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## No Caste Here? Toward a Structural Critique of American Education

Daniel Kiel

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# No Caste Here? Toward a Structural Critique of American Education

Daniel Kiel\*

## ABSTRACT

In his famous dissent in *Plessy v. Ferguson*, Justice John Marshall Harlan argued that in the United States, there was “no caste here.” Justice Harlan was rejecting the idea that American society operated to assign preordained outcomes to individuals based upon classifications, including racial classifications. This Article questions whether Justice Harlan’s aspirational assertion accurately reflects contemporary American education. Identifying: (1) multiple classification mechanisms, all of which have disproportionate racial effects, and (2) structural legal, political, and practical impediments to reform, the Article argues that the American education system does more to maintain the nation’s historical racial hierarchy than to disrupt it. This is so, the Article suggests, despite popular agreement with the casteless ideal and popular belief that education can provide the opportunity to transcend social class. By building the framework for a broad structural critique, the Article suggests that a failure to acknowledge and address structural flaws will preclude successful comprehensive reform with more equitable outcomes.

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## INTRODUCTION

The frustration and disgust in the famous dissent of John Marshall Harlan from the U.S. Supreme Court's decision in *Plessy v. Ferguson*<sup>1</sup> is palpable. Writing alone in dissent from a decision that found the practice of racial segregation in Louisiana railcars to be constitutional, Justice Harlan recognized the undeniable intent of segregation laws: the subjugation of African Americans.<sup>2</sup> In contrast to this intent, he set out an appealing interpretation of the Constitution: "[I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here."<sup>3</sup>

Justice Harlan's "no caste here" assertion expressed an aspiration rather than a reality; indeed, his eight colleagues had just ensured that a comprehensive racial caste system would be maintained in the post-slavery era. Over time, Justice Harlan's dissent took on the air of prophecy,<sup>4</sup> anticipating *Plessy*'s ultimate fate—an infamous, even shameful, decision that would be discredited by history.<sup>5</sup> However, more than a century later, the aspiration of a country without racial stratification has hardly been realized. Explicitly racial Jim Crow laws have been eliminated. Open racism is no longer a political badge of honor. But even as the nation commemorates important anniversaries in

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

2. *Id.* at 557 (Harlan, J., dissenting).

3. *Id.* at 559.

4. See, e.g., Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1206 n.228 (2008) (gathering references to Justice Harlan's dissent, including some calling it "prophetic").

5. See *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting) ("In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case*.").

the dismantling of the Jim Crow caste system, there is great frustration that racial disparities persist.<sup>6</sup> Recently, such frustrations exploded in places like Ferguson, Missouri, over perceived biases by law-enforcement officers and the failure of the legal system to hold officers accountable for biased actions, such as killing unarmed African American suspects.<sup>7</sup> Some scholars have critiqued structures that allow disparities to persist in other contexts.<sup>8</sup>

The goal of this Article is to build on that work and apply it in the context of American education. This Article's proposed contribution is not in uncovering new developments in education law or policy; much of what is presented is well known and has been ably argued elsewhere. Rather, this is the beginning of a larger project aiming to connect the dots among existing works to construct a comprehensive critique of the system and thereby reframe the problem of racial disparities in education as a problem with the structure of the system itself. At its core, this Article suggests that, despite Justice Harlan's aspirations, there *is* caste here, and the structure of American education helps make it so.

A caste system uses a network of laws, policies, customs, and institutions collectively operating to ensure that certain groups remain in a predetermined status within society.<sup>9</sup> A fundamental component of any caste system is a classification mechanism through which individuals in different categories can be separated and treated differently.<sup>10</sup> This

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6. This frustration is often articulated with claims to the effect that schools remain "separate and unequal." See, e.g., Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1461–62 (2003); Robert A. Garda, Jr., *Coming Full Circle: The Journey from Separate but Equal to Separate and Unequal Schools*, 2 DUKE J. CONST. L. & PUB. POL'Y 1, 4 (2007).

7. See, e.g., Kevin King, *Effectively Implementing Civilian Oversight Boards To Ensure Police Accountability and Strengthening Police-Community Relations*, 12 HASTINGS RACE & POVERTY L.J. 91, 94 (2015) (including summaries of reactions in Ferguson, Missouri, to the killing of Michael Brown by local police as part of an argument in support of Civilian Oversight Boards).

8. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 12–13 (2010) (arguing that the criminal justice system operates to reconstitute racial caste). See generally WILLIAM JULIUS WILSON, *MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY* (2010) (identifying structural factors impacting racial disparities in housing, employment, and family); DONNA L. FRANKLIN, *ENSURING INEQUALITY: THE STRUCTURAL TRANSFORMATION OF THE AFRICAN AMERICAN FAMILY* (1997) (connecting institutional factors to marriage and family decisions in African American families).

9. *Id.*

10. See CHARLES TILLY, *DURABLE INEQUALITY* 62–63 (1998) ("A category consists of a set of actors who share a boundary distinguishing all of them from and relating all of them to at least one set of actors visibly excluded by that boundary. A category simultaneously lumps together actors deemed similar, splits sets of actors considered dissimilar, and defines relations between the two sets.").

Article focuses on the classification mechanisms utilized to separate students and the legal, political, and practical effects of that sorting.

Specifically, the Article begins by describing the role education plays in either maintaining a caste system or disrupting it. Although there are examples of education both creating and undoing caste in America, Part I describes the historical roots of American education as a critical part of successive racial caste systems.

Part II discusses contemporary sorting mechanisms that separate students from their peers. These mechanisms include student-assignment policies that sort by geography, by merit, and by disciplinary practices. Each of these sorting mechanisms has a substantial correlation to race—geographic sorting often has the effect of creating racially homogenous schools, while merit tracking and disciplinary practices have been shown to be administered in racially disparate ways. Thus, although contemporary sorting is neither explicitly racial nor racially absolute, as it was during Jim Crow, the classification mechanisms used today continue to create racially identifiable groups of students.

Part III discusses some of the caste-creating or caste-maintaining effects of contemporary sorting systems. As an initial matter, the sorting allows for differentiated resources to be allocated to different groups within the system. Such disparately allocated resources include not only tangible resources like money but also intangible resources like teacher or peer quality. Further, contemporary methods of classification insulate even a largely segregated and racially unequal education system from legal challenges due to the colorblindness of, and educational justifications for, today's classifications. Finally, the sorting system creates practical and political impediments to remedial efforts, thus reducing the enthusiasm for, or the effectiveness of, interventions to close educational gaps.

This Article does not seek to minimize the importance of searching for effective policy changes or legal strategies within the existing structure. Rather, it seeks to complement that effort by bringing into focus flaws inherent in the existing structure and exposing how these flaws ensure the caste-maintaining outcomes so many advocates fight against. By emphasizing this structural critique, the Article argues that advocates today, like those of the past, face a comprehensive, though facially non-discriminatory system of inequality and that failing to conceive of the problem in this way will ensure that disparities persist.

## I. EDUCATION AND CASTE

Education of children is a crucial tool for shaping a society. Critical decisions about what to teach, to whom it should be taught, and by whom

it should be financed both reflect and perpetuate social norms. When societies are highly stratified, education can justify and maintain that stratification, ensuring that caste divisions remain effective. Conversely, critics of caste-based societies may also look to education as a means of empowering individuals or altering institutions in order to break down existing barriers. The same tool, therefore, holds the potential to deliver two vastly different outcomes—preservation of a caste system, or destruction of it.

The importance of education in American caste is demonstrated by the fact that *Plessy*, a case about caste but not education, justified its caste-maintaining holding by an earlier case allowing for segregation in schools in Massachusetts.<sup>11</sup> The centrality of education to caste is reinforced by the fact that an education case, *Brown v. Board of Education*,<sup>12</sup> ultimately reversed *Plessy*.<sup>13</sup>

In historical caste systems in the United States, education was critical to the subjugation of African Americans during both the slavery and Jim Crow eras of caste. During slavery, teaching slaves to read was illegal.<sup>14</sup> A colonial act in South Carolina noted that teaching slaves to write “may be attended with great inconveniences” and fined any person who did so 100 pounds.<sup>15</sup> Similarly, the slavery-era Virginia code characterized any meeting of slaves to teach reading and writing as an unlawful assembly, punishable by up to twenty lashes.<sup>16</sup> Racial segregation during the Jim Crow era enabled massive disparities in state-provided resources for public education based on race, part of a concerted effort at subjugation. In Alabama, for example, as Reconstruction waned, spending on teacher salaries in white and black schools, which had once been roughly equal, diverged to the point that teacher spending was \$30 per white student and less than \$1 per African American student.<sup>17</sup> For his part, Justice Harlan did not interfere with this arrangement when, just three years after *Plessy*, he wrote the unanimous majority opinion in a case endorsing a scheme in which black

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11. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (citing *Roberts v. City of Boston*, 59 Mass. 198 (1849)).

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

13. *Id.* at 494–95.

14. DAVID TYACK, THOMAS JAMES & AARON BENAVIDES, LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954, at 134 (1987).

15. An Act for the Better Ordering and Governing Negroes and Other Slaves in this Province, No. 670 (1740), art. XLV, reprinted in 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 397, 413 (David J. McCord ed., 1840).

16. 1 VA. REV. CODE ch. 111, § 15 (1819).

17. DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME 105–06 (1st Anchor Books ed. 2009).

schooling ceased before high school, while white schooling continued through high school.<sup>18</sup>

Bearing witness to these disparities, in part, drew Thurgood Marshall to the cause of confronting segregation.<sup>19</sup> The NAACP's campaign to end Jim Crow segregation hinged greatly on the belief that an education system that denied Americans the opportunity to move beyond their predetermined caste was inconsistent with the Constitution. The "equality" victories that preceded *Brown* embraced that ideal with regard to both tangible and intangible resources.<sup>20</sup> Then, *Brown* held that the act of classification itself denied equality of educational opportunities as guaranteed by the Constitution—"[s]eparate educational facilities are inherently unequal."<sup>21</sup>

The *Brown* court eloquently described the centrality of education to American life:

Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.<sup>22</sup>

Just as education had been utilized to subjugate in the past, the *Brown* Court, calling the opportunity of an education "a right which must be made available to all on equal terms," gave voice to the hope that education could be the vehicle to dismantle the existing caste system.<sup>23</sup> *Brown* vindicated Justice Harlan and held promise for moving the nation closer to the society without caste he had envisioned.

However, six decades since *Brown*, racial disparities persist in education. Even as education is hailed as the ticket to the American dream,<sup>24</sup> it has not succeeded in dismantling a social order that, more

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18. See *Cumming v. Richmond Cnty. Bd. of Educ.*, 175 U.S. 528, 541–45 (1899).

19. See JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* 63–64 (Three Rivers Press 1998).

20. See generally, e.g., *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950) (holding graduate school policies requiring segregation of African American students within cafeteria and classrooms unconstitutional); *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding a separate law school for African American students to be unconstitutional due to inequality in intangible factors, such as reputation and alumni network, as compared to law school for white students).

21. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

22. *Id.* at 493.

23. *Id.*

24. Carol Morello et al., *More People Express Uncertainty in Chance To Achieve the American Dream*, WASH. POST (Sept. 28, 2013), <http://www.washingtonpost.com/local/more-people-express-uncertainty-in-chance-to-achieve-the-american-dream/2013/09/28/d8e99084-260e-11e3-ad0d->

often than not, ends with African Americans in the most disadvantaged position. Despite varied efforts to alter education law and policy and disrupt this trend, a common lament is that schooling does not look all that different today than it did during Jim Crow.<sup>25</sup> Today, many students are learning in racially homogenous schools, with the perceived worst-performing schools being the ones serving largely African American student populations. Whereas Charles Hamilton Houston and the advocates he led faced a system explicitly designed to achieve this result, today's system aspires to be consistent with Justice Harlan's vision of a caste-free society. The structural critique presented here, however, suggests that just as education was a tool of subjugation within the American racial caste systems of the past, the contemporary system does more to maintain caste than disrupt it.

The modern American education system did not emerge from a vacuum. It is, rather, the product of a long process of tinkering. According to one scholar, "institutionally sanctioned discrimination in access to education is older than the American nation itself."<sup>26</sup> A motivation to increase access for and reduce disparities among groups within the system has driven many education reforms, particularly over the past 60 years.<sup>27</sup> However, despite claims (and examples) to the contrary, education has more often served to create or perpetuate racial stratification within society rather than as a system to ameliorate it. This is because modern American education already has a head start in achieving the effect of a caste system since it has the bones of a system initiated in order to create and maintain racial caste. Further, today's students have inherited both positive and negative legacies of previous caste systems, preserving many disparities of the past.

A system of caste requires classifications of individuals. Within education, this means classification of students. During Jim Crow, the primary method of student classification was explicitly racial, and it was absolute. It was explicitly racial in the sense that students were classified based exclusively on their assigned race, and classification was mandated by law. Racial classifications touched nearly every decision involved in

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b7c8d2a594b9\_story.html (discussing a Washington Post-Miller Center poll in which education and hard work were ranked highest on the question of what is required to achieve the American dream). Full survey results are available at [http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2013/09/28/National-Politics/Polling/release\\_266.xml?uuid=uD8cGiiSEeOKs7WqzJ4RZQ](http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2013/09/28/National-Politics/Polling/release_266.xml?uuid=uD8cGiiSEeOKs7WqzJ4RZQ).

25. See generally, e.g., DERRICK BELL, *SILENT COVENANTS: BROWN v. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004); Chemerinsky, *supra* note 6; Garda, *supra* note 6.

26. LINDA DARLING-HAMMOND, *THE FLAT WORLD AND EDUCATION* 28 (James A. Banks ed., 2010).

27. See DAVID TYACK & LARRY CUBAN, *TINKERING TOWARD UTOPIA* 47 (1995).



operating schools, from student assignment to resource allocation. The Jim Crow system was absolute in the sense that once a student was racially classified, that student was required to attend certain schools and prohibited from attending others. There were no exceptions from the racial hierarchy. From this segregation, the system could deliver the intended inequitable results.

Although explicit and absolute racial classifications are no longer permissible, the various education reforms of the past 60 years have largely left intact basic structures of the prior system. As an initial matter, the assignment of responsibility to states and ultimately local districts once allowed for segregation to be decided at the local level and later provided the basis for resistance to aggressive desegregation remedies. Such local administrative control remains the norm, with districts enjoying sovereignty within and local funding from relatively small, impenetrable boundaries. Dividing students geographically by district or by school attendance zones remains a primary feature of contemporary education, and separate administration remains the norm.

Contemporary American education not only maintains the foundational structural elements of prior caste systems but also inherits generational impacts on students from intentional discrimination of the past. The costs of growing up within families that were systematically denied the opportunity to learn may be difficult to measure, but lingering effects of prior discrimination suggest that intentional disparities of the past would continue to permeate even a perfectly egalitarian system.<sup>28</sup> This Article argues that in practice, contemporary American education is far from perfectly egalitarian. It should not be surprising, then, that the effects of a discriminatory past continue to infect contemporary schooling. These unremedied generational disparities are a

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28. Considered another way, one could say that the benefits of growing up within systematically privileged families undoubtedly exist as well. To take one illustrative example in the disadvantage faced by children of a formerly-subjugated group after the end of a system of subjugation, consider the fate of the 55,000 black children attending public school in Alabama in 1871, just after the Civil War. These children's parents were largely illiterate and kept that way by law—any interference with that pattern was going to have to come from school, as parents were not equipped to catch their children up. BLACKMON, *supra* note 17, at 39. Recent work has confirmed the continuing correlation between parental education level and student success. See, e.g., Sean F. Reardon, *The Widening Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in WHITHER OPPORTUNITY? RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES 91, 106 (Greg J. Duncan & Richard J. Murnane eds., 2011); Pamela E. Davis-Ken, *The Influence of Parent Education and Family Income on Child Achievement: The Indirect Role of Parental Expectations and the Home Environment*, 19 J. FAM. PSYCHOL. 294, 294 (2005); Eric Dubow, Paul Boxer & L. Rowell Huesmann, *Long-term Effects of Parents' Education on Children's Educational and Occupational Success: Mediation by Family Interactions, Child Aggression, and Teenage Aspirations*, 55 MERRILL-PALMER Q. 224, 225 (2009).

contemporary manifestation of prior caste systems, and the continued failure to address them suggests that the education system is, at best, not disrupting caste and, at worst, is maintaining it. In the next Part, this Article turns to the contemporary American education system, beginning with the modern classification system, which is neither explicitly racial nor racially absolute, but which continues to create racially identifiable classes of students within states, districts, and classrooms.

## II. THE MODERN CLASSIFICATION SYSTEM

If a system operates on the basis of caste, that system must classify those within it in order to deliver disparate treatment that can assign individuals to the appropriate caste position. This Part discusses three contemporary sorting mechanisms that separate students and enable disparate experiences. First, geography is the primary criteria used to determine the schools students will attend. Second, measures of skill, merit, or interest are used to assign students to different programs, schools, or peer groups. Finally, disciplinary policies often physically separate students from the school, in some cases permanently. In addition to these mechanisms within the public school system, there is also a sorting out of students from public education into private or home school environments that serves to further separate students. While these sorting mechanisms are not racial, they continue to create groups of students that are racially identifiable, an effect similar to the explicitly racial classifications of the past.

### A. *Geographic Sorting*

The primary sorting mechanism in an educational caste system is a sorting of which students attend which schools. Within the public system, the primary sorting for student assignment is geographic—first by state, then by school district,<sup>29</sup> then by school.<sup>30</sup> Some movement across school zone lines is permitted, such as through freedom of choice programs or transfer opportunities. In fewer circumstances, movement is allowed across district lines through interdistrict transfer programs or policies that allow for enrollment of students from adjacent districts.<sup>31</sup>

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29. Hawaii does not break administration up into districts, but rather operates a single statewide district. This, however, is a consistent source of proposed reform. Linda Jacobson, *Report Faults Hawaii's Statewide School District*, EDUC. WEEK (Dec. 10, 2003), <http://www.edweek.org/ew/articles/2003/12/10/15hawaii.h23.html>.

30. Most student assignments are made based on geographically-defined attendance zones within a district, though many district have opportunities for families to choose other school options.

31. Daniel Kiel, *The Enduring Power of Milliken's Fences*, 45 URB. LAW. 137, 148 nn.46–47 (2013).

But, for most students, where they live determines where they will attend school.

