

# The Deconstitutionalization of Education

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## I. INTRODUCTION

Fifty years ago, in *Brown v. Board of Education*,<sup>1</sup> Chief Justice Earl Warren eloquently proclaimed the importance of education. He wrote:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. 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>2</sup>

*Brown* offered the promise that the federal courts would recognize a fundamental right to education and use the Constitution to ensure equal educational opportunity for all children in the United States.<sup>3</sup> In my opinion, the simple reality is that without judicial action equal educational opportunity will never exist. There is no powerful political constituency for equalizing educational opportunities for children who are poor or are part of racial minority groups.<sup>4</sup> For decades, no President has addressed the problem of school segregation.<sup>5</sup> Nor is it

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

2. *Id.* at 493.

3. *See id.* at 495 (holding that segregation in public education deprives students of the equal protection of the laws guaranteed by the Fourteenth Amendment).

4. *See Top 20 PAC Contributors to Federal Candidates, 2003-2004*, at <http://usgovinfo.about.com/gi/dynamic/offsite.htm?zi=1/XJ&sdn=usgovinfo&zu=http%3A%2F%2Fwww.opensecrets.org%2Fpacs%2Ftopacs.asp> (last visited Nov. 5, 2004) (showing that industry lobbyists, trial lawyers, labor unions, and corporations are the heaviest political action committee contributors).

5. Perhaps the most significant presidential act in recent memory was President Dwight D. Eisenhower's dispatch of the United States Army, including the 101st Airborne Division, to Little Rock, Arkansas, to enforce desegregation in the 1950s. *See* Stephen Ambrose, *Dwight D.*

possible to think of many state or local politicians who have made an issue of separate and unequal schools. Any systematic attempt to deal with education would be highly unpopular; transferring money and students from wealthy areas to poorer areas is sure to engender enormous opposition. Those with the most influence in the political system can opt out of city public schools, by living in suburbs or sending their children to private schools.<sup>6</sup>

The result is that if the courts do not equalize educational opportunity, no one will. Yet, the reality is that for over thirty years, with the exception of largely disastrous and unsuccessful court-ordered busing, the Supreme Court, and the lower federal courts, have done nothing to advance desegregation of schools or to equalize expenditures for education.<sup>7</sup>

In fact, the Supreme Court's overall approach has been to withdraw the courts from involvement in American schools. I term this withdrawal the "deconstitutionalization of education." In numerous decisions, involving many different kinds of claims, the Supreme Court has professed almost unlimited deference to school officials and has refused to apply the Constitution in schools.<sup>8</sup> The Court's abdication of responsibility for school desegregation and for equalizing educational opportunity must be understood as part of this larger pattern of the deconstitutionalization of education.<sup>9</sup>

My goal in this article is to describe and criticize the deconstitutionalization of education. Part II of this article seeks to show how the Supreme Court has withdrawn the judiciary from enforcing the

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*Eisenhower 1953-1961*, in CHARACTER ABOVE ALL: TEN PRESIDENTS FROM FDR TO GEORGE BUSH 74-75 (Robert A. Wilson ed., 1995) (describing how President Eisenhower sent American troops into Little Rock, Arkansas to enforce the implementation of *Brown*).

6. In the 2000 and 2004 presidential elections, much was made of the private prep-school backgrounds of Al Gore, George W. Bush, and John Kerry, all sons of wealthy public servants.

7. The Supreme Court upheld court-ordered busing in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), but the federal courts have done little in the way of addressing school funding disparities. However, there have been some such efforts in state courts. See, e.g., *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 398-99 (Tex. 1989) (finding the Texas school funding scheme unconstitutional and requiring the state legislature to take "immediate action"). The resulting "Robin Hood" style funding plans, in which richer districts provide money to poorer districts, have been very controversial, unpopular, and recently, targeted for termination by lawmakers. April Castro, *Lawmakers Propose End to Robin Hood School Funding*, AMARILLO GLOBE-NEWS, Jan. 31, 2003, at [http://www.amarillonet.com/stories/013103/tex\\_robinhood.shtml](http://www.amarillonet.com/stories/013103/tex_robinhood.shtml) (last visited Nov. 5, 2003).

8. See *infra* notes 111-158 and accompanying text (discussing *Hazelwood*, *Bethel*, *T.L.O.*, *Vernonia*, *Goss* and *Ingraham*).

9. The focus of this paper is exclusively on elementary and secondary schools. Thus, I am not considering the issue of affirmative action in colleges and universities.

Constitution in public schools.<sup>10</sup> Part III argues why the deconstitutionalization of education is undesirable and why judicial action, through the Constitution, is imperative to deal with the problems in American public schools.<sup>11</sup> Thus, this article is both descriptive, detailing the Court's abdication of responsibility for the constitutional rights of students, and normative, arguing that this is undesirable.

## II. DECONSTITUTIONALIZATION HAS OCCURRED

What is striking and has been overlooked is that the Supreme Court's failure to enforce equal protection in the school context is part of its overall refusal to enforce any parts of the Constitution when it comes to public schools.<sup>12</sup> In this section, I look at several examples, beginning with desegregation and then considering school funding, free speech rights for students, and searches of students. In every area, the result is the same: the Supreme Court has ruled in favor of school autonomy and refused to enforce constitutional limits to improve the quality of education.<sup>13</sup>

### A. Desegregation

A recent study by Harvard Professor Gary Orfield carefully documents that during the 1990s America's public schools became substantially more segregated.<sup>14</sup> In the South, for example, he shows

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10. See *infra* Part II (describing and criticizing the deconstitutionalization of education). I do not want to overstate my descriptive thesis. There are some isolated areas where the courts have continued to enforce the Constitution in schools. The notable example is in preventing prayer in public schools. See notes 159–61 and accompanying text (discussing the Court's consistent holding that prayer in public schools violates the Establishment Clause of the First Amendment). But as described below, this is very much the exception in an overall pattern of judicial refusal to enforce the Constitution when it comes to education.

11. See *infra* Part III (describing recent Supreme Court decisions as deconstitutionalizing because they: (1) abdicate responsibility for enforcing the Constitution in schools; and (2) have consequent, detrimental effects).

12. See *infra* Part II.C (discussing the theory that the Supreme Court's failure to enforce equal protection reflects a larger failure of the judiciary to enforce the Constitution in schools and noting that First Amendment free speech cases are a compelling example).

13. See *infra* Part II.C–D (discussing the Supreme Court's high level of deference to school administrators in the areas of First Amendment free speech cases and Fourth Amendment cases).

