MINOW, *supra* note 11, at 29 (noting mandated performance measures focusing on student race); *id.* at 48 (discussing provisions on standardized tests); *id.* at 112-13 (noting the constraints on the option of parents to obtain a waiver for their children to leave a failing school for a higher-performing one); *id.* at 147 (discussing mixed results from state testing programs).

47. *Id.* at 48.

48. *Id.* at 80.

49. *Id.* at 31.

information on the changing federal role in education, a role that *Brown* and its aftermath both shaped and energized and that NCLB took to a higher level.

The book also underplays democratic citizenship and the mission of schools to make “good citizens” as key components of *Brown*’s ruling.<sup>50</sup> Minow notes that “*Brown* underscored the importance of schooling as the key entry point for jobs and civic participation,<sup>51</sup> makes several references to citizenship and civic engagement,<sup>52</sup> and acknowledges the interests of early common-school reformers in building a democracy.<sup>53</sup> She makes no mention, however, of democracy among the three “memorable ideas” that stand out in *Brown*.<sup>54</sup> Like many others, she hails the decision as “central” to the protection of individual rights and recognizes the inherent tension with group rights to a shared identity.<sup>55</sup> But she fails to emphasize that the Court, perhaps in a nod to patriotic fervor, also underscored “the importance of education to our democratic society,” calling it “the very foundation of good citizenship” and “a principal instrument in awakening the child to cultural values.”<sup>56</sup> In doing so, the Justices implicitly tied their ruling to the past and future, validating the rationale underlying the common school while foreshadowing the equality-based reforms that followed.

I now fill in what *In Brown’s Wake* left unsaid, examining the early common school, the expansion of the federal role following *Brown*, and the accountability and testing movement. Each represents a critical moment in the nation’s history, and each opens a particular window on the legacy of *Brown* as it relates to the mission of schooling in America.

## II. THE COMMON SCHOOL AND PRESERVING DEMOCRACY

Education, as embodied in the common school, dates back to the early Athenians, who believed in training males of certain birth to perpetuate the

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50. See generally *MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY* (Diane Ravitch & Joseph P. Viteritti eds., 2001) (interrogating the normative place of politics and values in civic education).

51. MINOW, *supra* note 11, at 35.

52. See, e.g., *id.* at 139 (suggesting civic engagement and democracy as possible success measures of social integration); *id.* at 150 (presenting the integration ideal as a “crucial element of preparing individuals for successful and productive lives as . . . civic participants in a pluralistic, democratic society”).

53. *Id.* at 160.

54. *Id.* at 19.

55. *Id.* at 104-05.

56. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

state's most cherished values. Their concept of *paideia* joined citizenship and learning around a shared set of norms and values under the legal and moral authority of the *politeia*, or prevailing culture.<sup>57</sup> Though the state did not establish or finance education, it rigidly supervised and regulated the curriculum.<sup>58</sup> In a modified fashion, modern nation-states have relied on mass compulsory schooling to indoctrinate the young in a common core of principles, the rationale being to promote solidarity through a shared sense of identity.

In the United States, the link between education and the political needs of a secular society did not emerge until the late eighteenth century. Up to that time, especially in the colonies, local schools typically operated under the direction of religious denominations, even though they were funded with tax revenues. Among the nation's Founders, it was Thomas Jefferson who institutionalized the ideas of the ancient Greeks, tying schooling to citizenship. For Jefferson, education was a mechanism for producing citizens of virtue and intelligence (albeit only white males) to meet the demands of republican government. In addition to realizing democracy, it was a means for advancing social reform.<sup>59</sup>

Nineteenth-century architects of the American common school universalized that view and opened it to women. They relied heavily on the Swiss educator Johann Heinrich Pestalozzi, who advocated teaching the masses "to love God and country" and to improve their work performance, without posing any threat to the ruling class. Yet unlike Pestalozzi, who emphasized spontaneity and creativity in educating the whole child, early school reformers focused on the interests of society and of the nation.<sup>60</sup> The tension between these two competing visions, one centered on the individual student and the other directed toward the collective good, would dominate education discourse throughout the coming century and to the present day.

As Minow affirms, the common-school cause "attracted reformers seeking social improvement."<sup>61</sup> But again the motive was largely statist. For Horace Mann, the first Secretary of the Massachusetts Board of Education and a leading figure behind the movement, public schooling was necessary to

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57. LORRAINE SMITH PANGLE & THOMAS L. PANGLE, *THE LEARNING OF LIBERTY: THE EDUCATIONAL IDEAS OF THE AMERICAN FOUNDERS* 58 (1993).

58. 1 ELLWOOD CUBBERLEY, *THE HISTORY OF EDUCATION* 26 (1909).

59. See SALOMONE, *supra* note 7, at 12-13.

60. FREDERICK M. BINDER, *THE AGE OF THE COMMON SCHOOL 1830-1805*, at 24 (1974); CLARENCE J. KARIER, *THE INDIVIDUAL, SOCIETY, AND EDUCATION: A HISTORY OF AMERICAN EDUCATIONAL IDEAS* 224 (2d ed. 1986).

61. MINOW, *supra* note 11, at 115.

preserve republican institutions and to create a political community “out of a maze of conflicting cultural traditions.”<sup>62</sup> The segregation of immigrants in distinct communities, their lack of economic means, and their low literacy rates threatened the vitality of the Republic. The school would teach the newcomers the principles of American democracy and lead them to appreciate the institutions of American society.<sup>63</sup> It would be “common” in that it would be “open to all and free of charge,” and it would instill in students a “common core of values” combining “religion, politics, and economics in [a] vision of a redeemer nation.”<sup>64</sup> Mann and his fellow reformers saw those values as a nonsectarian compromise grounded in what they considered widely accepted religious truths that, in reality, clearly reflected those of white, middle-class, Anglo-American, mainstream Protestantism.<sup>65</sup> In the interests of promoting equality while improving the quality of schools, they encouraged uniformity—in “standards of pedagogy, schoolbooks, and even schoolhouses”—that sometimes proved “stultifying, rigid, and inhumane,” especially in urban school districts.<sup>66</sup>

As eager as the common-school crusaders were to promote their nationalistic goals, they also understood that a state-imposed ideology would meet political obstacles from an American culture that was deeply suspicious of central government. And so they built a “two-tiered governance structure” whereby the state would maintain general oversight while local governments would be responsible for the operation and primary funding of the schools.<sup>67</sup> In this way, the transmission of political, economic, and social knowledge would remain in the hands of each community. As David Tyack explains, the common school movement initially was a “grassroots phenomenon” wherein

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62. Lawrence A. Cremin, *Horace Mann's Legacy*, in *THE REPUBLIC AND THE SCHOOL: HORACE MANN ON THE EDUCATION OF FREE MEN* 3, 8 (Lawrence A. Cremin ed., 1957).

63. LAWRENCE A. CREMIN, *THE AMERICAN COMMON SCHOOL: AN HISTORIC CONCEPTION* 44-47 (1951); SALOMONE, *supra* note 7, at 14.

64. DAVID TYACK & ELISABETH HANSOT, *MANAGERS OF VIRTUE: PUBLIC SCHOOL LEADERSHIP IN AMERICA, 1890-1980*, at 20 (1982).

65. Jeffrey E. Mirel, “*Between God and the Youth of Our City*”: *Conflicts over Religion and Education in Detroit, 1842-1949*, 22 *URB. EDUC.* 203, 205-06 (1987).

66. David Gamson, *From Progressivism to Federalism: The Pursuit of Equal Educational Opportunity, 1915-1965*, in *TO EDUCATE A NATION: FEDERAL AND NATIONAL STRATEGIES OF SCHOOL REFORM* 180 (Karl F. Kaestle & Alyssa E. Lodewick eds., 2007).

