Education's Perfect Storm - Racial Resegregation, High Stakes Testing, and School Resource Inequities: The Case of North Carolina

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Public schools in North Carolina and throughout the South face the prospect of a "perfect storm," as current educational policies collide to produce strongly adverse, unanticipated consequences. The forces in play include the rapid resegregation of the region's public schools, due to the termination of court-ordered desegregation decrees in many southern school districts; the Fourth Circuit's prohibition on the use of race-conscious student assignment plans; the consequent drift toward assignment policies that permit greater racial segregation; the certainty that as schools become more segregated, the poverty levels in predominately nonwhite schools will grow steadily; and the evidence that "high-poverty" conditions place children at substantially greater risk of poor academic performance—whatever their personal academic potential—simply because of their attendance at these schools.

Yet this emerging challenge is simply one component of the broader educational storm currently brewing. North Carolina and other southern states are also deploying comprehensive school "accountability systems," now federally mandated by the No Child Left Behind Act. Those systems promise to shine a searchlight on the performance of every district, school, and student statewide in order to assure that all children receive higher quality educations. Yet when "high-stakes" accountability measures are imposed upon, and interact with, school systems hampered by growing racial segregation, they threaten instead to worsen the plight of schools that are disproportionately filled with nonwhite children from low-income families—as middle-class and white parents, along with better trained, more highly qualified teachers, abandon

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those schools. In short, the convergence of racial resegregation and statewide, high-stakes accountability measures is likely to increase the racial segregation and economic isolation of some public schools—whose students will disproportionately fail state accountability tests, thereby entrenching broad patterns of grade retention, student demoralization, and teacher flight.

One source of shelter might lie in a judicial commitment to school-finance reform, represented in North Carolina by Leandro v. State, a school finance/minimum adequacy case. Such cases promise judicial aid in meeting the educational needs of every child, especially those at special risk of educational failure. Yet Leandro and similar cases have been challenged vigorously. Even if they are eventually affirmed on appeal, their broad decrees depend upon the active cooperation of the legislative and executive branches, which must provide significant additional state funding and undertake expansive programs to deliver educational programs to at-risk children. The likelihood of meaningful legislative and executive assistance seems uncertain at best. Assuming that cooperation flows freely, moreover, a generation of careful studies—from James Coleman’s seminal work in the mid-1960s to the present—suggest that no quantum of resources can easily compensate for the cumulative educational injuries inflicted by attendance at racially isolated, high-poverty public schools.

Avoiding the unintended consequences of these converging educational challenges will severely test both the wisdom and the good faith of the present generation of educational policymakers.
INTRODUCTION

In The Perfect Storm, author Sebastian Junger recounts the last voyage of the Andrea Gail, a seventy-two foot “rake-stem, hard-chined western-rig swordfisherman,” whose crew sailed out of Gloucester, Massachusetts, in mid-September of 1991, in a late-season quest for swordfish. After three weeks of grueling but unproductive labor on the Grand Banks off Newfoundland, the Andrea Gail pushed its luck by sailing further eastward in uncertain autumn waters toward another fishing ground called the Flemish Cap, some 1,200 miles away.

2. Id. at 29.
miles off the New England coast. There, its luck appeared to turn, and by October 25th, the Andrea Gail steered westward toward harbor, its hold stowed with 40,000 pounds of fresh swordfish.

Two days later, while still 750 miles out of homeport, the ship's captain received word of three developing weather systems—a hurricane brewing off Bermuda, a cold front descending from Canada, and a gale soon to develop on the Grand Banks. The captain, who had battled strong storms before, was determined to move his perishable cargo directly to market and pressed on toward Gloucester. His fateful decision delivered the Andrea Gail into the eye of a once-in-a-century, threefold storm. By October 29th, freak warm winds from the late-season Hurricane Grace converged with the colder Canadian low and the gale to produce, at their juncture, conditions far deadlier than any one storm alone could have summoned—a “meteorological hell” that whipped seas to an unfathomable fury. The hapless vessel and her crew, battling these unnatural forces, found themselves at the mercy of 70- and 80-foot waves. The Andrea Gail capsized and went down, all hands lost.

Among its lessons, The Perfect Storm illustrates how converging forces can sometimes overwhelm seasoned professionals who focus on individual threats, rather than on their combined power. This Article will examine three educational forces presently gathering strength in 2003, especially in North Carolina and the American South. Each alone presents formidable challenges to educational policymakers and administrators. Yet without the most careful foresight and planning, their simultaneous convergence threatens to send public schools reeling off course, beyond the effective control of even the most well-meaning and conscientious public servants. They could well become public education’s “perfect storm.”

The first of these rapidly intensifying forces comes with the imminent end of fifty years of court-ordered school desegregation, a period during which hundreds of judicial and administrative decrees brought racial integration to public schools across the South, transforming it from the most segregated to the most integrated region in the nation. The new era beyond court-ordered desegregation promises massive though still uncertain changes in the

3. Id. at 94.
patterns of student assignment and enrollment that could reshape southern education for the coming generation.

Although many school districts remain under federal court order in early 2003, the present trend toward federal disengagement is clear, impelled by the Rehnquist Supreme Court, which has made "local control" of public school boards its chief constitutional imperative. However, many southern school boards, including those in North Carolina, will find themselves effectively prohibited from using this newly restored "local control" to assure the continuance of racially integrated public schools.

The explanation for this new constraint on maintaining racially integrated public schools lies in two astonishing decisions, rendered by the United States Court of Appeals for the Fourth Circuit, that take away, with one judicial hand, the very "local control" that the Rehnquist Court has offered with the other. These opinions forbid school boards from directly considering the races of students as they make school assignment decisions, either to implement a good faith belief that all American children in the twenty-first century need to be educated in multiracial schools, or even to avoid the patterns of racially segregated student attendance that characterized an earlier


8. See Tuttle, 195 F.3d at 705 (holding that school officials cannot rely on race as a factor in admitting students to magnet schools, because nonremedial efforts to achieve racial balance in assigning students to public schools are unconstitutional); Eisenberg, 197 F.3d at 133-34 (using the reasoning in Tuttle to hold that any use of race in making student transfer decisions is unconstitutional).
era. Absent a contrary Supreme Court decision\(^9\) or extraordinary efforts by southern school boards to circumvent its impact, this new ban on race-conscious student assignments threatens to re-create, in many urban and some rural southern districts, levels of racial and socioeconomic isolation not experienced by students in the South since the mid-1960s.\(^10\)

The second force currently shaping southern education is the new "accountability" approach that has, during the past decade, attained practical domination over the educational planning and delivery systems of every state.\(^11\) Originally proposed in response to concern over the lagging test scores of American students and the ostensibly poor work skills of high school graduates,\(^12\) these accountability systems borrow many of their essential features from the world of business management.\(^13\) Accountability approaches to

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\(^9\) The Supreme Court recently has granted certiorari to review the race-conscious admissions policies of the University of Michigan. See Grutter v. Bollinger, 123 S. Ct. 617 (2002) (mem.) (granting certiorari to hear a case challenging The University of Michigan Law School's admissions policy); Gratz v. Bollinger, 123 S. Ct. 602 (2002) (mem.) (granting certiorari to hear a case challenging The University of Michigan's undergraduate admissions policies). In resolving the Grutter and Gratz cases, the Court will almost certainly revisit its 1978 decision in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), and determine whether "educational diversity" remains a sufficiently compelling government interest to justify race-conscious admissions decisions. If the Court does reaffirm Justice Powell's opinion in Bakke, the Fourth Circuit's decisions in Tuttle and Eisenberg inevitably will be closely reexamined and likely will be overruled. On the other hand, even if race-conscious admissions decisions are ruled unconstitutional in the higher education context, that decision will not necessarily foreclose the use of race as one factor in the very different context of K-12 education. See John Charles Boger, Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools, 78 N.C. L. Rev. 1719, 1763-66 (2000) (contrasting elementary and secondary student assignments from "zero-sum" decisions such as government contracting or employment choices, or admission to selective schools, in which a decision to select some applicants inevitably deprives others).

\(^10\) See infra Part II.D.2-3.

\(^11\) See Seeking Stability for Standards-Based Education, in QUALITY COUNTS 2001: A BETTER BALANCE: STANDARDS, TESTS, AND THE SCHOOLS TO SUCCEED 8, 8 (Educ. Wk., Jan. 11, 2001) (warning that in the past decade, "[s]tates may be placing too much weight ... on tests and their use in accountability systems to drive changes in teaching and learning," adding that "[r]esponses to ... [a national] teacher survey suggest state tests may be looming too large in classrooms and encouraging undesirable practices").

\(^12\) See generally NAT'L RESEARCH COUNCIL, HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION (Jay P. Heubert & Robert M. Hauser eds., 1999) (discussing the need for reform of American public schools and suggesting appropriate uses of tests in school accountability programs).

\(^13\) THE EDUCATIONAL REFORM MOVEMENT OF THE 1980S: PERSPECTIVES AND CASES 19 (Joseph Murphy ed., 1990) (citing several sources in support of this conclusion).
educational reform have been especially popular in southern states such as North and South Carolina, Texas, and Kentucky.\footnote{14}  

During the past fifteen years, North Carolina has wholeheartedly embraced an accountability model; its system, known locally as “The ABCs of Education,”\footnote{15} has been singled out as among the nation’s best.\footnote{16} In early 2002, Congress, relying in part on the apparent success of accountability experiments such as those underway in Texas and North Carolina,\footnote{17} radically restructured the Federal Title I program\footnote{18} by imposing sweeping new accountability procedures on every state that receives Federal Title I monies (as every state currently does).\footnote{19}
This “federalization” of the accountability approach marks a major departure for Congress; never before has the federal government intruded so centrally into the curriculum and the yearly goals for the public schools. The No Child Left Behind Act ensures that accountability systems will everywhere become mainstays of public educational organization and practice in the decade to come.\(^2\)

The perennial struggle over educational resources constitutes a third force affecting southern education. This winner/loser contest pits financially favored districts—where schools are modern, teachers well-qualified, and special academic programs abundant—against less fortunate districts—where shortages of library books, computers, or laboratory equipment are perhaps less educationally damaging than a persistent lack of qualified teachers, smaller classes, and specialized programs.

Prior to 1954, of course, these struggles over resources took an explicitly racial cast in the South, since all-white legislatures and school officials deliberately starved African-American schools of the financial and human resources afforded their white counterparts.\(^2\) \(^1\) In more recent decades, however, the struggles have set the economically more prosperous and “property rich” regions of each state against less prosperous, “property poor” regions or school districts.\(^2\) \(^2\) Since 1970, several successive waves of school finance

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20. See Lynn Olson, States Gear up for New Federal Law, 21 EDUC. WK., Jan. 16, 2002, at 1, 24 (describing the new federal requirements for all states that receive Federal Title I funds, including “statewide reading and mathematics tests each year in grades 3–8 by the 2005–06 school year’’); Lynn Olson, “Inadequate” Yearly Gains Are Predicted, 21 EDUC. WK., Apr. 3, 2002, at 1, 1 (quoting one state superintendent of education who predicted that the new federal standards were “going to really be a nightmare for states’’).


22. See generally San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 58–59 (1973) (deciding, by a 5-to-4 vote, that the Federal Equal Protection Clause does not authorize the federal judiciary to “strictly scrutinize” state school finance statutes, even those that permit wide fiscal disparities among school districts); JOHN E. COONS ET AL., PRIVATE WEALTH & PUBLIC EDUCATION (1970) (laying out the classic economic and educational critique of state school finance systems that rely heavily upon local property taxation,
reform lawsuits, many in southern states, have invoked state constitutional principles of educational equality or "adequacy" to obtain judicial reordering of legislative choices challenged as inequitable and unjust.23

Some believe that these recent judicial decisions redirecting more educational resources to needy schools and students might prove an educational counterforce sufficiently powerful to neutralize the adverse effects of racial re segregation and thus bring high achievement to all children.24 Poor or predominantly minority schools do not need the benefits of racial integration, the argument runs, if they have sufficient resources and adopt appropriate pedagogical and administrative methods.25 Yet, in states where the judiciary has proceeded boldly to direct school finance reform, serious political resistance has limited the effectiveness of judicial initiatives.26 If there are inherent limits on the practical ability of


23. Although the Supreme Court of the United States has determined that federal constitutional principles are essentially irrelevant to this struggle, see Rodriguez, 411 U.S. at 58-59, many state courts have decided that their state constitutions do constrain legislative allocation of funds to local school districts. For a review of recent legal struggles to implement school finance reform, see Molly S. McUsic, The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation, in Law & School Reform: Six Strategies for Promoting Educational Equity 88, 88-159 (Jay P. Heubert ed., 1999). See generally James E. Ryan, The Influence of Race in School Finance Reform, 98 Mich. L. Rev. 432 (1999) (reviewing the history of modern school finance litigation, and suggesting that racial considerations may still drive judicial and legislative resolutions in many of these cases).

24. See, e.g., Craig D. Jerald, Dispelling the Myth Revisited: Preliminary Findings from a Nationwide Analysis of "High-Flying" Schools 2 (2001) (asserting that there are "thousands" of high-poverty and high-minority schools nationwide that also have high student performance, and providing details on those schools).


26. Ryan, supra note 23, at 471, 476 (marshalling evidence that in many states, such as New Jersey, Texas, and Arizona, "the legislature and/or the public has openly and often fiercely opposed devoting more resources to districts attended primarily by minority students," and concluding that "one cannot fully understand the dynamics and limitations of school finance reform without paying attention to the dynamics of race relations in general and school desegregation in particular").
state and federal courts to command effective racial desegregation, as many observers contend, there seem likewise to be practical limits on the power of courts to compel legislative majorities to drive dollars disproportionately toward poor and minority schoolchildren. Moreover, educational researchers are divided over whether additional resources alone can suffice, over the long term, to overcome the structural challenges presented by the concentration of low-income children in “high-poverty” schools.

This Article will explore the convergence of these three educational forces in North Carolina, a southern state that has witnessed a long period of relatively successful school desegregation, that has been praised for the overall quality of its school accountability system, and that is currently embroiled in long-standing, yet partially successful, school finance reform litigation. Although the convergence of these three forces is particularly salient in North Carolina, these trends have implications for educational policymakers nationwide.

27. See generally David J. Armor, Forced Justice: School Desegregation and the Law 174–88, 210 (1995) (suggesting that both mandatory and voluntary desegregation plans in metropolitan areas lead to “white flight” from metropolitan schools to surrounding suburban districts); James S. Coleman et al., Trends in School Segregation (1975) (same); Christine H. Rosell, The Carrot or the Stick for School Desegregation Policy: Magnet Schools or Forced Busing 187–88 (1990) (arguing that magnet schools, by bringing students together through their parents’ voluntary choices, lead to more desegregation than do mandatory assignment plans, which prompt white flight).

28. See Christopher P. Lu, Note, Liberator or Captor: Defining the Role of the Federal Government in School Finance Reform, 28 Harv. J. on Legis. 543, 552–53 (1991) (arguing that both suburban self-interest and class bias work against voluntary legislative action for effective school finance reform); Note, Unfulfilled Promises: School Finance Remedies and State Courts, 104 Harv. L. Rev. 1072, 1078–81 (1991) (noting the strong institutional reluctance of state courts to intrude upon the legislature’s taxation and appropriations powers, the “disproportionate influence of property-rich districts in state legislatures,” the “collective action problems arising from voter unwillingness to pay for the higher taxes associated with school finance remedies” and the average middle class suburbanite’s “undervaluation of the collective benefit” to be derived from adequately educating urban and minority youth); see also Wise, supra note 22, at 198 (calling it “unrealistic to expect state legislators to vote for programs which do not yield direct benefits to their own constituents” and noting the “rough sledding” that school finance reforms have traditionally had in state legislatures); William H. Clune, New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy, 24 Conn. L. Rev. 721, 752 (1992) (noting the necessity for judicial action “to overcome ... legislative resistance against substantial amounts of compensatory aid”); Betsy Levin, Current Trends in School Finance Reform Litigation: A Commentary, 1977 Duke L.J. 1099, 1128–36 (discussing the various forms of “backlash” litigation and legislative resistance to school finance reform).

29. See discussion infra Part I.E–F.
In Part I, the Article will examine developments that are currently leading to greater racial segregation in the public schools of North Carolina and the South, including profound shifts in the federal doctrines that govern school desegregation (Parts I.A–C), the changing racial composition of the region, and the move by boards toward race-neutral student assignment policies (Part I.D). It will then explore the collateral impact of racial resegregation, including the increase in the numbers of high-poverty schools, as well as the likely adverse educational impact of this growing racial and economic isolation (Part I.E).

In Part II, the Article will briefly consider the recent movement in public education toward “high-stakes” accountability systems (Part II.A). It will examine closely North Carolina’s celebrated school accountability approach (Part II.B) and then reflect upon the possible unintended consequences of such systems, especially for students, parents, and teachers in those schools and districts undergoing racial resegregation (Part II.C). Finally, in Part III, the Article will consider the likely impact of ongoing school finance/resource reform upon the future prospects of schools and students at risk of academic failure, particularly those students who attend racially segregated, economically isolated public schools.

I. SCHOOL RACIAL COMPOSITION: THE LEGAL AND DEMOGRAPHIC REALITIES IN NORTH CAROLINA

A. The Supreme Court’s Changing Constitutional Commands

Until 1954, laws in North Carolina and every southern state required rigid segregation along racial lines of both public school students and faculty.30 For over a decade after the Supreme Court’s seminal decision in Brown v. Board of Education,31 North Carolina’s state and local political leadership parried the thrust of Brown with a variety of policies, all deliberately crafted to delay racial integration of schools. The “North Carolina way” employed legal and administrative devices more subtle than the open defiance that marked the post-Brown responses of the Deep South, but the results

were no less devastating. As late as 1964, only a handful of North Carolina’s African-American students were attending desegregated schools.

During the 1950s and 1960s, national civil rights organizations joined with the small number of African-American lawyers then practicing civil rights law in the South to launch scores of desegregation lawsuits, including over three-dozen in North Carolina alone. Most languished inconclusively until after 1968, when the Supreme Court in Green v. County School Board first declared that formerly segregated school systems could not purge their dual systems simply by adopting “freedom-of-choice” plans that placed both the initiative and the social burdens of desegregation on black schoolchildren and their parents. Instead, Green required school boards themselves to fashion “unitary, nonracial system[s] of public education,” paying particular attention to six areas of school life: (1) student body composition; (2) faculty assignments; (3) staff assignments; (4) student transportation; (5) extracurricular activities; and (6) school plant and physical facilities.


34. See Jack Greenberg, Crusaders in the Courts 38–41 (1994) (recalling that “as late as 1965, Mississippi had only three black lawyers in civil rights,” while Maryland had at most, five or six in the 1950s; North Carolina, only three (at least, before the Chambers, Stein firm opened its offices in Charlotte in 1964); South Carolina, only one; Georgia, one; Alabama, four; and Florida three or four).

35. Id. at 254–55 (noting that by the end of the 1950s, the NAACP Legal Defense & Educational Fund, Inc. had brought more than sixty elementary and high school desegregation cases, but that as of June of 1960, not a single African-American child was attending school with whites in the five Deep South states of Alabama, Georgia, Louisiana, Mississippi, and South Carolina, and fewer than 200 each in other southern states including Arkansas, Florida, North Carolina, Tennessee, and Virginia).


37. Green v. County Sch. Bd., 391 U.S. 430, 437–38 (1968); see also id. at 440 n.5 (reciting evidence from the United States Commission on Civil Rights about economic, social, and physical threats often faced by black families who sought to exercise the “freedom of choice” to attend white schools).

38. Id. at 435–36 (enumerating what have since become known as the six “Green factors”).
The most decisive remedial victory of the entire post-Brown era came three years later, in a North Carolina case, Swann v. Charlotte-Mecklenburg Board of Education,\(^\text{39}\) in which a unanimous Supreme Court authorized an array of race-conscious methods to desegregate Charlotte’s countywide school district. The Court authorized (1) black/white ratios as starting points when making student assignments to Charlotte’s schools, (2) pairing predominantly black, central-city neighborhoods in Charlotte with white suburban neighborhoods to create racially integrated (though geographically noncontiguous) school zones, and (3) the use of extensive crosstown busing to transport students for desegregative purposes.\(^\text{40}\)

In the wake of Green and Swann, both the United States Department of Health, Education, and Welfare and federal judges throughout the South acted to demand similar plans.\(^\text{41}\) The percentage of African-American children in the South attending majority-white schools soared from 2.3% in 1964 to 33.1% in 1970, to 37.6% in 1976, and to 43.5% by 1988—affording the South by far the most racially integrated schools in the nation.\(^\text{42}\) While many

\(^{39}\) 402 U.S. 1 (1971).

\(^{40}\) Id. at 23-30.

\(^{41}\) See Derrick Bell, Race, Racism & American Law 552-54 & n.4 (3d ed. 1992); see also United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 847-48 (5th Cir. 1966) (requiring broad desegregation in Alabama, Mississippi, and Louisiana schools, drawing heavily upon HEW guidelines as proper measures of remedial obligations), aff’d, 380 F.2d 385 (1967) (en banc).

\(^{42}\) See Gary Orfield and John T. Yun, Re Segregation in American Schools 13 tbl.8 (entitled Change in Black Segregation in the South, 1954-96: Percentage of Black Students in Majority-White Schools) (June 1999), http://www.civil rightsproject.harvard.edu/research/deseg/Re segregation_American_Schools99.pdf (on file with the North Carolina Law Review). Two factors explain why North Carolina schools, and those of the South more generally, moved past nonsouthern school districts during this era to become the least segregated in the nation. The first stems from constitutional law: Federal courts are authorized by the Equal Protection Clause to require broad desegregative remedies only after finding that a school board has engaged in intentional segregative actions. See Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 198, 208 (1973) (observing that “in the case of a school system . . . where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action”). Because statutes or state constitutional provisions in every southern state required racial segregation before 1954, the burden to demonstrate intent was easily satisfied. See supra note 30 and accompanying text; see also Gary Orfield, Turning Back to Segregation, in Dismantling De Segregation, supra note 4, at 1, 14-15. By contrast, very few nonsouthern localities operated under statutes that expressly required racial segregation. Uncovering indirect proof of school board intent was normally far more difficult, even when clear patterns of de facto segregation emerged in local schools. See Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 412-21 (1977) (vacating a judgment that imposed a systemwide desegregation remedy on Dayton schools, in the absence of proof of discriminatory intent, even though the great majority of Dayton schools were racially imbalanced); see also Keyes, 413 U.S. at 219–20 (Powell, J.,
skirmishes and some serious legal challenges followed, and while thousands of white parents withdrew their children from the public schools in some southern cities and Deep South school districts, the years between 1972 and 1992 nonetheless witnessed a pattern of broad compliance with federal judicial decrees. The progress toward fully integrated schooling proved so substantial that few plaintiffs were prompted to revisit federal courthouses after 1980 for revision or enforcement of still-outstanding court decrees. Indeed, when Reagan Administration lawyers contacted many southern school boards in the 1980s, offering the full assistance of the Department of

concurring in part and dissenting in part) (contending unsuccessfully, with support only from Justice Douglas, that the Court should abandon its constitutional “distinction between de jure and de facto segregation” in school cases).

