

2019

## Adequate Education: The Disregarded Fundamental Right and the Resurgence of Segregation of Public Schools

Neubia L. Harris

Follow this and additional works at: <https://open.mitchellhamline.edu/mhlr>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Education Law Commons](#), [Fourteenth Amendment Commons](#), and the [Law and Race Commons](#)

### Recommended Citation

Harris, Neubia L. (2019) "Adequate Education: The Disregarded Fundamental Right and the Resurgence of Segregation of Public Schools," *Mitchell Hamline Law Review*: Vol. 45 : Iss. 1 , Article 15.

Available at: <https://open.mitchellhamline.edu/mhlr/vol45/iss1/15>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in Mitchell Hamline Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact [sean.felhofer@mitchellhamline.edu](mailto:sean.felhofer@mitchellhamline.edu).

© Mitchell Hamline School of Law

---

---

**ADEQUATE EDUCATION: THE DISREGARDED  
FUNDAMENTAL RIGHT AND THE RESURGENCE OF  
SEGREGATION OF PUBLIC SCHOOLS**

Neubia L. Harris<sup>†</sup>

I.	INTRODUCTION.....	237
II.	ADEQUATE EDUCATION IS A FUNDAMENTAL RIGHT.....	239
III.	INTEGRATION JURISPRUDENCE .....	241
	A. <i>Establishment of “Separate but Equal”</i> .....	241
	B. <i>Brown v. Board of Education and the Aftermath</i> .....	243
	C. <i>Case Studies</i> .....	246
	1. <i>Alabama Case Study</i> .....	247
	2. <i>Louisiana Case Study</i> .....	249
	3. <i>North Carolina Case Study</i> .....	249
	4. <i>Tennessee Case Study</i> .....	252
IV.	ANALYSIS.....	253
	A. <i>Types of School Choice</i> .....	254
	B. <i>Disparate Impact of School Choice</i> .....	257
V.	CONCLUSION.....	263

I. INTRODUCTION

One does not need to be a scholar, educator, or parent to understand the importance of an adequate education. Education has long been hailed as the mechanism by which those who are born into underprivileged families can change their economic situations for the better.<sup>1</sup> The constitutions of every state in the United States of

---

<sup>†</sup> Neubia Harris is an education lawyer in Raleigh, North Carolina. She holds a bachelor’s degree from the University of North Carolina at Greensboro and a Juris Doctorate from Wake Forest University.

1. Claude Fischer, *Does Education Increase Social Mobility? A Look at U.S. History*, BERKELEY BLOG (June 10, 2016), <http://blogs.berkeley.edu/2016/06/10/does-education-work> [<https://perma.cc/3K3C-TQFB>].

America have a provision for education.<sup>2</sup> Yet, the Constitution of the United States does not explicitly state that education is a fundamental right.<sup>3</sup> Although the jurisprudence in the United States has come a long way in understanding the value of racially and socioeconomically integrated public schools, states have found various mechanisms—under the guise of school choice—to undermine integration. School choice is championed as a means to allow the educational market to correct itself. However, children whose families do not have the means or knowledge to exercise school choice often remain in schools with decreased funding due to the reallocation of public-school resources to charter schools and voucher programs.<sup>4</sup>

This article will explore the right to an adequate education against a political landscape that encourages school choice yet minimizes the effect that the rise in white and affluent families exercising school choice has on the educational experiences of students of color and poor students. Part I will present evidence that an adequate education is a fundamental right.<sup>5</sup> Part II will discuss the establishment of the “separate but equal” doctrine that led to a litany of school desegregation litigation, and the United States Supreme Court’s integration jurisprudence that supports the position presented in Part I.<sup>6</sup> Part III of this article will present case studies of secession efforts of suburban counties in the southern United States—namely, in Alabama, Louisiana, North Carolina, and Tennessee.<sup>7</sup> Part IV will analyze the Equal Protection Clause’s applicability to the rights of students of color and poor students who remain in public schools after the removal of their white and affluent peers under school choice options.<sup>8</sup>

---

2. See EMILY PARKER, CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION 1 (2016), <https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf> [<https://perma.cc/5ZHF-DPT9>].

3. *Id.* at 1–2.

4. Matthew M. Chingos, *Does Expanding School Choice Increase Segregation?*, BROOKINGS (May 15, 2013), <https://www.brookings.edu/research/does-expanding-school-choice-increase-segregation> [<https://perma.cc/UEL5-XU8T>] (explaining that school choice leads to increased segregation by race and that class has motivated families move to better schools and leave the most disadvantaged students behind in the worst public schools).

5. See *infra* Part I.

6. See *infra* Part II.

7. See *infra* Part III.

8. See *infra* Part IV.

## II. ADEQUATE EDUCATION IS A FUNDAMENTAL RIGHT

The United States Constitution does not grant a right to public education.<sup>9</sup> However, each state constitution in the United States has a provision explicitly providing the right to an education, with some even making attendance compulsory for children between the ages of four and twenty-one.<sup>10</sup> Society in the United States has always regarded education and the opportunity to acquire knowledge as matters of paramount importance.<sup>11</sup> Thomas Jefferson and the founding fathers wrote declarations championing the philosophy that public education is integral to democracy.<sup>12</sup> If citizens “are unable to comprehend the issues and thereby make informed choices,” the United States could “lose its democratic character and look more like an aristocracy run by those with sufficient wealth or other privilege to attain an unattainable quality of education.”<sup>13</sup> Education provides the basic devices that enable individuals to lead “economically productive lives to the benefit of us all.”<sup>14</sup> Additionally, “education prepares individuals to be self-reliant and self-sufficient participants in our society.”<sup>15</sup>

---

9. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29, 35 (1973) (holding that disparate educational funding did not violate the Equal Protection Clause of the U.S. Constitution and that education was not a fundamental right requiring strict scrutiny).

10. PARKER, *supra* note 2, at 5–22.

11. *Myer v. Nebraska*, 262 U.S. 390, 400 (1923) (“The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.”).

12. Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL’Y 45, 60 (2011).

13. Areto A. Imoukhuede, *Educational Rights and The New Due Process*, 47 IND. L.J. 467, 475 (2014) [hereinafter Imoukhuede, *Educational Rights*] (discussing the imperative of an adequate education as preventative of a society in which a few educated citizens “effectively rule over a populace of largely uneducated people [who are] incapable of meaningfully evaluating the performance of those they have technically ‘elected’”).

14. See *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (“Public education has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage: deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual, and poses an obstacle to individual achievement.”).

15. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (adopting Thomas Jefferson’s position that “some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence”).

Public schools are the institutions through which our country ordinarily provides an education. Moreover, public schools “impart the values on which our society rests.”<sup>16</sup> Education is vital to prepare citizens to participate in the democratic political process and to preserve the freedoms and independence that United States citizens enjoy.<sup>17</sup> In a dissent from the Supreme Court’s finding in *San Antonio Independent School District v. Rodriguez*, Justice Thurgood Marshall reasoned that an individual’s interest in education is, in fact, a fundamental right.<sup>18</sup> Justice Marshall explained that his view that education is a fundamental right was supported “by the unique status accorded [to] public education by our society, and by the close relationship between education and some of our most basic constitutional values.”<sup>19</sup>

In addition to general welfare considerations, support for the argument that education is a fundamental right can be found in the Constitution and the jurisprudence interpreting the same. The right to receive an adequate education is grounded in the Fifth and Fourteenth Amendments of the United States Constitution. The Fifth Amendment provides that “no person shall be . . . deprived of life, liberty or property, without due process of law,” while the Fourteenth Amendment, expanding due process to the states, provides that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.”<sup>20</sup> The absence of language in the Constitution that specially

---

16. See *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 242 (1963) (Brennan, J., concurring) (agreeing with the majority that a Pennsylvania prayer statute was unconstitutional and violative of the First and Fourteenth Amendments, and discussing the role of public education in our society, stating that “[t]he lesson of history—drawn more from the experiences of other countries than from our own—is that a system of free public education forfeits its unique contribution to the growth of democratic citizenship when that choice ceases to be freely available to each parent”); see also *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979) (discussing education as a primary vehicle for “the maintenance of a democratic political system”).

