The Parted Paths of School Desegregation and School Finance Litigation

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I am delighted to be part of this conference on the fiftieth anniversary of *Brown II*.[1] After the many commemorations of the fiftieth anniversary of *Brown I*[2] last year, it seems especially important and commendable that the University of Minnesota Law School has directed our attention to *Brown II*. After all, it's not difficult to affirm and celebrate the accomplishment of *Brown I*: the authoritative, unequivocal declaration that state-imposed racial segregation violates the constitutional rights of Black schoolchildren. *Brown II*, however, poses the harder question of how to make those rights real—how to remedy legal wrongs—in the untidy crucible of American public schools. On the long road to racial equality in education, *Brown I* gave us an enduring symbol, while *Brown II* began to address matters of substance.

In the five decades since *Brown II*, two major legal strategies have been used in pursuit of the principle that educational "opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[3] The first is school desegregation; the second is school finance reform. One strategy involves redistributing schoolchildren; the other involves redistributing money. One focuses on race; the other focuses on resources. Despite these differences, both are united by a common purpose of improving educational opportunity for the most disadvantaged children—in particular, those who are minority and poor. School desegregation is, of course, a lineal descendant of *Brown*. But school finance litigation also lies within

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1. Brown v. Bd. of Educ., 349 U.S. 294 (1955).
2. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
3. *Id.* at 493.

"a continuing progressive legal dynamic" sparked by *Brown*.[4] According to Michael Rebell, one of the nation's top school finance litigators, the strategy reflects "a renewed attempt to implement *Brown*'s vision of equal educational opportunity."[5]

Given their common goal and similar time frame of evolution, it is somewhat puzzling that school desegregation and school finance litigation have led largely separate lives in our legal culture. As Professor James Ryan has observed, "[o]ne can easily envision how school finance reform and desegregation could have worked well together to equalize the educational opportunities of poor and minority children by ensuring that the fate of disadvantaged students was tied to the fate of their more advantaged peers."[6] Politically, school finance reform is easier to achieve where its beneficiaries are not segregated by race,[7] and desegregation is easier to achieve where all schools are amply resourced.[8] Educationally, we know that both resource-dependent interventions as well as peer and environmental influences have important effects on learning outcomes, even if the relative strength of these factors remains unclear.[9]

Notwithstanding these points of convergence, school desegregation and school finance reform are rarely treated together. Although the plight of poor minority schoolchildren is a shared point of departure, the two strategies are compartmentalized in casebooks and commentary,[10] and their advocates appear to keep each other at a distance. For example, although court-ordered school desegregation has slowed to a virtual standstill over the past decade, the NAACP Legal Defense

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4. Michael A. Rebell, *Adequacy Litigations: A New Path to Equity*, *in* BRINGING EQUITY BACK: RESEARCH FOR A NEW ERA IN AMERICAN EDUCATIONAL POLICY 291, 292 (Janice Petrovich & Amy Stuart Wells eds., 2005).

5. *Id.* at 298.

6. James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 259 (1999).

7. *See e.g.*, James E. Ryan, *The Influence of Race on School Finance Reform*, 98 MICH. L. REV. 432 (1999).

8. This is the intuition underlying the creation of magnet schools for the purpose of desegregation. For an historical overview, see Christine H. Rossell, *Magnet Schools: No Longer Famous but Still Intact*, EDUC. NEXT, Spring 2005, at 44.

9. *See infra* notes 108-113 and accompanying text.

10. *See, e.g.*, MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW (4th ed. 2002) (discussing school desegregation in Chapter 4 and school finance litigation in Chapter 7). Professor Ryan's work exploring the relationship between desegregation and school finance litigation is an exception in the literature. In addition to the articles cited in notes 6 and 7 above, see James E. Ryan, Sheff, *Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529 (1999).

Fund ("LDF") has not embraced school finance litigation as a tool to improve educational opportunity for minority schoolchildren, even though such litigation has gained momentum in recent years.[11] Similarly, school finance reformers have been cool to the cause of school desegregation from the beginning.[12]

How did this disconnect come about? Today I'd like to explore this question through an historical lens, focusing on a particular moment when school desegregation and school finance reform crossed paths at the United States Supreme Court. The year was 1973, and the Court was confronting two major educational equity cases: *San Antonio Independent School District v. Rodriguez*[13] and *Keyes v. School District No. 1*.[14] The two cases were argued on the same day, October 12, 1972,[15] and they were decided exactly three months apart, *Rodriguez* on March 21, 1973, and *Keyes* on June 21, 1973. In both cases, the plaintiffs alleged a denial of equal protection to minority students who were poor and racially segregated.[16] In both cases, the aggrieved students included not only Black but also Hispanic schoolchildren.[17]

Although we typically put *Keyes* and *Rodriguez* into separate categories as a matter of doctrine and policy, I will argue that the boundary between these two cases, as they reached the Court in the October 1972 Term, was actually quite blurry. *Keyes* and *Rodriguez* presented common questions concerning equality of educational opportunity that were a source of both symmetry and

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11. *See* Rebell, *supra* note 4, at 297 ("Plaintiffs [in school finance suits] prevailed in the vast majority (18 of 29) of the major decisions of the highest state courts since 1989.").

12. *See* JOHN E. COONS ET AL., PRIVATE WEALTH AND PUBLIC EDUCATION xvii-xviii (1970) ("[T]o suppose that integration would itself produce equality of education is plainly naive."); Ryan, *supra* note 10, at 532 n.14 ("School finance litigation began in the late 1960s and early 1970s, at a time when the slow pace of desegregation was causing some civil rights activists to question the efficacy of desegregation as a tool to improve the educational opportunities of minority students.").

13. 411 U.S. 1 (1973).

14. 413 U.S. 189 (1973).

15. *See* 77 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 567 (Philip B. Kurland & Gerhard Casper eds., 1975) (*Keyes* oral argument transcript); 76 *id.* at 571 (*Rodriguez* oral argument transcript).

16. *See Keyes*, 413 U.S. at 189; *Rodriguez*, 411 U.S. at 5-6.

17. *Keyes* determined that "schools with a combined predominance of Negroes and Hispanos" are properly regarded as "'segregated' schools," 413 U.S. at 198, and *Rodriguez* involved a poor school district whose student body was 90% Mexican-American and over 6% Black, 411 U.S. at 12.

tension between the cases. The Court's resolution of those questions set school desegregation and school finance reform apart from each other. The former was held to involve justiciable racial discrimination; the latter was held to involve nonjusticiable educational policy. Yet this was not how the two cases arrived from the lower courts, and the point I wish to make today is that *Keyes* and *Rodriguez*, though now distinct and compartmentalized, presented the Court with an opportunity to synthesize the law of school desegregation and school finance reform into a unified doctrine of equal educational opportunity. Regrettably, the Court declined this opportunity in 1973.

Part I of this Essay tells the tale of *Keyes* and *Rodriguez*, highlighting the relationship between the two cases and the way the Court set them apart. Part II characterizes the Court's 1977 decision in *Milliken II*[18] as a half-step down the road not taken in 1973. Finally, Part III affirms the continuing need to bring school desegregation and school finance reform under a common principle of equal educational opportunity. Part III also briefly discusses two Connecticut Supreme Court decisions, *Horton v. Meskill*[19] and *Sheff v. O'Neill*,[20] that demonstrate how school desegregation and school finance reform can be synthesized.