14. GARY ORFIELD, *SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 2* (2001). See also THE CENTURY FOUNDATION TASKFORCE ON THE COMMON SCHOOL, *DIVIDED WE FAIL: COMING TOGETHER THROUGH PUBLIC SCHOOL CHOICE 17* (2002) [hereinafter CENTURY FOUNDATION] (noting that more than seventy percent of black students attend "mostly minority schools," as do seventy-six percent of Latinos); David Waters, *School Resegregation the Result of Law that Can't Be Repealed*, SCRIPPS HOWARD NEWS SERVICE, at <http://64.233.167.104/search?q=cache:Uin0mXOJTf8J:www.thesunlink.com/shns/story.cfm%3Fpk%3DFAITH-FAITH-05-12-04%26cat%3DLR+%22resregation+of+schools%22&hl=en> (last visited Nov. 6, 2004) (noting that in Memphis, Tennessee, 84 of the 185 public schools in the city

that “[f]rom 1988 to 1998, most of the progress of the previous two decades in increasing integration in the region was lost. The South is still more integrated than it was before the civil rights revolution, but it is moving backward at an accelerating rate.”<sup>15</sup>

The statistics presented in Professor Orfield’s study are stark. For example, the percentage of African-American students attending majority white schools has steadily decreased since 1988.<sup>16</sup> In 1954, at the time of *Brown v. Board of Education*, only 0.001% of African-American students in the South attended majority white schools.<sup>17</sup> In 1964, a decade after *Brown*, it was just 2.3%.<sup>18</sup> From 1964 to 1988, there was significant progress: from 13.9% in 1967, to 23.4% in 1968, to 37.6% in 1976, to 42.9% in 1986, and this percentage rose steadily to 43.5% in 1988.<sup>19</sup> But since 1988, the percentage of African-American students attending majority white schools has gone in the opposite direction.<sup>20</sup> By 1991, the percentage of African-American students attending majority white schools in the South had decreased to 39.2% and over the course of the 1990s it went to 36.6% in 1994, to 34.7% in 1996, and to 32.7% by 1998.<sup>21</sup>

Professor Orfield shows that nationally the percentage of African-American students attending majority black schools and schools where over 90% of the students are minorities also has increased since 1995.<sup>22</sup> In 1986, 63.3% of black students attended schools that were fifty to one hundred percent comprised of minority students; by 1998-99, 70.2% of black students were attending schools that were 50 to 100% minority.<sup>23</sup>

In North Carolina, for example, the same pattern exists. Between 1993, the number of schools with minority enrollments of 80% or more doubled.<sup>24</sup> In Charlotte, fewer than sixty percent of the schools are racially diverse, down from 85% in the 1980s.<sup>25</sup>

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are ninety to one hundred percent African-American even though thirty-five percent of the city population is white).

15. ORFIELD, *supra* note 14, at 2.

16. *Id.* at 29.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 31.

23. *Id.*

24. Tim Simmon & Susan Ebbs, *Separate and Unequal Again*, THE NEWS AND OBSERVER, Feb. 18, 2001, at A1, available at <http://www.newsobserver.com/news/education/gap/reseg/story/1236445p-7346051c.html>.

25. *Id.*

Quite significantly, Professor Orfield shows that the same is true for Latino students. The historic focus for desegregation efforts has been to integrate African-American and white students. The burgeoning Latino population requires that desegregation focus on this racial minority as well. The percentage of Latino students attending schools where the majority of students are of minority races, or almost exclusively of minority races, increased steadily over the 1990s.<sup>26</sup> Professor Orfield notes that “[Latinos] have been more segregated than blacks for a number of years, not only by race and ethnicity but also by poverty.”<sup>27</sup>

And there is every reason to believe that the problem is going to get worse. A significant cause of the predicament is that Supreme Court decisions ending successful desegregation orders are causing substantial increases in segregation.<sup>28</sup> In several cases, the Supreme Court concluded that school systems had achieved “unitary” status and thus that federal court desegregation efforts were to end.<sup>29</sup> The result was that remedies, which were in place and working, ended and resegregation resulted. Many lower courts followed the lead of the Supreme Court and likewise ended desegregation orders.<sup>30</sup> The result has been predictable: the increase in resegregation which Professor Orfield documents.<sup>31</sup>

In several recent cases, the Supreme Court has considered when a federal court should terminate a desegregation order.<sup>32</sup> In 1991, in

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26. ORFIELD, *supra* note 14, at 31. See also CENTURY FOUNDATION, *supra* note 14, at 17 (discussing segregation of Latino students in public schools).

27. ORFIELD, *supra* note 14, at 2.

28. *Id.* at 16 (noting the Rehnquist Court’s consistent dissents against school desegregation law); see also *Missouri v. Jenkins*, 515 U.S. 70, 100 (1995) (holding that normative measures designed to attract non-minority students and teachers into the Kansas City School District were beyond the scope of the Court’s remedial authority); *Freeman v. Pitts*, 503 U.S. 467, 471 (1992) (holding that the District Court did not have to supervise remedial measures to correct racial imbalances); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247 (1991) (holding that the school district did not have to show grievous wrong in order to dissolve desegregation and that once a “unitary” system had been achieved, an earlier desegregation order should end).

29. See *Jenkins*, 515 U.S. at 100, 102 (holding that the district court’s “desegregative attractiveness” plan exceeded its authority and remanding with instructions to the district court to consider that many of the goals of the education plan had been met and that the school system was operating in compliance with the Constitution); *Dowell*, 498 U.S. at 244 (upholding the district court’s determination that the Oklahoma City school system had achieved unitary status and reversing the appellate court’s holding that the Board had an affirmative duty not to impede the process of dismantling the dual system).

30. See, e.g., *People Who Care v. Rockford Bd. of Educ.*, 246 F.3d 1073, 1075, 1078 (7th Cir. 2001) (observing that the Rockford schools are less segregated than any previous case in which a school system was declared unitary and terminating the consent decree in effect).

31. ORFIELD, *supra* note 14, at 31.

32. See *infra* notes 33–60 (discussing the *Dowell*, *Pitts*, and *Jenkins* cases).

*Board of Education of Oklahoma City v. Dowell*, the issue was whether a desegregation order, which had been terminated in 1977, should be reinstated when respondents contended that the district's new plan would mean a resegregation of the public schools.<sup>33</sup> Oklahoma schools had been segregated according to state law until 1972—eighteen years after *Brown*.<sup>34</sup> In 1972, however, a federal court successfully desegregated the Oklahoma City public schools.<sup>35</sup> Evidence proved that ending the desegregation order would result in dramatic resegregation.<sup>36</sup> Nonetheless, the Supreme Court held that once a “unitary” school system had been achieved, a federal court’s desegregation order should end even if it will mean resegregation of the schools.<sup>37</sup>

The Court, however, did not define “unitary system” with any specificity. The Court simply said that courts should end desegregation decrees if the school board “has complied in good faith” and “the vestiges of past discrimination have been eliminated to the extent practicable.”<sup>38</sup> The Court said that in evaluating this “the District Court should look not only at student assignments, but ‘to every facet of school operations—faculty, staff, transportation, extra-curricular activities and facilities.’”<sup>39</sup>

In *Freeman v. Pitts*, the Supreme Court held that a federal court desegregation order should end when schools have complied with that particular order, even if other desegregation orders for the same school system remain in place.<sup>40</sup> A federal district court ordered desegregation of various aspects of a school system in Georgia that previously had been segregated by law.<sup>41</sup> Part of the desegregation plan had been met; the school system had achieved desegregation in pupil assignment and facilities.<sup>42</sup> Another aspect of the desegregation order, concerning assignment of teachers, had not yet been fulfilled.<sup>43</sup> After partially complying with the desegregation order, the school system planned to construct a facility that likely would benefit whites more than African-

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33. *Dowell*, 498 U.S. at 240–44 (Marshall, J., dissenting).

34. *Id.* at 251.

35. *See Dowell v. Bd. of Educ.*, 338 F. Supp. 1256, 1268–71 (W.D. Okla. 1972) (ordering desegregation under a court-imposed plan).