The second explanation for the South’s more thorough desegregation during the 1970s and 1980s is geographical and governmental. Historically, southern states organized their public schools into large districts, often fully coextensive with county or metropolitan lines. See Orfield, supra, at 15. By contrast, most school districts in northeastern or north-central states are small and highly fragmented; a metropolitan region like Detroit might contain between fifty and a hundred small school districts, often relatively homogeneous and stratified by socioeconomic status and race. See, e.g., Milliken v. Bradley, 418 U.S. 717, 729–30 n.10 (1974) (noting that the Detroit tri-county metropolitan region contained eighty-six independent school districts); Sheff v. O’Neill, 678 A.2d 1267, 1272–73 (Conn. 1996) (noting that 92.4% of students in the Hartford public schools were nonwhite, while only seven of the twenty-one Hartford suburban districts had a nonwhite population of as much as 10%; moreover, there was a large gap in socioeconomic status between the majority of Hartford schoolchildren who came from economically disadvantaged homes, often headed by single parents, in which a language other than English, and their suburban peers). When the Supreme Court in 1974, in Milliken, decided that federal courts could not constitutionally order interdistrict school desegregation remedies except in unusual circumstances, it effectively foreclosed the racial desegregation of many metropolitan areas outside the South. See Orfield, supra, at 10–12; James E. Ryan, Schools, Race, and Money, 109 Yale L.J. 249, 261 (1999). Professor Erwin Chemerinsky has argued that the Supreme Court’s decisions, beginning with Milliken, have contributed significantly to the tide toward resegregation. Erwin Chemerinsky, The Segregation and Resegregation of American Public Education: The Courts’ Role, 81 N.C. L. Rev. 1597, 1607–13, 1615–20 (2003). Professor James Liebman has shown, however, that desegregation orders continued to be issued in many nonsouthern school districts throughout the 1980s, including Buffalo, Indianapolis, Kansas City, Milwaukee, St. Louis, Yonkers, and the suburbs of Pittsburgh. James S. Liebman, Desegregation Politics: “All-Out” School Desegregation Explained, 90 Colum. L. Rev. 1463, 1468–69 (1990) (citing federal cases mandating school desegregation plans in the 1980s).


45. Orfield, supra note 42, at 17–18.
Justice in ending federal judicial supervision, they were surprised at how very few accepted the offer.46

Although southern schools remained substantially integrated by race throughout the 1980s, the unraveling of this educational pattern began in the 1990s, prompted, in part, by new judicial rulings issuing from the Rehnquist Supreme Court. In a succession of sharply divided opinions issued in 1991, 1992, and 1995, Chief Justice Rehnquist invested “local control” of schooling with a constitutional weight that counterbalanced the earlier Warren Court’s concern for racial discrimination and educational injury.47 In so doing, the Court responded not only to its own hierarchy of values, but to a new class of litigants. These new plaintiffs were not the avowed southern segregationists of the 1950s and 1960s—the Orval Faubuses of Arkansas or George Wallaces of Alabama—but affluent migrants to the South’s growing suburbs and small towns. They had not participated in the desegregation battles of the 1960s and 1970s, and they saw in the cross-neighborhood school assignments a relic of a distant past, injurious to their children’s present educational interests, and an implicit breach of their paid-for neighborhood entitlements.48

B. Charlotte-Mecklenburg: The Supreme Court’s New Approach Plays Out

The Charlotte-Mecklenburg school district, the chief battleground of the Swann era, illustrates the transformation wrought by this new approach. In 1992, prompted by the district’s suburban parents and its business interests,49 Charlotte’s new school superintendent (although still under court order and acting without

46. See id.; GAIlLARD, supra note 36, at xv (recalling how President Ronald Reagan, running for reelection in 1984, seriously miscalculated local sentiment in Charlotte on a campaign trip, receiving stony silence from an otherwise enthusiastic Charlotte crowd when he asserted, mid-speech, that “‘busing ... takes innocent children out of the neighborhood school and makes them pawns in a social experiment that nobody wants. And we’ve found out that it failed.’”).

47. See supra note 6 for references to the Supreme Court’s decisions in Dowell, Freeman, and Jenkins.


federal court approval), persuaded the school board to abandon the mandatory crosstown busing at the heart of Charlotte's twenty-year desegregation plan. In its place, he installed a regime of school assignments built around newly designated "magnet schools," each with some special educational theme, to which parents from across the school district could voluntarily elect to send their children. This did not seem, at first, to undermine Charlotte-Mecklenburg's hard-won racial integration, because the school board required these new magnet schools to retain a rough racial balance reflecting the demography of the Charlotte school system as a whole.

Yet some suburban white parents filed federal lawsuits in 1997 when they found that their children were unable to attend the magnet schools of their choice because of the school board's continuing commitment to racial balance. They asserted that the school board's race-conscious student assignments violated the Equal Protection Clause. The Charlotte school board defended its continuing commitment to racial balance as a necessary part of its compliance with the *Swann* decree. The white parents responded that the Charlotte school district had long since met its outstanding constitutional obligations to desegregate, and that the district should forthwith be declared "unitary," released from further federal obligations, and forbidden to make any further race-conscious school assignments.

At this point, attorneys for the original African-American plaintiffs in *Swann* reentered the scene, insisting that Charlotte had not eliminated all vestiges of its former racially dual system, that any decree of "unitary" status would therefore be premature, and that therefore race-conscious assignments were not merely permissible

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50. *Id.* at 183-88 (recounting the arrival of new school superintendent John Murphy in 1991, and his efforts to craft and institute a magnet school policy); see also Alison Morantz, *Desegregation at Risk: Threat and Reaffirmation in Charlotte*, in *DISMANTLING DESEGREGATION*, supra note 4, at 179, 179–206 (recounting Charlotte's change in the 1990s to a magnet school approach).


53. *Id.* at 239–40.
under the Equal Protection Clause but constitutionally obligatory. A lengthy hearing ensued. The black plaintiffs produced evidence demonstrating that after a long period of substantial integration between 1974 and 1992 under the mandatory assignment system, Charlotte attendance patterns lurch sharply toward racial resegregation under the post-1992 magnet school plan. Moreover, this change, they contended, was not the result of any overall demographic shift in the Charlotte school-aged population. While Charlotte’s population grew substantially after 1970, the percentage of African Americans remained relatively stable, moving upward only from 24% to 27%. Moreover, while the total school population increased from 84,000 students in 1969 to 98,542 students in 1998–1999, the black student population also remained quite stable after 1980, rising only from 40% in 1980 to 42% in 1998.

Despite this overall continuity in Charlotte’s residential and school populations, the number of Charlotte schools that became “racially identifiable” as black during the 1990s (that is, where student populations exceeded by more than 15% the percentage of blacks in the overall student population of the district) grew by 50% systemwide and by nearly 200% at the high school level. At the same time, the number of schools with student bodies that were over 90% white increased from none (during the nearly two decades after 1974), to eight (after the 1992 assignment plan changes). By 1998, nearly 30% of all African-American students in the Charlotte system were attending racially identifiable schools.

54. Id. at 239.
55. Id.; Belk, 269 F.3d at 370, 384–85 (Motz & King, JJ., dissenting in part) (observing that the evidence at trial showed that “[t]he trend in [the Charlotte-Mecklenburg district] toward resegregation of its schools has accelerated markedly since the move to deemphasize satellite zones and mandatory busing in 1992”).
57. Capacchione, 57 F. Supp. 2d at 245–46 (noting some uncertainty about the precise measure of impermissible racial identifiability employed by the federal court in the Swann case in the past, and adopting a measure that would allow variations in the racial population of any one school so long as those variations did not exceed, by more than fifteen percentage points in either direction, the overall racial composition figures for the district as a whole).
The white suburban plaintiffs did not seriously contest these figures, but they insisted that these changing school populations were the product of Charlotte’s changing residential demographics. The federal district court agreed, noting that “Charlotte has experienced an outward growth of its population from the inner city into the peripheral areas of the county,” and “[d]uring this suburbanization trend, the inner city and nearby suburbs lost large numbers of white residents,” so that “[t]oday, blacks are still more concentrated near the inner city, and whites have become highly concentrated in the outer peripheries.”

The district court also observed that a significant percentage of white students in Charlotte had left the public system for private or home schools, which accounted for 14.2% of Charlotte’s overall student enrollment by 1998.

The court acknowledged that Charlotte schools had drifted toward greater racial segregation during the 1990s, and that most of these increases followed the 1992 change to a magnet school model. Yet it reasoned that the district’s shift in assignment policies was justifiable in light of the lengthy bus rides some children had endured under the mandatory system; it also deferred to the board’s judgment that “[t]he implementation of magnet schools [would] help[] to restore and maintain racial balance in schools that were rapidly becoming imbalanced” because of the changing residential demographics. The court reasoned that the emerging 90% white schools were located in “the northernmost and southernmost regions of the county where the census tracts are virtually all-white” and that the school board had no constitutional obligation “to fix growing imbalances that were attributable not to the prior de jure system but to independent demographic forces and private choice.”

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rapid resegregation of Charlotte public schools, and finding that the practice of tracking students in higher and lower level tracks in various academic subjects resegregates students even in racially balanced schools; the students in lower tracks are nearly all black, and the highest tracks are overwhelming white.).

60. *Capacchione*, 57 F. Supp. 2d at 237.
61. *Id.* at 238.
62. *Id.* at 249.
63. *Id.* at 254–55. The Supreme Court’s 1971 decision in *Swann* had been very attentive to the possibility of abuse in such circumstances, noting that

[p]eople gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on the composition of inner-city neighborhoods.

In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. . . . [S]chool authorities have sometimes, . . . built[ ] new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the
This crucial issue lies on a fault line of contemporary school desegregation law. The earlier jurisprudence of *Green* imposed upon school boards an “affirmative duty to take whatever steps might be necessary” to eliminate racial discrimination “root and branch,” so that the resulting system would be “without a ‘white’ school and a ‘Negro’ school, but just schools.”\(^{64}\) In *Swann*, the Court developed a legal presumption (rebuttable by the school board but controlling in the absence of contrary evidence), that racially imbalanced schools in a desegregating district were the products of continuing, impermissible discrimination.\(^{65}\)

Twenty years later, the Court’s 1992 decision in *Freeman v. Pitts*\(^{66}\) held that any continuing obligation of desegregating school districts to maintain racial balance would thereafter depend on the resolution of a factual issue—whether current racial imbalances were a “vestige of the dual system, rather than a product of independent racial segregation.” Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with “neighborhood zoning,” further lock the school system into the mold of separation of the races.

*Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20–21 (1971). Although the Charlotte-Mecklenburg’s white student population declined by 15,000 students between 1970 and 1990, while its black student population increased by over 15,000, *Capacchione*, 57 F. Supp. 2d at 238, the Charlotte school board placed twenty-five of the twenty-seven new schools built after 1980 in white residential areas. Petition for Certiorari at 20, Belk v. Charlotte-Mecklenburg Bd. of Educ. (No. 01-1122). The district court dismissed the constitutional significance of these facts by noting that “[w]ith the exception of some of the newest schools in the southernmost and northernmost areas of the county, these [new] schools have been able to accommodate racially balanced student populations.” *Capacchione*, 57 F. Supp. 2d at 252–53.


\(^{65}\) *Swann*, 402 U.S. at 26. The *Swann* Court did acknowledge, however, that:

> It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.

*Id.* at 31–32 (emphasis added).

By 1992, Justice Scalia was insisting that any such presumption would inevitably work, in practice, to prevent any end to a school board’s affirmative duty. *See Freeman v. Pitts*, 503 U.S. 467, 505 (1992) (Scalia, J., dissenting) (noting that in formerly segregated jurisdictions, *Swann* and later cases had established “a presumption, effectively irrebuttable (because the school district cannot prove the negative), that any current racial imbalance is the product of that violation, at least if the imbalance has continuously existed”).

demographic forces." The Court then fashioned two rules that, in effect, lightened the evidentiary burden on school districts. First, it suggested that plaintiffs bore the burden to demonstrate a causal relationship between the board's prior segregative policies and any current racial disparities in student enrollment. Second, it directed reviewing courts to assume that any causal relationship diminishes to legal insignificance over time, absent proof of continuing misconduct by the school board.

The district court's decision in *Capacchione v. Charlotte-Mecklenburg Schools*, declaring that the Charlotte system had become unitary by 1999—despite sharp increases in the racial segregation of Charlotte's elementary and secondary schools during that decade—flowed directly from the Supreme Court's subtle but crucial shifting of the burden of proof from the defendants, on whom *Green* and *Swann* had clearly placed it, to those minority plaintiffs who continue to urge school boards to adjust pupil assignments to

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67. *Id.* at 477.
68. The *Freeman* Court stressed the difference between state action and private choice in creating school desegregation:

Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once *de jure* segregated . . . .

In one sense of the term, vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And stubborn facts of history linger and persist. But though we cannot escape our history, neither must we overstate its consequences in fixing legal responsibilities. The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the *de jure* violation being remedied. It is simply not always the case that demographic forces causing population change bear any real and substantial relation to a *de jure* violation. And the law need not proceed on that premise.

As the *de jure* violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system. The causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith.

*Id.* at 495–96.
counter racial changes within their district. The consequences flowing from the Capacchione ruling were swift and dramatic: in the 2002–2003 school year, the number of Charlotte-Mecklenburg schools with minority enrollment of 91% to 100% more than doubled from the previous year—from seven elementary schools in 2001–2002 to sixteen in 2002–2003, and from two middle schools to four. There was no change in the number of elementary and middle schools with minority enrollment of 20% or less.

C. The New Judicial Ban on Race-Conscious Student Assignments: Lower Federal Courts Write Their Own Chapter

As part of its 1999 decision in the Charlotte case, the district court forbade the Charlotte school board, once unitary, from continuing to consider race in making student assignments to public schools, whether through race-based lotteries, preferences, or set-asides. In so doing, it anticipated by a month the constitutional rule set forth in two Fourth Circuit decisions decided later in 1999, Tuttle v. Arlington County School Board and Eisenberg v. Montgomery County School Board, that currently govern every school district in West Virginia, Maryland, Virginia, North Carolina, and South Carolina. While an argument can be made that these cases are fundamentally wrong, because they misread both the Equal Protection Clause and the Supreme Court precedents on which the Fourth Circuit purports to rely, that discussion is beyond the scope of this Article. Nonetheless, the Fourth Circuit’s decisions currently

70. See Missouri v. Jenkins, 515 U.S. 70, 96 (1995) (quoting Freeman, 503 U.S. at 496); id. at 101 (suggesting that plaintiffs must establish “a causal link” between prior segregation and remaining racial inequities in student performance or other school factors before a federal court would be authorized to order further injunctive relief).

71. Choice Adds to Concentration of Minorities, Poor, EDUCATE!, Nov. 14, 2002, at 9, at http://www.educateclt.org/archive-pdf/2002/Educate!%20021114.pdf (on file with the North Carolina Law Review); Tim Simmons, School Choice Is Resegregating Charlotte, NEWS & OBSERVER (Raleigh, N.C.), Nov. 3, 2002, at 1A (reporting that “almost 70 percent of the schools no longer reflect the racial balance of the entire district” with minority enrollment topping 80% in nearly a one-quarter of all the system’s schools).


74. Boger, supra note 9, at 1751–62 (contending that in cases such as City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), and Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), the Supreme Court carefully limited its holdings to remedial contexts, and that four earlier Supreme Court decisions plainly endorsed, in dicta, voluntary use of race-conscious student assignment policies when adopted by school boards to further pedagogical ends).
bind all lower federal courts within its jurisdiction, and they may well command assent from the other two major federal appellate circuits with jurisdiction over southern schools, the Fifth Circuit and the Eleventh Circuit, once the issue is squarely presented.  

It is thus crucial to ask what student assignment practices remain available to school boards that desire to retain racially integrated schools. The decisions in Tuttle and Eisenberg offer no clear answer. Tuttle referred to several “alternative race-neutral” student assignment policies that, if employed by the Arlington County School Board, might have passed constitutional muster. Yet both of those plans depended for their successful operation upon the clear assumption that Arlington’s various neighborhoods are highly racially segregated. Indeed, such plans would achieve racial diversity in public schools by relying on the known racial differences of different neighborhoods as a proxy for students’ races. This seems problematic, because any school board reliance on proxy measures of

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75. Although neither the Fifth nor the Eleventh Circuits has addressed the permissibility of race-conscious student assignment policies in elementary and secondary schools, both courts have rejected Justice Powell’s basic conclusion in Regents of University of California v. Bakke, 438 U.S. 265, 311-14 (1978), that achieving a racially diverse student body in college and graduate schools is a constitutionally permissible practice, and have held instead, albeit for different reasons, that colleges and professional schools may not routinely engage in race-conscious admissions practices. See Johnson v. Regents of Univ. of Ga., 263 F.3d 1234, 1251-54, 1263-64 (11th Cir. 2001) (concluding that even if racial diversity remains a compelling governmental objective under Bakke, a university’s use of race-conscious criteria to achieve that end is presumptively unconstitutional, since college admissions decisions may not employ racial criteria absent an “extraordinary justification”); Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (rejecting racial diversity as a sufficiently “compelling governmental interest” to survive Equal Protection Clause scrutiny), cert. denied, 518 U.S. 1033 (1996).

76. Boger, supra note 9, at 1785-89.

77. One plan would allow a school board to designate “a small geographic area . . . as the home school for [the school attendance zone] and fill the remaining spaces . . . by means of an unweighted random lottery.” Tuttle, 195 F.3d at 706 n.11. The home school geographic area, the plan noted, “would presumably be selected so that its residents would positively effect the diversity of the school.” Id. Presumably, the home zone would be an area with a predominantly minority residential population, so that the inclusion of some home zone students, plus others chosen from throughout the school district by random lottery, would assure a racially mixed student population. Another plan cited with approval by the Tuttle court would allot to “[e]ach neighborhood school . . . a certain number of slots [for potential transfer students] at each alternative school.” Id.

78. It is possible that the Fourth Circuit might decide that such plans are somewhat more narrowly tailored than a direct selection of students by race. Since neighborhoods cannot, of course, limit residential entry to members of one race or ethnicity, Buchanan v. Warley, 245 U.S. 60, 82 (1917); see also Shelley v. Kraemer, 334 U.S. 1, 22-23 (1948), parents of whatever race who want to give the advantage of particular student assignments that appear to flow to children from one neighborhood would be legally free to move there (if economically able to do so).
student racial identity brings its own constitutional problems. The
Supreme Court has long forbidden state actors to adopt ostensibly
race-neutral criteria with the underlying intent to draw racial
distinctions,79 and lawsuits in several other jurisdictions have directly
challenged the constitutionality of such practices by school boards.80

If the use of neighborhoods as racial proxies eventually is held to
be impermissible, what other student assignment options might
remain for school boards interested in assuring student diversity?
The Wake County, North Carolina school board has recently chosen
to rely upon two other demographic factors: (1) “[d]iversity in
student achievement (no more than 25% of the students assigned to
any school will be performing below grade level on state tests, when
averaged across a two-year period);” and (2) “[d]iversity in
socioeconomic status (no more than 40% of the students assigned to
any school will be eligible for free or reduced price lunch).”81
Because the average socioeconomic condition of African-American
and Latino families in Wake County and elsewhere in the South and

otherwise neutral on its face, must not be applied so as invidiously to discriminate on the
252, 265–66 (1977) (applying Davis). Indeed, parents in other states are currently
challenging the general authority of school boards to consider race when drawing student
assignment zones. See infra note 80 and accompanying text.

80. See, e.g., Boston’s Children First v. City of Boston, 98 F. Supp. 2d 111, 112–14 (D.
Mass. 2000) (denying school board’s motion to dismiss a lawsuit alleging that the Boston
School Committee’s designation of school attendance zones, drawn in part upon
consideration of the racial demography of Boston’s residential neighborhoods, violates
both the Fourteenth Amendment as well as federal and state statutes); Comfort v. Lynn
preliminary injunction in a similar lawsuit).

www.wcpss.net/policy-files/series/policies/6200-bp.html (last visited Nov. 22, 2002) (on file
with the North Carolina Law Review); see also Boger, supra note 9, at 1726 n.18, 1792
(noting that Wake County is using socioeconomic status and student achievement as
criteria to assign students to schools); Elizabeth Jean Bower, Note, Answering the Call:
Wake County’s Commitment to Diversity in Education, 78 N.C. L. REV. 2026 passim
(2000) (describing the Wake County approach to student assignment). For a general
discussion of the value of using class-based measures in creating student bodies, see
generally JAMES S. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY 299–
302 (1966) (demonstrating a strong empirical relationship between the socioeconomic
status of a school’s student population and individual academic performances);
CHRISTOPHER JENCKS ET AL., INEQUALITY: A REASSESSMENT OF THE EFFECT OF
FAMILY AND SCHOOL IN AMERICA (1972) (same); RICHARD KAHLENBERG, ALL
TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL
CHOICE (2001) (discussing the value of using class-based measures in making student
assignments).
nation is lower than that of average white Anglo families, and because their children perform less well on statewide tests, Wake County’s student assignment criteria will have the incidental effect of creating a substantial degree of racial and ethnic desegregation, as well.

Wake County’s twin emphasis on the socioeconomic composition and the academic performance would not appear to raise any significant Equal Protection Clause issues, unless shown to have been adopted as a mere pretext for continuing racial assignments. Distinctions based upon students’ socioeconomic status or their academic performance are normally not subject to “strict scrutiny” by

82. See Bureau of the Census, U.S. Dept. of Commerce, Statistical Abstract of the United States: 2001, at 40, tbl.37 Demographic and Economic Profiles of Selected Racial and Hispanic Origin Populations (reporting national figures that in 1999, only 7.3% of white families were below the poverty line, compared with 21.9% of black families and 20.2% of Hispanic families); see also Luis M. Laosa, Texas Public Schools: Within-School Ethnic/Racial, Socioeconomic, and Linguistics Mix of Students and Academic Performance 12 (Aug. 30, 2002) (unpublished manuscript, on file with the North Carolina Law Review) (reporting a positive correlation between the percentage of minority students in Texas schools and the schools’ percentage of economically disadvantaged students); Ellen B. Goldring & Claire Smrekar, Shifting from Court-Ordered to Court-Ended Desegregation in Nashville: Student Assignment and Teacher Resources 22 (Aug. 30, 2002) (unpublished manuscript, on file with the North Carolina Law Review) (documenting the strong link between race and poverty in Nashville public schools).

83. See N.C. Just. & Cmty. Dev. Ctr., Exposing the Gap: Why Minority Students Are Being Left Behind in North Carolina’s Educational System 26 (2002) (reporting that in 2001–2002, 3–8th grade composite reading and math scores in Wake County schools on state end-of-grade tests were, on average, 34.4 points lower for African-American students than whites). The overall statewide gap separating African-American and white students in North Carolina in 2000–2001 was 30 points. Id. at 19; see also The N.C. Comm’n on Raising Achievement and Closing Gaps, First Report to the State Board of Education (Dec. 2001) (discussing gaps in achievement between white and black children) [hereinafter BRIDGES REPORT]. The Bridges Report disclosed that in 2001, the average composite scores achieved on statewide tests among all of North Carolina’s 3rd–8th grade students, disaggregated by race and ethnicity, were 82.0 for whites, 78.6 for Asians, 60.0 for Native Americans, 58.7 for Hispanics, and 52.0 for blacks. Id. at 26 exh.2. See generally The Black-White Test Score Gap (Christopher Jencks & Meredith Philips eds., 1998) (analyzing the origins of, historical extent of, explanations for, and policies that might overcome, the racial achievement-score gap).