I. A Tale of Two Cases: *Keyes* and *Rodriguez*

Keyes and *Rodriguez* arrived at the Supreme Court from different doctrinal paths. *Keyes* was the first major case to test whether the desegregation principles announced two years earlier in *Swann v. Charlotte-Mecklenburg Board of Education* would apply not only to Southern school districts with long histories of *de jure* segregation,[21] but also to school districts in the North and West where, despite state laws prohibiting segregation, racially identifiable schools persisted as a result of residential migration and school board actions.[22] *Rodriguez*, on the other hand, was not framed as a race case. The plaintiffs invoked *Brown* not for what

18. Milliken v. Bradley (*Milliken II*), 433 U.S. 267 (1977).

19. 376 A.2d 359 (Conn. 1977).

20. 678 A.2d 1267 (Conn. 1996).

21. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971) (establishing a presumption of unconstitutional discrimination "against schools . . . substantially disproportionate in their racial composition").

22. *See Keyes*, 413 U.S. at 191 ("[The Denver] system has never been operated under a constitutional or statutory provision that mandated or permitted racial segregation in public education.")

it said about racial discrimination, but for what it said about the importance of education.[23] Because of its intimate connection to political participation, education was thought to implicate a fundamental interest that the state must provide evenhandedly absent compelling justification to do otherwise.[24] Further, the plaintiffs presented *Rodriguez* as the next logical step in a line of cases where the Court had vindicated claims of discrimination against poor people in settings other than education.[25]

Despite these differences, *Keyes* and *Rodriguez*, as they emerged from the lower courts, presented similar issues of unequal educational opportunity that blurred the boundary between school desegregation and school finance litigation. As discussed below, the two cases had an important symmetry in their approaches to liability, but also an important tension in their perspectives on remedy. By resolving these issues as it did, the Supreme Court missed an opportunity to draw school desegregation and school finance litigation closer together doctrinally and instead pushed them apart.

A. Keyes*'s Convergence with* Rodriguez

Let me begin with *Keyes*. The case involved racial segregation in two regions of the sprawling Denver school district. One region was the Park Hill neighborhood in northeast Denver. There, "the District Court found that '[b]etween 1960 and 1969 the Board's policies . . . show an undeviating purpose to isolate Negro students' in segregated schools 'while preserving the Anglo character of [other] schools.'"[26] The policies included segregative manipulation of attendance boundaries and deliberate

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23. *See* Brief for Appellees at 26-27, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (No. 71-1332) (quoting *Brown I*'s famous passage that begins "[t]oday, education is perhaps the most important function of state and local governments . . . .").

24. *Rodriguez* thus involved values similar to those at stake in *Williams v. Rhodes*, 393 U.S. 23 (1968) (invalidating state election law that gave established political parties an advantage over new parties), and *Reynolds v. Sims*, 377 U.S. 533 (1964) (invalidating state malapportionment of electoral districts).

25. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (invalidating state residency requirement for receipt of welfare benefits); Harper v. Virginia Bd. of Educ., 383 U.S. 663 (1966) (invalidating poll tax); Douglas v. California, 372 U.S. 353 (1963) (upholding a criminal defendant's right to counsel regardless of ability to pay); Griffin v. Illinois, 351 U.S. 12 (1956) (upholding a criminal defendant's right to trial transcript necessary for appeal regardless of ability to pay).

26. *Keyes*, 413 U.S. at 198-99 (quoting Keyes v. Sch. Dist. No. 1, 303 F. Supp. 289, 294 (D. Colo. 1969)).

concentration of minority teachers in minority schools.[27] There was little doubt about the School Board's liability for intentional discrimination in Park Hill and the need for desegregation as a remedy.

The second and, for our purposes, more interesting region was the core city area of Denver, where residential segregation together with neighborhood attendance zones had created and maintained racially identifiable schools.[28] The central issue in *Keyes* was what liability the School Board faced with respect to these schools, whose segregation was arguably *de facto*, not *de jure*. The Supreme Court resolved this issue by establishing a presumption that the segregation in the core city resulted from the same discriminatory intent as the segregation in Park Hill.[29] In doing so, the Court all but ensured that *de jure* violations would be found in both areas, whereupon "the District Court must, as in the case of Park Hill, decree all-out desegregation of the core city schools."[30] This outcome fulfilled the plaintiffs' goal of securing a system-wide desegregation remedy.[31]

Given this result, what, if anything, did *Keyes* have to do with *Rodriguez*? Answering this question requires a close look at the record in *Keyes*, with attention to how the district court originally addressed the issue of segregation in the core city schools. In their complaint, the plaintiffs, represented by LDF, gave three reasons why segregation in the core city was unconstitutional. First, they alleged that the School Board had purposefully created segregated schools through boundary changes, school site selection, and a neighborhood school policy.[32] Second, they argued that the Board's neighborhood school policy, even if adopted with no discriminatory

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27. *See Keyes*, 303 F. Supp. at 290-95; Keyes v. Sch. Dist. No. 1, 303 F. Supp. 279, 284-85 (D. Colo. 1969).

28. *See Keyes*, 413 U.S. at 198-202.

29. *See id.* at 208 ("[A] finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious.").

30. *Id.* at 214.

31. On remand, the district court found that the intentional segregation demonstrated in Park Hill rendered the entire Denver system an unconstitutionally segregated system, *see* Keyes v. Sch. Dist. No. 1, 368 F. Supp. 207, 210 (D. Colo. 1973), and the court adopted a system-wide desegregation plan, *see* Keyes v. Sch. Dist. No. 1, 380 F. Supp. 673 (D. Colo. 1974). On appeal, the Tenth Circuit affirmed the district court's finding of system-wide liability and upheld the court's desegregative student assignment and transportation plan. *See* Keyes v. Sch. Dist. No. 1, 521 F.2d 465, 484 (10th Cir. 1975).

32. *See* Keyes v. Sch. Dist. No. 1, 313 F. Supp. 61, 63-64 (D. Colo. 1970).

intent, was unconstitutional so long as it produced segregation in fact.[33] Third, they contended that the high-minority core city schools, whether *de jure* or *de facto* segregated, were inferior and provided unequal educational opportunity—a condition failing to meet even the "separate but equal" standard of *Plessy v. Ferguson* and requiring a remedy regardless of its cause.[34]

As to the second argument, the district court declined to hold that segregation arising from a non-racially motivated neighborhood school policy is by itself unconstitutional.[35] The court adhered to the now-familiar rule that racial segregation is unlawful only if it is the result of segregative intent.[36] As to the plaintiffs' first argument, the district court acknowledged that various zoning and site selection decisions by the School Board had increased the minority concentration at certain core city schools.[37] However, the court was not convinced that those decisions were motivated by a segregative purpose rather than considerations of school capacity.[38] Equally important, the court found the evidence insufficient to establish a causal connection between School Board decisions and current patterns of segregation. Observing that the purportedly segregative School Board actions occurred in the 1950s, "at an earlier date [than the actions concerning Park Hill] and, in some instances, prior to the *Brown* decision,"[39] the district court said that "much of the [racial] concentration [in the core city schools] occurred long after these decisions were made."[40] According to the court, "the complained of acts are remote in time and do not loom large when assessing fault or cause. The impact of the housing patterns and neighborhood population movement stand out as the actual culprits."[41]

Thus, the district court refused to find core city segregation to be unconstitutional either on a *de facto* theory (because legally

33. *See id.* at 64.