36. *Dowell v. Bd. of Educ.*, 890 F.2d 1483, 1487–88 (10th Cir. 1989).

37. *Dowell*, 498 U.S. at 244–46.

38. *Id.* at 249–50.

39. *Id.* at 250 (citations omitted).

40. *Freeman v. Pitts*, 503 U.S. 467, 471 (1992).

41. *Pitts v. Freeman*, 755 F.2d 1423, 1424 (11th Cir. 1985).

42. *Freeman*, 503 U.S. at 474.

43. *Id.* at 473.

Americans. Nonetheless, the Supreme Court held that the federal court could not review the discriminatory effects of the new construction because the part of the desegregation order concerning facilities had already been met.<sup>44</sup> The Court said that once a portion of a desegregation order is met, the federal court should cease its efforts as to that part and retain involvement only as to those aspects of the plan that have not been achieved.<sup>45</sup>

Finally, in *Missouri v. Jenkins*, the Court ordered an end to a school desegregation order for the Kansas City schools.<sup>46</sup> Missouri law once required the racial segregation of all public schools.<sup>47</sup> It was not until 1977 that a federal district court ordered the desegregation of the Kansas City, Missouri public schools.<sup>48</sup> The federal court's desegregation effort made a difference. In the 1983-84 school year, twenty-four schools in the district had an African-American enrollment of more than ninety percent.<sup>49</sup> **By 1993, no elementary-level student attended a school with an enrollment that was ninety percent or more African-American.<sup>50</sup> At the middle school and high school levels, the percentage of students attending schools with an African-American enrollment of ninety percent or more declined from about forty-five percent to twenty-two percent.<sup>51</sup>**

The Court, in an opinion by Chief Justice Rehnquist, ruled in favor of the state on every issue.<sup>52</sup> There were three parts to the Court's holding. First, the Court ruled that the district court's order, which attempted to attract non-minority students from outside the district, was impermissible because there was no proof of an inter-district

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44. *Id.* at 485.

45. *Id.* at 490-91.

46. *Missouri v. Jenkins*, 515 U.S. 70 (1995). Earlier in *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990), the Supreme Court ruled that a federal district court could order that a local taxing body increase taxes to pay for compliance with a desegregation order, although the federal court should not itself order an increase in the taxes.

47. The Missouri Constitution originally provided for "separate free public schools . . . [for] children of African descent." MO. CONST. art. IX, § 3 (1875). The section was a part of Missouri's current constitution until repealed by special election in 1976. MO. CONST. art. IX, § 1(a) (1945). Additionally, a Missouri statute prohibited "any colored child to attend any white school, or for any white child to attend a colored school." MO. REV. STAT. § 9216 (1929). The statute was later recodified at MO. REV. STAT. § 163.130 (1949) and repealed by 1957 Mo. Laws 452 § 1.

48. *Jenkins*, 515 U.S. at 74.

49. *Id.* at 115 (Thomas, J., concurring).

50. Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1466 (2003).

51. *Id.*

52. *Jenkins*, 515 U.S. at 94, 100.

violation.<sup>53</sup> Chief Justice Rehnquist, however, applied *Milliken v. Bradley* to conclude that the inter-district remedy—incentives to attract students from outside the district into the Kansas City schools—was impermissible because there was only proof of an intra-district violation.<sup>54</sup> The social reality, however, is that many city school systems are now primarily comprised of minority students, while surrounding suburban school districts are almost all white.<sup>55</sup> Thus, effective desegregation requires an inter-district remedy.

Second, the Court ruled that the district court lacked authority to order an increase in teacher salaries.<sup>56</sup> Although the district court believed that an across-the-board salary increase to attract teachers was essential for desegregation, the Supreme Court concluded that it was not necessary as a remedy.<sup>57</sup> In my view, this further limited the federal courts' remedial authority in dealing with the legacy of discrimination.

Finally, the Court ruled that the continued disparity in student test scores did not justify continuance of the federal court's desegregation order.<sup>58</sup> The Court concluded that the Constitution requires equal opportunity, not any result, and therefore disparities between African-American and white students on standardized tests were not a sufficient basis for concluding that desegregation had not been achieved. Ultimately, the Supreme Court held that once a school complies with a desegregation order, the federal court effort should be ended.<sup>59</sup> The Court held that disparity in test scores is not a basis for continued federal court involvement.<sup>60</sup>

Together, the three cases have given a clear signal to lower courts: the time has come to end desegregation orders, even when the effect will be resegregation. Lower courts have followed this lead.<sup>61</sup> The

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53. *Id.* at 90–92, 94.

54. *Id.* at 93–94 (citing *Milliken v. Bradley*, 418 U.S. 717, 745 (1974)).

55. *See id.* at 93 (citing *Milliken*, 418 U.S. at 735, in which the lower court found that any less comprehensive a solution than a metropolitan area plan would result in an all African-American school system immediately surrounded by practically all white suburban school systems).

56. *Id.* at 100.

57. *Id.*

58. *Id.*

59. *Id.* at 89 (holding that the “ultimate inquiry” is whether the school has “complied in good faith with the desegregation decree”).

60. *Id.* at 101.

61. *Reed v. Rhodes*, 179 F.3d 453, 456 (6th Cir. 1999) (affirming a lower court decision that modified a school desegregation consent decree and terminated judicial supervision of student school assignments primarily because the district had achieved partial unitary status as to student assignments); *Hull v. Quitman County Bd. of Educ.*, 1 F.3d 1450, 1453–55 (5th Cir. 1993) (noting that a remedy to de jure segregation has been eliminating unconstitutional school segregation patterns and concluding that the Quitman County School Board had no duty to keep

United States Court of Appeals for the Fourth Circuit has ended the desegregation remedy for the Charlotte-Mecklenburg schools.<sup>62</sup> The Eleventh Circuit ended the desegregation order for the Hillsborough County schools in Tampa, Florida.<sup>63</sup> The Eleventh Circuit rejected the district court's conclusion that unitary status had not been reached.<sup>64</sup> Notwithstanding the Eleventh Circuit's conclusion, at thirteen Hillsborough schools Latino students outnumber whites and African-Americans combined.<sup>65</sup> A recent article in the *National Law Journal* describes the end of desegregation orders throughout the country and quotes education expert Gary Orfield: "We're going back to a kind of *Plessy* separate-but-equal world. I blame the courts. Because the courts are responsible for the resegregation of the South."<sup>66</sup> The federal courts are withdrawing from overseeing school desegregation; it is an area of profound deconstitutionalization.

### B. School Funding

By the 1970s, it also was clear that there were substantial disparities in school funding. In 1972, education expert Christopher Jencks estimated that on average, fifteen to twenty percent more was being spent on each white student's education than on each African-American child's schooling throughout the country.<sup>67</sup> For example, the Chicago public schools, where 45.5% of the students were white and 39.1% were African-American, spent \$5,265 for each student's education; but in the

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one school open in order to maintain a partially integrated school housing fewer than seven percent of the district's students); *Tasby v. Moses*, 265 F. Supp. 2d 757, 764, 780–81 (N.D. Tex. 2003) (dissolving a desegregation order because the school district achieved unitary status); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 237 F. Supp. 2d 988, 1089 (E.D. Ark. 2002) (partially declaring unitary status because of the Little Rock School District's compliance with a desegregation order in the areas of good faith, student discipline, extracurricular activities, advanced placement courses, and guidance counseling); *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 370 (W.D. Ky. 2000) (ordering desegregation in part because of the school district's good faith compliance with the desegregation decree for the previous twenty years).

