

PICKING THROUGH THE REMNANTS OF *BROWN V. BOARD*
TO REALIZE THE IDEAL OF QUALITY PUBLIC EDUCATION
FOR ALL CHILDREN IN THE POST COVID-19 ERA

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INTRODUCTION

The United States Supreme Court's decision in *Brown v. Board of Education* set the apex for constitutional and educational equality among racial groups.¹ The Court not only set legal precedent but also began to erode social norms. Most importantly, the Justices re-vitalized the principle of education as the great equalizer. Education advocates reinterpret the *Brown* opinion's effects in generational waves, which have included finance equity,² affirmative action in admissions,³ reform for disabled students,⁴ and performance standards.⁵ The COVID-19 pandemic greatly exposed the fissures in education equality across race and socioeconomic lines.⁶

Brown, above and beyond eliminating the "separate but equal" doctrine, presented many socio-legal principles that were abdicated or diluted during the government's COVID-19 response. This Article will address several strands recognized throughout the opinion's seventy-year history by the courts and legal commentators that were illuminated during this period. First, the pursuit of quality education remains elusive for people of color and students from lower socioeconomic backgrounds.⁷ Second, public education continues to be an aspirational pathway to upward social mobility and building a democracy composed of educated citizens.⁸ Third, the

1. See generally *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954); *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

2. See Andrea Alajbegović, *Still Separate, Still Unequal: Litigation as a Tool to Address New York City's Segregated Public Schools*, 22 CUNY L. REV. 304, 308-09 (2019).

3. See Brian Willoughby, *Brown v. Board: An American Legacy*, S. POVERTY L. CTR. LEARNING FOR JUST., Spring 2004, <https://www.learningforjustice.org/magazine/spring-2004/brown-v-board-an-american-legacy> [https://perma.cc/NEB9-U5SH] (statement of historian and commentator Juan Williams) ("And even today, as we argue about affirmative action in colleges and graduate schools, the power of *Brown* continues to stir the nation.").

4. See *id.* (explaining how movements advocating for "the rights of people with disabilities" were "fueled by *Brown*").

5. See Alajbegović, *supra* note 2, at 324.

6. See U.S. DEP'T OF EDUC., OFF. FOR C.R., EDUCATION IN A PANDEMIC: THE DISPARATE IMPACTS OF COVID-19 ON AMERICA'S STUDENTS 6, 11 (2021), <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf> [https://perma.cc/5C64-3PVH].

7. *Id.* at i.

8. See Raquel Muñoz, *Education Law and Policy in the Time of COVID-19: Using a Legal Framework to Expose Educational Inequity*, AERA OPEN, Jan.-Dec. 2021, at 5, <https://journals.sagepub.com/doi/10.1177/23328584211054107> [https://perma.cc/8THG-2SFC].

anti-subordination construction, as opposed to the anti-classification interpretation, of the Fourteenth Amendment would have proven better suited to ensuring the educational progress of disadvantaged students, including those students who did not fall into an identifiable protected class.⁹ Fourth, the need for school districts with strained budgets to provide wraparound services in metropolitan and rural areas is analogous to the critique that *Brown* stopped short of taking a holistic approach to achieving quality public education.¹⁰ Desegregation in and of itself overlooked other contributing factors that negatively affected the goal of quality education.

Brown marked the beginning of a social movement generations in the making that moved on to produce the Civil Rights Act; affirmative action policies; Black Lives Matter; and diversity, equity, and inclusion (DEI) initiatives. The anti-subordination, as opposed to the anti-classification, ideal represents a common thread through each push for social change.¹¹ However, unlike the *Brown* era, the disparities in public education due to the COVID-19 pandemic have not received the same concentrated public protest found in the desegregation protests of the 1950s. The COVID-19 recovery has been slow across many sectors, and this is especially true in public education due to the lackluster government response and lack of a nationwide effort to combat the potential generational deficiency that has arisen from the pandemic.¹² Judicial and legislative advancements for adequately educating identifiable protected

9. See Jack M. Balkin, *Brown v. Board of Education—A Critical Introduction*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 10-13 (Jack M. Balkin ed., 2001). The anti-subordination principle is characterized as embracing “equal citizenship,” whereas the anti-classification principle is described as adopting the idea of “color-blindness.” See *id.* at 11 (discussing the anti-subordination interpretation of *Brown* used to support affirmative action plans in employment and education).

10. See *id.* at 6, 66; Bruce Ackerman, *Revised Opinions in Brown v. Board of Education*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 116 (Jack M. Balkin ed., 2001).

11. See Balkin, *supra* note 9, at 11; MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 381 (2004) (discussing the motivation behind direct-action protests).

12. See Karyn Lewis & Megan Kuhfeld, *Education’s Long COVID: 2022-23 Achievement Data Reveal Stalled Progress Toward Pandemic Recovery*, *CTR. FOR SCH. & STUDENT PROGRESS* 8-9 (2023), https://www.nwea.org/uploads/Educations-long-covid-2022-23-achievement-data-reveal-stalled-progress-toward-pandemic-recovery_NWEA_Research-brief.pdf [<https://perma.cc/YU5S-Q9RM>] (explaining the nation’s slow recovery from the COVID-19 pandemic and the resulting toll on student achievement).

groups and disadvantaged students seeking a quality public education have subsequently experienced setbacks through judicial and legislative curtailments.¹³ The COVID-19 response and the continued post-COVID-19 challenges require a joint federal, state, and local solution.

I. PRINCIPLES OF *BROWN V. BOARD OF EDUCATION*

The elimination of “separate but equal” in public schools will always stand as *Brown*’s primary contribution. De jure and de facto segregation pervaded public schools in the Jim Crow Era across both southern and northern states.¹⁴ The anniversary of *Brown* ushers in an era with not much less segregation than found seventy years ago at the opinion’s writing.¹⁵ Over time, social justice advocates retreated from the desegregation goal¹⁶ and shifted their efforts to delivering a quality education to communities of color.¹⁷ This transition in focus was met with resistance from some frontline litigators and race advocates, but others persuasively gave merit to fighting for the core ideals that ignited the socio-legal movement.¹⁸

First and foremost, *Brown* sought a quality education for Black children to encourage social mobility and participation as fully educated citizens.¹⁹ *Brown* emphasized the importance of education to a democratic society by fostering “good citizenship,” conveying “cultural values,” and providing “professional training.”²⁰ The desegregation litigation was adopted as the best means to an end. *Brown*

13. See Balkin, *supra* note 9, at 66.

14. See Wendy B. Scott, *The Unfinished Business of Desegregation: Race Conscious College Admissions*, 32 WM. & MARY BILL RTS. J. 321, 334 (2023); see also Alajbegović, *supra* note 2, at 313-14 (“De jure segregation is found when ‘a current condition of segregation result[s] from intentional state action directed specifically to the [allegedly segregated] school[.]’” (quoting *Missouri v. Jenkins*, 515 U.S. 70, 115 (1995) (Thomas, J., concurring) (alterations in original))).