34. *See id.* at 63-64, 69-83 (citing Plessy v. Ferguson, 163 U.S. 537 (1896)).

35. *See id.* at 76-77.

36. *See Keyes*, 413 U.S. 189, 208 (1973) ("We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate."); *see also* Washington v. Davis, 426 U.S. 229, 239-41 (1976) (establishing discriminatory intent as the touchstone of unconstitutional discrimination).

37. *See Keyes*, 313 F. Supp. at 75-76.

38. *See id.*

39. *Id.* at 69.

40. *Id.* at 75.

41. *Id.*

insufficient) or on a *de jure* theory (because factually insufficient). This point is important. It means that the district court did not see the problem facing the core city schools as a problem of unlawful racial discrimination.

Instead, the district court accepted the plaintiffs' third argument that unequal provision of educational opportunity to the students in racially identifiable core city schools violates the Constitution. In finding unconstitutional inequality, the court compared the segregated core city schools with predominantly White schools and with district-wide averages on five measures.[42] Three were educational inputs (teacher experience, teacher turnover, and school facilities), and the other two were educational outcomes (student achievement and dropout rates). In each instance, the court compiled data, including four pages of statistical appendices, showing that students in high-minority core city schools received an inferior education.[43] For example, whereas 23.9% of teachers had no previous experience, 48.6% were on probation, and 17.4% had ten or more years of experience in minority elementary schools, only 9.8% had no previous experience, 25.6% were on probation, and 47.1% had ten or more years of experience in predominantly White elementary schools.[44] Student achievement data for elementary, junior high, and senior high schools revealed substantial gaps between predominantly minority schools and district-wide norms.[45] Additional data showed that students at predominantly minority junior and senior high schools dropped out at rates many times higher than their peers at predominantly White schools.[46]

The fact of racial segregation *did* enter into the court's analysis of educational inequality. Drawing on expert testimony and independent studies,[47] the court determined that "segregation, regardless of its cause, is a major factor in producing inferior

42. *See id.* at 78-81, 86-89.

43. *See id.* at 86-89.

44. *See id.* at 79-80. The court went on to explain that seniority-based teacher transfer policies "creat[ed] a much higher turnover rate at predominantly minority schools than at predominantly Anglo schools," resulting in a higher percentage of inexperienced teachers at minority schools. *Id.* at 80.

45. *See id.* at 78-79, 86.

46. *See id.* at 89.

47. *See id.* at 81-82 (relying on expert testimony of New York University education professor Dan Dodson and findings of the Special Study Committee on Equality of Educational Opportunity in the Denver Public Schools).

schools and unequal educational opportunity."[48] But here the district court understood segregation to be relevant not as a free-standing *legal* harm but as a contributing source of *educational* harm. In other words, segregation was problematic not in and of itself, but because it compromised the substantive quality of education at high-minority schools.[49]

Although the district court saw segregation as a key factor in producing inequality, it did not believe that the answer entailed desegregation as opposed to compensatory educational measures. In its preliminary discussion of appropriate remedies, the court proposed several "equalizing" strategies for the parties to consider: renovating core city school buildings, prohibiting teachers with seniority from transferring to superior schools, and paying teachers "premium salaries" to teach in high-minority schools.[50] While encouraging the parties to develop a school improvement program with these and other components, the court was much less supportive of busing: "In connection with equalizing the educational opportunity, it is not so clear that compulsory transportation is the answer."[51]

At this point in the story, it is evident that *Keyes* and *Rodriguez* presented an interesting convergence. By shifting the target of equal protection concern from racial segregation to substantive educational inequality, the district court in *Keyes* advanced a theory that began to shade into the kind of claims being tested in *Rodriguez*. The court's empirical analysis resembled the very arguments made by the *Rodriguez* plaintiffs to establish unconstitutional inequality in school finance. Indeed, the *Rodriguez* plaintiffs claimed that, under the Texas school funding system, poorer districts had higher teacher turnover, poorer teacher quality, worse school facilities, lower student achievement, and higher dropout rates.[52] Moreover, the legal

48. *Id.* at 82.

49. The district court seemed aware that its equal protection theory, though sensitive to the role of racial segregation in producing substantive educational inequality, had applicability beyond the context of segregated schools. *See id.* at 83 ("'Theoretically, . . . purely irrational inequalities even between two schools in a culturally homogeneous, uniformly white suburb would raise a real constitutional question.'" (quoting Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969))).

50. *Id.* at 84.

51. *Id.* The court qualified this statement by acknowledging that "it is conceivable that [busing] could become the only effective remedy as a matter of law." *Id.* at 85.

52. *See* Brief for Appellees at 20-22, San Antonio Indep. Sch. Dist. v. Rodriguez,

principle stated by the district court in *Keyes*—that "if the school board chooses not to take positive steps to alleviate *de facto* segregation, it must at a minimum ensure that its schools offer an equal educational opportunity"[53]—seemed equally applicable to the state of Texas as it was to the Denver School Board. In addition, the *Keyes* court centered the remedy issue on what was necessary not to cure racial segregation *per se*, but to provide substantive equality in educational opportunity. Substantive equality, the court suggested, might require better facilities, better teachers, and more resources—the sorts of educational inputs sought by the plaintiffs in *Rodriguez*—but not necessarily desegregation.[54] Thus, the *Keyes* litigation had noticeable similarities with *Rodriguez* in doctrinal, evidentiary, and remedial dimensions. But the symmetry soon gave way to a pointed tension.

B. Keyes*'s Divergence from* Rodriguez

Going into the remedial stage, the plaintiffs in *Keyes* had prevailed on one of their theories of liability concerning the core city schools. But the theory, as interpreted by the district court, did not automatically entail the remedy they wanted most: system-wide desegregation. To obtain that remedy, the plaintiffs set out to make a factual showing that system-wide desegregation was essential to equalizing school quality. Predictably, the School Board took the opposing view that equalization could occur through a program of compensatory education—including incentives for good teachers to work in core city schools, early child development initiatives, teacher training, and various forms of academic enrichment—"with little emphasis on desegregation."[55] Thus the issue was joined:

> The crucial *factual* issue considered [at the remedial

411 U.S. 1 (1973) (No. 71-1332). State-court successors to the *Rodriguez* plaintiffs have taken a similar empirical approach in challenging state school finance systems. *See, e.g.*, Campaign for Fiscal Equity v. New York, 801 N.E.2d 326, 333-40 (N.Y. 2003).