67. SALOMONE, *supra* note 7, at 16.

local citizens consciously embraced the concept and directly determined what their children learned.<sup>68</sup>

Through the late 1800s, the public school curriculum gradually became more secular as the school population became more heterogeneous with the addition of newly arrived Catholics and Jews who challenged the pan-Protestant compromise. Educators and policymakers realized that it was more important to Americanize the newcomers than to Protestantize them. The move toward secularization continued into the new century and through the mid-1900s. What became known as progressive education, most identified with the pragmatist John Dewey, blended the romantic emphasis on the needs of the child embraced by Jean-Jacques Rousseau,<sup>69</sup> and later Pestalozzi, with a “democratic faith” in the common school inherited from Jefferson and Mann.<sup>70</sup> For Dewey, the school was an organ of social mobility, as well as a mechanism for promoting both community awareness and a sense of national identity by nurturing good citizens. The religion of the public schools more definitively became the religion of democracy. Yet to their credit, Dewey and his progressive followers rejected the nativist tendencies of the day, incorporating an appreciation for cultural differences into the notion of community.<sup>71</sup>

At the same time, other voices within education took the concept of individual difference down a darker path. Academic elites like Ellwood P. Cubberley, the dean of the Stanford School of Education, urged urban educators to forsake the “exceedingly democratic idea that all are equal, and that our society is devoid of classes.”<sup>72</sup> With the aid of intelligence and other ability tests, school officials classified children into categories with a prescribed curriculum. Democracy meant that educational “opportunity” would be selectively delivered; “accepting one’s place” took precedence over “equality.”<sup>73</sup> And though the United States could pride itself as one of the few developed countries that spread education across all classes largely by local initiative, the system was highly stratified. Some students, primarily the children of immigrants and racial minorities, were found to lack the inherent capacity for academic pursuits and were tracked into vocational and “life adjustment”

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68. David Tyack, *Preserving the Republic by Educating Republicans*, in *DIVERSITY AND ITS DISCONTENTS: CULTURAL CONFLICT AND COMMON GROUND IN CONTEMPORARY SOCIETY* 63, 65 (Neil J. Smelser & Jeffrey C. Alexander eds., 1999).

69. See JEAN-JACQUES ROUSSEAU, *EMILE: OR, ON EDUCATION* 37 (William Boyd trans. & ed., Teachers College 1965) (1762).

70. See Martin S. Dworkin, *John Dewey: A Centennial Review*, in *DEWEY ON EDUCATION* 9 (1959).

71. SALOMONE, *supra* note 7, at 25.

72. ELLWOOD P. CUBBERLEY, *CHANGING CONCEPTIONS OF EDUCATION* 57 (1909).

73. Gamson, *supra* note 66, at 183.

programs. That view persisted into the 1950s until *Brown* jolted prevailing assumptions about innate abilities and equal educational opportunity.

Related in part to progressive thinking, patriotism reached an almost feverish pitch in the aftermath of World War I, when a number of states adopted laws mandating varied forms of nationalistic instruction, including courses in U.S. history and citizenship, flag displays, recitation of the Pledge of Allegiance, and patriotic school assemblies.<sup>74</sup> The push toward aggressive “Americanization” continued full-throttle during the period between the two world wars as the United States closed its doors to most foreigners and turned its sights inward.<sup>75</sup> At the same time, the nation closed its eyes to the evils of racial segregation and discrimination within its borders.

Global events surrounding World War II and the years that followed eventually demanded a turnaround in policies on both immigration and race, all of which veered the common school once again in a new direction. The imperative need for the Supreme Court to speak definitively as it did in *Brown* crystallized in the pressures of the Cold War and the international embarrassment of racial segregation.<sup>76</sup> The unequal status of blacks, globally visible in the wartime military, had become grist for the Soviet propaganda mill. The injustice itself seriously threatened the nation’s moral standing as leader of the free world. Similar concerns compelled political forces to reconsider restrictive immigration policies.

As for progressivism, its more extreme innovations had become irrelevant to the times by the late 1950s. Though classrooms had become more energized, permissiveness and anti-intellectualism had distorted Dewey’s dream, a development that Dewey himself lamented.<sup>77</sup> By all objective measures, progressives seemed inexplicably blind to domestic and global changes that demanded greater emphasis on history, foreign languages, and technology. They also seemed insensitive to the racial and class ramifications of separating students by “ability” into academic, general, and vocational tracks.<sup>78</sup> In the end, the enduring effects of the movement on the curriculum remain open to debate, though the connection between school and society, envisioned by

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74. SALOMONE, *supra* note 7, at 24.

75. See ROSEMARY C. SALOMONE, *TRUE AMERICAN: LANGUAGE, IDENTITY, AND THE EDUCATION OF IMMIGRANT CHILDREN* 30-41 (2010).

76. See generally MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000) (demonstrating the role played by the Cold War and foreign affairs in U.S. civil rights reforms).

77. Dworkin, *supra* note 70, at 10.

78. See DIANE RAVITCH, *THE TROUBLED CRUSADE: AMERICAN EDUCATION, 1945-1980*, at 78-80 (1983).

Dewey, resonates in *Brown* and continues to pervade America's approach to education.

### III. *BROWN*, EQUALITY, AND THE FEDERAL ROLE

The Court's decision in *Brown* was indeed a significant event that indelibly changed the power configuration of public education. As Minow comprehensively describes, the Court set the groundwork for equality to guide numerous public policy decisions, initially at the federal level and subsequently across the states, for decades to come. Until the mid-twentieth century, the federal government had moved cautiously on education matters, stimulating rather than regulating local activity primarily through categorical grants for discrete projects, often in response to a perceived national "crisis."<sup>79</sup> In fact, up to that point, the U.S. Office of Education, established during the Reconstruction Era, had done little more than compile "obscure statistical reports."<sup>80</sup>

By the mid-1960s, the political aims embraced by Mann and Dewey had fallen into the shadows as the state's interest in schooling took a new turn and reformers sought to wed the social with the economic. With equality of opportunity as their policy objective, architects of President Lyndon Johnson's Great Society programs justified their proposals on a theory of education as "investment in human capital."<sup>81</sup> For them, human skills and knowledge were resources in which the nation ought to invest for the general welfare. That compelling economic argument soon folded into a broader vision, one emphasizing individual rights, as *Brown* and its aftermath propelled public schooling into the orbit of equal educational opportunity.

Education more definitively became a leveling agent to foster social justice along with economic growth. The rationale was as follows: poverty was a root cause of educational failure; the poor tended to live in specific geographic areas; and additional government assistance would grant them equal access to educational opportunity which, in turn, would make them productive members of society. Ironically, Horace Mann, looking to garner support from business interests a century earlier, had reluctantly made a similar economic

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79. ROSEMARY C. SALOMONE, *EQUAL EDUCATION UNDER LAW: LEGAL RIGHTS AND FEDERAL POLICY IN THE POST-BROWN ERA* 2 (1986).

80. *Id.*

81. See 111 CONG. REC. 5736 (1965) (statement of Rep. Carl Perkins) ("If we can reduce the costs of crime, delinquency, unemployment, and welfare in the future by well-directed spending on education now, certainly, on this count alone, we will have made a sound investment."); see also Theodore W. Schultz, *Investment in Human Capital*, 51 AM. ECON. REV. 1 (1961).

pitch, though his decision to do so was purely pragmatic and contrary to his moral instincts.<sup>82</sup>

In combating the effects of poverty and promoting equality, the Johnson Administration developed a two-pronged attack of carrots and sticks, using the power of the federal purse to induce compliance with the Administration's civil rights agenda. Congress first had to adopt a series of prohibitions to assure that racial minorities were afforded equal treatment. Those prohibitions initially appeared in the Civil Rights Act of 1964 and its various provisions, particularly Title VI outlawing race and national origin discrimination, and granted the Executive Branch authority to enforce the law's provisions.<sup>83</sup> The following year Congress passed Title I of the Elementary and Secondary Education Act of 1965 (ESEA). Title I provided federal funds for remedial instruction to meet the educational needs of educationally disadvantaged children by channeling monies to communities with high concentrations of families living below the poverty level.<sup>84</sup> School districts that did not conform would be found ineligible for much-needed federal aid.

