Choosing Equal Educational Opportunity: School Reform, Law, and Public Policy

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Former President Clinton’s much sought after legacy in American education policy is likely one he neither desires nor expects. Clinton’s legacy flows from a revealing, private gesture: the former President and First Lady’s (and now Senator) decision to educate their only child in a private school. In terms of influencing education policy, the First Family’s private action overshadows eight years of the Clinton Administration’s public legislative activity.

The Clintons’ decision to eschew public for private schools for their only child reflects Americans’ growing unease over the performance of public schools. This unease was not lost on either former Vice President Gore or President Bush during their respective campaigns. As presidential candidates, both Gore and Bush pledged to make education reform a centerpiece of their domestic policy agenda.

On another level, the Clintons’ decision concerning the education of their child marks a far deeper issue. The juxtaposition of the Clintons’ private decision to send their child to a private school and then-President Clinton’s public opposition to school choice legislation drew additional attention to school choice as a policy issue. Reaction to the uncomfortable contrast between the former First Family’s private and public positions on school choice evidences a growing notion that, at least in the education sector, the public puts stock not only in politicians’ rhetoric, but also in their actions. The proposition that public figures can espouse policy prescriptions for the purported benefit

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1 Schools, in this context, refer to public elementary and secondary education. Warranted or not, many feel that the nation’s higher education system—the rightful envy of the world—deserves far less attention from policymakers.

of the citizenry yet make contrary decisions for their personal lives appears to be wearing thin.

Law and School Reform: Six Strategies for Promoting Educational Equity and School Choice and Social Controversy: Politics, Policy, and Law are best understood against the backdrop of the public's growing dissatisfaction with the nation's schools, particularly many urban public schools. Law and School Reform presents six "law-driven" reform strategies designed to increase educational equity. These strategies cover a significant swath of policy terrain, from school finance to special education. In contrast, School Choice and Social Controversy considers a single education reform policy—school choice—and assesses both its strengths and weaknesses from multiple legal and policy perspectives. On balance, both books advance our understanding of the intersection of law and education policy. Moreover, they achieve the more modest goal of emphasizing educational opportunity's increasing import and advancing our understanding of the law's role in promoting it. Greater scholarly attention to the intersections of law and equal educational opportunity doctrine is warranted, particularly as our understanding of legal institutions' comparative strengths and weaknesses increases. Those seeking to deploy law in an effort to achieve education policy goals will benefit from a greater understanding of how law and policy interact.

Although Law and School Reform reflects an understanding that traditional forms of law-driven education reforms need to adapt to a dynamic policy milieu, it overestimates the law's reach in this context, especially in the desegregation and school finance areas. School Choice and Social Controversy understands that a structural assault on the education status quo is almost assuredly a necessary condition for the generation of much needed and desired education reform. That neither book develops a thesis that can independently achieve the elusive goal of educational equity is more a function of such a project's immense complexity than an indictment of either book. The books' lack of focus on any single policy prescription makes the prospects for immediate school improvement seem bleak.

I. TRENDS IN EDUCATIONAL OPPORTUNITY

Both books (Law and School Reform directly, School Choice and Social Controversy indirectly) reflect a scholarly approach toward the nation's longstanding ideal of equal educational opportunity. It is an ideal that resonates deeply in many facets of American life. Most people take seriously assertions that the promise of educational opportunity remains unequally distributed throughout society. Many scholarly treatments of the equal educational opportunity doctrine approach the subject from the perspective of student achievement and express
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growing concerns about American student performance levels. Many of the books' contributors share these concerns.

A paucity of data hamstrings efforts to assess American student achievement in a comprehensive manner. The National Assessment of Educational Progress ("NAEP") is the only major test specifically designed to monitor achievement trends among nationally representative samples of American students in crucial academic subjects. Since its inception in 1969, NAEP has monitored the nation's nine-, thirteen-, and seventeen-year-olds' scholastic achievement in science, mathematics, reading, and writing. On balance, NAEP trends are not encouraging. Science proficiency declined significantly for seventeen-year-olds from 1969 to 1990. However, the same proficiency levels improved significantly during the 1980s (but not enough to return to 1970 levels). Another often-cited barometer of student achievement, SAT scores, conveys a similar message. Between 1963 and 1980, the average verbal SAT score declined more than fifty points and the average math score dropped almost forty points.

Recently released international performance data cast additional somber light onto American student performance. The Third International Mathematics and Science Study ("TIMSS") is a leading source of comparative international student performance data. The 1999 data reveal that America's fourth graders perform above the international average in science and at the international average in math. American eighth graders' performance in math and science falls below the international averages. By grade twelve, American students lag even further behind students in a growing number of countries.

More potentially devastating is the implication, gleaned from the TIMSS data, that the longer American students are exposed to schooling, the further they fall behind their foreign counterparts in core aca-

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5 Id at 3.
6 Id.
7 The Scholastic Aptitude Test's ("SAT") shortcomings as a proxy for student achievement are the subject of a separate, vigorous debate. For a general discussion, see David W. Grissmer, et al, Student Achievement and the Changing American Family: An Executive Summary 20–22 (Inst on Educ & Training 1994); Charles Murray and Richard J. Herrnstein, What's Really Behind the SAT-Score Decline?, 106 Pub Interest 32,32–36 (1992).
8 National Commission on Excellence in Education, A Nation at Risk: The Imperative for Educational Reform 8–9 (GPO 1983) (examining the quality of education in the United States and offering practical recommendations for reform and improvement).
9 Diane Jean Schemo, 8th Graders See Success Fall Off from 4th Grade, NY Times A1, A18 (Dec 6, 2000).
The 1999 TIMSS data follow an earlier TIMSS assessment conducted four years earlier in 1995. Comparing the performance of American fourth graders in 1995 with the performance of those same students four years later (as eighth graders) reveals a relative degradation in math and science performance. Former U.S. Education Secretary Richard W. Riley advanced a more optimistic interpretation of these data when he opined: "American children continue to learn, but their peers in other countries are learning at a higher rate."