53. *Keyes*, 313 F. Supp. at 83. The district court in *Keyes* cited *Griffin* and *Douglas*, two of the key cases relied on by the plaintiffs in *Rodriguez*, in declaring that "where state action, even if non-discriminatory on its face, results in the unequal treatment of the poor or a minority group as a class, the action is unconstitutional unless the state provides a substantial justification in terms of legitimate state interest." *Id.* at 82 (citing Griffin v. Illinois, 351 U.S. 12, 18 n.11 (1956), and Douglas v. California, 372 U.S. 353 (1963)).

54. *See id.* at 82-83.

55. Keyes v. Sch. Dist. No. 1, 313 F. Supp. 90, 93 (D. Colo. 1970).

> stage] was whether compensatory education alone in a segregated setting is capable of bringing about the necessary equalizing effects or whether desegregation and integration are essential to improving the schools in question and providing equality. The evidence of both parties [was] directed to this question.[56]

Here is where *Keyes* and *Rodriguez* were drawn into tension. In *Keyes*, the plaintiffs sought to show not only "that desegregation is essential in improving the quality of educational opportunity in the [core city] schools," but also its negative corollary: "that compensatory programs of the type proposed by the defendants cannot work in a segregated setting."[57] Three experts testified for the plaintiffs on this point. First, Dr. James Coleman, author of the famed Coleman Report,[58] explained that "isolation of children from low socioeconomic families creates an atmosphere which inevitably results in an inferior educational opportunity."[59] Second, Dr. Neil Sullivan, a former superintendent who had implemented a desegregation plan in Berkeley, California, testified that

> Berkeley had attempted to improve racially segregated schools by massive programs of compensatory education including lowering the teacher-pupil ratio, improving equipment and materials, and instituting cultural enrichment programs. These programs had little effect on student achievement. It was Dr. Sullivan's expert opinion that any effort at compensatory education must be correlated with desegregation if it is to achieve positive results.[60]

Third, the plaintiffs relied on Dr. Robert O'Reilly, a New York State Department of Education researcher who had conducted "the most extensive study of compensatory education programs on a national scale currently available."[61] Dr. O'Reilly reported that "most compensatory education programs include such items as lowering teacher-pupil ratio, use of paraprofessionals, inservice teacher and staff training programs, individualized tutoring and cultural enrichment courses."[62] Based on his study, he concluded that these activities "carried on in a segregated atmosphere had

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56. *Id.* at 94.

57. *Id.*

58. *See* JAMES S. COLEMAN ET AL., OFFICE OF EDUC., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966).

59. *Keyes*, 313 F. Supp. at 94.

60. *Id.*

61. *Id.*

62. *Id.*

little or no effect on raising achievement."[63]

Although the School Board presented testimony on enrichment programs already underway in Denver,[64] the district court found the plaintiffs' evidence "overwhelming."[65] Persuaded by the importance of peer effects on student learning,[66] the court backtracked from its earlier views on remedy and concluded that "[t]o seek to carry out a compensatory education program within minority schools without simultaneously developing a program of desegregation and integration has been unsuccessful. Experience has shown that money spent in these programs has failed to produce results and has been, therefore, wasted."[67] This factual conclusion paved the way for the district court to order desegregation of the core city schools, together with compensatory programs implemented in a desegregated context.[68]

It is hard not to notice a conflict here with the position advanced by the plaintiffs in *Rodriguez*. A principal theme of the *Rodriguez* litigation was that additional resources, presumably spent on compensatory programs, *do* make a difference in improving educational quality, even in intensely segregated schools like those in the 96% minority Edgewood district. Indeed, the plaintiffs in *Rodriguez* insisted on the efficacy of precisely the types of educational inputs—lower teacher-pupil ratios, better teacher quality, improved school facilities—that the plaintiffs and district court in *Keyes* described as ineffective in segregated schools.[69] The district court in *Rodriguez* held in favor of the

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63. *Id.*

64. *See id.* at 95 (commenting on existing inservice trainings for educators and vocational training programs).

65. *Id.* at 96; *see also id.* (describing plaintiffs' experts as "authorities in the field" and their opinions as "supported by extensive, comprehensive, in depth studies and, in some instances, actual experience in the field").

66. The court noted:

> The minority citizens are products, in many instances, of parents who received inferior educations and hence the home environment . . . yields virtually no educational value. Thus, the only hope for raising the level of these students and for providing them the equal education which the Constitution guarantees is to bring them into contact with classroom associates who can contribute to the learning process; it is now clear that the quality and effectiveness of the education process is dependent on the presence within the classroom of knowledgeable fellow students.

Id. at 96-97.

67. *Id.* at 97.

68. *See id.* at 97-98 ("The ideal approach, and that which offers maximum promise of success, is a program of desegregation and integration coupled with compensatory education.").

69. *Compare Keyes*, 313 F. Supp. at 96-97 *with* Brief for Appellees at 20-21, San

plaintiffs without explicitly addressing the relationship between resources and educational quality.[70] But, as the Supreme Court observed in *Rodriguez*, "an assumed correlation [between resources and quality] underl[ies] virtually every legal conclusion drawn by the District Court in this case."[71]

Thus, when *Keyes* and *Rodriguez* reached the Court in the October 1972 Term, there was an evident contradiction between the essential premise of the district court's desegregation order in *Keyes* and the essential premise of the district court's order invalidating the school finance system in *Rodriguez*.[72]

C. Race, Resources, and Resolution

Although it is unclear whether the Justices actually noticed, it seems unlikely that the symmetry and tension between *Keyes* and *Rodriguez* could have eluded the careful study undertaken by the Court in important cases such as these. How might these issues have affected the Court's disposition of the two cases?

In *Rodriguez*, the question whether resources matter to educational quality was a major preoccupation for all sides, garnering repeated attention from Justices in the majority and dissent.[73] In lengthy footnotes, the Court cited the emerging mass

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Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (No. 71-1332).

70. *See* Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973).

71. Rodriguez v. San Antonio Indep. Sch. Dist., 411 U.S. 1, 43 (1973).

72. The LDF, which represented the plaintiffs in *Keyes*, filed an *amicus* brief in support of the plaintiffs in *Rodriguez*. *See* Brief for NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae Supporting Respondents, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (No. 71-1332) [hereinafter LDF Brief]. In the slim 18-page submission, LDF's main argument was that the Texas school finance system was racially discriminatory and thus unconstitutional. *See id.* at 7 ("*Plaintiffs are all Mexican-Americans.* They claimed relief as and for Mexican Americans."). Although the LDF Brief said that the plaintiffs' "claim based on race was specifically upheld" by the district court, *id.* at 7-8, the district court's opinion in *Rodriguez* does not seem to support this statement. *See Rodriguez*, 337 F. Supp. 280. The LDF Brief also argued that the Texas scheme unconstitutionally discriminated against the poor. *See* LDF Brief, *supra*, at 8-12. While trying hard to frame the case as one involving discrimination against a suspect class, the brief said little to support the claim that resource disparities produce substantive inequality in educational opportunity. *See id.* at 14 ("[T]he money differences proved by plaintiffs in this case are material enough to warrant judicial intervention in light of their relationship to the other factors present, including race and poverty."); *id.* at 6 n.2, 14 n.8 (affirming generally that money matters to educational opportunity and outcomes).