The Administration, however, understood that such a dramatic expansion in the federal role would raise concerns among the states. Affirming public statements made by the President himself, both Francis Keppel, then Commissioner of Education, and Democratic Congressman Adam Clayton Powell, Chairman of the House Education and Labor Committee, made clear that "the Federal Government must participate—not to seek domination, but to serve as a partner in a vital enterprise"<sup>85</sup> whose "determination" and "execution" would belong "to local and State educational authorities."<sup>86</sup>

Despite these assurances, government intervention gradually became more sweeping as the years wore on. Each additional dollar brought greater programmatic specifications and more federal control. In the process, the economic purposes of schooling became swallowed up in the spirit of equality. Though Keppel had hailed a "revolution of American education," joining quality and equality,<sup>87</sup> the outputs of student performance in fact were used

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82. HORACE MANN, FIFTH ANNUAL REPORT, *reprinted in* THE REPUBLIC AND THE SCHOOL, *supra* note 62, at 53.

83. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601-02, 78 Stat. 252, 252-53 (codified in scattered sections of 42 U.S.C.).

84. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.)

85. 111 CONG. REC. 880 (1965) (statement of Francis Keppel, Comm'r of Ed.).

86. 111 CONG. REC. 5734 (1965) (statement of Rep. Adam Clayton Powell).

87. FRANCIS KEPPEL, THE NECESSARY REVOLUTION IN AMERICAN EDUCATION 17 (1966).

merely as a tool for assessing federally funded programs. Equality of opportunity, or equal access, was no longer a means to a more productive society but an end in itself.

Meanwhile, the Cuban Revolution, the Vietnam War, and (in particular) the Hart-Cellar Immigration Act of 1965 dismantling immigration quotas set in motion a diverse flow of newcomers into the country. Together with the “Chicano” movement among Mexican-Americans, these seemingly disconnected events created a robust notion of group identity and interest group politics. They consequently posed new questions concerning the relationship between race and national origin that bore on equal educational opportunity and the government’s role in providing it.

As Minow demonstrates, within the rapidly changing political environment of the 1970s, the Civil Rights Act served as a template for subsequent laws that enabled federal regulators and the courts to enforce and extend *Brown*’s equality mandate beyond racial minorities and those faced with poverty to include the physically and emotionally handicapped,<sup>88</sup> linguistic minorities,<sup>89</sup> and women.<sup>90</sup> In that context, the concept became legally tied to notions of adequate, appropriate, and meaningful education. These measures were challenging for courts to define and for school officials to implement. By the mid-1970s, the social and economic strands of equality were colliding as the Court’s 1971 decision upholding intradistrict busing provoked rancorous debate and elected officials feared the political fallout.<sup>91</sup>

As that debate escalated, the Supreme Court and Congress quietly crafted a legal and political basis for the accountability movement that soon followed. In several key decisions and acts, each institution measured the right to equal access and the remedy for denial not by racial integration or equal resources

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88. See Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. §§ 701-796l (2006)) (“No otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

89. See Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, § 204, 88 Stat. 514, 515 (requiring states “to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs”).

90. See Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 236, 373 (“No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”) (codified as amended at 20 U.S.C. § 1681 (2006)).

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

but by student academic performance or outcomes.<sup>92</sup> In 1974 in *Lau v. Nichols*,<sup>93</sup> and again in 1977 in *Milliken v. Bradley (Milliken II)*,<sup>94</sup> the Court tied the remedy directly to compensatory programs designed to improve the quality of education and the academic gains of the plaintiff children. In the first, the Justices affirmed the right of Chinese-speaking students in San Francisco to a “meaningful” education that took into consideration their language differences.<sup>95</sup> In the second, the Court broadened desegregation remedies and goals beyond busing to achieve racial balance; upheld the use of remedial reading programs, guidance and counseling services; and revised testing measures to remedy the lingering effects of past discrimination.<sup>96</sup>

The link between instructional quality and student achievement, in fact, was central to the plaintiffs’ arguments in *Lau*, a case decided not under the Equal Protection Clause but under Title VI of the Civil Rights Act of 1964.<sup>97</sup> The Equal Educational Opportunities Act of 1974 (EEOA),<sup>98</sup> adopted just subsequent to the *Lau* decision, similarly focused on instruction and its effects on academic achievement. Feeling the sting of public opposition to court-ordered busing, in 1972 President Nixon had proposed that the Act’s emphasis on the quality of education programs would accomplish civil rights goals far more effectively.<sup>99</sup> Essentially intended as anti-busing legislation, the Act also prohibited the states from denying “equal educational opportunity” based on national origin and required states “to take appropriate action to overcome language barriers.”<sup>100</sup> In 1974 when the EEOA was finally passed, Congress

92. Adam R. Nelson, Rodriguez, Keyes, *Lau*, and *Milliken Revisited: The Supreme Court and the Meaning of “Equal Educational Opportunity,” 1973-1974*, in *TO EDUCATE A NATION*, *supra* note 66, at 202-24.

93. 414 U.S. 563 (1974).

94. 433 U.S. 267 (1977).

95. 414 U.S. at 566.

96. 433 U.S. 267.

97. For a discussion of the *Lau* litigation, see SALOMONE, *supra* note 74, at 119-36; Rachel F. Moran, *The Story of Lau v. Nichols: Breaking the Silence in Chinatown*, in *EDUCATION LAW STORIES 111* (Michael A. Olivas & Ronna Greff Schneider eds., 2008).

98. Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, § 204, 88 Stat. 514.

99. Address to the Nation on Equal Educational Opportunities and School Busing, 8 WEEKLY COMP. PRES. DOC. 590 (Mar. 16, 1972), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=3775&st=Busing&sti>.

100. Equal Educational Opportunities Act § 204(f).

further amended the Bilingual Education Act,<sup>101</sup> significantly increasing targeted funds to local school districts to promote this same goal.<sup>102</sup>

As these events unfolded in Washington, a confluence of forces—including an economic downturn with spiraling inflation—increased unemployment, decreased tax revenues, and forced spending cuts at the local and state levels.<sup>103</sup> The public began to question federal expenditures for compensatory programs and underfunded mandates, demanding greater accountability for educational outcomes from the public schools. That backlash fueled a state-level testing and standards movement that set the groundwork for stepped-up federal initiatives. As the 1970s drew to a close, and as the achievement gap between white and racial minority students continued to grow, there emerged a groundswell of opposition ostensibly to the equality principle but in fact to the specific reforms that were shaping *Brown's* legacy.

#### IV. ACCOUNTABILITY, TESTING, AND THE PRODUCTIVITY AGENDA

By the early 1980s, many states had adopted minimum competency tests as requirements for high school graduation. Proponents saw them as a means to assess and thereby to improve student learning. A federal appeals court decision lent constitutional legitimacy to that argument.<sup>104</sup> Critics, on the other hand, assailed the use of such high-stakes tests for the severe consequences that they imposed, especially on disadvantaged and minority students.<sup>105</sup>

In 1983, a flood of disquieting reports inundating American educators and the public further supported the reliance on test scores.<sup>106</sup> The most publicized

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101. Elementary & Secondary Education Amendments of 1974, Pub. L. No. 93-380, § 833, 88 Stat. 603.

102. Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CALIF. L. REV. 1249, 1271-72 (1988).

103. Nelson, *supra* note 92, at 203.

104. *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. Unit B May 1981), *reh'g en banc denied*, 654 F.2d 1079 (5th Cir. Sept. 1981) (remanding for further proceedings because the record was insufficient with regards to content validity, but indicating that tests would be constitutional if covered materials were strictly from the curriculum).

105. See generally GEORGE MADAUS, MICHAEL RUSSELL & JENNIFER HIGGINS, *THE PARADOXES OF HIGH STAKES TESTING: HOW THEY AFFECT STUDENTS, THEIR PARENTS, TEACHERS, PRINCIPALS, SCHOOLS, AND SOCIETY* (2009) (providing a history of educational testing in the United States and highlighting the dangers of using a single quantitative measure for all students and schools as the key instrument for reform).

