

# PERPETUAL EVOLUTION: A SCHOOLS-FOCUSED PUBLIC LAW LITIGATION MODEL FOR OUR DAY

*James S. Liebman\**

*In celebrating the monumental accomplishments of the new form of public law litigation that Constance Baker Motley and her colleagues pioneered, this Essay reinterprets their paradigm-shifting body of work in a manner that obliges the current generation of civil rights advocates to change direction. In the hopes of reengaging the affirmative force of constitutional litigation after decades in which it has waned, this Essay argues that the central lesson to be derived from Motley's generation lies not in the mode of public law litigation it pioneered but in the design of that litigation in the image of the dominant form of governance of the day: bureaucracy. Today, however, bureaucracy's penchant for uniformity disqualifies it as a model judges can use to engineer the change needed by millions of children of color and in poverty trapped in failing schools. Today's advocates can best honor Motley, therefore, by identifying the most generative form of governance of our own day and developing a model of public law litigation in its image. In that vein, this Essay advocates a duty of "responsible administration" of the public schools designed in the image of a more modern and effective form of governance: evolutionary learning. Drawing upon multiple analogies in modern legal practice, this duty requires officials responsible for students' egregiously deficient and suspiciously disparate levels of educational attainment to track results, develop and test solutions, and use successes to set a progressively rising constitutional minimum for similarly situated students.*

INTRODUCTION .....	2006
I. A CONSTITUTIONAL DUTY OF RESPONSIBLE ADMINISTRATION OF THE NATION'S SCHOOLS, IN BRIEF .....	2011
II. THE RISE AND FALL OF BUREAUCRACY AND BUREAUCRATIC PUBLIC LAW LITIGATION .....	2013
III. EVOLUTIONARY LEARNING AS A MORE UP-TO-DATE MODEL FOR EDUCATION REFORM LITIGATION .....	2018
A. Evolutionary Learning in Public Administration Generally ....	2018
B. Evolutionary Learning in the Operation of Public Schools.....	2020
IV. EVOLUTIONARY LEARNING IN LAW AND LEGAL ACTION.....	2025
A. Evolutionary Learning in Nonconstitutional Law Generally ...	2026

---

\* Simon H. Rifkind Professor of Law, Columbia Law School. I am deeply grateful to Anoushka Asgari, Remy Grosbard, Colin O'Neal, Gautam Rao, and Jamie Elizabeth Wolfe for superb research, drafting, and editorial assistance.

B. Evolutionary Learning in Nonconstitutional Law in the K–12 Education Context .....	2029
C. A Constitutional Duty of Responsible Administration in Noneducation Contexts .....	2030
D. Hints of Constitutional Evolutionary Learning in the Higher Education Context.....	2032
E. Traditional and Novel Strategies in Recent Constitutional Litigation in the K–12 Education Context.....	2035
V. A CONSTITUTIONAL DUTY OF RESPONSIBLE ADMINISTRATION OF THE NATION’S SCHOOLS, IN DETAIL.....	2038
CONCLUSION .....	2041

### INTRODUCTION

This Essay honors Judge Constance Baker Motley and her contemporaries at the NAACP Legal Defense Fund.<sup>1</sup> It celebrates their victory in *Brown v. Board of Education*<sup>2</sup> and the vast amounts of “public law litigation”<sup>3</sup> that ensued. This litigation beneficially restructured the nation’s previously segregated schools<sup>4</sup> and means of financing public education,<sup>5</sup>

---

1. In addition to Judge Motley, my neighbor and daily inspiration, I dedicate this piece to my mentor and friend Jack Greenberg (1924–2016), who shared Judge Motley’s work and lifelong commitment to racial justice.

2. 347 U.S. 483 (1954).

3. “Public law litigation” refers herein to lawsuits on behalf of classes of plaintiffs seeking affirmative injunctions vindicating public policies by restructuring institutions’ operations and outcomes. The Essay contends that the governance model (bureaucracy, evolutionary learning, or something else) that influences the litigation’s focal policies and remedies also affects its likely success. For discussions of public law litigation, see, e.g., Abram Chayes, Foreword: Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 4, 4 (1982) (defining “public law litigation” and providing examples); Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1284 (1976) [hereinafter Chayes, Role of the Judge] (same); see also Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 Harv. L. Rev. 1015, 1016–20 (2004) [hereinafter Sabel & Simon, Destabilization Rights] (discussing the evolution of legal scholarship regarding public law litigation and introducing the concept of “destabilization rights”); Charles F. Sabel & William H. Simon, The Duty of Responsible Administration and the Problem of Police Accountability, 33 Yale J. on Reg. 165, 166–69 (2016) [hereinafter Sabel & Simon, Duty of Responsible Administration] (discussing the evolution of civil rights doctrine and postbureaucratic administration). But cf. Theodore Eisenberg & Stephen C. Yeazell, The Ordinary and the Extraordinary in Institutional Litigation, 93 Harv. L. Rev. 465, 465–67, 481–86 (1980) (arguing that public law litigation is not a new form of litigation and that judicial supervision of complex enterprises is an old legal phenomenon).

4. See, e.g., *Missouri v. Jenkins*, 495 U.S. 33, 37 (1990) (upholding the district court’s desegregation order, as modified by the court of appeals); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 528–29 (1979) (affirming the district court’s “system wide plan for desegregating the public schools of Dayton, Ohio”); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (affirming the district court’s broad authority to order remedial desegregation); *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 441 (1968) (rejecting the school

as well as its criminal justice systems,<sup>6</sup> police forces,<sup>7</sup> prisons,<sup>8</sup> mental health facilities,<sup>9</sup> welfare agencies,<sup>10</sup> and other public systems found to be failing large swaths of the American people, most of them of color or in poverty. By mobilizing the affirmative force of constitutional courts to make massive collective improvements in the lives of millions of chronically underserved individuals, the public law litigation *Brown* inspired is certainly one of the most successful acts of social engineering and improvement in the nation's history.<sup>11</sup>

In honor of Judge Motley, however, this Essay reinterprets her and her colleagues' paradigm-shifting body of legal work in a manner that obliges the current generation of civil rights advocates to change direction. It does so in hopes of *re-engaging* the affirmative force of constitutional courts after decades in which the judicial power that Judge Motley and her colleagues unleashed has waned.<sup>12</sup>

---

board's proposed "freedom of choice" plan as insufficient for ensuring desegregation); *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 299–301 (1955) (laying out guidelines for judicial participation in carrying out desegregation of public schools).

5. See, e.g., *Serrano v. Priest*, 487 P.2d 1241, 1241, 1244 (Cal. 1971) (striking down the California public school funding system and requiring equal expenditures per pupil), *aff'd*, 557 P.2d 929 (Cal. 1976); *Abbott v. Burke*, 575 A.2d 359, 384–85 (N.J. 1990) (holding that "the State must assure that [its] educational expenditures per pupil are substantially equivalent" across districts); *Robinson v. Cahill*, 303 A.2d 273, 297 (N.J. 1973) (holding that the state must fill in gaps in local funding to meet the constitutionally guaranteed educational opportunity); Douglas S. Reed, *Court-Ordered School Finance Equalization: Judicial Activism and Democratic Opposition* 116–18 (1996), <http://nces.ed.gov/pubs97/97535g.pdf> [<http://perma.cc/X2EA-YF37>] (listing state and federal court school-finance decisions).

6. See James S. Liebman & David Mattern, *Correcting Criminal Justice Through Collective Experience Rigorously Examined*, 87 S. Cal. L. Rev. 585, 589–91 (2014) (surveying Supreme Court decisions imposing a bureaucratic "constitutional code of procedure" on criminal justice systems).

7. See, e.g., Samuel Walker & Carol A. Archbold, *The New World of Police Accountability* 48–49 (2d ed. 2014) (citing decrees and court settlements).

8. See, e.g., *Hutto v. Finney*, 437 U.S. 678, 680–81 (1978) (affirming a thirty-day limit on isolated confinement in prisons); Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* 30–50 (1998) (providing an overview of judicial prison reform through the late-twentieth century).

9. See, e.g., *Wyatt v. Stickney*, 344 F. Supp. 373, 376–79 (M.D. Ala. 1972) (imposing command-and-control regulations on Alabama's mental institutions).

10. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972) (requiring predeprivation hearings before seizure of chattels pursuant to replevin statutes); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (requiring evidentiary hearings prior to termination of welfare benefits); Anthony Michael Bertelli, *Strategy and Accountability: Structural Reform Litigation and Public Management*, 64 Pub. Admin. Rev. 28, 28 (2004) ("Through structural reform litigation, nearly half of all U.S. state-level child welfare agencies . . . had been brought under remedial decrees by March 1996.")

11. See, e.g., James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 Colum. L. Rev. 1463, 1467–70 (1990) [hereinafter Liebman, *Desegregating Politics*] (summarizing the impact of school desegregation efforts).

12. See, e.g., Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 Fordham L. Rev. 1177, 1195 (2009) (dubbing institutional-reform decrees "a

This Essay argues that the most fundamental lesson current advocates can learn from Judge Motley's work lies not in the model of public law litigation she and her contemporaries pioneered. Instead, the lesson emerges from her generation's creation of a litigation model in the image of the most evidently effective form of governance of the day: bureaucracy. Crucially definitive of bureaucracy for current purposes is its commitment to treating likes alike<sup>13</sup>—to, for example, defining the classrooms, teachers, and curricula students need at each grade level and mandating their equal provision to all children in that grade.

Today, however, the proliferating diversity and unpredictability of everyday life have dethroned bureaucracy.<sup>14</sup> Whether practiced by private-sector managers, public officials, or constitutional judges, bureaucracy's inflexible rules, roles, and hierarchies and its single-minded focus on treating likes alike promote a different, but no less destructive, brand of inequality and injustice: treating *unlikes* alike. They ignore vast differences in individuals' conditions that diversity and unpredictability multiply and for which public actions must account if they are effectively to serve people's needs. Today, that is, educators widely agree that mandating equal access to a classroom, teacher, and curriculum designed for the "average student" in each grade deprives the majority of "nonaverage" children—often those who are not white and middle class or have special needs, gifts, learning styles, or language barriers—of the differentiated services and support they require to learn and succeed.<sup>15</sup>

For these reasons, private-sector managers and public officials in many sectors in the nation and worldwide are abandoning bureaucracy in search of other, more supple and responsive governance forms.<sup>16</sup> It is time, therefore, for civil rights advocates and constitutional judges to recognize, as well, that the era of bureaucracy—and thus of bureaucratically inspired public law litigation—has passed.

---

dying breed"); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 *Yale L.J.* 1836, 1860–61 (2015) (doubting the "broad availability of systemic [constitutional] challenges" to how public institutions operate).