62. *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 311 (4th Cir. 2001) (en banc).

63. *Manning v. Sch. Bd.*, 244 F.3d 927, 929 (11th Cir. 2001).

64. *Id.*

65. Marilyn Brown, *Beyond Black and White*, TAMPA TRIB., Feb. 10, 2000, at A1.

66. Tresa Baldas, *Saying Goodbye to Desegregation Plans*, NAT'L L. J., June 16, 2003, at 4. Of course, the Midwest and North has by no means been a model for desegregation itself, given its own patterns of segregated schools and neighborhoods. See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993) (detailing how racial segregation is a persisting reality and is perpetuating urban poverty, which ultimately has led to a separate-but-equal environment).

67. CHRISTOPHER JENCKS, *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* 28 (1972).

Niles school system, just north of the city, where 91.6% of the students were white and 0.4% African-American, \$9,371 was spent on each student's schooling.<sup>68</sup> Similarly, in mostly African-American Camden, New Jersey, \$3,538 was spent on each pupil; but in mostly white Princeton, New Jersey, \$7,725 was spent.<sup>69</sup>

There, of course, is a simple explanation for the disparities in school funding. In most states, education is substantially funded by local property taxes.<sup>70</sup> Wealthier suburbs have significantly larger tax bases than poor inner cities.<sup>71</sup> The result is that suburbs can tax at a low rate and still have a great deal to spend on education.<sup>72</sup> Cities must tax at a higher rate and nonetheless have less to spend.<sup>73</sup>

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68. JONATHAN KOZOL, *SAVAGE INEQUALITIES* app. at 236 (1991).

69. *Id.*

70. JAMES A. KUSHNER, *APARTHEID IN AMERICA: A HISTORICAL AND LEGAL ANALYSIS OF CONTEMPORARY RACIAL RESIDENTIAL SEGREGATION IN THE UNITED STATES* 59–60 (1980). Kushner observed:

The real property tax is the primary source of funding for schools and municipal services. Ad valorem property taxes, based on the assessed valuation of land plus improvements, have been a major catalyst fostering urban decay. Tax-ratable commercial and industrial land uses contribute a large amount of revenue in proportion to their low demand for services; while their suburban relocation has left the residents of the deteriorating housing market without the means to pay for their expensive welfare and educational services. The central city government is placed in an untenable position as assessed property valuations decline in inverse proportion to escalating demand for services. This results in a continually increasing tax burden on the remaining residents to sustain their welfare, educational requirements and community services.

*Id.*; see also Lauren A. Wetzler, Comment, *Buying Equality: How School Finance Reform and Desegregation Came to Compete in Connecticut*, 22 *YALE L. & POL'Y REV.* 481, 485 (2004) (discussing how Connecticut relies heavily on property taxes to fund education which results in wealthy towns having unequal school district expenditures).

71. See Marion Crain, *Colorblind Unionism*, 49 *UCLA L. REV.* 1313, 1319 (2002) (recognizing that "educational opportunities are linked to property values, because school budgets are financed through local property taxes").

72. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 *COLUM. L. REV.* 346, 422 (1990) (observing that wealthier communities have higher levels of property wealth and can therefore tax at lower rates yet generate substantially more revenue than urban communities); Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 *WASH. L. REV.* 93, 147 n.203 (2003) (reasoning that the "federal tax treatment of local property taxes produces a huge indirect subsidy for wealthy districts").

73. See Briffault, *supra* note 72, at 422 (noting that poorer communities tax at much higher rates than wealthier communities but have comparatively low levels of school spending); see also *Abbott v. Burke*, 575 A.2d 359, 363 (N.J. 1990) (finding the state's Public School Education Act unconstitutional as applied to the poor urban school districts). Specifically, the New Jersey Supreme Court, in *Abbott*, found:

[T]he poorer the district and the greater its need, the less the money available, and the worse the education. That system is neither thorough nor efficient. We hold the [Public School Education] Act unconstitutional as applied to

The Court had the opportunity to remedy this inequality in education in *San Antonio Independent School District v. Rodriguez*.<sup>74</sup> But the Court profoundly failed and concluded that the inequalities in funding did not deny equal protection.<sup>75</sup> *Rodriguez* involved a challenge to the Texas system of funding public schools largely through local property taxes.<sup>76</sup> The Texas financing system meant that poor areas had to tax at a high rate, but had little to spend on education while wealthier areas could tax at lower rates, but still had much more to spend on education.<sup>77</sup> For example, one poorer district spent \$356 per pupil, while a wealthier district spent \$594 per student.<sup>78</sup>

The plaintiffs challenged this system on two equal protection grounds: (1) it violated equal protection as impermissible wealth discrimination; and (2) it denied children from the poor areas the fundamental right to education.<sup>79</sup> The Court rejected the former argument by holding that poverty is not a suspect classification, and therefore discrimination against the poor only need meet rational basis review.<sup>80</sup> Moreover, the Court rejected the claim that education is a fundamental right.<sup>81</sup> The Court said:

It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is “fundamental” is not to be

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poorer urban school districts. Education has failed there, for both the students and the State. We hold that the Act must be amended to assure funding of education in poorer urban districts at the level of property-rich districts; that such funding cannot be allowed to depend on the ability of local school districts to tax; that such funding must be guaranteed and mandated by the State; and that the level of funding must also be adequate to provide for the special educational needs of these poorer urban districts in order to redress their extreme disadvantages.

*Id.*

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

75. *See id.* at 50–51 (concluding that “the existence of some inequality in the manner in which the state’s rationale is achieved is not alone a sufficient basis for striking down the entire system” (internal quotations omitted)).

76. *Id.* at 4–5, 10.

77. *Id.* at 11–13. The poorest school district was taxed at a rate of \$1.05 per \$100,000 assessed value to contribute a total of \$26 per student in tax revenues. *Id.* at 12. On the other hand, the wealthiest district was taxed at a rate of only \$0.85 per \$100,000, but still contributed more than \$300 per student. *Id.* at 13.

78. *Id.* at 12–13.

79. *Id.* at 19, 29.

80. *Id.* at 28.

81. *Id.* at 37. *See also id.* at 29–30 (discussing the Court’s reasoning that although providing education is an important state service, that importance alone “does not determine whether it must be regarded as fundamental for purposes of an examination under the Equal Protection Clause”).

found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.<sup>82</sup>

Justice Powell, writing for the majority, then concluded: “Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”<sup>83</sup> Although education obviously is inextricably linked to the exercise of constitutional rights such as freedom of speech and voting, the Court nonetheless decided that education, itself, is not a fundamental right.<sup>84</sup> Applying the rational relationship test, the Court said:

[T]he logical limitations on appellees’ nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment.<sup>85</sup>

The Court also noted that the government did not completely deny an education to students; the challenge was to inequities in funding.<sup>86</sup> The Court concluded that strict scrutiny was inappropriate because there was neither discrimination based on a suspect classification nor infringement of a fundamental right.<sup>87</sup> The Court thus found that the Texas system for funding schools through local property taxes met the rational basis test.<sup>88</sup>

The Court reaffirmed that education is not a fundamental right under the Equal Protection Clause in *Kadrmas v. Dickinson Public Schools*.<sup>89</sup>

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82. *Id.* at 33.