106. The year 1983 appeared to be the “year of the report.” The major studies published included: ERNEST L. BOYER, *HIGH SCHOOL: A REPORT ON SECONDARY EDUCATION IN AMERICA* (1983); EDUC. COMM’N OF THE STATES TASK FORCE ON EDUC. FOR ECON. GROWTH,

and influential among them, *A Nation at Risk*,<sup>107</sup> rallied and energized the outcomes movement. President Ronald Reagan's Secretary of Education Terrel Bell had commissioned the report after the White House refused to sponsor it. Subtly invoking national security fears, the report warned of a "rising tide of mediocrity" imperiling American education.<sup>108</sup> The nation had expected too little of its schools over the previous two decades, having "squandered the gains in student achievement made in the wake of the Sputnik challenge" and committing "an act of unthinking, unilateral educational disarmament."<sup>109</sup>

The report's central thesis was that the performance of U.S. students was on a downward spiral and thereby threatened the nation's technological, military, and economic performance. The report cited test scores measuring a variety of aptitudes and subjects to demonstrate that the schools were failing. It then proposed standardized testing as a method to improve educational quality and thereby maintain the nation's position among its competitors. Though more overtly alarmist, the hauntingly familiar drift of the report both reflected the 1960s "War on Poverty" and foreshadowed the current "Race to the Top."

The compelling rhetoric of competition immediately caught the national imagination while equal educational opportunity swiftly fell from public attention. The first result is readily understandable. The second is somewhat more complicated. Patricia Albjerg Graham explains the shift as follows:

The goal of the policy, equal educational opportunity, was admirable. Making it happen was very difficult. . . . Efforts, undoubtedly inadequate, to provide equal opportunity failed to provide equal results. . . . Americans woke up to the fact that many of their children, particularly ones of color, had not mastered academic subjects. . . . For many Americans who did not want to be called racist, it seemed easier to fight for greater academic achievement, a goal that few would

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ACTION FOR EXCELLENCE (1983); JOHN J. GOODLAD, *A PLACE CALLED SCHOOL: PROSPECTS FOR THE FUTURE* (1983); NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATION REFORM* (April 1983) [hereinafter *A NATION AT RISK*], available at <http://www2.ed.gov/pubs/NatAtRisk/index.html>; and TWENTIETH CENTURY FUND TASK FORCE ON FED. ELEMENTARY AND SECONDARY EDUC. POLICY, *MAKING THE GRADE* (1983).

107. *A NATION AT RISK*, *supra* note 106; see also *A Nation at Risk: A 20-Year Reappraisal*, 79 PEABODY J. OF EDUC. 1 (2004) (providing a retrospective examination of the report and addressing whether the state of public schooling in the early 1980s was actually placing the nation at risk, which of the recommended policies were adopted and whether they led to educational improvement, and what risks and opportunities faced the nation twenty years later).

108. *A NATION AT RISK*, *supra* note 106, at 5.

109. *Id.*

dispute, than to deal with disparities in opportunity between blacks and whites, rich and poor directly.<sup>110</sup>

Apart from its historical and social significance, one would have expected *A Nation at Risk*'s troubling news to propel Washington into action. But those were the Reagan years and the President had ridden into the White House on the horse of "New Federalism." Arguing for the interests of state and local control and individual freedom, the Administration advanced an attack on numerous fronts—"budget reductions, deregulation, program consolidation," and cutbacks in civil rights enforcement among them.<sup>111</sup> In the end, though these measures reduced the size of the federal share of education funding from nine percent to 6.5 percent over eight years, they barely "touched its contours."<sup>112</sup> Other key proposals for granting tuition tax credits and dismantling the newly created Department of Education, together with efforts to erode equity-based programs for special student populations, remained stymied in Congress.

*A Nation at Risk* merely alluded to the achievement gap between white middle-class and low-income and minority students, with only a brief note on "equit[y]" and the dangers of "undemocratic elitism."<sup>113</sup> Yet despite the apparent oversight, the report's emphasis on test scores as a measure of the nation's productivity inevitably led to a more intense examination of those glaring student disparities. In 1984, the Department of Education began ranking the states according to scores attained by college-bound students on the ACT and SAT.<sup>114</sup> Within a year, thirty-five states had adopted new graduation requirements, twenty-two had enacted curriculum reforms, and twenty-nine had set new policies on testing.<sup>115</sup> As Michael Heise points out, state efforts to develop and implement standards and testing in turn gave political legitimacy to federal policies moving in the same direction.<sup>116</sup> In 1988, the ESEA reauthorization for the first time explicitly presented states as partners in federal reform efforts. It also was the first time that the law focused on educational outputs and not merely on inputs, tying academic performance

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110. GRAHAM, *supra* note 9, at 159-60.

111. SALOMONE, *supra* note 79, at 190-91.

112. PAUL MANNA, SCHOOL'S IN: FEDERALISM AND THE NATIONAL EDUCATION AGENDA 69 (2006).

113. A NATION AT RISK, *supra* note 106, at 13.

114. MARIS A. VINOVSIS, FROM A NATION AT RISK TO NO CHILD LEFT BEHIND: NATIONAL EDUCATION GOALS AND THE CREATION OF FEDERAL EDUCATION POLICY 18 (2009).

115. U.S. DEP'T OF EDUC., THE NATION RESPONDS: RECENT EFFORTS TO IMPROVE EDUCATION 144-46 (U.S. Government Printing Office 1984).

116. Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 133 (2006).

of Title I students to state-defined achievement levels as a means of identifying poorly performing schools.<sup>117</sup>

Beyond the Reagan years of federal retreat, and through successive presidential administrations, *A Nation at Risk* continued to inspire a push for national standards and increased federalization of education policy. The reform movement began to take clearer shape under President George H.W. Bush with the introduction of “America 2000,” a set of goals for U.S. schools to meet by the new millenium. Under the plan, the states would lead, and the federal government would provide support. Though the legislation failed to pass Congress, it served as the blueprint for President Bill Clinton’s “Goals 2000” program. Both Presidents Bush and Clinton considered themselves “education presidents.”<sup>118</sup>

Goals 2000 was a grant program meant to help states develop and implement standards for all students, not just for those participating in Title I programs. Congress adopted the initiative in 1994 to support the ESEA reauthorization known as the Improving America’s Schools Act. Together they more definitively transformed Title I and hence the federal role. To be eligible for funds under the Act, states had to create “challenging” content and performance standards in reading and math for all students, develop coordinated assessments, and establish plans for sanctioning failing schools.<sup>119</sup> Achievement standards for Title I and non-Title I students for the first time had to be the same. The Administration’s increased demands on state and local education agencies in exchange for federal dollars presaged even larger exactions in the decade to follow. But President Clinton’s plan to launch national standards never materialized.

Federal involvement in education, depending on how one looks at it, both increased and decreased under President George W. Bush. Paying lip service to civil rights protections while cutting back on enforcement, his administration dove deeply into state and local discretion over education programming. As the Great Society architects had overstated the importance of inputs to promote equal access, the Bush White House erred in the opposite direction. Achieving equal results took center stage while *Brown*’s equality mandate receded into the background. The centerpiece of that effort, the NCLB of 2001,<sup>120</sup> was the basis

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117. MANNA, *supra* note 112, at 73.

118. VINOVSIS, *supra* note 114, at 35, 61.

119. Improving America’s Schools Act, 20 U.S.C. §§ 6311(b)(A), (C) (2006); see JOHN F. JENNINGS, *WHY NATIONAL STANDARDS AND TESTS? POLITICS AND THE QUEST FOR BETTER SCHOOLS* 154-70 (1998).

120. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (expired September 30, 2007, but automatically extended until a new bill is enacted).

for a sweeping overhaul of federal education programs and priorities with testing and accountability as its driving force.