15. Muñiz, *supra* note 8, at 6.

16. Scott, *supra* note 14, at 335.

17. See DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 114-15 (2004).

18. See *id.* at 115.

19. See Muñiz, *supra* note 8, at 5, 7.

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

recognized that equal resources alone do not make for a quality educational experience.²¹

Brown II's prescription for implementing *Brown I* "with all deliberate speed" unexpectedly set up first steps for the division of authority for federal versus local control in public education and the appropriate role of the courts.²² In light of COVID-19, it can clearly be seen that more focus needs to be placed on creating equity of funding to ensure that students can have quality teachers, facilities, instruction, and learning materials, whether attending segregated or diverse public schools.²³ Finally, *Brown* set the foundation for the decades-long policymaking efforts seeking integration, affirmative action, and most recently, DEI policies.²⁴

A. *Deterioration of Brown v. Board's Legacy*

Although the Supreme Court decided many cases post-*Brown*, there are pivotal holdings since the decision that frame the U.S. government's failure to properly address the COVID-19 response. The Warren Court set forth broad language regarding the importance of education and the need to desegregate schools "with all deliberate speed."²⁵ In *Swann v. Charlotte-Mecklenburg Board of Education*, the Supreme Court empowered district courts to craft remedial desegregation plans when school officials did not present an effective plan.²⁶ The Court held that the desegregation plan's scope should be proportionate to the continuing violation.²⁷ *Keyes v. School District No. 1, Denver, Colorado* recognized that de facto segregation violated *Brown*'s proscription of segregated schools in the same way as de jure segregation.²⁸ Next, in *Milliken v. Bradley*, the Court held that metropolitan desegregation plans across school

21. See *id.* at 495.

22. See *Brown II*, 349 U.S. 294, 301 (1955).

23. See U.S. DEP'T OF EDUC., OFF. FOR C.R., *supra* note 6, at 6.

24. See Muñoz, *supra* note 8, at 5, 7-8.

25. *Brown I*, 347 U.S. at 493 (highlighting the importance of education); *Brown II*, 349 U.S. at 301 (calling for the district courts to immediately admit affected students to public schools).

26. 402 U.S. 1, 30 (1971).

27. *Id.* at 16.

28. 413 U.S. 189, 214-15 (1973) (Douglas, J., concurring).

districts were unconstitutional.²⁹ Here, the federal district court drafted a revolutionary desegregation plan to address the issues of white flight and wealth disparities in the greater Detroit metropolitan area that included suburban districts outside the Detroit Public School District.³⁰ The district court proposed a plan that included representations from this enlarged desegregation area to altogether constitute an “effective desegregation plan.”³¹ The Supreme Court overruled the lower court, reasoning that “an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race.”³² However, those valid reasons for an interdistrict remedy were not present in the case.³³ In *Missouri v. Jenkins*, further interpreting *Brown*, the Court focused on the state’s obligation to fund a quality education through salary increases and remedial programs meant to close the achievement gap across multiple grade levels.³⁴

Following *Brown*, the issue of single race school districts caused by white flight became prevalent, and according to *Freeman v. Pitts*, there is no way for a school district to intervene in segregated districts resulting from white flight.³⁵ Thus, *Brown* failed to anticipate some of the challenges in actually creating integrated schools in the country. Finally, in *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court applied strict scrutiny to a voluntary desegregation plan.³⁶ The Supreme Court recognized only two permissible compelling government interests that may support assigning students based on race: (1) “remedying the effects of past intentional discrimination,” and (2) “diversity in higher education.”³⁷ In summation, Chief Justice Roberts, writing on behalf of the Court’s majority, emphasized that “[t]he way to stop discrimination

29. 418 U.S. 717, 740-41, 745 (1974).

30. *Id.* at 725, 766.

31. *Id.* at 766.

32. *Id.* at 745.

33. *Id.*

34. See *Missouri v. Jenkins*, 515 U.S. 70, 100 (1995).

35. See 503 U.S. 467, 496 (1992).

36. 551 U.S. 701, 709-10, 720 (2007).

37. *Id.* at 720, 722.

on the basis of race is to stop discriminating on the basis of race”—the classic anti-classification, colorblind interpretation of the Equal Protection Clause.³⁸ The anti-classification interpretation, as opposed to the anti-subordination interpretation of the Equal Protection Clause, has calcified the issues that *Brown* advocates sought to redress with their litigation campaign.³⁹ In *Parents Involved*, Chief Justice Roberts’s closing argument overlooks the reality that the quality of public education can be traced to a student’s race and socioeconomic status.⁴⁰ It remains evident at present that race-blind school assignments based on neighborhood placements, which ignore current patterns of demographic redistribution dating back to white flight, prove, at best, ignorance of educational patterns and, at worst, an intentional act to harm students of color.

The federal judiciary’s involvement with school desegregation came to an end with changes in the Court’s composition. For the purposes of this Article, two cases are pivotal, but not exclusive, to appreciating the difficulty in COVID-19-era students bringing an equal protection claim using the *Brown* principles: *Milliken v. Bradley*, which refused to recognize interdistrict segregation as a *Brown* violation in certain circumstances,⁴¹ and *Parents Involved in Community Schools v. Seattle School District No. 1*, which found unconstitutional a voluntary desegregation plan.⁴²

B. Critiques of Brown v. Board

The fiftieth anniversary of *Brown* gave constitutional scholars the opportunity to reflect on the opinion’s significance when handed down and its enduring impact decades later. At the time of the *Brown* decision, similar to today, public schools were greatly segregated and minority communities had inferior resources and diminished access to quality education.⁴³ In his book *Silent Covenants*, Derrick Bell wrote extensively about *Brown*, including his professional experiences attempting to implement desegregation

38. *Id.* at 748.

39. See Balkin, *supra* note 9, at 11-13.

40. See *Parents Involved*, 551 U.S. at 746-47.

41. See 418 U.S. 717, 745 (1974).

42. See 551 U.S. at 730, 748.

43. See Balkin, *supra* note 9, at 3, 7, 12.

plans and his changed perspective in hindsight.⁴⁴ Bell recounts the brave parents and advocates in the southern states that tirelessly strategized to implement *Brown*'s promise through the courts.⁴⁵ The lackluster results and dogged resistance transformed his approach in seeking a quality education for Black school children.⁴⁶ He eventually turned his attention to the underlying core pursuit of equity as opposed to the integration statistics.⁴⁷

In the compilation *What Brown v. Board of Education Should Have Said*, several hypothetical opinions were written to explore what the Warren Court could have written to better address the future state of public education.⁴⁸ Jack Balkin prefaces these opinions with the thought that “[t]he use made of *Brown* is often criticized, but the idea of *Brown* remains largely sacred in American political culture.”⁴⁹ Every contributor other than Derrick Bell wrote a concurrence-style opinion.⁵⁰ John Hart Ely concluded that the Constitution neither requires nor prohibits public schools from seeking racial balance across all student populations in the district, which would apparently address the *Parents Involved* dilemma.⁵¹ Ely’s reasoning was that the Fourteenth Amendment was meant to protect racial minorities “from unequal treatment at the hands of the law, and ... was not intended to be tethered by ... future attempt[s] to guess what particular instances of inequality our 1868

44. See generally BELL, *supra* note 17.

45. See *id.* at 114-15.

46. See *id.*

47. See *id.*

48. Jack M. Balkin, Drew S. Days III, Bruce Ackerman, Frank I. Michelman, John Hart Ely, Catharine A. MacKinnon, Michael W. McConnell, Cass R. Sunstein & Derrick A. Bell, *Revised Opinions in Brown v. Board of Education*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 77-200 (Jack M. Balkin ed., 2001) (setting forth a revised opinion of *Brown* that includes a majority opinion authored by Jack Balkin, seven concurring opinions, and a dissenting opinion).