13. See, e.g., Rudi Volti, *An Introduction to the Sociology of Work and Occupations* 59–70 (2d. ed. 2012) (identifying bureaucracy's key principles, including basing individuals' treatment on their objective talents and needs, not their social status or personal connections).

14. See, e.g., *id.* at 65–74 (associating bureaucracy's effectiveness with relatively uniform and predictable conditions and tying its decline to the proliferation of diversity and unpredictability).

15. See, e.g., Carol Ann Tomlinson, *Reconcilable Differences? Standards-Based Teaching and Differentiation*, *Educ. Leadership*, Sept. 2000, at 6, 6–11 (describing the need for "differentiation" in teaching and providing examples of harmfully standardized curricula and of curricula beneficially customized to student needs); Lory Hough, *Beyond Average*, *Harv. Ed. Mag.* (Aug. 24, 2015), <http://www.gse.harvard.edu/news/ed/15/08/beyond-average> [<http://perma.cc/XQ5G-NBRX>].

16. See *infra* notes 53–56, 68–91 and accompanying text.

Nowhere are new advocacy strategies needed more than for poor and minority children trapped in failing public schools. In part because of the depredations of bureaucratically organized school systems<sup>17</sup> and in part because of the courts' refusal to extend to the rest of the nation the benefits that school desegregation decrees achieved in the South<sup>18</sup>—a refusal attributable in part to the shortcomings of bureaucratic public law litigation—the number of such children<sup>19</sup> and the size of their achievement gaps<sup>20</sup> are rapidly increasing.

This Essay argues, therefore, that the current generation of advocates can best honor Judge Motley and her generation by imitating her and her colleagues' deeper strategy: by identifying the most generative and effective form of governance of our *own* day and developing a new model of public law litigation in *its* image. Building on other recent scholarship,<sup>21</sup> this Essay derives a new constitutional duty of “responsible

---

17. See *infra* notes 58–59 and accompanying text.

18. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007) (Roberts, C.J.) (plurality opinion); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977); *Milliken v. Bradley*, 418 U.S. 717, 744–47 (1974).

19. See U.S. Gov't Accountability Office, GAO-16-345, K–12 Education: Better Use of Information Could Help Agencies Identify Disparities and Address Racial Discrimination 10, 12, 42 (2016) (documenting the 2001–2014 increase in the proportion of the nation's schools attended mainly by high-poverty, black or Hispanic students from nine to sixteen percent; the number of students of color attending racially isolated public schools; and high-poverty schools' “associat[ion] with worse educational outcomes”).

20. See, e.g., Michael DeArmond et al., *Ctr. on Reinventing Pub. Educ., Measuring Up: Educational Improvement & Opportunity in 50 Cities* 36 (2015), [http://www.crpe.org/sites/default/files/measuringup\\_10.2015\\_0.pdf](http://www.crpe.org/sites/default/files/measuringup_10.2015_0.pdf) [<http://perma.cc/9W7L-6946>] (finding that, on average, U.S. students eligible for free and reduced-price lunch suffer a fourteen-percentage-point achievement gap compared to other students); McKinsey & Co., *The Economic Impact of the Achievement Gap in America's Schools* 6, 9, 11 (2009), [http://mckinseysociety.com/downloads/reports/Education/achievement\\_gap\\_report.pdf](http://mckinseysociety.com/downloads/reports/Education/achievement_gap_report.pdf) [<http://perma.cc/66GN-Z6DE>] (finding that, on average, black and Latino students are between two and three years of learning behind white students and less than a third as likely to score at an advanced level; estimating the economic impact of the nation's persistent achievement gaps as “equivalent [to] a permanent national recession”); Kate Zernike, *An F-Minus for America's Schools from a Fed-Up Judge*, *N.Y. Times* (Sept. 8, 2016), [http://www.nytimes.com/2016/09/09/nyregion/crux-of-connecticut-judges-grim-ruling-schools-are-broken.html?\\_r=0](http://www.nytimes.com/2016/09/09/nyregion/crux-of-connecticut-judges-grim-ruling-schools-are-broken.html?_r=0) (on file with the *Columbia Law Review*) (reporting that only eighteen percent of black fourth graders read at or above “proficient” on the National Assessment of Education Progress, compared to forty-six percent of their white peers).

21. See James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 *N.C. L. Rev.* 1703, 1706–07 (2003) (arguing that the No Child Left Behind Act can further “a new civil rights strategy that seeks racial justice directly through increasingly equitable educational outcomes, rather than indirectly through racial balance”); James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 *N.Y.U. Rev. L. & Soc. Change* 183, 192 (2003) [hereinafter Liebman & Sabel, *Public Laboratory*] (arguing that new reforms can continue the “movement for desegregation of the schools”); Sabel & Simon, *Destabilization Rights*, *supra* note 3, at 1020 (discussing lower courts' experimentalist practice and the destabilization-rights approach to public law intervention); Sabel & Simon, *Duty of Responsible Administration*, *supra* note 3, at

administration” of public schools<sup>22</sup> from a generative modern-day form of governance referred to here as “evolutionary learning.”<sup>23</sup>

Evolutionary learning positions organizations to learn by doing. Rather than specifying one strategy for all, central actors (i) set general objectives (e.g., higher graduation rates); (ii) motivate and multiply opportunities for a wide array of actors in the field (e.g., schools, educators, and the communities they serve) to take planned and observed steps, contextualized to local conditions, to move toward those goals; then (iii) recognize successful interventions and use them to benchmark expectations for other similar sites while supporting the interventions’ customization to those sites.<sup>24</sup> In turn, a judicially enforceable duty of responsible administration treats officials’ creation of harmful conditions affecting important constitutional interests or raising suspicions of invidious motivation (e.g., racially disparate graduation rates) as triggering a duty to

---

169 (comparing differing approaches to judicial remediation in cases of police forces found to have engaged in unconstitutional practices); Rebecca I. Yergin, Note, Rethinking Public Education Litigation Strategy: A Duty-Based Approach to Reform, 115 Colum. L. Rev. 1563, 1595 (2015) (proposing the adoption of a duty of responsible administration in constitutional public-education litigation); Kathleen G. Noonan et al., Courts as Institutional Reformers: Bankruptcy and Public-Law Litigation 1 (Feb. 22, 2017) (unpublished manuscript) (on file with the *Columbia Law Review*) (discussing “the legitimacy and capacity of courts to induce and supervise” reform by comparing bankruptcy reorganization and public law litigation).

22. In Professors Sabel and Simon’s general formulation, public officials’ “duty of responsible administration” is to “articulate reflectively the policies and principles that govern their work,” “monitor the activities of peers and subordinates to induce compliance with these policies and principles,” and “frequent[ly] reassess[] . . . these policies and principles in light of the officials’ own experience and that of comparable institutions.” Sabel & Simon, *Duty of Responsible Administration*, supra note 3, at 166. Rather than prescribing solutions, courts “induce entities that have violated constitutional norms to undertake disciplined self-analysis of the extent and underlying causes of the harms they have inflicted and a painstaking search for less burdensome alternatives.” *Id.* at 211; see also Yergin, supra note 21, at 1587–88 (advocating for the application of a duty of responsible administration to public school system reform); infra notes 155–156 and accompanying text (discussing Yergin’s analysis). This Essay focuses on this duty’s application to school-system reform.

23. See Christopher K. Ansell, *Pragmatist Democracy: Evolutionary Learning as Public Philosophy* 9–14 (2011) (“Evolutionary learning occurs when these three generative conditions—a problem-driven perspective, reflexivity, and deliberation—work together in a recursive cycle.”).

24. See, e.g., *id.* at 6–7, 9–16 (discussing the Chicago Police Department’s use of evolutionary learning in community policing in the 1990s and discussing evolutionary learning’s applicability to pragmatic public philosophy); infra notes 53–56 and accompanying text (highlighting Japanese automakers’ use of evolutionary learning); infra notes 65–95 and accompanying text (discussing the applicability of evolutionary learning to education reform); infra notes 131–140 and accompanying text (examining the use of evolutionary learning in other contexts).

moderate the harms at reasonable expense by implementing the learning process just described.<sup>25</sup>

Part I introduces the litigation model this Essay advances by outlining the application of a constitutional duty of responsible administration to children trapped in failing schools. Parts II–IV then explain why a mismatch between modern conditions and the bureaucratic underpinnings of the old model of public law litigation call for a new approach to litigation (Part II), why evolutionary learning is more suited to modern conditions than bureaucracy (Part III), and how evolutionary learning can be used to ameliorate harmful deficiencies and suspicious disparities implicating constitutional interests (Part IV). Part IV closes with examples of Congress, courts, and administrative agencies enforcing existing evolutionary learning obligations in nonconstitutional and constitutional contexts, including in education settings. Finally, Part V gives a more detailed account of the application of this more modern form of public law litigation to alleviate harms faced by poor and minority children in failing schools.

#### I. A CONSTITUTIONAL DUTY OF RESPONSIBLE ADMINISTRATION OF THE NATION'S SCHOOLS, IN BRIEF

Applied to the K–12 context, the duty of responsible administration would oblige officials who relegate poor and minority children to schools with egregious educational-outcome deficiencies and disparities based on race, ethnicity, poverty, special needs, or English-learner status to take steps to determine whether and how they can diminish those deficiencies and disparities without harm to other values.<sup>26</sup> Given the importance of education to individuals and the general welfare, and given continuing suspicions that bias, stereotypes, and false assumptions contribute to the inadequate educational outcomes of particular categories of children, officials would have to attend and reasonably respond to evidence of serious deficiencies and disparities.

In keeping with evolutionary learning's recognition of the importance of treating unlike children differently, the duty of responsible administration identifies educational deficiencies and disparities as actionable only when they have actually been shown to be reasonably corrigible. And, in assessing violations and defining remedies, the new duty encourages maximum flexibility for educators to discover such conditions and respond appropriately. Often, the differential outcomes of traditionally

---

25. The duty may arise under federal or state equal protection, due process, adequate education, or similar provisions.

26. This duty must be triggered by measures that are locally authoritative, widely recognized, and correlated with success as an adult. Examples may include college attendance, college graduation, and high school graduation rates; accumulation of advanced placement and other credit; students' socioemotional preparation for higher grades; and literacy, math, and science test scores.

underserved children on whose behalf innovative steps have and have not been taken will provide the best evidence of a violation and the strongest basis for a remedy.