17. *Yoder*, 406 U.S. at 221.

18. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 102–03, 110, 132 (1973) (Marshall, J., dissenting).

19. *Id.* at 111, (Marshall, J., dissenting).

20. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

addresses the right to receive an adequate education does not mean that the right to an education is not a fundamental right.<sup>21</sup>

### III. INTEGRATION JURISPRUDENCE

Cases involving the constitutional right to education typically center on race or ethnicity. Although socioeconomic status is not a protected class, the Supreme Court's holdings on educational integration apply in cases of disparate impact on students of color.

#### A. *Establishment of "Separate but Equal"*

Prior to the enactment of the Fourteenth Amendment, state courts were already trying to decide the legality of maintaining separate schools for white and black students. In 1849, the Supreme Court of Massachusetts created an outline for the "separate but equal" doctrine.<sup>22</sup> At the time, Massachusetts law created a right of action and damages for any child that was unlawfully excluded from the public schools.<sup>23</sup> In *Roberts v. City of Boston*, the parents of Sarah Roberts sued Boston City Schools for excluding her from her district primary school based solely on her race.<sup>24</sup> The court gave great deference to school superintendents who were responsible for arranging, classifying, and distributing students in a way that was "best adapted to their general proficiency and welfare."<sup>25</sup> The plaintiff's argument—that the maintenance of separate schools deepened and perpetuated a caste system whereby students of color

---

21. Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 117 (2013) (discussing Justice Marshall's dissent in *San Antonio Independent School District*, 411 U.S. at 70–134).

22. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 205 (1849) (noting that the black plaintiff was not unlawfully excluded from public education when the city of Boston allowed her to attend only a separate school for blacks that was "as well conducted in all respects, and as well fitted, in point of capacity and qualification of the instructors, to advance the education of children under seven years old, as the other primary schools").

23. *Id.* at 198.

24. *Id.* at 200.

25. *Id.* at 208–09 (stating that "it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence" and noting that "we cannot say, that their decision upon it is not founded on just grounds of reason and experience, and in the results of a discriminating and honest judgment").

were an inferior class—fell on deaf ears.<sup>26</sup> The court upheld Boston's decision to maintain separate schools for white and black students.<sup>27</sup>

In 1896, the Supreme Court of the United States decided *Plessy v. Ferguson*. Although *Plessy* did not deal with educational rights, its decision—that separate railcar facilities could be maintained for white and black patrons, so long as the facilities were equal—made the *Roberts* holding the law of the land and influenced most of the early educational rights decisions.<sup>28</sup> The *Plessy* Court acknowledged that the purpose of the Fourteenth Amendment's Equal Protection Clause was to create "absolute equality" between the races.<sup>29</sup> Nonetheless, the Court held that the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either."<sup>30</sup>

In 1899, the Supreme Court decided one of the first school-finance cases. In *Cummings v. County Board of Education*, the African-American plaintiffs sought to enjoin the defendant school board from operating a white high school that excluded African-American students.<sup>31</sup> The high school was built and maintained with money that was, in part, collected from African-American taxpayers.<sup>32</sup> The

---

26. *Id.* at 209–210 (reasoning that "[t]his prejudice, if it exists, is not created by law, and probably cannot be changed by law" and that "[w]hether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted").

27. *Id.* ("In the absence of special legislation on this subject, the law has vested the power in the committee to regulate the system of distribution and classification; and when this power is reasonably exercised . . . the decision of the committee must be deemed conclusive.")

28. See generally *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (upholding a Louisiana law that mandated "separate but equal" railway cars for white and black commuters).

29. *Id.* at 544.

30. *Id.* (reasoning that laws that permit—or even require—racial separation "in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power" and stating that the "most common instance" of this "is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced").

31. 175 U.S. 528, 529–30 (1899).

32. *Id.* at 531.

plaintiffs asked the Court, pursuant to the Fourteenth Amendment, to prohibit the board from operating the all-white school until the board resumed operation of an African-American high school.<sup>33</sup> In its strict interpretation of the Constitution, the Court remarked, “the education of the people in schools maintained by state taxation is a matter belonging to the respective states” and that “any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.”<sup>34</sup> Almost three decades later, in *Gong Lum v. Rice*, a student of Chinese descent was not permitted to attend a white school because she was not a “member of the white or Caucasian race.”<sup>35</sup> The Court again held that this decision was within state discretion.<sup>36</sup>

*B. Brown v. Board of Education and the Aftermath*

Perhaps the most cited and well-known education case is *Brown v. Board of Education*, a 1954 Supreme Court school desegregation case in which the plaintiffs challenged the holding of *Plessy* in the arena of public schools.<sup>37</sup> The plaintiffs in *Brown* were African-American children who were barred from enrolling in white schools.<sup>38</sup> The students challenged their exclusion from the white schools pursuant to the Equal Protection Clause of the Fourteenth Amendment.<sup>39</sup> The named plaintiff, Linda Brown, had to ride the bus across town to attend the African-American school instead of attending the all-white school near her home.<sup>40</sup> Linda’s parents filed suit against the Board of Education in Topeka, Kansas, challenging the

---

33. *Id.* at 530.

34. *Id.* at 545 (holding that there was no violation of the Equal Protection or Privileges and Immunities Clauses of the Fourteenth Amendment).

35. 275 U.S. 78, 80 (1927).

36. *Id.* at 86–87 (holding that the Mississippi school board had not violated the Equal Protection Clause of the Fourteenth Amendment by classifying the plaintiff in a manner that was consistent with the Court’s decision in *Plessy* and similar cases).

37. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that “in the field of public education the doctrine of ‘separate but equal’ has no place” and that “[s]eparate educational facilities are inherently unequal”).

38. *Id.* at 487–88.

39. *Id.* at 488.

40. *Brown v. Board of Education Podcast*, U. S. COURTS, <http://www.uscourts.gov/about-federal-courts/educational-resources/supreme-court-landmarks/brown-v-board-education-podcast> [<https://perma.cc/3BWJ-YYXB>].

constitutionality of school segregation.<sup>41</sup> The United States District Court for the District of Kansas held that Linda's exclusion from white schools was lawful under the Supreme Court's decision in *Plessy*.<sup>42</sup> The Browns appealed to the Supreme Court, where their case was merged with other cases on appeal concerning school desegregation in South Carolina, Virginia, and Delaware.<sup>43</sup> The Supreme Court reversed the district court's decision in a lengthy discussion explaining that segregation deprived students of educational opportunities.<sup>44</sup> Later, the Court clarified that school districts had an "affirmative duty to take whatever steps might be necessary" to desegregate.<sup>45</sup>

In the wake of *Brown*, some white families pushed for local school secession from city and county schools to avoid the mandate of desegregation. In 1972, the Court held that an entity, such as a municipality, could not secede from a county-based school district if the effect impeded a county school system's ability to desegregate pursuant to a federal court desegregation order.<sup>46</sup>

Nearly twenty years after the Court's decision in *Brown*, the Court held that busing was an appropriate legal tool for addressing segregation in schools.<sup>47</sup> However, the idea that school districts needed to achieve desegregation by any means necessary was short-lived. In 1974, the Court held that local control was an important tradition in education and blocked a Detroit suburb's desegregation plan that involved busing students across school district boundaries.<sup>48</sup> The Court severely limited the remedial authority of federal courts to issue a desegregation order to a school district by requiring the existence both an intra-district violation and an inter-

---

41. *Brown*, 347 U.S. at 488 ("The plaintiffs contend that segregated public schools are not 'equal' and cannot be made 'equal,' and that hence they are deprived of the equal protection of the laws.")

42. *Brown v. Bd. of Educ.*, 98 F. Supp. 797, 800 (D. Kan. 1951).

43. *Brown*, 347 U.S. at 486, 486 n.1.

44. *Id.* at 493-96.

45. *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 437-38 (1968).

46. *Wright v. Council of Emporia*, 407 U.S. 451, 470 (1972).

47. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 27-29 (1971) (emphasizing the broad remedial powers that district courts have to fashion effective school desegregation remedies and stating that the "deliberate[] . . . transfer of Negro students out of formally segregated Negro schools and [the] transfer of white students to formally all-Negro schools" could not "be said to be beyond the broad remedial powers of a court").

48. *Milliken v. Bradley*, 418 U.S. 717, 741, 744-45 (1974).

district effect before imposition of such an order.<sup>49</sup> However, three years later, the Court ordered the state of Michigan and the Detroit school system to finance a plan addressing the educational deficits facing African-American children due to segregation.<sup>50</sup> The Court held that desegregation alone could not remedy the damage that occurred to African-American students while the schools were segregated.<sup>51</sup>

The year 1974 began a busy period in education jurisprudence. That year, the Court also upheld a school financing plan based on local property taxes that resulted in disparities in public education.<sup>52</sup> In *San Antonio Independent School District v. Rodriguez*, the Court considered whether the disparity in per-pupil spending between districts in neighborhoods with higher property values (i.e., affluent neighborhoods) and those in neighborhoods with low property values (i.e., poor neighborhoods) violated the Fourteenth Amendment's Equal Protection Clause.<sup>53</sup> The Court held that wealth-based discrimination in education did not violate the Equal Protection Clause.<sup>54</sup> In 1975, the Court held that when a state establishes and maintains a public school system and has compulsory school attendance requirements for children of a certain age, the state must afford students in the public school with the due process protections contained in the Fourteenth Amendment.<sup>55</sup>

In 1982, the Court went further in its analysis of the importance of education and the impact of providing education in a discriminatory manner:

[E]ducation 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 . . . [D]enial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers

---

49. *Id.* at 744–45 (stating that before a court could issue such an order, “it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district”); Myron Orfield, *Milliken, Meredith, and Metropolitan Segregation*, 62 *UCLA L. REV.* 364, 408–09 (2015).

50. *Milliken v. Bradley*, 433 U.S. 267, 291 (1977).

51. *Id.* at 289–90.

52. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54–55 (1973).

53. *Id.* at 17.

54. *Id.* at 54–55.

55. *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority.<sup>56</sup>

Justice Blackmun concurred, stating: “Children denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve.”<sup>57</sup>

### C. Case Studies

State and local governments ordinarily afford municipalities with discretion to determine the breadth of services, such as public education, that the residents who live within their borders receive.<sup>58</sup> As a result, municipalities can create distinct communities by attracting the type of residents they deem desirable—by using zoning and taxation, for instance—and excluding the type of residents the municipality does not deem desirable.<sup>59</sup> It should come as no surprise that the desirable residents are usually white and wealthy, while the undesirables are people who do not fall into those limited categories. Therefore, when school lines mimic municipality limits, the effect is often segregation and discrimination.<sup>60</sup> The use of these techniques is an old scheme that southern states in the United States have used in their efforts to circumvent desegregation laws and mandates.<sup>61</sup>

Since 2000, more than seventy communities have tried to secede; approximately fifty have been successful, including communities in Alabama, Louisiana, North Carolina, and Tennessee.<sup>62</sup>

---

56. *Plyler v. Doe*, 457 U.S. 202, 221–22 (1982).

57. *Id.* at 234 (Blackmun, J., concurring).

58. Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 143 (2016).

59. *Id.*

60. *Id.*

61. *Id.* at 144.

62. Valerie Strauss, *Back to the Future: A New School District Secession Movement Is Gaining Steam*, WASH. POST (May 2, 2018), [https://www.washingtonpost.com/news/answer-sheet/wp/2018/05/02/back-to-the-future-a-new-school-district-secession-movement-is-gaining-steam/?utm\\_term=.aeeab0efa13a](https://www.washingtonpost.com/news/answer-sheet/wp/2018/05/02/back-to-the-future-a-new-school-district-secession-movement-is-gaining-steam/?utm_term=.aeeab0efa13a) [https://perma.cc/5YE3-PYT4].

### 1. *Alabama Case Study*

Jefferson County, Alabama, has been fighting integration in its public schools since the Supreme Court's decision in *Brown*.<sup>63</sup> In 1965, the National Association for the Advancement of Colored People's Legal Defense Fund sued the Jefferson County school district to enforce integration mandates.<sup>64</sup> In 1971, after years of litigation in lower courts, the Fifth Circuit of the United States Court of Appeals ordered the district court to require Jefferson County schools to desegregate.<sup>65</sup> Although there were some integration efforts in the aftermath of the Fifth Circuit's ruling, "progress . . . has been obstructed by 'white flight' splinter districts—individual municipalities within the county that leave the county school district to form their own independent municipal district."<sup>66</sup>

In 2014, the city of Gardendale, Alabama, announced its intent to separate from Jefferson County Schools shortly after Jefferson County built a "\$51 million high school in the city, for the use of all county students."<sup>67</sup> Astonishingly, Gardendale, "which is both whiter and wealthier than the average" community in Alabama, claimed that it had no responsibility to desegregate the public schools that it was seeking to control.<sup>68</sup> On March 13, 2015, the Gardendale Board,

---

63. See *Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988, 992 (11th Cir. 2018) (providing a detailed history of one of the longest-running desegregation cases in the country).

64. *Stout v. Jefferson*, LDF, <http://www.naacpldf.org/case-issue/stout-v-jefferson> [<https://perma.cc/DY37-6TC4>].

65. *Stout v. Jefferson Cty. Bd. of Educ.*, 448 F.2d 403, 404 (5th Cir. 1971) ("[W]here the formulation of splinter school districts, albeit validly created under state law, have the effect of thwarting the implementation of a unitary school system, the district court may not, consistent with the teachings of *Swann v. Charlotte-Mecklenburg* . . . recognize their creation."); *Stout*, 882 F.3d at 992–93 (discussing the Fifth Circuit's holding in the previous *Stout* case and stating that after the predominantly white cities of Pleasant Grove, Vestavia Hills, Homewood, and Midfield departed from the Jefferson County school system and "formed municipal school districts, our predecessor circuit directed the district court to 'require the school board forthwith to implement a student assignment plan' that 'encompasses the entire Jefferson County School District as it stood at the time of the original filing of this desegregation suit'").

66. *Stout v. Jefferson*, *supra* note 64 (explaining that the splinter municipalities are communities that are "typically much whiter than the county and consistently wealthier, and [that] their departure removes valuable resources from the county schools while increasing the racial imbalance in those schools").

67. *Id.*

68. *Id.*

responsible for the city's secession efforts, moved to intervene in *Stout* while simultaneously filing a complaint in an Alabama state court requesting that the court order the Jefferson County Board of Education to relinquish control of the schools situated in Gardendale.<sup>69</sup> The district court enjoined the state lawsuit filed in Alabama by the Gardendale Board; black children who were attending Jefferson County schools were substituted as plaintiffs; and the city of Graysville, the town of Brookside, and two parents from Mount Olive moved to intervene in the action to oppose the secession.<sup>70</sup>

Gardendale moved the district court to allow Gardendale to operate its own municipal school system.<sup>71</sup> Although the district court held that the Gardendale Board violated the Equal Protection Clause of the Fourteenth Amendment—because race was clearly a motivating factor in Gardendale's decision to secede from the Jefferson County Public School System—the court nonetheless granted Gardendale a partial secession.<sup>72</sup>

In February 2018, the Eleventh Circuit Court of Appeals heard the most recent iteration of *Stout* on appeal. The court of appeals affirmed the district court's ruling that the Gardendale School District's secession plan violated the Fourteenth Amendment and was solely motivated by race.<sup>73</sup> The court also held that the district court abused its discretion when it granted partial secession to Gardendale.<sup>74</sup> The court's decision was a victory in the pushback on the effects of school choice on the children left behind. However, given Gardendale's reluctance to integrate its schools over the past seventy years, it is highly unlikely this is the last hearing of the *Stout* case.<sup>75</sup>

---

69. *Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988, 1000 (11th Cir. 2018).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 1007 (reasoning that the statements of Gardendale private citizens to the Gardendale Board and the actions the board took to secede from the Jefferson County School district were relevant to prove the underlying intent behind a state actor's actions and stating that "[t]o be sure, only a state actor can violate the Fourteenth Amendment, but constituent statements and conduct can be relevant in determining the intent of public officials").