83. *Id.* at 35.

84. *Id.* at 37.

85. *Id.* (citations omitted).

86. *Id.* at 38–39. The opinion reasoned that by adopting a method to finance public education, the state was extending the reach of education to more residents. *Id.* Therefore, the plan “should be scrutinized under judicial principles sensitive to the nature of the State’s efforts.” *Id.* at 39.

87. *Id.* at 37, 40.

88. *Id.* at 55. The Court began its rational basis analysis by noting that the Texas system was entitled to a presumption of validity. *Id.* It then emphasized the fact that the system was based on “responsible studies conducted by qualified people.” *Id.* The Court also recognized that property tax-financed public education previously had the support of most local governments and explained that it was “unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 states.” *Id.*

89. *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450 (1988).

When a poor family challenged a state law authorizing local school systems to charge a fee for use of school buses,<sup>90</sup> the Court again reiterated that poverty is not a suspect classification, that education is not a fundamental right, and that discrimination against the poor only has to meet rational basis review.<sup>91</sup> The Court said that education was not denied because the fee did not preclude the student from attending school.<sup>92</sup> Hence, the Court said that rational basis review was appropriate<sup>93</sup> and concluded that the plaintiffs “failed to carry the ‘heavy burden’ of demonstrating that the challenged statute is arbitrary and irrational.”<sup>94</sup>

These decisions are wrong—tragically wrong—in holding that there is not a fundamental right to education. Education is essential for the exercise of constitutional rights, for economic opportunity, and ultimately for achieving equality.<sup>95</sup> Almost three decades after *Brown*, in *Plyler v. Doe*, Justice Brennan writing for the majority reiterated the vital importance of public education:

Public education is not a “right” granted to individuals by the Constitution. But neither is it merely some governmental “benefit” indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction . . . . [E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society.<sup>96</sup>

*Rodriguez* and *Kadrmas* were enormously important steps in the deconstitutionalization of education because they made it clear that American public education is characterized by poor, African-American city schools surrounded by wealthy, white suburban schools spending a great deal more on education.<sup>97</sup> As discussed below, however, the

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90. *Id.* at 454. The state law at issue allowed certain school districts to recover transportation costs by charging user fees. *Id.* The fees could recover the total charge to the district. *Id.*

91. *Id.* at 458.

92. *Id.* at 460–61 (distinguishing the program at issue, which only impacted one of a number of transportation alternatives, from other programs that barred the only available alternative and consequently prohibited participation altogether).

93. *Id.* at 461–62.

94. *Id.* at 463 (citation omitted).

95. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (stressing the importance of education in American society as the foundation of good citizenship).

96. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (internal citations omitted).

97. See generally JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001) (tracing the developments in desegregation since *Brown* and focusing on the impact of significant Supreme Court decisions in those

federal Constitution does not address this predicament and the federal courts offer no remedy to the problem via greater protections.<sup>98</sup>

### C. Freedom of Speech

My thesis is that the Court's failure to enforce equal protection in education must be understood as part of a larger failure on the part of the judiciary to enforce the Constitution when it comes to schools. The First Amendment and the free speech rights of students are a powerful example of this.<sup>99</sup>

*Tinker v. Des Moines Independent Community School District* was the high watermark of the Supreme Court protecting the constitutional rights of students.<sup>100</sup> The decision is perhaps best remembered for its ringing pronouncement: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>101</sup> This sentence powerfully conveys that schools are not institutions immune from constitutional scrutiny.

*Tinker* was decided in 1969, the last year of the Warren Court. Chief Justice Earl Warren had already announced his resignation and was soon to be replaced by the much more conservative Warren Burger.<sup>102</sup> The author of the majority opinion in *Tinker*, Justice Abe Fortas, already had been denied confirmation as Chief Justice when *Tinker* was released, and Justice Fortas would shortly resign from the Court amidst a scandal.<sup>103</sup> Justice Fortas's successor, Justice Harry Blackmun, would

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developments).

98. See *infra* Part II.C (discussing the Court's failure to enforce the freedom of speech rights of students); Part II.D (discussing the Court's failure to enforce the Fourth Amendment rights of students).

99. "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I; see *infra* notes 108–131 and accompanying text (discussing how the Court limited student rights under the First and Fourth Amendments in *Bethel* and *Kuhlmeier*, respectively).

100. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). The challenged policy in *Tinker* prohibited students from wearing black armbands to protest the Vietnam War. *Id.* at 504. First, the Court found that wearing armbands in protest was a constitutionally protected form of free speech. *Id.* at 505–06. Then, the Court found that because the school failed to demonstrate that the prohibition served to prevent substantial disruption of school activities, it unconstitutionally prohibited protected speech. *Id.* at 514.

101. *Id.* at 506.

102. Chief Justice Warren actually resigned before the 1968 election in the failed hope that President Lyndon Johnson would appoint a liberal successor. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN* 10 (1979). The result was that when Nixon took office in January 1969, he already had Warren's letter of resignation and was free to appoint a conservative judge. *Id.* In June 1969, the Senate confirmed Warren Burger, a conservative Court of Appeals judge for the District Of Columbia, as Chief Justice. *Id.* at 11, 24.

103. Justice Fortas was considered a crony of President Johnson, and his nomination for Chief

be a strong conservative voice and a consistent conservative vote in his first years on the Court.<sup>104</sup>

Over the three decades of the Burger and Rehnquist Courts, there have been virtually no decisions protecting rights of students in schools. Indeed, there have been remarkably few rulings concerning students' speech, despite hundreds of lower court decisions on the topic. Excluding cases concerning religious expression, there have been only two Supreme Court cases concerning student speech in elementary, middle schools, and high schools: *Bethel School District No. 403 v. Fraser*<sup>105</sup> and *Hazelwood School District v. Kuhlmeier*.<sup>106</sup> In both, the Court rejected the students' First Amendment claims and sided with the schools.<sup>107</sup>

In *Bethel*, the Court upheld the punishment of a student for a speech given at a school assembly, in which the student nominated another student for a position in student government by giving a speech filled with sexual innuendos.<sup>108</sup> The school suspended the student speaker for a few days and kept him from speaking at his graduation as scheduled.<sup>109</sup>

In upholding the punishment, the Supreme Court emphasized the need for judicial deference to educational institutions.<sup>110</sup> Chief Justice Burger, writing for the Court, said that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."<sup>111</sup> The Court also distinguished *Tinker* on the ground that it had involved political speech,

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Justice was rejected by the Senate. *Id.* at 10. Justice Fortas resigned from the Supreme Court following disclosure that he had accepted \$20,000 from an industrialist who bragged that Justice Fortas would help him with a pending investigation against him by the Securities and Exchange Commission. *Id.* at 18. Wolfson, the industrialist, was convicted and Justice Fortas returned the money in secret. *Id.* Justice Fortas resigned in May 1969 as a result of the scandal. *Id.* at 20.

104. *See id.* at 122 (noting that the conservatives, Justice Blackmun and Chief Justice Burger, were on opposing sides of Supreme Court opinions in only two of their first fifty cases together).

105. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

106. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

107. *Id.* at 266 (asserting that students can lose constitutional protections to free speech if "school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students'"); *Bethel*, 478 U.S. at 681 (stating that "'fundamental values' must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students").