The duty of responsible administration requires a process that (i) recognizes and tracks problems as they occur; (ii) identifies and tests reasonable steps for mitigating the problems without undercutting other important values or meaningfully diminishing opportunities for other public school children; and (iii) uses results of steps shown to reduce negative outcomes for suspect categories of children to set minimum attainment and maximum disparity levels permitted for similarly situated children in the defendant state or school district.<sup>27</sup> To use an example this Essay develops below, officials might base attainment minimums or disparity maximums on their own or other jurisdictions'<sup>28</sup> operation of racially integrated magnet schools, interdistrict transfer opportunities, or charter or other categories of schools in which students situated similarly to the plaintiff children typically perform well and experience meaningfully smaller outcome disparities than the plaintiff children.<sup>29</sup>

The duty of responsible administration implies new *remedies* as well. Courts should direct defendants who violate the duty to implement a responsible system of the sort just described and to document the results of efforts to mitigate educational deficiencies and disparities and the steps taken in response to those results. In the meantime, courts should direct defendants to avail the plaintiff children either of the innovations that have proven to work for similarly situated children or of other equally or more effective steps.

This strategy is modest and flexible. It does not expect courts or institutions under their jurisdiction to have the prescience that bureaucratic public law decrees require of central experts the courts and institutions employ.<sup>30</sup> It does not ask courts to require defendants to accomplish the

---

27. "Similarly situated" refers to children with family and demographic backgrounds, economic means, and special education and English-language-learner statuses (among other factors) that are similar to those of the plaintiff children. Notice that this approach gives legal status to disparities not only between, say, black and white students but also between poorly performing black students in schools where most black students fail and otherwise similarly situated higher-performing black students in the same jurisdiction attending schools where success rates are higher.

28. The most obviously persuasive results are ones generated by steps that the defendant officials themselves have taken. Results achieved in other jurisdictions are also persuasive, if they are of the sort that the defendant officials might have attended to pursuant to a responsible system for identifying and mitigating deficiencies and disparities, with due recognition given to cross-jurisdictional differences.

29. See Yergin, *supra* note 21, at 1598–99 (suggesting an application of the duty of responsible administration to advance public-education reform in Connecticut); *infra* notes 170–172 and accompanying text (describing a lawsuit brought against the state of Connecticut based in part on this theory).

30. On the importance of experts under the bureaucratic public law model, see, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 9 (1971); Chayes, *Role of the Judge*, *supra* note 3, at 1300–01.



impossible or to engage in the self-consciously redistributive affirmative action that an obligation to end all deficiencies and disparities would entail. It does not even require defendants to advance all children to the proficiency levels that their own official standards have identified as the goal or norm in the jurisdiction.<sup>31</sup> Indeed, the approach does not require defendants to diminish disparities at all if they can show they have responsibly tried to do so and failed. And if the defendants have identified steps that do diminish disparities without harming other interests in a redistributive way, they would not be required even then—although they might opt—to scale those same steps to all similarly situated children; the defendants instead could choose to take other steps to reach the requisite minimum or maximum level. What the standard does require is that defendants responsibly *inquire* whether deficiencies and disparities in access that affect at least modestly suspect categories of children *can* be diminished without causing appreciable harm to other values and other children and, if they can, that defendants incrementally reduce those deficiencies and disparities in ways and to the extent their ongoing inquiries reveal to be possible.

## II. THE RISE AND FALL OF BUREAUCRACY AND BUREAUCRATIC PUBLIC LAW LITIGATION

Given its modesty, substituting a duty of responsible administration for the more directive remedies that bureaucratic public law litigation pursues requires justification. This Part explains why bureaucracy, although a brilliant model for public law litigation in Judge Motley's day, is no longer suited to modern conditions. The remainder of the Essay then explains why evolutionary learning is better suited to those conditions and illustrates courts' and agencies' adoption of evolutionary learning in contexts that validate its use as a model for public law litigation built around a duty of responsible administration.

The brilliance of Judge Motley and her generation was to realize that the best way to convince courts to understand and cure constitutional violations was to characterize the violations as egregious deviations from, and to order remedies that fully embraced, bureaucracy.<sup>32</sup> Bureaucracy was an attractive model, among other reasons, because it was widely embraced by the nation's largest and most respected corporations and administrative agencies, as well as by the military.<sup>33</sup> The culmination of this

---

31. The strategy proposed here does, however, use those standards to measure the greater degree of educational attainment or lesser degree of disparity that the jurisdiction's inquiry has shown to be achievable. See *infra* note 76 and accompanying text.

32. See, e.g., *Meredith v. Fair*, 305 F.2d 343, 348–49 (5th Cir. 1962) (describing a class action complaint filed by Judge Motley and colleagues against the University of Mississippi alleging that the University pursued a state policy of segregation and seeking injunctive relief).

33. See, e.g., Michael J. Piore & Charles F. Sabel, *The Second Industrial Divide* 19–48 (1984) (linking the mass-production systems characterizing large American corporations

strategy was a public law litigation model that associated rights with the deep bureaucratic principle of treating likes alike, found violations when likes were treated differently, and imposed two types of bureaucratic, rule-enforcing remedies: one in which courts ordered defendants to become (better) bureaucracies, the other in which courts acted as substitute bureaucracies.<sup>34</sup>

Characteristic of the first type of remedy were court orders restructuring police forces, prisons, mental health facilities, and welfare agencies into functioning bureaucracies that centrally generated and hierarchically enforced uniform rules of their own choosing.<sup>35</sup> In acting, instead, as substitute bureaucracies, courts ordered defendant agencies to implement one-size-fits-all solutions; judges either developed these solutions themselves based on competing proposals from the parties' experts or they employed their own experts or "neoreceivers" to develop and even, at times, implement them.<sup>36</sup> Court-designed solutions in the school desegregation context, for example, included mandated busing; the siting, pairing, and clustering of schools to maximize racial integration;<sup>37</sup> and mandated reading programs, in-service teacher training, and

---

during the middle part of the twentieth century to bureaucratic governance); Lisa Shultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 Mich. L. Rev. 47, 53 (2006) (explaining the administrative state's embrace of an "expertise" model of governance). Put another way, Judge Motley and her generation characterized the alleged constitutional violations in a manner that associated them with failed governance models of old and sought remedies that partook of a governance model then in wide and effective use. In her day, the old, failed governance approaches tied the distribution of resources to caste, patronage, corruption, and other personal relationships irrespective of merit. Broadly accepted approaches were bureaucratic. See, e.g., *Calhoun v. Members of Bd. of Educ.*, 188 F. Supp. 401, 402–03 (N.D. Ga. 1959) (seeking an injunction barring those in charge of the Atlanta public school system from operating racially segregated schools).

34. See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 475–78 (2001) [hereinafter Sturm, *Second Generation*] (critiquing the "rule-enforcement model" in the context of employment discrimination disputes); Joanna Kudisch Weinberg, *The Judicial Adjunct and Public Law Remedies*, 1 Yale L. & Pol'y Rev. 367, 374 (1983) (describing the remedial role played in old-style public law litigation by judicial adjuncts).

35. See, e.g., Feeley & Rubin, *supra* note 8, at 40–41 (noting that classic prison decrees "specif[ied] many requirements in . . . excruciating detail [including] the wattage of the light bulbs in the cells, the frequency of showers, and the caloric content of meals"); Charles Sabel, *Litigation, Child Welfare Organization, and EBM*, Nat'l Acads. (Jan. 30–31, 2012), <http://nationalacademies.org/hmd/~media/Files/Activity%20Files/Children/UnderstandingChildAbuse/Presentations/Sabel13112.pdf> [<http://perma.cc/45FK-RNMX>] (noting child-welfare reform litigators' desire to make decrees "as specific as possible").

36. See, e.g., Weinberg, *supra* note 34, at 367–68 & nn.2–4.

37. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22–31 (1971) (upholding a desegregation plan that included mandatory busing as well as pairing and grouping of noncontiguous school zones); Jennifer L. Hochschild, *The New American Dilemma: Liberal Democracy and School Desegregation* 27–28 (1984) (discussing *Swann* and its aftermath); Sabel & Simon, *Destabilization Rights*, *supra* note 3, at 1022–28 (describing desegregation decrees supervising how schools were sited, staffed, and administered).

counseling for segregated children for whom integrated settings were unavailable.<sup>38</sup> Other examples include court-ordered finance formulas for the orderly and equitable distribution of state funds to districts and schools<sup>39</sup> and codes of procedural rules for police and criminal courts to use in enforcing the criminal laws<sup>40</sup> or for agencies to follow in administering welfare entitlements,<sup>41</sup> terminating child custody,<sup>42</sup> and seizing property.<sup>43</sup>

Although brilliant and powerfully effective throughout the 1950s, 1960s, and well into the 1970s,<sup>44</sup> the infusion of bureaucratic norms and sensibilities into litigation strategies lost steam in the final quarter of the twentieth century,<sup>45</sup> just as bureaucracy was losing its place as the dominant form of governance in nonjudicial settings.<sup>46</sup> During that period, bureaucracy began to succumb to the effects of the very features that made it attractive as a model for rights- and equality-based advocacy—in particular, its penchant for uniformity and its disposition to lump as many conditions and people as possible into the same category or small set of categories, and to require all those presumptive “likes” to be treated alike.<sup>47</sup>

Bureaucracy assumes that (i) expertise is in short supply and best amassed at the organizational center; (ii) the problems organizations need to solve are relatively few and predictable; and (iii) actors at the organization’s periphery, who are charged with implementing solutions, lack expertise and are poorly aligned with organizational objectives.<sup>48</sup> Based on these assumptions and following the “likes treated alike” norm, bureaucracies depend upon the uniform implementation of a small number of solutions developed by central experts.<sup>49</sup> Bureaucracies assure uniform implementation of solutions by disaggregating them into relatively rote steps that are assigned via rules, standard procedures, and

---

38. See, e.g., *Milliken v. Bradley*, 433 U.S. 267, 273 (1977).

39. See, e.g., *Abbott v. Burke*, 575 A.2d 359, 363 (N.J. 1990).

40. See *Liebman & Mattern*, *supra* note 6, at 586–91.

41. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 254–55 (1970).

42. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 745–46 (1982).

43. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 67–68 (1972).

44. See *supra* notes 2–11 and accompanying text.

45. See *infra* notes 52–63 and accompanying text.

46. See, e.g., *Piore & Sabel*, *supra* note 33, at 3–7 (arguing that industrial organizations using the bureaucratic model slowed economic growth); *Sturm, Second Generation*, *supra* note 34, at 475 (cataloguing difficulties bureaucracies face in solving modern problems due to limits on localization and experimentation).

47. See, e.g., *James S. Liebman et al., Governance of Steel and Kryptonite: Politics in Contemporary Public Education Reform*, 69 Fla. L. Rev. 365, 375 (2017) [hereinafter *Liebman et al., Governance of Steel*] (claiming that bureaucracies have become less effective in modern times as conditions have become less stable and predictable).

48. See, e.g., *id.* at 373–75 (explaining how central experts in bureaucracies set rules for actors lower down the hierarchy to prevent field-level discretion).