Using a similar but more comprehensive approach than the Improving America's Schools Act, the most significant changes in NCLB related to teachers, testing, and accountability.<sup>121</sup> Adopted with broad bipartisan support and the endorsement of liberal Democrats including its cosponsor Senator Edward Kennedy, NCLB presented far-reaching changes in the ESEA.<sup>122</sup> Yet, like the original ESEA, it used a carrot-and-stick approach to induce states and school districts into complying with federal requirements. Though NCLB expired in 2008, Congress has yet to reauthorize or replace it.

NCLB shifts the terminology from offering "equal educational opportunity" and "equal access" to closing the "achievement gap," a term now generally favored in education circles. The centerpiece of NCLB is a detailed system of student testing and school accountability. It requires each state to develop its own set of standards, which by the 2004-05 school year had to be linked to a state-developed program of annual assessments in reading and math for third to eighth grade students. The ultimate goal is for every student to perform at a proficient level by the year 2014. In the interim, each state has to submit to the U.S. Department of Education a report mapping out the annual yearly progress that schools are expected to make. If a school fails to meet that mark for more than two consecutive years, corrective action, which might lead to staff dismissals and school closings, must be taken. Failing schools must offer students free after-school tutoring and the opportunity to transfer to another school.

States applying for federal funds must agree to participate in the reading and math segments of the National Assessment of Educational Progress (NAEP). The NAEP, referred to as "The Nation's Report Card," is a federal testing program begun in 1969 that periodically assesses a representative sampling of students in grades four, eight, and twelve in several core academic subjects. It also tests a sample of students at ages nine, thirteen, and seventeen for long-term trends and aggregates scores by race, sex, and locale.<sup>123</sup> Comparisons between NAEP and state standardized test scores serve to measure the quality of the standards that states have adopted on their own.

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121. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 939 (2004).

122. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified in scattered sections of 20 U.S.C.).

123. National Center for Education Statistics, U.S. Department of Education, *NAEP Overview* (Aug. 16, 2010), <http://nces.ed.gov/nationsreportcard/about/>.

NAEP scores have been used to support successive waves of education reform since the 1970s.

The Obama Administration's *Blueprint for Reform*, released in March 2010, revisits a number of NCLB provisions.<sup>124</sup> It eliminates NCLB's school ratings based on the "annual yearly progress" on student test scores.<sup>125</sup> It also replaces the 2014 proficiency deadline with the goal for all students to leave high school "college and career ready" by 2020.<sup>126</sup> It thus attempts to avoid some of the weaknesses of NCLB. Yet its tone and substance are still long on testing and accountability and short on measures that directly support equal access. It calls on states to develop new academic standards along with statewide assessments that move students toward that goal. To that end, the National Governors Association has coordinated an effort among the states to develop the Common Core Standards, which, as of February 2011, had been adopted by forty-two states and territories and the District of Columbia.<sup>127</sup> The *Blueprint* assures that the federal government will continue to meet the needs of diverse learners, including English language learners and students with disabilities, though it offers no details. It also pledges support for additional public-school-choice options.

The plan reaffirms the Administration's Race to the Top initiative, announced in 2009.<sup>128</sup> Designed as a grant program, the initiative placed states in competition, based on meeting certain criteria, for \$4.35 billion in education stimulus funds allocated for fiscal year 2010. Applicants had to create data-driven systems for training and evaluating teachers and principals, encourage the establishment of high-quality charter schools, develop plans for turning around failing schools, demonstrate statewide political consensus for proposed reforms, and adopt the national education standards.

## V. THE RHETORIC AND REALITY OF REFORM

Both the No Child Left Behind Act and the more recent Obama Administration proposals raise a number of contentious issues that bear

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124. U.S. DEP'T OF EDUC., A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT (2010), available at <http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf>.

125. *Id.* at 9-10.

126. *Id.* at 4.

127. COMMON CORE STANDARDS INITIATIVE, <http://www.corestandards.org/in-the-states> (last visited Dec. 28, 2010).

128. Race to the Top Fund, 74 Fed. Reg. 59,836 (Nov. 18, 2009).

directly on *Brown's* legacy and the equality ideal. The most widely debated of these involves testing. Since 2002, all fifty states have implemented standardized testing schemes that measure student academic achievement in English reading (or language arts) and math. Twenty-six states use statewide tests as a graduation requirement or plan to do so in the near future.<sup>129</sup> The testing question provokes sharp disagreements, even among those who advocate on behalf of minority students. Some have employed tests as a sword, others as a shield. Some maintain that test results hold school officials' feet to the fire to move students successfully toward meeting state standards. But even here they argue that current testing fails to consider differences among students.<sup>130</sup> Many educators contend that the law "sets impossible goals for students and schools and humiliates students and educators when they fall short."<sup>131</sup>

As Diane Ravitch recently explained, "The problem with using tests to make important decisions in people's lives is that standardized tests are not precise instruments."<sup>132</sup> Even testing experts, she tells us, advise school officials that test scores should not be used "in isolation" but as part of a broader assessment of student performance including school grades, class participation, homework, and teacher assessments.<sup>133</sup> A striking irony of the accountability and testing movement is that sanctions for failure, the very means used to improve student achievement, have actually lowered the goals. As James Ryan and others have noted, NCLB left states to decide how difficult their tests would be, thus creating a perverse incentive for states to dilute their academic standards and proficiency thresholds, transforming a "race to the top" to a

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129. CTR. ON EDUC. POLICY, STATE HIGH SCHOOL EXIT EXAMS: TRENDS IN TEST PROGRAMS, ALTERNATE PATHWAYS, AND PASS RATES 1 (2010), [http://www.cepd.org/index.cfm?fuseaction=document\\_ext.showDocumentByID&nodeID=1&DocumentID=297](http://www.cepd.org/index.cfm?fuseaction=document_ext.showDocumentByID&nodeID=1&DocumentID=297).

130. See *Impact of No Child Left Behind on English Language Learners: Hearing Before the Subcomm. on Early Childhood, Elementary and Secondary Educ. of the H. Comm. on Educ. and Labor*, 110th Cong. 28-33 (2007) (statement of Peter Zamora, Co-Chair, Hispanic Education Coalition); WORKING GRP. ON ELL POLICY, IMPROVING EDUCATIONAL OUTCOMES FOR ENGLISH LANGUAGE LEARNERS: RECOMMENDATIONS FOR THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 6-7 (Mar. 25, 2010), <http://ellpolicy.org/wp-content/uploads/ESEAFinal.pdf>.

131. Sam Dillon, *Obama To Seek Sweeping Change in "No Child" Law*, N.Y. TIMES, Feb. 1, 2010, at A1.

132. DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION 152 (2010).

133. *Id.*

“race to the bottom.”<sup>134</sup> Rather than focusing on the quality of the educational experience for all students, states have “dumbed down” the test. The dramatic drop in New York City’s recalibrated scores on state-mandated tests, in the wake of tougher state standards, brought this reality to light.<sup>135</sup> The results should have come as no surprise to state and city officials. The tests were short and predictable and released publicly, thus making coaching each year easier.<sup>136</sup>

For critics of NCLB, like linguist Jim Cummins, federal and state policies impose a “pedagogical divide” in which “poor kids get behaviorism and rich kids social constructionism”—in other words, “skills for the poor and knowledge for the rich.” To underscore the absurdity of the situation, Cummins recounts the experience of a Maryland English-as-a-Second-Language (ESL) teacher who calculated that in the 2004–05 school year, English language learners in a fifth-grade class had missed thirty-three days of ESL classes, or about 18 percent of their English instruction, due to standardized testing.