108. *Bethel*, 478 U.S. at 677-78.

109. *Id.* at 678.

110. *Id.* at 686-87.

111. *See id.* at 680-82. The Court recognized the *Tinker* holding that students do not lose constitutional protections just by entering school. *Id.* at 680. "It does not follow, however, that simply because the use of an offensive speaker considers a political point, the same latitude must be permitted to children in a public school." *Id.* at 682.

whereas the expression in *Bethel* was sexual in nature.<sup>112</sup> Chief Justice Burger said that “it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.”<sup>113</sup> He concluded that “[a] high school assembly or classroom is no place for a sexually explicit monologue . . . [and] it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech . . . is wholly inconsistent with the ‘fundamental values’ of public school education.”<sup>114</sup>

The Court went even further in its deference to school authorities in *Hazelwood School District v. Kuhlmeier*.<sup>115</sup> In *Kuhlmeier*, a school newspaper produced as part of a journalism class was going to publish, with the approval of its faculty advisor, stories about three students’ experiences with pregnancy and about the impact of divorce on students.<sup>116</sup> No student’s name was included in the article on pregnancy and one was mentioned in the article on divorce (although it had been deleted after the paper had been forwarded to the principal for review).<sup>117</sup> Prior to publication, the paper went to the school principal for final review.<sup>118</sup> The principal decided to publish the paper without these articles by deleting the two pages on which they appeared.<sup>119</sup> The principal expressed the view that the articles on pregnancy discussed sexual activity and birth control in a manner that were inappropriate for some of the younger students at the school.<sup>120</sup> Further, he reasoned that the three students in the article on pregnancy might be identified from other aspects of the article and that the parents of the student identified in the article about divorce should have the opportunity to respond.<sup>121</sup> The students claimed the principal’s actions violated their right to free speech.<sup>122</sup>

The Supreme Court upheld the principal’s decision and rejected the First Amendment challenge.<sup>123</sup> At the outset, Justice White, writing for the Court, quoted *Tinker*, explaining that “[s]tudents in the public

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112. *Id.* at 680.

113. *Id.* at 683.

114. *Id.* at 685–686.

115. *Hazelwood*, 484 U.S. at 260.

116. *Id.* at 263.

117. *Id.*

118. *Id.*

119. *Id.* at 264.

120. *Id.* at 263.

121. *Id.*

122. *Id.* at 264.

123. *Id.* at 266.

schools do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>124</sup> Quoting *Bethel*, however, he then added that the “First Amendment rights of students in the public schools ‘are not automatically coextensive with the rights of adults in other settings.’”<sup>125</sup> Justice White concluded that the school newspaper was a nonpublic forum and that as a result “school officials were entitled to regulate the contents of [the school newspaper] in any reasonable manner.”<sup>126</sup> The Court emphasized the ability of schools to control curricular decisions, such as what appears in school newspapers published as part of journalism classes.<sup>127</sup> Justice White wrote:

The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators’ ability to silence a student’s personal expression that happens to occur on the school premises. The latter question concerns educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.<sup>128</sup>

The Court said that in this context schools have broad authority to regulate student speech.<sup>129</sup> The cases discussed above effectively deconstitutionalize the First Amendment in the context of schools by declaring there will be great judicial deference to school administrator’s decisions.<sup>130</sup> Lower courts have followed this lead and have consistently sided with the schools and ruled against free speech claims of students.<sup>131</sup>

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124. *Id.* (quoting *Tinker v. Des Moines Indep. County Sch. Dist.*, 393 U.S. 503, 506 (1969)).

125. *Id.* (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986)).

126. *Id.* at 270 (citation omitted).

127. *Id.*

128. *Id.* at 270–271.

129. *Id.* at 271.

130. *See supra* notes 108–29 and accompanying text (reviewing the Court’s failure to protect the First Amendment rights of students).

131. *See, e.g.*, *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001) (finding that school’s expulsion of student for writing poem with violent imagery involving the shooting deaths of fellow students did not violate the First Amendment); *Demers v. Leominster Sch. Dep’t*, 263 F. Supp. 2d 195–206 (D. Mass. 2003) (finding school’s actions were reasonable and did not violate the First Amendment when officials sent student home for writing “I want to die” on a piece of paper and drawing pictures of the school superintendent with explosives at his feet and a gun pointed at his head).

*D. Other Constitutional Rights of Students*

Another example of the deconstitutionalization of education concerns the Fourth Amendment.<sup>132</sup> In *New Jersey v. T.L.O.*, the Supreme Court held that schools could search students without meeting the probable cause requirement of the Fourth Amendment.<sup>133</sup> The Court held that special disciplinary needs exist in the school context and that adherence to the warrant requirement “would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.”<sup>134</sup> The Court expressly proclaimed the need to defer to the authority and expertise of the schools, declaring that “strict adherence to the requirement that searches be based upon probable cause” would undercut “the substantial need of teachers and administrators for freedom to maintain order in the schools.”<sup>135</sup>

The Court diminished Fourth Amendment protections in schools even further in cases involving drug testing of students.<sup>136</sup> In *Vernonia School District v. Acton*, the Supreme Court approved random drug testing for high school athletes.<sup>137</sup> In *Acton*, an Oregon school district required that all student athletes submit to drug testing before the school year and subsequent random tests during the school year.<sup>138</sup> Justice Scalia, writing for the Court, found that the program did not violate the Fourth Amendment.<sup>139</sup> The Court stressed that students have a relatively minimal privacy interest, especially when compared to the schools’ significant interest in stopping the use of illegal drugs.<sup>140</sup> The Court expressed the need for deference to schools saying: “When the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake.”<sup>141</sup> In other words, schools are allowed to violate the Fourth Amendment’s basic requirement of individualized suspicion. The Court’s deference to the authority and expertise of schools is

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132. U.S. CONST. amend. IV. The Fourth Amendment provides for “[t]he right of the people . . . against unreasonable searches and seizures . . . and no Warrants shall issue, but upon probable cause.” *Id.*

133. *New Jersey v. T.L.O.*, 469 U.S. 325, 347 (1985).

134. *Id.* at 340.

135. *Id.* at 341.

136. *See infra* notes 137–49 and accompanying text (describing the Court’s approval of drug testing programs in high school).

137. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995).

138. *Id.* at 648.

139. *Id.* at 664–65.

140. *Id.* at 657, 661.

141. *Id.* at 665.

controlling.<sup>142</sup>

The Court went even further in *Board of Education of Pottowatamie School District v. Earls*, by upholding a school program that required random drug testing of all students who wanted to participate in extracurricular activities, even non-competitive ones.<sup>143</sup> In *Acton*, the testing was limited to student athletes and the Court had stressed the risks of injury to drug impaired students participating in sports events.<sup>144</sup> Also in *Acton*, the school documented a serious drug problem among its students.<sup>145</sup> In *Earls*, however, the Oklahoma school district offered no such proof, and said that its goal was preventing drug use among students.<sup>146</sup>

The Supreme Court, in the 5–4 *Earls* decision, accepted this rationale and held that the drug testing did not violate the Fourth Amendment.<sup>147</sup> Justice Thomas’s opinion for the Court stressed the important interest of schools in preventing drug use and the minimal invasion of privacy from random drug tests.<sup>148</sup> Justice Thomas’s reasoning would leave virtually no protection for students’ Fourth Amendment rights in schools. Indeed, it appears, at least under Justice Thomas’s majority opinion, that schools can impose drug testing as if there were no Fourth Amendment.<sup>149</sup> The denial of Fourth Amendment protections to

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142. See *id.* (holding that the school’s policy was reasonable and constitutional but noting that “suspicionless drug testing will readily pass constitutional muster in other contexts. The most significant element . . . is . . . that the Policy was undertaken in furtherance of the government’s responsibilities, under a public school system, as guardian and tutor of children entrusted to its care”).