49. *Id.* at 374.

instructions<sup>50</sup> to actors constrained by fixed divisions of labor and hierarchical supervisors who themselves are checked by workers' codified due process protections.<sup>51</sup>

By the 1970s, many organizations began sensing that conditions violating bureaucratic assumptions were becoming the norm.<sup>52</sup> Faced with ever more multifaceted, protean, and context-sensitive problems, bureaucracies found themselves at a disadvantage to more flexible organizations that first entered the national consciousness in the form of Japanese automakers.<sup>53</sup> These more modern organizations were able to respond to increasingly diverse and perplexingly entangled operational, managerial, legal, environmental, and psychological factors by gathering and sharing new and better information, building responsive institutional capacities, and more thoroughly incorporating local-level actors and their superior contextual knowledge into the decisionmaking process.<sup>54</sup> These organizations often succeeded by trusting field-level workers to customize solutions to conditions at the periphery of the organization pursuant to the principle that those conditions had to be treated *unlike* the idealized conditions imagined by experts at the center and unlike the different conditions found at other local sites.<sup>55</sup> Once better informed by conditions that actually obtained locally and by comparing and spreading the best of the locally proliferating solutions, the center could more effectively achieve its objectives and serve the needs of its clients and consumers.<sup>56</sup>

Observers had begun applying these same critiques to public agencies as early as the 1960s;<sup>57</sup> by the 1990s, bureaucratic failure was an article of faith on both the right and the left. Conservatives blamed public education bureaucracies, for example, for hemming in school leaders

---

50. *Id.* at 374, 378–80.

51. *Id.*

52. See Piore & Sabel, *supra* note 33, at 194–220.

53. See Liebman et al., *Governance of Steel*, *supra* note 47, at 423–24 (discussing how Toyota overtook American car manufacturers by, among other steps, empowering assembly-line workers to identify and solve problems without instructions from central bureaucrats).

54. See *id.*; see also Sturm, *Second Generation*, *supra* note 34, at 475 (describing organizational changes needed to address problems of second-generation discrimination).

55. See Liebman et al., *Governance of Steel*, *supra* note 47, at 418, 423–24 (discussing democratic experimentalism and Toyota's use of workers as problem solvers).

56. See, e.g., *id.* at 423 (describing Toyota's use of a localized inquiry process to gain information about how to improve working conditions that is then shared across factories).

57. See, e.g., Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* 15 (30th Anniversary ed. 2010) (noting the inability of central experts in a wide array of government agencies to establish rules sufficient to avoid exercises of ungoverned discretion by field staff facing unanticipated complications); James Q. Wilson, *Varieties of Police Behavior: The Management of Law and Order in Eight Communities* 83–84 (1978) (describing challenges patrol officers face when attempting both to abide by bureaucratic rules and to maintain order in dangerously unpredictable situations); William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 *Md. L. Rev.* 1, 36 (1985) (documenting welfare bureaucracies' inability to meet the needs of individual clients).

with so many inflexible edicts and collective bargaining provisions that they could not effectively manage schools.<sup>58</sup> Liberals blamed them for denying teachers the capacity for creativity and for sensing and serving the variegated needs of students.<sup>59</sup>

The forces undermining bureaucracy in nonjudicial settings had a similarly disruptive effect on bureaucratic public law litigation, ultimately leading many courts to abandon it. Paralleling the critique of bureaucracy generally, the bipartisan knocks on bureaucratic public law litigation focused on the *illegitimacy* and *incompetence* of distant judges who lacked both the democratically conferred authority and contextualized knowledge needed to order changes that were appropriate for the vast range of conditions present in the field.<sup>60</sup>

The Supreme Court famously adopted these critiques as its own in its 1973 decision in *San Antonio Independent School District v. Rodriguez*.<sup>61</sup> In declining to embroil itself in school finance equalization litigation, the *Rodriguez* Court refused to find a constitutional right to education and to treat disparities on the basis of wealth as constitutionally suspect, thereby ushering in a decades-long moratorium on federal “right to education”

58. See, e.g., John E. Chubb & Terry M. Moe, *Politics, Markets, and America's Schools* 26 (1990) (“[The public school system] is too heavily bureaucratic—too hierarchical, too rule-bound, too formalistic—to allow for the kind of autonomy and professionalism schools need if they are to perform well.”); see also Mary Anne Raywid, *Rethinking School Governance*, in *Restructuring Schools: The Next Generation of Educational Reform* 152, 153 (Richard F. Elmore ed., 1990) (“The second half of the twentieth century . . . has been a period of increasing public skepticism about major societal institutions and of growing lack of confidence in large organizations.”).

59. See, e.g., Diane Ravitch, *The Death and Life of the Great American School System: How Testing and Choice Are Undermining Education 193–94* (2010) (criticizing modern teacher-compensation systems for providing poor incentives for strong educational performance); Theodore R.Sizer, *Horace's Compromise: The Dilemma of the American High School* 207, 210 (1992) (discussing the pitfalls of “pyramid governance” in schools); Johnny Ray Youngblood & Kathy Maire, *Opinion, Drain NYC's School Swamp*, N.Y. Daily News (Feb. 12, 2002), <http://ebc-iaf.org/sites/default/files/2002%20Drain%20NYC%20School%20Swamp%20NY%20Post%20JRY%20%26%20Kathy%20Maire.pdf> [http://perma.cc/57VG-V3AH] (documenting the bureaucratic failures of the New York City public school system).

60. For criticism from the right, see generally, e.g., Donald L. Horowitz, *The Courts and Social Policy* 273 (1977) (arguing that courts lack the capacity to make complex social policy decisions); Ross Sandler & David Schoenbrod, *Democracy by Decree: What Happens when Courts Run Government* 109–10 (2003) (questioning the legitimacy of decisions by judges on matters traditionally left to elected officials). For criticism from the left, see generally, e.g., Sabel & Simon, *Destabilization Rights*, *supra* note 3, at 1017–18, 1023 (explaining how courts' shallow capacity to effect change in public agencies undermined the effectiveness of public law litigation); Sturm, *Second Generation*, *supra* note 34, at 475 (arguing that judicial rule enforcement on the bureaucratic model cannot prevent modern forms of discrimination because rules specific enough to change behaviors cannot account for modern complexity, while more general rules cannot sufficiently influence the subterranean behaviors that systematically harm minorities).

61. 411 U.S. 1, 43 (1973).

litigation that is only now beginning to be challenged.<sup>62</sup> Justice Powell's reasoning for the *Rodriguez* majority appeals directly to the knocks on bureaucracy noted above. "[T]he judiciary," Powell wrote, "is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions."<sup>63</sup>

As was evident as early as the 1970s, bureaucracy today has little appeal to judges as a model for redressing deficient and disparate educational outcomes that themselves are widely associated with the failings of school bureaucracies. We can best honor Judge Motley, therefore, by discarding the bureaucratic strategies her generation applied to such good effect at the time and by replacing them with public-education reforms that adopt the more flexible governance structures of the private and public organizations that recently have gotten the better of bureaucracy. To be clear, the proposal here is not to give up on structural reform through the courts; the very complexity of modern conditions that brought old-style public law litigation down may require structural intervention if constitutional rights are to be vindicated.<sup>64</sup> The point instead is that the strategies used to bring about reform must change from bureaucratic to more modern and flexible forms.

### III. EVOLUTIONARY LEARNING AS A MORE UP-TO-DATE MODEL FOR EDUCATION REFORM LITIGATION

This Part nominates evolutionary learning to serve the generative purposes that bureaucracy served in Judge Motley's day. Section III.A describes evolutionary learning and offers a justification for adopting it as a model for modern public law litigation. Section III.B illustrates the use of evolutionary learning in the operation of school systems, noting how it nullifies the Supreme Court's rationale in *Rodriguez* for concluding that constitutional courts cannot legitimately or competently intervene to improve public-education systems.

#### A. *Evolutionary Learning in Public Administration Generally*

Evolutionary learning is a process for self-consciously and rapidly using feedback from an organization's everyday responses to problems to improve overall performance.<sup>65</sup> Centrally supported and observed groups of internal and external stakeholders at the field level drive this process

---

62. *Id.* at 36.

63. *Id.* at 43.

64. See Noonan et al., *supra* note 21, at 14–18 (discussing instances in which structural reform is needed).

65. See Liebman et al., *Governance of Steel*, *supra* note 47, at 416–30 (using the term “democratic experimentalism” to describe evolutionary learning as an alternative to existing models of public administration).

through structured efforts to solve problems as they manifest themselves at each local site. Actors at the center then identify effective strategies for recognizable categories of problems by comparing and aggregating the results achieved at each local site and spread what is learned throughout the organization.

Although bureaucracy reigned supreme in its day, public-sector actors today disagree about the best replacement for bureaucracy.<sup>66</sup> Key contenders in addition to evolutionary learning include pure or simulated markets, managerialism (setting a few outcome targets and exposing managers to positive and negative consequences if they do or do not reach the targets), and professionalism and craft (residing discretion cabined by collective norms in highly trained or accomplished actors).<sup>67</sup>

For reasons developed in detail elsewhere, evolutionary learning eclipses these other models in two ways.<sup>68</sup> Descriptively, evolutionary learning has more widely and effectually supplanted bureaucracy in fields as diverse as manufacturing, trade policy, research and development, labor standards, child welfare services, drug-addiction rehabilitation, food safety, environmental protection, policing, and public education.<sup>69</sup> Normatively, evolutionary learning retains a feature of bureaucracy that, although discarded by other contenders—baby with bathwater—is crucial to problem-solving under complex conditions. Unlike the other contenders, which treat knowledge as tacit and available only to the market's hidden hand or to actors in proportion to their innate talents and instincts, evolutionary learning takes self-conscious steps to make *explicit* the know-how of key actors, enabling more learning to occur

---

66. See id. at 404–14.

67. See id.

68. See id. at 416–19; Charles F. Sabel & William H. Simon, Minimalism and Experimentalism in the Administrative State, 100 *Geo. L.J.* 53, 56–60 (2011) [hereinafter Sabel & Simon, Minimalism] (criticizing bureaucracy and both market-based and managerialist alternatives to bureaucracy that aim to minimize the role of government).