84. If Wake County or another school board adopted such a plan program because of those racial effects, of course, it would subject itself to a Tuttle challenge, since the intent of the state actor is decisive in assessing whether the Equal Protection Clause has been violated. Yet a school board’s recognition that its use of socioeconomic and/or academic criteria would have a disproportionate racial effect, on the other hand, would not suffice, standing alone, to establish any constitutional violation. See, e.g., Personnel Adm’r v. Feeney, 442 U.S. 256, 279 (1979) (forbidding only those governmental actions taken, at least in part, “because of” disparate gender effects, not merely “in spite of” such effects).
the federal courts.\textsuperscript{85} The Wake County Board of Education, if challenged, must show only that these criteria are "reasonably related" to "legitimate" state ends.\textsuperscript{86} That far lower burden of proof should be easily met, since educational researchers have long noted that both the socioeconomic composition and the academic composition of schools can affect the academic performance of children who attend them—with clear evidence that strong performances become more unlikely in high-poverty schools or in schools with high percentages of low-performing students.\textsuperscript{87}

The real wrinkle in the Wake County approach, however, is not constitutional; it is political. Some parents in Wake County have already begun to object to any assignment to their children's schools of children from lower income neighborhoods. In March of 2000, two white PTA copresidents attempted to organize resistance to a proposed transfer of sixty-eight poor and low-performing children, all but one of whom were African-American, to their local school.\textsuperscript{88} One copresident defended her position, insisting, "I'm not a racist .... I'm trying to protect my neighborhood school."\textsuperscript{89} Although that particular incident ended without turmoil, even greater opposition arose the following year when the school board reassigned some white, middle-income children away from their neighborhood schools to provide socioeconomic and academic balance in lower performing and lower income schools.\textsuperscript{90} Although Wake County has not


\textsuperscript{86} Kadrmas, 487 U.S. at 461–62.

\textsuperscript{87} COLEMAN ET AL., supra note 81, at 299–302 (demonstrating a strong empirical relationship between the socioeconomic status of a school's student population and individual academic performances); JENCKS, supra note 81, at 30, 100–03 (same); see discussion infra Part I.E.–F.

\textsuperscript{88} See T. Keung Hui, School Plan Draws Foes, NEWS & OBSERVER (Raleigh, N.C.), Apr. 7, 2000, at 1B.

\textsuperscript{89} Id.; see also T. Keung Hui, Turned Out, Turned Away, NEWS & OBSERVER (Raleigh, N.C.), May 6, 2000, at 1A (describing the transferee children, most of whom lived in single-parent, African-American families with working mothers).

\textsuperscript{90} In the fall of 2001, Wake County administrators attempted to broaden their initial practice of relying on moves by mostly low-income students to achieve diversity goals. When they sought to reassign middle and upper income students, their decision drew sharp opposition from PTA leaders, who objected that reassigning middle-class children away from their schools would take away active parent volunteers. See T. Keung Hui, PTAs Say Too Many Children Shifted, NEWS & OBSERVER (Raleigh, N.C.), Nov. 29, 2001, at 1A.

Another focus of parental opposition was an administrative proposal to shift students from two overcrowded, suburban elementary schools to two underenrolled
abandoned its plan, public controversy has led the board to acquiesce in somewhat less than full compliance: by mid-year of 2001–2002, the overall student composition in fourteen of Wake County’s public schools fell outside of its demographic guidelines. Moreover, the most recent evidence suggests that some white parents are beginning to abandon the public school system in Wake County.

D. The Future of North Carolina’s Public Schools in the Absence of Race-Conscious Student Assignments

If federal constitutional principles no longer permit North Carolina school boards freed from federal judicial supervision to engage in race-conscious student assignments, what are the likely consequences for the composition of public schools in the coming decade? The answer would appear to depend principally upon two factors: (1) the extent of residential segregation in North Carolina’s 117 school districts; and (2) the precise design of the student assignment plans in each of those districts. Obviously, residential segregation will prove especially likely to lead to school resegregation if districts choose student assignment strategies based on neighborhood schools. Yet even if districts rely on assignment plans that afford greater parental choice, residential segregation will play an important residual role (since most such plans designate neighborhood schools as the default assignment absent a choice by parents), and it is thus important to begin by assessing the level of residential segregation in the South generally, and North Carolina more particularly.

91. Hui, Anti-Busing, supra note 90.

92. T. Keung Hui, Public Schools Less White, NEWS & OBSERVER (Raleigh, N.C.), Jan. 18, 2003, at 3B (reporting that the percentage of white students in the Wake system has declined from 64.7% in 1999–2000 to 60.1% in 2002–2003, “the lowest ever”).
1. The Latest Evidence on Residential Segregation: Moderate Declines

Data drawn from the 2000 census indicate that residential segregation among African Americans is decreasing; indeed, significant declines have occurred since 1970, both during the decade between 1980 and 1990, and again between 1990 and 2000. At present, overall residential segregation is at its lowest level since the 1920s. Moreover, the South has experienced the greatest overall decline of any region. All of these trends are reflected in North Carolina.


94. Id. at 3, 8.

95. JOHN ICELAND ET AL., RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980-2000, CENSUS 2000 SPECIAL REPORTS 59 (Aug. 2002), http://www.census.gov/prod/2002pubs/censr-3.pdf. The South has the greatest decline in residential segregation on two accepted indexes, and trails only the West on three other key indexes. Id. Iceland and his colleagues measured segregation using the familiar dissimilarity index, an isolation index (the converse of the more familiar exposure index), a delta index (a concentration measure calculating the proportion of a group's population that would have to move across neighborhood boundaries to achieve a uniform density across a metropolitan area), an absolute centralization index (examining the distribution of a minority group around a metropolitan center) and a spatial proximity index (measuring the extent to which minority neighborhoods are clustered). Id. at 5-6. The South had the lowest measured residential discrimination under the delta/concentration index and the absolute centralization index. Id. at 64 tbl.5-2.

Another study that examined the fifty metropolitan regions with the largest African-American populations in 2000 noted that although segregation remained high in ten "mainly Rustbelt metro areas" of the northeast and midwest, "[a]t the other extreme, ... segregation has now fallen into what social scientists consider the moderate range ... [in] several mid-sized metropolitan regions in the South: Charleston, Greenville, Norfolk, Raleigh-Durham and Augusta." THE LEWIS MUMFORD CENTER, ETHNIC DIVERSITY GROWS, NEIGHBORHOOD INTEGRATION LAGS BEHIND 4 (Apr. 3, 2001, as revised, Dec. 18, 2001), http://mumford1.dyndns.org/cen2000/WholePop/WPreport/MumfordReport.pdf (on file with the North Carolina Law Review). However, three larger southern cities, Memphis, Birmingham, and New Orleans, are among the ten metropolitan areas nationally where blacks are most isolated from whites. Id. at 7 (unnumbered table entitled Black Isolation in Top 50 Metro Areas).

96. While two North Carolina metro areas, Hickory-Morganton-Lenoir and Jacksonville, are among a handful of metropolitan areas (only 19 of 291) where black/nonblack segregation increased during the decade between 1990 and 2000, residential segregation declined by over twelve percentage points in Wilmington, North Carolina, by between five and ten percentage points each in Greensboro-Winston-Salem-High Point, and Raleigh-Durham, and by five percentage points or fewer in Asheville, Charlotte-Gastonia-Rock Hill, and Fayetteville. GLAESER & VIGDOR, supra note 93, at 9-15, tbl.1.
Despite this good news about downward trends, because residential segregation has historically been extremely high, overall levels of residential segregation remain very high for African Americans in most metropolitan areas. Seventy-four American metropolitan areas, approximately one quarter of the total, remain “hypersegregated” in 2000 under conventional demographic measures, while 160 remain “partially segregated,” and only 83 “less segregated.”

Moreover, most declines in segregation result from the relocation of small numbers of African Americans to formerly all-white or overwhelmingly white neighborhoods, rather than from moves by substantial numbers of blacks into white neighborhoods, or alternatively, movements by substantial numbers of whites into black areas.

Indeed, in 2000 the average white resident lives in a metropolitan area that is overwhelmingly white: 80.2% of his/her neighbors are white while only 6.7% are black, 7.9% Hispanic, and 3.9% Asian. Suburban figures show even more dramatic disparities: the average suburban white neighborhood in 2000 is only 5.3% black (a figure up only slightly, from 3.5%, since 1980).

Turning to Hispanic and Asian populations, overall levels of residential segregation are lower, since these groups “are considerably less segregated than African Americans,” by most

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97. *Id.* at 4. Glaeser and Vigdor employ the “dissimilarity” index for this measure. Their use of the dissimilarity index measures the proportion of the black population that would be required to move from its current census tract for blacks to be evenly distributed among all census tracts throughout a metropolitan region. The index ranges from 1.0 (indicating that every black resident would need to move) to 0.0 (indicating that no moves would be necessary). A metropolitan area with an index score of 0.6 or above is deemed “hypersegregated.” “Partial segregation” refers to dissimilarity scores from 0.4 to 0.6, and “less segregated,” to scores below 0.4. *Id.* at 2-4. Glaeser and Vigdor note that “[t]he large number of American metropolitan areas with extremely high levels of segregation [in 2000] remains striking.” *Id.* at 4. Moreover, the overall national dissimilarity index has fallen only from 0.695 in 1990 to 0.652 in 2000, still in the hypersegregation range. *Id.* at 5.

98. *Id.* at 5. Whereas in 1960, all-white metropolitan census tracts were the norm—indeed, 17.2% of all metropolitan census tracts in 1960 had zero black residents, and nearly two-thirds, or 61.8%, had fewer than 1% black residents—by 2000, only one-quarter of all metro census tracts, or 23.1%, remain true white enclaves. *Id.*


100. *Id.* at 31 (unnumbered table entitled *Segregation and Isolation Averages Show Persistence in Cities and Suburbs*). Measured another way, over half of all African Americans who lived in metropolitan areas in the year 2000 (30.6%) still resided in census tracts that were 75% black or greater, down only a fraction from the 53.9% who lived in such hypersegregation in 1980. By contrast, fewer than one in every ten resided in a census tract with a “low” level of segregation (below 0.55). *Id.* at 11-12.
Asian-white segregation “is in the moderate range, and it has remained virtually unchanged since 1980.” Only eight of the forty most segregated metropolitan areas for Asians in 2000 are in the South, and six of those eight are in either Texas or Florida. None are in North Carolina.103

2. The Latest Evidence on School Segregation: Substantial Increases

Since levels of residential segregation are declining, one might expect that levels of school segregation would be likewise trending downward in North Carolina and elsewhere the South. The strongly contrary findings by contributors to the August 2002 resegregation conference that is the source of this special symposium issue104 and

101. Id. at 1. Employing the dissimilarity index, in 2000, the overall white dissimilarity with blacks measured 59.9, while white dissimilarity with Hispanics measured only 45.1 and dissimilarity with Asians, 38.9. Id. at 31 (unnumbered table entitled Segregation and Isolation Averages Show Persistence in Cities and Suburbs). Yet the trends since 1980 among Hispanics have been mixed: looking at differences among various cities, it is more common for Hispanic segregation to increase rather than decrease in 2000. ICELAND ET AL., supra note 95, at 77. Indeed, as the number of Hispanic residents increases in a metropolitan region, so does the tendency toward increased residential segregation and isolation. Id. at 84 & tbl.6-2 Residential Segregation Indexes for Hispanics or Latinos by Characteristics of Selected Metropolitan Areas: 1980,1990, and 2000; THE LEWIS MUMFORD CENTER, supra note 95, at 16 (unnumbered table entitled Hispanic-White Segregation in Top 50 Metro Areas). As one report observed, “the metro areas with the largest Hispanic populations are also the most highly segregated.” Id. at 13. North Carolina has no metropolitan areas in which Hispanics are highly segregated. Id. at 13–16 (listing all such areas).

102. THE LEWIS MUMFORD CENTER, supra note 95, at 16 (unnumbered table entitled Asian-White Segregation in Top 40 Metro Areas).

103. Id. The southern cities among the top 40 in 2000 are Houston, Atlanta, Dallas, Ft. Worth-Arlington, Austin-San Marcos, Orlando, Tampa-St. Petersburg-Clearwater, and Norfolk-Virginia-Beach-Newport News, with dissimilarity rates ranging from a high of 0.49 for Houston to a low of 0.34 for the Norfolk area. Id.

104. See Charles T. Clotfelter, Helen F. Ladd & Jacob L. Vigdor, Segregation and Resegregation in North Carolina’s Public School Classrooms, 81 N.C. L. REV. 1463, 1500 (2003) (describing as an “arresting finding . . . the marked increase in measured segregation over the six-year period from 1994/95 to 2000/01” in North Carolina schools); Catherine Freeman et al., Racial Segregation in Georgia Public Schools, 1994–2001: Trends, Causes, and Impact on Teacher Quality 15–16 (Aug. 30, 2002) (unpublished manuscript, on file with the North Carolina Law Review) (determining that unitary status has brought about increased school segregation in four Georgia school districts); Goldring & Smrekar, supra note 82, at 15, 18 (finding that within the first three years following the lifting of federal desegregation decrees in Nashville, the number of racially isolated African-American schools doubled, that nonselective magnet schools become less integrated, and that the student population of selective magnet schools become more predominantly white); Sean F. Reardon & John T. Yun, Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990–2000, 81 N.C. L. REV. 1563, 1586 (2003) (concluding that residential segregation is not responsible for the modest increase in school segregation in the South between 1990 and 2000, since
other researchers\textsuperscript{105} therefore deserve the most careful attention. Professors Charles Clotfelter, Helen Ladd, and Jacob Vigdor have examined school segregation in North Carolina at the metropolitan, district, school, and classroom levels. Their multiphased analysis begins by dividing North Carolina schools into eleven plausible subcategories: (1) the 5 largest of North Carolina's 117 school districts, which together educate 28% of the state's public school students; (2) other urban districts, grouped according to North Carolina's three principal geographical regions (Mountains, Piedmont, Coastal Plain); and (3) rural districts, again grouped by geographic region.\textsuperscript{106}

Their first principal observation is that, although in 2000–2001 "public schools in North Carolina were, on average, not highly segregated in comparison to other districts in the United States,"\textsuperscript{107} a comparison with figures from 1994–1995 "shows a widespread trend toward increasing segregation in the state."\textsuperscript{108} Three of North Carolina's five largest school districts, Charlotte-Mecklenburg, Guilford, and Winston-Salem/Forsyth—what I will call the "rapidly resegregating" districts—have experienced dramatic rises in between-school segregation during those six years, reflecting that black and Hispanic children are disproportionately being assigned to certain schools within the district.\textsuperscript{109} Forsyth's "segregation index" has more than tripled (from .07 to .25), while Charlotte-Mecklenburg's segregation index has increased by 67% (from .12 to .20), and Guilford, already high in 1994, rose still higher (from .24 to .29).\textsuperscript{110}

\begin{footnotesize}
\begin{enumerate}
\item[106.] Clotfelter, Ladd & Vigdor, supra note 104, at 1470.
\item[107.] Id. at 1474; see also id. at 1473 tbl.2 (entitled Segregation in School Districts in North Carolina, 1994/95 and 2000/01, Using Two Measures Based on School-Level Data).
\item[108.] Id. at 1474; see Yun & Reardon, supra note 59, at 12–14 (finding that in North Carolina, between-district segregation decreased between 1991 and 1993, but that within-district segregation increased during the same period, and that total segregation increased between 1987 and 2000).
\item[109.] Clotfelter, Ladd & Vigdor, supra note 104, at 1481 tbl.4, 1483; see also id. at 1474 tbl.2 (reporting changes in the segregation index over time).
\item[110.] Id. at 1473 tbl.2.
\end{enumerate}
\end{footnotesize}
By contrast, two other large school districts—Wake and Cumberland—experienced far smaller increases. Among Clotfelter's other categories of North Carolina schools, none exhibited either overall levels of segregation or changes between 1994 and 2001 that approached those of the three "rapidly resegregating" districts.

111. Wake’s segregation index rose from .06 to .09 and Cumberland, from .11 to .13. Id. The authors explain that their "segregation index" "measures the degree to which the actual distribution of students diverges from a racially balanced distribution"—that is, a distribution in which the racial composition of students at each school would be identical to the overall racial composition of students in the school district as a whole. On their scale, a score of 1.0 represents total segregation, while 0.0 represents maximum integration. Id. at 1472.

112. Id. at 1473 tbl.2. For example, segregation in the “other urban” district category for the Coastal Plain increased from .11 to .14, while segregation in the Piedmont and Mountain urban districts barely increased at all. Id. Piedmont urban districts, indeed, remained steady at .11 in both years measured, while the Mountain urban districts rose only from .07 to .08. In rural school districts, segregation in both the Piedmont and Mountain regions closely parallels that in the “other urban” districts (moving up from .11 to .12, and from .06 to .08, respectively) while in the rural Coastal Plain, school districts have even lower levels of segregation (.06 to .07) than do urban coastal districts. Id.

Of course, these between-school measures tend to understate students' actual, in-class experience of racial segregation. Some of the more innovative and interesting portions of the Clotfelter, Ladd, and Vigdor report move inside North Carolina schools, to learn the degree of classroom segregation experienced by children assigned to the same school building. They report substantial within-school segregation, with greater levels of classroom segregation found among districts that also have higher levels of between-school segregation. Id. at 1485, 1488 fig.4. Moreover, while classroom segregation within schools is very slight in the earlier grades in North Carolina schools, it increases sharply in some schools by grades 7 and 10. Id. at 1493, 1494 fig.6.


A final possibility that Clotfelter, Ladd, and Vigdor explore is that interdistrict residential segregation in North Carolina may be operating to direct racial groups to different school districts within a single metropolitan area. Clotfelter had earlier demonstrated that these interdistrict disparities explain a substantial portion of the overall metropolitan area school segregation in many northeastern and midwestern cities. Charles T. Clotfelter, Public School Segregation in Metropolitan Areas, 75 LAND ECON. 487, 502 (1999) ("confirm[ing] the prevailing opinion that, not only are metropolitan areas very segregated, [but that] most of that segregation is due to racial disparities between
The data for Hispanic/white segregation in North Carolina schools follow the same general pattern, with two important exceptions. Hispanic/white segregation is less than black/white segregation in the 1st and 4th grades, although since 1994 it has increased “markedly” among 7th and 10th graders, “becoming by 2000/01 more pronounced than black/white segregation.”\textsuperscript{113} Moreover, the rate of the increase in North Carolina’s school segregation among Hispanics over the 1994–2001 period was greater than for any other racial group.\textsuperscript{114}

Clotfelter, Ladd, and Vigdor compared levels of residential segregation to the levels of school segregation and found, as we have already suggested, that “the relationship between neighborhood and school segregation is surprisingly weak…. [M]any counties with similar levels of segregation across neighborhoods have extremely different levels of segregation between and within schools.”\textsuperscript{115} This rapid resegregation, in theory, could be a product of an increasing overall proportion of African-American and/or Hispanic students, districts rather than segregative patterns within districts”). They found much less interdistrict segregation in North Carolina, in large part because many of the state’s metro areas comprise only a single school district. Yet there is some evidence of interdistrict racial segregation in those metro areas that contain more than one school district, especially in three metro areas—Asheville, Greensboro-Winston Salem-High Point, and Charlotte-Gastonia-Rock Hill, see Clotfelter, Ladd & Vigdor, supra note 104, at 1496 tbl.5 (entitled Segregation in North Carolina Metropolitan Areas, 1994/95 and 2000/01), that we have previously identified as “rapidly resegregating” districts.

This overall pattern, moving from between-school segregation to within-school segregation, is consistent with Douglas Massey’s observation that, while the mechanisms may vary (interdistrict, intradistrict, intraschool sorting), most American communities continue to find some means by which to segregate black from white children. Douglas S. Massey & Zoltan L. Hajnal, The Changing Geographic Structure of Black-White Segregation in the United States, 76 Soc. Sci. Q. 527, 538–39 (1995).


114. Id. The levels of Hispanic-white segregation between 1994 and 2001 increased from 0.16 to 0.25 among seventh graders and from 0.17 to 0.34 among tenth graders. The comparable increases in levels of black/white segregation during that period were from 0.18 to 0.24 among seventh graders, and from 0.20 to 0.23 among tenth graders. Id. at 1479 tbl.3.

115. Id. at 1492. But see Erica Frankenberg, The Impact of School Segregation on Residential Housing Patterns: Mobile, AL and Charlotte, NC 36 (Aug. 30, 2002) (unpublished manuscript, on file with the North Carolina Law Review) (concluding that in Mobile, Alabama, where school desegregation has been minimal, residential segregation is increasing, while in Charlotte, where there has been substantial school desegregation, there is an accompanying decline in residential segregation); Freeman et al., supra note 104, at 13 (finding that greater residential segregation in Georgia leads to greater within-district school segregation).
especially in the more rapidly resegregating districts. Yet enrollment figures do not support that hypothesis.116

3. The Crucial Determinant of School Resegregation: School Assignment Policies

In sum, levels of residential segregation in North Carolina’s neighborhoods cannot explain the very large differences that emerge between the three “rapidly resegregating” districts we have identified—Charlotte, Winston-Salem/Forsyth, and Greensboro—and much lower levels of school resegregation within two districts of comparable size—Wake and Cumberland. The explanation must therefore lie elsewhere, almost certainly in the differences among the student assignment policies employed by the various districts.

The myriad issues raised by school assignment strategies lie beyond the scope of this Article.117 My more limited concern will be with the apparent effect of three alternative policies on the racial and socioeconomic composition of schools in North Carolina, specifically: (1) the neighborhood school policy currently pursued in such districts as Greensboro; (2) the controlled-choice approach adopted by Charlotte in the early 1990s and currently being pursued in the Winston-Salem/Forsyth district as well; and (3) Wake’s unique reliance on student achievement and school socioeconomic composition.

The data from Clotfelter, Ladd, and Vigdor’s recent study—showing that the greatest increases in racial segregation have occurred in Charlotte, Greensboro, and Winston-Salem/Forsyth—confirm earlier studies’ findings that assignment plans based on neighborhood schooling, such as those in Greensboro,118 and those
based on “controlled choice” by parents, such as those in Charlotte and Winston-Salem/Forsyth, do not work successfully to avoid racial and socioeconomic resegregation. The first conclusion is unsurprising, in light of the extent of residential segregation in the South in general and North Carolina in particular. The second is more troubling, because many school boards will feel pressure to offer parents more choice in their children’s schooling in order to retain their continued loyalty to the public schools.

Those who have studied the political dynamics of the Charlotte system, as noted above, suggest that the dramatic shift from a mandatory student assignment system in 1992 to a magnet school/choice approach reflected just such a calculation about how best to retain the support of middle-class white parents and the business community. Unfortunately, as the Charlotte experience

attendance zones throughout the city [of Greensboro] to create enrollment close to 70% white and 30% minority at each public school. The former High Point school district used a similar approach the same year. The former Guilford County district, which included the county’s suburban and rural districts, had integrated its schools a year before.” John Newsom, Dismantling Desegregation: As Busing Fades, Local Schools Are Becoming More Segregated, NEWS & RECORD (Greensboro, N.C.), Aug. 19, 2001, at A1. The plan relied on the assignment of many children outside of their neighborhoods of residence, creating over thirty-five satellite attendance zones. Id.

The Guilford school board in 1998 adopted a redistricting plan that “reassign[ed] about 20,000 students to schools closer to their homes… After three years of implementation, the plan has erased all or part of 24 satellite attendance zones, where students attend schools miles from their homes to promote racial balance. The remaining 11 zones will disappear within three years.” Id.

According to a local News & Record poll, while 70% of Guilford respondents said “racially diverse schools were at least somewhat important . . . 59% of those polled said they would give up a diverse school for one closer to home.” Id. Some African-American leaders in the community have turned their attention away from desegregation and toward assurance of “a fair share of educational resources” for minority schools, and the Guilford school board has acted to redirect some of its resources even as it has abandoned racial integration as a goal. Id. “Since 1996, Guilford County Schools has spent $8.2 million on teachers and programs at schools with high concentrations of low-income, minority children. It was the state’s first such equity-funding program. The Board of Education carved $4 million out of this year’s budget for schools in minority neighborhoods,” and has promised to build “four of the county’s next six new schools in minority areas.” Id.

119. See, e.g., Susan E. Eaton & Gary Orfield, Introduction, in DISMANTLING DESSEGREGATION, supra note 4, at xvi-xvii (noting that neighborhood schooling has failed in Norfolk, Virginia following the termination of school desegregation, and that controlled choice has likewise failed in Montgomery and Prince George’s County, Maryland).