143. *Bd. of Educ. v. Earls*, 536 U.S. 822, 839 (2002).

144. *Acton*, 515 U.S. at 649.

145. *Id.*

146. *Earls*, 536 U.S. at 836.

147. *Id.* at 838.

148. *Id.* at 836–37.

149. See *id.* at 828–38 (explaining how Fourth Amendment rights differ, and are significantly less, in a public school setting). Justice Thomas began his opinion by noting that the Fourth Amendment requirement for probable cause before conducting a search is particularly intended for criminal settings. *Id.* at 828. Ordinarily in civil settings, this individualized suspicion standard is impracticable where the government reasonably “seeks to *prevent* the development of hazardous conditions.” *Id.* (quoting *Treasury Employees v. Von Raab*, 489 U.S. 656, 667–68 (1989)). Justice Thomas reiterated that “the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion.” *Id.* at 829 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976)). Thus, Justice Thomas set the stage to uphold suspicionless mandatory drug testing in public schools and to reject the student’s claim that at least some level of individualized suspicion was necessary for drug testing.

In analyzing the specific facts of the case, Justice Thomas found that a public school’s responsibility for maintaining discipline, health, and safety significantly outweighed the nature of a student’s privacy interest. *Id.* at 830–31. “Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults.” *Id.* at

students in school is a clear and powerful example of the deconstitutionalization of education.

This deference to schools has been evident in other areas, such as in determining what procedural due process is required in student disciplinary matters.<sup>150</sup> In *Goss v. Lopez*, the Court held that the government must provide procedural due process when suspending students from public schools.<sup>151</sup> Yet, just as the Supreme Court backed away from *Tinker* and its protection of speech in schools, so did the Court minimize the application of due process in education.<sup>152</sup>

In *Ingraham v. Wright*, the Court held that the imposition of corporal punishment involved a deprivation of liberty, but did not require that the school provide any type of due process prior to its imposition.<sup>153</sup> The Court recognized that liberty includes “freedom from bodily restraint and punishment” and therefore where school authorities “deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, . . . Fourteenth Amendment liberty interests are implicated.”<sup>154</sup>

Yet the Court refused to require that the school provide any procedures with regard to the imposition of corporal punishment.<sup>155</sup> The Court stated it was sufficient for due process that the state provided tort law remedies against abuses.<sup>156</sup> The Court emphasized: “[h]earings, even informal hearings require time, personnel, and a diversion of attention from normal school pursuits. School authorities may well choose to abandon corporal punishment rather than incur the burdens of complying with the procedural requirements.”<sup>157</sup> The Court stressed the need for judicial deference to school authorities:

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831. Thus, students in public schools had a limited expectation of privacy. *Id.* at 832. Justice Thomas then found that the confidentiality and method of collecting urine samples rendered the school’s policy minimally intrusive. *Id.* at 834. Finally, the overwhelming drug epidemic among young people was a legitimate interest for schools to conduct base-less mandatory drug testing. *Id.* at 835–37.

150. See *infra* notes 151–158 and accompanying text (discussing the limitations on due process rights in public schools under *Goss* and *Ingraham*).

151. *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

152. See *id.* at 582, 584 (finding that in the public school context, due process does not always require notice before inflicting punishment and, when notice is required, an informal discussion will suffice).

153. *Ingraham v. Wright*, 430 U.S. 651, 672, 682 (1977). The Court also held the imposition of corporal punishment was not cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at 683.

154. *Id.* at 674.

155. *Id.* at 682.

156. *Id.* at 672.

157. *Id.* at 680.

“Assessment of the need for, and the appropriate means of maintaining, school discipline is committed generally to the discretion of school authorities subject to state law.”<sup>158</sup>

The one area where the Court has been willing to apply the Constitution in schools concerns the Establishment Clause.<sup>159</sup> For example, the Court has consistently held that prayer in public schools violates the Establishment Clause of the First Amendment.<sup>160</sup> In *Santa Fe Independent School District v. Doe*, the Court held that student-delivered prayers at high school football games are unconstitutional.<sup>161</sup> Likewise, in *Lee v. Weisman*, the Court held that clergy-delivered prayers at public school graduations violate the Establishment Clause.<sup>162</sup> This enforcement of the First Amendment in schools, however, stands in marked contrast to the failure to apply so much else of the Constitution in education.

### III. THE UNDESIRABILITY OF THE DECONSTITUTIONALIZATION OF EDUCATION

I believe that the decisions described above are undesirable in two senses. First, the federal courts are abdicating their proper role under the Constitution to enforce the fundamental rights of children in schools. Second, the rulings are undesirable in their social effects: increased segregation, continued inequality of school funding, suppressed student speech, and lost privacy rights for students.<sup>163</sup>

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158. *Id.* at 681-82.

159. The Establishment Clause of the First Amendment provides that “Congress shall make no law respecting an establishment of religion.” U.S. CONST. amend. I.

160. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316 (2000) (finding that the announcement of a prayer before football games, even though elected by a majority of students, “empowers the student body majority with the authority to subject students of minority to constitutionally improper messages” and that this “power alone, regardless of the students’ ultimate use of it, is not acceptable”); *Lee v. Weisman*, 505 U.S. 577, 598-99 (1992) (holding that a school cannot compel a student to participate in a religious exercise, where a public school had clergy give a religious prayer at graduation ceremonies, and finding that “[t]he prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid”).

161. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 316.

162. *Weisman*, 505 U.S. at 599.

163. *See generally*, Bruce J. Biddle & David C. Berliner, *A Research Synthesis/Unequal School Funding in the United States*, 59 EDUC. LEADERSHIP 8, 48-59 (May 2002) (compiling statistics from many sources to show the trends that schools that have more minorities are generally in impoverished areas and receive inadequate funding), available at [http://www.ascd.org/publications/ed\\_lead/200205/biddle.html](http://www.ascd.org/publications/ed_lead/200205/biddle.html); ERICA FRANKENBERG & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, RACE IN AMERICAN PUBLIC SCHOOLS: RAPIDLY RESEGREGATING SCHOOL DISTRICTS (August 2002) (scrutinizing

As to the former, the Supreme Court and the federal judiciary have an essential role to play in enforcing the Constitution's protections, especially in contexts where the political branches are unlikely to do so. This philosophy—deference to the political branches of government in some areas, but the need for aggressive judicial review in others—was expressed in a very famous footnote in *United States v. Carolene Products Co.*<sup>164</sup> In footnote four, the Court declared:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment. . . . Nor need we [i]nquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.<sup>165</sup>

In other words, courts generally should presume that laws are constitutional. As the Court has noted, a “more searching judicial inquiry” is appropriate when a law interferes with individual rights, restricts the ability of the political process to repeal undesirable