69. See, e.g., Steven J. Spear, The High Velocity Edge: How Market Leaders Leverage Operational Excellence to Beat the Competition 140–47 (2010) (describing Pratt & Whitney's adoption of evolutionary learning techniques to improve and reduce the cost of developing new jet engine designs); Michael C. Dorf & Charles F. Sabel, Drug Treatment Courts and Emergent Experimentalist Government, 53 *Vand. L. Rev.* 831, 832–34 (2000) (describing drug-treatment courts' use and monitoring of individualized treatment plans to increase experimentation and improve outcomes); Liebman et al., Governance of Steel, *supra* note 47, at 423–30 (discussing the implementation of evolutionary learning in car manufacturing, drug courts, environmental policy, policing, and special education); Charles F. Sabel & William H. Simon, Contextualizing Regimes: Institutionalization as a Response to the Limits of Interpretation and Policy Engineering, 110 *Mich. L. Rev.* 1265, 1267–69 (2012) [hereinafter Sabel & Simon, Contextualizing Regimes] (analyzing arrangements in the face of uncertainty about effective policy prescriptions that prompt stakeholders to experiment with new solutions); Charles F. Sabel, On Richard M. Locke, the Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy, 12 *Socio-Econ. Rev.* 226, 228–30 (2014) (book review) (discussing Nike's adoption of evolutionary learning programs for supplier firms and the effects such programs have on labor conditions).

more rapidly.<sup>70</sup> What evolutionary learning adds to bureaucracy are steps to make explicit the know-how of agencies' dispersed field staffs and clients, as well as that of its central managers.<sup>71</sup>

In *Rodriguez*, the Court ascribed transcendent importance to its own and administrators' need but uncertain ability to access explicit knowledge about whether, how, and to what extent education systems can improve student outcomes.<sup>72</sup> As is documented further in the next section, evolutionary learning's capacity to meet that need makes it an especially appealing model for public law adjudication.

To be sure, the structures and disciplines needed to foster transparent learning by dispersed, imperfectly capacitated field staff and client populations are costly, making other approaches seem more attractive.<sup>73</sup> Many highly effective organizations, however, have overcome these difficulties at reasonable expense, discovering an ability over the long haul to outperform their own and other organizations' strategies focused on short-term optimization.<sup>74</sup> Given that the very purpose of public law litigation in all its forms is to prod organizations to bear the short-term expense of transitioning to more effective governance models in order to accelerate their capacity to achieve the Constitution's and their own objectives, resistance to doing so is as much a reason as a problem for public law litigation.

#### B. *Evolutionary Learning in the Operation of Public Schools*

Evolutionary learning's promising but incomplete adoption by public school systems illustrates two points just made. Evolutionary learning can pay back its capacity-building costs and more in improved outcomes for children. For that reason, the failure of school systems to build their own learning capacity may justify resort, in egregious cases, to public law litigation in the image of evolutionary learning.

As is developed more fully elsewhere, when adopted by school officials in place of bureaucracy, evolutionary learning has achieved considerable success in the public-education context in, for example, Baltimore, Boston, Charlotte, Denver, Houston, Nashville, New York, and Washington,

---

70. See Liebman et al., *Governance of Steel*, supra note 47, at 418, 433–34.

71. See id.

72. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973).

73. See Liebman et al., *Governance of Steel*, supra note 47, at 421–22, 430–31 (describing concerns about the workability of evolutionary learning).

74. See id. at 422–36 (offering responses in principle and practice to concerns about evolutionary learning's practicality); Sabel & Simon, *Minimalism*, supra note 68, at 79–80 (providing examples of evolutionary learning's capacity to outperform strategies devoted to short-term optimization). For collections of case studies of organizations that improved their effectiveness and came to dominate their fields by using strategies for making know-how explicit and accelerating learning, see generally Ansell, supra note 23, at 3–12; Spear, supra note 69, at 9–19.



D.C.<sup>75</sup> Although these reforms have taken a number of forms, they typically involve school districts giving individual schools—often mixes of traditional and charter schools—greater responsibility, authority, and resources for responding to each student’s needs and for getting and keeping each student on track to graduate ready to succeed in college or a career.<sup>76</sup> Rather than prescribing uniform rules and procedures for each school to follow, central state and district officials set standards, provide educators with data and problem-solving procedures to assess and respond to student needs, and monitor and use the results different schools achieve as a basis for revising standards in light of what is shown to be possible, spreading learning from school to school and managing the overall portfolio of schools.<sup>77</sup>

In Baltimore, for instance, schools CEO Andres Alonso empowered schools to implement their own plans for improving student outcomes, developed qualitative and quantitative reviews of schools to help them track student needs and successes, held regular meetings with principals to review the success of their plans and identify steps schools and district officials could take to foster improvement, and used the results to make personnel decisions and structure the district’s overall portfolio of schools.<sup>78</sup> Alonso’s tenure coincided with notable increases in enrollment, student attendance, test scores, and graduation rates.<sup>79</sup>

Likewise, New York City and Washington, D.C. have placed their school systems under mayoral control, avidly implemented the Common Core learning standards, given schools more autonomy while increasing their accountability for results, and replaced failing schools with new ones modeled on schools that had previously succeeded with similar populations.<sup>80</sup> These reforms have also been associated with improved test scores and graduation and college-attendance rates.<sup>81</sup>

Recent Louisiana legislation<sup>82</sup> returning responsibility over New Orleans schools to the Orleans Parish School Board (OPSB) after a decade of state control following Hurricane Katrina provides another interesting evolutionary learning model. For years after the 2005 storm, the state-run Recovery School District (RSD) oversaw the reestablishment and operation

---

75. See Liebman et al., *Governance of Steel*, supra note 47, at 390–401, 447–49; *infra* notes 78–95 and accompanying text.

76. Typically, responsibility is formalized in learning standards and associated success measures; authority includes control over budget, hiring and firing teachers, use of time, and school programs; and resources are allocated based on a formula driven by the relative learning challenges each child presents given, for example, her special needs and language barriers. See, e.g., Liebman et al., *Governance of Steel*, supra note 47, at 432–36.

77. See *id.*

78. See *id.* at 399–401.

79. See *id.* at 401.

80. See *id.* at 387, 393–98, 402–03.

81. See *id.* at 398–99, 402–03.

82. Act of May 12, 2016, 2016 La. Sess. Law Serv. 158 (West).

of most New Orleans public schools, most of them charter schools.<sup>83</sup> Among other flexibilities, the RSD afforded schools substantial authority to hire and fire teachers.<sup>84</sup> It also placed a high value on experimentation in academic offerings and emphases, language-immersion programs, and traditional curricula.<sup>85</sup> As a whole, New Orleans schools operated by the RSD after Katrina showed substantial gains compared to the performance of New Orleans public schools before the storm and the concurrent performance of other Louisiana schools.<sup>86</sup>

Building on this success, while taking steps to assure that charter schools do not “cream-skin” better-prepared students, underenroll special-education students, and overdiscipline children,<sup>87</sup> the new legislation positions OPSB as a *regulator* and *provider of services* to, but not (with modest exceptions) an *operator* of, schools.<sup>88</sup> OPSB assigns all students in the district to schools based on family preferences using a parish-wide application and matching system designed to deter schools from using strategic

---

83. See Alan Greenblatt, *New Orleans District Moves to an All-Charter System*, nprED (May 30, 2014), <http://www.npr.org/sections/ed/2014/05/30/317374739/new-orleans-district-moves-to-an-all-charter-system> [<http://perma.cc/J2MC-6L3Q>].

84. See, e.g., Douglas N. Harris, *Good News for New Orleans*, EducationNext, Fall 2015, at 8, 14 (discussing New Orleans school leaders’ freedom to make personnel decisions as a result of reforms adopted in the aftermath of Hurricane Katrina).

85. See, e.g., *id.* at 8, 14 (discussing empirical evidence that providing a “degree of differentiation in schooling options” enabled more tailored choices by families, while greater flexibility in making instructional, personnel, and other decisions enhanced the effectiveness of New Orleans schools).

86. A recent study comparing pre- and post-reform outcomes in New Orleans concluded that the reforms raised student test performance by eight to fifteen percentage points, greatly reducing the performance gap between New Orleans and other Louisiana schools. Douglas N. Harris & Matthew Larsen, *Educ. Research All. for New Orleans, The Effects of the New Orleans Post-Katrina School Reforms on Student Academic Outcomes 6* (2016) [hereinafter Harris & Larsen, *Effects*], <http://educationresearchalliancenola.org/files/publications/The-Effects-of-the-New-Orleans-Post-Katrina-School-Reforms-on-Student-Academic-Outcomes.pdf> [<http://perma.cc/4FNF-C5JY>].

87. See, e.g., *Complaint-Class Action at 19–35, Berry v. Pastorek*, No. 2:10-cv-04049 (E.D. La. filed Oct. 26, 2010), [http://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/case/pb\\_v\\_pastorek.pdf](http://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/pb_v_pastorek.pdf) [<http://perma.cc/Y6K4-ZWUQ>] (alleging violations of the federal Individuals with Disabilities Education Improvement Act based on the exclusion of students with disabilities from New Orleans charter schools); Howard Blume, *Union-Commissioned Report Says Charter Schools Are Bleeding Money from Traditional Ones*, L.A. Times (May 10, 2016), <http://www.latimes.com/local/education/me-union-charter-study-20160509-snap-story.html> (on file with the *Columbia Law Review*) (reporting that relative to traditional public schools, Los Angeles charter schools enroll a smaller proportion of the most expensive special-needs students); Stephanie Simon, *Special Report: Class Struggle—How Charter Schools Get Students They Want*, Reuters (Feb. 15, 2013), <http://www.reuters.com/article/us-usa-charters-admissions-idUSBRE91E0HF20130216> [<http://perma.cc/UMH7-3PNG>] (identifying tactics some charter schools use to influence which students do and do not apply).

88. Harris & Larsen, *Effects*, *supra* note 86, at 3.

behavior in recruiting students.<sup>89</sup> With funding apportioned according to the educational needs of each child, all New Orleans' schools have full responsibility and full personnel, budget, and programmatic authority, without interference from OPSB, to decide how to educate children.<sup>90</sup> OPSB, however, retains authority to create new schools based on family demand and the success of different school models and to close existing traditional schools and withdraw charters based on chronically low School Performance Scores.<sup>91</sup> OPSB also has sole authority, on request by schools, to expel children or impose other serious discipline<sup>92</sup>—a power charter and other schools had previously been accused of exercising to push out low-performing students<sup>93</sup>—and it operates citywide schools for students suffering the effects of trauma<sup>94</sup> and for incarcerated youth.<sup>95</sup>

Notice how evolutionary learning implemented by willing school systems alleviates the concerns about the inaccessibility of know-how and other features of bureaucratic public law litigation that drove the *Rodriguez* Court to withdraw from the school-reform field.<sup>96</sup> Fueling the Court's worries about the legitimacy and efficacy of judicial intervention were doubts about the plaintiffs' and courts' ability (i) to demonstrate the existence and seriousness of educational deficiencies and disparities facing school children complaining about the impact of different school funding or other conditions<sup>97</sup> and (ii) to identify—as bureaucratic public law

89. Douglas N. Harris et al., *The New Orleans OneApp*, EducationNext, Fall 2015, at 17, 17–18.

90. See Harris & Larsen, *Effects*, supra note 86, at 3–7.

91. See *id.* at 3–4; Andrew Vanacore, *What New Orleans Can Teach Betsy DeVos About Charter Schools*, Politico (Jan. 9, 2017), <http://www.politico.com/magazine/story/2017/01/what-new-orleans-can-teach-betsy-devos-about-charter-schools-214610> [<http://perma.cc/GFP9-2KEA>] (noting that OPSB will regain control over decisions to open and close charter schools in 2018).