As has been the case throughout American educational history, public education is the responsibility of state government, but its administration and some of its funding is more locally based. Each local school district is part of a larger state system but enjoys substantial autonomy within its geographic boundaries, creating a sense of school-district sovereignty. Districts are responsible to their own constituents and have no responsibility to students beyond their borders.<sup>32</sup> Geographic borders between districts were given even greater importance in *Milliken v. Bradley*<sup>33</sup> when the Supreme Court prohibited courts from ignoring school district lines in crafting desegregation remedies.<sup>34</sup> *Milliken* thus strengthened the idea of district sovereignty.

School attendance zones operate similarly. A school is responsible to the students within a given zone but has no responsibility to those beyond the zone's boundaries. However, in contrast to school districts, attendance zones are regularly altered (though not without controversy), and the degree of school-level autonomy is generally less than that enjoyed at the district level.

Impenetrable fences between school districts, like the racial laws that preceded them, provide a mechanism for stratification. Just as the separation of black schools and white schools once allowed for education to be used as part of the Jim Crow system of caste, now schools in district *A* and schools in district *B*, still explicitly separated, have the potential to generate a similar effect. However, geographic separation of districts is facially non-racial. Thus, to the extent geographic sorting could be considered part of a *racial* caste system, geographic classifications would have to result in racially homogenous districts or schools. They do.<sup>35</sup>

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32. *Id.* at 140 (citing Aaron Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495, 502 (2010)).

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

34. *Id.* at 752–53.

35. GARY ORFIELD, JOHN KUCSERA & GENEVIEVE SIEGEL-HAWLEY, THE CIVIL RIGHTS PROJECT, E PLURIBUS . . . SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS 9 (2012), available at [http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield\\_epluribus\\_revised\\_omplete\\_2012.pdf](http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf) (finding that “80% of Latino students and 74% of black students attend majority nonwhite schools (50–100% minority), and 43% of Latinos and 38% of blacks attend intensely segregated schools (those with only 0–10% of whites students) across the nation”). These districts also serve a disproportionate number of Latino students. However, this Article focuses on African Americans as its intent is to place the current educational structure into the narrative of education-created subjugation, including slavery and Jim Crow, that specifically targeted African Americans.

For example, 15 percent of African American students attend schools that are zero to one percent white.<sup>36</sup> In metropolitan areas, those numbers are even greater—in Chicago, for example, nearly half of black students attend such schools.<sup>37</sup> Enrollment in schools of racial isolation—schools with minority student populations 90 percent or greater—is even greater: 38 percent of African American students attend such schools nationally, with figures in metropolitan areas like Chicago and New York closer to 70 percent.<sup>38</sup> In addition to segregation at the school level, segregation *between* districts is an increasing feature of contemporary American education.<sup>39</sup>

Although many schools and districts remain racially identifiable, there are important distinctions between geographic and racial classifications. The educational justification for local control is that smaller units can be more responsive to and reflective of local needs and thus can make choices about funding and curriculum priorities that will best serve local students. The Supreme Court has stated: “[L]ocal autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.”<sup>40</sup> By helping maintain local support for schools, local control increases educational quality.

In addition, although there may be disparities between districts *A* and *B* and although there may be disparate racial makeups of the two districts, the racial element is neither explicit nor absolute. There are white children in both districts and black children in both districts.<sup>41</sup> In this sense, it is not a color-conscious racialized caste system—instead, it is officially a colorblind, geographically-based system. The colorblindness of this sorting mechanism has important effects.<sup>42</sup> However, it is worth noting that although the colorblind nature of the sorting ensures that not every black student is being sorted into a position of disadvantage<sup>43</sup>—certainly a good thing—colorblindness legally and politically insulates from substantive critique a system that operates with persistent racial disparities.

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36. *Id.*

37. *Id.* at 58 tbl.24.

38. *Id.* at 9, 58 tbl.24.

39. Jennifer Jellison Holme & Kara S. Finnigan, *School Diversity, School District Fragmentation and Metropolitan Policy*, 115 TCHRS. C. REC. 1, 2–3 (2013).

40. *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974).

41. This may be less true at the school level where single-race schools still persist. See ORFIELD, KUCSERA & SIEGEL-HAWLEY, *supra* note 35, at 9 (finding that 15% of black students and 14% of Latino students attend schools where whites make up 0–1% of the enrollment).

42. See *infra* Part III.

43. And not every white student is put in a position of advantage.

### B. *Sorting by Choice, Briefly*

This Article primarily focuses on the public system of education. However, an initial sorting of American students has the effect of excluding approximately 10–15 percent of the school-age population from the public system altogether.<sup>44</sup> Students who attend private schools or learn in a homeschool environment are outside of the system discussed here and are largely untouched by public education reform. The entitlement of parents and students to opt out of the public system is constitutionally protected.<sup>45</sup> The sorting out of privately-schooled students excludes a disproportionately white and wealthy group of students from the public system. For example, the public school population is 52.4 percent white, while white students make up 72.6 percent of private school students and 68 percent of home-schooled students.<sup>46</sup> This public-private separation represents another structural feature that contributes to the racial identifiability of schooling experience for many American students.

### C. *Meritocratic Sorting*

The system not only sorts by geography to determine who goes to which school and in which district,<sup>47</sup> but it also sorts students in various

44. Approximately 4–5 million students attended private schools in 2010–2011. See JESSICA DAVIS & KURT BAUMAN, SCHOOL ENROLLMENT IN THE UNITED STATES: 2011, at 6 (2013); Stephanie Ewert, *The Decline in Private School Enrollment* 8 (U.S. Census Bureau SEHSD Working Paper No. FY12–117, 2013). In addition, approximately 3% of the school-aged population was homeschooled in 2011–2012. *Fast Facts: Homeschooling*, NAT'L CTR. FOR EDUC. STAT., <http://nces.ed.gov/fastfacts/display.asp?id=91> (last visited Jan. 11, 2015). For comparison, 49.5 million students attended public schools in 2010. *Digest of Education Statistics: Table 44*, NAT'L CTR. FOR EDUC. STAT., [http://nces.ed.gov/programs/digest/d12/tables/dt12\\_044.asp](http://nces.ed.gov/programs/digest/d12/tables/dt12_044.asp) (last visited Jan. 11, 2015).

45. See *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 535–36 (1925) (holding compulsory public education statute unconstitutional); *Wisconsin v. Yoder*, 406 U.S. 205, 234–35 (1972) (holding that other constitutional rights can excuse a family's failure to abide by compulsory attendance statute).

46. Approximate racial demographics for public, private, and home-school students are as follows: students at public schools are 52.4% white, 16.0% black, 23.1% Hispanic, and 5.0% Asian. *Digest of Education Statistics: Table 44*, *supra* note 45. Private school students are 72.6% white, 9.2% black, 9.4% Hispanic, and 5.1% Asian. *Private School Universe Survey (PSS): Table 9*, NAT'L CTR. FOR EDUC. STAT., [http://nces.ed.gov/surveys/pss/tables/table\\_2009\\_09.asp](http://nces.ed.gov/surveys/pss/tables/table_2009_09.asp) (last visited Jan. 11, 2015). Home schooled students are 68% white, 8% black, 15% Hispanic, and 4% Asian. *Fast Facts: Homeschooling*, *supra* note 44.

47. There is also developing evidence that the sorting of school choice serves to segregate students racially. Thus, even when the initial assignment may not rigidly enforce segregation, choice might. For example, charter schools have been found to have more extensive segregation than traditional public schools. See generally ERICA

other ways. This Article will use the umbrella term of meritocratic sorting to describe any sorting that uses measures of or assumptions about students' skills, capacities, or interests to separate them from one another. As with geographic sorting, the separation is what enables disparate treatment.

Meritocratic sorting can take a variety of different forms. For example, sorting of students by ability measured by achievement or intelligence tests, often called tracking, is a form of meritocratic sorting. Another form is classification by *disability*, including both the separation of students with disabilities or students with specific content deficits, such as limited English proficiency. Meritocratic sorting also includes separation by interests, such as the distinction between vocational and academically-advanced programs. This sorting can take place among schools—such as with magnet schools or specialized interest programs—or within schools that offer differing opportunities to different students. It could even take place within classrooms to the extent that students are exposed to different curricula based upon merit.

To take one example, it has been found that more than 90 percent of first grade classrooms use some form of ability grouping, such as differentiated reading groups.<sup>48</sup> Just as occurs at the school level where curricular and instructional practices are strongly determined by the skills of students and by the expectations of teachers, resulting in lower-performing students being exposed to a less demanding curriculum, this sort of differentiation occurs within classrooms as well. Lower reading groups can be taught a less demanding curriculum affecting not only how much the student learns but also how the student thinks of him or herself.<sup>49</sup> While this result may trouble some, it may be justified by the relative increase in opportunities that “high” track students receive—but for ability grouping, these students may not be pushed to reach their own full potential.

With geographic sorting, the benefits of local control justify the separation of students. The idea that an individual's education should be tailored to the needs and interests of each student justifies the individual sorting described here. This reasoning is pedagogically alluring—only by responding to individual circumstances can an education enable each student to reach her potential—and it is consistent with the idea that resources should be distributed according to merit.

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FRANKENBURG, GENEVIEVE SIEGEL-HAWLEY & JIA WANG, CHOICE WITHOUT EQUITY (2010).