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data of public schools at the district level to evaluate the trend toward resegregation and its effect on minorities other than African-Americans), available at [http://www.civilrightsproject.harvard.edu/research/deseg/reseg\\_schools02.php](http://www.civilrightsproject.harvard.edu/research/deseg/reseg_schools02.php); Libero Della Piana, *Reading, Writing, Race & Resegregation: 45 Years After Brown* v. Board of Education, 2 COLORLINES 1 (Spring 1999) (citing GARY ORFIELD, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION (1997) as stating that current segregation of schools now surpasses the levels of segregation that existed before *Brown*), at [http://www.arc.org/C\\_Lines/CLArchive/story2\\_1\\_01.html](http://www.arc.org/C_Lines/CLArchive/story2_1_01.html); GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, *BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE?* (January 2004) (compiling and analyzing statistics to show that despite minority growth in wealthier areas, minority students are still, and increasingly, attending primarily minority schools and showing that this is not what should have resulted from the *Brown* decision), available at <http://www.civilrightsproject.harvard.edu/research/reseg04/resegregation04.php>; and, Patricia Macias Rojas & Rebecca Gordon, *Just Facts: Racial Resegregation and Inequality in the Public Schools*, 2 COLORLINES 1 (May 1999) (compiling statistics to show the disparity in funding between schools which are predominantly white, with the minimal funding received by schools that are predominantly minority), at [http://www.arc.org/C\\_Lines/CLArchive/story2\\_1\\_01.html](http://www.arc.org/C_Lines/CLArchive/story2_1_01.html).

164. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). For excellent discussion of this footnote and its significance, see generally J.M. Balkin, *The Footnote*, 83 Nw. U. L. REV. 275 (1989); and, Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 4, 713 (1985).

165. *Carolene Products*, 304 U.S. at 152 n.4.

legislation, or discriminates against a “discrete and insular minority.”<sup>166</sup> It is a framework that provides general judicial deference to the legislature but requires more intensive judicial review in particular areas.

The enforcement of basic constitutional rights in schools fits exactly within the areas where the *Carolene Products* footnote justifies heightened review because the infringement of fundamental rights secured by the Bill of Rights, as well as a “discrete and insular minority exist.” The discrete and insular minority concept protects groups that are unlikely to rely on the political process for adequate protection. Aggressive judicial review, therefore, is justified because insular minority groups cannot trust the other branches of government.<sup>167</sup>

Racial minorities are the classic insular minority. The reality is that the political process never has worked—and I fear never will—to desegregate schools. It is impossible to think of any politician in recent years who has made school segregation an issue. Nor is the political process going to achieve the equalization of funding for schools. Those with the greatest political power benefit from the inequality, or at the very least are unaffected by it as they can send their children to private schools.<sup>168</sup> Families with children in inadequately funded public schools lack the political power to do anything about ensuring equal educational opportunity.

Nor do students have political power to protect their First or Fourth Amendment rights through the political process. For student rights, courts must take action or there will be no protections at all. Unfortunately, the reality over the past quarter of a century has been the latter.<sup>169</sup>

My objection, of course, is not solely at the process level. What is particularly troubling is the result of the Supreme Court’s deconstitutionalization of education. American public education is separate and unequal, and as discussed above, becoming ever more

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166. *Id.*

167. *See, e.g.,* Ann Scales, *Memo to Democrats: Black Vote Isn’t Secure*, BOSTON GLOBE, July 10, 1998 (noting black voter outrage at Jeremiah Nixon—then-Missouri Attorney General and 1998 Democratic candidate for the United States Senator—following Nixon’s proposal to end state aid for desegregation). While Nixon is still Attorney General in Missouri, his Senate bid failed and Republican Christopher Bond was re-elected by a wide margin. *See* MO US Senate at <http://www.ourcampaigns.com/cgi-bin/r.cgi/RaceDetail.html?&RaceID=3805> (last visited Oct. 20, 2004) (detailing 1998 Senate election results).

168. *See supra* note 6 (discussing the prep school backgrounds of recent presidential candidates).

169. *See supra* Part II (explaining how the Court has increasingly limited students’ constitutional rights over the years).

so.<sup>170</sup> The reality is that the average African-American or Latino student receives a very different education than the average white student in the United States.<sup>171</sup> The promise of *Brown's* equal educational opportunity has not been realized and will not be as long as the deconstitutionalization of education continues. People can devise accepting rationalizations: that courts could not really succeed; that desegregation does not matter; and that parents of minority students do not really care about desegregation.<sup>172</sup> But none of these rationalizations are true. *Brown* was right: separate schools can never be equal.

#### IV. CONCLUSION

Why has this country failed to live up to *Brown's* promise and its mandate? In part, it is a lack of political will. No President since Lyndon Johnson has proposed steps to deal with segregation in housing or schools. No Congress has attempted to deal with the problem. Neither candidate for the 2004 presidential election proposed any way to deal with segregation.<sup>173</sup> There just is not the political will, and there never has been, to deal with segregated unequal schools through the legislative process.

Unfortunately, the courts have failed us too. In a series of decisions, the Supreme Court has essentially deconstitutionalized education.<sup>174</sup> As

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170. See *supra* note 163 (providing examples and studies of how the trend in American schools has increasingly become more unequal both racially and monetarily).

171. See *supra* Parts II.A and II.B (discussing racial segregation and funding disparities, respectively).

172. Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court's Role*, 81 N.C. L. REV. 1597, 1622 (2003) (arguing that the Supreme Court "seems intent on declaring victory over the problem of school segregation and withdrawing the judiciary from solving the problem," which results in interested citizens seeking rationalizations for the failure of desegregation). See *Brown v. Board of Education: A Moot Court Argument*, 52 AM. U. L. REV. 1343, 1369 (2003) (detailing that during a mock re-argument of *Brown*, Prof. Derrick Bell of New York University Law School "predicts" that if desegregation were ordered, short term enthusiasm for *Brown* would be replaced by a longer-term loss of interest in desegregation issues); Bradley W. Joondeph, *Missouri v. Jenkins and the De Facto Abandonment of Court Enforced Desegregation*, 71 WASH. L. REV. 597, 653 (1996) (arguing that recent decisions are harbingers of the end of courts acting as the mechanism for school desegregation); *Lifting "Desegregation Court" Orders, Where Winning Isn't Always a Victory, Issues and Views* (June 1, 2001) (noting that some black parents would rather focus on high-quality academics as opposed to bussing to achieve desegregation goals), at <http://www.issues-views.com/index.php/sect/1003/article/1039>.

173. See Bush and Kerry Mark Desegregation in Topeka, N.Y. TIMES, May 18, 2004 (recapping each politician's comments during their brief visit to Topeka, Kansas, in commemoration of the 50th anniversary of *Brown*, whereby each politician acknowledged that racism still exists and that the government needs to act to rectify this problem).

174. See *supra* Part II (detailing the major cases which effectively limited student rights in

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described above, constitutional guarantees of equal protection, freedom of speech, protection from unreasonable search and seizure, and procedural due process all have been deemed to have little application in schools.<sup>175</sup>

Equal educational opportunity can be achieved. But living up to the legacy and promise of *Brown* will require effort and courage by politicians and courts that has yet to be shown. For far too long, the problem of separate and unequal schools has been ignored. The fiftieth anniversary of *Brown* should be the occasion for more than a celebration of that decision; it must be the time for making its promise a reality.

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public schools under the Constitution).

175. *Id.*