Cummins and others agree that relegating lower-achieving students, many of them racial minorities, to a steady diet of English and math via “teaching to the test” denies them the comprehensive and enriching education—including the arts, social studies, science, literature, creative writing, civics, and foreign languages—that students from wealthier communities and private schools enjoy.<sup>137</sup> These subjects are often seen as the hook that gets students low in math and reading skills to “care about school” and to appreciate the point of reading beyond identifying “the main idea.”<sup>138</sup> A constant focus on test preparation also denies students the critical thinking and higher-order analytic skills essential for college and the workplace. Deep learning entails more than practicing strategies and memorizing facts. Not only are standardized tests inadequate for assessing important intellectual proficiencies, but evidence also suggests that high scores may actually correlate with a superficial approach to

134. JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* 10–11 (2010); see also Heise, *supra* note 116, at 144.

135. Jennifer Medina, *New Standards Mean More F’s in State Testing*, N.Y. TIMES, July 29, 2010, at A1.

136. Jennifer Medina, *State Long Ignored Red Flags on Test Scores*, N.Y. TIMES, Oct. 11, 2010, at A1.

137. Meteor Blades, *Jim Cummins Demolishes NCLB’s Ideology and Practice*, DAILY KOS (July 26, 2007, 11:49:56 AM), <http://www.dailykos.com/story/2007/7/26/131722/394> (quoting Jim Cummins’s remarks in a speech before the annual conference of the California Teachers of English to Speakers of Other Languages Association in San Diego on July 25, 2007).

138. LINDA PERLSTEIN, *TESTED: ONE AMERICAN SCHOOL STRUGGLES TO MAKE THE GRADE* 123 (2007).

learning.<sup>139</sup> The situation brings to mind the oft-quoted statement typically attributed to Albert Einstein: “Not everything that counts can be counted, and not everything that can be counted counts.”<sup>140</sup>

Recent data on the ACT test for college admissions (which covers English, reading, math, and science) give credence to the curriculum gap. While the numbers of black and Hispanic students taking the test have grown by 55% and 84% respectively over the past five years, both groups are far less likely than their white or Asian counterparts to have taken a minimum core curriculum that prepares them for college admissions. It is thus not surprising that in 2010, only 4% of blacks and 11% of Hispanics reached ACT score levels that are predictive of college success, as compared to 30% of white students and 39% of Asians.<sup>141</sup>

The Obama Administration’s reform proposals, in particular, contain a number of conditions for the receipt of competitive funds that have provoked vigorous debate. Supporters credit the approach with fueling innovation. Critics, on the other hand, question the wisdom of expending fiscal and political capital on programs like charter schools,<sup>142</sup> “turnaround” models,<sup>143</sup>

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139. See ALFIE KOHN, *THE CASE AGAINST STANDARDIZED TESTING: RAISING THE SCORES, RUINING THE SCHOOLS* 10 (2000).

140. See *THE NEW QUOTABLE EINSTEIN* 293 (Alice Calaprice ed., 2005) (suggesting that the quotation probably did not originate with Einstein); WILLIAM BRUCE CAMERON, *INFORMAL SOCIOLOGY* 13 (1967) (representing the possible origin of the quotation).

141. ACT, *THE CONDITION OF COLLEGE & CAREER READINESS* 3, 15 (2010), available at <http://www.act.org/research/policymakers/cccr10/pdf/ConditionofCollegeandCareerReadiness2010.pdf>.

142. See CTR. FOR RESEARCH ON EDUC. OUTCOMES, *MULTIPLE CHOICE: CHARTER PERFORMANCE IN 16 STATES* 3 (2009) available at [http://credo.stanford.edu/reports/multiple\\_choice\\_credo.pdf](http://credo.stanford.edu/reports/multiple_choice_credo.pdf) (finding that charter school students performed the same or worse on math tests than did students in traditional schools); CAROLINE M. HOXB, SONALI MURARKA & JENNY KANG, *THE NEW YORK CITY CHARTER SCHOOLS EVALUATION PROJECT: HOW NEW YORK CITY’S CHARTER SCHOOLS AFFECT ACHIEVEMENT IV-4* (2009), available at [http://www.nber.org/~schools/charterschoolseval/how\\_NYC\\_charter\\_schools\\_affect\\_achievement\\_sept2009.pdf](http://www.nber.org/~schools/charterschoolseval/how_NYC_charter_schools_affect_achievement_sept2009.pdf) (finding that charter schools closed the achievement gaps between inner-city students and their suburban counterparts).

143. See Andy Smarick, *The Turnaround Fallacy*, EDUC. NEXT, Winter 2010, at 21-26, available at <http://educationnext.org/the-turnaround-fallacy/> (reporting on studies finding that attempts to save failing urban schools by restructuring and other methods tend to prove unsuccessful and suggesting that they be closed); Richard D. Kahlenberg, *Turnaround Schools That Work: Moving Beyond Separate But Equal*, CENTURY FOUND., available at <http://tcf.org/events/pdfs/ev264/turnaround.pdf> (rejecting the conventional turnaround model of changing faculty and school governance in favor of conversion to a magnet school that attracts students of diverse socioeconomic class).

and tying teacher evaluations to student test scores,<sup>144</sup> that have yielded no consistent evidence of success on student test performance. As Diane Ravitch told the members of the National Education Association, “Equal educational opportunity is the American way. The race will have few winners and a lot of losers. That’s what a race means.” Tying teacher assessment, or even worse compensation, to test scores, she warned, “will promote teaching to not very good tests. It may or may not improve scores, but it definitely will not improve education.” She reminded the group that “[p]ublic schools are a cornerstone of our democratic society.”<sup>145</sup>

Democracy neither forms part of the current standards-and-testing vernacular nor plays into the movement’s objectives. In the Race to the Top initiative, the juxtaposition of a winners/losers paradigm (it is, after all, a “race”) with the democratic mission of schooling is revealing. It specifically uses terminology like “points,” “winner announcements,” and “finalists” in a competition for funds based not on student need but on narrowly defined state abilities. It measures those abilities by the state’s adherence to certain rules without considering differences among students. As a result, it treats students merely as means for collecting data in the interests of national productivity rather than as potential democratic actors.<sup>146</sup>

The composition of the second round of “winners” announced in August 2010 was especially eye-opening. Of the dozen states that received major grants, eleven were east of the Mississippi. The sole exception was Hawaii. It was clear that the rules favored densely populated Eastern states, placing the

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144. See ECON. POLICY INST., *EPI BRIEFING PAPER: PROBLEMS WITH THE USE OF STUDENT TEST SCORES TO EVALUATE TEACHERS* (2010) (report prepared by leading education scholars questioning the validity of student test scores in determining teacher performance); NAT’L CTR. ON PERFORMANCE INCENTIVES, *TEACHER PAY FOR PERFORMANCE: EXPERIMENTAL EVIDENCE FROM THE PROJECT ON INCENTIVES IN TEACHING* (2010) (reporting on three-year randomized study in Nashville, Tennessee public schools and finding that performance-based teacher compensation neither affected student achievement in math nor damaged school culture); NAT’L CTR. FOR EDUC. EVALUATION AND REGIONAL ASSISTANCE, *ERROR RATES IN MEASURING TEACHER AND SCHOOL PERFORMANCE ON STUDENT TEST SCORE GAINS* (2010), available at <http://ies.ed.gov/ncee/pubs/20104004/> (finding notable chance of teachers being misjudged by ranking systems based on only several years of student test scores); Stephen Sawchuk, *Merit-Pay Model Pushed by Duncan Shows No Achievement Edge*, EDUC. WK., June 9, 2010, at 1 (reporting on findings from Chicago showing no evidence that performance-based compensation for teachers boosted student achievement on math and reading tests).

145. Diane Ravitch, Educational Historian, Speech Delivered at the 2010 Representative Assembly (June 6, 2010), <http://www.nea.org/grants/40246.htm>.

146. Kathleen M. Collins & Joseph Valente, *[Dis]abling the Race to the Top*, TCHR. C. REC., June 17, 2010, <http://www.tcrecord.org/>.

nation's rural communities and sparsely populated Western regions at a competitive disadvantage. Small towns with just one school could not establish a charter school or attract new principals to failing schools. Rural states like Vermont, New Hampshire, Idaho, and Montana had neither the staff nor the resources to hire high-powered consulting groups like McKinsey to prepare proposals of 500-plus pages, as some of the winning states had done.<sup>147</sup> The results demonstrated how the Administration's overall shift from formula to competitive funding for such a large allocation of funds posed particular problems for small and underfunded school districts, diminishing equal access for their students.