49. See Balkin, *supra* note 9, at 4. Balkin points out that the opinion is often criticized for being “inartfully written, that it depended too much on social science literature, that it did not go far enough, or that it has been misinterpreted by legal and political actors to promote an unjust political agenda.” *Id.*

50. See Derrick A. Bell, *Revised Opinions in Brown v. Board of Education*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 185 (Jack M. Balkin ed., 2001).

51. See John Hart Ely, *Revised Opinions in Brown v. Board of Education*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 139-40 (Jack M. Balkin ed., 2001); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

forebears had at the forefront of their minds.”⁵² In addressing the social science, Catharine MacKinnon dispels any notion that the constitutional harm lies in the children’s thoughts, instead reframing the harm as “the construction put upon the colored children by the imposed arrangements that constitutes the harm of the segregation that forms the core of the injury to equality rights.... Nothing the children thought or felt—their construction of it, as it were—created or could have changed that.”⁵³ Derrick Bell’s proposed dissent demanded “[r]ealistic rather than symbolic relief for segregated schools [with] a specific, judicially monitored plan designed primarily to promote educational equity.”⁵⁴ Finally, Balkin and Ackerman drew upon original intent to build a national citizenship to support the *Brown* opinion.⁵⁵

C. *Brown v. Board as Applied to Other Groups*

Brown laid the foundation for the recognition of other forms of discrimination, established the importance of the right to education, and highlighted the importance of education. In 1974, following *Brown*, Congress passed the Equal Educational Opportunities Act.⁵⁶ The Act expanded upon *Brown* by prohibiting discrimination in schools and requiring equal opportunity for students regardless of race, color, sex, and national origin.⁵⁷ The anti-discrimination sentiment of *Brown* was extended to other minorities, including language minorities. This was evidenced in *Castaneda v. Pickard*, which created a three-part standard for evaluating English for Speakers of Other Languages (ESOL) programs.⁵⁸

Specifically, the Equal Educational Opportunities Act inspired advocates to expand the reach of *Brown* beyond racial equality in public education to other underserved groups. In time, the opinion

52. See Ely, *supra* note 51, at 135.

53. See Catharine A. MacKinnon, *Revised Opinions in Brown v. Board of Education*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 147 (Jack M. Balkin ed., 2001).

54. See Bell, *supra* note 50, at 187.

55. See Jack M. Balkin, *Revised Opinions in Brown v. Board of Education*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 87; Ackerman, *supra* note 10, at 101.

56. See Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, 88 Stat. 514 (1974) (codified as amended at 20 U.S.C. § 1701).

57. 20 U.S.C. § 1701(a)(1).

58. See 648 F.2d 989, 1009-10 (5th Cir. 1981).

improved the public education services provided to immigrant children, students with physical and learning disabilities, and girls.⁵⁹ The language employed by the Court and Congress to spread *Brown*'s promise to these discrete groups created an intricate web of legal doctrine and policy that needs resurrecting in order for the country to overcome the setbacks caused by the government's less than ideal COVID-19 response.

II. THE MINIMAL "IMPORTANCE" OF QUALITY EDUCATION

A. *Equitable Resource Distribution for Preparing Good Citizens*

As reflected in the history of *Brown*, many organizers, activists, and community members wanted to fight for quality education and education as a fundamental right. Educational equality met its constitutional match when advocates isolated socioeconomic differences as an impediment to receiving a quality learning experience in public schools.

In *San Antonio Independent School District v. Rodriguez*, Mexican-American parents from an urban district in San Antonio brought a class action lawsuit on behalf of both minority children and poor students attending schools in high poverty districts with a low property tax base.⁶⁰ The Court once again acknowledged *Brown*'s words that "education is perhaps the most important function of state and local governments."⁶¹ However, the importance placed on education does not translate into quality education qualifying as a constitutional fundamental right under the Equal Protection Clause.⁶² The plaintiffs' arguments pressed the Court to make comparisons regarding other fundamental rights.⁶³ If we consider the wraparound services necessary to sustain the COVID-19 students from high-poverty districts, the Court's response may be found in its statement that:

59. See Derek Black, Robert A. Garda, Jr., John E. Taylor & Emily Gold Waldman, *EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM* 15-16 (3d ed. 2021).

60. 411 U.S. 1, 4-5 (1973).

61. *Id.* at 111 (quoting *Brown I*, 347 U.S. 483, 493 (1954)).

62. *Id.* at 30.

63. See *id.* at 31-32 ("The right to interstate travel has long been recognized as a right of constitutional significance.").

It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is “fundamental” is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing.⁶⁴

But we know that these concerns were inextricably linked for explaining COVID-19 educational disparities and were highlighted in the *Brown* critiques regarding the inability of the judiciary to fully appreciate interlocking social disadvantages.⁶⁵

The *Rodriguez* plaintiffs also touched upon the national citizenship ideal brought to fruition only through a quality education: free speech and the right to vote.⁶⁶ The Court responded by saying that “we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice.... [T]hey are not values to be implemented by judicial intrusion into otherwise legitimate state activities.”⁶⁷

The Court comes to the conclusion that reflects the retreat apparent in the desegregation cases—that federal courts should not get involved in local education matters even though at the highest level under the Equal Protection Clause, we are attempting to proliferate an educated national citizenry. The *Rodriguez* majority surmised that:

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short.... [T]hat argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made

64. *Id.* at 33.

65. *Cf. id.* (citing *Lindsey v. Normet*, 405 U.S. 56, 74 (1972)) (discussing the lack of judicial authority to assure adequate housing absent a constitutional mandate as an example of a specific social disadvantage).

66. *See id.* at 35.

67. *Id.* at 36.

that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.⁶⁸

The *Brown* movement's efforts were so heavily focused on racial integration that the educational gaps between Black and white students momentarily took a back seat.⁶⁹ Unfortunately, the efforts to understand the appropriate equity principles and resource allocation continue to be a stumbling block. More equitable educational opportunities are provided when the approach considers support to specific populations.⁷⁰ Therefore, *Rodriguez* proves an ever-lasting obstacle to attaining quality education,⁷¹ despite the shift to pursuing remedies via state constitutions.⁷²

In *Rodriguez*, the Court dispensed a disappointing setback to education law progressives, yet simultaneously ignited the prominence of state constitutions to move along the strides initiated with the *Brown* opinion. Here, the Court made two critical declarations: (1) quality education is not a fundamental right guaranteed under the Constitution, and (2) socioeconomic status is not an identifiable protected classification to be analyzed under strict scrutiny.⁷³

Following the defeat in *Rodriguez*, public education advocates turned to state constitutions for improvement. State constitutions provided hope through the judicial system through various clauses. Some states explicitly recognized education as a fundamental right, whereas others guaranteed a baseline level of educational quality to be defined by the courts—characterized as an “an efficient,

68. *Id.* at 36-37.