However one interprets these data for the nation on the whole, markedly few serious scholars dissent from the proposition that many American urban public schools confront substantial challenges in their efforts to serve their students, many of whom are members of minority groups or come from low-income households or both. Some commentators describe the state of urban public education as in near collapse: "[d]ropout rates hover well above 50 percent, truancy is the norm rather than the exception, violence is common, students struggle for basic literacy, often without success, a great deal of teaching is uninspired, and the physical condition of the schools is a disgrace."

Nagging gaps between minority and nonminority student achievement persist. For example, average reading scores for African-American high school seniors lag behind the average reading scores of their white counterparts by approximately four years. In science achievement, the gap exceeds five years.

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10 Louis V. Gerstner, Jr. and Tommy G. Thompson, The Problem Isn’t the Kids, NY Times A31 (Dec 8, 2000) (noting that "[e]very day our public schools are open, the gulf between our children and the world’s top performers grows wider").
11 Schemo, 8th Graders See Success Fall Off, NY Times at A1 (cited in note 9).
12 Id.
13 In 1988, forty-seven of the nation’s largest urban public school systems enrolled more than 37 percent of the nation’s African-American children and more than 31 percent of the nation’s Hispanic school children. See Council of the Great City Schools, National Urban Education Goals: Baseline Indicators, 1990–91, figs 9 and 13 (1992); Nathan Glazer, The Real World of Urban Education, 106 Pub Interest 57, 58 (1992) (noting that “urban schools are for the most part segregated, with black and Hispanic students making up almost all or most of the students in many such schools”).
15 See, for example, Ravitch, National Standards in American Education at 72 (cited in note 3) (noting the narrowing but still significant gaps in academic achievement between white and Asian students and disadvantaged minority students, and providing empirical evidence). See also Chubb and Moe, Effective Schools at 161–83 (cited in note 3) (using empirical evidence to show that a new approach is needed to reform the effectiveness of urban public schools).
16 Stephen Thernstrom and Abigail Thernstrom, America in Black and White: One Nation Indivisible 19 (Simon & Schuster 1997).
17 Id.
However, some scholars, such as Jeffrey R. Henig, paint a more optimistic—if guarded—picture by noting that the overall deterioration of achievement in the early 1980s was followed by signs of leveling off and, in some places, reversal. Of course, even if the performance of American students has remained flat over time in absolute terms, it has fallen in relative terms due to the improved performances of many foreign students. Moreover, the levels of achievement and skill mastery that might have supported a reasonable standard of living as recently as a generation ago no longer appear adequate in today’s economy.

These somber student achievement levels persist despite the nation’s robust financial investment in education. The U.S. Department of Education estimates per pupil spending for the 1998–99 school year at $6,915. In inflation-adjusted dollars, per pupil spending in the United States has increased in almost every year since 1919. America’s investment in education compares well internationally. Among the twenty countries reporting in the TIMSS study, only three outspent the United States in high school per pupil spending in 1995. Of course, as contributors to both books make clear, macro-level education spending data mask substantial variation in per pupil spending in the United States (see, for example, Heubert, ed, pp 88–159; Sugarman and Kemerer, eds, pp 111–39). Thus, it is entirely possible that while the per pupil spending means at the national or state levels might be acceptable, in certain instances students at the lower end of the distribution curve might not receive enough resources.

Enduring concerns with America’s schools and stagnant student performance fuel a steady stream of reform measures. The release in 1983 of the Nation At Risk report prompted the current cycle of education reform. During the almost two decades since the report’s publication, the education reform landscape has changed. What have not markedly changed are student achievement trends. Commentators continue to remark that American students’ “unimpressive SAT scores, flat performance on the National Assessment of Educational

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21 Id.
22 Id at 470, table 418 (The three countries are: Luxembourg, Iceland, and Switzerland.).
23 National Commission on Excellence in Education, A Nation At Risk (cited in note 8).
Progress, and continuing lackluster results in comparisons with other nations' have become an even greater concern.\textsuperscript{24} Although broad generalizations endeavoring to capture the condition of American schools are admittedly elusive and vigorous rhetoric engulfs extremes on both sides of the debate, an almost mournful consensus has formed that: (1) The overall quality of American schools has not changed much during the past two decades despite numerous reform efforts;\textsuperscript{25} (2) American students' academic performance remains unsatisfactory and fares increasingly poorly in comparison to their foreign counterparts;\textsuperscript{26} (3) For whatever reason (or combination of many reasons) independent and parochial schools are somewhat more successful than public schools in delivering education services and generally do so for less cost;\textsuperscript{27} and (4) While education quality is reasonably good in many affluent suburbs, public schools in most urban centers remain "shamefully deficient."\textsuperscript{28}

II. SEND IN THE LAWYERS

What to do about challenges to increasing equal educational opportunity and problems with student and school performance is one of the leading policy challenges that confronts American society today. Law and School Reform seeks to identify and explicate "law-based" or "law-driven" education reform strategies that expand lawyers' and legal institutions' roles in an effort to advance equal educational opportunity (Heubert, ed, pp 3–5). The book's orientation—namely, exploring the peculiar role of lawyers and law-driven reforms—is both a strength and a weakness. Such an orientation makes obvious good sense, especially after one looks backward and assesses the influence of law on education reform and in securing some level of equity. After all, we can take rightful pride in the monumental increase in educational equity secured by past legal efforts. The Brown v Board of Education\textsuperscript{29} decision is only one obvious jewel in an impressive crown.