73. *See Rodriguez*, 411 U.S. at 23-24, 42-43, 46-47 n.101 (commenting on the "unsettled and disputed" nature of the issue of whether a connection exists between expenditure and educational quality); *id.* at 82-84 (Marshall, J., dissenting)

of social science literature on the topic[74] and observed that "few empirical data . . . support the advantage of any particular pupil-teacher ratio or . . . document the existence of a dependable correlation between the level of public school teachers' salaries and the quality of their classroom instruction."[75] The district court's findings in *Keyes* could have only added to the doubt. There the court said that additional investment in poor minority schools would, absent desegregation, be "wasted."[76]

Ultimately, the majority in *Rodriguez* took no firm stance on the issue, calling it a "major source[] of controversy"[77] and an "unsettled and disputed question."[78] That, however, was all the Court needed to say in order to legitimize a posture of judicial restraint. If the Court could not be sure that increased investment in segregated schools such as Edgewood's would produce results, then there was little practical reason to invalidate the existing state systems of school finance throughout the country. More fundamentally, if additional resources could not guarantee educational improvement, then how could deprivation of resources form the basis of an equal protection violation? Pleading uncertainty as to the educational significance of school funding disparities, the Court characterized the plaintiffs' claim as untenably insisting on "absolute equality or precisely equal advantages."[79] In the end, although the Court refrained from saying that additional resources would *not* make a difference educationally, the district court's conclusion to that effect in *Keyes* could only have served to validate the Court's uncertainty.

With *Rodriguez* decided the way it was, the Court in *Keyes* was in no position to endorse the district court's approach to the case. Having declined to decide the cost-quality controversy in *Rodriguez*, the Court in *Keyes* could not then affirm the inefficacy of compensatory programs and declare the necessity of core city desegregation on educational grounds. Even more importantly, by rejecting the plaintiffs' equal protection claim in *Rodriguez* in broad doctrinal terms, the Court effectively foreclosed the theory of

(arguing that despite disagreements about the correlation between resources and educational quality, increased per pupil funding unquestionably leads to "greater choice in educational planning").

74. *See id.* at 43 n.86.

75. *Id.* at 46 n.101.

76. Keyes v. Sch. Dist. No. 1, 313 F. Supp. 90, 97 (D. Colo. 1970).

77. *Rodriguez*, 411 U.S. at 42-43.

78. *Id.* at 23.

79. *Id.* at 24.

liability in *Keyes* that focused on unequal educational opportunity instead of *de jure* or *de facto* segregation. Recall that *Rodriguez* and *Keyes*, as they reached the Supreme Court, were cut from the same equal protection cloth. The district court in *Keyes*, like the plaintiffs in *Rodriguez*, had relied on strong evidence of educational inequality to establish constitutional liability. After the Court's decision in *Rodriguez*, however, educational inequality by itself was no longer a sufficient basis for imposing remedial obligations on either the state of Texas or the Denver school district.

Yet the Court in *Keyes* was unwilling to leave segregation in Denver's core city schools intact.[80] Just two years earlier, in *Swann*, the Court had condemned a similar pattern of residentially-based school segregation in the Charlotte-Mecklenburg school system and had approved busing as a remedy.[81] An opposite result in *Keyes* would have left the Court vulnerable to criticism that it had employed a double standard between the South and the rest of the country, especially since public schools in the North and West were (and still are) more racially segregated.[82] The Court's solution was to salvage the theory of liability rejected by the district court and also by the Tenth Circuit—namely, that core city segregation was the result of intentionally discriminatory School Board actions. The Court took

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80. Before *Keyes* arrived at the Court, the Tenth Circuit had reversed the district court's determination that unequal educational opportunity in the core city schools violated the Constitution while affirming that segregation in those schools was not the result of segregative intent, thereby absolving the School Board of all liability in that part of the district. *See* Keyes v. Sch. Dist. No. 1, 445 F.2d 990, 1004-07 (10th Cir. 1971).

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

82. *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 218 (1973) (Powell, J., concurring in part and dissenting in part) ("There is segregation in the schools of many of these [northern] cities fully as pervasive as that in southern cities prior to the desegregation decrees of the past decade and a half. The focus of the school desegregation problem has now shifted from the South to the country as a whole."). Justice Powell also noted:

> According to the 1971 Department of Health, Education, and Welfare (HEW) estimate, 43.9% of Negro pupils attended majority White schools in the South as opposed to only 27.8% who attended such schools in the North and West. Fifty-seven percent of all Negro pupils in the North and West attend schools with over 80% minority population as opposed to 32.2% who do so in the South.

Id. at 218 n.3 (citation omitted). Today, segregation continues to be less intense in the South than in other parts of the nation. *See* ERICA FRANKENBERG ET AL., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 37-46 (2003), *available at* http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf.

this step on the ground that the lower courts had improperly ignored the probative value of the plaintiffs' proof of intentional segregation in Park Hill.[83] By deploying a presumption of segregative intent to facilitate a finding of *de jure* segregation, the Court achieved two things: It steered clear of the cost-quality debate that it had left unsettled in *Rodriguez*, and it brought Northern school desegregation doctrine in line with the doctrine applicable to the South.

Thus, the tension between *Keyes* and *Rodriguez* did not compel the Court to take a position on whether compensatory resources make a difference in poor minority schools. Instead, it bolstered one of the prudential reasons for the Court's decision in *Rodriguez* to stay out of school finance reform.[84] The symmetry between the two cases did not yield a nascent doctrine of unconstitutional educational inequality. Given *Rodriguez*'s rejection of this possibility, the Court reframed *Keyes* as a case involving *de jure* segregation, not substantive inequality in educational opportunity. As a result, the Court in 1973 drove a wedge between school desegregation and school finance litigation, holding the latter to implicate issues beyond the competence of courts to resolve, and focusing the former on racial, not educational, inequality and on racial, not educational, remedies.

D. Educational Inequality in the Aftermath

Interestingly, this cleavage became explicit in *Keyes* itself as the litigation went forward. On remand, the district court adopted a district-wide busing plan and ordered bilingual education programs to help Chicano students learn English.[85] On appeal,

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83. *See Keyes*, 413 U.S. at 206-08.

84. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 41-43 (1973) (stating that school finance reform involves matters of fiscal and educational policy on 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"); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1218 (1978) ("[I]nstitutional concerns significantly informed the Court's view that the equal protection clause was not violated by Texas' system of financing public schools largely through local property taxation.").