48. George Farkas, *Racial Disparities and Discrimination in Education: What Do We Know, How Do We Know It, and What Do We Need To Know?*, 105 TCHRS. C. REC. 1119, 1126 (2003).

49. DARLING-HAMMOND, *supra* note 26, at 51; Farkas, *supra* note 48, at 1131.

A meritocracy is a system where rewards are distributed according to merit, measured through effort, achievement, or need. A meritocracy is the precise opposite of a caste system, where some innate characteristic restricts an individual to some predetermined fate. The crucial component of a meritocracy is the ability to objectively define and measure merit. If the measurement of merit is infected by subjective bias, then the whole idea crumbles.

In practice, many measures of individual merit utilized for sorting American students demonstrate bias. And in most cases, the process disfavors minority students. Controlling for other variables, ability grouping tends to disproportionately place African American students in lower tracks.<sup>50</sup> If the sorting of students into different tracks is biased and if the effects of that sorting tend to widen gaps, then individual classifications through programs like ability grouping will structurally maintain, even widen, disparities in educational opportunities.

The problem begins early and compounds on itself throughout the schooling experience. The disproportionate sorting of African American students into low track reading groups in first grade is repeated throughout the educational cycle through graduation. Similar disparities are found in identification of students for gifted services,<sup>51</sup> and eventually in enrollment in Advanced Placement courses.<sup>52</sup>

As with geographic sorting, meritocratic sorting is facially colorblind, yet has the effect of recreating racially identifiable groups that receive different educations. Here, the differentiated experience is deliberate—the whole idea of tracking, ability grouping, or specialized programs is to provide a tailored experience different from a standard education. The racial disparities in grouping, though unintentional, are real. The persistence of racially identifiable grouping, whether by geography or merit, demonstrates that even a non-racial classification system can operate to perpetuate *racial* caste.

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50. Roslyn Mickelson, *Subverting Swann: First- and Second-Generation Segregation in the Charlotte-Mecklenburg Schools*, 38 AM. EDUC. RES. J. 215, 217 (2001); DARLING-HAMMOND, *supra* note 26, at 57–60.

51. Kathleen Barlow & C. Elaine Dunbar, *Race, Class, and Whiteness in Gifted and Talented Identification*, 1 BERKELEY REV. EDUC. 63, 64 (2010); see also Al Baker, *In One School, Students Are Divided by Gifted Label — and Race*, N.Y. TIMES, Jan. 13, 2013, at MB1.

52. COLL. BD., THE 10TH ANNUAL AP REPORT TO THE NATION 30 fig.8 (2014), available at <http://media.collegeboard.com/digitalServices/pdf/ap/rtn/10th-annual/10th-annual-ap-report-to-the-nation-two-page-spread.pdf> (finding that African American students were the most underrepresented in advanced placement (“AP”) classrooms, where only 9.2% of AP students were black, despite the 2013 graduating class having 14.5% African American students).

#### D. Behavioral Sorting

Although racial sorting may exist in schools, an additional form of sorting takes students entirely out of classrooms. Studies of student disciplinary practices have consistently shown that African American students are more likely to be suspended and expelled. Even in preschool, African American students, who make up only 18 percent of preschool enrollment, make up 42 percent of the students suspended.<sup>53</sup> Overall suspension rates demonstrate similar disparities—24 percent of African American students have been suspended, compared to only 7 percent of white students.<sup>54</sup> Such suspensions further steer those suspended students (disproportionately African American) toward academic disengagement, lower achievement, and increased risk of dropout, creating what many have described as the school-to-prison pipeline.<sup>55</sup>

Thus, the system first sorts based on geography into districts and schools with a high racial correlation, and then based on ability or performance into separate schools, classrooms or groups, again with a racial correlation. And finally, students are sorted out of the classroom by disciplinary practices that also have a racial correlation. Thus, at every step of the process, beginning with the decision of who goes to which school all the way to decisions about who gets excluded from school, the system operates in a way that solidifies rather than disrupts the caste system that has long existed in the nation's education system.

### III. EFFECTS OF THE SORTING

The classification system described above accomplishes a critical first step in enabling the perpetuation of racial caste—it creates groups of students that are largely racially identifiable. Where districts, schools, classrooms, and reading groups remain separated with racial correlations, the opportunity for differentiated treatment—and largely racially

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53. *Expansive Survey of America's Public Schools Reveals Troubling Racial Disparities*, U.S. DEP'T EDUC. (Mar. 21, 2014), <http://www.ed.gov/news/press-releases/expansive-survey-americas-public-schools-reveals-troubling-racial-disparities>.

54. Donna St. George, *Researchers Point to Racial Disparities in School Suspension, Spotlight New Practices*, WASH. POST (Mar. 14, 2014), [http://www.washingtonpost.com/local/education/researchers-point-to-racial-disparities-in-school-suspension-spotlight-new-practices/2014/03/14/0017cd98-aaa7-11e3-adbc-888c8010c799\\_story.html](http://www.washingtonpost.com/local/education/researchers-point-to-racial-disparities-in-school-suspension-spotlight-new-practices/2014/03/14/0017cd98-aaa7-11e3-adbc-888c8010c799_story.html) (citing the work of the Discipline Disparities Collaborative).

55. See, e.g., CATHERINE Y. KIM ET AL., *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM* 1–4 (2010) (“The School-to-Prison Pipeline thus refers to the confluence of education policies in underresourced public schools and a predominantly punitive juvenile justice system that fails to provide education and mental health services for our most at-risk students and drastically increases the likelihood that these children will end up with a criminal record rather than a high school diploma.”).



differentiated treatment—is present. However, a comprehensive structural critique must include not only an examination of how the structure creates or maintains disparities but also an explanation of why these outcomes are difficult to confront.

One possible explanation is that people are not aware of the disparities of the system. This is not the case. Ironically, the same system that enables disparate treatment also makes comparisons across schools, districts, or states easier. In other words, it is only because of the rigid, differentiated structure that the disparities within the system are so glaring. This was the case during the Jim Crow era of education as well, and the ease with which evidence could be developed which demonstrated disparities among black and white schools made cases challenging segregation more successful. The contemporary educational structure has not been insulated from challenge due to lack of evidence or knowledge of racial disparities.

Highlighted by *Brown* and continuing in the decades since, incessant waves of reform aimed at reducing racial stratification within education have challenged the caste-maintaining status quo. There are two primary critiques of the caste system underpinning the reform movement: first, there are challenges to the sorting process itself; second, there are challenges to the differentiated treatment enabled by the sorting. *Brown* is an example of the first critique, while legal challenges to funding disparities across districts is an example of the second. Challenges may occur through litigation or legislation, or through local policy choices aimed at reducing disparities, such as where to locate specialized programs or how to identify students for those programs.

That such challenges occur is a welcomed sign of a nation dissatisfied with racial disparities. That such challenges have occurred in courtrooms, legislatures, and classrooms for decades but have not substantially disrupted the racial disparities within the education system is disheartening. This Part argues that a reason for the limited success over the past 60 years is that contemporary classification structures that have replaced the explicit and absolute racial sorting of the past insulate the system from substantial intervention. These classification structures provide insulation legally, politically, and practically.

Specifically, a series of legal holdings have embraced the geographic and meritocratic sorting, making establishing unlawfulness of even a vastly unequal system exceedingly high, particularly in the absence of intent. Further, the structure makes political support for systemic change difficult to generate or sustain. And finally, interventions are constrained in practice by the larger structure in which

they are implemented, ensuring that even successful interventions will remain isolated exceptions within the overall enterprise.

#### A. *Insulation from Legal Challenge*

Some of the most successful efforts to disrupt racial caste in American education have come through litigation. Under Jim Crow, litigation was used to push for equalized resources, and *Brown* declared racial sorting unconstitutional.<sup>56</sup> Various state courts have found funding schemes that deliver unequal resources to different districts impermissible, and the use of non-racial classifications to sort racially has been disallowed.<sup>57</sup> However, contemporary sorting seems to be insulated from legal challenge. A substantial degree of this insulation comes from another idea found in Justice Harlan's *Plessy* dissent: colorblindness.<sup>58</sup> Because today's sorting is race neutral on its face—that is, it is neither explicitly nor absolutely racial—both the classification system and the differentiated treatment of classes within the system are protected from arguments used in the past, such as equal protection challenges. This protection of sorting comes from legal developments in the decades since *Brown*. Specifically, district lines are considered sacrosanct, and inequalities across district lines are tolerated. Further, meritocratic sorting that is colorblind is reviewed with great deference and, even where it results in racially disparate impact, is difficult to establish as unlawful.

##### 1. Local Control and the Toleration of Inequality

As described above, geographic sorting is the primary basis for classification of students, and this geographic sorting—by district and by school-attendance zone—often leads to racially identifiable districts and schools. Some have argued that district lines play a “decisive role in determining the quality of education that a student will receive.”<sup>59</sup> However, despite such criticism, the Supreme Court has made clear that district lines cannot be ignored.

In *Milliken v. Bradley*, the Court asserted, “No single tradition in public education is more deeply rooted than local control over the

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56. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

57. See Aaron Y. Tang, *Broken Systems, Broken Duties: A New Theory for School Finance Litigation*, 94 MARQ. L. REV. 1195, 1202–11 (2011) (summarizing a number of such court decisions); Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1157–66 (1995).

58. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

59. Erika Wilson, *Leveling Localism and Racial Inequality in Education Through the No Child Left Behind Public Choice Provision*, 44 U. MICH. J.L. REFORM 625, 630 (2011).

operation of schools.”<sup>60</sup> As a result, the district court’s proposed remedy for Detroit’s school segregation, a remedy that included surrounding school districts in a regional student-assignment plan, was beyond the court’s authority.<sup>61</sup> The *Milliken* Court elevated the importance of district lines, noting that “the notion that district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country.”<sup>62</sup> In the years following *Milliken*, a trend toward consolidating school districts abruptly ceased as sovereign districts were insulated from federal court remedies, even as many suburban districts served white families relocating from cities subject to desegregation decrees.<sup>63</sup>

Although *Milliken* helps establish that district lines—and with them, geographic sorting—are sacrosanct, this holding is even more significant when combined with the Court’s view that inequality across district lines does not violate the Equal Protection Clause of the U.S. Constitution.<sup>64</sup> In *Brown*, the Supreme Court stated plainly that “education, where the state provides it, is a right which must be made available to all on an equal basis.”<sup>65</sup> When pushed on this equality mandate, however, the Court demonstrated tolerance for extraordinary inequality across district lines.

In *San Antonio Independent School District v. Rodriguez*,<sup>66</sup> plaintiffs from a school district in a poor area of San Antonio brought an equal protection challenge to Texas’s school financing scheme.<sup>67</sup> The plaintiffs’ district, Edgewood Independent School District, served a high percentage of Hispanic students and, through property taxes, was able to generate approximately \$26 per student in local funding.<sup>68</sup> In Alamo Heights, another district also within San Antonio that served an 80% white student population, local property taxes (set at a lower rate) generated \$333 per student, nearly 13 times the local funding in Edgewood.<sup>69</sup>

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60. *Milliken v. Bradley*, 418 U.S. 717, 741 (1974).

61. *Id.* at 752–53.

62. *Id.* at 741.

63. See Christopher Berry & Martin West, *Growing Pains: The School Consolidation Movement and Student Outcomes*, 26 J.L. ECON. & ORG. 1, 4 (2010).

64. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54 (1973).

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

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

67. *Id.* at 4–7.

68. *Id.* at 12.

69. *Id.* at 12–13. In addition to local funding, both districts received approximately \$220 in state funding per pupil. *Id.* Edgewood received \$108 per pupil in federal funding, while Alamo Heights received only \$36 per pupil in from federal sources. *Id.* at 12–13.

In finding this setup constitutional, the Supreme Court disputed the relevance of school spending to educational quality and held that so long as the state was providing an adequate education to all students, inequities did not offend the Constitution.<sup>70</sup> According to the Court, the Constitution thus tolerates vast inequities in educational inputs.

Unequal outputs are constitutionally tolerable as well. Even in the context of remedying previous state-sponsored racial discrimination, the Supreme Court has stated that achievement of parity across district lines in student achievement is not a constitutionally mandated goal. In *Missouri v. Jenkins*,<sup>71</sup> a federal district court utilized interdistrict comparability to determine if the vestiges of segregation had been eliminated from schools in Kansas City, Missouri.<sup>72</sup> In essence, the district court felt that the only way to determine whether Kansas City students were learning at the same level as suburban peers and were no longer burdened by previous discrimination was to compare their achievement directly to adjacent districts.<sup>73</sup> The Supreme Court rejected this theory: "The District Court's pursuit of 'desegregative attractiveness' cannot be reconciled with our cases placing limitations on a district court's remedial authority."<sup>74</sup> Those limitations had been laid out in *Milliken*.

Thus, *Milliken* establishes that district lines are sacrosanct, while *Rodriguez* and *Jenkins* make clear that inequities across those lines do not offend the Constitution. Given this, geographic classification is insulated from challenge under the U.S. Constitution. In several states, district inequities have been found to violate state constitutions, but as discussed below, remedying such unconstitutional schemes has proven politically and practically difficult.

## 2. Colorblindness and the Difficulty of Proving Discrimination

Even if geographic sorting results in racially identifiable schools or districts, it is still a colorblind classification system. The same is true of meritocratic sorting—it is facially colorblind even if it produces racially identifiable districts. Although colorblindness ensures that race is not, on

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70. See *id.* at 54–55. *Rodriguez*'s mandate for the provision of an adequate education comes into sharper focus when compared to cases where states have excluded classes of students from schools altogether. For example, in *Plyler v. Doe*, the Court declared Texas's exclusion of undocumented students from public schools to be unconstitutional. *Plyler v. Doe*, 457 U.S. 202, 230 (1982). Similarly, a district court held that exclusion of students with disabilities from schools would violate constitutional due process. *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972).

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

72. *Id.* at 70.

73. *Id.* at 91–92.

74. *Id.* at 98.

its own, determinative of any individual student's fate, colorblindness makes legal challenge of a system that continues to produce racially disparate outcomes extraordinarily difficult. First, the shift from racial to non-racial sorting makes constitutional challenge virtually impossible. Since racial classifications automatically evoke strict constitutional scrutiny<sup>75</sup> and geographic classifications engender great deference to the legislative decisions,<sup>76</sup> the state need only provide some rational basis for its system of geographic classification, regardless of resulting disparities, in order to satisfy the Equal Protection Clause. Thus, the burden on the state to justify the system is far lower. If the new sorting were not also producing racially isolated schools, then such a lowering of the burden would not be problematic. However, because the system locks in the disparities of the old racial system and makes geographic classification nearly as impenetrable as racial classification once was, the lowered burden has the perverse effect of disarming today's educational equity advocates. Some scholars have argued that advocates of the *Plessy* era had stronger legal tools at their disposal than the advocates of today.<sup>77</sup> In addition, colorblindness masks the racial nature of the caste system, which undercuts structural criticisms like the one posed in this Article. These two effects are discussed in greater detail below.

In addition, federal courts are often reluctant to impose policies on schools. Perhaps in response to the protracted federal court involvement in post-*Brown* desegregation cases and the resulting political backlash against federal courts, federal courts often exercise restraint in second-guessing educational decisions and policies. *Rodriguez* indicates a strong embrace of local control and deference to the judgment of Texas legislators and educational experts in devising a rational educational

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75. See, e.g., *Fisher v. Univ. of Tex.*, S. Ct. 2411, 2420 (2013) (noting that strict scrutiny imposes an "ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice"); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny."); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (noting that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification") (alteration in original) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)).

76. This is true presuming that the legislature is not shown to have made the geographic classifications with the intent to discriminate on some other basis, such as race. See Gerald Neuman, *Territorial Discrimination, Equal Protection and Self-Determination*, 135 U. PA. L. REV. 261, 271–75 (1987).

77. See Gloria J. Ladson-Billings, *Can We At Least Have Plessy? The Struggle for Quality Education*, 85 N.C. L. REV. 1279, 1280 (2007); Rick Guzman, *An Argument for a Return to Plessy v. Ferguson: Why Illinois Should Reconsider the Doctrine of "Separate but Equal" Public Schools*, 29 N. ILL. U. L. REV. 149, 151 (2008).

system.<sup>78</sup> In *Jenkins*, the Court expressed concern about the federal court becoming a de facto and permanent superintendent of schools and the negative impact that would have on local control.<sup>79</sup> This reluctance to interfere with educational policies that cause or perpetuate inequalities further diminishes the likelihood that federal courts will be a venue to disrupt the current system.

Courts are able to be deferential in such cases because, as long as policies are race neutral and are pursued without any provable intent to discriminate, they are scrutinized under the Court's rational basis review. Only where students are treated differently based on race is a higher level of scrutiny applied.<sup>80</sup> However, 60 years after *Brown*, instances of explicit race-based discriminatory practices are rare—colorblindness is the rule of the day.<sup>81</sup>

Further, even if race neutral policies produce racially disparate impacts, there can be no finding of unconstitutional discrimination absent

78. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42–43 (1973). The Court reasoned:

[T]his case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. . . . [T]he very complexity of the problems of financing and managing a statewide public school system suggests that "there will be more than one constitutionally permissible method of solving them," and that within the limits of rationality, "the legislature's efforts to tackle the problems" should be entitled to respect. . . . [T]he judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

*Id.*

79. *Jenkins*, 515 U.S. at 98–99. The Court noted that this rationale—that establishing equity across district lines could be a valid goal of desegregation—is "not susceptible to any objective limitation." *Id.* at 98. The Court also noted:

[T]he greater [the district's] dependence on state funding, the greater its reliance on continued supervision by the District Court. But our cases recognize that local autonomy of school districts is a vital national tradition, and that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution.

*Id.* (citation omitted); see also *Freeman v. Pitts*, 503 U.S. 467, 489–90 (1992) ("Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system. . . . Where control lies, so too does responsibility.").

80. A higher level of scrutiny would also apply to the extent that a "fundamental right" were interfered with even without any racial classification. However, education has been found to not qualify as a fundamental right. See *Rodriguez*, 411 U.S. at 37.