\textsuperscript{24} Howard Gardner, Paroxysms of Choice, NY Rev of Books 44 (Oct 19, 2000).
\textsuperscript{25} For a general discussion, see Sam Peltzman, The Political Economy of the Decline of American Public Education, 36 J L & Econ 331 (1993) (finding a plausible relation between school performance and the state's political economy, specifically analyzing the growth of teacher organizations, shift of financial responsibility to state government, and changes in a state's industrial structure).
\textsuperscript{26} See, for example, Hanushek, et al, Making Schools Work at 39–45 (cited in note 19).
\textsuperscript{27} Gardner, Paroxysms of Choice, NY Rev of Books at 44 (cited in note 24).
\textsuperscript{28} Id. See also Diane Ravitch and Joseph P Viteritti, Introduction, in Diane Ravitch and Joseph P Viteritti, eds, New Schools for a New Century: The Redesign of Urban Education 1, 1–16 (Yale 1997); Council of the Great City Schools, National Urban Education Goals at 13–71 (cited in note 13). For a general discussion, see Kozol, Savage Inequalities (cited in note 14).
\textsuperscript{29} 347 US 483 (1954).
A. Limits to Law

However, Heubert's focus on law-driven reforms is not without important limitations. One is that it locks itself into the world of law, lawyers, and legal institutions. This is regrettable because the nature of equal educational opportunity is multi-faceted and continues to evolve. Law-driven reforms may have possessed a comparative advantage in past tasks, particularly in securing basic universal education for all children of all races, abilities, and backgrounds. Whether law or legal institutions retain any comparative advantage over nonlegal strategies in current educational policy issues is increasingly unclear.

Achieving the larger goal of increasing educational equity now resides beyond the exclusive domain of law, lawyers, and legal institutions. To be fair, many of the contributors emphasize the need for lawyers to broaden their base and integrate more fully with the larger, nonlegal world that bears on education policy (see, for example, Heubert, ed, p 281). This is certainly good advice. That said, the starting point for all six law-driven reforms remains the law. And it is this starting point that hamstrings the book.

Perhaps any policy reforms relying exclusively or even extensively on lawyers are a risky strategy in today's political climate. To say that society's collective general view of lawyers and the legal profession is dim understates today's views. Leading law professors (and law school deans) warn that lawyers have lost their way. Moreover, educators' sentiments about "the growing involvement of lawyers in America's public schools in the past half century" (Heubert, ed, p vii) are decidedly mixed. Professor Edley bluntly predicted that "[e]ducators and the public in general may recoil at the proposition that lawyers might be centrally involved in shaping the response to the education crisis." Law-based reforms' inherent coercive quality—a quality not found in many non-law-based reforms—explains some of the probability for recoil.

To be sure, lawyers will certainly continue to occupy a prominent seat at most education reform tables. And this will continue whether educators like it or not and regardless of the public's opinion of law-

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yers. Less certain is the proposition that law-driven reforms will improve schools. Solutions to many problems that confront American schools today require more than technical legal tinkering. Heubert is clearly mindful of this point when he notes that many believe the government is no longer a viable source of solutions to many social problems—such as those confronting schools—where others consider government itself to be the problem or, at the very least, part of it (Heubert, ed, p 4).

Professor Howe identifies a critical point when he remarks that in the past fifty years "barriers to equal educational opportunity had their source in law" (Heubert, ed, p vii). While this is an accurate assessment of the past, it is no longer true. Today, barriers to equal educational opportunity are far more nuanced and complex. Their many sources may still include the law, but they also include an array of nonlegal sources as well. A brief discussion of chapters in Law and School Reform dealing with school desegregation and finance illustrates this point.

B. School Desegregation

The challenge Professor Orfield addresses (Heubert, ed, pp 39–87) involves increased racial isolation in public schools. Orfield proposes as a solution "[a] better process with a larger role for lawyers representing minority students and more care by the courts" (Heubert, ed, p 41). At one level, this approach makes sense as the law clearly exerts some influence on public schools' racial composition (Heubert, ed, pp 42–45). The Supreme Court's 1974 Milliken v Bradley decision (a decision that predictably troubles Orfield) substantially limits the scope of federal courts' reach into student assignment policies between and among school districts. However, within the parameters established by Milliken and more than forty years after the Brown decision, many school districts continue to operate under court-supervised desegregation orders that seek to reduce racial isolation by regulating student assignments.

Of course, numerous nonlegal factors influence racial isolation levels in schools, and Orfield's solution does not adequately account for them. Such variables include housing, migration, and demographic patterns along with the political changes Orfield discusses (Heubert, ed, p 40). Orfield also fails to consider how desegregation efforts themselves trigger white flight and thereby exacerbate racial isola-

33 418 US 717 (1974) (holding that a metropolitan-wide remedy for a single district's racially discriminatory acts was unconstitutional).


35 Id at 172 fig 4.3, 176–80 (summarizing studies of the relationship between white flight
tion in schools. Paradoxically, on this point Professor Orfield might be a victim of his earlier success in extracting detailed school desegregation orders from courts.

Even if Orfield’s proposal sufficiently addressed the full breadth of the complicated school desegregation puzzle, as a reform policy it amounts to a call for an improved version of the status quo: lawyers and lawsuits. To the extent that existing school desegregation strategies have failed meaningfully to reduce racial isolation in American public schools, it is difficult to conceive how Orfield’s proposal for more and better lawyering will be more effective. If Orfield is correct in contending that better litigation efforts will improve integration levels, history shows that such improvement will be confined to the margins, at best.

School desegregation plans’ growing inefficacy might help explain Professor Orfield’s anger at current school desegregation trends. One principal object of Orfield’s frustration includes Article III judges (specifically, Reagan and Bush appointed judges) with whom he disagrees about what the Constitution commands in the school desegregation context (Heubert, ed, pp 49–56). Having participated in a multi-decade judicial project designed to inject federal courts into hundreds of public school systems nationwide, it is jarring to see Professor Orfield now rail so sharply against judicial activity in these matters. While Orfield’s steady drumbeat for ongoing federal judicial involvement in integrating public schools has remained constant over the decades, constitutional doctrine and social science have evolved. The tide has turned against Orfield. Old strategies—even repackaged and refined ones—are unlikely to work in this new context.