120. Mickelson, supra note 112, at 218 (contending that Charlotte’s 1992 shift “occurred largely because of pressure both from business elites, who complained that the desegregation plan hindered economic development, and from newly relocating middle-class White parents who were dissatisfied with the race and class integration of the schools they found once they arrived in Mecklenburg County”); see also Mickelson & Ray, supra note 48 (describing the influence newly relocated companies had on Charlotte-Mecklenburg school policies); see also Mickelson et al., supra note 49, at 175-76 (same).
demonstrates, controlled-choice plans tend to retain white students only at the price of accelerated resegregation. A recent look at changes in student enrollment patterns in Johnston County, situated just east of Raleigh and Wake County, has found a very similar trend toward resegregation under a choice system.\textsuperscript{121}

In the future, moreover, parental pressures for choice among schools will no longer be limited to the public system. The Supreme Court's June 27, 2002, decision in \textit{Zelman v. Simmons-Harris},\textsuperscript{122} upholding the constitutionality of school vouchers for parents of low-income children in Cleveland public schools, opens new avenues to private or parochial school educations, paid for with public funds, for parents unhappy with their children's current options in public education.\textsuperscript{123} Private schooling, such as that examined by Professor Clotfelter in North Carolina, provides yet other options for parents with sufficient means.\textsuperscript{124}

School assignment plans can have no interschool racial impact, of course, in those thirty-three North Carolina school districts with only one districtwide high school in 2001–2002.\textsuperscript{125} (Twenty of these thirty-

\begin{footnotes}
\item[121.] Adrienne Lu, \textit{Choices Lead to Shades of Segregation}, \textit{NEWS & OBSERVER} (Raleigh, N.C.), Oct. 26, 2001, at 1A (contrasting, for example, changes in Selma Elementary School's nonwhite enrollment, under a parental choice plan, from 47% in 1995 to 76% in 2001, while five other Johnston County elementary schools have white enrollments in 2001 over 80%). The school superintendent in Johnston County suggested that the situation warranted study and acknowledged that race played some part in parents' decisions to transfer their children: "I don't doubt that that's some of it. How much, I don't know." \textit{Id.}

\item[122.] 122 S. Ct. 2460 (2002).

\item[123.] The \textit{Zelman} decision, of course, only eliminates constitutional objections to vouchers under the Establishment Clause of the First Amendment. The political aim of voucher supporters, obtaining widespread legislative authorization of this approach, lies ahead. Because of the threat vouchers appear to pose to the fiscal and educational integrity of public schools, vouchers have powerful political opposition, and future political struggles should be fierce in most jurisdictions.

\item[124.] See generally Clotfelter, \textit{supra} note 44 (finding that in the South, private school enrollment increases as the percentage of nonwhites in a community increases); see also \textit{SEAN F. REARDON & JOHN T. YUN, PRIVATE SCHOOL RACIAL ENROLLMENTS AND SEGREGATION} 3 (2002), http://www.civilrightsproject.harvard.edu/research/deseg/Private_Schools.pdf (finding higher levels of black/white segregation in private schools than public schools nationwide, with especially high rates of segregation in Roman Catholic schools and in private schools in the South and West).

\item[125.] See Education First, NC School Report Cards, at http://www.ncreportcards.org (listing and reporting on every high school, middle school, and elementary school in each of North Carolina's 117 districts) (last visited Mar. 21, 2003) (on file with the North Carolina Law Review).
\end{footnotes}
three small districts, moreover, had only one middle school as well, precluding any middle or high school choice by students or their parents.)

Yet these thirty-three districts, while comprising over 28% of North Carolina's 117 districts, educate only 8% percent of the state's K-12 students. The majority of North Carolina school districts present schooling options that can potentially facilitate racial and class resegregation under some school assignment plans.

**E. The Adverse Educational Impact of Racial Resegregation: Decreased Diversity, Concentration Effects, and High-Poverty Schools**

One policy response to this trend toward racial resegregation might well be acquiescence. Policymakers and school board members might reason that parents will choose more segregated settings only if they conclude that integration's educational and social benefits to their children simply are not as important as other values. Under this view, the future of school integration should be left to voluntary association, as neighborhoods become more integrated or parents of different races choose the same public schools.

There are at least three responses to this "free market" approach. The first is that public schooling is more than a consumer good provided for the benefit of students and their parents. Society itself has deep and legitimate interests in social re-production—the intellectual, moral, and social development of the present youth who

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126. *Id.*


128. Professor David Armor, for example, has proposed an "equity choice" concept which would "allow parents or students to choose any public or private school within a reasonably large geographic area surrounding their residence, independent of school system boundaries," with school funds following the students in the form of vouchers or transfer payments. ARMOR, supra note 27, at 228. Armor's plan would permit some race-conscious decisionmaking, by requiring receiving schools to give priority to transfers that improved the racial balance of the receiving school. *Id.* at 229. Professor Rossell supports a "public choice" model that leaves racial composition solely to parents' decisions, with incentives to desegregate only in the form of magnet schools to induce voluntary integrative choices. ROSSELL, supra note 27, at 183-216. See generally JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS & AMERICA'S SCHOOLS (1990) (arguing for a system based on parental choice of schools); LEARNING FROM SCHOOL CHOICE (Paul E. Peterson & Bryan C. Hassel eds., 1998) (a series of essays generally supporting a system based on choice); NEW SCHOOLS FOR A NEW CENTURY: THE REDESIGN OF URBAN EDUCATION (Diane Ravitch & Joseph P. Viteritti eds., 1997) (same).
must become society's leaders in all fields of endeavor. Weighty philosophical and constitutional considerations justify taking this societal interest seriously when making decisions about the basic design of public schooling, even in a political democracy otherwise committed to individual liberty and private choice.\textsuperscript{129} The second response, following from the first, is that states or local school boards might plausibly conclude that the collective future of our schools (a majority of whose students are expected to be nonwhite by 2020)\textsuperscript{130} and our society (a majority of whose members are expected to be nonwhite by the middle of the 21st century),\textsuperscript{131} depends upon educating citizens who will be able to live and work comfortably across racial lines, and that integrated schooling is an indispensable means toward that compelling state end.\textsuperscript{132} As Professor Jomills Braddock has argued:

Schools do more than teach academic skills; they also socialize the young for membership in adult society. School desegregation is not simply an educational reform; it also reforms the socialization function of the schools. For this reason, U.S. society cannot avoid the pain of decisions about school desegregation simply by improving the quality of segregated schools.\textsuperscript{133}

\begin{itemize}
\item \textsuperscript{129} See Wisconsin v. Yoder, 406 U.S. 205, 213–14 (1972) (assuming the power of the state "reasonably to regulate all schools, ... to require that all children of proper age attend some school, ... that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare") (quoting Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925)). See generally AMY GUTMANN, DEMOCRATIC EDUCATION (1987) (reviewing major philosophic justifications for assigning authority over public education to various actors in the polity, and clarifying the public interest, in a democracy, in shaping educational policy).
\item \textsuperscript{130} See GARY NATRIELLO ET AL., SCHOOLING DISADVANTAGED CHILDREN: RACING AGAINST CATASTROPHE 36–39 (1990) (projecting a decline in the proportion of white children of school age from 70% in 1988 to 49% by 2020).
\item \textsuperscript{131} BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 2000 CENSUS, NP-T5-G Projections of the Resident Population by Race, Hispanic Origin and Nativity: Middle Series, 2050 to 2070 (showing that the white, non-Hispanic population of the United States will likely fall below 50% by July 1, 2060).
\item \textsuperscript{133} Jomills Henry Braddock II et al., A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults, 66 PHI DELTA KAPPAN 259, 260 (Dec. 1984).
\end{itemize}
Finally, for those unmoved by broader arguments based on societal needs, a convincing body of evidence suggests that racially segregated schools are educationally detrimental to many individual students who attend them. This justification need not depend upon the theory, put forth by the Supreme Court in *Brown v. Board of Education*, that segregation inflicts "stigmatic harm" on African Americans, a contention that has been the object of intense scholarly disagreement. Nor need it directly depend on the substantial body of empirical evidence about the positive educational effects of racial desegregation on students in southern jurisdictions, or the suggestion

134. 347 U.S. 483, 494-95 (1954) ("[S]eparating the races is usually interpreted as denoting the inferiority of the negro group ... [and] has a tendency to [retard] the educational and mental development of negro children ... ." (internal quotations omitted) (alterations in original)). The Court cited research by Kenneth Clark, Franklin Frazier, and other social scientists to support the proposition that separating children based solely on their race generates a feeling of inferiority among minority children. *Id.* at n.11.

135. The Court's reference in footnote eleven of *Brown* generated an extensive debate, both about the accuracy of the scientific evidence cited and about the propriety of resting major constitutional pronouncements upon shaky social scientific findings. See, e.g., Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157-68 (1956) (questioning the quality of the expert evidence submitted in *Brown* and the wisdom of founding fundamental rights upon developing social scientific theories); Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS. 57, 69-71 (Autumn 1978) (faulting, not only *Brown's* footnote eleven, but the broader tendency by the Supreme Court to rely upon social science evidence to support constitutional judgments). See generally Betsy Levin & Philip Moise, *School Desegregation Litigation in the Seventies and the Use of Social Science Evidence: An Annotated Guide*, 39 LAW & CONTEMP. PROBS. 50, 53-56 (Winter 1975) (reviewing the academic and judicial controversy stirred by *Brown's* reliance upon social scientific evidence). Professor Ryan has argued plausibly that the Court did not, in fact, actually ground its decision on the social scientific evidence cited in footnote eleven. See generally James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659 (2003) (drawing upon the accounts of those who drafted the opinion, as well as upon the immediate extension of *Brown's* holding to other circumstances, such as segregated golf courses, buses, and beaches, to which its evidence clearly did not apply).

136. Many studies have investigated the educational, psychological, sociological, and labor market implications of the move toward desegregated education. For example:

(1) Some researchers have attempted to measure the impact of desegregation on the academic achievement of African-American children (and sometimes, of white children as well). See, e.g., Nancy St. John, *School Desegregation Outcomes for Children 18-22* (1975) (concluding, after an examination of forty-one prior studies on the academic effects of integration, that the evidence is mixed); Robert L. Crain & Rita E. Mahard, *Desegregation and Black Achievement: A Review of the Research*, 42 LAW & CONTEMP. PROBS. 17 (Summer 1978) (reporting that among 73 studies, 40 found positive, and only 12 negative, effects); Meyer Weinberg, *The Relationship Between School Desegregation and Academic Achievement: A Review of the Research*, 39 LAW & CONTEMP. PROBS. 241 (Winter 1975) (concluding, after a review of numerous prior studies, that "overall, desegregation does indeed have a positive effect on minority achievement levels," although most studies suffer from definitional and methodological weaknesses).
that that more talented minority youth tend to underperform in schools attended by higher percentages of minorities. Instead, the

(2) Other researchers have investigated whether school desegregation has had any positive effects upon the educational attainment, labor market prospects, or other "life chances" of blacks and/or whites. See, e.g., Henry M. Levin, Education, Life Chances, and the Courts: The Role of Social Science Evidence, 39 LAW & CONTEMP. PROBS. 217 (Winter 1975) (stressing the inherent limits of social science evidence in answering causal questions about the long-term effects of desegregation); James M. McPartland, Desegregation and Equity in Higher Education and Employment: Is Progress Related to the Desegregation of Elementary & Secondary Schools?, 42 LAW & CONTEMP. PROBS. 108-09 (Summer 1978) (looking at the later educational and occupational careers of minorities who have experienced desegregated education).

(3) Later researchers also sought to reexamine the Supreme Court's psychological conclusion that the segregation of public schools injures the self-esteem or aspirations of black children. See, e.g., Edgar G. Epps, The Impact of School Desegregation on the Self-Evaluation and Achievement Orientation of Minority Children, 42 LAW & CONTEMP. PROBS. 57, 75-76 (Summer 1978) (finding little significant evidence that either racial segregation or racial integration lowers black self-esteem and aspirations, apart from independent socioeconomic effects); Edgar G. Epps, The Impact of School Des[egregation on Aspirations, Self-Concepts and Other Aspects of Personality, 39 LAW & CONTEMP. PROBS. 300 (Spring 1975) (same).

(4) Still other researchers sought to determine the sociological or intergroup consequences of desegregation. See, e.g., Janet Ward Schofield & H. Andrew Sagar, Desegregation, School Practices, and Student Race Relations, in THE CONSEQUENCES OF SCHOOL DESEGREGATION 58, 58 (Christine H. Rossell & Willis D. Hawley eds., 1983) (noting that the social impact of desegregation may be more important in influencing the future occupational and social success of students than in affecting academic outcomes); John B. McConahay, The Effects of School Desegregation Upon Students' Racial Attitudes and Behavior: A Critical Review of the Literature and a Prolegomenon to Future Research, 42 LAW & CONTEMP. PROBS. 77 (Summer 1978) (critiquing various earlier studies).

(5) Finally, researchers investigated the extent to which school desegregation has succeeded in increasing interracial exposure in education. See, e.g., Janet Eyler et al., Resegregation: Segregation Within Desegregated Schools, in THE CONSEQUENCES OF SCHOOL DESEGREGATION, supra, at 1, 1-2 (considering schools that continue to segregate students by classroom within formally desegregated schools and the impact on schoolchildren); Christine H. Rossell, Desegregation Plans, Racial Isolation, White Flight, and Community Response, in THE CONSEQUENCES OF SCHOOL DESEGREGATION, supra, at 13, 13 (comparing the success of mandatory versus voluntary desegregation); Christine H. Rossell, School Desegregation and Community Social Change, 42 LAW & CONTEMP. PROBS. 133 (Summer 1978) (looking at the impact of communities on the outcomes of desegregation).

Many of these studies naturally crossed conceptual lines, offering remedial suggestions, for example, in light of research findings on achievement, social interactions, etc., or explaining later "life chances" in light of social interaction and/or academic achievement in integrated schools.

137. See ERIC A. HANUSHEK ET AL., NEW EVIDENCE ABOUT BROWN V. BOARD OF EDUCATION: THE COMPLEX EFFECTS OF SCHOOL RACIAL COMPOSITION ON ACHIEVEMENT 28-29 (Nat'l Bureau of Econ. Research, Working Paper No. 8741, 2002), http://papers.nber.org/papers/w8741.pdf (on file with the North Carolina Law Review) (finding a "strong adverse effect on achievement of Blacks"—especially blacks in the upper half of the schools' ability distribution—from attending schools with higher percentages of African Americans); CHARLES L. THOMPSON, N.C. EDUC. RES. COUNCIL, RESEARCH-BASED REVIEW OF REPORTS ON CLOSING ACHIEVEMENT GAPS 33 (Apr. 15, 2002) (noting that "[m]iddle class black students actually suffer the greatest
justification draws its power from the substantial body of evidence that students of all races who attend schools with high percentages of low-income students ("high-poverty schools") have significantly lower academic performances, on average, even after their own socioeconomic status and family background have been taken into account.\textsuperscript{138} The empirical foundations of this "school composition claim" were put forward, without major controversy, in the otherwise highly controversial Coleman Report, which was issued by the Department of Education in 1966.\textsuperscript{139}

Most of the controversy stirred by the Coleman Report stemmed from its conclusion that black schools and white schools, at least within the nation's various geographical regions, appeared to have relatively similar educational resources by the mid-1960s,\textsuperscript{140} a finding which undermined widely shared assumptions about the inadequacy of resources in African-American schools, especially in the segregated South. Equally controversial was the Coleman Report's conclusion that students' own family and socioeconomic backgrounds, not any resource inequities in the schools they attended, appeared to explain most of the differences in students' academic achievement.\textsuperscript{141}

damage from segregation, scoring significantly lower in segregated schools than in an integrated setting).\textsuperscript{138}

138. See infra notes 139-63 and accompanying text.

139. COLEMAN ET AL., supra note 81, at 22. The Coleman Report had been commissioned in response to section 402 of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 247 tit. IV, § 402 (omitted), to document racial inequities in the provision of educational resources throughout the nation. The project became associated with its principal investigator, Professor James Coleman of Johns Hopkins University. Coleman and his colleagues, reading their research mandate very expansively, decided not only to investigate what educational resources were being provided, but also to determine whether schools were attaining similar outcomes in student achievement, and to analyze the relationship between the resources being provided and the achievement attained.

In a masterful reexamination of the Coleman Report, Professors Daniel Moynihan, Frederick Mosteller, and fifteen of their colleagues subjected the report to searching substantive and methodological scrutiny. See generally ON EQUALITY OF EDUCATIONAL OPPORTUNITY (Frederick Mosteller & Daniel P. Moynihan eds., 1972) [hereinafter Mosteller & Moynihan] (discussing the results of an extensive substantive and methodological examination of the Coleman Report). Mosteller and Moynihan, in describing the social and political circumstances that prompted the report, linked it expressly with the inauguration of the use of modern social scientific methods in the service of national policy. Id. at 3-4. The report itself—the "second largest social science research project in history," involving data on 570,000 pupils, 60,000 teachers, and 4000 schools, id. at 5—was considered by Mosteller and Moynihan to be "the most important effort of its kind ever undertaken by the United States government." Id. at 4.

140. The report concluded that both interregional differences and metropolitan-rural differences in resource allocation were greater than racial differences. COLEMAN ET AL., supra note 81, at 12.

141. In blunt language, the report concluded,
Almost overlooked amid these central conclusions from the Coleman Report was another striking finding:

[A] pupil's achievement is strongly related to the educational backgrounds and aspirations of the other students in the school. . . . Thus . . . if a minority pupil from a home without much educational strength is put with schoolmates with strong educational backgrounds, his achievement is likely to increase.142

The report concluded, in fact, that the social characteristics of a school's student body were the single most important school-related factor in predicting minority student achievement: “Attributes of other students account for far more variation in the achievement of minority group children than do any attributes of school facilities and slightly more than do attributes of staff.”143

Since the Coleman Report's uncongenial findings about school resource parity made it unpopular in the civil rights community,144 initial support for the report tended to come not from the political left or supporters of desegregation, but from the center and right.145

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142. Id. at 325.
143. Id. at 302. Later in the report, researchers reemphasized that “characteristics of facilities and curriculum are much less highly related to achievement than are the attributes of a child's fellow students in school.” Id. at 316. In the report's final summary on achievement, other factors were once again dismissed as of little importance: “[N]o school factors account for much variation in achievement, [although] teachers' characteristics account for more than any other. . . . [T]he social composition of the student body is more highly related to achievement, independently of the student's own social background, than is any school factor.” Id. at 325.
144. The finding was featured, however, in the Kerner Commission Report, which was promulgated by a distinguished presidential panel appointed in the wake of the urban riots of 1965-1967. REPORT OF THE NAT'L ADVISORY COMM’N ON CIVIL DISORDERS 427 (1968) (citing the Coleman Report's finding on the school composition effect). It was also noted in an important report issued by the United States Commission on Civil Rights, 1 RACIAL ISOLATION IN THE PUBLIC SCHOOLS 72-124 (1967).
145. One of the most provocative reanalyses of the Coleman data came in 1972 from Christopher Jencks, JENCKS ET AL., supra note 81, whose writings on education prompted a host of strong denunciations from African-American scholars and others. See generally Ronald Edmonds et al., A Black Response to Christopher Jencks's Inequality and Certain Other Issues, 43 HARV. EDUC. REV. 76 (1973) (containing an essay by ten leading black scholars who fault Jencks and his colleagues for a variety of methodological, ideological,
Gradually, however, academic support for the school composition proposition deepened within the academic community and among school reformers. For example, in 1977, as part of the first congressionally mandated study of compensatory education programs, Alison Wolf examined the relationship between a student’s location and his or her achievement, and found that “[f]or the country as a whole, the correlation [between the proportion of a school’s pupils in poverty and its average achievement level] is about .5 or .6. No other single social measure is consistently more strongly related than poverty to school achievement.” Five years later, Professor Karl White attempted to evaluate 101 previous studies examining the strength of the relationship between individual student achievement and family socioeconomic status. When he turned his attention from the socioeconomic status of individual students to “schools or other aggregated groups,” Professor White found that the overall socioeconomic composition of schools seemed more intellectual, and moral errors, especially their seeming suggestion that any failure in education is the inherent fault of poor and minority children themselves, and not the remediable fault of public schools and public policy); Stephan Michelson, The Further Responsibility of Intellectuals, 43 HARV. EDUC. REV. 92 (1973) (faulting Jencks for his failure to analyze the actual processes of education, the economic function of education in allocating scarce jobs, or the structural role schools play in our society); Lester L. Thurow, Proving the Absence of Positive Association, 43 HARV. EDUC. REV. 106 (1973) (criticizing the methods, presentation, and conclusions of Inequality). Jencks nonetheless explicitly concurred with Coleman, saying that “[t]he achievement of lower-class students, both black and white, was fairly strongly related to the socioeconomic level of their classmates.” Christopher S. Jencks, The Coleman Report and the Conventional Wisdom, in Mosteller & Moynihan, supra note 139, at 69, 71. This is one of only nine principal findings reported by Jencks; it is the only finding that identifies any significant school-based effect on student achievement. Id. at 70–71.


147. Id., Summary at II. Dr. Wolf reported that an individual’s own family income was correlated with his or her achievement at a .3 level. Id., Summary at I. The far higher correlation of .5 between school poverty level and student achievement was independent of a student’s background and represented an independent school effect. Id. at 3–4. That effect was strongest in those areas, such as large city school districts, that were marked by extreme economic contrasts among neighborhoods. Id. at 9. “In other areas, where housing is less economically segregated, or where desegregation has changed school attendance patterns, the relationship is less close, and shows wide variations.” Id.