69. See U.S. DEP'T OF EDUC., OFF. FOR C.R., *supra* note 6, at i (highlighting how disparities in the quality of education existed “long before the COVID-19 pandemic”).

70. See Roslin Growe & Paula S. Montgomery, *Educational Equity in America: Is Education the Great Equalizer?*, 25 PRO. EDUCATOR 23, 25 (2003).

71. 411 U.S. at 30 (concluding that the importance of a quality education does not mean it is a fundamental right).

72. See SCOTT DALLMAN & ANUSHA NATH, EDUCATION CLAUSES IN STATE CONSTITUTIONS ACROSS THE UNITED STATES, FED. RESERVE BANK OF MINNEAPOLIS 2-3 (2020), <https://www.minneapolisfed.org/~media/assets/articles/2020/education-clauses-in-state-constitutions-across-the-united-states/education-clauses-in-state-constitutions-across-the-united-states.pdf?la=en> [<https://perma.cc/FT56-Z6BJ>].

73. See *Rodriguez*, 411 U.S. at 28-30.

adequate, or thorough system of public education to all residents.”⁷⁴ Pursuant to these provisions, plaintiffs have successfully forced the reform of state funding in order to attain the resources necessary to secure equal educational opportunity for poor students as compared to students in wealthier districts.⁷⁵

After *Rodriguez*, many states addressed finance inequity pursuant to their state constitutional education quality clauses. The State of New Hampshire provides an example of the protracted nature and complexities surrounding these cases. The so-called *Claremont* cases, decided in 1993 and 1997, held that New Hampshire had violated the state constitutional requirement to provide an adequate education to all school children.⁷⁶ In two cases brought nearly thirty years after the groundbreaking *Claremont* school finance decisions, school districts and property taxpayers alleged that state funding per pupil was insufficient to provide an adequate education.⁷⁷ In *Contoocook Valley School District v. State*, the superior court nearly doubled the spending requirement from \$4,100 to \$7,356.01 per student.⁷⁸ The court also ruled in *Rand v. State* that the statewide education property tax was unconstitutional because these taxes are collected by the town instead of the state, which benefits wealthier communities.⁷⁹ The court ruled in both cases that, under the state constitution, these taxes should be distributed across districts.⁸⁰ In *Contoocook Valley School District*, the court specifically took note of the additional cost associated with administrative assistance, guidance counselors, custodians, nurses, and other specialists, which provide the vital wraparound services needed during the COVID-19 response for high-poverty districts.⁸¹ Bell provides one critique of school finance litigation that was

74. BELL, *supra* note 17, at 163.

75. *See id.*

76. *See* *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993) (identifying the right to an adequate education mandated by the state constitution); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1354, 1360-61 (N.H. 1997) (holding that the property tax for funding education is a violation of the state constitution).

77. *Contoocook Valley Sch. Dist. v. State*, 261 A.3d 270, 276 (N.H. 2021); *Rand v. State*, No. 215-2022-CV-00167, 2023 N.H. Super. LEXIS 15, at *14-16 (Nov. 20, 2023).

78. No. 213-2019-CV-00069, slip op. at 52 (N.H. Super. Ct. filed Nov. 20, 2023).

79. 2023 N.H. Super. LEXIS 15, at *1, *15, *18, *30-31.

80. *See Contoocook Valley Sch. Dist.*, 261 A.3d at 278; *Rand*, 2023 N.H. Super. LEXIS 15, at *1, *25-26.

81. *Contoocook Valley Sch. Dist.*, slip op. at 52.

evident from the COVID-19 response: “Schools in poor, segregated neighborhoods that have been marginalized for decades will not suddenly achieve high-quality education and produce students competitive with those of the traditionally privileged schools just because they are now given equal funding.”⁸²

COVID-19 laid bare the persisting disparities in educational achievement when comparing racial and socioeconomic demographic groups. To survive schooling during COVID-19, students needed internet, mobile devices, and parental support beyond the traditional teacher/student connection.⁸³ These were necessary before COVID-19, but a lack of access further exacerbated the COVID-19 challenges to providing even minimal quality public education; we know that some students went without having the necessary educational requirements.⁸⁴

In *Plyler v. Doe*, the Supreme Court affirmed the priority bestowed upon receiving an education—this time in the context of providing public education to immigrant children.⁸⁵ In *Plyler*, the Texas legislature passed a bill to exclude undocumented children from enrolling in the public elementary and secondary education system.⁸⁶ The Court identified migrant workers as a “shadow population” and concluded that “[t]he existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.”⁸⁷ In the immigrant context, the Court discounted the presence of immutable traits such as race or disability but observed that the State should not punish children for illegal actions committed by their parents.⁸⁸ The Court found public education distinguishable from other “social welfare legislation” due to its role “in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child.”⁸⁹

The *Plyler* Court acknowledged the national citizenship prong recognized in *Brown* and explicated by Fourteenth Amendment

82. BELL, *supra* note 17, at 163.

83. See U.S. DEP'T OF EDUC., OFF. FOR C.R., *supra* note 6, at 7, 13.

84. See *id.* at 4, 13, 26.

85. 457 U.S. 202, 221-23 (1982).

86. *Id.* at 205.

87. *Id.* at 218-19.

88. *Id.* at 219-20.

89. *Id.* at 221.

scholars, at both the individual and collective societal level. The Court wrote that:

[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.... By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.⁹⁰

Rodriguez and *Plyler* exemplify the ebb and flow of championing minority rights pursuant to *Brown* because the Warren Court declared public education's importance but did not carve out its place as a fundamental right.⁹¹ *Rodriguez* examined *Brown*'s equality principles concerning national citizenship via democratic participation and individual economic security, and the holistic connections between quality education and other social burdens, such as housing, health care, and employment opportunities.⁹² *Plyler*, on the other hand, invoked *Brown* to reiterate the importance of education in the pursuit of national citizenship ideals that support desired social values, which should include undocumented immigrant children.⁹³

The COVID-19 educational debacle demonstrates the historical disconnect between the underlying goal of quality education and its translation into real access and opportunity for marginalized students. The Warren Court established white students as the benchmark for educational attainment.⁹⁴ Moreover, later desegregation movements, in the vein of affirmative action, focused on how a "critical mass" of minority students benefits white students.⁹⁵ The

90. *Id.* at 221, 223.

91. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29-30 (1973) (first quoting *Brown I*, 347 U.S. 483, 493 (1954); and then quoting *Plyler*, 457 U.S. at 221, 223).