In the Race to the Top Assessment Competition, all forty-four state applicants and the District of Columbia were part of at least one of the two winning consortia that agreed to develop a new generation of tests in math and English language arts for states to use voluntarily by the 2014-15 school year. One consortium will develop a series of interim tests administered throughout the school year with one end-of-year accountability test. The other will develop a series of formative assessments that will be averaged into one score for accountability purposes.<sup>148</sup> The new tests promise to measure higher-order thinking skills. Yet test results are valid for assessing learning only if they are tied to what students actually are taught, which demands a coordinated curriculum. In the meantime, funds for research and assessment development in other subject areas, like civics, foreign languages, and science, are given low priority and left to state discretion as part of a separate funding stream in the proposed ESEA reauthorization.

Aside from questions of validity and scope, there is the cost factor. Test construction, validation, and revision of this magnitude will undoubtedly demand billions of dollars, at a time when school districts nationwide are strapped for funds—science labs lack equipment; history classes use outdated books; school libraries lack technology; enrichment programs, including the

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147. Sam Dillon, *Winners of Aid for Education Are Mostly in the East*, N.Y. TIMES, Aug. 25, 2010, at A3.

148. Arne Duncan, U.S. Sec'y of Educ., Remarks to State Leaders at Achieve's American Diploma Project Leadership Team Meeting, *Beyond the Bubble Tests: The Next Generation of Assessments* (Sept. 2, 2010), <http://www.ed.gov/news/speeches/beyond-bubble-tests-next-generation-assessments-secretary-arne-duncans-remarks-state-l>; Press Release, Dep't of Educ., U.S. Secretary of Education Duncan Announces Winners of Competition To Improve Student Assessments (Sept. 2, 2010), <http://www.ed.gov/news/press-releases/us-secretary-education-duncan-announces-winners-competition-improve-student-asse>.

arts and athletics, are being cut or are based on the payment of a fee; and class sizes are growing as teachers lose their jobs.<sup>149</sup>

Though the Administration's strategies for improving education may resonate among the "winners," recent Gallup poll findings indicate that the same sentiment is not shared nationally. High grades for the President's performance in support of public schools are down from forty-five percent in 2009 to thirty-four percent. Four out of five Americans believe that it is not for the federal government but for the states to hold schools accountable for student achievement. Nor do Americans support firing teachers and principals or closing underperforming schools; rather, they prefer maintaining the existing staff with comprehensive outside support.<sup>150</sup>

Viewed in this light, the Race to the Top and *Blueprint for Reform*, with their "standards" agenda, threaten to undermine the dual promise of *Brown*: to break down barriers that impede equal opportunity and to preserve democratic government. Both plans effectively marginalize the needs of the individual child and underscore the continued return to a state-centered system of schooling. Despite the Administration's rhetoric of opportunity, the lineup of winners makes it appear inevitable that urban and suburban schools, as well as poor and wealthier schools, educate different groups of students. That realization stands in stark contrast to the original vision of the common school where children from "all walks of life come together to be educated under one roof."<sup>151</sup>

As the Gallup poll results suggest, the heavy-handed barrage of mandates and conditions emanating from Washington defies a long tradition of local and state control over education and raises serious federalism concerns. It uses the power of federal funding not merely to induce but to coerce financially desperate states into jumping onto an accelerated standards-and-testing treadmill that remains disconnected from what is taught and leaves little room

149. See, e.g., Andrea Billups, *School Budget Cuts Threaten Gains*, WASH. TIMES, Mar. 11, 2009, at A1, available at <http://www.washingtontimes.com/news/2009/mar/11/schools-cut-budgets-where-it-hurts-children-most/print>; Stacy Teicher Khadaroo & Amanda Paulson, *School Budget Cuts Across the US Projected for Next Academic Year*, CHRISTIAN SCI. MONITOR, Apr. 20, 2010, at 4, available at <http://www.csmonitor.com/USA/Education/2010/0420/School-budget-cuts-across-the-US-projected-for-next-academic-year>.

150. William J. Bushaw & Shane J. Lopez, *A Time for Change: The 42nd Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools*, KAPPAN (Phi Delta Kappa Int'l, Bloomington, In.), Sept. 2010, at 8, 10-11 (2010), available at <http://www.hcsao.org/sites/default/files/PDKGallupPoll2010.pdf>.

151. RYAN, *supra* note 134, at 245.

for teacher creativity or student differences.<sup>152</sup> It undermines the “partnership” relationship that architects of the Great Society programs promised in designing a new federal role four decades ago. And unlike the early common school, whose key objective to preserve democracy was truly for the public good, this slant toward economic production may not only harm some students but also poorly serve national interests. As a recent report pointedly stated, “America cannot be globally competitive in the 21st century . . . when we are able to identify by race, ethnicity, gender and zip code who is more likely to have an opportunity to learn.”<sup>153</sup>

Most fundamentally, the almost single-minded fixation on productivity undercuts *Brown’s* legacy guaranteeing an effective, appropriate, and meaningful education. It runs the risk of denying students—especially the most disadvantaged—the means of self-realization through a broad-based curriculum including the arts and literature. At the same time, it fails to equip them with the knowledge and skills needed to compete in a global economy. What seems to be lost on Washington is the reality of why other nations consistently outrank the United States on the Programme for International Student Assessment (PISA) exam: those nations provide students not simply with standards but with a comprehensive, content-rich education in the liberal arts and sciences.<sup>154</sup> The now highly touted Finnish schools are a clear case on point. In the 1980s, the country closed a resistant achievement gap by replacing state-mandated tests with well-trained teachers and “curriculum and assessments” geared toward “problem solving, creativity, independent learning, and student reflection.”<sup>155</sup> Though the Common Core Standards are a step in the right direction, they are meaningless unless tied to a core curriculum that states within our federal system may adopt at their discretion and not under the gun of federal sanctions or denials of competitive funds.

Merely focusing on economic competition, without a more expansive vision of schooling, also disserves the nation’s position as a leader in democratic governance. Though knowledge is essential for democratic participation, neither the *Race to the Top* nor the *Blueprint* thoughtfully and directly addresses this correlation, especially as it relates to changing demographics.

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152. See Heise, *supra* note 116, at 135–41 (discussing federal inducement versus coercion in the context of NCLB mandates).

153. SCHOTT FOUND. FOR PUB. EDUC., YES WE CAN: THE SCHOTT 50 STATE REPORT ON PUBLIC EDUCATION AND BLACK MALES 37 (2010), [www.blackboysreport.org](http://www.blackboysreport.org).

154. COMMON CORE, WHY WE’RE BEHIND: WHAT TOP NATIONS TEACH THEIR STUDENTS BUT WE DON’T 13–16 (2009), [http://www.commoncore.org/\\_docs/CCreport\\_whybehind.pdf](http://www.commoncore.org/_docs/CCreport_whybehind.pdf).

155. LINDA DARLING-HAMMOND, THE FLAT WORLD AND EDUCATION: HOW AMERICA’S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE 5 (2010).