148. Karl R. White, The Relation Between Socioeconomic Status and Academic Achievement, 91 PSYCHOL. BULL. 461, 463–64 (1982). Professor White concluded that “home atmosphere” was most predictive of academic performance, including such intangible factors as parents’ attitudes toward education, parents’ aspirations for their children, and other factors not directly correlated with traditional measures of socioeconomic status, such as occupation, income, or educational level. Id. at 466–71.
predictive of academic achievement than did a student’s individual socioeconomic status.\textsuperscript{149}

Professor Mary Kennedy of Michigan State and her colleagues oversaw preparation of a 1986 report addressing the relationship between poverty and student achievement.\textsuperscript{150} In that report, Professor Kennedy reconfirmed the findings of earlier research that high rates of school poverty adversely affected individual student achievement.\textsuperscript{151} Three years later, in 1989, Professors Susan Mayer and Christopher Jencks reported that ongoing research tended to confirm the relationship between student attendance at schools with high socioeconomic composition and improvements in achievement test scores.\textsuperscript{152}

These results seemed consistent with, and indeed, explanatory of, otherwise puzzling (and to some, offensive) findings about school desegregation that suggested that, while desegregation brought positive achievement gains for African-American children, nonetheless, at some level, an increase in the proportion of black children in a desegregated school began to become associated with a decline in average achievement.\textsuperscript{153} Professors Robert Crain and Rita

\begin{itemize}
\item \textsuperscript{149} See id. at 475.
\item \textsuperscript{150} MARY M. KENNEDY ET AL., OFFICE OF EDUC. RES. & IMPROVEMENT, U.S. DEP’T OF EDUC., POVERTY, ACHIEVEMENT AND THE DISTRIBUTION OF COMPENSATORY EDUCATION SERVICES (1986). David E. Meyers authored the portion of this work that addresses the effects of the social composition of schools.
\item \textsuperscript{151} The summary drew a sharp distinction between the individual effects of poverty and school effects:
\begin{quote}
NIE . . . found that family poverty was in fact related to students’ educational achievement. Generally speaking, a youngster’s chances of doing well in school were diminished if he or she came from a poor family. The association between family poverty and student achievement was not especially strong, however. There were still many poor youngsters who did well in school, and many low achievers who were not poor. On the other hand, when looking at schools rather than individual children within the schools, the association was much stronger: schools with large proportions of poor students were far more likely to exhibit lower average achievement scores than other schools . . . . A rather large body of research now exists confirming these findings . . . .
\end{quote}
\item \textsuperscript{152} Susan E. Mayer & Christopher Jencks, Growing Up in Poor Neighborhoods: How Much Does It Matter?, 243 SCIENCE 1441, 1442 & nn.15–16 (1989) (citing both Professor Kennedy’s 1986 findings and their own study). Professors Mayer and Jencks indicated that these studies had uncovered “what could be sizable [achievement] effects” from school socioeconomic composition, though they noted that “neither [study] properly controls for skills of students when they enter school.” Id. at 1442–43. Mayer and Jencks also reported that their study indicated that “a high school’s mean SES has more impact on the cognitive skills of black students than the cognitive skills of white students.” Id. at 1442.
\item \textsuperscript{153} See, e.g., Robert L. Crain & Rita E. Mahard, Minority Achievement: Policy Implications of Research, in EFFECTIVE SCHOOL DESEGREGATION 55, 74 (Willis B. Hawley
Mahard, discussing such findings in 1981, speculated that they might reflect, not any specifically racial phenomenon, but instead, underlying socioeconomic differences (and implicitly, poverty-concentration effects):

The finding that schools with smaller black populations have higher achievement can be explained in two ways. First, if the main effect of desegregation is to place students from low-income families into schools with affluent students, the more white students, the greater income level in the school. (We cannot test this directly, since none of the 93 studies [Crain and Mahard relied upon] reported the actual social class of either the black or white students.) Secondly, a smaller black population makes it more difficult to resegregate the school by creating an all-minority class of supposedly low-ability students.154

More recently, additional research has confirmed the adverse academic impact of school composition effects.155 In early 1993, the
Chapter 1 Final Report, opened its report to Congress with a twenty-five-page analysis highlighting the substantial achievement gaps it had uncovered between students attending high-poverty schools and those in low-poverty schools. The Final Report noted the “important effects of school poverty . . . on individual student performance” and underlined the disproportionate burden that was borne by racial and ethnic minority students because of their attendance at high-poverty schools. Not only did minority children comprise 77% of the student bodies in high-poverty schools, but in 45% of the nation’s high-poverty schools, the average enrollment was more than 90% minority. Several recent studies have concluded

31% and 50% scored in the highest quartile (only 5% below the 25% norm), when the poverty population increased to 51–75%, only 10% of students scored in the top quartile, and among schools with poverty rates above 75%, only 5% of the students were in the top quartile. Id. Indeed, in these highest poverty schools, only 19% of the students managed to place above the 50th percentile on reading, and only 18% on mathematics. See id.

Nonetheless, Anderson was careful to caution that readers “should not attempt to infer causation” from her findings, since there was insufficient information on other factors that may have influenced these outcomes, including the social composition of schools the sample may have attended in their earlier years, and how their family circumstances might have changed over time. Id. at 3–4.

In another report published in 1992, Eric Camburn, of the National Opinion Research Center at The University of Chicago, described his findings after an examination of national High School and Beyond data to determine what factors influenced students from the nation’s large metropolitan areas to apply to, attend, and graduate from, four-year colleges. Eric M. Camburn, College Completion Among Students from High Schools Located in Large Metropolitan Areas, 98 AM. J. EDUC. 551, 551 (1990). Camburn found that, as expected, a student’s intention to attend college, socioeconomic status, academic record, and performance on standardized tests were all predictive of each step in the college completion process: application to college, attendance at college, and ultimate graduation from college. Id. at 563.

In addition, however, Camburn found that “the percentage of whites in a student’s high school[] was . . . the strongest predictor among all high school characteristics studied.” Id. at 559. More specifically, attendance at a high-minority school had an adverse impact on the likelihood of college completion that was independent of a student’s own race, socioeconomic background, grades, or standardized test scores. Camburn suggested the “likelihood that one of the major reasons minority-dominant students are less likely to persist toward attainment of a college degree is that they are receiving inadequate preparation for the academic rigors of college.” Id. at 566.


157. Id. at 14–38.

158. Id. at 16.

159. Id. at 17. Although the Final Report chose to emphasize these findings, it conceded that the processes by which socioeconomic composition affects individual student achievement are not yet well understood, and it therefore declined to offer specific advice on how schools might reduce or eliminate the effects, other than to urge that “reforms must be comprehensive and systematic” in high-poverty schools. Id. at 37.
that attendance at high-poverty schools brings adverse, long-term, nonacademic consequences as well. 160

In one perceptive article, Professor Sheryll Cashin, the former Deputy Assistant Secretary for Empowerment Zones in the Clinton Administration’s Department of Housing and Urban Development, examined the many factors that currently draw middle-class African Americans in the Washington, D.C. area to predominantly black suburban communities in nearby Prince George’s County,

160. Laosa, supra note 82, at 23 (concluding that the socioeconomic composition of a school’s student body has “a pervasive statistical effect” on the school’s overall academic performance on Texas end-of-year tests); Russell W. Rumberger, The Impact of Student Composition on Academic Achievement in Southern High Schools 12–21 (Aug. 30, 2002) (unpublished manuscript, on file with the North Carolina Law Review) (finding that both student socioeconomic status and school socioeconomic status contribute to achievement growth in northern and southern schools, but that in the South, school socioeconomic status has a much greater impact than does a student’s own socioeconomic status).

Professor Susan Mayer analyzed data on 26,425 students who were tenth grade students in 1980 and who submitted to follow-up interviews two years later and found that “students who attend high-SES schools are less likely to drop out and less likely to have a child than students of the same race and socioeconomic background who attend lower-SES schools.” Susan E. Mayer, How Much Does a High School’s Racial and Socioeconomic Mix Affect Graduation and Teenage Fertility Rates?, in THE URBAN UNDERCLASS 321, 325–27 (Christopher Jencks & Paul E. Peterson eds., 1992). Furthermore, Professor Mayer calculated that the positive effects of moving low-income students from high-poverty to average schools are significantly greater than the minimal negative effects of moving high-income students from low-poverty to average-poverty schools. Id. at 327. Professor Mayer noted that when she controlled for a school’s socioeconomic mix, the racial composition of the school “had only a small and statistically insignificant effect on dropping out or on teenage childbearing, and the proportion of students who are Hispanic had a statistically reliable effect only on dropping out.” Id. at 328–29.

Employing a very different methodology, Professor James Rosenbaum of Northwestern University and his colleagues have studied for two decades the experience of 4,500 low-income families who are participating in a unique program carried out in the Chicago area as part of the settlement of a major housing lawsuit, Hills v. Gautreaux, 425 U.S. 284 (1976). See James E. Rosenbaum et al., Can the Kernes Commission’s Housing Strategy Improve Employment, Education, and Social Integration for Low-Income Blacks?, 71 N.C. L. REV. 1519, 1522 (1993). Under the terms of the Gautreaux settlement, families living in public housing projects in Chicago have been offered the opportunity to move into subsidized apartment units elsewhere within the city or its predominantly white, middle-income suburbs. Since 1976, more than 4,500 families have participated in the program, and roughly half have moved to the suburbs. Id. at 1522–23. Professor Rosenbaum and his colleagues have followed the Gautreaux families, examining not only their subsequent labor force experiences, but also the experiences of their children, thrust from inner city Chicago schools into middle-class, suburban schools. In his first study, carried out in 1982, Professor Rosenbaum reported that on a range of measures such as dropout rates, participation in college-track courses, and college attendance, suburban movers had far better outcomes. Id. at 1552–56.
Maryland. Although she stresses the powerful social and psychic benefits these communities offer many African Americans, who find themselves weary or embittered by struggle in integrated residential settings, she also notes that the consequences for their children's schooling have been largely negative:

The Prince George's County public schools have the second lowest test scores in the state of Maryland. "About 32 percent of all its third-, sixth- and eight-grade students scored at a satisfactory level or better on the Maryland School Performance Assessment Program last year, well above Baltimore City's 16 percent score but well below top-ranked Howard County's 60 percent." . . .

In addition to funding problems, Prince George's County schools have a higher concentration of low-income students than do other suburban school systems in the region—another possible contributor to the county's low school performance. Given the performance and funding problems of Prince George's County schools, many affluent [black] families are opting out of the public school system. The implications of this vast body of "school composition" evidence for the future of North Carolina's resegregating public schools should be clear. Because a significantly higher percentage of African-American, Hispanic, and Native-American children in North Carolina (and elsewhere throughout the South and the nation) live in low-income families, as North Carolina schools grow more racially segregated, they will simultaneously re-stratify along economic lines, producing high-poverty schools disproportionately populated by African-American, Hispanic, and Native-American students, and low-poverty schools, disproportionately populated by non-Hispanic whites.

162. Id. at 743-51.
163. Id. at 759-60 (quoting Erin Teixeira, Prince George's: A Dream Revisited, BALT. SUN, Jan. 18, 1999, at 1A); see also Susan E. Eaton & Elizabeth Crutcher, Magnets, Media, and Mirages, in DISMANTLING DESEGREGATION, supra note 4, at 265, 265-89 (suggesting that earlier, laudatory accounts of Prince George's County's success with a magnet school approach vastly overstated its academic and educational achievements).
The trends toward resegregation and economic isolation are already manifesting themselves in a number of North Carolina's urban districts. For example, in Winston-Salem/Forsyth, where a "schools of choice" program has been in place since 1995-1996,165 the student population in at least ten of the district's fifty-four elementary schools had become 80% black or greater by 2001. Each of those highly segregated black schools had a student population in which at least 63% of the students were poor (eligible for free or reduced-price lunch), and in seven of the ten, the poverty percentages ranged from 80% to 94%. By contrast, at least eight of the Winston-Salem/Forsyth's district's elementary schools had white student populations in excess of 80%. None had a poverty rate over 50%.166 Similar correlations between a school's racial composition and its poverty composition are present in Charlotte-Mecklenburg, Cumberland, Guilford, and many smaller school districts throughout the state.167

Moreover, just as school composition research predicts, average academic performance in North Carolina's high-poverty schools typically falls well below that of students in more affluent student bodies. For example, in only one of the ten Winston-Salem/Forsyth elementary schools enrolling a nonwhite population in excess of 80% did 70% or more of the student body attain proficient scores on statewide end-of-grade tests in 2000-2001. Among schools with poverty populations in excess of 80%, the percentage of students attaining proficient scores ranged from 47% to 62%.168

165. Douglas Punger, Winston-Salem/Forsyth County Schools Magnet School Assistance Grant Application IV-17 (undated and unpublished manuscript, on file with the North Carolina Law Review).

166. This data was gathered from the information available at the Department of Public Instruction's Web site. See DEPT OF PUB. INSTRUCTION, REPORTS & STATISTICS, available at http://www.ncpublicschools.org/reportstats.html (last visited Apr. 21, 2003) (on file with the North Carolina Law Review). The data set contains pertinent information on only forty-one of Forsyth's fifty-four elementary schools, so the data likely underreport the extent of black/white resegregation at the elementary school level.

167. See John Newsom, Dismantling Desegregation as Busing Fades, Local Schools Are Becoming More Segregated, NEWS & RECORD (Greensboro, N.C.), Aug. 19, 2001, at A1 (noting that 18% of all Guilford's African Americans were attending schools that were over 90% black in 2000-2001, up from 10% in 1993); CMS Releases School Enrollment, Lunch Numbers, EDUCATE! 6-8 (Nov. 7, 2002), at http://www.educateclt.org/archive-pdf/ Educate!%20021107.pdf (on file with the North Carolina Law Review) (providing free-lunch-eligible numbers for Charlotte schools). Among the twenty-eight Charlotte schools where nonwhite student populations exceeded 80%, twenty-one had free-lunch-eligible populations between 80% and 93%. On the other hand, among the eight elementary schools where white student populations exceeded 80%, none had free-lunch-eligible populations greater than 16%. Id.

168. See DEPT OF PUB. INSTRUCTION, supra note 166.
Exceptions do exist, of course. For reasons that are not generalizable, some predominantly minority, high-poverty schools have student bodies that perform at unexpectedly high levels. The superior court that heard North Carolina’s school finance litigation pointed out this fact in one of its orders and directed the parties to examine five such schools to determine what pedagogical or leadership lessons might be derived from their relative success. However, during the subsequent hearing, North Carolina’s educators and attorneys could point to no consistent pattern leading to high academic performance in any of these schools, much less a coherent group of educational methods that has worked to assure high performance in high-poverty schools. In this North Carolina is not alone. Although some researchers contend that educators in East Harlem or El Paso—or indeed, in several thousand schools nationwide—have identified pedagogic methods that can empower willing and able educators to reach all children despite the poverty level of their schools, the evidence to confirm these hopeful contentions remains, sadly, all too slim.

169. Hoke County Bd. of Educ. v. North Carolina, No. 95 CVS 1158, at 58–60 (Wake County Super. Ct. Mar. 26, 2001) (mem.) (describing the five schools, including West Hoke Middle School, Kingswood Elementary School in Wake County, Gaston Middle School in Northampton County, Baskerville Elementary School in Rocky Mount/Nash County, and Winstead Elementary School in Halifax County); see also Hoke County Bd. of Educ. v. North Carolina, No. 95 CVS 1158, at 24 (Wake County Super. Ct. Apr. 4, 2002) (mem.) (describing the subsequent hearing on the five successful school districts) (mem.).

170. See Hoke County Bd. of Educ., No. 95 CVS 1158, at 73–74 (Wake County Super. Ct. Mar. 26, 2001) (mem.) (noting that “[t]he majority of successful schools whose principals testified at the hearings still have many Students below Grade Level and have not been able to maintain their levels of at-risk success in 2000–01,” and that, indeed, “four of the five schools the Court identified as successful failed to meet even expected growth [under North Carolina’s accountability standards] for 2000–01, receiving ‘no recognition’ status”).

171. See, e.g., JERALD, supra note 24 (examining 4,577 schools nationwide in which (1) the average student’s reading or mathematics scores are in the top one-third of those statewide at that grade level and (2) at least 50% of the students are either minority or low-income or both); CHARLES A. DANA CTR., UNIV. OF TEX., HOPE FOR URBAN EDUCATION: A STUDY OF NINE HIGH-PERFORMING, HIGH-POVERTY URBAN ELEMENTARY SCHOOLS (U.S. Dept’ of Educ., Planning and Evaluation Service, 1999) (explaining how nine urban elementary schools serving children of color in high-poverty communities transformed themselves into high-achieving schools); see also Ronald R. Edmonds, Making Public Schools Effective, 12 SOC. POL’Y 56, 56–60 (1981) (setting forth, though without supporting data, a classic argument that effective pedagogical and leadership methods can suffice to lift student performances in low-income and minority schools).
F. Conclusion: North Carolina's Steady Drift Toward Racial Resegregation Will Have Educationally Harmful Consequences

This Article has argued to this point that schools in North Carolina, and the South more generally, face the prospect of increasing resegregation and educational inequality as the consequence of several related forces: (1) the imminent end of court-ordered desegregation decrees in most areas; (2) a new Fourth Circuit prohibition against the voluntary use of race-conscious student assignment plans by school boards, even to ensure racially integrated schools; (3) a drift by many school boards toward assignment policies that allow parents options that, exercised collectively, create resegregative outcomes; (4) the demographic certainty that as schools attended by nonwhite students become more racially segregated, their overall poverty levels will grow steadily as well; and (5) evidence that the high-poverty conditions that inevitably accompany resegregation will place children who attend these resegregating schools at substantially higher risk of poor academic performance—whatever their personal academic potential—simply because of the "school composition" effects from the schools they attend. In addition, of course, racial resegregation will result in the loss of the many educational benefits that researchers and lay people alike have ascribed to integrated public education.172

What makes the prospect of southern school resegregation such a special tragedy is that, unlike the fragmented, often racially homogeneous school districts of the northeast and north-central states—where racial integration is almost impossible to achieve—most southern districts have historically been countywide and racially diverse. Thus, the educational injury widely experienced in many northeastern and north-central metropolitan areas could be readily avoided by southern school boards if federal courts would allow them to seek and maintain educational diversity in their elementary and secondary schools; or if, as Wake County demonstrates, school boards could summon sufficient political will to assign students under alternative criteria that would avoid the most educationally debilitating effects of high-poverty schools.

These recent developments pose a major policy challenge, one that should give parents, educational policymakers, and even our "colorblind" federal courts, great pause. Yet this emerging challenge is simply one component of the broader educational storm currently

172. See generally powell, supra note 132 (cataloging the harms of segregated education and the corresponding values of integration).
brewing. As we will see in Part II, these increases in school segregation are certain to bring other unintended challenges as North Carolina steadily raises the educational bar through its accountability system, now federally mandated by the No Child Left Behind Act.

II. SCHOOL ACCOUNTABILITY: UNINTENDED CONSEQUENCES?

A. A Brief Look at the Development of the Accountability Approach

The shift toward state-designated accountability goals and measures for public schools and students is one of the most significant developments in American education. It was spurred in part by A Nation at Risk, the 1983 report by the National Commission on Excellence in Education that deplored the mediocrity of American schools and cautioned that unless American students were held to higher educational standards, they would fall further behind their peers in other nations. At risk, these critics of contemporary education contended, were not only the individual futures of these failing children, but the nation's preeminence in world science, technology, and trade. By the end of President Ronald Reagan's first term in 1984, some researchers, school reformers, and business leaders began to converge on an ambitious agenda to raise educational standards nationwide. Others saw the prospect of using
accountability as a tool to promote greater equity in public education.\textsuperscript{177}

The proper solution, these post-1983 advocates contended, depended upon an interrelated series of reforms to demand outcome accountability from every actor in the system: first, by setting high educational goals for every student and school; second, by providing carefully designed curricula moving students directly toward those goals; third, by regularly measuring student progress through uniform, statewide tests; fourth, by providing incentives—both rewards and punishments—to motivate all those in the system; and fifth, by freeing local authorities—teachers, principals, and school boards—from most state regulation. The theory assumed that, once unshackled from centralized bureaucratic constraints and given freedom to innovate in response to perceived local student needs, educational "managers" would employ ingenuity and initiative to tailor education services so as to achieve high goals.\textsuperscript{178}

\textit{High-Stakes Testing in the Public Schools}, 34 AKRON L. REV. 107, 109–11 (2000); see Debra P. v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979) (rejecting, as contrary to Federal Due Process and Equal Protection Clause standards, Florida's imposition of high school graduation standards on students, especially formerly segregated African-American students, who had not been exposed to the underlying material), aff'd in part and vacated in part, 644 F.2d 397 (5th Cir. 1981).

\textsuperscript{177} See, e.g., Chambers, supra note 176, at 60–67 (discussing how state standards might be used to demand a minimally adequate education under state statutes and constitutional provisions); see also DIANNE M. PICHÉ, CITIZENS' COMM'N ON CIVIL RIGHTS, TITLE I AT MIDSTREAM: THE FIGHT TO IMPROVE SCHOOLS FOR POOR KIDS 7–18, 26–28 (Corrine M. Yu & William L. Taylor eds., Summer 1999) (arguing that the reauthorization of Title I by Congress in 1994 imposed an obligation on states to develop meaningful standards and accountability requirements, offering great promise to low-income and minority children, but that the federal obligations were being widely ignored). See generally James S. Liebman, Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform, 76 VA. L. REV. 349 (1990) (outlining a legal strategy to capitalize on the state standards movement for the benefit of poor and minority students).

\textsuperscript{178} A number of implicit criticisms of the then-current educational scene were evident in this new approach. For those who saw American students languishing in mediocrity, the imposition of high standards promised to set the educational bar higher. Much of the nation's educational energy in the decade between 1964–1974 had been expended in the struggle over the integration of formerly segregated public schools. Subsequently, courts and educators struggled to respond to the school finance reform campaigns of the 1970s and 1980s, with their focus on parity in funding for teacher salaries, buildings, and equipment. The accountability movement promised something new; it turned the attention of educators from issues of equality in inputs or services toward equality in educational "outputs," concrete educational gains for all students.

Moreover, after decades during which federal and state concern with public education seemed to manifest itself principally through a stream of statutes, regulations, and/or court decisions, many saw the promise of greater local control and autonomy for principals and teachers as a great boon. "Site-based management"—allowing those at the
Although a few states, such as Connecticut, began adopting accountability principles as early as the mid-1980s, and other states, such as Florida, experimented with statewide high school exit examinations, it was only in the 1990s that more comprehensive accountability models emerged in Texas, Kentucky, North Carolina, South Carolina and other states undergoing large-scale scene to make key decisions—reflected the emerging consensus of industrial managers and educational reformers.

Other critics of public education suggested that teachers and administrators were largely exempt from the normal demands and expectations faced by other workers. Their tenure and/or union contracts shielded them from effective accountability to anyone—principals, parents, or students themselves—and inattention and ineptness were too frequently the result. Clear goals and regular measurement of progress, these critics suggested, would reinvigorate the teaching profession and identify those (hopefully a small minority) who had ceased to do their proper job.

179. See NAT'L RESEARCH COUNCIL, supra note 12, at 56–57, 163–64 (briefly recounting these efforts). For a critical account of the minimum competency movement and the judicial decisions that arose in its wake, see generally Jay P. Heubert, High-Stakes Testing in a Changing Environment: Disparate Impact, Opportunity to Learn, and Current Legal Protections (Aug. 30, 2002) (unpublished manuscript, on file with the North Carolina Law Review) (discussing the nature and extent of high-stakes tests, and the effect of these tests on students).


182. See infra Part II.B.

educational reform in the wake of successful school finance lawsuits. When students in some of these states showed marked improvement on major national tests of student achievement, such as the National Assessment of Educational Progress ("NAEP"), other states throughout the South and elsewhere began to adopt similar approaches.184

B. North Carolina's Commitment to Accountability: The "ABC's of Education"

North Carolina laid its foundation for an accountability approach in 1986, by adopting a comprehensive Basic Education Plan ("BEP") that specified uniform curricular and other input standards for all elementary and secondary schools.185 In 1989, North Carolina launched a major experiment with accountability by authorizing its

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184. Another principal explanation for the rapid spread of accountability principles lies with the federal mandates that accompanied the reauthorization of Title I of the ESEA in 1994. Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518, (codified as amended in scattered sections of 20 U.S.C.A. (West 2000 & Supp. 2003)). As the nation's most extensive federal spending program for public elementary and secondary schools, Title I has gone through a number of semi-total transformations in basic approach since its original enactment in 1965. Statutes and regulations that once encouraged schools to teach needy children in separate "pull-out" classes have yielded to demands that schools deliver such services within mainstream classroom settings whenever possible. More pertinent, an earlier approach that stressed the need to teach "basic skills" to low-performing students in the 1980s was replaced in 1994 with the demand that schools impose "high academic expectations" on all children. This shift in educational strategy meshed well with accountability principles, since it encouraged systemwide testing to discern whether all students are learning, and it did not shy away from requiring poor and minority students to meet the same academic standards as other students. Since the Title I program dispensed at least $6.2 billion to school districts in every state in 1999-2000, it seems clear that the dramatic shift toward accountability during the 1990s was impelled in substantial measure by the desire of state legislatures to bring themselves into compliance with the Title I requirements in order to be eligible for the continued receipt of this important source of federal funding. But see PiChê, supra note 177, at 26–28 (lamenting the failure of states to comply faithfully with these provisions).