74. *Id.* at 1013 (explaining that the district court erred when it ruled that a partial secession could be permitted even though the Gardendale Board had not proved a "lack of deleterious effects on desegregation").

75. *But see Gardendale Will Cease Efforts to Create New School System*, AL.COM (Feb. 28, 2018), [https://www.al.com/news/birmingham/index.ssf/2018/02/gardendale\\_will\\_cease\\_efforts.html](https://www.al.com/news/birmingham/index.ssf/2018/02/gardendale_will_cease_efforts.html) [<https://perma.cc/Q3HA-8BRL>].

## 2. Louisiana Case Study

In 2015, St. George, an unincorporated territory in the State of Louisiana, attempted to incorporate its own independent city for the sole purpose of creating its own school district—which would have been overwhelmingly white and wealthy.<sup>76</sup> St. George residents advocated for the neighborhood to be incorporated as a new municipality and to secure an amendment to the Louisiana Constitution that would enable them to form their own school district.<sup>77</sup> Louisiana law presents a unique challenge to municipalities wishing to secede from their county's school district; namely, the legislature must take certain specific actions to create a new school district.<sup>78</sup> St. George's efforts were unsuccessful.<sup>79</sup> Despite St. George's failure to incorporate and the public opinion that the efforts were divisive, proponents for the incorporation have resurrected the movement.<sup>80</sup> It is yet to be seen what the final outcome of the St. George secession efforts will be.

## 3. North Carolina Case Study

The North Carolina Constitution guarantees that each student in North Carolina has the right to receive a sound, basic education in the public schools of North Carolina.<sup>81</sup> In *Leandro v. State*, the court applied a strict scrutiny standard and placed the burden on the state to show there was a compelling interest to deny students' access to a sound, basic education.<sup>82</sup>

---

76. EDBUILD, *FRACTURED: THE BREAKDOWN OF AMERICA'S SCHOOL DISTRICTS 14* (2017) <https://edbuild.org/content/fractured/fractured-full-report.pdf> [<https://perma.cc/G4S3-4WSP>].

77. *Id.*

78. *Id.*

79. Rebekah Allen, *St. George Organizers: Fight Far from Over After Registrar's Office Finds Petition Drive Falls 71 Signatures Short*, *ADVOCATE* (June 16, 2015, 12:17 PM), [https://www.theadvocate.com/baton\\_rouge/news/article\\_30f0f7e5-d3f6-51e6-aeeb-3ec4f4cf29e5.html](https://www.theadvocate.com/baton_rouge/news/article_30f0f7e5-d3f6-51e6-aeeb-3ec4f4cf29e5.html) [<https://perma.cc/Z8Z7-JSJY>].

80. Andrea Gallo & Charles Lussier, *Unifying or Dividing? St. George City Movement Draws Mixed Reviews from Residents, Mayor Broome*, *ADVOCATE* (Mar. 2, 2018, 11:30 AM), [https://www.theadvocate.com/baton\\_rouge/news/article\\_0962de76-1e37-11e8-ac50-f7fe0687c3ec.html](https://www.theadvocate.com/baton_rouge/news/article_0962de76-1e37-11e8-ac50-f7fe0687c3ec.html) [<https://perma.cc/8W5B-KHS8>].

81. N.C. CONST. art. 1, § 15; *id.* art. IX, § 2; *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997).

82. *Leandro*, 488 S.E.2d at 261.

North Carolina's introduction to the charter school movement began in the mid-1990s. When the Republican-led North Carolina General Assembly introduced the idea of charter schools in North Carolina, advocates for the poor and minorities adamantly opposed the idea.<sup>83</sup> The opposition was for good reason, given North Carolina's history with "school choice" serving as a way around federal integration mandates.<sup>84</sup> Democrats agreed to support charter schools because the alternative—school vouchers that fund students' removal from public schools and placement into private schools—would be even more harmful to disadvantaged students.<sup>85</sup>

In 1996, the General Assembly approved the Charter School Act (CSA), which allowed any person, group, or non-profit organization to propose a charter school.<sup>86</sup> Under the CSA, the North Carolina State Board of Education has the authority to approve or reject a proposal for a charter school.<sup>87</sup> The CSA capped the number of charter schools in the state at 100.<sup>88</sup>

The original goals of North Carolina's charter school legislation were threefold. The first goal was to improve overall student learning and increase learning opportunities for at-risk students and academically gifted students.<sup>89</sup> The second goal was to encourage new teaching methods and to create alternative professional opportunities for teachers.<sup>90</sup> The third goal was to give parents more options concerning the education of their children.<sup>91</sup>

As of July 2018, North Carolina had 185 active charter schools.<sup>92</sup> The increase in charter schools in North Carolina has caused North

---

83. Helen F. Ladd et al., *The Growing Segmentation of the Charter School Sector in North Carolina 3* (Nat'l Bureau of Econ. Res., Working Paper No. 21078, 2015) [hereinafter, Ladd et al., *Growing Segmentation*].

84. Robert Bifulco et al., *Public School Choice and Integration Evidence from Durham, North Carolina* (Nat'l Ctr. for Analysis Longitudinal Data in Educ. Research, Working Paper No. 14, 2018).

85. Ladd et al., *Growing Segmentation*, *supra* note 83, at 3–4.

86. Will Schultz, *Charter Schools*, N. C. HIST. PROJECT, <https://northcarolinahistory.org/encyclopedia/charter-schools> [https://perma.cc/GNG2-Z37B].

87. *Id.*

88. *Id.*

89. Ladd et al., *Growing Segmentation*, *supra* note 83, at 4.

90. *Id.*

91. *Id.*

92. *Educational Directory and Demographical Information Exchange*, PUB. SCH. N.C., <http://apps.schools.nc.gov/ords/f?p=125:1100> [https://perma.cc/5ZHA-7UBZ].

Carolina public schools to become more segregated.<sup>93</sup> North Carolina's public schools have experienced significant demographic changes in the past ten years that have corresponded with the increase of the number of charter schools within the same time period.<sup>94</sup> Students of color have increased from 44% of all traditional public school students to over 51%.<sup>95</sup> In the same time frame, students qualifying for free or reduced lunch have increased from 48% to 60%.<sup>96</sup> Several districts have become increasingly segregated in the last ten years, including Pitt, Nash-Rocky Mount, Wake, Guilford, Harnett, and Charlotte-Mecklenburg.<sup>97</sup> Nearly half of all North Carolina's public school students reside in the ten largest school districts, and those districts tend to be among the most segregated.<sup>98</sup>

North Carolina recently ratified a bill allowing municipalities to create less racially and economically diverse schools in the state.<sup>99</sup> On June 7, 2018, the North Carolina General Assembly ratified House Bill 514, permitting any nonprofit corporation *or municipality* to apply for the establishment of a charter school.<sup>100</sup> The law was pushed through by the Republican-led Joint Legislative Study Committee on the Division of Local School Administrative Units.<sup>101</sup> This law could lead to the breakup of North Carolina's fairly well-integrated county school district structure by allowing wealthy white suburbs to secede from county districts.<sup>102</sup> In essence, the mostly white, higher-income towns of Matthews, Cornelius, Mint Hill, and Huntersville—all suburbs of Charlotte and part of the Charlotte-Mecklenburg School System—are now free to open their own charter schools.<sup>103</sup> Proponents argue that

---

93. KRIS NORDSTROM, *STYMIED BY SEGREGATION: HOW INTEGRATION CAN TRANSFORM NORTH CAROLINA SCHOOLS AND THE LIVES OF ITS STUDENTS 12-13* (2018), <http://www.ncjustice.org/sites/default/files/STYMIED%20BY%20SEGREGATION%20-%20FINAL.PDF> [<https://perma.cc/RT3C-GRTP>].