Neither gives serious attention, for example, to the valuable linguistic and cultural resources that children from immigrant families, now twenty-two percent of the school-age population, bring to the school setting and the potential for those children to bridge the global divide.<sup>156</sup> Both plans likewise ignore the way in which mass migration is challenging notions of national identity and increasing the importance of citizenship education in promoting social cohesion.<sup>157</sup> There is no mention of the vital role that public schools play in cultivating the knowledge, values, and attitudes that make “good citizens” – citizens who embrace common political principles, a shared sense of allegiance and belonging, and a common historical memory while leaving room for differences at the margins.<sup>158</sup> Nor are there any defined objectives for promoting students’ critical and independent-thinking skills or active involvement that are crucial to a thriving democracy. These understandings and capacities are especially salient for the increasing number of children who live transnational lives, shuttling back and forth between the United States and their parents’ home countries, or whose families have little or no experience with democratic institutions.<sup>159</sup> The *Blueprint*, in fact, eliminates separate funding for foreign languages and civics, merging both into a larger competitive program including the arts, financial literacy, and environmental learning to ensure a “well-rounded education.”<sup>160</sup>

Even the early school reformers, though overzealous in promoting the state’s interests over those of the individual child, understood the connection between education and democratic citizenship. The Court in *Brown* affirmed the importance of both factors in forging a just society. As President Lyndon Johnson noted over four decades ago “[F]reedom is fragile if citizens are

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156. See SALOMONE, *supra* note 74, at 9; Nick Anderson, *U.S. Students in the Middle of Global Pack*, WASH. POST, Dec. 7, 2010, at A4.

157. See generally WOLFRAM SCHULZ ET AL., INITIAL FINDINGS FROM THE IEA INTERNATIONAL CIVIC AND CITIZENSHIP EDUCATION STUDY 13 (2010), available at [http://www.iea.nl/fileadmin/user\\_upload/ICCS/ICCS\\_2010\\_Initial\\_Findings.pdf](http://www.iea.nl/fileadmin/user_upload/ICCS/ICCS_2010_Initial_Findings.pdf) (studying the ways in which countries prepare their children to undertake their roles as citizens).

158. See CIRCLE (THE CENTER FOR INFO. & RES. ON CIVIC LEARNING & ENGAGEMENT) & CARNEGIE CORP. OF N.Y., THE CIVIC MISSION OF SCHOOLS (2003), <http://www.civicmissionofschools.org/site/campaign/documents/CivicMissionofSchools.pdf&pli=1>.

159. See SALOMONE, *supra* note 74, at 238.

160. Rosemary C. Salomone, *The Foreign Language Defecit: A Problem in Search of an Obvious Solution*, TCHR. C. REC., Jan. 28, 2011, available at <http://www.tcrecord.org/PrintContent.asp?Contentid=16317>.

ignorant.”<sup>161</sup> The productivity agenda, in the end, supports neither education nor democracy in its rush to win the global economic race.

All of this is not to suggest that the Obama Administration has turned its back on equal educational opportunity. To its credit, the Administration has taken up an ambitious civil rights agenda. With 102 positions added to its 2010 budget, the Department of Justice is pursuing civil rights violations on broad fronts including education.<sup>162</sup> In a March 2010 speech marking the 45th anniversary of the “Bloody Sunday” march in Selma, Alabama, Secretary of Education Arne Duncan likewise laid out the Department of Education’s plans to “reinvigorate civil rights enforcement” in the nation’s schools, including compliance reviews to assure equal access to college-prep courses and equal treatment regarding school discipline.<sup>163</sup> The Department’s Office for Civil Rights (OCR), as of October 2010, was reviewing violations regarding English language learners in eight school districts while the Justice Department has opened fifteen similar investigations since January 2009.<sup>164</sup> OCR has launched five compliance reviews on racial disparities in school discipline while applying a disparate-impact analysis, a course of action that some civil rights leaders maintain was neglected during the previous Administration.<sup>165</sup> In October 2010, OCR issued guidelines on school bullying as a possible violation of civil rights laws.<sup>166</sup> These actions, focused on educational procedures, are indeed noteworthy and hopefully will serve as a bulwark against discriminatory practices in the schools. Nonetheless, they do not negate equity-based concerns over other federal initiatives, especially as they relate to conditions on federal funding that directly affect educational quality in a more substantive way.

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161. President Lyndon B. Johnson, Special Message to Congress, *Toward Full Educational Opportunity* (Jan. 12, 1965), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=27448>.

162. Byron York, *Obama’s Zealous Civil Rights Enforcer Gets Busy*, THE EXAMINER (Aug. 6, 2010, 2:00 AM), <http://washingtonexaminer.com/print/politics/obama039s-zealous-civil-rights-enforcer-gets-busy>.

163. Arne Duncan, U.S. Sec’y of Educ., *Crossing the Next Bridge: Remarks on the 45th Anniversary of “Bloody Sunday” at the Edmund Pettus Bridge, Selma, Alabama* (Mar. 8, 2010), available at <http://www2.ed.gov/print/news/speeches/2010/03/03082010.html>.

164. Mary Ann Zehr, *ELL Civil Rights Probes Span from Coast to Coast*, LEARNING THE LANGUAGE (Oct. 7, 2010, 2:54 PM), [http://blogs.edweek.org/edweek/learning-the-language/2010/10/ell\\_civil\\_rights\\_probes\\_span\\_c.html](http://blogs.edweek.org/edweek/learning-the-language/2010/10/ell_civil_rights_probes_span_c.html).

165. Mary Ann Zehr, *School Discipline Inequities Become a Federal Priority*, EDUC. WK., Oct. 13, 2010, at 15.

166. Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. (Oct. 26, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

## CONCLUSION

In sorting through the issues raised in current education debates, one senses that we are living through a transformative moment in American schooling. The affirmative move in program funding and conditions away from equality to productivity, with direct curricular implications, is cutting deeply into the nation's thinking on educational purposes and the federal government's role in shaping education policy. Never before have policymakers expected Americans uniformly to embrace "results," defined in terms of measurable achievement, as the overarching goal of public schooling.

Looking back at other key historic moments, this turn is indeed striking. A century ago, assimilation was the primary objective. Helping children "become American" simply meant English language proficiency and acceptance of society's cultural norms and political values. When the Great Society programs changed that objective to access, the project was to level the playing field, often by allocating additional funds so that students could effectively benefit from programs appropriate to their needs. Both of these purposes unquestionably have merit. Nonetheless, each standing alone and pushed to the "extreme" ultimately proved inadequate and demanded a rethinking of the school's role in society.<sup>167</sup>

To be sure, academic achievement is a central purpose of schooling. And while social factors – including wealth, parental expectations, community social capital, and family stability – undeniably affect student test scores, schools need to be held accountable at least in part for student learning. Measuring the quality of schools simply by the resources that they receive shortchanges the students they are designed to serve. This is especially the case for black and Hispanic students whose test scores remain lower and whose dropout rates remain higher than those of their white and Asian counterparts.<sup>168</sup>

Whether the Obama Administration's pending *Blueprint for Reform* or its civil rights enforcement efforts will survive a politically divided Congress remains a question. There already are signs that the now Republican-led

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167. GRAHAM, *supra* note 9, at 160-61.

168. See SUSAN AUD, MARY ANN FOX & ANGELINA KEWALRAMANI, NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T EDUC., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS (2010), available at <http://nces.ed.gov/pubs2010/2010015.pdf> (examining the academic progress made by racial minority students and the persistent challenges that they face as compared with their white counterparts); PAUL E. BARTON & RICHARD J. COLEY, THE BLACK-WHITE ACHIEVEMENT GAP: WHEN PROGRESS STOPPED 5-6 (2010), available at <http://www.ets.org/Media/Research/pdf/PICBWGAP.pdf>.

House of Representatives will not enact the *Blueprint*.<sup>169</sup> Yet one thing is certain: the pendulum will continue to swing toward the pole of productivity. As it does, we must not lose sight of *Brown*'s dual promise to provide equal opportunities to all students regardless of individual circumstances or group identity as well as to promote democratic participation. As political leaders continue to roll out achievement-based proposals, we must avoid what appears to be a misguidedly narrow focus, understanding that schooling has multiple purposes—not the least of which are those underscored in the Court's groundbreaking decision.

In the end, we should strive toward designing an education agenda that incorporates, in a measured, way the political vision of the early common school and the social awareness of post-*Brown* reforms, while still maintaining the nation's competitive edge in the global economy.

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169. Sam Dillon, *New Challenges for Obama's Education Agenda in the Face of a G.O.P.-Led House*, N.Y. TIMES, Dec. 12, 2010, at A36.