185. For the first time, the General Assembly directed the State Board of Education to develop a statewide Standard Course of Study—a uniform, sequential curriculum that would assure regular progression in every major subject area from grade to grade, everywhere in the state. The BEP also specified class sizes and teacher/student ratios, and it committed the state to pay for schools' operational costs, including teacher salaries. The BEP did not provide for all local school districts' needs; for example, no funds were allocated for capital expenditures such as school construction and repair. Moreover, the General Assembly never fully funded the BEP. Still, in all, the BEP started North Carolina on the road toward a uniform state curriculum. Dep't of Pub. Instruction, Basic Education Program for North Carolina Schools (adopted Sept. 1985), www.ncpublicschools.org/basic_ed_plan/ (on file with the North Carolina Law Review).
State Board of Education to develop and implement a “performance-based accountability program” that would allow local school districts to set student performance goals or indicators. Pursuant to the 1989 Act, the state board developed, and in 1992–1993 began to administer, statewide end-of-grade (“EOG”) tests to all children in grades three through eight, as well as end-of-course (“EOC”) tests for students in high schools. The 1989 Act also authorized the state

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186. The state board was directed to develop tests and other measures (such as attendance rates, dropout rates, parental involvement, and post-secondary outcomes) that could chart progress toward those goals. School Improvement and Accountability Act of 1989, ch. 778, § 3, 1989 N.C. Sess. Laws 2799, 2799–2804 (current version at N.C. GEN. STAT. §§ 115C-105.20–21, 127, (2001)). Initially, the program was optional; to encourage local schools to participate, the statute offered local districts broad exemption from many reporting obligations and waivers from many state regulations and other requirements, including increased financial flexibility. Id. § 3, 1989 N.C. Sess. Laws at 2799–2800 (current version at N.C. GEN. STAT. § 115C-105.21 (2001)). In exchange, schools electing to participate were required to develop local school improvement plans.

187. Id. § 4, 1989 N.C. Sess. Laws at 2804 (codified as amended at N.C. GEN. STAT. § 115C-174.11(c) (2001)). The General Assembly initially contemplated in 1986 that the state board might acquire commercially available statewide tests. In the 1989 legislation, however, the General Assembly directed the state board itself to develop tests that could test students on the core academic competencies prescribed by the Standard Course of Study, so that North Carolina principals and teachers could see how well their students were absorbing the very curriculum that the BEP prescribed.

The North Carolina end-of-grade tests employed by the ABCs were not developed by educational testing specialists. Instead, the officials of the Department of Public Instruction (“DPI”) assembled a cross-section of teachers from all parts of the state in the early 1990s. After these teachers had drafted and submitted proposed test questions, the DPI officials selected among the various questions, then tested them in field trials, and finally settled on the content of the tests for each grade. DOUG HAYNES, GRADING OUR SCHOOLS '99: SECOND ANNUAL REPORT TO NORTH CAROLINA PARENTS AND TAXPAYERS, 19–20 (N.C. Alliance for Smart Schools/John Locke Foundation, Sept. 1999). The obvious intent was to assure that children were tested on those items that they were actually being taught every day in school. Critics of the approach, however, noted that the teachers who drafted the questions were not “testing experts or uniquely qualified in their academic field.” Id. at 19. The state board has explained that the tests measure a variety of “higher-level thinking skills,” not just rote memorization of facts, and that “[t]he test development process . . . includes a stage where teachers, university professors, DPI curriculum and test development specialists and others classify test questions based on the thinking skill level required.” DEPT OF PUB. INSTRUCTION, “TESTING STARTED WITH THE ABCS” AND OTHER MYTHS ABOUT TESTING AND ACCOUNTABILITY IN NORTH CAROLINA 4 (Dec. 2000), http://www.ncpublicschools.org/parents/myths.pdf (on file with the North Carolina Law Review) [hereinafter MYTHS ABOUT TESTING].

The adoption of the current testing approach did not proceed without serious disagreement at the state level. A Standards and Accountability Commission, appointed in 1993 to develop the standards and goals for students, released a report in July of 1996, criticizing the testing program in a number of respects. Rather than multiple-choice examinations, the commission recommended assessment based on simulated “real-world use of knowledge,” employing multiple measures of performance. The commission’s suggestions were not adopted; instead, the Commission was disbanded in 1997, and a new
board to issue annual “report cards” for each school district, indicating its progress toward improvement of student performance, taking into account its year-to-year progress as well as “demographic, economic, and other factors that have been shown to affect student performance.”

North Carolina moved beyond the experimentation phase in 1995 by enacting legislation known as the ABC’s of Education Act. The ABC’s made mandatory and statewide the previously voluntary program of local school improvement, requiring annual performance goals for every school in the state in three core subjects—reading, mathematics, and writing—and providing rewards to administrators and instructional personnel in schools that could reach or exceed their expected goals. The ABC’s statute also outlined a procedure for identifying “low-performing” schools, and provided state assistance teams to investigate the causes of these schools’ low academic performance, recommend changes, and work with local school personnel. The ABC’s placed principals and/or teachers in low-performing schools at risk of forfeiting their jobs if improvements were not forthcoming.

In 1997, North Carolina took up the challenge of improving teacher quality. In a series of statutes it increased the substantive standards both for initial teacher certification and continuing certification, while modifying procedures for teacher dismissal. The 1997 law also made provision for administering a “general knowledge” test to teachers in those low-performing schools assigned an assistance team, to weed out the unqualified or incompetent.

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Committee on Standards and Accountability was created to advise the state board on student performance standards. Haynes, supra, at 20.


190. Id. § 3, 1995 N.C. Sess. Laws at 356–57 (codified at N.C. GEN. STAT. § 115C-105.21(a) (2001)).

191. Id. at 367–68 (current version at N.C. GEN. STAT. §§ 115C-105.35–36 (2001)).


Finally, the 1997 statute provided annual bonuses of $1,500 to all teachers in schools that achieved higher than expected growth under the ABCs program, and $750 bonuses to all teachers in schools that achieved at least expected growth goals.\textsuperscript{196}

In prescribing target student outcomes on North Carolina's EOG tests (for grades three through eight) and its EOC tests (for high school courses), the state board developed a four-fold classification system for all reading and mathematics test results, Levels I through IV.\textsuperscript{197} Under the board's system, Level III represents student achievement at a "proficient" level.\textsuperscript{198} Only students who score at Level III or Level IV count toward a school's annual growth goals,\textsuperscript{199} and students who do not score at least Level III on their third, fifth, and eighth grade EOG tests stand at risk of nonpromotion to the next grade.\textsuperscript{200}

Every school in North Carolina receives an annual rating under the ABC's statute. Unlike states that hold every school to the same standard (for example, requiring at least 50\% or 60\% of all children to meet Level III performance goals), North Carolina employs a complex multiple regression formula to set specific composite growth goals for each school. In general, the formula weighs prior performance by students in each school, along with other demographic factors such as socioeconomic status and race, and sets an individual goal for each school.\textsuperscript{201} Under the Federal Leave No

\textsuperscript{196} Excellent Schools Act, § 20(a), 1997 N.C. Sess. Laws at 467.
\textsuperscript{197} N.C. ADMIN. CODE tit. 16, r. 6D.0501(4) (June 2002).
\textsuperscript{198} Level IV represents achievement at an "advanced" level. Level III represents achievement at a "proficient" level. Level II represents achievement at a "basic" level. Level I represents failure to achieve at a basic level. \textit{Id.}
\textsuperscript{199} N.C. ADMIN. CODE tit. 16, r. 6D.0304 (June 1998) (repealed Dec. 1, 1999) (defining those students who are "at or above grade level" as those who score at Level III or IV in each content area).
\textsuperscript{200} N.C. ADMIN. CODE tit. 16, r. 6D.0502 (June 2000) (amended Aug. 1, 2001) (requiring student achievement on reading and mathematics test at Level III to pass through the third, fifth, and eighth grade "gateways"). North Carolina's writing tests are graded on a different scale, and 2.5 proficiency level is required. \textit{Id.}
\textsuperscript{201} See N.C. ADMIN. CODE tit. 16 r. 6G.0305 (June 2002). Professors Clotfelter and Ladd have compared North Carolina's school-level accountability measurement approach with seven other possible approaches, and found that North Carolina's measurements seem less predetermined by the demographic characteristics of the students who attend the schools than some other approaches, although "most of the adjusted measures show some bias in the direction of more affluent and whiter schools." Clotfelter & Ladd, \textit{supra} note 183, at 38-39 & tbs.2-1, 2-2, 2-3.
Child Behind statute, North Carolina will also be required to develop and employ a single uniform standard for measuring growth in its schools, to be dubbed the “measure of adequate yearly progress” or AYP.\footnote{202}{N.C. State Bd. of Educ., No Child Left Behind: Summary of Key Provisions, para. 2, at http://www.ncpublicschools.org/nclb/summary.html (last visited Mar. 31, 2003) (on file with the North Carolina Law Review). To satisfy the federal statute, any state accepting Federal Title I money must define a single standard for “adequate yearly progress” (“AYP”) for all of its schools statewide, not merely those receiving Title I funds, which cannot take into account the socioeconomic or prior educational status of different student population mixes in different schools. See Rod Paige, Dear Colleague Letter to Education Officials Regarding Implementation of “No Child Left Behind,” at http://www.ed.gov/News/Letters/020724.html (July 24, 2002) (on file with the North Carolina Law Review). Therefore, in addition to, or in place of, its current system, North Carolina must implement a single, statewide set of measures not tailored to the particular circumstances of different schools or student populations. Id.}

North Carolina schools are annually grouped into one of four classifications, depending upon whether they have exceeded state-established goals, met those goals, failed to meet them, or seriously underperformed.\footnote{203}{Those that meet their projected goals (that is, in which the percentage of students achieving at Level III or above coincides with DPI growth projections) receive an “expected growth” label. Schools in which a higher percentage of students than projected achieve a Level III or above performance receive an “exemplary growth” label. Schools that fail to meet their projected growth and also have significantly fewer than 50% of their students performing at Level III or above are labeled “low-performing.” Schools that fail to meet their projected goals, but in which at least 50% of all students achieve at Level III or above receive no recognition.} The state apparently intends that its publication of these classifications will serve to prompt schools toward

202. N.C. State Bd. of Educ., No Child Left Behind: Summary of Key Provisions, para. 2, at http://www.ncpublicschools.org/nclb/summary.html (last visited Mar. 31, 2003) (on file with the North Carolina Law Review). To satisfy the federal statute, any state accepting Federal Title I money must define a single standard for “adequate yearly progress” (“AYP”) for all of its schools statewide, not merely those receiving Title I funds, which cannot take into account the socioeconomic or prior educational status of different student population mixes in different schools. See Rod Paige, Dear Colleague Letter to Education Officials Regarding Implementation of “No Child Left Behind,” at http://www.ed.gov/News/Letters/020724.html (July 24, 2002) (on file with the North Carolina Law Review). Therefore, in addition to, or in place of, its current system, North Carolina must implement a single, statewide set of measures not tailored to the particular circumstances of different schools or student populations. Id.

The North Carolina State Board of Education has responded by recently voting to recommend that the State continue pursuit of its own ABCs goals, and continue to award the financial incentives to teachers and staff who meet those state goals, while simultaneously developing federally required AYP standards and goals for North Carolina schools, and offering additional financial incentives for those teachers and staff who attain the federal goals. See N.C. State Bd. of Educ., SBE Highlights, at http://www.ncpublicschools.org/sbehighlights/june02highlights.html (June 5–6, 2002) (on file with the North Carolina Law Review) [hereinafter SBE Highlights]. Under that proposal, faculty members would receive $600 annually if their schools met the State’s “expected growth” goals, an additional $600 if their schools met the State’s higher, “exemplary growth” goals, and an additional $600 if the school also met the federal AYP standards—a total of $1,800 in potential annual bonus payments for certified staff members in every North Carolina school. Id.

One recent analysis, conducted by the North Carolina Department of Public Instruction to assess the likely impact of the federal statute on North Carolina schools, concluded that 75% of North Carolina schools would have failed, in 2000–2001, to achieve adequate yearly progress under federal standards. Letter from Phil Kirk, Chairman of the North Carolina State Board of Education, and Mike Ward, Superintendent of the North Carolina Department of Public Instruction, to the Honorable Howard Manning, Jr., 11 (July 29, 2002), http://www.ncpublicschools.org/news/01-02/Mike-Phil_resp.pdf (on file with the North Carolina Law Review).

203. Those that meet their projected goals (that is, in which the percentage of students achieving at Level III or above coincides with DPI growth projections) receive an “expected growth” label. Schools in which a higher percentage of students than projected achieve a Level III or above performance receive an “exemplary growth” label. Schools that fail to meet their projected growth and also have significantly fewer than 50% of their students performing at Level III or above are labeled “low-performing.” Schools that fail to meet their projected goals, but in which at least 50% of all students achieve at Level III or above receive no recognition.
successively higher levels of student performance. These annual performance measures have far more than intangible significance for teachers and administrators; as noted above, they are directly tied to cash rewards.204

Apart from incentives based upon professional pride, these labels are also designed to mobilize pressure on teachers and administrators from parents, who can learn from the annual ABCs scores just how much their children’s schools are improving. For “low-performing” schools, the impetus toward improvement can come not only from concerned parents, as noted above, but from official “assistance teams,” dispatched by the state board to low-performing schools with broad authority to investigate and review all facets of school operations, evaluate teachers and other school personnel, collaborate to design a school improvement plan, and if the school ultimately fails to improve, recommend to the state board that it dismiss the principal or replace the superintendent (if more than half the schools in the district are low-performing or if the superintendent fails to cooperate with the assistance team).205 Under circumstances where the local school board itself fails to cooperate,

204. Prior to 2003, all teachers and other certified personnel in schools that received an “exemplary” designation received a $1,500 bonus, while teachers’ assistants received a $500 bonus. In schools that achieved expected growth, the bonuses were halved, to $750 and $250 respectively. No bonuses are awarded if schools perform below “expected” levels. Several features of this bonus system have drawn criticism. Since only three subjects are tested in grades three through eight, the bonuses of all teachers and other school personnel depend directly upon the performance of only a portion of the instructional staff. Other teachers lament that the high-stakes focus on the end-of-grade tests constrains their freedom in teaching. Whether the accountability movement is impoverishing the breadth of the elementary and secondary curriculum is an important empirical question that deserves greater attention from educational researchers.

The ABCs may unintentionally affect the operation of schools, especially those that serve third through eighth graders, in ways that have prompted concern from some critics. Since these schools’ annual designation and the bonuses of school personnel depend exclusively on student performance in only three subjects—reading, mathematics, and writing—principals may be sorely tempted to trim resources, instructional personnel, and attention devoted to other subjects, such as science, social studies, geography, art, music, and health in favor of all-but-exclusive focus on the three tests subjects.

This concern is less serious at the high school level, of course, since end-of-course tests cover a broader range of subjects, including algebra I, biology, economic, legal and political systems (“ELPS”), English I and II, and U.S. history. N.C. ADMIN. CODE tit. 16 r. 6G.0305 (June 2002). Nonetheless, even at the high school level, higher mathematics, and sciences other than biology, as well as the arts and music, play no current role in determining a high school’s “performance composite.”

the state board may suspend its authority and administer schools in the district directly.206

C. The Likely Impact of Accountability in a Resegregating School System

1. The Impact on Students

Students’ performances on EOG tests in the third, fifth, and eighth grades now bear directly on their promotion to a higher grade at the end of the school year. As part of its commitment to accountability, North Carolina has decreed an elimination of “social promotion,” the practice of passing along students who have not mastered the material to a higher grade so that they may stay with their age group. The new EOG test scores play a major role in three new “gateways” at the third grade (gateway 1), fifth grade (gateway 2), and eighth grade (gateway 3) levels, determining whether thousands of North Carolina children each year will be promoted.207 Moreover, high school students will soon be required to pass a battery of tests before they are permitted to receive a North Carolina high school diploma.208 Regulations adopted by the North Carolina State Board of Education initially implied that performance at Level III on both the reading and mathematics tests would be a prerequisite for promotion to the fourth, sixth, and ninth grades, even if a student has attained passing grades on all other regular school work and examinations.209 The actual reality is a bit more complex, since the

206. Id. § 115C-39(d).

207. There are serious questions about whether North Carolina’s use of its EOG tests in making student promotion decisions is an appropriate use of the tests, which were initially designed, not for making individual student determinations, but for assessing schools’ overall effectiveness in teaching basic curricular subjects. See COMM. ON EDUC. FIN., NAT'L RESEARCH COUNCIL, MAKING MONEY MATTER 181 (Helen F. Ladd & Janet S. Hansen eds., 1999) [hereinafter MAKING MONEY MATTER] (raising questions about the validity of North Carolina’s use of its schoolwide accountability tests for making student promotion decisions).

208. MYTHS ABOUT TESTING, supra note 187, at 5 (discussing how end-of-course tests serve a different purpose than high school exit exams). These “exit tests” will differ from, and be administered in addition to, the end-of-course tests already administered in high school courses, and they will serve as the exclusive gateways to a high school diploma. The exit examinations will test students through four, two-hour examinations that will cover English, reading, and grammar; mathematics (through algebra 1); science (including biology); and social studies (including U.S. history and economics/legal/and political systems). Id.

209. The North Carolina Administrative Code provides:

In addition to meeting local promotion requirements, students in grade 3 shall demonstrate proficiency by having test scores at level III or above on end-of-
state board has elaborated a whole series of retests and “focused interventions,” such as after-school drilling or summer school, to assist students who initially fail the EOGs, and has mandated a more formal, semi-adversary procedure for parents unhappy with a child’s retention. In 2001, the General Assembly turned many of these administrative protections into positive law, thereby enlarging the protections for unhappy parents and their children. Moreover, although earlier versions of the ABC’s required all districts to report to the state board any decisions to promote a child despite his or her failure of a gateway EOG test, the General Assembly moved in 2001 to soften the more stringent demand for successful passage of the EOG tests. While decisions on promotion traditionally rest with each school principal under North Carolina law, the General Assembly forbade principals to decide against promotion based upon the EOG results alone, instead affirmatively requiring the principal to consider classroom work, grades, and the best interests of the child, before making the promotion decision.

In North Carolina, the nonpromotion rate has increased in each of the three gateway grades during the 1990s, though the increased percentage figures during the 1990s are relatively small, and the overall percentages are relatively small as well. In 1998–1999, the grade tests in both reading and mathematics. Students who score at Level III or above and who meet all local promotion requirements shall be promoted to grade 4 unless the school principal shall determine otherwise in consultation with teacher(s). These requirements shall become effective with the 2001–02 school year.

N.C. ADMIN. CODE tit. 16, r. 6D.0502(a) (June 2000) (amended Aug. 1, 2001).
211. N.C. ADMIN. CODE tit. 16, § 6D.0505(d)(1) (June 2002).
213. See id. The amendment added the following qualification to the more general power to “grade and classify pupils”:

In determining the appropriate grade for a pupil who is already attending a public school, the principal shall consider the pupil’s classroom work and grades, the pupil’s scores on standardized tests, and the best educational interests of the pupil. The principal shall not make the decision solely on the basis of standardized test scores.

§ 28.17(b), 2001 N.C. Adv. Legis. Serv. 424 (emphasis added); see Laurie L. Mesibov, Changes Affecting Elementary and Secondary Education, 32 SCH. L. BULL. Vol. No. 4, at 1, 1 (2001) (discussing these changes).
214. The following table displays the nonpromotion rates in North Carolina in the three gateway grades, as well as the ninth grade.
number of students not promoted included 3,069 from the third grade, 1,102 from the fifth grade, and 2,275 from the eighth grade. Hence, only 6,446 students were retained in 1998–1999 prior to the institution of the new EOG gateway process.

During 2000–2001, the first year of effective high-stakes testing for North Carolina fifth graders, the new standards were not rigorously enforced, in part because of acknowledged problems with the mathematics test. In fact, only 2% of the state’s 105,830 fifth graders were actually retained; 5,406 were promoted despite failing one or more of their EOG test grades. Results from 2001–2002 are not reported as of the date of this Article’s submission. Nonetheless, the experience of other states that have adopted high-stakes testing is that the percentages and numbers of nonpromoted students will rise, at least during the first years of the new system. The State Board of Education acknowledges as much, though its expressed view is relatively sanguine. Under the state board’s assumptions, overall retentions will likely increase from 6,446 to 20,837 (or 323%), once all three gateways are in operation in 2002–2003. Yet these nonpromotion figures seem relatively optimistic. In 2000–2001, according to the state’s own figures, only 82.7% of the state’s fifth graders performed at Level III or above on EOG reading tests.

<table>
<thead>
<tr>
<th>Year</th>
<th>3rd Grade</th>
<th>5th Grade</th>
<th>8th Grade</th>
<th>9th Grade</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989-1990</td>
<td>2.0</td>
<td>0.8</td>
<td>2.2</td>
<td>10.4</td>
</tr>
<tr>
<td>1999-2000</td>
<td>3.5</td>
<td>1.4</td>
<td>2.6</td>
<td>16.1</td>
</tr>
<tr>
<td>2000-2001</td>
<td>3.4</td>
<td>2.0</td>
<td>2.3</td>
<td>14.6</td>
</tr>
</tbody>
</table>


while 86.7% performed at Level III or above on their mathematics tests. Among African-American students, the figures were 69.2% and 75% respectively.

To put it more pointedly, in 2000–2001, approximately 17.3% of all fifth graders, and 30.8% of all African-American fifth graders failed to achieve Level III on their EOG reading tests. Since every student must pass both reading and mathematics tests to avoid a risk of nonpromotion, the number of students at-risk under the ABC’s will be somewhat greater; in fact, in 2000–2001, 21.6% of all fifth graders and 38% of African-American fifth graders failed one or both of these exams. Using the state’s projected “final average daily membership” figures, that would mean more than twenty percent of North Carolina’s 105,988 fifth graders alone, or 22,893 young souls, would have faced the unhappy prospect of failing the new “high-stakes” version of the ABC’s had the current system been in place in 2000–2001.

A special commission charged with examining North Carolina’s “achievement gap” confirmed these black/white disparities in a December 2001 report to the North Carolina State Board of Education:

We can no longer afford to avoid the discomfort often associated with recognizing that ethnic culture (race) is somehow associated with [academic] failure. The evidence is compelling. In every analysis of EOG test data from the ABC’s program presented to the Commission over the past year, the factor of race was dominant in differentiating levels of achievement.

The most pronounced differential exists between the white student group with 82 percent achieving at or above grade level on the 2000–2001 EOG testing, while only 52 percent of African-American students were at or above grade level.

220. 2000–2001 End of Grade Reading, supra note 218.
223. See STATISTICAL PROFILE 2002, supra note 127, at 5 tbl.2. These projections do not include the potential effects of retesting or focused intervention, which might substantially reduce the overall numbers and percentages of students who would be retained.
Hispanic and American Indian students scored above blacks but considerably below whites and Asians.224

Although the overall gap between white and black student performance is high statewide, as in many other states,225 there is some evidence that it is especially large in those schools that are more segregated. For example, among the five urban districts identified by Clotfelter, Ladd, and Vigdor, black/white gaps on both reading and mathematics are higher in the three "rapidly resegregating" districts—Charlotte/Mecklenburg, Guilford, and Winston-Salem/Forsyth—than in the two “more racially integrated” districts, Cumberland and Wake. The following report provides composite percentages for African-American students scoring at or above Level III proficiency on North Carolina’s 2000-2001 EOG exams:

<table>
<thead>
<tr>
<th></th>
<th>Reading &amp; Math</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charlotte/Mecklenburg</td>
<td>48.5</td>
</tr>
<tr>
<td>Forsyth/Winston-Salem</td>
<td>47.9</td>
</tr>
<tr>
<td>Guilford</td>
<td>50.7</td>
</tr>
<tr>
<td>Cumberland</td>
<td>57.5</td>
</tr>
<tr>
<td>Wake</td>
<td>58.1226</td>
</tr>
</tbody>
</table>

Of course, it is possible that these differences stem from other factors that vary among these districts, such as differences in the average socioeconomic status of their students, their levels of school funding, or their teacher characteristics. However, the available data do not substantiate these alternative explanations.227

224. BRIDGES REPORT, supra note 83, at 4, 21 & ex. 2 (showing 82.0% of white students in grades 3–8, 78.6% of Asians, 60.0 of American Indians, 58.7% of Hispanics, but only 52.0% of blacks scoring at or above Level III on both state reading and mathematics tests in 2000-01); see also DEPT OF PUB. INSTRUCTION, NORTH CAROLINA STATE TESTING RESULTS: “THE GREEN BOOK,” 2000-01, at 53–54, 65, 68, 72 (Apr. 2002), http://www.ncpublicschools.org/accountability/testing/reports/green/01complete.pdf (on file with the North Carolina Law Review) [hereinafter THE GREEN BOOK] (providing detailed statistics on students passage rates on state EOG tests at the third-, fifth-, and eighth-grade levels, disaggregated by race and ethnicity, that show similarly wide disparities at each grade level).