94. *Id.* at 6.

95. *Id.*

96. *Id.*

97. *Id.* at 7.

98. *Id.* at 8.

99. See H.R. 514, 2017-2018 Gen. Assemb., Reg. Sess. (N.C. 2018).

100. *Id.*

101. Derek Black, *How Far Will North Carolina Go to Dismantle Integration and Equality in its Schools?*, EDUC. L. PROF BLOG (Apr. 11, 2018), [http://lawprofessors.typepad.com/education\\_law/2018/04/how-far-will-north-carolina-go-to-dismantle-integration-and-equality-in-its-schools.html](http://lawprofessors.typepad.com/education_law/2018/04/how-far-will-north-carolina-go-to-dismantle-integration-and-equality-in-its-schools.html) [<https://perma.cc/D7AL-9MDV>].

102. *Id.*

103. Ann Doss Helms, *Segregation in 2018? Resistance Builds as NC Town Charter School Bill Labeled Racist*, CHARLOTTE OBSERVER (June 5, 2018, 4:29 PM),

it is a matter of school choice, while opponents call it what it is—segregation by a different name.<sup>104</sup>

#### 4. Tennessee Case Study

In 2014, six predominantly white and wealthy Tennessee suburbs seceded “from the impoverished Shelby County school district after nearly a decade’s struggle.”<sup>105</sup> The mass exodus of white and wealthy families from Memphis, like many other southern cities, began in the wake of the Supreme Court’s holdings in *Brown* and *Cumming*.<sup>106</sup> In 1973, many of Memphis’ white and wealthier families moved from the city of Memphis to the surrounding suburbs of Shelby County.<sup>107</sup> This exodus left the Memphis school district disproportionately poor and non-white.<sup>108</sup> Meanwhile, the Shelby County school district became more than 50% white, with a median family income more than double that of the Memphis school district.<sup>109</sup> Both Memphis and Shelby County residents paid a countywide property tax that was shared amongst the county’s school districts.<sup>110</sup> By 2008, Shelby County’s parents had grown disenchanted with their property taxes being used to fund Memphis schools and began embarking on the journey of seceding from the county school district.<sup>111</sup>

The suburban district of Shelby County had higher property values than those in the Memphis district. Therefore, the suburbs, if considered their own entities, could lower their property tax rates while still maintaining the income to cover the expenses of their schools. Meanwhile, Memphis City Schools would have to more than double the taxes for Memphis residents to cover the lost revenue if the suburban entities of Shelby County were permitted to secede.

---

<https://www.charlotteobserver.com/news/local/education/article212517324.html> [https://perma.cc/PRR4-JFWG].

104. See *id.*

105. EDBUILD, *supra* note 76, at 9; see Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 897–98 (1998) (explaining that a large population of southern blacks started migrating north at the turn of the twentieth century, in what is known as “The Great Migration”).

106. EDBUILD, *supra* note 76, at 9.

107. *Id.*

108. *Id.* (discussing the Memphis school district serving a student population that was 93% non-white and disproportionately poor).

109. *Id.*

110. *Id.*

111. *Id.*

Initially, Tennessee did not permit secession of municipalities from county school districts. However, when the Republican party obtained a majority in the Tennessee legislature, the legislature removed legal roadblocks that prevented municipalities from forming their own school districts.<sup>112</sup> As a result of the secessions, the Memphis City School budgets were cut by 200%. Moreover, seven Memphis area schools closed during the 2014–2015 school year; in 2015 and 2016, the district laid off approximately 500 teachers.<sup>113</sup>

#### IV. ANALYSIS

As the Court explained in *Brown* and subsequent cases, segregation of students based on race is incompatible with the Equal Protection Clause of the Fourteenth Amendment. The Court has been reluctant to extend this analysis to discrimination based on socioeconomic status. The *Roberts* Court may have breathed unintended life into the idea that poor or neglected students require an education separate and apart from their wealthier or otherwise advantaged peers.<sup>114</sup>

Today, the United States is faced with a different segregation issue—the new iterations of school choice. Predominantly white and affluent suburbs in the southern United States are seceding from racially and economically diverse school districts and forming their own homogenous school districts.<sup>115</sup> Charter schools are more numerous than ever but have little concern for racial or socioeconomic integration.<sup>116</sup> School choice, in its many forms, removes affluent and white students from the public school, and deprives the remaining students of the benefits of being educated with their peers. “While poor and minority students are certainly

---

112. *Id.*

113. *Id.* at 10 (citing Micaela Watts, *For a Second Year, Layoffs Impact About 500 Shelby County Educators*, CHALKBEAT (May 27, 2016), <http://www.chalkbeat.org/post/s/tn/2016/05/27/for-a-second-year-layoffs-impact-about-500-shelby-county-educators> [<https://perma.cc/72LF-WBJZ>]).

114. See *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 208 (1849) (discussing the necessity and prudence of establishing special schools for poor and neglected children who had passed the age of seven who were “too old to attend the primary school but having not yet acquired the rudiments of learning, to enable them to enter the ordinary schools”).

115. Wilson, *supra* note 58, at 141.

116. Wendy Parker, *From the Failure of Desegregation to the Failure of Choice*, 40 WASH. U. J.L. & POL’Y 117, 121 (2012) [hereinafter Parker, *Failure of Desegregation*].

---

---

capable of learning in the absence of white and affluent students, the institutional limitations imposed by racial segregation and high levels of poverty in schools make it exceedingly difficult.”<sup>117</sup>

A. *Types of School Choice*

The fundamental right to receive a free adequate education is being trampled under the guise of localism and school choice. School choice is primarily a right provided by state—not federal—law.<sup>118</sup> Unfortunately, school choice options often facilitate self-segregation by race and class.<sup>119</sup> School choice takes on many forms, the most prevalent of which are charter schools and school vouchers.<sup>120</sup> Other forms include magnet schools, inter-district and intra-district public school choice, homeschooling, online learning, or customized learning that can include a mix of online and experiential learning.<sup>121</sup>

Charter schools are independently operated public schools that are not bound by some of the requirements that are applied to traditional public schools.<sup>122</sup> Charter schools operate under a contract with a charter-school authorizer, typically a nonprofit organization, that holds the school accountable to the standards outlined in their contract, or “charter.”<sup>123</sup> Today, there are over 7,000 charter schools in operation in the United States.<sup>124</sup> The origins of these types of schools stem from educational reform intended to bring freedom of

---

117. Wilson, *supra* note 58, at 197 (citing Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 404 (2012)).

118. Ladd et al., *Growing Segmentation*, *supra* note 83, at 1.

119. Parker, *Failure of Desegregation*, *supra* note 116, at 127 (discussing parental preference for children to be educated in schools where their child’s race is the majority and whether parents have access to information and transportation to effectuate school choice).

120. See Morgan Polikoff & Tenice Hardaway, *Don’t Forget Magnet Schools When Thinking About School Choice*, BROOKINGS (Mar. 16, 2017), <https://www.brookings.edu/research/dont-forget-magnet-schools-when-thinking-about-school-choice> [<https://perma.cc/M4XZ-LFJA>].

121. *Types of School Choice*, EDCHOICE, <https://www.edchoice.org/school-choice/types-of-school-choice> [<https://perma.cc/PY3U-7WTA>].

122. *What is a Charter School?*, NAT’L ALLIANCE FOR PUB. CHARTER SCHS., <https://www.publiccharters.org/about-charter-schools/what-charter-school> [<https://perma.cc/QT5X-ZSFH>].