92. See *id.* at 33-36.

93. See *Plyler*, 457 U.S. at 221.

94. See *Brown I*, 347 U.S. at 494.

95. See *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

COVID-19 struggle brought into light that quality education involves the inextricable link between race and socioeconomic status. The research demonstrates that rural and high-poverty districts have suffered the most from the government's insufficient response.⁹⁶

The COVID-19 response's full reverberation through the public education system will carry on for decades, but research confirms that education leaders did not adapt quickly enough to avoid a disparate impact on already disadvantaged communities.⁹⁷ These effects may be observed from many angles. Racial and ethnic minority students, and those from depressed socioeconomic backgrounds, bore the brunt of shortcomings emanating from COVID-19's social restrictions.⁹⁸

The earlier days of COVID-19 presented basic barriers to maintaining educational progression, which disproportionately affected Black and Latino students. These students experienced special challenges in logging into their virtual classrooms, and even with virtual access, many students did not participate in the lessons.⁹⁹ The technological access hurdle was addressed through a combined influx of funds from local districts, states, and the federal government.¹⁰⁰

Much more detrimentally, families of color simply lost contact with their children's school. According to the Department of Education Office for Civil Rights,

In one nationally representative survey conducted in spring 2020, nearly 30% of principals from schools serving "large populations of students of color and students from lower-income households" said they had difficulty reaching some of their students and/or families—in contrast to the 14% of principals who said the same in wealthier, predominantly white schools.¹⁰¹

96. See U.S. DEP'T OF EDUC., OFF. FOR C.R., *supra* note 6, at 1, 21, 32.

97. See Lewis & Kuhfeld, *supra* note 12, at 9.

98. See *id.* at 6-8 figs. 4, 5 & 6. See generally Muñiz, *supra* note 8; U.S. DEP'T OF EDUC., OFF. FOR C.R., *supra* note 6.

99. U.S. DEP'T OF EDUC., OFF. FOR C.R., *supra* note 6, at 13-14.

100. *Id.* at 13.

101. *Id.* at 14.

Both high-poverty and rural school districts lacked the adequate staff to properly support the wraparound needs of their students that extended past academic needs due to budgetary constraints and unique logistical challenges.¹⁰² Across the board, students lost instruction time.¹⁰³ The challenges to engage in their lessons were compounded by the mental health consequences brought about from isolation, depression, and the inability to predict the future.¹⁰⁴ These students lacked access to basic nutrition and were recipients of federal free or reduced lunches, and administrators needed to provide food for this population.¹⁰⁵ According to one source, “[t]he fact that so many local education systems were pressed into delivering food to families and communities, not to mention attending to the provision of other basic social services (medical and psychological) is a reminder of the enacted social compact of America.”¹⁰⁶ A lesser noted concern involved the physical space necessary to thrive, because families with multiple children were living full-time day-to-day in small square footage residential homes.¹⁰⁷

Many students achieved academic gains during the pandemic, but these gains paled in comparison to the year-to-year academic progress seen in pre-pandemic years; moreover, in certain grade levels, the learning progress for higher-income students increased during the pandemic shutdown.¹⁰⁸ Keep in mind, even pre-pandemic, students of color performed lower than white students on national assessments.¹⁰⁹ The Department of Education Office for Civil Rights proposes that these academic achievement “disparities are associated with devastating financial costs both for individuals and the American economy.”¹¹⁰

102. *See id.* at 3-4.

103. *Id.* at 1-2.

104. *See id.* at 2.

105. Jonathan A. Supovitz & Om Manghani, *The Role of Inequity in School Responses to the COVID-19 Pandemic*, 97 PEABODY J. EDUC. 257, 266 (2022).

106. *Id.* at 271.

107. *See id.* at 266 (noting the impact of housing inequities on mental health concerns).

108. *See* U.S. DEP’T OF EDUC., OFF. FOR C.R., *supra* note 6, at 4-5; Heather J. Hough, *COVID-19, the Educational Equity Crisis, and the Opportunity Ahead*, BROOKINGS INST. (Apr. 29, 2021), <https://www.brookings.edu/articles/covid-19-the-educational-equity-crisis-and-the-opportunity-ahead/> [<https://perma.cc/U6GC-NXLX>].

109. *See* Lewis & Kuhfeld, *supra* note 12, at 6.

110. U.S. DEP’T OF EDUC., OFF. FOR C.R., *supra* note 6, at 10.

At baseline, students of color as compared to their white counterparts have less access to adequate resources through their schools and at home through their parents and guardians.¹¹¹ These schools have teachers with less experience, disproportionately track students of color into curricular programs that do not stretch their potential, and fail to set high expectations.¹¹² According to the Department of Education Office for Civil Rights, “schools serving the most Black and Latinx students are 1.5 times more likely to employ teachers who are newest to the profession, as compared to schools serving the fewest of those students.”¹¹³

Access to the internet and school lessons only captures a sliver of the obstacles to “quality education” for students enrolled in rural and high-poverty school districts. During the COVID-19 outbreak, Black and Latino parents were more often employed as frontline workers, which exposed them to illness, hospitalization, or death.¹¹⁴ In addition, Black and Latino parents tended to work in sectors most affected by the shutdown policies, which resulted in decreased or no income and other attendant harms.¹¹⁵ The most desperate results, affecting students’ education, were the increases in hunger, food insecurity, and homelessness.¹¹⁶ Mental health issues among students of color were also exacerbated in the pandemic, especially because these students “disproportionately rel[ied] on their schools for [mental health] services.”¹¹⁷ Parents often could not stay at home and provide needed supervision.¹¹⁸

Black and Latino students also did not re-engage as quickly in full-time in-person education.¹¹⁹ In-person instruction relates to three important contacts: student-teacher, student-to-student, and student-to-academic and wraparound services.¹²⁰

111. *Id.* at 6-7.

112. *Id.* at 7.

113. *Id.* at 9.

114. See Muñoz, *supra* note 8, at 1-2; Supovitz & Manghani, *supra* note 105, at 268.

115. See Muñoz, *supra* note 8, at 1-2; U.S. DEP’T OF EDUC., OFF. FOR C.R., *supra* note 6, at 11.

116. U.S. DEP’T OF EDUC., OFF. FOR C.R., *supra* note 6, at 11-12.

117. *Id.* at 12.

118. Hough, *supra* note 108.

119. See U.S. DEP’T OF EDUC., OFF. FOR C.R., *supra* note 6, at 12.

120. *Id.*

Like any systemic deficiency, there are long-term consequences that resemble a domino effect: students do not perform well in school, these schools matriculate fewer students into college, and these students do not have the skills needed to succeed in higher education or skilled vocations.¹²¹

The lag in academic achievement worsened post-pandemic, and we are not yet able to make any more than longitudinal predictions. One study found that academic achievement gains in 2022-23 actually fell behind the pre-pandemic trends, which was worse than the 2021-22 academic year, where “achievement gains [stayed] consistent with or even surpassed pre-pandemic trends.”¹²² The achievement gaps are pronounced in the core topics of reading and math, with younger students presenting an exception to these setbacks.¹²³ With this in mind, several studies affirm that catching up to grade-level performance for students of color in high-poverty school districts will take months not allotted for in the normal academic year.¹²⁴ How do we address this problem? Although the estimate varies from one organization to another, the Center for School and Student Progress predicts that “[a]t the end of the 2022-23 school year, across all grade levels, the average student will require the equivalent of 4.1 months of additional schooling to catch up to pre-COVID levels in reading and 4.5 months in math.”¹²⁵ The same study adds an additional month or more, relative to their peer age groups, for Black and Latino students to reach pre-pandemic learning expectations.¹²⁶ Specifically, the researchers predict that “providing an additional 6.7 months of schooling would return these [middle school Hispanic] students to achievement levels that were ... below national average” and that “[t]o reach parity with national averages, an additional 11 months of schooling would be required.”¹²⁷

121. *Id.* at 7-8.