92. See Act of May 12, 2016, 2016 La. Sess. Law Serv. 158, 160 (West); Jonathan Chait, *How New Orleans Proved Urban-Education Reform Can Work*, N.Y. Mag. (Aug. 24, 2015), <http://nymag.com/daily/intelligencer/2015/08/how-new-orleans-proved-education-reform-can-work.html> [<http://perma.cc/STS9-D7BL>] (noting that, because of the citywide disciplinary process, principals cannot use disciplinary measures to push out low-performing students).

93. See Vanacore, supra note 91 (discussing charter schools' practice of expelling the hardest-to-serve students).

94. See Mallory Falk, *New Program Will Serve Students with Mental and Behavioral Health Needs*, New Orleans Pub. Radio (Aug. 25, 2015), <http://wno.org/post/new-program-will-serve-students-mental-and-behavioral-health-needs> [<http://perma.cc/F3FM-M5XS>].

95. See Youth Study Center, City of New Orleans, <http://www.nola.gov/youth-study-center/> [<http://perma.cc/2PCE-KYX4>] (last updated June 2, 2017).

96. See supra notes 61–63 and accompanying text.

97. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 n.56, 55 (1973) (calling the alleged correlation between per-pupil expenditures and school quality “a matter of considerable dispute among educators and commentators” and noting that the Court is “unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States”).

adjudication required—one or a small number of effective treatments for the offending conditions.<sup>98</sup> The Court, that is, had no authoritative basis for deciding which children were falling below what valid educational standards and whether there was anything educators could reasonably be expected to do about it.

Over the last decade and more, however, explosive growth in educational standards, measurement technologies, pedagogical strategies, and other tools educators applying evolutionary learning structures use to diagnose and gradually diminish educational deficiencies have filled these gaps.<sup>99</sup> Nearly all states now have educational standards that are authoritative in multiple senses, having been promulgated by legislatures or administrative agencies, designed by educators, blessed by educational experts and the federal government, and validated by their connection to individuals' success as adults and with the nation's economic and civic health.<sup>100</sup> States and districts also have developed aligned measures of whether students achieve the standards<sup>101</sup> and routinely and publicly document deficiencies

---

98. *Id.* at 56 (“[T]here is nothing simple or certain about predicting the consequences of massive change in the financing and control of public education. Those who have devoted the most thoughtful attention to the practical ramifications of these cases have found no clear or dependable answers . . .”).

99. See Laura S. Hamilton et al., RAND Corp., *Standards-Based Reform in the United States: History, Research, and Future Directions 17–24* (2008), [http://www.rand.org/content/dam/rand/pubs/reprints/2009/RAND\\_RP1384.pdf](http://www.rand.org/content/dam/rand/pubs/reprints/2009/RAND_RP1384.pdf) [<http://perma.cc/9MXN-H669>] (documenting the evolution of standards-based reform efforts in the United States); Nat'l Acad. of Educ., *Standards, Assessments, and Accountability 2–3* (2009), <http://files.eric.ed.gov/fulltext/ED531138.pdf> [<http://perma.cc/NP6T-THDD>] (discussing standards-based reform efforts and their impact on education outcomes). Evolutionary learning strategies use standards and measures to motivate and empower educators to diagnose educational deficiencies and to test and improve solutions. Using standards and measures instead to evaluate and impose consequences on schools, educators, or students is associated with a different governance form sometimes called “managerialism.” See *supra* notes 65–71 and accompanying text.

100. See Yergin, *supra* note 21, at 1568–69, 1596–97 (noting that forty-three states have been permitted to waive provisions of the No Child Left Behind Act in favor of their own comprehensive plans to use publicly available data to improve student outcomes and describing the duties such plans impose on states); see also, e.g., Press Release, N.Y. State Educ. Dep't, *State Education Department Releases Revised NYS English and Mathematics Learning Standards* (May 2, 2017), <http://www.nysed.gov/news/2017/state-education-department-releases-revised-nys-english-and-mathematics-learning-standards> [<http://perma.cc/9NMD-Q22T>] (“These new [literacy and math] standards recognize the importance of preparing New York's children for success in life and provide the foundation needed to get there.”).

101. See, e.g., Paul E. Barton, *National Education Standards: Getting Beneath the Surface 32* (2009), <http://www.ets.org/Media/Research/pdf/PICNATEDSTAND.pdf> [<http://perma.cc/2T76-H6HP>] (offering a comprehensive overview of U.S. education standards and noting that federal laws have “required states to develop and align content standards and assessments”); David Figlio & Susanna Loeb, *School Accountability*, in *Economics of Education* 383, 392, 400–14 (Eric A. Hanushek et al. eds., 2011) (inventorying standards and measures used to assess student success in schools); Michael J. Petrilli & Aaron Churchill, *Why States Should Use Student Growth, and Not Proficiency Rates, when Gauging School Effectiveness*, *Thomas B. Fordham Inst.* (Oct. 13, 2016), <http://edexcellence.net/>

and disparities by race, ethnicity, socioeconomic status, and other categories in children's success in meeting the standards.<sup>102</sup>

These same tools enable school officials to expose with ever-increasing acuity categories of students—including those assigned to particular schools and teachers—who systematically exceed or fall short of the state's learning standards and the outcomes that demographic and other conditions predict students will likely attain.<sup>103</sup> By revealing which classrooms and schools routinely outperform or underperform expected outcomes, evolutionary learning tools uncover policy options associated with changes in the portfolio of such schools and classrooms and how students are distributed among them. By making explicit evidence of why certain schools, teachers, and interventions outperform others in particular situations, evolutionary learning enables educators to alter pedagogical and other responses to the needs of students and to conditions associated with their home life, neighborhoods, and economic status in ways that can improve students' chances of success.<sup>104</sup>

As this section illustrates in the context of public education, evolutionary learning in operation provides what both bureaucracy and many of its alternatives fail to offer and what the Court identified in *Rodriguez* as a prerequisite to public law adjudication of a constitutional right to an education: an ability to proliferate and access learning about what ails egregiously failing schools or other systems and how to fix them without assuming the panoptic prescience of courts and other centralized actors. The next Part considers whether judges and allied regulatory agencies are capable of adopting evolutionary learning strategies for this and similar purposes.

#### IV. EVOLUTIONARY LEARNING IN LAW AND LEGAL ACTION

This Part explains how evolutionary learning operates not simply as a feature of administrative environments under review by courts but also

---

articles/why-states-should-use-student-growth-and-not-proficiency-rates-when-gauging-school [http://perma.cc/3E8H-RD8D] (advocating measures of student year-to-year academic growth over static measures of proficiency levels attained).

102. See, e.g., Press Release, N.Y. State Educ. Dep't, Commissioner Elia Identifies 144 Struggling and Persistently Struggling Schools to Begin Implementation of School Receivership in New York State (July 16, 2015), <http://www.nysed.gov/news/2015/commissioner-elia-identifies-144-struggling-and-persistently-struggling-schools-begin> [http://perma.cc/5WS6-X68F]; see also *supra* notes 19–20.

103. See, e.g., Debora Mitchell, Six Arizona Schools Named “Beat the Odds Schools,” AZEdNews (Feb. 17, 2015), <http://azednews.com/six-arizona-schools-named-beat-the-odds-schools/> [http://perma.cc/52J5-UWUG] (listing schools that “Beat the Odds” by, among other things, showing consistently improved test scores); Press Release, Ga. Dep't of Educ., 1000+ Georgia Schools ‘Beat the Odds’ in 2016 (Feb. 28, 2017), <http://www.gadoe.org/External-Affairs-and-Policy/communications/Pages/PressReleaseDetails.aspx?PressView=default&pid=510> [http://perma.cc/76KG-Y7PA] (noting schools that outperformed statistical expectations given demographics and other predictive factors); see also *supra* notes 19–20.

104. See, e.g., Liebman & Sabel, Public Laboratory, *supra* note 21, at 289.

as a model for how courts and other legal institutions should conduct such review. Sections IV.A (for contexts other than education) and IV.B (for education) illustrate how legal actors in nonconstitutional settings already use evolutionary learning to decide whether a condition subject to regulatory or legal redress (e.g., racial discrimination) is present and, if so, what steps can be taken to moderate that condition. Sections IV.C through IV.E then, respectively, explore evolutionary learning in use in constitutional litigation in noneducation, higher-education, and K–12 contexts.

A. *Evolutionary Learning in Nonconstitutional Law Generally*

Evolutionary learning can help courts respond to another important problem to which *Rodriguez* alludes<sup>105</sup>: how to acquire evidence of discriminatory intent—a key predicate for equal protection violations based on racial disparities<sup>106</sup>—without direct access to subjective motivations that actors can easily, and often unconsciously, conceal.<sup>107</sup> Although the Supreme Court has acknowledged the possibility of objective evidence of racial intent,<sup>108</sup> it rarely relies on such evidence, fearing that doing so might tempt judges to commit their own equal protection violations by compelling race-conscious redistributive affirmative action to bring disadvantaged minorities up to the level of the majority.<sup>109</sup> Evolutionary learning structures offer a way to avoid this problem by exposing objective evidence of the presence or absence of invidious purpose without compelling or risking racially redistributive affirmative action.<sup>110</sup> They do so by observing how officials whose actions are associated with harmful racially disparate outcomes respond to opportunities to experiment with modest iterative steps to diminish disparities at little or no cost. This section

---

105. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 60 (1973).

106. See, e.g., *Washington v. Davis*, 426 U.S. 229, 240 (1976).

107. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317, 322 (1987) (marshaling evidence suggesting that “a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation”).

108. A number of cases illustrate how racial motivation may be shown through objective evidence (i.e., without directly accessing decisionmakers’ subjective thoughts). See, e.g., *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464–65 (1979) (discussing inferences from defendants’ adoption of racially segregative strategies for siting and assigning children to schools over other reasonable but less segregative options); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977) (discussing inferences from segregative siting and assignment decisions for public housing); *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (inferring racial motivation from the nearly perfectly segregative effect of irregular and illogical lines drawn to separate municipalities from each other); *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) (inferring discriminatory motivation from a pattern of discretionary licensing of laundries that excluded virtually all, and only, Chinese applicants).

109. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720–21 (2007); *Washington*, 426 U.S. at 245–46.

110. See *supra* note 108.

provides a number of legislative, administrative, and adjudicative examples of evolutionary learning employed in this fashion, some dating back to Judge Motley's time as a civil rights advocate.

As courts have come to interpret them, Title VII of the Civil Rights Act of 1964,<sup>111</sup> the Fair Housing Act of 1968,<sup>112</sup> and the Age Discrimination in Employment Act of 1967 (ADEA)<sup>113</sup> all have evolutionary learning features. Under the reigning doctrine in all three contexts, evidence of disparate outcomes based on race, ethnicity, gender, or age puts the responsible actors under an obligation to identify a nondiscriminatory purpose for their disparity-creating actions.<sup>114</sup> By putting actors at risk if they do not do so, these standards essentially create a before-the-fact duty to take note of disparities their actions create and to diminish those disparities if they can do so without harm to other legitimate interests. Rather than forbidding disparities and requiring affirmative action to end them, these regimes make the existence of disparities the occasion for inquiring whether they can be diminished at little or no cost.<sup>115</sup>

Even more explicitly, a number of legislative<sup>116</sup> and administrative<sup>117</sup> mandates tied to federal funding require local agencies receiving federal

---

111. § 703(a)(1), 42 U.S.C. § 2000e-2(a) (2012) (“It shall be . . . unlawful . . . for an employer . . . to fail or refuse to hire or to discharge any individual . . . because of such individual’s race, color, religion, sex, or national origin.”).

112. § 804(a), 42 U.S.C. § 3604 (“It shall be unlawful . . . to refuse to sell or rent . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”).

113. § 4(a), 29 U.S.C. § 623 (2012) (“It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual’s age.”).

114. See, e.g., *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2516–22 (2015) (adopting an objective approach to adjudicating discrimination under the Fair Housing Act); *Ricci v. DeStefano*, 557 U.S. 557, 592–93 (2009) (ruling that, in order to survive a disparate treatment claim, the City of New Haven had to establish a legitimate reason for discarding test results that otherwise would have awarded fire-fighting jobs to white and Hispanic applicants); *Smith v. City of Jackson*, 544 U.S. 228, 235 (2005) (assessing motivation objectively under the ADEA); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (“Congress [in Title VII] has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.”); see also James S. Liebman & Michael Mbikiwa, *Every Dollar Counts: In Defense of the Obama Department of Education’s “Supplement Not Supplant” Proposal*, 117 *Colum. L. Rev. Online* 36, 42–43 (2017), <http://columbialawreview.org/wp-content/uploads/2017/02/March-2017-LM-Online.pdf> [<http://perma.cc/3URZ-E3Z3>] (explaining the rationale behind requiring the defendant to produce a different, legitimate explanation after the plaintiff establishes a prima facie case of racial discrimination).

115. See Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 *N.Y.U. L. Rev.* 1339, 1368 (2012) [hereinafter Johnson, *Equality Directives*] (discussing administrative regulations enforcing the requirements of Title VI and Title VIII by requiring state actors to take affirmative steps to identify and moderate racially uneven results of federally financed programs).

116. See, e.g., the Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5633(a); Prison Rape Elimination Act of 2003, *id.* § 15605(a)–(e); American Recovery and Reinvest-

dollars to take note of any racially disparate impact or segregative effect of their actions and to monitor the effect of modest experimental steps to diminish the disparities without undue cost. In the juvenile justice context—the most fully studied of these mandates—a succession of such small steps has been associated with major declines in the national rate of juvenile detention.<sup>118</sup> Examples include telephone reminders of and transportation to court hearings, which diminish otherwise common and racially uneven detention orders based on juveniles' failure to appear in court.<sup>119</sup>

By exposing officials' willingness to tolerate known and easily avoidable disparities with no legitimate basis, these duties to inquire and experiment provide evidence of invidious motivation, conscious or otherwise. More importantly, the steps these duties impel may *alter* motivations, especially unconscious ones, by confronting officials with both the effect and lack of a justification for their racially disparate actions.<sup>120</sup> In the juvenile justice context, for example, the steps noted above may lead officials to see that assumptions that may have formerly disposed them to detain certain categories of children more often than others—for example, that failure to appear in court evidenced guilt, flight proneness, or irresponsibility—are wrong.<sup>121</sup>

---

ment Act of 2009, Pub. L. No. 111-5, § 5004(g), 123 Stat. 115, 504 (codified as amended in scattered titles of the U.S.C.).

117. See, e.g., Exec. Order No. 13,166, 3 C.F.R. § 289 (2001); 28 C.F.R. § 31.303 (2016); id. pt. 115; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum on Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009 § 1.6, at 7 (2009); see also Johnson, Equality Directives, *supra* note 115, at 1383 (detailing the requirements set out in the executive order).

118. See, e.g., Act 4 Juvenile Justice Working Grp., The Juvenile Justice and Delinquency Prevention Act: A Fact Book 2, 10–11 (2007), <http://www.campaignforyouthjustice.org/Downloads/Resources/jjdpafactbook.pdf> [<http://perma.cc/BW5M-K6KE>] (discussing the Juvenile Justice Delinquency and Prevention Act and its role in helping reduce youth incarceration); see also The Annie E. Casey Found., Reform the Nation's Juvenile Justice System (2009), <http://www.aecf.org/m/resourcedoc/aecf-IssueBriefJuvenileJusticeReform-2009.pdf> [<http://perma.cc/UDZ2-6NHN>]; Richard A. Mendel, The Annie E. Casey Found., Juvenile Detention Alternatives Initiative Progress Report 2014, at 11–20, 26 (2014), <http://www.aecf.org/m/resourcedoc/aecf-2014JDAIProgressReport-2014.pdf#page=14> [<http://perma.cc/3SNW-QT68>] (claiming that declines in juvenile incarceration are due, in part, to the foundation's partnership with the federal government to promote experimentation with detention-reduction activity, supported by federal grants).

119. See Sabel & Simon, Contextualizing Regimes, *supra* note 69, at 1290.

120. See, e.g., Johnson, Equality Directives, *supra* note 115, at 1365–66 (describing affirmative duties to track and ameliorate racial disparities and racial segregation that various civil rights statutes and associated administrative regulations impose on state actors receiving federal funding); Olatunde C.A. Johnson, Stimulus and Civil Rights, 111 Colum. L. Rev. 154, 200–04 (2011) (describing new approaches to civil rights accountability based on a duty to track and moderate racial disparities).

121. For discussions of the possible effects on the dispositions of state actors of encouraging them to discover relatively simple but previously unimagined ways of reducing racial disparities, see generally, e.g., Olatunde C.A. Johnson, Disparity Rules, 107 Colum. L. Rev. 374, 401–06 (2007); Sabel & Simon, Contextualizing Regimes, *supra* note 69, at 1290.



B. *Evolutionary Learning in Nonconstitutional Law in the K–12 Education Context*

In *Endrew F. v. Douglas County School District*, the Supreme Court gave an evolutionary learning gloss to a federal education statute for the first time, construing the Individuals with Disabilities Education Act (IDEA)<sup>122</sup> to require school districts to provide disabled students with education services that are “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”<sup>123</sup> By giving school officials a statutory duty of reasonable inquiry, *Endrew F.* buttresses a response given above to one of the key worries about public law litigation on an evolutionary learning model.<sup>124</sup>

In place of the prescience that old-style public law litigation demanded of courts and agencies in identifying simple substantive solutions for complex problems, evolutionary learning requires courts and officials to preside over a muscular process of local experimentation and shared learning that may seem no less unrealistic and demanding. Based on this concern, some lower courts prior to *Endrew F.* had limited judicial intervention in IDEA cases to bright-line situations in which schools failed to exercise their discretion and thus to provide disabled students with any educational benefit at all.<sup>125</sup> Supporting this approach is the extreme personalization of the central obligation IDEA imposes: to engage school administrators, special-education experts, service providers, teachers, parents, and the student in developing and implementing an Individualized Education Plan (IEP) customized to the needs of each child requiring special services.<sup>126</sup> Each plan includes data analyzing the child’s current performance, annual goals, services for meeting the goals, and tools for measuring progress.<sup>127</sup>

The *Endrew F.* Court, however, rejected both old-style review strategies that courts had previously followed: standing aside and letting presumptively expert school bureaucracies exercise their discretion, or standing in for presumptively failed education bureaucracies and imposing their own view of educational adequacy.<sup>128</sup> In an evolutionary learning mode, the Court instead directed lower court judges to review IEPs based on how responsibly school officials designed and learned in each

122. 20 U.S.C. § 1400 (2012).

123. 137 S. Ct. 988, 999 (2017).

124. See *supra* notes 67–74 and accompanying text.

125. The lower court in *Endrew F.* held that the school met its educational duty when it provided disabled students with more than de minimis services. *Endrew F. ex. rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 798 F.3d 1329, 1338 (10th Cir. 2015), vacated, 137 S. Ct. at 1002.

126. Office of Special Educ. & Rehab. Servs., U.S. Dep’t of Educ., A Guide to the Individualized Education Program 7 (2000), <http://www2.ed.gov/parents/needs/speced/iepguide/iepguide.pdf> [<http://perma.cc/T962-EDB5>].

127. *Id.* at 5–6.

128. *Endrew F.*, 137 S. Ct. at 999.

case from the documented process of analysis and information sharing among educators, experts, and parents in developing the IEP in question.<sup>129</sup> By the time a dispute reaches a courtroom, judges should expect school authorities to offer a cogent and responsible explanation—much of it based on what has been learned about the student’s needs and appropriate responses from intervention options tested along the way—of why the IEP under review is reasonably calculated to allow the student to make educational progress given his or her unique needs.<sup>130</sup>

The analysis *Andrew F.* imagines for individual students thus provides another analogy for how future courts may assess claims of egregiously inadequate or unequal educational opportunities for student bodies at large. If school officials cannot offer a reasonable explanation—based on their own self-conscious process of hypothesizing and testing solutions—of how they have tried to moderate existing educational deficiencies and disparities or why progress is currently impossible, then courts should step in and require the officials to undertake that iterative learning process.

The next three sections consider examples of evolutionary learning principles driving a federal *constitutional* duty for officials to inquire whether and how they can mitigate harms to important interests. Section IV.C focuses on institutional reform litigation outside education, section IV.D on litigation over the use of preferential admissions in higher education for diversity purposes, and section IV.E on what several recently filed constitutional education reform lawsuits reveal about evolutionary learning in the K–12 context.