C. School Finance

Professor McUsic’s treatment of school finance (Heubert, ed, pp 88–159) also illustrates the potential limits of law and law-driven reforms in enhancing educational equity. According to McUsic, since a legal structure created and preserved by lawyers creates educational “inequities,” it seems “fitting that lawyers should play a role in its remedy” (Heubert, ed, p 89). (Of course, the opposite conclusion is equally plausible.) The specific inequities that McUsic has in mind pivot on the sometimes tremendous variations in financial resources supporting individual schoolchildren. These variations reflect the nature of the fundamental engine of elementary and secondary school finance in this country—local property taxes (Heubert, ed, pp 98–99). Per pupil education spending levels vary because property tax bases
vary. Property tax bases vary because property values vary. Aside from more radical assaults on school finance regimes\(^{36}\) there is little that law or lawyers can do to change it. McUsic places considerable weight on the transition from equity to adequacy in school finance litigation theory to overcome existing distributional challenges (Heubert, ed, pp 91–92).

Even if one accepts McUsic's (entirely plausible) characterization of the issues, a critical question remains: Why default to courts and lawyers? In terms of school funding, McUsic correctly notes that schoolchildren from low-income households typically do not fare as well as their more affluent counterparts. Low-income families' unsatisfactory efforts to obtain increased educational resources from legislative and executive sources fuel frustration and a search for alternative avenues. Hence, following the well-trodden path made by civil rights leaders before them, beginning in the 1970s school finance activists turned to the courts.

Victories for school finance activists—at least in terms of securing favorable judgments—soon followed. As McUsic notes, plaintiffs have prevailed in about one-half of all cases (Heubert, ed, p 105). However, even successful lawsuits have not been uniformly kind to plaintiffs, thereby signaling the possibility of institutional limits. Many governors and state lawmakers do not appreciate the perceived (or real) "end-run" around the legislative process to the courthouse in an effort to garner increased educational resources. Resistance to judicially mandated or initiated school finance reform, both formal and informal, hinders many successful lawsuits that rely on legislators and governors for implementation at the remedial stage.

Given the substantial money and time already devoted to school finance litigation,\(^{37}\) it is logical to ask what these lawsuits have accomplished. It would be helpful to know whether and, if so, how and to what degree successful school finance litigation has influenced school finance in ways desired by litigants. Such a complex question is not easily answered and efforts to do so empirically are especially difficult.\(^{38}\) School funding is a complicated process, influenced by numerous variables that often interact in unanticipated ways. Empirical evidence on the efficacy of court decisions to influence education spend-


ing is mixed, at best, and some suggests that courts may have overestimated their comparative institutional strength in this context. 39

In addition to the courts' potential institutional limits, social science might also limit the ability of school finance litigation to increase educational equity. Even if courts could, by the mere wave of the judicial hand, reduce education spending inequity or increase adequacy, such an effort relies on relations among education spending, quality, and outcomes. As McUsic knows (Heubert, ed, p 107 n 109), these assumed relations are far from certain and bump into a long-standing debate that endures both inside and out of the social science community. 40

D. (New and Improved) More of the Same

Two general points emerge from Law and School Reform. It is a given that lawyers and law-driven reform will continue to play an important role in American schools. It is also likely that lawyers' nonlitigation roles will become increasingly important. Thus, it follows that lawyers involved with education reform efforts would be better served by greater (non-law) substantive expertise as well as nonlitigation skills. On this first point the contributors' collective effort to advocate for a "new legalization" succeeds.

However, a second point is that it remains unclear how the six law-driven reforms described in Law and School Reform will succeed in generating increased educational equity, at least at any meaningful level. Although Heubert characterizes the strategies as "new legalization," legalization remains at their core. The power relations and hierarchies remain largely intact. Although the mode of discourse and ne-

gotiations might change, the six law-driven strategies still default to the traditional legal tools of the past—lawyers, lawsuits, and courts.

Although important, these law-driven reforms constitute only one piece of a decidedly larger, highly complex puzzle. While some of the contributors' proposals are more radical than others, the thrust of the proposals—and the law-driven reform measures discussed—avoids more fundamental questions bearing on the production and delivery of educational services. Given the enormity and consequences of the task at hand and the stakes involved (both at the individual and social levels), whether a more ambitious reform posture is warranted is a close question.

It is true that future education lawyers will need to approach their roles with a broader array of skills and with a more collegial and less litigious orientation. That said, a belief that legal activity alone will generate increased educational equity reflects more optimism than existing evidence can support. Equal educational opportunity has evolved in ways that go beyond the exclusive reach of law-driven policy reforms. Policymakers can easily take from this book the impression that more funding and more able lawyers pushing a few more lawsuits are all that we really need to fix our schools. Such an impression will generate more harm than good to the extent that it diverts policymakers' efforts from other nonlegal pieces of the educational equity puzzle.

III. CHOOSEING EQUITY

While *Law and School Reform* largely ignores school choice as a law-driven reform strategy, *School Choice and Social Controversy* considers *only* school choice policies. Such a focus is warranted. As the editors note in their introduction, giving parents the right to choose their children's schools is an "increasingly popular idea, both in practice and in popular opinion" (Sugarman and Kemerer, eds, p 1). At the scholarly level, serious discussions about education policy can no longer ignore the choice dimension, however odious it might be to many liberals and members of the education establishment.\(^{41}\) Moreover, that a growing chorus of education professionals, among those least likely to favor school choice policies, now acknowledge (however grudgingly) the relevance of school choice in today's education reform discourse\(^{42}\) further demonstrates how deeply school choice has penetrated as a policy issue.

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\(^{41}\) Cookson, *School Choice* at 1 (cited in note 14) ("By the late 1980s, however, school choice had become the hottest educational reform idea on the policy horizon.").