85. Applying the presumption of *de jure* segregation established by the Supreme Court's decision in *Keyes*, the district court on remand concluded that the Denver School Board had maintained an unconstitutional dual system, *see* Keyes v. Sch. Dist. No. 1, 368 F. Supp. 207, 209-10 (D. Colo. 1973), that called for busing and bilingual education remedies, *see* Keyes v. Sch. Dist. No. 1, 380 F. Supp. 673, 689-94 (D. Colo. 1974).

the Tenth Circuit upheld the busing plan but not the bilingual programs.[86] Quoting *Rodriguez*, the Tenth Circuit explained that the bilingual programs exceeded the district court's remedial authority partly because they implicated "[e]ducational policy, . . . an area in which the courts' 'lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at state and local levels.'"[87] Relying further on *Rodriguez*, the Tenth Circuit held that, because "education is not a right protected by the Constitution,"[88] "the school's alleged failure to adapt to the cultural and economic needs of minority students [does not] amount to a violation of the fourteenth amendment."[89]

Three years after *Rodriguez* and *Keyes*, former LDF staff attorney and then Harvard law professor Derrick Bell observed:

> The espousal of educational improvement as the appropriate goal of school desegregation efforts is out of phase with the current state of the law. Largely through the efforts of civil rights lawyers, most courts have come to construe *Brown v. Board of Education* as mandating "equal educational opportunities" through school desegregation plans aimed at achieving racial balance, whether or not those plans will improve the education received by the children affected.[90]

Marshaling the sentiments of Black leaders in Atlanta, Boston, and other communities who "wished to place greater emphasis on upgrading the schools' educational quality,"[91] Bell provocatively argued that "racial balance may not be the relief actually desired by the victims of segregated schools."[92] "Low academic performance and large numbers of disciplinary and expulsion cases,"[93] he explained, were among the harmful consequences of insisting that "black children are entitled to integrated schools without regard to the educational effects of such assignments."[94]

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86. *See* Keyes v. Sch. Dist. No. 1, 521 F.2d 465, 481 (10th Cir. 1975).

87. *Id.* at 482 (quoting *Rodriguez*, 411 U.S. at 42).

88. *Id.* (citing *Rodriguez*, 411 U.S. at 35-37).

89. *Id.* at 483 (citing *Rodriguez*, 411 U.S. at 39).

90. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471 (1976).

91. *Id.* at 482.

92. *Id.* at 472.

93. *Id.* at 488.

94. *Id.* at 480. Professor Bell eventually took the position that *Brown* might have achieved more for the cause of equal educational opportunity over the past half-century had it required rigorous enforcement of *Plessy*'s "separate but equal" standard instead of declaring segregation unconstitutional. *See* DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES

Bell's concerns echoed those of early school finance reformers who were skeptical of integration as a strategy for educational equality:

> Integration is indeed a sound, long-run prescription for many of the basic ailments of education and of our society—so long as we don't, in the meantime, die of something else; but to suppose that integration would itself produce equality of education is plainly naive. . . . Not only will quality education for all children not be guaranteed by integration, but there is danger that a holy war with this single objective will produce a Pyrrhic victory by neglecting and obscuring other important forms of discrimination in education against both white and black.[95]

Bell's negative assessment of desegregation has been controversial, and, coming in the mid-1970s, it was perhaps premature. Despite the lapse of twenty years since *Brown*, desegregation was still in its early stages in many communities. Best practices had yet to emerge, and research on educational outcomes had many methodological problems and focused narrowly on short-term gains.[96] Had the courts and political leaders after *Keyes* championed desegregation as a national priority, opposition to desegregation might have ebbed to a degree that would have allowed the project to succeed. However, at the time of his writing, Bell was correct that the doctrine emerging from *Keyes* and *Rodriguez* "fail[ed] to encompass the complexity of achieving equal educational opportunity for children to whom it so long ha[d] been denied."[97] Although desegregation, where possible, was an important component of equality-promoting reform, "too little attention ha[d] been given to making [minority] schools educationally effective."[98] This predicament followed directly from the Court's failure in 1973 to assimilate school desegregation and school finance into a broader theory of equal educational opportunity.

II. Race and Resources Revisited: *Milliken II*

Would *Keyes* have turned out differently had it not arisen together with *Rodriguez*? Perhaps not. Although *Rodriguez*

FOR RACIAL REFORM 20-27 (2004).

95. COONS ET AL., *supra* note 12, at xvii-xviii.

96. *See* Robert L. Crain & Rita E. Mahard, *The Effects of Research Methodology on Desegregation-Achievement Studies: A Meta-Analysis*, 88 AM. J. SOC. 839, 847 (1983).

97. Bell, *supra* note 90, at 478.

98. *Id.* at 479.

precluded the Court in *Keyes* from endorsing the district court's attempt to frame the problem of segregation in educational terms, the Court might well have treated *Keyes* as a racial, not educational, discrimination case in any event. As suggested above, the patterns of segregation in Denver and Charlotte-Mecklenburg implicated similar degrees of school board complicity. Accordingly, the Court in *Keyes* saw fit to adapt its existing theory of liability in *Swann* to the circumstances of the North and West rather than embark on a new theory as the district court and Justice Powell would have done.[99] Moreover, a district-wide busing remedy was equally available in Denver as it was in Charlotte-Mecklenburg.

Nevertheless, the Court soon found a limit to the pursuit of racial balance in school desegregation and infused its doctrine with more explicitly educational concerns. One year after *Keyes*, the Court in *Milliken I* lost its appetite for Northern school desegregation when faced with the prospect of busing across district lines in order to desegregate the predominantly Black Detroit school system.[100] The problem of racially segregated districts, not merely racially segregated schools, produced an important doctrinal shift between 1974 and 1977.

Given the futility of intradistrict busing in Detroit, *Milliken II* upheld a wide-ranging remedial education plan that included a reading program, comprehensive teacher training, nondiscriminatory testing, and counseling and career guidance.[101] While continuing to identify *de jure* segregation as the "*condition that offends the Constitution*,"[102] the Court in *Milliken II*—like the district court in *Keyes*—took a step toward redefining segregation as a problem of unequal educational opportunity and reorienting remedies toward educational outcomes. The goal, according to the

99. *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 219-36 (1973) (Powell, J., concurring in part and dissenting in part) (urging abandonment of the *de jure/de facto* distinction and adoption of a uniform national standard for desegregation obligations).

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

101. *See* Milliken v. Bradley, 433 U.S. 267, 275-77, 279-88 (1977). The full plan, comprised of 12 educational components, is described in *Bradley v. Milliken*, 402 F. Supp. 1096, 1134-45 (E.D. Mich. 1975). Although intradistrict busing was part of the remedial plan, the most it could practically achieve was the elimination of identifiably White schools in Detroit, not identifiably Black schools. *See id.* at 1134-38. In the 2000-01 school year, Black students comprised 91% of the enrollment in Detroit public schools. *See* FRANKENBERG ET AL., *supra* note 82, at 54 tbl.19.

102. *Milliken II*, 433 U.S. at 282 (quoting *Milliken I*, 418 U.S. at 738) (internal quotation marks omitted).

Court, was "to restore the victims of discriminatory conduct to the position they would have enjoyed *in terms of education*."[103] Moreover, by upholding an order requiring the state to pay half the costs of the remedial plan's major elements,[104] *Milliken II* channeled additional resources to minority schools where racial balance could not be achieved through intradistrict busing. In this way, *Milliken II* served as a partial surrogate for the outcome not achieved in *Rodriguez*.

Thus, *Milliken II* can be viewed as a half-step down the road not taken in 1973 in two senses. While continuing to treat *de jure* segregation as the core violation, the Court focused the remedy on improving educational quality. And while recognizing the importance of new resources to improving educational quality, the Court now left racial balance out of the equation.