81. See, e.g., *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2420 (2013); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 701 (2007).

a finding of intent, a requirement imposed by the Court in 1976.<sup>82</sup> Evidence of disparate impact may be relevant to claims of intentional discrimination,<sup>83</sup> and statutory basis remains for disparate impact claims.<sup>84</sup> However, even those statutory claims may no longer be pursued by private litigants, but rather must be enforced by federal agencies.<sup>85</sup> Even where courts do hear complaints regarding such policies, such as challenges to the adoption of high stakes tests, tracking, or student disciplinary policies with racially disparate effects, the policies may still be found legal if they can be shown to be educationally necessary.<sup>86</sup> This provides another opportunity for courts to defer to local and educational authorities—so long as a practice can be justified in some way educationally and cannot be tied directly to a history of racial discrimination, courts have tended to err on the side of allowing the practice to continue.<sup>87</sup>

The erosion of disparate impact theory as a basis for a finding of discrimination has substantially increased the burden on those claiming systemic discrimination because evidence of intent is difficult to uncover. This development has worked together with judicial restraint as a matter of principle or deference to local decision making—including

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82. *Washington v. Davis*, 426 U.S. 229, 232 (1976).

83. *Vill. of Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 253 (1977) (laying out a series of factors, such as the degree of disparate impact and the historical background leading up to the implementation of a disparity-producing policy that could be utilized to help prove intent).

84. While *Washington v. Davis* restricted constitutional claims to those evidencing intent and *Regents of the Univ. of Cal. v. Bakke*, 428 U.S. 262, 262 (1978), held that the scope of Title VI of the Civil Rights Act of 1964 was identical to the scope of the Equal Protection Clause, regulations enacted under Title VI continue to allow disparate impact claims to be brought. FTC Credit Practices Rule, 34 C.F.R. § 100.3(b)(2); see also Jennifer Braceras, *Killing the Messenger: The Misuse of Disparate Impact Theory To Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1111, 1117–21 (2002).

85. *Alexander v. Sandoval*, 532 U.S. 275, 275 (2001).

86. See, e.g., *G.I. Forum v. Tex. Educ. Agency*, 87 F. Supp. 2d 667, 677 (W.D. Tex. 2000) (citing *Wards Cove Packaging, Inc. v. Atonio*, 490 U.S. 642, 656–57 (1989) from the context of Title VII employment, to lay out the disparate impact burden-shifting analysis under Title VI in a high stakes testing case). Even if a policy is proved to be educationally necessary, plaintiffs could still prevail if they are able to show that a feasible alternative would be as effective without producing the same degree of disparate impact. See Braceras, *supra* note 84, at 1159.

87. See Zachary W. Best, *Derailing the Schoolhouse-to-Jailhouse Track: Title VI and a New Approach to Disparate Impact Analysis in Public Education*, 99 GEO L.J. 1671, 1674 (2011) (“[A]dvocates have found it exceedingly difficult to convince courts to take action against disparate racial outcomes without proof of discriminatory intent.”) (citing Charles Abernathy, *Legal Realism and the Failure of the Effects Test for Discrimination*, 94 GEO. L.J. 267, 270 (2006); Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 396 (2007); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 705–06 (2006)).

parental decision making—as a matter of law to substantially diminish the ability of courts to interfere with a caste-preserving system.

*B. Insulation from Political Change*

Litigation is not the only route to challenge contemporary educational classifications or their disparate effects. There is political support for the goal of closing the racial achievement gap that could manifest itself in legislative or other policy proposals that could effectively accomplish that goal. Such proposals require political support. Unfortunately, several features of the contemporary classification structure make generating and sustaining that political support difficult.

Sorting narrows the frame of political engagement and fragments political support for broad educational reform, often pitting advocates for differently-sorted groups against one another. In addition, just as colorblindness insulates both geographic and meritocratic sorting from legal challenge, it politically insulates these classifications as well. By obscuring the racial effects of sorting through the use of colorblind and sometimes merit-based classifications, contemporary educational sorting appeals to non-racial explanations for persistent racial disparities. Further, the success of some minority students within the current system undercuts arguments that the system inherently perpetuates racial caste. Given these headwinds created by the way contemporary classification occurs, the system is protected from broad political challenge.

1. Narrowing the Frame of Engagement

A significant effect of local control is to limit the frame of concern for individuals within a local district's boundaries to the schools within that district. To citizens, taxpayers, and perhaps parents or alumni, schools beyond district borders are of minimal or no concern. Within metropolitan areas where multiple districts serve a metropolitan student population, this dynamic splinters the community's attention when it comes to public education. To the extent that placing political accountability for education as close to the local level as possible is a benefit of local control, it is offset by the fact that citizens are disincentivized to engage with any schools other than their own. This shields the broader system from a broader critique and accountability.

Parents, for instance, may be very engaged with problems in their children's classrooms, schools or even districts, but have rationally diminished interest in problems beyond those boundaries. Further, to the extent that any such concern does exist, it is likely to be of a competitive nature, as schools within a district or districts within a state or



metropolitan area compete for students, programs, attention, and dollars. Despite the impact this narrowing has on willingness to consider education more broadly, it is fully consistent with the American individualist creed. The focus on the local and the smallest unit—even in competition with neighbors—is not only tolerated, but encouraged by this individualism. As a result, local control makes intuitive sense to the individualistic American mind.

But this individualism and the narrow frame of concern serve to make challenges to the current system more difficult. For example, communities that are satisfied with the status quo will find proposals for change or even criticisms of the current system unnecessary and unwelcomed.<sup>88</sup> Some groups see a greater threat in disrupting the current system than in preserving it. As a result, communities dissatisfied with the status quo could then face more than mere lack of enthusiasm from others but may have to pursue change in the face of active resistance.

Further, because much of the system's sorting occurs with high racial correlations,<sup>89</sup> this effect takes on additional importance. Even without any individual bias or racism, the structure of the sorting ensures that many people's frame of concern will be racially homogenous. White communities are left to care about largely white schools with little incentive to engage with other schools no matter the racial makeup. And the same is true of largely white districts. Meanwhile, black communities concern themselves with largely black schools or districts.

The structure of the system narrows the frame of concern in a way that tends to generate an "us versus them" dynamic and does so in a world where "us" and "them" are likely to be racially identifiable. The effect both reflects and amplifies racial differences. Thus, there is not only a lack of interracial contact, but an enabling of racial competition. According to racial threat theory, racial prejudice is most powerful when the dominant group perceives a political or economic threat from another group.<sup>90</sup> In the competition among narrowly-concerned schools or districts for students, teachers, programs, and dollars, a great deal is at stake, and the potential perception of threat from racially identifiable school or district competitors could trigger these racial threats. The injection of racial stereotyping and competition further chills enthusiasm for change.

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88. See JAMES RYAN, 5 MILES AWAY, A WORLD APART 121 (2010) (describing this phenomenon as "Save the Cities, Spare the Suburbs").

89. See *supra* Part II.

90. Michael Rocque & Raymond Paternoster, *Understanding the Antecedents of the "School-to-Jail" Link: The Relationship Between Race and School Discipline*, 101 J. CRIM. L. & CRIMINOLOGY 633, 639 (2011).

In sum, the sorting mechanisms that allow for differentiation within the education system have the effect of narrowing concern for others beyond an individual's own schools, thus making challenges to the system harder to pursue. In addition, the narrowed lenses encouraged by this system and the American individualist ideal go beyond blunting support for change—they may actually encourage resistance to change from those satisfied with the status quo. And all of this occurs atop a sorting system that is racially identifiable (even if not racially based), thus making coalition building more difficult and amplifying the power of racial stereotyping. As a result, Justice Harlan's aspirational "colorblind" society is pushed even further into the future.

## 2. Colorblind Explanations for Racial Disparities

As described above, the fragmented structure of the system actually discourages close examination of the system as a whole by most Americans. But for those willing to take a broader look, there are ready alternative explanations of the disparities that plague education that are far more flattering than that of the American education system as one that is structurally unequal and preserving of racial caste. By appealing to the ideals of meritocracy and colorblindness, the system is able to deflect attention from its structural flaws.

The explicit and absolutely racial nature of classification under Jim Crow made it not only constitutionally, but also politically vulnerable. Indeed, some have argued that the Supreme Court's decision in *Brown* did not galvanize, but merely reflected shifting political sentiment with regard to segregation.<sup>91</sup> The achievement of individual African Americans served as proof that the classification was not justifiable on any grounds other than racial prejudice, and despite a history that suggests otherwise, American ideals disfavor such naked discrimination.

As described above, contemporary classifications are not explicitly racial, nor are they absolute. Instead, they are based on race-neutral factors like geography, merit, or behavior. Having cleansed the sorting of its most objectionable characteristic, the modern system classifies with colorblind criteria that make intuitive political sense. Non-racial geographic classifications help maintain local support for education, and non-racial meritocratic classifications help deliver education tailored to the talents, interests, and needs of students. These classifications are not only not racial but can also be seen as educationally wise. In this way,

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91. Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 10 (1994) (arguing that "the *Brown* decision was judicially conceivable in 1954 only because the forces for change had been preparing the ground for decades").

colorblindness insulates contemporary sorting from political challenge by providing non-racial justifications for racially disparate outcomes.

Given the choice, most Americans would likely prefer to think of the education system as a meritocracy as opposed to a caste system. This is because, particularly for those who have achieved success, we would like to believe that *we* earned it and not that our success was the product of some bias in the system's structure. Thus, in a competition between explaining the system as meritocratic or as caste-preserving, the meritocracy has an inherent political advantage, particularly among individuals at the higher end of the caste system.