\(^{42}\) See, for example, Arthur Levine, *Why I'm Reluctantly Backing Vouchers*, Wall St J A28 (June 15, 1998) (proposing a limited voucher program for those attending the bottom 10 percent
A. Choice Landscape

Four factors contributed to the development of an intellectual and political foundation upon which many school choice policy discussions rest. The first was the 1962 publication of Nobel Prize-winning economist Milton Friedman's work in which he advanced the idea that parental choice and market mechanisms are better able to generate personal and social good than government regulation in the education context. The second was the publication of another book, Politics, Markets, and America's Schools, by Professors John E. Chubb and Terry M. Moe. Building on the work of Professor Coleman and others, Chubb and Moe sought an empirical account of the differences in private and public school performances. They argued that political and market controls operate differently in the education context and these differences help explain private schools' comparative advantages over their public counterparts. Third, traditional liberals, including some prominent members of the education establishment, began publicly to embrace school choice policies, including the use of publicly funded education vouchers. Arthur Levine, President of Columbia University Teachers College, one of the nation's leading education schools, wrote:

Throughout my career, I have been an opponent of school voucher programs. . . . However, after much soul-searching, I have reluctantly concluded that a limited school voucher program is now essential for the poorest Americans attending the worst public schools.
Today, to force children into inadequate schools is to deny them any chance for success. To do so simply on the basis of their parents' income is a sin."

A fourth factor is the growth of privately funded voucher programs, particularly since the 1990s. In addition to drawing further attention to voucher programs as a policy option, they began to address the intellectual debate surrounding vouchers, which includes sometimes heated and conflicting claims about how voucher programs would work if implemented. Numerous empirical questions exist about the effects of voucher programs on students and schools because of the virtual absence of large-scale voucher program experimentation.

School Choice and Social Controversy contributes to this growing scholarly foundation. The editors define school choice policies broadly and organize their treatment of them in a manner that coheres. One set of chapters describes the array of school choice policies in practice as well as emerging empirical research. A second set of chapters assesses many of the policy implications posed by school choice programs on other education institutions, public and private. The final chapters consider some of the traditional legal and constitutional disputes that inevitably follow from both publicly and privately funded school choice programs.

By most measures, this book achieves its goal of dispassionately analyzing the legal and policy aspects of school choice (Sugarman and Kemerer, eds, p 1). More importantly, the editors strike a helpful balance between scope of coverage and topical depth. Finally, the authors' presentation of numerous key secondary and tertiary legal and policy issues is a distinctive feature. These issues include the interactions of choice policies and teacher unions (Sugarman and Kemerer, eds, pp 300-31), the state action doctrine (Sugarman and Kemerer, eds, pp 215-34), and accountability (Sugarman and Kemerer, eds, pp 174-211). One minor quibble is that some of the chapters appear to recycle or update previously published work. Aside from any recycling, School Choice and Social Controversy remains a leading synthesis of law and policy on the school choice issue.

Professors Henig and Sugarman describe today's existing education choice landscape. They estimate that nearly 60 percent of all American schoolchildren attend "schools of choice" (Sugarman and Kemerer, eds, p 29, table 1-1). This figure defines the choice policies in a way that captures the mostly middle- and upper-income families

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49 Levine, Why I'm Reluctantly Backing Vouchers, Wall St J at A28 (cited in note 42).
who exercise education choice through their decisions on where to live, charter schools, home schooling, and private schools.

The authors are justifiably nervous about the accuracy of their estimate of the number of households that considered public schools when deciding where to live (Sugarman and Kemerer, eds, pp 14–17). Setting aside questions about accuracy, the authors correctly identify housing decisions as a critical piece of the school choice puzzle. That residential real estate agents are frequently among the better informed about public school quality and reputation evidences this point. Collapsing the various forms of education choice exercised today illustrates that while many policy and legal aspects of school choice are not well understood, school choice as a policy is already extensive in American education. However, the benefits of existing choice policies fall mainly to middle- and upper-income families.

B. Choice and Consequences

School choice opponents frequently assert that large-scale school choice policies will destroy public education (Sugarman and Kemerer, eds, p 1) and exacerbate differences between the educational “haves and have nots.” In contrast, proponents argue that school choice policies will improve educational quality for many students (Sugarman and Kemerer, eds, p 1), especially for those most in need. This sentiment is frequently distilled to a testable empirical proposition: that school choice policies will independently improve student achievement. Such real world consequences of large-scale publicly funded school choice programs are among the most hotly debated aspects of the current policy debate.

In his chapter summarizing empirical findings on the efficacy of school choice policies (Sugarman and Kemerer, eds, pp 68–107), Henig acknowledges the searing debate over whether private schools (or public schools of choice) increase how much students learn. While most bitter academic disputes over technical research issues such as sampling bias, control groups, and regression equations typically are waged in academic journals, disputes about school choice research on these matters have spilled into the mainstream press. Indeed, given

For a general discussion, see Rasell and Rothstein, eds, School Choice (cited in note 47).

See, for example, John E. Chubb and Terry M. Moe, America’s Public Schools: Choice Is a Panacea, 8 Brookings Rev 4 (Summer 1990). In the interest of full disclosure I am among those who have endorsed school choice policies as one way to improve education for students assigned to failing public schools. See Michael Heise, Equal Educational Opportunity and Constitutional Theory: Preliminary Thoughts on the Role of School Choice and the Autonomy Principle, 14 J L & Pol 411 (1998).

See, for example, Bob Davis, Class Warfare: Dueling Professors Have Milwaukee Dazed over School Vouchers, Wall St J A1 (Oct 11, 1996).
some of the debate's shrillness, Henig notes with dismay the possibility that high quality empirical research might not play an important role in policy formation (Sugarman and Kemerer, eds, p 98).