122. Lewis & Kuhfeld, *supra* note 12, at 3.

123. *Id.* at 5-6.

124. *See id.*

125. *Id.* at 6.

126. *Id.* at 7 fig.5.

127. *Id.* at 7-8.

B. *The Great Equalizer*

The achievement gap in the United States public education system has existed since the nation's inception. The initial social movement to close educational disparities was premised on the influx of impoverished immigrants in urban centers during the Industrial Revolution.¹²⁸ The demographic focus was composed of European immigrants.¹²⁹ To note, this segment of our society would now be considered a part of white America.¹³⁰ The Progressive Movement birthed the principle of education as the "great equalizer."¹³¹ This concept is woven tightly into the legal reasoning supporting *Brown* and subsequent civil rights legislation and litigation in the public education context.

Many decades later, the glaring divide in access to quality public education existed along racial lines.¹³² Discrimination in education persisted aside social discrimination in many other social contexts.¹³³ However, public education became the United States Supreme Court's first entry into breaking down the legal precedent around racial discrimination.

Horace Mann famously proclaimed public education the great equalizer: "Education, then, beyond all other devices of human origin, is the great equalizer of the conditions of men—the balance-wheel of the social machinery."¹³⁴ In the Twelfth Annual Report to

128. Charles Hirschman & Elizabeth Mogford, *Immigration and the American Industrial Revolution from 1880 to 1920*, 38 SOC. SCI. RSCH. 897, 906 (2009) ("Concurrent with the creation of an industrial society from 1880 to 1920 was the expansion of business and the beginnings of public provision of education.").

129. *Id.* at 903 (describing the influx of immigrants from Northwestern, Southern, and Eastern Europe to urban centers during the Industrial Revolution).

130. See Mark Lawrence McPhail, Book Review, 2 RHETORIC & PUB. AFFS. 681, 685 (1999) (reviewing MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* (1998)) ("[A]s the nation progressed into the era of Civil Rights, the logic and lexicon of a unified whiteness continued to erase and reconfigure the material and symbolic realities of racial division and identification.").

131. See generally MASS. BD. OF EDUC., *TWELFTH ANNUAL REPORT OF THE BOARD OF EDUCATION* 59 (1849).

132. See *Brown I*, 347 U.S. 483, 487 (1954) ("[Plaintiffs] seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis.").

133. See, e.g., *Bailey v. Patterson*, 369 U.S. 31, 33 (1962) (per curiam) (addressing desegregation of interstate and intrastate transportation services); *Loving v. Virginia*, 388 U.S. 1, 9, 11 (1967) (addressing interracial marriage).

134. MASS. BD. OF EDUC., *supra* note 131, at 59.

the Massachusetts Board of Education in 1848, Mann made several observations still pertinent to reflections stemming from the COVID-19 experience.¹³⁵ Similar to the spreading achievement gaps based along race and wealth classifications that worsened from pre-pandemic to COVID-19, the country experienced like challenges during its infancy. Mann stated that “[t]he distance between the two extremes of society is lengthening, instead of being abridged,” but it should be noted that people of color were not a relevant concern at this time.¹³⁶ This early writing also invokes quality education as a necessary prerequisite to citizenship, democracy, and self-sufficiency: “The spread of education, by enlarging the cultivated class or caste, will open a wider area over which the social feelings will expand; and, if this education should be universal and complete, it would do more than all things else to obliterate factitious distinctions in society.”¹³⁷ Finally, but not least of import, Mann connects educational attainment to social mobility and national success: “Beyond the power of diffusing old wealth, it has the prerogative of creating new.... [Education] adds a thousand fold more to a nation’s resources than the most successful conquests.”¹³⁸

Horace Mann’s “great equalizer” conception of public education did not contemplate race, but socioeconomic disparities are central to the proposition.¹³⁹ And whether we are considering this language in finding a better understanding of the Fourteenth Amendment, *Brown*, or the COVID-19 response, the arguments for easing society’s differences through public education supports an anti-subordination approach to crafting policies that benefit identifiable classes through public education policy. Derrick Bell elaborated on how the *Brown* opinion did not address economic impoverishment with regards to not fully understanding Black students and discussed how eliminating “separate but equal” was not enough to cure the depravity in public education.¹⁴⁰ These words aptly apply

135. *See id.* at 57.

136. *Id.*

137. *See id.* at 60.

138. *Id.*

139. *See id.* at 59 (“If one class possesses all the wealth and the education, while the residue of society is ignorant and poor, it matters not by what name the relation between them may be called; the latter, in fact and in truth, will be the servile dependants and subjects of the former.”).

140. *See generally* BELL, *supra* note 17.

to the COVID-19 experience, because an influx in public school resources will not set straight the disparities associated with a lack of access to technology, cramped living spaces, and absent parents. The end hope for these policies would be a self-sufficient, educated citizenry, and that individualized betterment will improve the class and thus improve the country.

Despite the aspirational message, rooted in equality, we have not given every child equal educational opportunity regardless of race, disability, socioeconomic status, or citizenship. Even legal precedents of seemingly solid grounding are being threatened to derail access to an education. For example, political groups are rallying to overrule *Plyler v. Doe*, which afforded children of illegal immigrants a right to education.¹⁴¹

In researching the pandemic's impact on education and school systems, Jonathan Supovitz and Om Manghani reflected that "schools are also the product of our social values, and in this way act to maintain and reinforce inequitable educational experiences," and that COVID-19 served as a "reminder that schools are in the awkward position of being both an ameliorator and perpetuator of many deep-seated inequities of American society."¹⁴² The "education as a great equalizer" did not incorporate people of color but definitely took into account marginalized groups.¹⁴³ The need to consider disparities based on race, ethnicity, and socioeconomic status in educational outcomes is pertinent because these gaps existed before the pandemic and only grew wider during and post-crisis.¹⁴⁴ *Brown's* core goal to achieve quality education aligns with the great equalizer mission. The rift between the *Brown* advocates centered around the methods used to reach this aspiration.

141. See, e.g., Madison Marino, Matthew Kuckelman, Lindsey Burke & Lora Ries, *The Consequences of Unchecked Illegal Immigration on America's Public Schools*, HERITAGE FOUND. (Feb. 28, 2024), <https://www.heritage.org/education/report/the-consequences-unchecked-illegal-immigration-americas-public-schools> [<https://perma.cc/AW3Y-F466>].

142. Supovitz & Mamghani, *supra* note 105, at 271.

143. See generally MASS. BD. OF EDUC., *supra* note 131.

144. See Lewis & Kuhfeld, *supra* note 12, at 7.

C. Applying Brown to the COVID-19 Response

The post-*Brown* holdings meant to implement the seminal case slowly chipped away at the tools needed to effectively implement desegregation plans. Under today's education law doctrine, legal advocates would have no recourse to protect equitable ideals through the courts.¹⁴⁵ The COVID-19 crisis also exposed that for students in public schools, a proper education involves securing food and housing in addition to receiving learning tools.