123. *Id.*

124. *Id.*

choice to public education.<sup>125</sup> The addition of charter schools has put an end to public school monopolies on public educational monies, causing traditional public and charter schools to now compete for public funding.<sup>126</sup> Charter school proponents argue that their programs are designed to promote educational excellence by creating a competitive market for public education dollars.<sup>127</sup> However, “charter schools generate negative fiscal externalities on public school districts to the degree that districts are unable to reduce spending in line with the revenue losses they experience as a result of charter schools without reducing services to the remaining public school students.”<sup>128</sup>

Many charter schools are not concerned with integration, as most states do not mandate diversity or integration when considering whether to issue or maintain a charter.<sup>129</sup> The location of charter schools may also facilitate racial and socioeconomic segregation.<sup>130</sup> Many suburban school districts have no interest in charter schools being located in their communities.<sup>131</sup>

[I]n 1998 and 2005, students whose parents have at least a college degree were overrepresented in charter schools relative to the traditional public sector. In 1998 close to 43 percent of the charter school parents had college degrees in contrast to only 25.8 percent of those in traditional public schools. This overrepresentation of students with college-educated parents should not be surprising. Despite the fact that charter schools are often billed as a way to expand options for disadvantaged students, parents must gather information and take the initiative to seek out a charter school, actions that are easier for college educated parents than for those with limited education.<sup>132</sup>

---

125. Schultz, *supra* note 86 (explaining that charter schools have the freedom to be flexible and innovative).

126. Parker, *Failure of Desegregation*, *supra* note 116, at 125.

127. *Id.*

128. Helen F. Ladd & John D. Singleton, *The Fiscal Externalities of Charter Schools: Evidence from North Carolina 1* (Econ. Res. Initiatives at Duke, Working Paper No. 261, 2018), <https://aefpweb.org/sites/default/files/webform/FiscalExt120517.pdf> [<https://perma.cc/3CPX-BRMB>].

129. Parker, *Failure of Desegregation*, *supra* note 116, at 128.

130. *Id.* at 133.

131. *Id.* at 133–34 (discussing the lack of charter schools in suburban school districts due to suburban parents’ overall satisfaction with existing schools and the unwillingness to share money designated for public schools with charter schools).

132. Ladd et al., *Growing Segmentation*, *supra* note 83, at 8.

School vouchers enable parents to choose a private school for their children by diverting the funds that would be spent on their children in a public school to a private school of their choice.<sup>133</sup> Fifteen states and the District of Columbia have school voucher programs.<sup>134</sup> Many, but not all, vouchers are targeted to low-income students or students with disabilities.<sup>135</sup> Education Savings Accounts (ESAs) are a type of school voucher that permits parents to withdraw their children from public schools and receive a deposit of public funds into government-authorized savings accounts for restricted educational purposes, which may include private-school tuition and fees.<sup>136</sup> Currently, there are five states with active ESAs.<sup>137</sup> Each of the five states reserve ESAs for students who have special needs and may require more extensive services than the public schools of the state can provide.<sup>138</sup>

School vouchers, in all forms, are only accessible to parents who have the information about the programs, as well as the means to

---

133. *What are School Vouchers?*, EdCHOICE, <https://www.edchoice.org/school-choice/types-of-school-choice/what-are-school-vouchers-2> [<https://perma.cc/4JJ9-GH8A>].

134. *Id.*

135. See, e.g., ARK. CODE ANN. §§ 6-41-801 to -805 (2017) (creating the Arkansas Building Better Futures High School Program for students in foster care and students with disabilities); FLA. STAT. § 1002.39 (2018) (creating the John M. McKay Scholarships for Students with Disabilities Program); N.C. GEN. STAT. §§ 115c-562.1 to -562.8 (2016) (creating the Opportunity Scholarship for low-income students).

136. *What is an Education Savings Account?*, EdCHOICE <https://www.edchoice.org/school-choice/types-of-school-choice/education-savings-account> [<https://perma.cc/N5RY-C9DJ>].

137. *Id.*

138. See ARIZ. REV. STAT. § 15-2401(7)(a)(i) (2017) (explaining that a student must be a student with a disability as defined by Section 504 of the Rehabilitation Act of 1973 or pursuant to the Individuals with Disabilities in Education Act to qualify for the state's ESA program); FLA. STAT. § 1002.385(3) (2018) (explaining that a student must have a disability and an Individualized Education Program (IEP) to qualify for the Gardiner Scholarship, which is the state's ESA program); MISS. CODE ANN. § 37-181-3 (2018) (providing that to qualify for the program, a student must have had an IEP within the past five years); N.C. GEN. STAT. §§ 115C-106.3, -592, -593 (2018) (explaining that to qualify for North Carolina's ESA, students must have an IEP and be identified as having special needs under the Individuals with Disabilities in Education Act definition of a "child with disabilities"); TENN. CODE ANN. § 49-10-1402(3)(A)(i)-(ix) (2017) (providing that a student must have an IEP and have been diagnosed with autism, deaf-blindness, a hearing impairment, an intellectual disability, an orthopedic impairment, a traumatic brain injury, developmental delay, visual impairment, or multiple disabilities to qualify for the program).

---

---

transport their children to a private school or another educational facility. In practice, most families that utilize school vouchers have at least one parent with a college degree and can cover the financial difference between the school voucher monetary caps and the cost of private school tuition. This imbalance of accessibility results in more affluent families being able to take advantage of these programs, while poorer students with severe disabilities remain in public schools without the resources to provide an appropriate education.

*B. Disparate Impact of School Choice*

The introduction of school choice and the reallocation of public school funding to charter schools and private school vouchers adds to the resurgence of segregation in public schools. A widely held belief exists that there is a crisis in public education and that education reform is necessary. The existence of this belief is apparent during the election season's candidate debates and in political advertisements. If a *general* education crisis exists, then the educational outlook for racial minorities and working-class children—who almost always receive a worse-than-average education compared to their white and affluent peers—is “nearing a state of complete dysfunction.”<sup>139</sup>

School choice advocates usually rely, in part, on one of two positions: (1) school choice creates better educational services for students by causing educational providers to compete for state and federal funding; or (2) local control of school districts is important.<sup>140</sup> These positions do not consider the impact on the students who are unable to exercise school choice. The competition aspect of school choice, whether intentional or not, creates disparate qualities of education among the affluent and the poor.<sup>141</sup> Similarly, localism disproportionately affects people of color and the poor due to “the

---

139. Imoukhuede, *Educational Rights*, *supra* note 13, at 500.

140. See Parker, *Failure of Desegregation*, *supra* note 116, at 125 (stating that “[w]ith the addition of charter schools, public school monopolies on public educational monies end” and that “traditional public and charter schools would compete for public funding” thus, “[b]y increasing competition, the theory holds, both traditional public and charter schools would improve educational offerings, for the benefit of all students”); Wilson, *supra* note 58, at 184, 189 (“Proponents of school district secessions suggest that in order for them to *truly* reap the benefits of classic localism in public education, the power afforded to school districts must be decentralized down to the municipal level rather than the county level.”).

141. Wilson, *supra* note 58, at 187.

---

ways in which municipalities within the American metropolis are marked along the lines of race and class.”<sup>142</sup>

Long-term studies have also revealed that voucher programs have no advantage in improving academic achievement for students attending private schools on vouchers.<sup>143</sup> For example, of the 158 private voucher schools reporting in Florida, only eighteen achieved statistically significant increases in reading and math from 2011 to 2014.<sup>144</sup> In fact, thirty-one of those schools reported statistically significant losses in both subjects over the same period of time.<sup>145</sup> A comprehensive two-year study of Louisiana’s voucher program showed that students who were performing at average math and reading levels fell twenty-four percentile points in math and eight points in reading over the two-year period when compared to non-voucher students.<sup>146</sup>

In the 1980s, 57% of African-American students from southern states in the United States attended schools in which African-American students made up a majority of the student body.<sup>147</sup> In 2005, this figure rose to 72% and research shows that this number continues to climb.<sup>148</sup> In 2010, 70% of charter schools were highly segregated by income, either serving students with high income or low income.<sup>149</sup> Researchers at Pennsylvania State University compared the racial composition of charter schools to public schools and found that African-American and Latino students often moved into charter schools that were more racially isolated than the public

---

142. *Id.* at 189.

143. RESEARCH & EDUC. FUND, SCHOOL CHOICE: DISPROPORTIONATELY NEGATIVE IMPACT ON VULNERABLE STUDENTS 2, <http://www.tpcref.org/wp-content/uploads/School-Choice-Impact-on-Vulnerable-Students.pdf> [<https://perma.cc/6D2S-SXA8>].