Prior to the 1990s, debates about the possible efficacy of school choice policies were limited by a paucity of systematic data. A small and largely failed pilot experiment in Alum Rock, California, during the 1970s generated an early data set for policymakers. An array of magnet and charter schools emerged during the 1970s and 1980s, respectively, which generated additional data germane to school choice research questions. In the 1990s, privately and publicly funded voucher programs were launched across the country in such cities as Indianapolis, Milwaukee, Cleveland, San Antonio, Washington, D.C., and New York City. Although many of the private programs' details vary, most share three key attributes: all are privately funded (thereby avoiding the litigation that encumbers their publicly funded counterparts); all target students from low-income households, most of whom live in urban areas; and all provide partial vouchers that the family is expected to supplement from outside sources. In addition, evaluations of the newer programs involve only students who had previously attended public schools, thereby further controlling for possible sample bias.

With more school choice experimentation came the opportunity to collect additional data. School choice programs' many structural similarities permit meaningful comparisons of results from different programs. Over the years, school choice programs have been designed in a manner sensitive to the needs of researchers. Lotteries frequently determine access to choice programs for eligible families (typically limited to low-income families). In many instances researchers are able to collect crucial baseline data on student test scores and family and school background characteristics. Another aspect critical to the design of research efforts evaluating the outcomes of school choice policies is that the demand by eligible families for school vouchers ex-

54 For a summary of the privately funded voucher programs see Terry M. Moe, ed, Private Vouchers (Hoover 1995). For a description of many publicly funded voucher programs see Paul E. Peterson and Bryan C. Hassel, eds, Learning From School Choice Part IV (Brookings 1998) (containing discussions on various school voucher programs in San Antonio, Indianapolis, Milwaukee, and Cleveland).
55 Such programs include: School Choice Scholarships Foundation (New York City), Parents Advancing Choice in Education (Dayton, OH), and Washington Scholarship Fund (Washington, D.C.).
ceeds their supply in most pilot programs. Students from families who applied for but did not receive a voucher and remained in public schools serve as a quasi-control group and are compared with students who received vouchers, departed public schools, and enrolled in private schools. Indeed, so designed, many recently developed voucher programs generate as close to a natural experiment that one is likely to find in the social sciences.

Henig's synthesis of the research literature on the outcomes of school choice policies (Sugarman and Kemerer, eds, pp 68–107) reveals support for two broad—albeit tentative—findings. On the key question of whether some level of academic improvement can be statistically attributable to the child's move from a public to a private school, Henig can only say that existing data are inconclusive (Sugarman and Kemerer, eds, p 95). He suggests that any positive results are typically small and arise only after a student attends a school of choice for a few years (Sugarman and Kemerer, eds, p 95). Interestingly, more recent empirical findings from a study of privately funded voucher programs in New York City, Dayton, Ohio, and Washington, D.C., point to academic achievement gains realized disproportionately by African-American students. The import of this finding is difficult to overemphasize as it bears squarely on the asserted intersection of school choice and the equal educational opportunity doctrine.

Second, parents participating in school choice programs express more satisfaction with private schools than with the public schools their children previously attended (Sugarman and Kemerer, eds, pp 73–74). Because most (if not all) of the private schools participating in existing voucher pilot programs deliver their educational services at less cost than public schools, net social gains may arise even where student achievement gains are absent (Sugarman and Kemerer, eds, pp 80–81).

C. Race and Choice

Professor Levin approaches her discussion of race with appropriate care (Sugarman and Kemerer, eds, pp 266–99). She deftly addresses one of the more delicate dimensions of school choice: If granted choice, what happens if families choose along racial, ethnic, or religious lines? While acknowledging the complexity of the issues, Levin endorses the common argument that school choice policies would unwind decades of school integration efforts and fuel increased

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57 Howell, et al, *Test-Score Effects of School Vouchers* at 32–33 (cited in note 56) (finding that “[b]lack students who switched from public to private schools in three cities scored after two years, on average, approximately 6.3 percentile points higher on the Iowa Test of Basic Skills than comparable blacks who remained in public school”).


socioeconomic isolation (Sugarman and Kemerer, eds, p 286). She is not alone in her concerns.

Historically, the intersection of school choice and race appears in an unflattering light. As Levin correctly notes, in the middle of the twentieth century, school choice, as an education policy, flourished in the South principally as a tool of white resistance to federal court desegregation efforts (Sugarman and Kemerer, eds, p 267). However, more recent history rehabilitates choice policies' implication for minorities. During the 1980s and 1990s, choice was a policy lever designed to increase racial integration in schools, principally through magnet schools and intradistrict transfer policies. It is deeply ironic that, despite an odious history, school choice policies are now advanced as a way to increase school integration.

Of course, a critique such as Levin's implies that the nation's public schools better resemble the ideal of a cohesive, integrated America. In the main, such an assumption generally fails. All too many urban public schools are racially identifiable. The same holds for rural and, to a lesser extent, suburban schools. Nationwide, a majority of children who attend public schools do so in a racially segregated setting. The same general observation holds for socioeconomic stratification.

Assertions that publicly funded voucher programs will exacerbate student stratification along racial and socioeconomic (reflected, albeit imperfectly, by family income) lines, such as Levin's, may well prove accurate. However, at this point such assertions reflect little more than a guess. Moreover, the guess may prove wrong, as it does not comport with existing data. In an empirical study of racial integration of American high schools, Professor Coleman and his colleagues concluded that "blacks and whites are substantially less segregated in the private sector than in the public sector." This is especially true in urban areas. Although many private schools are more racially integrated than many public schools, private school attendance increases with family income. Of course, this is to be expected given that private schools charge tuition. Interestingly, most of the nation's privately funded educational voucher programs employ a means test for eligi-

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59 Joseph P. Viteritti, Choosing Equality: School Choice, the Constitution, and Civil Society 49 (Brookings 1999).
60 Coleman, Hoffer, and Kilgore, High School Achievement at 34 (cited in note 46).
61 Glazer, 106 Pub Interest at 58 (cited in note 13) ("[U]rban schools are for the most part segregated, with black and Hispanic students making up almost all or most of the students in many such schools.").
Such means testing serves to reduce the economic barrier to entry into the private school market for many low-income families, ensuring that low-income families receive a high percentage (if not all) of the vouchers. The infusion of more students from low-income families into private schools through school choice programs should reduce income stratification.