That advantage becomes even greater when the measures of merit are easy to understand and facially objective. In recent years, standardized tests have been increasingly utilized to provide a meritocratic basis for a great deal of differentiation within the system. The colorblind identification of groups further protects such differentiated treatment from political challenge.

An example of the use of test scores to provide a merit-based rationale for sorting and differentiated treatment is instructive. Under the No Child Left Behind Act ("NCLB"),<sup>92</sup> public schools were labeled "failing" if they failed to achieve adequate yearly progress on state-administered standardized tests and, as a result, were subject to a variety of interventions.<sup>93</sup> At the extreme, the school's administration could be removed from the local district and transferred, in some cases, to charter school operators. Charter schools operate under different policies than traditional public schools, but this disparate treatment is justified by test scores—thus by merit, not race.<sup>94</sup>

Still, given the disparities that persist, the system is vulnerable to critiques of bias against black students. Many scholars and advocates

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92. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. § 6301 (2012)).

93. The very threat of these interventions and the necessity of scoring high on the tests likely led to other curricular effects, such as "teaching to the test." See, e.g., Charles R. Lawrence III, *Who Is the Child Left Behind? The Racial Meaning of the New School Reform*, 39 SUFFOLK U. L. REV. 699, 712-13 (2006) (explaining that to meet the standards, some schools have adopted federally-incentivized curricular programs that focus heavily on mechanical techniques such as repetition and arguing that this differentiation in content and delivery makes available different types of knowledge to students of different social classes). It is likely that this phenomenon occurred disproportionately often in schools with larger African American populations because these schools were under greater threat of not meeting state accountability measures. See *id.* at 715-16. But these effects are beyond the scope of this Article.

94. Tests are also used to justify much of the other sorting by ability throughout the system as discussed above. Qualification for gifted services or placement in academically rigorous courses is often accomplished on the basis of a test of alleged merit. See DARLING-HAMMOND, *supra* note 26, at 57-60.

have made such arguments, essentially claiming that the meritocratic ideal is illusory due to gaps in opportunities or disparities in evaluation, or both, that cut across racial lines.<sup>95</sup> However, because educational policies, such as school assignment or meritocratic testing, are facially colorblind, proving that the system is biased is an uphill battle that requires roundabout, rather than direct, evidence.

Proving that a race neutral policy has a discriminatory effect can be politically daunting because there are many plausible causal explanations for disparate outcomes. The idea that a particular policy ought not have a racially disparate impact because it is designed and administered in a colorblind manner is alluring. When a racial effect does follow from a colorblind practice, the colorblind instinct is to argue that racial disparities are the result of some other type of non-racial inequity. For example, lower performance among African American students may be explained by disparities in teacher quality or parental involvement or self-motivation or peer effects or school safety or the all-encompassing effect of poverty.<sup>96</sup> It is not that the system is racially biased, the argument goes. Rather, too much poverty exists in the black community or too many black students and families do not value education. These alternative explanations are more comfortable than a comprehensive indictment of the system as caste system, and they are made particularly attractive because of the colorblindness ideal and the colorblind policies that govern the system. In addition, these problems can be addressed within the system without disturbing the sorting that is so crucial to maintaining the nation's social hierarchy. If the problem is disparate access to teacher quality, then schools simply need more high quality teachers. If it is low parental involvement, then schools need programs to engage and educate parents. And so on.

In addition, the claim that the American education system perpetuates racial caste faces another obstacle that discourages belief in the claim—there are many counterexamples. In a rigid and perfectly constructed caste system, no students from a lower caste would break through the barriers imposed on them by the system to enjoy upward social mobility through education. In the United States, however, there

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95. See generally, e.g., STEPHEN MCNAMEE & ROBERT K. MILLER JR., *THE MERITOCRACY MYTH* (3d ed. 2014).

96. For example, Linda Darling-Hammond made the point that “[t]he achievement gap would be much reduced if low-income minority students were routinely assigned such qualified teachers rather than those they most often encounter.” See DARLING-HAMMOND, *supra* note 26, at 43–44. While Darling-Hammond noted that the difference in achievement among students with highly versus poorly qualified teachers was larger than the difference between a white student with college-educated parents and black student with high school-educated parents, *id.*, she did not address the structures described in this Article that make such assignment unlikely.

are numerous examples of just this type of story.<sup>97</sup> Indeed, these are some of our most inspiring stories; stories that make us collectively feel good about the opportunities our country offers and the power of education. If you work hard enough, the stories suggest, anyone can make it.

Although these stories are rightly celebrated, they play an important role in masking the flaws of the broader system. By proving that emerging successfully through the system *is* possible, successful students suggest that the meritocracy functions properly. Their success shields the system from complaints about systemic barriers that prevent their peers from enjoying similar success. When successful students are members of minority groups, their success suggests that the system is genuinely colorblind. Ironically, these successful students offer support for the American ideals of individualism, meritocracy, and colorblindness in a way that actually indicates that students who do not similarly succeed fail to do so as the result of individual rather than systemic failure. If the successful student made it, the thought goes, why didn't you? Under this view, what is required to remedy the problem is not systemic reform, but rather reform of individuals.

By serving as proof that the system can work as a tool for upward social mobility, successful students give life to the idea that the system does work. However, data suggests otherwise.<sup>98</sup> According to a recent study, 43 percent of Americans raised in the bottom socioeconomic quintile remain there as adults, and 70 percent remain in the bottom half of income; only four percent of those individuals make it to the top quintile as adults.<sup>99</sup> The report further found that African Americans "have a harder time exceeding the family income and wealth of their parents" and "are more likely to be stuck in the bottom and to fall from the middle" income levels.<sup>100</sup>

This series of narratives about the American system of education—that it is based on merit and that those who succeed within it have earned that success; that it operates in a fair manner because it is colorblind; that non-racial factors can explain racial disparities; that the system would work fine but for these other factors, including poverty; that stories of successful students are proof that the system can work—reduces our

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97. See generally, e.g., RON SUSKIND, *A HOPE IN THE UNSEEN* (rev. & updated ed. 2005).

98. PEW CHARITABLE TRUSTS, *PURSUEING THE AMERICAN DREAM: ECONOMIC MOBILITY ACROSS GENERATIONS* 2–3 (2012), available at [http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/economic\\_mobility/PursuingAmericanDreampdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/economic_mobility/PursuingAmericanDreampdf.pdf).

99. *Id.* at 2.

100. *Id.* at 3.

collective ability to accept the idea that the education system is a caste-preserving system. Sorting mechanisms allow for stratification to exist, and legal doctrines, such as tolerance for inequity or mandating findings of intent to prove discrimination, make challenges difficult. But these narratives serve to lessen the political appetite for challenging the system in the first place. They help ensure that political support for systemic critiques will be limited, weakening the prospect for reform.

### C. PRACTICAL IMPEDIMENTS

The legal and political insulation of contemporary education from structural change is not absolute. Although federal courts have become increasingly inhospitable to charges of racial discrimination in education, some state courts have attempted to at least remedy disparities in resources across district lines. Similarly, although political support for many disparity-reducing policies is difficult to generate and sustain, policymakers from school boards to state legislatures to the federal Congress have attempted policies aimed at increasing equity in education. Unfortunately, these remedial efforts are handicapped by the very system they seek to reform. Practical implementation of equalizing measures within a highly stratified system where pockets of disadvantaged students are separated and isolated from others has proven largely quixotic. Thus, even where legal and political headwinds have not squashed attempted remedies, effectiveness is hampered by the system's structure. The structure is institutionally resistant to change that would interfere with its caste-maintaining nature.

It is worth noting that most attempted interventions take aim at the challenge of differentiated treatment. They are not interventions to the sorting of students by district, school, or program, but rather interventions seeking to ensure that, regardless of how a student is sorted, she has access to equal opportunities. Perhaps the best example of these challenges is the school financing suits pursued under state constitutions in the wake of the *Rodriguez* decision.

Following the rejection by the U.S. Supreme Court of the argument that the federal Constitution did not tolerate vast disparities in resources across school districts, advocates turned their attention to similar claims under state constitutions. In the second wave of school finance litigation, a number of state courts found constitutional problems with school financing schemes that distributed resources unequally within the state.<sup>101</sup> State courts, like their federal counterparts, were often reluctant

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101. Slightly fewer than half of the state-court challenges to funding schemes—which had occurred in 36 states—had been successful as of 2004. See John Dayton &

to order specific remedial action by legislatures in such cases. Instead, courts often gave legislatures an opportunity to devise a more appropriate funding scheme, a directive that often led to a never-ending back-and-forth between court and legislature regarding school finance.<sup>102</sup> Most remedial efforts did not substantially interfere with the basic sovereign district structure or its property-based funding.

Some courts, however, have been more aggressive in ordering remedies. The results from such efforts provide a cautionary tale. For example, in 1996, the Connecticut Supreme Court overturned the state's funding scheme, finding that "the single most important factor that contributes to the present concentration of racial and ethnic minorities in Hartford [is] the town-school district system."<sup>103</sup> The court suggested that dismantling the district status quo was necessary for effective change, but the legislative response involved mostly *intradistrict* remedies and a small number of interdistrict transfers.<sup>104</sup> Even those transfers, which blurred the sacrosanct lines between districts, however slightly, required suburban approval, and by 2003, the case was settled with no impact on the districting scheme.<sup>105</sup> The geographic classification scheme the court criticized has endured.