144. *Id.*

145. *Id.*

146. JONATHAN N. MILL ET AL., HOW HAS THE LOUISIANA SCHOLARSHIP PROGRAM AFFECTED STUDENTS? 4 (2016), <https://educationresearchalliancenola.org/files/publications/ERA-Policy-Brief-Public-Private-School-Choice-160218.pdf> [<http://perma.cc/RM99-XAJV>].

147. Ansley T. Erickson, *The Rhetoric of Choice: Segregation, Desegregation, and Charter Schools*, DISSENT, Fall 201, at 41, [https://www.tc.columbia.edu/faculty/ate11/faculty-profile/files/Erickson\\_Dissent.pdf](https://www.tc.columbia.edu/faculty/ate11/faculty-profile/files/Erickson_Dissent.pdf) [<https://perma.cc/3Q6C-BL3D>].

148. *Id.*

149. William J. Mathis & Kevin G. Welner, *School Choice, Segregation and Democracy*, SCH. ADMIN., Jan. 2018, at 33, 35, <http://www.pageturnpro.com/AASA/82406-January-2018/index.html#34> [<https://perma.cc/4RT6-XD6A>].

school they left.<sup>150</sup> A 2012 study found that 43% of private schools consisted of a student body that was 90% or more white, while only 27% of public schools consisted of a student body that was 90% or more white.<sup>151</sup>

During the 2014–2015 school year, 4% of the United States' traditional public schools contained a student body that comprised 99% minority students, whereas 17% of the nation's charter schools contained a student body that was 99% minority.<sup>152</sup> In cities where charter schools are more prevalent, 25% of charter schools contain over 99% minority students, compared to 10% for traditional public schools.<sup>153</sup> States in the southern United States with school choice options have the largest over-representation of white students in private schools.<sup>154</sup> For example, enrollment of white students at private schools in Alabama is about 86%; Louisiana, 85%; and North Carolina, 89%.<sup>155</sup> Between 1996 and 2016, the number of public schools with less than 40% of white enrollment has doubled.<sup>156</sup>

Public schools that predominately serve non-white students lack the financial resources of schools that have primarily white populations.<sup>157</sup> Additionally, "schools in impoverished and working-class communities tend to be significantly underfunded compared to more economically privileged public schools."<sup>158</sup> Although private schools or tuition vouchers may appear to be an easy fix for parents

---

150. Kristie Auman-Bauer, *Impacts of School Choice on Segregation*, PENN ST. NEWS (Mar. 27, 2017), <https://news.psu.edu/story/458193/2017/03/27/research/impacts-school-choice-segregation> [<https://perma.cc/FAK5-MQ8W>].

151. S. EDUC. FOUND., RACE AND ETHNICITY IN A NEW ERA OF PUBLIC FUNDING OF PRIVATE SCHOOLS: PRIVATE SCHOOL ENROLLMENT IN THE SOUTH AND THE NATION, 1, 36, 63 (Mar. 2016), <http://www.southerneducation.org/getattachment/be785c57-6ce7-4682-b80d-04d89994a0b6/Race-and-Ethnicity-in-a-New-Era-of-Public-Funding.aspx> [<https://perma.cc/5MYD-4DBP>].

152. Julian Vasquez Heilig et al., *Does the African American Need Separate Charter Schools?*, 36 LAW & INEQ. 247, 255 (2018) (citing Ivan Moreno, *U.S. Charter Schools Put Growing Numbers in Racial Isolation*, AP NEWS (Dec. 3, 2017), <https://www.apnews.com/e9c25534dfd44851a5e56bd57454b4f5> [<https://perma.cc/679U-46SV>]).

153. *Id.* (citing Moreno, *supra* note 152).

154. S. EDUC. FOUND., *supra* note 151, at 17.

155. *Id.*

156. Will Stancil, *School Segregation Is Not a Myth*, ATLANTIC (Mar. 14, 2018), <https://www.theatlantic.com/education/archive/2018/03/school-segregation-is-not-a-myth/555614> [<https://perma.cc/2AZ8-PCSC>].

157. Imoukhuede, *Educational Rights*, *supra* note 13, at 500.

158. *Id.*

experiencing underfunded public schools in the community, this simply is not the case. Private schools are expensive and voucher programs may only provide a portion of the fee, often requiring parents to come up with the remainder of tuition fees.<sup>159</sup> Rudy Crew, the executive director of the University of Washington's new Institute for K-12 Leadership, opposes voucher programs. In explaining how voucher programs create a redistribution of opportunities, Crew stated:

I understand that the whole notion of choice has a very, very important and valuable competitive nature. I believe in that nature. I believe in that opportunity. But I also know that there are schools that already are trying to fight for just getting their roof fixed. They're trying to make sure that they have technology available for some kids, not even for everybody yet, that they have an opportunity to have adequate textbooks and labs for science experiments to be done, on exams that they now have to take. So to start talking about removing tax dollars from the base that would otherwise go to support that kind of an instructional high quality program is to walk away from children who are in these schools.<sup>160</sup>

Additionally, the Century Foundation has explained:

Two-thirds of school transfers in one program and 90 percent of transfers in the other program increased segregation in private schools, public schools, or both sectors. Furthermore, data suggest that there is a strong risk that voucher programs will be used by white families to leave more diverse public schools for predominantly white private schools and by religious families to move to parochial private schools, increasing the separation of students by race/ethnicity and religious background.<sup>161</sup>

---

159. See, e.g., ANNA J. EGALITE ET AL., PARENT PERSPECTIVES: APPLICANTS TO NORTH CAROLINA'S OPPORTUNITY SCHOLARSHIP PROGRAM SHARE THEIR EXPERIENCES 16 (2017), <https://ced.ncsu.edu/elphd/wp-content/uploads/sites/2/2017/07/Parent-Perspectives.pdf> [<http://perma.cc/K5GY-R8WF>] (noting that in North Carolina, if private school tuition exceeds the voucher amount, "families are responsible for the payment of any additional tuition and fees owed").

160. *The Case Against Vouchers*, FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/vouchers/choice/convouchers.html> [<https://perma.cc/V9SB-X288>].

161. HALLEY POTTER, DO PRIVATE SCHOOL VOUCHERS POSE A THREAT TO INTEGRATION?, 2-3 (2017), <https://s3-us-west-2.amazonaws.com/production.tcf.org/app/uploads/2017/03/22102646/do->

Charter school growth may be linked to systematic patterns of housing and school segregation. The growth of charter schools occurred because school choice options, including vouchers, were established as one way to counter the link between schools and neighborhoods by offering alternatives to the local school.<sup>162</sup> Yet, as one sociologist observed, “some people are better able to exercise ‘choice’ than others” because “taking advantage of school choice options depends on knowing and understanding the options, having an option located close by or having transportation available, and having enough seats available.”<sup>163</sup> Research has indicated that charter schools often locate in higher-need census tracts but avoid locating directly within the highest-need communities, strategically making it “easier to attract a quorum of *relatively* higher achieving students who are less expensive to educate, therefore increasing their chances of meeting academic benchmarks and retaining their charters.”<sup>164</sup>

School *segregation* negatively impacts low-income students and students of color, while school *integration* positively impacts low-income students and students of color.<sup>165</sup> For example, a Maryland study found that students from low-income families that were randomly assigned to low-poverty schools experienced better academic outcomes than similar students assigned to high-poverty schools.<sup>166</sup> A researcher at Pennsylvania State University explained that “[m]inority students in more diverse school settings have higher short-term and long-term academic outcomes than those who attend racially isolated minority schools.”<sup>167</sup> Moreover, all students who are

---

private-school-vouchers-pose-a-threat-to-integration.pdf [https://perma.cc/E6RV-94WJ].

162. Michelle Chen, *What Betsy DeVos’s Emphasis on ‘Choice’ Means for School Segregation*, NATION (Apr. 19, 2017), <https://www.thenation.com/article/what-betsy-devoss-emphasis-on-choice-means-for-school-segregation/9> [https://perma.cc/YBE2-ME3Y].