D. School Choice and Finance: Common Ground

Professor Sugarman’s contribution (Sugarman and Kemerer, eds, pp 111–39) is notable for its illustration of how school choice policies can influence education policies far outside the confines of the traditional choice debate. By explaining how school choice policies can reduce per pupil spending disparities, Sugarman plows conceptual ground that links *Law and School Reform* and *School Choice and Social Controversy*. Sugarman goes so far as to say that school choice may be “understood to be part of a larger movement that has sought to reform the financing of elementary and secondary education” (Sugarman and Kemerer, eds, p 111). While Sugarman’s statement risks overemphasizing the school finance movement and underemphasizing school choice, his point is well taken.

If nothing else, Sugarman’s observation illustrates that various manners are available to lever a single policy change. School finance activists have pursued judicial relief partly to overcome an inability to obtain satisfaction from the legislative and executive branches. After more than three decades of school finance litigation, the results of the effort remain unclear. New Jersey’s multi-decade struggle with school finance illustrates limitations and problems that can encumber a judicial approach. It is intriguing to consider that choice policies might yield increased school funding equity or adequacy by further harnessing market forces and unleashing private preferences into the education system.

Professor Sugarman’s final point is equally interesting and provocative: Publicly funded school vouchers might constitute a plausible legal remedy for children stranded in public schools that courts deem to fall below state constitutional minimums (Sugarman and Kemerer, eds, p 137). Among the array of justifications for school choice policies, few are more compelling than a call to deploy them for families consigned to public schools deemed constitutionally inadequate. Ap-

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63 For a general description of the nation’s major privately funded educational voucher programs, see Moe, ed, *Private Vouchers* (cited in note 54).

64 For a brief description, see Heise, 34 Akron L Rev at 99–101 (cited in note 39).

65 Others have raised this point as well. See, for example, Heise, 14 J L & Polit at 415 (cited in note 51); Greg D. Andres, Comment, *Private School Voucher Remedies in Education Cases*, 62 U Chi L Rev 795 (1995).
proached from this perspective, the school choice and finance movements join. 66

E. Choice and Law

A broad-based education policy involving publicly funded vouchers might remain an abstract idea if the courts conclude that the Constitution’s Establishment Clause forbids religious school participation. (Whether the Free Exercise Clause permits the exclusion of religious schools from a program that includes other private schools is another open question.) Professor Choper (Sugarman and Kemerer, eds, pp 235–65) ably handles the relevant constitutional questions. A resolution by the Supreme Court appears imminent as a split has recently developed between state and federal courts on this question. How the present Court might resolve this split is the subject of building speculation. As Professor Choper notes, the Court’s recent decisions in Zobrest v Catalina Foothills School District 67 and Agostini v Felton 68 fuel choice supporters’ optimism about a favorable ruling.

Lower state and federal court decisions evidence the closeness of the constitutional question. State Supreme Courts in Wisconsin 69 and Ohio 70 have permitted religious schools to participate in publicly funded voucher programs. In contrast, the Sixth Circuit recently concluded that the program, previously approved by the Ohio Supreme Court, violates the U.S. Constitution. 71 The circuit court’s opinion reasoned that the religious schools’ popularity among participating families is an argument against the voucher program’s constitutionality. 72

66 In her chapter on school finance, McUsic recognizes, but ultimately dismisses, this link (Heubert, ed, p 128).

67 509 US 1, 14 (1993) (holding that the Establishment Clause does not prevent a school district from furnishing a handicapped child enrolled in a sectarian school with a sign language interpreter to facilitate his education).

68 521 US 203 (1997). The Court held that:

A federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees under a program containing safeguards such as those [present in New York City’s Title I program].

Id at 234–35.

69 Jackson v Benson, 218 Wis 2d 455, 578 NW2d 602, 632 (1998) (holding that Wisconsin’s statutory school choice program that allowed participation of sectarian schools did not violate the Establishment Clause of the First Amendment or Wisconsin’s public purpose doctrine).

70 Simmons-Harris v Goff, 86 Ohio St 3d 1, 711 NE2d 203, 211 (1999) (holding that Ohio’s school voucher program does not violate the Establishment Clause of the federal Constitution or the Ohio Constitution, except for some selection criteria that gave preference to parents with religious affiliation).

71 Simmons-Harris v Zelman, 234 F3d 945, 961 (6th Cir 2000) (holding that the voucher portion of the Ohio Pilot Scholarship Program violated the Establishment Clause of the First Amendment).

72 Id at 959–60 (noting that the Ohio Pilot Project Scholarship Program provides public fi-
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Under the Ohio program, eligible low-income families may redeem their education vouchers at any school—public or private—located within Cleveland's boundaries. However, no nearby suburban public schools elected to participate in the program. Of the private schools willing to receive voucher-supported students, many were religiously affiliated. Another explanation for religious schools' popularity is their historic reputation for delivering high quality education to minority children. The Sixth Circuit used the popularity of religious schools to support the argument that the voucher program's primary effect was to advance religion and thereby run afoul of the Establishment Clause. 73

Setting aside the question about whether the Sixth Circuit interpreted the Constitution correctly, from a public policy perspective the court's legal reasoning creates a troubling set of incentives. To reduce the likelihood of voucher programs' constitutional success (and thereby reduce competitive pressure from private schools), public schools are given incentives to limit current students' opportunities to enroll in choice programs. To increase the likelihood of a choice program surviving judicial scrutiny, religious schools are given incentives to limit their enrollment of voucher-supported students. Neither outcome is desirable from a policy perspective and both defy common sense.