In addition to court challenges, policymakers dismayed by educational inequities pursue policies hoping to reduce or eliminate those inequities. To take one illustrative example, in 2001, Congress passed NCLB, which mandated that states adopt standards, assessments for determining whether students were learning those standards, and systems of accountability to apply in the event that students in a particular school or district were not learning the standards. The primary mechanism for determining whether a school or district was on the right track required consideration of whether it was making adequate yearly progress toward 100 percent proficiency.<sup>106</sup> The statute explicitly articulated its desire to eradicate racial and other gaps in achievement. To that end, the statute dictated that a school could be sanctioned if any single racial group was not making adequate yearly progress toward 100 percent proficiency

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Anne Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351, 2353 (2004).

102. School finance litigation has been compared to a Russian novel because "it's long, tedious, and everybody dies at the end." Mark G. Yudof, *School Finance Reform in Texas: The Edgewood Saga*, 28 HARV. J. ON LEGIS. 499, 499 (1991); see also RYAN, *supra* note 88, at 145-79.

103. Sheff v. O'Neill, 678 A.2d 1267, 1289 (1996).

104. Saiger, *supra* note 32 at 514-15.

105. *Id.* at 515 nn.116-25. A subsequent revised settlement similarly left the district boundaries untouched.

106. It is beyond the scope of this Article to assess whether the use of tests in and of itself has disparate effects within the education system.

even if the school as a whole was. In name and through policy, the statute explicitly attempted to transform American education to be more reflective of the system's mobility-producing ideal. The disaggregation of data by race held schools and districts accountable for ensuring that there was no differential treatment of students—at least up to the point that students were achieving “proficiency.”

However, as with the state court-ordered remedies, the practical realities of the system's structure handicapped the remedies suggested by the statute. For example, one of the most radical remedies available under NCLB was the ability of students in schools labeled “failing” to transfer to non-failing schools.<sup>107</sup> However, because of the primacy of local control and the inviolability of district lines, the transfer option was of limited effectiveness. First, the statute called only for transfers within the student's home district. Unfortunately, for a student in a “failing” school seeking transfer, the fragmentation of school administration enabled by geographic sorting made it likely that many other schools in the district would also be performing poorly on state assessments. The choice, therefore, was among a series of struggling schools—schools disproportionately made up of minority students. Students who theoretically had the transfer right as a result of attending a “failing” school had no realistic option to attend any school that was substantially different from the one they had been attending, whether demographically or in quality.<sup>108</sup>

The transfer option is particularly noteworthy because it implicitly recognizes that the geographic classifications, which determine who attends what school, must be loosened in order to reduce racial opportunity gaps. This exemplifies modifying the sorting machinery so that students are not locked into failing schools. The broader movement embracing school choice rests on a similar idea—allowing students to sort themselves could undercut the caste-maintaining nature of the system by enabling students to avoid attending bad schools. This only works, however, if students have genuine options. Otherwise, the “choice” simply masks the sorting of some students into disadvantaged situations. The NCLB transfer policy demonstrates the limitations of school choice if implemented without interfering with district sovereignty in districts that are racially homogenous and isolated from better resources.

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107. Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race-Conscious Accountability*, 47 *How. L.J.* 243, 261 (2004).

108. Goodwin Liu & William L. Taylor, *School Choice To Achieve Desegregation*, 74 *FORDHAM L. REV.* 791, 803 (2005) (concluding that the transfer provisions and choice generally “does not alter the basic geography of educational inequality”).



Thus, perhaps the most substantial practical impediment to successful large-scale intervention against today's educational disparities is the degree of isolation enabled by the stratified nature of the sorting system. Students are isolated in pockets of racially homogeneous, high-poverty, low-resource schools and districts. Expanding "resource" to include curricular opportunities, peer quality, and school culture, among other intangibles that contribute to quality of education makes the deprivation even more glaring. The teachers who teach, the principals and school operators who lead, and the institutions that work in these environments face incredible headwinds from the outset. Isolated instances of success are rightly celebrated, but widespread reduction of educational disparities where these isolated pockets remain is unlikely.

One solution is to give students tickets out of these pockets, as the NCLB transfer policy sought to do. Another logical solution would be to reduce the degree of isolation within the system. This was attempted during the era of desegregation—the solution was to ensure that there were no longer black schools and white schools, but that there were "just schools."<sup>109</sup> With most districts having been relieved of court supervision and with political and demographic realities limiting the number of places where isolation-reducing policies can be voluntarily pursued, these efforts are infrequent today. However, the story of one community that attempted just such a solution demonstrates the multiple impediments that insulate contemporary American education from caste-disrupting change.

Following dismissal of its longstanding desegregation order, Jefferson County (Louisville) Public Schools ("JCPS") voluntarily adopted a race- and income-conscious student-assignment plan that aimed to limit the pockets of isolation in its schools.<sup>110</sup> This policy, largely a continuation of the district's preexisting desegregation plan, was chosen over a neighborhood-schools plan because relying exclusively on geographic sorting would have led to largely racially segregated schools. Although practical—and fiscal—difficulties existed in implementing the district's complex plan, the school board, the local superintendent, and a majority of the community endorsed it. From a legal standpoint, the policy was voluntarily adopted rather than judicially mandated, so concerns about remedial authority and deference to local

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109. *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 442 (1968) (identifying an obligation on local school boards to successfully comply with desegregation mandate as formulation of a new plan "which promise[s] realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools").

110. See Daniel Kiel, *Accepting Justice Kennedy's Dare: The Future of Integration in a Post-PICS World*, 78 *FORDHAM L. REV.* 2873, 2881–82 (2010).

control were neutralized. The plan was challenged, however, as a form of reverse discrimination—it was not colorblind.

The case was consolidated with a similar case from Seattle and reached the Supreme Court in 2007 as *Parents Involved in Community Schools v. Seattle School District*.<sup>111</sup> In a crowning blow to even voluntary efforts to reduce racial isolation in schools, the Supreme Court ruled the plan unconstitutional.<sup>112</sup> The Court held that the policy's race-conscious assignment efforts violated the colorblindness mandate, arguing that the constitutional problem discriminated *in favor of* African Americans and even citing *Brown*.<sup>113</sup> Chief Justice Roberts expressed the essence of this sentiment in the plurality opinion: "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>114</sup> This is Justice Harlan's colorblindness ideal taken to its logical endpoint, but it conflicts with his aspiration of a caste-less society.

Here, a school district, with community support, enacted a bold policy aimed at reducing racial isolation in schools, one of the primary causes of educational disparities—and thus, a guardian of racial caste—only to have the plan rejected. Following the legal rejection of the plan, the district attempted to develop a new policy that would fit the Court's narrowing standards,<sup>115</sup> but community support for the program quickly dissipated.<sup>116</sup> Having been rejected legally, the policy was ultimately rejected politically as well. The classification system and the disparities it produced endured. The practical, political, and legal impediments to change proved too powerful even for this rare community taking aggressive action to create circumstances where education will do more to disrupt racial caste than preserve it.

## CONCLUSION

When Justice Harlan wrote that there is "no caste here," he articulated a legal argument: in the eyes of the law, there could be no distinguishing among citizens. But the sentiment expresses a broader ideal in the opportunities promised by the United States in contrast to other rigidly-stratified nations. That this ideal remains elusive in practice

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111. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

112. *Id.* at 745.

113. *Id.* at 747.

114. *Id.* at 748.

115. Kiel, *supra* note 110, at 2895–2900.

116. The diminution of public support for the student-assignment plan ultimately led the JCPS Board to vote not to retain the district's superintendent. Thomas McAdam, *Louisville School Board Gives Berman the Axe*, EXAMINER.COM (Nov. 22, 2010, 9:33 PM), <http://www.examiner.com/article/louisville-school-board-gives-berman-the-axe>.

and that the very system best positioned to bring it to life may be working against its realization raises questions about our true national commitment to a society without caste, particularly racial caste.

However, this Article presumes that the “no caste” ideal is widely held. Our history, from a time when teaching a slave to read might merit 20 lashes to a time when many advocates of many races are committed to confronting educational disparities, is evidence of the validity of this presumption. The Article seeks to give structure to a broader critique in order to unleash this caste-less ideal yet again.

When Charles Hamilton Houston observed the structures upon which Jim Crow was built, the task of altering that structure must have seemed daunting. The challenge is similar today. This Article is an invitation to institutions and individuals to consider crucial questions that might begin to undermine the root causes of structural educational inequality in addition to the work of treating its symptoms. For instance: are there viable arguments that could reduce the amount of sorting and differentiation within the system, whether in funding and administration, assignment of students, or tracking within districts, schools or classrooms?; what legal strategies remain available and what new legal arguments could be pursued to resurrect discrimination claims?; and perhaps most crucially, what can be done to alter the narrative that the current structure is not the primary problem?

Over time, the field of legitimacy shifted against state-mandated segregation, as Justice Harlan predicted that it would. The *Brown* decision was a crucial marker in that process. If advocates for confronting contemporary educational disparities are to succeed, a similarly seismic shift will be required—the more vividly the magnitude of these structural flaws can be revealed, the more quickly the nation’s education system will move toward Justice Harlan’s ideal.