The Warren Court's solution to rectifying public schools has been critiqued for not taking on a full understanding of the race problem.¹⁴⁶ The Black student experience in white schools did not fulfill expectations. These students dealt with overt racism from their white peers, and Black parents were shunned from participating in policy making bodies.¹⁴⁷ Their academic achievement was impeded by tracking Black students into under-sourced programs while assigning white students to advanced enrichment programs.¹⁴⁸ Over time, Black parents hesitated to send their children to white schools, which more likely than not proved harmful as opposed to passing along the benefits discussed in the *Brown* opinion.¹⁴⁹

145. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (holding that there is no fundamental right to education under the Constitution).

146. See Richard Rothstein, *Brown v. Board at 60: Why Have We Been So Disappointed? What Have We Learned?*, ECON. POLY INST. (Apr. 17, 2014), <https://www.epi.org/publication/brown-at-60-why-have-we-been-so-disappointed-what-have-we-learned/> [<https://perma.cc/LVP4-TKZQ>] (“*Brown* was unsuccessful in its purported mission—to undo the school segregation that persists as a central feature of American public education today.”).

147. See Sonya Ramsey, *The Troubled History of American Education After the Brown Decision*, ORG. AM. HISTORIANS, <https://www.oah.org/tah/february-3/the-troubled-history-of-american-education-after-the-brown-decision/> [<https://perma.cc/C3TG-SYPB>] (describing the backlash against Black students after *Brown* and Black parents' exclusion from the Parent Teacher Association (PTA) and other groups).

148. See Dania V. Francis & William A. Darity, Jr., *Separate and Unequal Under One Roof: How the Legacy of Racialized Tracking Perpetuates Within-School Segregation*, 7 RSF: RUSSELL SAGE FOUND. J. SOC. SCIS. 187, 188 (2021) (“The legacy of magnet schools, however, was to perpetuate within-school segregation where white middle-class students are mostly situated in classes with advanced and enriched curricula and minority students and those navigating poverty are mostly situated in standard or remedial classes.”).

149. See Mallory Lutz, *The Hidden Cost of Brown v. Board: African American Educators' Resistance to Desegregating Schools*, 12 ONLINE J. RURAL RSCH. & POL'Y (2017), <https://newprairiepress.org/cgi/viewcontent.cgi?article=1085&context=ojrrp> [<https://perma.cc/ZEK3-ZKTU>] (discussing how some Black parents hesitated to integrate because of concerns related to their children's well-being).

According to Derrick Bell, “[z]ealous faith in integration blinded us to the actual goal of equalizing educational opportunities for [B]lack children, and led us to pursue integration without regard to, and often despite, its ultimate impact on the well-being of students.”¹⁵⁰ Latino students also experience similar deficits in public schools: segregation, high poverty, inferior resources, and disproportionate dropout rates.¹⁵¹ These conditions are compounded by insufficient bilingual curricula.¹⁵² Beyond the academic shortcomings, the facilities are often subpar and the teachers and administrators are often majority white.¹⁵³

During and after COVID-19, the grave educational shortcomings for Black, Latino, and Native American students may be attributed to inequitable health care access, below-poverty-line household incomes, and the need to work “essential” jobs that placed them at a higher risk of contracting the virus.¹⁵⁴ *Brown* incited mass resistance by whites and public mobilization in the Black community.¹⁵⁵ On the other hand, during the pandemic, we collectively suffered from isolation, but the individualized effects were not clearly laid bare in time for government entities to quell their long-term repercussions. Districts with students that relied upon their schools for meals, internet, and electronic devices struggled to provide those resources during the pandemic.¹⁵⁶ There, the transition to remote learning proved rather difficult as compared to wealthier districts.¹⁵⁷ Such less affluent districts enrolled a

150. BELL, *supra* note 17, at 113.

151. See Barbara Schneider, Sylvia Martinez & Ann Owens, *Barriers to Educational Opportunities for Hispanics in the United States*, in *HISPANICS AND THE FUTURE OF AMERICA* 179, 195-97 (Marta Tienda & Faith Mitchell eds., 2006) (“Compared with other groups, Hispanic students disproportionately attend schools with the highest levels of poverty, as measured by the proportion of students who qualify for a free or reduced price lunch, and are enrolled in the most highly segregated schools.” (citation omitted)).

152. See *id.* at 197.

153. BELL, *supra* note 17, at 129 (“Facilities often range from inadequate to awful and because of many factors, including seniority and teacher-union rules, and invalidated and often-irrelevant job requirements, whites make up the majority of the faculty and administrators.”).

154. See Hough, *supra* note 108.

155. See KLARMAN, *supra* note 11, at 408.

156. Muñiz, *supra* note 8, at 5.

157. White families, as compared to families of color, were able to establish nano-schools that taught in small settings unrestricted by COVID-19 restrictions and were more likely to enroll their students in private schools not under the COVID-19 distancing restrictions. *Id.* at 2.

disproportionately large number of Black and Latino students.¹⁵⁸ For example, the need to access the requisite technology placed districts in the position to transfer service and devices from the schools to student homes, and there were reports that some communication companies would only provide free service after households paid any previous debt.¹⁵⁹ Unfortunately, adherence to contemporary constitutional interpretations would bring about a clash between law and social progress in the public education context. The spirit of *Brown* advocates can be seen in the COVID-19 experience, but a strong legal claim may not exist in combining *Brown*, *Milliken*, and *Parents Involved*'s takes on desegregation and *Rodriguez*'s take on education as a fundamental right capable of garnering a heightened level of scrutiny based on socioeconomic status.¹⁶⁰

Brown has fallen short in facilitating equal education as many schools, even pre-pandemic, exhibited gaps in quality of education and resources, but the pandemic exposed and exacerbated the differences.¹⁶¹ In hindsight, an equity framework based on an anti-subordination principle, rather than equality and anti-classification, would have better addressed the achievement gap problems. *Brown* and its progeny are simply insufficient to address contemporary public education challenges, and, although not foreseeable, education must be recognized as a fundamental right for the law to constitutionally penetrate its deep-seated problems.¹⁶² Ironically, in the current policymaking climate, we witness ostensibly neutral and objective laws, policies, and social structures, resulting in inherently unequal treatment of children.¹⁶³ *Brown*, together with *Rodriguez*, upholds the status quo of white school districts having the most concentrated wealth and, as a natural result, more resources that typically lend to better educational outcomes.¹⁶⁴

158. *See id.* at 3; Hough, *supra* note 108.

159. Supovitz & Manghani, *supra* note 105, at 267.

160. *See* KLARMAN, *supra* note 11, at 447; *supra* notes 41-42 and accompanying text; *supra* note 62 and accompanying text.

161. *See* Muñiz, *supra* note 8, at 1, 5.

162. *See id.* at 5-6.

163. *See id.* at 9.

164. *See id.* at 3, 5, 7.