Given this "educational" turn in desegregation doctrine, it is interesting to imagine how *Rodriguez* might have turned out had it reached the Court not with *Keyes* in 1973, but with *Milliken II* in 1977. The Court's uninhibited engagement with educational policy beyond pupil assignment might have provided a more favorable backdrop for consideration of *Rodriguez*. Consider this passage in *Milliken II*:

> Children who have been . . . educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. They are likely to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete, if they are to enter and be a part of that community. This is not peculiar to race; in this setting, it can affect any children who, as a group, are isolated by force of law from the mainstream. Cf. Lau v. Nichols, 414 U.S. 563 (1974).
>
> Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures. In short, speech habits acquired in a segregated system do not vanish simply by moving the child to a desegregated school. The root condition shown by this record must be treated directly by special training at the hands of teachers prepared for that task.[105]

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103. *Id.* (emphasis added).

104. *See id.* at 288-91.

105. *Id.* at 287-88. Although the Court's fixation on "speech habits" has a somewhat impertinent ring, I think the term can be read as a proxy for the broad array of learning disadvantages that result from educational and cultural isolation.

Here the Court did not assume a posture of skepticism or agnosticism toward the efficacy of "independent measures" (*i.e.*, remedial programs) that "treat[] directly" the "root condition" of educational and cultural isolation. Instead, the Court was telling the unlawfully segregated Black schoolchildren of Detroit that compensatory resources, and not interdistrict busing, would be effective in making them educationally whole. Had *Rodriguez* arisen at the same time, wouldn't it have been difficult for the Court to question the educational efficacy of similar compensatory resources for the Hispanic and Black children of poor school districts like Edgewood?

But this is not to say that the result in *Rodriguez* would necessarily have been different in 1977 than in 1973. Despite its educational thrust, the remedy in *Milliken II* was still premised on a finding of racial discrimination, which was absent in *Rodriguez*. My point is simply that one of the key issues running through *Rodriguez*—whether additional resources matter to educational quality—was clearly tipped to one side by the Court's remedial approach in *Milliken II*. If compensatory programs would benefit culturally isolated minority schoolchildren in Detroit, then surely they would benefit culturally isolated minority schoolchildren in San Antonio as well.

Had *Rodriguez* been considered with *Milliken II*, the Court could not easily have invoked uncertainty about the relationship between resources and quality in rejecting the Equal Protection claim (although it could have relied on other reasons). In authorizing district courts to order compensatory resources as a remedy for segregation, *Milliken II* presupposed the educational efficacy of such resources in segregated schools. This would have forced a more candid appraisal in *Rodriguez* of the disparities in educational quality between well-resourced and poorly-resourced school districts. As it was, the Court saw fit to doubt the educational significance of such disparities in *Rodriguez* and to suggest misleadingly that the only grievance at stake was a denial of "absolute equality or precisely equal advantages."[106]

III. *Sheff* and Synthesis

Fifty years after *Brown II*, school desegregation—both racial balancing under *Keyes* and remedial programs under *Milliken II*—has all but come to an end. Meanwhile, school finance reform

106. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973).

continues apace in state courts, with notable successes in recent years. The two strategies remain largely separate in theory and in practice.

Yet the dual imperatives of reallocating students and reallocating resources linger, as public school segregation by race and poverty persists and, in many areas, worsens.[107] Whereas the Court in 1973 moved forward with racial integration while leaving resource redistribution behind, today we appear to be pursuing the opposite strategy. Four decades after the Coleman Report, we have better evidence that additional resources can enhance educational quality when spent in the right places on the right things.[108] And we are continually expanding our knowledge about what it really costs to provide an equal or adequate education for children who live with the multidimensional disadvantages of concentrated poverty.[109]

However, just as Derrick Bell warned that integration is not a panacea, it behooves us to temper any expectation that more

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107. *See generally* FRANKENBERG ET AL., *supra* note 82.

108. *See e.g.*, Ronald F. Ferguson & Helen F. Ladd, *How and Why Money Matters: An Analysis of Alabama Schools*, *in* HOLDING SCHOOLS ACCOUNTABLE: PERFORMANCE-BASED REFORM IN EDUCATION 265 (Helen F. Ladd ed., 1996); Larry V. Hedges et al., *Does Money Matter? A Meta-Analysis of Studies of the Effects of Differential School Inputs on Student Outcomes*, EDUC. RESEARCHER, Apr. 1994, at 5. For helpful reviews of the literature, see DAVID GRISSMER ET AL., IMPROVING STUDENT ACHIEVEMENT: WHAT STATE NAEP TEST SCORES TELL US (2000), and COMM. ON EDUC. FINANCE, NAT'L RESEARCH COUNCIL, MAKING MONEY MATTER: FINANCING AMERICA'S SCHOOLS (Helen F. Ladd & Janet S. Hansen eds., 1999). Based on state-level data, Grissmer's study reported, "[o]ther things being equal, higher per-pupil expenditures, lower pupil-teacher ratio in lower grades, higher reported adequacy of teacher-reported resources, higher levels of participation in public prekindergarten, and lower teacher turnover all show positive, statistically significant effects on achievement." GRISSMER ET AL., *supra*, at 98. Grissmer also writes:

> The most efficient uses of educational expenditures among those evaluated here were providing all K-8 teachers more-adequate resources for teaching, expanding public prekindergarten in lower-SES states, and targeting reductions in pupil-teacher ratios in lower grades in lower-SES states to well below the national average and in medium-SES states to the national average.

Id. at 99.

109. *See* William D. Duncombe & John M. Yinger, *Performance Standards and Educational Cost Indexes: You Can't Have One Without the Other*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES, 260, 260 (Helen F. Ladd et al. eds., 1999) (cost function for New York); Andrew Reschovsky & Jennifer Imazeki, *Achieving Educational Adequacy Through School Finance Reform*, 26 J. EDUC. FIN. 373 (2001) (cost functions for Texas and Wisconsin). For a review of state-level cost studies, see ACCESS Project, Campaign for Fiscal Equity, A Costing Out Primer (2005), http://www.schoolfunding.info/resource_center/costingoutprimer.php3.

resources, even wisely spent, will fully close the educational gaps between poor minority schoolchildren and their more wealthy White peers. It would be remarkable—and inconsistent with a large body of research[110]—if tangible resources alone could entirely offset the complex and ineffable consequences of racial and socioeconomic isolation. Our experience with *Milliken II* remedies provides some evidence of this fact.[111] Similarly, although school finance lawsuits have helped narrow spending inequalities between districts,[112] any hope that they will completely eliminate the achievement gap "is bound to be disappointed" because "[s]chools, no matter how good, cannot carry the entire burden of narrowing our substantial social class differences."[113]

One concrete example of this lesson—and an instructive doctrinal response—is the interplay between two educational equity decisions of the Connecticut Supreme Court, *Horton v. Meskill*[114] and *Sheff v. O'Neill*.[115] *Horton* was an early school finance case in which the Connecticut Supreme Court invalidated a property tax-based funding scheme under the equal protection