225. See generally Larry V. Hedges & Amy Nowell, Black-White Test Score Convergence Since 1965, in THE BLACK-WHITE TEST SCORE GAP, supra note 83, at 149, 149–81 (reporting on “every major national survey of high school students since 1965 that has tested both blacks and whites,” and finding substantial, but diminishing, differences in performance nationwide).


227. For example, a far higher percentage of students in the Cumberland County school district (51.3%) were eligible for free or reduced price lunches (a common measure
Nor do differences in public spending on education correlate with, or predict, student test scores. In 1999–2000, the three large districts with lower performing students all ranked among the state's top sixteen (out of a total of 117 districts) in total spending per average daily membership (a conventional measure of students in attendance), while Cumberland, in which student performance is substantially higher, ranked only forty-sixth in spending.

In addition, there do not appear to be substantial differences in the levels of teacher education, teacher experience, or teacher certification among these five districts. Once again, Cumberland has, by a fraction, the lowest percentage of teachers with master's or doctorate degrees, and other measures of teacher quality are comparable among the five districts.\(^{228}\)

Moreover, these high rates of average failure are not evenly distributed among all elementary schools within these five districts. Instead, as we might expect based upon earlier evidence,\(^{229}\) the highest rates of failure come in schools with the greatest increases in school segregation and among high-poverty schools.

\(^{228}\) See \textit{Statistical Profile 2002, supra} note 127, at 34 tbls.19–20 (2002), for data on current spending on education:

<table>
<thead>
<tr>
<th>District</th>
<th>Current Spending Per ADM</th>
<th>Capital Spending Per ADM</th>
<th>Total Spending Per ADM</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charlotte/Mecklenburg</td>
<td>$2,073</td>
<td>$1,292</td>
<td>$3,365 (3d)*</td>
</tr>
<tr>
<td>Forsyth/Winston-Salem</td>
<td>$1,667</td>
<td>$674</td>
<td>$2,341 (11th)</td>
</tr>
<tr>
<td>Guilford</td>
<td>$1,685</td>
<td>$456</td>
<td>$2,141 (16th)</td>
</tr>
<tr>
<td>Cumberland</td>
<td>$1,007</td>
<td>$445</td>
<td>$1,452 (46th)</td>
</tr>
<tr>
<td>Wake</td>
<td>$1,528</td>
<td>$1,464</td>
<td>$2,994 (5th)</td>
</tr>
</tbody>
</table>

\(^{229}\) See text accompanying \textit{supra} notes 134–63 (discussing the relationship between race, low-income status, and student performance).
In sum, it is likely that the numbers and percentages of students who are not promoted under the ABCs of Education will rise substantially, especially in schools with higher percentages of African-American and Hispanic children, and in schools with higher percentages of poor children. In school districts where schools are resegregating by race and socioeconomic class, these “failing schools” may either soon house especially large percentages of children who are being retained in grade, with all of the increased risks for dropping out that researchers have identified, or else will effectively abandon any real commitment to end social promotion simply in order to keep their student cohorts moving through the system.

These trends obviously present grave educational challenges. Perhaps the greatest virtue of accountability systems is their capacity to identify those districts, individual schools, and specific students who are not achieving at desirable levels. North Carolina’s ABCs system will accomplish that task. Moreover, since the Federal No Child Left Behind Act will require all schools to disaggregate their scores by race, ethnicity, limited-English proficiency, and family income status, even districts and schools that have overall high levels of student performance will no longer be able to ignore major subgroups of their student populations. These are the substantial pluses of the accountability system.

Yet once that identification process has been completed, the major work lies ahead, not behind. North Carolina’s resegregating and high-poverty schools must be assured of receiving the human and fiscal resources they need: enough certified teachers to staff every classroom; smaller classes, especially in the earlier grades; experienced principals and staffers; sufficient funds for professional development; and resources to support meaningful tutoring, after-school, English proficiency, special education, and other tailored programs to match those of schools in more affluent areas. Even if these high-poverty schools can be thus provisioned, the body of empirical evidence we have examined suggests these additional

230. See generally NAT’L RESEARCH COUNCIL, supra note 12, at 128–33 (summarizing previous studies, and concluding that “simply repeating a grade does not generally improve achievement; moreover, it increases the dropout rate” (citations omitted)). One study cited by the National Research Council reported that “the presence of high-stake 8th grade tests is associated with sharply higher dropout rates, especially for students at schools serving mainly low-SES students.” Id. at 130 (citing Sean F. Reardon, Eighth Grade Minimum Competency Testing and Early High School Dropout Patterns (Apr. 1996) (unpublished paper presented at the annual meeting of the American Educational Research Ass’n, New York).
resources alone may not suffice to overcome the severe effects of poverty concentration.

Moreover, as we shall see in Part III, any confident assumptions that adequate resources will be provided to each needy school and child throughout North Carolina may be premature.\textsuperscript{231} Despite the shining promises of the state's constitution, despite the farsightedness and determination of its state judiciary in the \textit{Leandro/Hoke} school finance litigation, and despite the manifest goodwill of North Carolina's educational leadership, any shortfall of resources could quickly swamp thousands of struggling low-income and minority children in North Carolina. For as the American Educational Research Association has cautioned:

\begin{quote}
[I]f high-stakes testing programs are implemented in circumstances where educational resources are inadequate \ldots there is potential for serious harm. Policy makers and the public may be misled \ldots students may be placed at increased risk of educational failure and dropping out; [and] teachers may be blamed or punished for inequitable resources over which they have no control.\textsuperscript{222}
\end{quote}

2. The Impact on Parents

One primary purpose of identifying high-performing and low-performing schools under an accountability system, as this Article has noted, is to identify schools that are falling short so that the State can take necessary steps to improve them, thereby allowing every child to attain high academic goals.\textsuperscript{233} However, identifying schools that fall short in academic performance opens another possible avenue for impatient parents: to move their children to schools where other

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{231} See infra notes 280–300 and accompanying text.
\item \textsuperscript{233} The National Research Council has observed that testing can have at least seven discrete functions: (1) to aid in instructional decisions about individual students; (2) to provide information about the status of the educational system; (3) to serve as a motivation for change or improvement; (4) to assess the effectiveness of particular educational programs; (5) to hold schools and educators accountable for student performance; (6) to act as a lever to change classroom performance; and (7) to certify students as having attained specific levels of mastery. NAT'L RESEARCH COUNCIL, \textit{supra} note 12, at 33–37. To the extent that North Carolina's ABCs serve purposes 2, 3, 4, 5, or 6, they can prompt meaningful educational changes without necessarily threatening students who find themselves within a deficient system.
\end{itemize}
\end{footnotesize}
students are already achieving at high levels. Scholars have long noted this classic "exit" pattern of response.234

North Carolina's developing patterns of school assignment lend themselves to the exercise of such a choice in at least two ways. In districts that opt for neighborhood schooling, parental choice can take the form of selecting the "right neighborhood" for residence—one in which public schools are high-performing (and the racial mix is to the parents' preference).235 A large body of empirical literature fortifies what most of us know from common observation: entry into neighborhoods with more desirable public schools is usually more expensive, since home prices reflect the "premium" derived from the better performing schools to which the neighborhood children will be assigned. Such neighborhoods, moreover, participate in a housing/education feedback system: their economic exclusivity augments, over time, the collective educational achievement of students in their schools (because students in those schools will be drawn from families with higher socioeconomic backgrounds, and will predictably perform better, on average, on academic tests). The contrary tendency will also manifest itself; poorer families will find themselves relegated to less expensive housing in secondary or overcrowded neighborhoods within a school district, or to poorer districts. Their public schools run the risk of becoming high-poverty schools as long as assignments are bounded by local neighborhoods.236

234. See generally ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970) (discussing, in part, the role that "exit" plays when individuals are dissatisfied with the status quo); James S. Liebman, Voice, Not Choice, 101 YALE L.J. 259 (1991) (evaluating the dangers to public education, especially for at-risk children, of allowing parents greater choice in the selection of their children's schools); see also Amy Stuart Wells & Jennifer Jellison Holme, No Accountability for Diversity: Standardized Tests and the Demise of Racially Mixed Schools, 12-13 (Aug. 30, 2002) (unpublished manuscript, on file with the North Carolina Law Review) (finding that "good" schools have become increasingly identified as schools that attain high rates of success on state accountability tests, and that in three of six formerly successful integrated schools—all regarded highly by both white and black parents—the initiation of accountability testing was accompanied by the beginning of "white flight").


What school accountability—with its annual test scores and its annual information about school performance trends—adds to this general tendency toward neighborhood stratification is its aura of concrete certainty. While neighborhood ambiance or the economic profiles of a community may be more intangible, comparative public school performances are now available on the Web, accurate to the decimal point. Realtors throughout Charlotte, Greensboro, and Winston-Salem have doubtless committed to memory ABC reading and mathematics scores for every elementary and secondary school within their sales area.\footnote{237}

Even in districts operating under "schools of choice" or other open school assignment plans that allow parents to choose their children's schools unconstrained by their neighborhood of residence, as Professor James Liebman once speculated in another context, "the educationally oriented parents and children (call them 'educational connoisseurs') ... [will] demand and receive higher quality educational services than ... consumers with less exacting educational tastes."\footnote{238} Indeed, that lack of relative educational sophistication among lower income parents may explain one recent surprise. A provision of the Federal No Child Left Behind Act empowers parents whose children attend any school that has failed to make adequate yearly progress for two years in a row to transfer their children to other, higher performing schools within the district.\footnote{239} Although the Act has immediate applicability (drawing upon whatever schools' scores the states have employed previously) and

\footnote{237. See Education First, Office of the Governor, North Carolina School Report Cards, http://www.ncreportcards.org (last visited Apr. 7, 2003) (on file with the North Carolina Law Review) (providing district-by-district, school-by-school information). This author received a friendly, colorful brochure from a Chapel Hill realtor during the summer of 2002, providing state EOG scores, accurate to the decimal place, for every elementary, middle, and high school within the Chapel Hill school district, and offering to help parents choose residential locations that would assure their children assignments to particular schools.

238. Liebman, supra note 234, at 261 (suggesting why apparently positive educational impacts of private school education might be misleading, since educationally oriented parents might choose private education in disproportionate numbers). See generally Wells & Holme, supra note 234 (exploring parental responses to accountability systems).

239. The No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1116(b)(1)(E), 115 Stat. 1425, 1479 (2002) (to be codified at 20 U.S.C. § 6316(b)(1)(E)), provides, in pertinent part: "In the case of a school identified for school improvement [because it has failed, for two consecutive years, to make adequate yearly progress] ... the local educational agency shall ... provide all students enrolled in the school with the option to transfer to another public school ... that has not been identified for school improvement ...." See generally William L. Taylor, Title I as an Instrument for Achieving Desegregation and Equal Educational Opportunity, 81 N.C. L. Rev. 1751 (2003) (discussing the potential for using the No Child Left Behind Act to increase the racial diversity of schools).}
parents in 8,652 schools nationwide were immediately eligible to demand reassignment.\footnote{240} apparently only "a trickle" of parents exercised their new option in the fall of 2002.\footnote{241}

Some might reason that since North Carolina's accountability system sets different goals for each school annually—adjusted school-by-school to reflect differences in demography—high-poverty schools might still attract parents by earning State commendation for "meeting expectations" every year (even if their absolute scores fall below those of other schools in the same district with a different racial and SES mix). Yet the new Federal No Child Left Behind statute will abandon precisely this feature of North Carolina's accountability system. Instead, the new federal law will require the designation of an unadjusted, annual standard by which all schools statewide will be measured.\footnote{242} Although some argue that this universal goal is important to assure high performance by all schools and children,\footnote{243} Professor Ladd has observed that such a standard does not actually measure the incremental progress each school manages to achieve in a given year. She thus argues that "the use of average unadjusted test scores as the ranking measure w[ill] disproportionately favor schools with above-average proportions of whites and below-average proportions of poor students," even if teachers and principals in lower performing schools are actually making great yearly strides (though with a student population that starts the academic year further behind students from more affluent schools).\footnote{244} In addition, it is unclear whether parents, especially more affluent parents, will be satisfied knowing how much progress their children's school has made, if the bottom line suggests the school is lagging substantially behind others in their district.

\footnote{240}{Lynn Olson & Erik W. Robelen, \textit{Frustration Grows as States Await "Adequate Yearly Progress" Advice}, 21 EDUC. WK., July 10, 2002, at 1, 41 (providing a state-by-state count of schools in which parents will have such choices).}
\footnote{241}{Erik W. Robelen, \textit{Few Choosing Public School Choice for This Fall}, 21 EDUC. WK., Aug. 7, 2002, at 1, 38.}
\footnote{242}{See 20 U.S.C.A. § 6311(b)(1)(A)–(B) (Supp. 2003) (requiring that states adopt "the same academic standards" for "all schools and children in the State").}
\footnote{243}{Helen F. Ladd, \textit{Introduction, in HOLDING SCHOOLS ACCOUNTABLE}, supra note 176, at 1, 13 (noting that the State of Kentucky and the Black Caucus in Mississippi have taken this position, favoring a uniform standard for all children in their states).}
\footnote{244}{Clotfelter & Ladd, supra note 183, at 56 (concluding that it is unfair not to adjust scores based upon factors outside schools' control that influence student test scores, such as students' socioeconomic status).}
3. The Impact on Teachers and Administrators

As we have seen, to spur teachers to improve the academic performance of their students, the accountability system relies on direct financial incentives, more indirect professional rewards, and the fear of professional failure. The logic, drawn from the world of business, is that teachers can be induced to maximize their professional activity if suitably motivated. The crucial assumption is that most teachers lack the will to excel, rather than the capacity or the means. Very few studies of teacher motivation and competence, however, confirm that key assumption. On the contrary, most teachers appear to be relatively idealistic and highly motivated, even if some lack professional competence in dealing with low-performing children or those from minority or low-income backgrounds.

Moreover, even as there are two basic strategies for parents who seek higher performance for their children, so are there two strategies for most teachers. The first is to redouble efforts at whatever school they find themselves, hoping thereby to improve the performance of their young charges. The second, however, is to move to a school in which the overall performance of students is already higher, so that the teacher can profit from his or her students' more successful learning patterns. A recent study examining factors responsible for teacher transfers in Texas public elementary schools found "strong evidence that teachers systematically favor higher achieving, non-

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245. One study by Eric Hanushek, John Kain, and Steven Rivkin, examining the factors responsible for teacher transfers, found that a ten percent salary increase (between two and three thousand dollars per year) would reduce the number of teachers leaving a district by only one to three percent. On the other hand, a one standard deviation decrease in school average achievement increases the probability of exiting between one and two percent, and a ten percent increase in the percentage of students who are black or Hispanic raises the probability that non-black, non-Hispanic teachers exit by an additional one to two percent. Consequently, schools serving a high proportion of students who are academically very disadvantaged and either black or Hispanic may have to pay an additional twenty, thirty or even fifty percent more in salary than those schools serving a predominantly white or Asian, well-prepared student body.


246. North Carolina's Bridges Commission noted this problem and recommended that "the state provide the substantial TIME that classroom teachers need to update their skills and gain new skills in working with diverse populations." BRIDGES REPORT, supra note 83, at 13 (boldface omitted); cf. THOMPSON, supra note 137, at 13–14 (cautioning against too much emphasis on "culturally responsive instruction," and suggesting that research shows what teachers of low-income and minority students most need is additional instruction on academic content).
minority, non-low income students." Indeed, the average teacher moved to a school where the achievement of their new students was 3% higher on average, while the percentage of black and Hispanic children they would teach declined by 2.5% to 5%, and the percent of poorer children—those eligible for free lunch—declined by 6.6%, on average. To be sure, there may be factors in addition to disappointing student test scores and the loss of faculty bonuses that might drive teachers away from low-performing schools, including the desire to avoid poorer quality facilities or more unsavory neighborhoods or higher student disciplinary problems. Since all of these problems tend to occur more frequently in high-poverty schools, however, the effect is the same: good teachers tend to flee.

Moreover, moving to another, more successful school normally requires either greater seniority or superior skills, so that it will be the more experienced and able teachers who will normally have the mobility to move to higher performing schools leaving less competent or experienced teachers behind.

Recent research findings document that this pattern of movement is exactly what is underway in many states. Professor Freeman and her colleagues have documented in Georgia what Professors John F. Kain and Kraig Singleton have likewise found in a study of over 1.8 million children and 4,500 elementary schools in Texas:

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247. HANUSHEK ET AL., supra note 245, at 12. Interestingly, the study found only "weak support for the belief that teachers commonly leave urban districts for suburban positions," but also found that those who do leave urban schools do generally relocate to suburban schools. Id. at 9–10. When teachers moved from an urban to a suburban district, average achievement rose .35 standard deviations and racial concentrations declined 15%–20%. Even more tellingly, suburban to suburban transfers saw an average rise in achievement of .1 standard deviation and percentages of black, Hispanic, and free-lunch eligible students all decline (7%, 4%, and 9.5% respectively). Id. at 12–13.

248. See Lynn Olson, The Great Divide, in QUALITY COUNTS 2003 9, 14 (Educ. Wk., Jan. 9, 2003) (reporting that "[s]chools serving high-poverty, high-minority, and low-achieving students have a harder time not only finding qualified teachers, but also keeping them," and citing numerous studies that confirm this trend).

249. MAKING MONEY MATTER, supra note 207, at 169 (observing that "[w]ealthy districts with high salaries and desirable working conditions rarely experience shortages in any field, whereas districts and schools with large numbers of low-income and minority students are much more likely to face difficulty recruiting qualified teachers and to hire unqualified teachers or to use substitute teachers to fill positions," citing Linda Darling-Hammond, Doing What Matters Most: Investing in Quality Teaching (1997)); cf. HANUSHEK ET AL., supra note 245, at 9 (finding that probationary teachers (0–2 years of experience) are four times more likely to switch districts than prime age teachers (11–30 years of experience)).

“teachers employed in schools with high fractions of disadvantaged minority students have lower ability (as measured by verbal and written test scores on a state teachers’ exam), fewer years of education, less experience, and more students in their classes than do teachers in schools with larger percentages of high-income and white students.”

One recent analysis of elementary school teachers in four school districts in North Carolina’s Research Triangle area reached a similar conclusion about relative teacher quality. Drawing upon state records, the report found that “[s]chools in the Triangle with high numbers of poor children have the least qualified teachers and experience the highest rates of turnover.” The report contrasted one Durham elementary school where 82% of the children receive subsidized school lunches with another where only 11% receive the lunches. In the high-poverty school, “fewer than two-thirds of the teachers were fully licensed, 44 percent had less than three years of experience, and the turnover rate was 52 percent.” In the low-poverty school, by contrast, “93 percent of the teachers were fully licensed, more than half had 10 years of experience, and [only] 18 percent had less than three years of experience.” More than 90% of students in the low-poverty school passed state EOG exams in 2001; the passage rate at the high-poverty school was only 54%.

The school superintendent of Johnston County has acknowledged that “finding teachers to work in schools with a large population of low-income students is difficult. ‘Teachers don’t want to work in those schools,’ [Superintendent] Causby said, though he added that there are exceptions.”

251. Making Money Matter, supra note 207, at 211; see also Freeman et al., supra note 104, at 27 (finding that white teachers are much more likely to leave Georgia schools that serve higher proportions of black students and move to schools that serve lower proportions of black and low-income students, where students on average are scoring higher on standardized tests).


253. Id.

254. Id.

255. Id. (offering 2001-2002 data on poverty rates, student passage rates, and rates of full teacher licensure, advanced degrees, and teacher board certification for every elementary school in the Wake, Johnston, Chapel Hill-Carrboro, and Durham school districts).

256. Id.; see also Todd Silberman, New Teachers Leaving at Faster Rate, NEWS & OBSERVER (Raleigh, N.C.), Nov. 17, 2002, at 1A (reporting that “[s]chools with high [teacher] turnover tend also to have larger percentages of inexperienced teachers, fewer
Superintendent Causby’s observations about teacher preferences coincide with anecdotal information from the National Research Council that standards-based reform “may be making schools that are identified as low performing less attractive to teachers.”

Professors Ladd and Zelli have found concern, especially among principals in North Carolina who serve low-performing schools, that the state’s accountability program may create incentives which will lure better performing teachers toward middle-class, white schools, while leaving them with few effective means to remove poor teachers already present in their low-performing schools.

Some argue that teacher flight from poorly performing schools will not be accelerated by accountability programs because the new Federal No Child Left Behind Act requires all schools to disaggregate their test data and thereby reveal average performance among various subcategories of students—grouped by economic disadvantage, race, ethnicity, disability, and limited English proficiency. Moreover, unless each subgroup meets its yearly targets, teachers will not be deemed to have met their school’s goals, even if the overall average academic performance of all children meets or exceeds annual goals.

Yet a more malign consequence of relying on disaggregated data is possible. Because professional and financial reward will flow only if all categories of students meet their performance targets, principals and teachers will have not one, but at least two, alternative means of achieving that end. The route obviously intended by accountability planners is to focus necessary attention and resources on students who have difficulty mastering the requisite material—fully-licensed teachers, more black students, and more students eligible for subsidized lunch)—

257. MAKING MONEY MATTER, supra note 207, at 272.
260. Id. § 1111(b)(1)(I), 115 Stat. at 1448–49 (to be codified at 20 U.S.C. § 6311(b)(1)(I)).
261. See supra note 196 and accompanying text.
special education students, African-American and Hispanic students, and children from economically and educationally impoverished backgrounds. The other, unintended route, however, would be for school administrators to adjust, as much as the system will allow, the pool of students for whom they have responsibility. Insofar as they are able, then, school officials may well avoid enrolling such students or resort to measures, such as expulsion or transfer to alternative schools, that remove these students from the cohort for which they have responsibility. The focus on disaggregated scores, in short, may well give principals, teachers, and perhaps superintendents (at least those in more affluent and white schools) both financial and professional incentives to place their political support behind fluid student assignment systems such as neighborhood schools (which facilitate residential sorting by race and socioeconomic status) or on parental choice (which allows more educated parents to direct their children toward the “winner” schools).