III. SOLUTIONS

A. *National Standards*

Based on today's demographic distribution, we must place value in preserving and uplifting historically Black neighborhoods and other communities of color that serve as safe havens for marginalized people that often suffer socioeconomic difficulties. The focus must be sustained to improve public school funding to the individual schools and across districts in the state. The fairytale may require diverse neighborhoods through affordable housing, increased wages, and robust social programming.

Both *Brown* and the governmental response to public education during the COVID-19 pandemic, on the federal and state level, support the need for a national standard of K-12 achievement. Moreover, the Supreme Court's recent pronouncement in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* calls into question the nation's commitment to the principles elucidated in *Brown*.¹⁶⁵ Many Americans adhering to the mantra that education is the great equalizer, even with its practical faults, can only rely on public education to rise above the circumstances of their upbringing.¹⁶⁶ We must duly connect the consequences of COVID-19 shortcomings to admissions in higher education.

Federalism and differences from state-to-state lead to discrepancies based on access, opportunities, and socioeconomic status, making it hard to institute changes that account for unique challenges at the county or district levels. Future legal advocacy must center movements, utilize anti-subordination approaches, and work at the federal and local level.

The need for accountability no doubt proved too much under the "all deliberate speed" deadline announced in the *Brown* opinions

165. Steven D. Schwinn, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina*, AM. BAR ASS'N (Dec. 7, 2022), https://www.americanbar.org/groups/public_education/publications/preview_home/student-admission-v-president-harvard/ [<https://perma.cc/4A68-QVLK>]. See generally *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023).

166. See *Grove & Montgomery*, *supra* note 70, at 23-24.

and their progeny.¹⁶⁷ For all intents and purposes, many school districts declined to apply the mandate in earnest before Congress passed the Civil Rights Act attaching the distribution of federal funds to desegregation compliance.¹⁶⁸ The No Child Left Behind Act included a plethora of legislative flaws to closing the achievement gap, but the accountability demands, though also daunting, upheld strong principles.¹⁶⁹

B. The Role of School Boards

Finally, the collective attitude towards school boards needs to shift in this country. In regions outside the Deep South, communities achieved desegregation through local school boards and state legislation.¹⁷⁰ It is unclear, under current law, whether these efforts would result in race-conscious school desegregation.¹⁷¹ But similar methods may be needed to overcome the current public education crisis presented by COVID-19 and its negative effects that have disproportionately paralyzed identifiable groups to different extents.

As schools face inadequate funds, instructors, and constraints on curriculum, the focus should be on creating equitable learning opportunities for all students, no matter what school they attend. By focusing on equity rather than the racial makeup of the school, the school district may improve the educational opportunities for all students, which may have the long-term effect of integration.

There must be a focus on local control because nothing else will work. As discussed above, the Civil Rights Act galvanized school districts to comply with the *Brown* decision.¹⁷² Essentially, the courts ran their course in executing the desegregation goal, and legislative policy proved necessary to make a change.¹⁷³ For the COVID-19 victims experiencing the worst end of the achievement

167. See *Brown II*, 349 U.S. 294, 301 (1955).

168. The United States Civil Rights Commission recommended the federal government decrease funding for districts that would not cooperate with the *Brown* holding, which the Civil Rights Act of 1964 codified. See KLARMAN, *supra* note 11, at 362-63.

169. See Thomas S. Dee & Brian Jacob, *The Impact of No Child Left Behind on Student Achievement*, 30 J. POL'Y ANALYSIS & MGMT. 418, 443 (2011).

170. See KLARMAN, *supra* note 11, at 344.

171. See Scott, *supra* note 14, at 325.

172. See *supra* note 167 and accompanying text.

173. See KLARMAN, *supra* note 11, at 363, 468.

gap, the law has cratered many pathways to redressing their disparities; more direct action via policy appears to be the default route.¹⁷⁴

C. Rethinking Education as a Fundamental Right

Brown paved the way for legislation that prohibited discrimination based on race, disability, and gender. These statutes, however, failed to address disparities in achievement. According to Robert Carter, an attorney on the *Brown* litigation team, “the Warren Court sacrificed individual and immediate vindication of the newly discovered right of [B]lack to a desegregated education in favor of a remedy more palatable to whites.”¹⁷⁵ With COVID-19, we saw that an anti-subordination interpretation in the midst of *Brown* may have affected the outcome of *Rodriguez*, and in turn placed children of all races in the position to seek legal redress under the Fourteenth Amendment following the government’s pandemic response.¹⁷⁶

Seventy years after *Brown*, schools remain extremely segregated despite the Court’s formulaic proclamations that under a colorblind Constitution, all sits right and fair in our society and race-conscious policies should cease to exist.¹⁷⁷ The current and pre-pandemic gaps in achievement not only affect individual students but also negatively affect the nation’s ability to bring about a responsible generation of productive citizens.

It is quite unfortunate that the *Brown* Court stopped short of recognizing quality education as a fundamental right. After the opinion, it no doubt remained that law had caught up with society, that education played a dominant role in maintaining a thriving democracy, and that education provided hope for advancement for underprivileged children. The *Plyler* opinion confirmed this realization,¹⁷⁸ although *Rodriguez* represents the ultimate constitutional retrenchment that needs unwinding to fully realize the *Brown*

174. *See id.*

175. BELL, *supra* note 17, at 95.

176. *See supra* notes 60-68 and accompanying text.

177. *See* Muñoz, *supra* note 8, at 6; Balkin, *supra* note 9, at 11.

178. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982).

mission.¹⁷⁹ The COVID-19 experience highlights the education-finance perspective, but the true missed opportunity was declaring quality education to be a fundamental right. This failure permitted education policy to continue as a political football that, to this day, seems to be lost by disadvantaged minors due to no fault of their own.

The COVID-19 response and Common Core leave stark gaps in the goal of access to quality public education to all students.

CONCLUSION

The extensive case law attributed to *Brown* would make one assume that great strides have been achieved in the desegregation arena, but instead, these court opinions slowly pervaded the Warren Court's and legal advocates' original purpose. Under the *Brown* Court's opinion, today's school districts would violate the desegregation goals, and there is no amount of deliberate speed that may ameliorate the present-day diversity statistics. Moreover, pursuant to case law and the proclivities of the Roberts Court, school districts are not required to move toward desegregation and are arguably discouraged from testing such policies.¹⁸⁰ The COVID-19 experience also reminded the nation that providing a quality education requires attention to circumstances beyond the schoolhouse walls. Therefore, policies that only target education programming alone cannot fix educational inequities—COVID-19 proved this point, similar to how an anti-classification interpretation of *Brown* has failed generations of public school students.

The long-lasting effects on the educational achievement of impoverished racial and ethnic minority children after the government's insufficient response to COVID-19 will stifle the progress of a generation, but it is not too late to address these missteps. The *Brown* ideal should guide K-12 policymakers to target not only funds but also resources toward underserved communities in areas exposed during the pandemic. Furthermore, the nation's pending challenge, as a collective, entwines higher education institutions. It is incumbent upon these administrators to review

179. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29-30, 35 (1973).

180. See *supra* notes 38-39 and accompanying text.

admission requirements in a manner cognizant of the disparate impact of the COVID-19 experience for disadvantaged youth. A family's socioeconomic status alongside their racial identity proved indicative of falling farther behind the learning curve for public education students.