Indeed, it would be a tragic irony were courts to rule publicly funded voucher programs unconstitutional due to the interaction of the unpopularity of failing public schools, the unwillingness of functioning public schools to participate in choice programs, and the desirability of religious schools. Reasons why low-income families want to leave the struggling Cleveland Public School system are obvious. The more desirable public schools in the Cleveland area elected not to enroll any voucher-supported students. No one should be surprised that many families select religious schools. After all, 85 percent of all students that attend private schools attend religiously-affiliated schools (Sugarman and Kemerer, eds, p 25). Consequently, that so many low-income Cleveland families selected religious schools once presented with the opportunity to do so is better characterized as a pragmatic, private decision rather than an impermissible governmental establishment of a religion.

IV. DEGREES OF FREEDOM

Two broad challenges confront any effort to explore the intersections of law and equal education opportunity. The dynamic, evolving
nature of the equal educational opportunity doctrine is one difficulty. The inherent uncertainties that attend to education policy present a second challenge.

A. Equal Educational Opportunity: From Race to Resources

American education's "Holy Grail"—the equal educational opportunity doctrine—continues to evolve. It is a dynamic doctrine that has changed profoundly in past decades. Concerns over resources recently displaced race as equal educational opportunity's mooring.

In Brown, a unanimous Supreme Court with nothing less than forceful elegance characterized providing education as perhaps state and local governments' most important function. Almost twenty years later in San Antonio School District v Rodriguez, the Court reaffirmed its "historic dedication to public education," stating forcefully that "the grave significance of education both to the individual and to our society' cannot be doubted." The Court has elsewhere noted education's centrality in maintaining our basic social and political institutions and the lasting impact of the deprivation of an education on the life of a child. Such sentiments are consistent with the Court's perception of widely shared public values: "The American people have always regarded education and acquisition of knowledge as matters of supreme importance." The Court's recognition of such values—including an abiding respect for education's crucial role in our free society—emerges in many Court opinions, even some that predate Brown.

Ever since the nation committed itself to improving equal educational opportunity in earnest, especially since the mid-twentieth century, race typically moored the attendant policies. Since Brown, many legal and policy discussions about equal educational opportunity have been shaped by the lens of race and expressed through school desegregation litigation. Although it is difficult, if not impossible, to over-

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74 347 US 483.
75 The court stated: "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." Id at 493.
76 411 US 1 (1972).
79 Meyer v Nebraska, 262 US 390, 400 (1923).
80 See, for example, id; Plyler, 457 US at 221; Abington School District v Schempp, 347 US 203, 230 (1963) (Brennan concurring); Pierce v Society of Sisters, 268 US 510 (1925). However, it remains important to note that although the Court has repeatedly recognized education's key role in our society, the right to education has not been deemed fundamental by the Court. See, for example, Rodriguez, 411 US at 30. But see id at 98–110 (Marshall dissenting).
81 The literature on equal educational opportunity and school desegregation, already considerable, continues to grow. Prominent works include Paul Gerwitz, Remedies and Resistance, 92
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estimate Brown’s impact on our nation’s schools, it is plausible to suggest that the importance of race in today’s debates over educational reform is waning. The generation-long struggle either assigned to or assumed by the courts over what equal educational opportunity means in terms of race has broadened to include other concerns about education and equal opportunity. Specifically, the nation’s current quest for more equitably and adequately financed and better (or “reformed”) schools now appears to have eclipsed (if not engulfed) the school desegregation movement catapulted by Brown.

Though subtle, implications from equal educational opportunity doctrine’s reorientation from race to resources are profound and reasons for it are only beginning to emerge. When this shift began is far from clear. The recent educational reform movement, launched in the 1980s, served as one accelerator as it broadened the equal educational opportunity doctrine’s focus to include such other factors as educational excellence and quality. Also since the 1980s, school finance litigation helped to dislodge further equal educational opportunity doctrine from its traditional mooring in race. Education leaders today, as Orfield notes with dismay, appear less interested in improving integration levels (Heubert, ed, pp 40–41) than in increasing resources. Paradoxically, the legal pursuit of educational equity through additional resources garnered from school finance adequacy litigation is strikingly similar in form and structure to the earlier struggles over educational equity forged in terms of race.

B. Education’s “Black Box”

Efforts by policymakers (as well as lawyers, judges, and courts) to improve educational systems and student achievement implicate a


83 For a general discussion, see Michael Heise, The Courts vs. Educational Standards, 120 Pub Interest 55 (Summer 1995) (arguing that the legal construction of equal educational opportunity is in transition). For a helpful account of the shift in litigation focus from race to wealth for many civil rights organizations, see, for example, Peter Enrich, Leaving Equality Behind: New Directions in School Finance Reform, 48 Vand L Rev 101, 122–28 (1995).
host of complicated and interacting variables. Regrettably, many of these variables either have not yet been identified by policymakers or resist public policy manipulation.

Amid this acknowledged social scientific uncertainty, however, stands one fact painfully obvious to all: too many public schools are failing to educate too many schoolchildren. Worse still, while social scientists cannot explain why such failures occur, the failures themselves are hauntingly easy to predict. As Professor Howard Gardner notes:

Tell me the ZIP code of a child and I will predict her chances of college completion and probable income; add the elements of family support (parental, grandparental, ethnic and religious values) and few degrees of freedom remain, at least in our country.  

CONCLUSION

Professor Gardner's alarming comment cannot be simply dismissed as intellectual hubris. Many first-year graduate students are capable of generating similar models and predictions. The ease with which these predictions can be made should not be taken lightly. The empirically demonstrable correlations Gardner describes drive a stake through the heart of America's ideal of equal educational opportunity. To the extent that equal educational opportunity means anything, at the very least it must mean that ZIP codes should not predict children's educational destiny. Nor should they crowd out the influence of more acceptable independent variables, such as talent and effort. Where ZIP codes remain correlative of educational success, as they presently do in the United States (and elsewhere), then more work—much more work—is required to improve the educational systems.

What is also clear is that no one policy advanced in Law and School Reform or School Choice and Social Controversy will single-handedly degrade the predictive power of a child's ZIP code on educational achievement. One can only hope—and, sadly, it remains merely a hope—that a combination of these policies might reduce the likelihood that where you come from dictates where you are going.