163. *Id.* (quoting University of Southern California sociologist Ann Owens).

164. Jennifer C. LaFleur, *Locating Chicago’s Charter Schools: A Socio-Spatial Analysis*, 24 EDUC. POL’Y ANALYSIS ARCHIVES 1, 1 (2016), <http://www.redalyc.org/pdf/2750/275043450019.pdf> [https://perma.cc/8S9F-38S5].

165. NORDSTROM, *supra* note 93, at 3.

166. *Id.* at 4 (citing HEATHER SCHWARTZ, HOUSING POLICY IS SCHOOL POLICY: ECONOMICALLY INTEGRATIVE HOUSING PROMOTES ACADEMIC SUCCESS IN MONTGOMERY COUNTY, MARYLAND 6 (2010), <https://tcf.org/assets/downloads/tcf-Schwartz.pdf> [https://perma.cc/897L-ZCNK]).

167. Kristie Auman-Bauer, *Impacts of School Choice on Segregation*, PENN ST. NEWS (Mar. 27, 2017), <https://news.psu.edu/story/458193/2017/03/27/research/impacts-school-choice-segregation> [https://perma.cc/JN9B-BDZS] (quoting Erica

educated in a diverse setting have “reduced prejudice and a higher probability of living and working in diverse environments as adults.”<sup>168</sup>

Research has shown that funding cuts to public schools decrease student academic achievement within those schools.<sup>169</sup> The superintendent of a California school district explained that “the loss of federal funding” from public school districts to charter and voucher programs “would be catastrophic to school districts” and that “[v]ery basic foundational programs and services would be reduced or eliminated.”<sup>170</sup> School choice impacts the greater community because the withdrawal of the funds from public schools results in teacher layoffs and school closures.<sup>171</sup> Further, “racially and economically isolated schools attract and retain fewer high-performing teachers and suffer from greater teacher and [administration] turnover.”<sup>172</sup> Funding differences in schools directly correlate with the performance gap between students graduating from public schools in lower income communities and students graduating from schools in economically privileged communities.<sup>173</sup> Moreover, “race-based achievement gaps often correlate with significant shortfalls in the resources allocated for underprivileged communities.”<sup>174</sup> If students

---

Frankenberg, associate professor of education and Population Research Institute associate at Pennsylvania State University).

168. *Id.* (quoting Frankenberg).

169. Derek W. Black, *Don't Divert Taxpayer Money to Vouchers. It Does Much More Good at Public Schools*, USA TODAY (Aug. 16, 2018, 3:15 AM), <https://www.usatoday.com/story/opinion/2018/08/16/spend-taxpayer-money-public-education-not-private-school-vouchers-column/976133002> [<https://perma.cc/C9NH-MRU9>] (citing C. Kirabo Jackson et al., *Do School Spending Cuts Matter? Evidence from the Great Recession* 15–17 (Northwestern Univ. Inst. for Policy Research, Working Paper No. WP-18-02, 2018), <https://www.ipr.northwestern.edu/publications/docs/workpapers/2018/wp-18-02.pdf> [<https://perma.cc/44H8-GJFB>]).

170. Deborah Sullivan Brennan, *Will School Choice Energize or Endanger Public Education?*, SAN DIEGO UNION-TRIB. (Mar. 6, 2017, 1:35 PM), <http://www.sandiegouniontribune.com/news/education/sd-me-school-choice-20170306-story.html> [<https://perma.cc/K9RJ-GL3G>].

171. Nicole Stelle Garnett, *Disparate Impact, School Closures, and Parental Choice*, 2014 U. CHI. LEGAL F. 289, 301, 310 (2014) (discussing the community impact of school choice rather than the educational impact on students).

172. NORDSTROM, *supra* note 93, at 5.

173. EDBUILD, *supra* note 76, at 15 (discussing the impact of resource disparity between low-income and high-income school districts across twenty states).

174. Dianne Piche et al., *Remediating Disparate Impact in Education*, 38 HUM. RTS. MAG. 15, 16 (2011).

do not have access to basic necessities in their classrooms and schools, it is impossible for them to learn.<sup>175</sup>

## V. CONCLUSION

The outlook for education in the United States may seem hopeless. However, there are methods that state and federal governments can implement to lessen the systematic disregard of education as a fundamental right and to protect the rights of students—especially students of color and poor students—to receive an adequate education.

The United States needs to create a better system of checks and balances on school choice programs. School choice programs need appropriate regulation to minimize or negate their contribution to the rise of segregation in public schools.<sup>176</sup> The federal government needs to provide more oversight of state and local education policies and enforce statutes protecting the civil rights of students.<sup>177</sup>

Additionally, the United States needs leaders in the U.S. Department of Education who have experience and knowledge about the public school system and about education policies and procedures. Moreover, the United States must strengthen the Department of Education's ability to enforce civil and due process rights as provided under the Equal Protection Clause of the Fourteenth Amendment. Under Secretary Betsy DeVos, the Department of Education's Office of Civil Rights—the entity that enforces federal civil rights laws in schools, including desegregation orders—is taking a narrower view of civil rights complaints and ignoring systemic issues.<sup>178</sup>

The United States needs strong legislative action rather than merely continued judicial action.<sup>179</sup> In fact, the “biggest obstacle for change from this angle is that responsibility lies with the American population to demand it.”<sup>180</sup> Although substantial changes have not

---

175. Rachel R. Ostrander, *School Funding: Inequality in District Funding and the Disparate Impact on Urban and Migrant School Children*, 2015 BYU EDUC. & L.J. 271, 281 (2015).

176. NORDSTROM, *supra* note 93, at 16.

177. Garnett, *supra* note 171, at 294.

178. NORDSTROM, *supra* note 93, at 16.

179. Ostrander, *supra* note 175, at 289 (explaining that the courts have been inadequate in implementing remedies for those challenging the current educational structures).

180. *Id.* at 290.

---

---

been implemented after constitutional challenges in the past, pursuing change by amending the education laws at the local and state level could prove successful.<sup>181</sup> For example, it is insufficient to permit charter schools to simply mirror the demographics of their specific towns, municipalities, or communities due to the self-segregation that often occurs in housing selection. Rather, states should revoke the charter—as North Carolina once did—for charter schools whose demographics do not mirror the racial and socioeconomic demographics of the *county* in which they are situated.<sup>182</sup> Additionally, charter schools should be required to provide lunch and transportation to include low-income families that would otherwise be excluded from schools that do not provide these necessities.<sup>183</sup>

There is no question that receiving an adequate education is vitally important to a student's future. There is also no question that students are better prepared for adulthood when they have been exposed to a variety of races, ethnicities, and socioeconomic backgrounds, and to peers who are different from themselves. School choice, in and of itself, is not detrimental to minorities and poor students. However, constitutional red flags arise when school choice is the vehicle by which those who ascribe to localism are permitted to create "white and wealthy schools."

U.S. jurisprudence makes it clear that there is no place in the United States for schools that separate on the basis of race. Although there is no case law supporting the premise that schools should not be segregated based on socioeconomic status, it is clear that separate schools based on income are more often than not, also segregated by race. The unintended effect is that minority students are still being left behind in their efforts to access quality education. This article presented some solutions to the problem. In the meantime, all persons should do their part by advocating for better schools for all children.

---

181. *Id.*

182. NORDSTROM, *supra* note 93, at 17.

183. *Id.*

---

## **Mitchell Hamline Law Review**

The Mitchell Hamline Law Review is a student-edited journal. Founded in 1974, the Law Review publishes timely articles of regional, national and international interest for legal practitioners, scholars, and lawmakers. Judges throughout the United States regularly cite the Law Review in their opinions. Academic journals, textbooks, and treatises frequently cite the Law Review as well. It can be found in nearly all U.S. law school libraries and online.

[mitchellhamline.edu/lawreview](http://mitchellhamline.edu/lawreview)

---

**MH**

MITCHELL | HAMLINE

School *of* Law

© Mitchell Hamline School of Law  
875 Summit Avenue, Saint Paul, MN 55105

[mitchellhamline.edu](http://mitchellhamline.edu)