North Carolina education officials have been conflicted about how to coordinate teacher and staff incentives under the provisions of the No Child Left Behind Act with North Carolina’s more well-established state incentives under the ABCs. The State Board of Education approved a revision during its June 2002 meeting that would have awarded additional bonuses to teachers and staff whose schools meet federal NCLB goals. However, the General Assembly, facing serious budgetary pressures in April of 2003, appears poised to reject that approach, instead retaining the ABCs approach, which currently provides $1,500 to teachers whose schools exceed annual ABC goals and $750 when schools meet those goals.262

D. Conclusion: Some Accountability Measures May Unintentionally Worsen North Carolina’s Drift Toward Racially Resegregated and Economically Isolated Public Schools

This Article does not argue that the accountability approach is either misguided or doomed to failure. The light that accountability

262. See SBE Highlights, supra note 202 (adopting, in June of 2002, a system under which teachers would be rewarded $600 for meeting annual state ABC goals, $600 more for exceeding state ABC goals, and a third $600—for a maximum total of $1,800—if they also met “annual yearly progress” goals under the federal No Child Left Behind Act). More recently, however, the House of Representatives of the North Carolina General Assembly has adopted an overall state budget that restores the earlier incentive system, awarding $750 for meeting state ABC goals, $750 more for exceeding those goals—for a maximum bonus payment of $1,500—with no additional bonus for meeting federal goals. See Todd Silberman, State Pulls Back Bonus, NEWS & OBSERVER (Raleigh, N.C.), April 19, 2003, at 1B.
measures hope to shine annually on every district, school, and student statewide could prove essential in assuring that all North Carolina children receive high-quality educations no matter where they live or what their parents' personal circumstances. What this Article does contend, however, is that when accountability measures are imposed on, and interact with, school systems characterized by growing racial and ethnic segregation, they threaten to exacerbate the isolation of African-American, Hispanic, Native-American, and low-income children, with negative consequences both for their access to highly performing classmates and for any prospect of attracting better, more highly qualified classroom teachers to their schools.

The reasons are clear: the convergence of racial segregation and high-stakes accountability testing all but dooms racially segregated, economically isolated public schools and their students to failure on state accountability tests, entrenching broad patterns of grade retention, student demoralization and dropout, and parental and teacher flight.

Indeed, some sobering assessments of the accountability approach on racial and ethnic minorities have already come from the National Research Council, which reported in 1999 that, at that time, only two systematic studies had been completed on the effect of these systems on student achievement. The first, an examination of the Dallas, Texas program conducted by Professor Ladd, found "evidence of gains in student achievement for whites and Hispanics but not for black students." The other study, an examination of Charlotte, North Carolina's five-year experience with its "Benchmark Goals Program" by Professors Smith and Mickelson, found "few or no gains from the incentive system." It is the convergence of North Carolina's increasing racial segregation with high-stakes accountability testing that, at present, is darkening the state's educational horizon.

263. MAKING MONEY MATTER, supra note 207, at 183 (citing Helen F. Ladd, The Dallas School Accountability and Incentive Program: An Evaluation of Its Impacts On Student Outcomes, 18 ECON. EDUC. REV. 1, 1-16 (1999)).
III. SCHOOL FINANCE/RESOURCE INEQUITIES: WHILE MAJOR REFORMS ARE EDUCATIONALLY NECESSARY, WILL THEY PROVE SUFFICIENT, AND CAN POLITICAL WILL BE SUSTAINED?

On any roster of outstanding structural deficiencies in America's public schooling system, school funding inequities would surely have ranked as a problem in the mid-1960s, second in gravity only to racial discrimination. Indeed, the very Congress that passed the Civil Rights Act of 1964 and outlawed many forms of racial discrimination simultaneously commissioned a report to determine just how great were the resource disparities that had been tolerated in the nation's public schools despite Plessy v. Ferguson's oft-ignored promise of "separate but equal." Among the more surprising findings of that report was its conclusion that interregional and metropolitan-rural differences in resource allocation were even greater than racial differences. The school finance reform struggles of the past thirty years—in both federal and state courthouses and in legislative assemblies throughout the land—have been waged to address the crucial challenges presented by this "fiscal storm."

Although some progress has been made toward greater interdistrict "fairness" or equity, many southern courts have

265. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 402, 78 Stat. 241, 247 (omitted) (commissioning a survey to address "the lack of availability of equal educational opportunities for individuals by reason of race, color, religion, or national origin in public educational institutions at all levels in the United States").

266. 163 U.S. 537, 540 (1896) (upholding a Louisiana statute that provided for "equal but separate" railway accommodations for black and white passengers).

267. Coleman Et Al., supra note 81, at 12.


North Carolina's efforts have not come exclusively in the courts. The General Assembly in 1991 created two additional funds, a Low Wealth Fund and a Small County Fund, to drive supplemental resources to less well-favored districts.

Since 1991 over $482.1 million has been appropriated, including $99.9 million in 1999–2000. For the 73 low-wealth counties that receive supplemental funding it increased their per pupil expenditures an average of $118 and for the ten lowest spending counties both supplemental fund sources accounted for an additional $333 per student, or 40% of their total current expenditures. Without the low wealth and small county supplemental funding, the current spending gap between the top and bottom spending counties would have swelled to $1,363 per pupil or $35,438 per classroom.
rejected any state constitutional obligation to assure funding equality,\textsuperscript{269} and those states, northern and southern, in which funding redress has been ordered have often found that effective redistribution of educational resources is far more difficult than initially anticipated.\textsuperscript{270} Like many states, North Carolina has witnessed a vigorous constitutional attack on its school finance policies. In a 1997 decision, \textit{Leandro v. State},\textsuperscript{271} the North Carolina Supreme Court interpreted two provisions of the state’s constitution to promise every child “the opportunity for a sound basic education."\textsuperscript{272} \textit{Leandro} was then remanded to a specially designated superior court judge who was charged to give concrete meaning both to the general right of North Carolina students and the duties of state educational officials. That judge, in turn, has rendered a remarkable series of rulings in four lengthy opinions that appear to require the...
State to address the unmet educational needs of every at-risk child. In his final memorandum decision, the judge ordered every classroom be staffed with a competent, certified, well-trained teacher who is ... implementing effective educational methods that provide differentiated, individualized instruction, assessment, and remediation to the students in that classroom,” and that “every school be provided, in the most cost effective manner, the resources necessary to support the effective instructional program within that school so that the educational needs of all children, including at-risk children, to have the equal opportunity to obtain a sound basic education, can be met. If fully implemented, such orders could require not only an “educational needs assessment” for every child in every school throughout North Carolina, but sufficient changes in educational practices and in resource enhancements to lift all children to a proficient level of performance. The superior court has ruled that it will exercise continuing jurisdiction to oversee the full implementation of its sweeping remedial orders. Yet the State has appealed these lower court decisions, and the future of Leandro is presently uncertain. In his response to the Leandro mandate,

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273. The superior court found, among other things: (1) that thousands of North Carolina children are not receiving a sound basic education; (2) that their sub-proficient performances on state accountability tests are an appropriate measure of that failure; (3) that those most at risk of academic failure tend to come from lower income families, from racial and ethnic minority backgrounds, from single parent or homeless families, or from other social conditions creating this greater risk; (4) that these at-risk children have the inherent capacity to succeed in school; (5) that, under the North Carolina constitution, their early-life disadvantages can and must be off-set by state-funded educational services, including pre-kindergarten programs; (6) that they require additional help, programs, and resources from public schools to meet their educational needs; and (7) that the first educational priority of the State of North Carolina must be to assure “a sound basic education” for these and other children. Hoke County Bd. of Educ. v. North Carolina, No. 95 CVS 1158, at 110 (Wake County Super. Ct. Apr. 4, 2002) (mem.); Hoke County Bd. of Educ. v. North Carolina, No. 95 CVS 1158 (Wake County Super. Ct. Mar. 26, 2001) (mem.); Hoke County Bd. of Educ. v. North Carolina, No. 95 CVS 1158 (Wake County Super. Ct. Oct. 26, 2000) (mem.); Hoke County Bd. of Educ. v. North Carolina, No. 95 CVS 1158 at 142 (Wake County Super. Ct. Oct. 12, 2000) (mem.).


275. Id. at 112.

276. The superior court rebuked North Carolina educational officials in two sharply worded letters following the State’s filing of a ninety-day report on July 5, 2002, in which the State outlined its purported progress in implementing a remedial decree. In the first letter, the court observed that:

[T]he materials submitted by the State of North Carolina to the Court, while commendable in their content and aspirations for the school children of North
North Carolina’s Attorney General is following a path well-trodden by executive officials and legislatures in other states, who have resisted judicially mandated redistribution of educational resources. Thus, the tenth year of school finance reform approaches in the Old North State with many crucial steps yet untaken, while the North Carolina Public School Forum has recently reported that “the spending gap between the state’s wealthiest counties and its poorest counties has become an abyss . . . widen[ing] 35.5% since the North Carolina Supreme Court ruled in Leandro v. North Carolina.”

Moreover, the most serious state budgetary crisis in over a decade now faces American statehouses and local counties alike. Indeed, the current taxation picture presents a prospect of long-term fiscal austerity for state educational establishments and hard choices among many pressing state needs.

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277. See generally Ryan, supra note 23, at 458–63, 471 (describing a twenty-five year battle by New Jersey and an eleven-year battle by Texas—with bouts both in state courts and in state legislative chambers—to resist school finance reform).

278. 2001 STUDY, supra note 268, at 1. The trend accelerated during the year 2002, when the Forum reported that disparities between the highest- and lowest-spending North Carolina districts widened to $1,437 per student or $37,362 per average twenty-six-student classroom, a gap 45.3% higher than when the North Carolina Supreme Court issued its Leandro decision in 1997. PUB. SCH. FORUM OF N.C., 2002 NORTH CAROLINA LOCAL SCHOOL FINANCE STUDY 1 (Sept. 2002), available at http://www.ncforum.org/20021sf.htm (on file with the North Carolina Law Review).

279. Alan Richar & Joetta L. Sack, States Brace for Tough New Year, 22 EDUC. WK., Jan. 8, 2003, at 1, 1 (reporting that current-year and next-year state budget shortfalls are projected to total at least $100 billion, prompting Jane Hanaway, an educational expert with the Urban Institute, to predict that “[w]e’re really beginning a significant, very serious period of resource trouble” in K-12 public education); see also A 50-State Budget Snapshot, 22 EDUC. WK., Jan. 8, 2003, at 18, 18–19 (offering a gloomy state-by-state...
This is all deeply disconcerting news, of course, since the chief hope of salvation from the imminent educational disasters forecast by this Article, as we have seen, appeared to lie in steering public resources toward those students and schools with the greatest educational need. The new accountability approach promised to accelerate this change, first, by identifying those who most need help and then, by motivating those who must provide that help. In past decades, accountability's supporters reason, the absence of information about the performance of marginalized children led either to a fool's paradise—in which students, their parents, and even their schools have drifted without full recognition of their students' underperformance—or to a cynic's wasteland—in which poor and minority children were abandoned or acculturated to subordination and failure.

Yet two impediments stand in the way of achieving this great promise. The first is pedagogical; the second, political. The pedagogical challenge is that no scholar or educator has yet identified a package of educational resources or practices that can, in a consistent and replicable manner, reach and lift the performances of those children who most need educational assistance. This is a controversial statement, for educational innovators regularly put claims forward that some new methods have worked or will work to transform children, classrooms, schools, and districts. Indeed, there exist marvelous and encouraging accounts of educational successes in the most straitened circumstances, where principals and teachers appear to have accomplished educational wonders in schools filled with poor and minority children. North Carolinians can tell such exceptional stories: the trial court on remand in the Leandro case pointed specifically to five schools—most of them in "low wealth" school districts without substantial resources, all enrolling student populations that are over 50% African-American, Native-American, and/or Hispanic, and all with students over 70% of whom are eligible for free or reduced priced lunches—in which achievement on North Carolina's EOG tests was outstanding.

Yet very few who have studied public schools carefully have identified any particular combination of strategies with high rates of replicable success. Indeed, Professor Ladd reports the ironic
conclusion that "[p]erformance-based reform of education makes sense because so little is known about the specific relationships between educational inputs and outputs. If those relationships were better understood, outcome goals could be achieved by focusing attention on the inputs to the educational process." A number of thoughtful and well-intentioned school reform designs exist, targeted especially at low-income and minority children, including Professor Robert Slavin's "Success for All" plan, Professor Henry Levin's "Accelerated Schools" approach, and Professor James Comer's "School Development Program." Yet, while research suggests that certain school resources have particular power to lift low student performance—specifically the provision of high-quality teachers (with high test scores and/or master's degrees in their fields) and the reduction of class size—researchers often acknowledge that "[w]e
are not yet certain about how to make schools better or how to deploy resources effectively,"^{287} and that “[e]ducational challenges facing districts and schools serving concentrations of disadvantaged students are particularly intense, and social science research provides few definitive answers about how to improve educational outcomes for these youngsters.”^{288}

This pedagogical uncertainty, in sum, is real and serious. Though it does not warrant hesitation about moving forward to address these problems, it does suggest that neither large doses of goodwill nor additional fiscal resources are enough, at present, to assure that “all children will learn.” That is especially true, current research suggests, for lower income African-American, Hispanic, and Native-American children who are condemned to learn in concentrated or high-poverty schools. Although accountability systems can be helpful, even constitutionally indispensable, as North Carolina’s *Leandro* court has suggested,^{289} if educators or legislators impose strict accountability goals on teachers and administrators who work in racially and economically isolated schools (or on the students themselves), they ratchet up the potential risks of personal and professional failure, without providing any dependable route toward success.^{290} This prospect seems especially pertinent in those southern states where public schools are rapidly resegregating by race and socioeconomic status, thereby creating precisely the kind of educational dilemmas that the nation’s best educational experts have found so intractable in

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^{288} *Id.* at 3 (boldface omitted). This volume noted specifically that none of these programs “can yet be said to be firmly established by research” although “many education policy makers are impressed with anecdotal evidence concerning the success of some or all of these programs.” *Id.* at 124.

^{289} Hoke County Bd. of Educ. v. North Carolina, No. 95 CVS 1158, at 142 (Wake County Super. Ct. Oct. 12, 2000) (mem.). The court found:

> “If the ABCs program were not in place, a similar accountability program would . . . be required so the State, and the public, could have a statewide accountability system to measure educational progress and . . . measure[e] whether or not each child is receiving the equal opportunity to obtain a sound basic education as the Constitution requires.

*Id.*

the central-city school districts of northeastern and midwestern states.\textsuperscript{291}

The political challenge is equally formidable. The convoluted story of modern school finance reform has often been told.\textsuperscript{292} Even in those states where courts have been willing to identify and enforce a right to education, real educational progress has come slowly, for courts have typically looked to state legislative or executive officials to prescribe the specific content of educational reform packages to redress interdistrict fiscal or resource inequities. Yet legislatures both North and South find themselves under very powerful pressure not to compromise the reliable political support they receive from white, suburban voters by showering additional aid on failing schools in poor and minority districts with far less electoral clout.\textsuperscript{293}

Moreover, the sums that may be required to purchase the most promising educational resources for low-performing students—better trained teachers, more teachers per school (hence smaller class size), tailored programs like Success for All—are huge fractions of the current per-student spending in most states. Professor Clune has estimated that in states where present spending averages $5,000, an additional $2,000 more per disadvantaged child may be needed for accelerated instruction alone, together with an additional $3,000 for “preschool and full-day kindergarten, qualified and adequately

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291. \textit{Id.} at 267–68. Noting,
One of the greatest challenges is how best to induce a productive use of resources in large urban districts serving disproportionate numbers of disadvantaged students. The productivity problems in these areas differ in some significant ways from those of suburban areas, and there appear to be no easy or simple solutions . . . . Social science research currently provides few definitive answers about how to improve educational outcomes for these children.

\textit{Id.}


293. \textit{See id.} at 97. Noting,
[The] effort to raise spending in low-spending districts often requires higher state taxes or redistribution of locally raised revenues from wealthier to less-wealthy districts, both of which are highly unpopular among those whose tax burdens would rise or who would see their tax dollars go to educate children in another jurisdiction. Some of this opposition is individual and personal; some stems from more general antitax and antigovernment sentiments. Demographics also play a role. Racial cleavages sometimes come into play, as voters see minorities (especially those dwelling in cities) as primary beneficiaries of reform.

\textit{Id.}
trained teachers, social and family services, and building maintenance and construction," for a total of $10,000 per child.\textsuperscript{294}

Even states like Connecticut, that have long driven extra dollars to poor and low-performing school districts under progressive, per-child formulas,\textsuperscript{295} or North Carolina, which has created supplemental funds both for low-wealth school districts and for small districts, seem unlikely to agree voluntarily to provide the level of additional resources that may be required.\textsuperscript{296} Moreover, Professor James Ryan has cautioned that racial dynamics distort the electoral choices on school finance, and that it is precisely those school finance reform campaigns that appear primarily of benefit to African-American and Hispanic children that have, in fact, either succeeded less often in court or, if judicially successful, have experienced significantly greater difficulty in commanding legislative enforcement.\textsuperscript{297} Professor Ryan concludes that "the racial makeup of school districts will continue to affect decisions regarding school funding."\textsuperscript{298}

Of course, resource disparities in North Carolina, and the South more generally, are not presently identical to those that characterize the underfunded, heavily minority urban school districts of the northeast and Middle West, as I have noted earlier. North Carolina's districts tend to be larger and more racially heterogeneous. Although the five low-wealth school districts that joined as successful plaintiffs in \textit{Leandro} are disproportionately African-American, Hispanic, and

\textsuperscript{294} Clune, \textit{supra} note 286, at 359 (citing those figures, but acknowledging other research has suggested that amounts varying from $2,000 to $5,000 per at-risk child, above regular spending, may be sufficient).

\textsuperscript{295} See \textit{CONN. GEN. STAT. ANN. §§ 10-262c–262h (West 1986 & 1993 Supp.)} (§ 262c–d repealed 1988) (§ 262e repealed 1988) (§ 262g repealed 1998) (setting forth a state funding formula that considered not only relative district wealth, but also student educational needs, allowing an extra .25 (beyond a 1.0 for each child) if a child came to school from a poverty-level family and an additional .25 for each child with a performance on statewide achievement tests below a "remedial level").

\textsuperscript{296} See discussion at \textit{supra} note 28.

\textsuperscript{297} Ryan, \textit{supra} note 23, at 433 (contending that minority school districts do not fare as well as white districts in school finance litigation and that "where minority districts have successfully challenged school finance schemes, they have encountered legislative recalcitrance that exceeds, in both intensity and duration, the legislative resistance that successful white districts have faced"); see also Douglas S. Reed, \textit{Twenty-Five Years After Rodriguez: School Finance Litigation and the Impact of the New Judicial Federalism}, 32 \textit{LAW & SOC'Y REV.} 175, 209–10 (1998) (reporting results from a survey indicating that white citizens in New Jersey believed school finance reform to have been a policy chiefly benefiting African Americans, and tended to oppose its implementation); Kent L. Tedin, \textit{Self-Interest, Symbolic Values, and the Financial Equalization of the Public Schools}, 56 J. \textit{POL.} 628 (1994) (reporting similar results from a survey in Texas).

\textsuperscript{298} Ryan, \textit{supra} note 23, at 480.
Native-American, the six “high-wealth” districts that intervened and also sought additional resources were racially far more typical of North Carolina and atypical of large, central-city districts in other regions.

Yet the struggles within southern state legislatures, and within the South’s larger school districts, are real, and because of the growing racial segregation, pose the danger of becoming increasingly racialized—especially insofar as increasing segregation of North Carolina schools, and gaps in meeting the state and federal accountability goals, begin to frame the need for additional resources in racial terms.

CONCLUSION

Public educators live amid policy controversies as potentially dangerous as late season hurricanes. Yet those who navigate the currents of public education must assess when challenges pose risks too great to run, and take prudent action to minimize or avoid such risks. This Article has contended that the impending racial resegregation of North Carolina’s public schools could combine catastrophically with the school accountability movement (especially as it undertakes the new federal requirements imposed by the No Child Left Behind Act) to accelerate the intradistrict flight of white and middle-class parents from schools that may become racially and economically isolated, avoided by better teachers and administrators, and by well-informed, economically advantaged parents.

It seems all but inevitable that if North Carolina’s public schools do substantially resegregate, many of its majority black and Hispanic

299. The five are Cumberland (42.1% white, 49% African-American, 5.5% Hispanic, 1.6% Asian, and 1.7% Native-American); Halifax (5.8% white, 88.5% African-American, 0.5% Hispanic, 0.05% Asian, and 5.3% Native-American); Hoke (29.8% white, 49.2% African-American, 5.4% Hispanic, 1.2% Asian, and 14.4% Native-American); Robeson (21.3% white, 31.7% African-American, 3.6% Hispanic, 0.3% Asian, and 43.1% Native-American); and Vance (29.3% white, 65.3% African-American, 4.7% Hispanic, 0.5% Asian, and 0.1% Native-American). Leandro v. State, 346 N.C. 336, 342, 488 S.E.2d 249, 252 (1997); see THE GREEN BOOK, supra note 224, at 26 tbl.2.

300. The six are Asheville (30.9% white, 44.5% African-American, 3.7% Hispanic, 0.6 Asian, and 0.1% Native-American); Buncombe (88.2% white, 7.3% African-American, 2.7% Hispanic, 0.7% Asian, and 0.4% Native-American); Durham (32.9% white, 58.6% African-American, 6.0% Hispanic, 2.3% Asian, and 0.3% Native-American); Forsyth (54.1% white, 37.9% African-American, 6.6% Hispanic, 1% Asian, and 0.3% Native-American); Mecklenburg (46.6% white, 43.1% African-American, 5.5% Hispanic, 4.4% Asian, and 0.5% Native-American); and Wake (62.9% white, 28.3% African-American, 4.6% Hispanic, 3.9% Asian, and 0.4% Native-American). THE GREEN BOOK, supra note 224, at 26 tbl.2.
schools will become perennially “low-performing,” that their students’ race and poverty status will become further viewed, both by those students and by their white peers, as predictive of school failure, and that that huge percentages of students in these majority black, Hispanic, and Native-American schools will either be retained in grade or passed along, leading to a spiraling downward cycle of school difficulties and demoralization.

The most obvious shelter from these dire consequences lies in a reversal of the Fourth Circuit’s pernicious and misguided jurisprudence, which would allow well-intentioned school boards forthrightly to continue the school assignment policies of the past thirty years that, despite their many deficiencies, have brought such measurable progress to the South and its children of all races. Reversal of those decisions, however, will come only with a change in the court’s composition, which seems highly unlikely in the near future, or from the Supreme Court, a prospect not inconceivable, but by no means a certainty. For educational policymakers and lawyers outside the Fourth Circuit, however, a concerted legal effort to quarantine this socially destructive doctrine should be an immediate legal priority.

Within North Carolina and the Fourth Circuit, the model of school assignment that Wake County has chosen to pursue would, if adhered to over time, avoid much of the educational damage which this Article has forecast, because it would actively resist the demographic trends toward high-poverty and low-performing schools that incite the sorting behavior by white and middle-class parents that can send a school’s demography spiraling toward long-term failure. Yet the capacity of the Wake school board to sustain broad public support for these enlightened policies will be seriously tested in the coming few years, and other school districts may not find leaders with foresight to follow Wake’s lead. Controlled-choice plans, such as those adopted by the Winston-Salem/Forsyth and Charlotte school systems, by contrast—however attractive to their district’s white political majorities—have already demonstrated their strong tendency toward irrecoverable levels of racial polarization.

The judicial commitment exhibited in Leandro/Hoke County to meet the educational needs of every child is salutary (although it has been rejected as a paradigm by other southern states such as Alabama, Florida, and Georgia), and perhaps it will diminish the worst features of the developing system. Yet it is being challenged vigorously by the State on appeal, and even if the North Carolina Supreme Court affirms these decisions, they must await the active
cooperation of the legislative and executive branches. Even if that cooperation flows freely, moreover, the evidentiary weight of scores of careful and unbiased studies—from James Coleman's work in the mid-1960s to the present—teaches that no discrete quantum of resources, separately delivered to racially and economically isolated public schools, can easily restore the cumulative educational injuries worked by their isolation. It was just such an insight that Chief Justice Earl Warren brought to the nation in Brown. Fifty years later, it is a lesson not only southerners, but all Americans, need to relearn, for the sake of our children and our democratic future.