110. *See* GRISSMER ET AL., *supra* note 108, at 33-36; Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: An Introduction*, *in* THE BLACK-WHITE TEST SCORE GAP 1, 3 (Christopher Jencks & Meredith Phillips eds., 1998); *see also* NAT'L CTR. FOR EDUC. STATISTICS, NAEP 1999 TRENDS IN ACADEMIC PROGRESS: THREE DECADES OF STUDENT PERFORMANCE 38-39 (2000). Whereas the Black-White gap on national achievement tests remains on the order of two-thirds to four-fifths of a standard deviation, *see* Jencks & Phillips, *supra*, at 3, even the most robust results of resource-oriented educational interventions show gains of only one-fourth to one-half of a standard deviation, *see, e.g.*, GRISSMER ET AL., *supra* note 109, at 33-35 (discussing results from class size reduction experiments). This contrast coheres with research findings, beginning with the Coleman Report in 1966, that emphasize the influence of peer effects and background social factors on student achievement. *See, e.g.*, RICHARD ROTHSTEIN, CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP (2004); *see also* RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 48-58 (2001) (collecting studies on peer influences).

111. In the predominantly Black Kansas City school district, for example, despite over one billion dollars of investment under a desegregation plan that increased per-pupil spending far above levels in the predominantly White surrounding suburban districts, *see* Missouri v. Jenkins, 515 U.S. 70, 74-80, 99 (1995), minority student achievement remained "at or below national norms at many grade levels," *id.* at 82 (internal quotation marks and citation omitted).

112. *See* William N. Evans et al., *The Impact of Court-Mandated School Finance Reform*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE, *supra* note 110, at 72, 87-90.

113. ROTHSTEIN, *supra* note 110, at 146.

114. 376 A.2d 359 (Conn. 1977).

115. 678 A.2d 1267 (Conn. 1996).

guarantee of the state constitution.[116] Declining to follow *Rodriguez*,[117] the court determined that large differences in local revenue-raising capacity produced "significant disparity in the quality of education" and that such disparity ran afoul of "the requirement that the state provide a substantially equal educational opportunity to its youth."[118] In the ensuing years, the legislature revised the funding scheme so that the neediest school districts, including the predominantly poor and over 90% minority Hartford public schools, would receive the most state aid. The revised system produced its intended effect, as "overall per pupil state expenditures in Hartford exceeded the average amount spent per pupil in the twenty-one surrounding suburban towns" in the 1990-91 and 1991-92 school years.[119] Despite this allocation of resources, however, "[t]he performance of Hartford schoolchildren on standardized tests [fell] significantly below that of schoolchildren from the twenty-one suburban towns."[120]

In the *Sheff* litigation, begun in 1989, the plaintiffs alleged that "students in the Hartford public schools are burdened by severe educational disadvantages arising out of their racial and ethnic isolation and their socioeconomic deprivation."[121] The central issue was "whether the state has fully satisfied its affirmative constitutional obligation to provide a substantially equal educational opportunity if the state demonstrates that it has substantially equalized school funding and resources."[122] In a novel ruling, the court held that, notwithstanding funding equalization, "the existence of extreme racial and ethnic isolation in the public school system deprives schoolchildren of a substantially equal educational opportunity and requires the state to take further remedial measures."[123] An equal educational opportunity, the court concluded, is one that is "free from substantial racial and ethnic isolation."[124] In 2003, the parties settled on a $245 million voluntary integration plan requiring the

116. *See Horton*, 376 A.2d at 374.

117. *Id.* at 371-73.

118. *Id.* at 374-75. Alluding to the misguided analysis in *Rodriguez*, the court said, "[o]bviously, absolute equality or precisely equal advantages are not required and cannot be attained except in the most relative sense." *Id.* at 376.

119. *Sheff*, 678 A.2d at 1273.

120. *Id.*

121. *Id.* at 1271.

122. *Id.* at 1281.

123. *Id.*

124. *Id.* at 1286.

construction of eight new magnet schools to attract suburban White children to the urban center and a large expansion of opportunities for urban minority children to attend suburban public schools.[125]

As Professor James Ryan has observed, *Sheff* "sprang not from the failure but from the success of earlier school finance litigation."[126] The case "represents an attempt to use desegregation to overcome the inadequacies of school finance reform."[127] Indeed, what is significant about *Sheff* is that the court did not find racial segregation problematic because of underlying racial discrimination.[128] Instead, it found segregation problematic for the same reason that it found unequal school funding problematic in *Horton*—because of the "substantial disparities in educational opportunities resulting from [it]."[129] Thus, through *Horton* and *Sheff*, the Connecticut Supreme Court managed to achieve what the United States Supreme Court failed to achieve in 1973: a doctrinal synthesis of school desegregation and school finance reform under a common principle of equal educational opportunity.[130]

As we move into *Brown II*'s next half-century, we would do well to evolve more *Sheff*s and more synthesis in our law and public policy on equal educational opportunity. Over thirty years ago, the district court in *Keyes* recognized that neither

125. *See* Robert A. Frahm, *Sheff Deadline 2007; Settlement: A Four-Year Effort Begins to Help Undo Hartford's School Segregation*, HARTFORD COURANT, Jan. 23, 2003, at A1; Paul von Zielbauer, *Hartford Integration Plan to Add 8 City Magnet Schools*, N.Y. TIMES, Jan. 23, 2003, at B5. In 2004, the *Sheff* plaintiffs went back to court to seek state compliance with the settlement timeline. *See* Stacey Stowe, *State Accused of Failure To Integrate In Hartford*, N.Y. TIMES, Aug. 4, 2004, at B6.

126. Ryan, *supra* note 10, at 538.

127. *Id.* at 532.

128. *See Sheff*, 678 A.2d at 1285 ("Racial and ethnic segregation has a pervasive and invidious impact on schools, whether the segregation results from intentional conduct or from unorchestrated demographic factors.").

129. *Id.*; *cf. Horton*, 376 A.2d at 374 (invalidating school finance scheme because "pupils in [low-wealth municipalities] receive an education that is in a substantial degree lower in both breadth and quality than that received by pupils in municipalities with a greater financial capability").

130. The California Supreme Court also achieved this synthesis in 1976 through *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976) (holding unequal school finance system unconstitutional under state equal protection clause), and *Crawford v. Board of Education*, 551 P.2d 28 (Cal. 1976) (holding *de facto* racial segregation unconstitutional under state equal protection clause). However, *Crawford* was effectively overruled by a 1979 voter-initiated constitutional amendment limiting the state's desegregation obligations to the requirements of the federal Constitution. *See* CAL. CONST. art. I, § 7(a).

compensatory resources nor desegregation alone could guarantee equal educational opportunity. For poor and racially isolated students, "the only feasible and constitutionally acceptable program—the only program which furnishes anything approaching substantial equality—is a system of desegregation and integration which provides compensatory education in an integrated environment."[131] This is as true today as it was then. Although the relative importance of redistributing students versus redistributing resources will be a question for the ages, it would be surprising if genuine equality of educational opportunity did not ultimately require both.

131. Keyes v. Sch. Dist. No. 1, 313 F. Supp. 90, 96 (D. Colo. 1970).