### C. *A Constitutional Duty of Responsible Administration in Noneducation Contexts*

Over the last decade or two, courts have resorted to evolutionary learning mechanisms to remedy alleged constitutional violations by public institutions that affect liberty interests. Unlike traditional public law litigation, these suits do not involve courts or receivers they appoint in the management of defendant agencies or in the identification of particular substantive policies that agencies must implement. Instead, the decrees seek more broadly to improve “governance, [transparency], and accountability” through “self-monitoring and assessment” and “a framework of ongoing elaboration and adaptation.”<sup>131</sup> Typically via consent decrees, courts order agencies to establish their own preliminary standards and ways of tracking the harmful conditions that prompted the suit.<sup>132</sup> Courts then order the agencies to develop and test those preliminary practices and to use the lessons from those experiments to revise

---

129. *Id.*

130. *Id.*

131. Noonan et al., *supra* note 21, at 2, 34–35.

132. See *infra* notes 134–140 and accompanying text.

the initial standards, provide benchmarks for acceptable future results, and identify presumptively effective practices.<sup>133</sup>

Examples of this progression in remedial orientation from old to new public law include structural reforms of mental health facilities,<sup>134</sup> prisons,<sup>135</sup> and police forces.<sup>136</sup> In contrast to the command-and-control decrees that prevailed in each of these areas in the 1970s and 1980s,<sup>137</sup> more recent orders set broad goals and give states and institutions latitude to determine—that is, to learn iteratively—how to achieve them. Illustrative examples include a 2001 “Compliance Plan” for Washington, D.C. mental health institutions explicitly eschewing detailed prescriptions of policies and procedures and instead establishing mutually agreed-upon goals, tasks, and outcome criteria for assessing effectiveness;<sup>138</sup> a prison medical care consent decree in which the California Department of Corrections agreed to adopt a “quality-assurance system with significant accountability to outside professionals and the plaintiff class”;<sup>139</sup> and decrees that require police forces to develop policies with respect to commonly encountered contexts in which police activities have proven controversial, require officers to record instances of behavior covered by the policies and the reason for actions taken, and require police departments to use the data collected to create benchmarks for appropriate behavior and define deviations from the benchmarks that trigger inquiry.<sup>140</sup>

---

133. See *infra* notes 134–140 and accompanying text.

134. See, e.g., Sabel & Simon, *Destabilization Rights*, *supra* note 3, at 1030–32 (discussing gradual replacement of command-and-control remedies with court-ordered administrative inquiry processes in court-ordered mental health reforms).

135. See, e.g., *Brown v. Plata*, 563 U.S. 493, 533–37 (2011) (adopting a remedy for prison violations requiring prison officials to monitor and develop responses to constitutionally questionable incidents); Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. Pa. L. Rev. 805, 856–59 (1990) (describing prison reform decrees utilizing a “deliberative remedial formulation process” managed by defendants with court oversight).

136. See Sabel & Simon, *Destabilization Rights*, *supra* note 3, at 1043–44 (analyzing U.S. Department of Justice lawsuits against police forces); Sabel & Simon, *Duty of Responsible Administration*, *supra* note 3, at 193–95 (describing the Cincinnati Police Department’s implementation of a settlement decree through “Problem-Oriented Policing” focused on iterative cycles of problem definition, intervention, impact assessment, and revision).

137. See *supra* notes 34–43 and accompanying text.

138. See Sabel & Simon, *Destabilization Rights*, *supra* note 3, at 1032–33.

139. Stipulation for Injunctive Relief at 9–12, *Plata v. Davis*, No. C-01-1351 TEH (N.D. Cal. June 20, 2002), [http://www.cphcs.ca.gov/docs/court/plata/2002-06-13\\_Stipulation\\_for\\_Injunctive\\_Relief.pdf](http://www.cphcs.ca.gov/docs/court/plata/2002-06-13_Stipulation_for_Injunctive_Relief.pdf) [<http://perma.cc/77KR-GH2F>]; see also Sabel & Simon, *Destabilization Rights*, *supra* note 3, at 1039–40.

140. See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 668, 685–86 (S.D.N.Y. 2013) (ordering New York City police to conduct a “pilot project” equipping patrol officers with body-worn cameras in selected precincts to test their impact on police misconduct); Sabel & Simon, *Destabilization Rights*, *supra* note 3, at 1044; Sabel & Simon, *Duty of Responsible Administration*, *supra* note 3, at 183–84.

D. *Hints of Constitutional Evolutionary Learning in the Higher Education Context*

Evolutionary learning has also influenced constitutional litigation through the Supreme Court's recent decision in *Fisher v. University of Texas (Fisher II)*.<sup>141</sup> Although not the same, the questions in the Title VII and similar contexts discussed in section IV.A above and in *Fisher II* mirror each other. In the Title VII context, the question is how to generate objective evidence of whether allegedly race-neutral actions with racially disparate results are invidiously motivated without imposing an unconstitutional duty on prospective defendants to engage in racially retributive affirmative action in order to avoid liability.<sup>142</sup> In *Fisher II*, the question was how the University of Texas (UT) could demonstrate that admittedly race-conscious admissions decisions were a constitutional effort to achieve compelling pedagogical benefits from racial diversity and not an unconstitutional form of racially redistributive affirmative action.<sup>143</sup> As in the Title VII and related contexts, evolutionary learning provided the answer in *Fisher II*.

Prior to *Fisher II*, the Supreme Court had held that government entities could engage in benignly motivated racial decisionmaking only if *beforehand* they produced a strategy for doing so that fully articulated a compelling diversity or other nonracially redistributive objective and provided a mechanism that demonstrably allowed only as much racial decisionmaking as was necessary to achieve that objective.<sup>144</sup> Not surprisingly, the Court had never found those requirements met, given how difficult they are to achieve absent some amount of trial and error.<sup>145</sup> Much to the surprise of Justice Alito and the other dissenting Justices, however, the *Fisher II* majority affirmed UT's race-conscious admissions policy even though the policy admittedly did not, *as of then*, meet the Court's preexisting requirements.<sup>146</sup> The Court did so after finding that UT's race-conscious admissions were part of a *responsible process for gradually and iteratively* (i) identifying the kinds of diversity that are compellingly

141. 136 S. Ct. 2198 (2016).

142. Cf. *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) ("I . . . write separately to observe that [the Court's] resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII . . . consistent with . . . equal protection?").

143. *Fisher II*, 136 S. Ct. at 2205–06, 2211.

144. See, e.g., *Fisher v. Univ. of Tex. (Fisher I)*, 133 S. Ct. 2411, 2418 (2013); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 734–35 (2007).

145. See, e.g., *Parents Involved*, 551 U.S. at 786–87 (Kennedy, J., concurring) (finding a compelling state interest for race-based decisionmaking but also concluding that the means chosen to effectuate the interest were not sufficiently tailored).

146. 136 S. Ct. at 2239 (Alito, J., dissenting) ("The Equal Protection Clause does not provide a 3-year grace period for racial discrimination. Under strict scrutiny, UT was required to identify evidence that race-based admissions were necessary to achieve a compelling interest *before* it put them in place—not three or more years after.").

important and possible to achieve only through racial decisionmaking and (ii) ascertaining how far race-based decisionmaking can be minimized while still achieving those diversity goals.<sup>147</sup>

As summarized by the Court, UT's process provides a case study in evolutionary learning. UT began by testing race-neutral admissions, "spen[ding] seven years attempting to achieve its compelling [diversity] interest using race-neutral holistic review" of college applications.<sup>148</sup> Only after "[n]one of these efforts succeeded" and "a reasonable determination was made that the University had not yet attained its goals" did UT embark on a "significant evolution" of a race-conscious policy.<sup>149</sup> To learn iteratively what was possible, UT experimented with different types of diversity the university might try to achieve and different steps for achieving them, using "the experience the school has accumulated and the data it has gathered since the adoption of its admissions plan" to make "periodic reassessment[s] of the constitutionality, and efficacy, of its admissions program" and provide a "reasoned, principled explanation" of actions it took at each step.<sup>150</sup> Crucially, the Court understood these actions as satisfying an ongoing constitutional duty of responsible inquiry triggered by its involvement in actions that otherwise violated the Constitution:

Through regular evaluation of data and consideration of student experience, the University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest. The University's examination of the data it has acquired in the years since petitioner's application, for these reasons, must proceed with full respect for the constraints imposed by the Equal Protection Clause. The type of data collected, and manner in which it is considered, will have a significant bearing on how the University must shape its admissions policy to satisfy strict scrutiny in years to come.<sup>151</sup>

In so ruling, the Court replaced a constitutionally required *product*—a pristine definition of diversity and plan for achieving it with the least amount of racial decisionmaking—with a responsible *process* for developing that product over time; the Court thus abandoned a bureaucratic solution in favor of an evolutionary learning one. UT evidently adopted this way of proceeding, and the majority approved it, for the same reason this Essay promotes evolutionary learning as a model for modern education reform litigation: It allows iterative progress toward constitutional

---

147. Id. at 2209–10 (majority opinion).

148. Id. at 2213.

149. Id. at 2205, 2212–13.

150. Id. at 2205, 2210–12.

151. Id. at 2210.

and other compelling state goals without insisting on impossible precision by blocking action until its results are entirely predictable.

This Essay thus reads *Fisher II* to suggest that severe harms to important interests like education or egregious racial disparities may trigger a federal constitutional obligation of responsible inquiry into how to diminish those conditions without undue cost. Default of this obligation would then provide evidence of a toleration of deficiencies or disparities that is unconstitutional for lack of any good reason.

These propositions invite two serious objections. First, it might be argued that a duty of responsible mitigation of severe educational deficiencies or disparities demands too *much* of the Constitution. The trigger for the duty in *Fisher II* was UT's presumptively unconstitutional race-conscious decisionmaking. In contrast, the duty proposed here is triggered by deficiencies or disparities that, however harmful, are not presumptively unconstitutional. Recall, however, that Congress and at times the Court have deemed it reasonable in the Title VII, fair housing, ADEA, and juvenile justice contexts to treat analogous harms and disparities as sufficient to trigger this same duty of inquiry,<sup>152</sup> so it would not be unreasonable for the Court to follow suit when the deficiencies and disparities affect contexts like education and race in which constitutionally important interests are undeniably at stake. This is especially so, given that the duty suggested here is far less demanding than the one imposed by *Fisher II*: to see if the deficiencies or disparities can be avoided at little or no cost, not, as in *Fisher II*, to avoid racial decisionmaking at *all* costs save for a compelling state interest. And default of this duty merely evidences, without absolutely establishing, a constitutional violation.

Suggesting instead that the argument proposed here asks too *little* of the Constitution, reform lawyers making it would have to acknowledge—in an effort to convince federal courts to require school officials to try to eliminate *some* serious educational deficiencies and disparities—that *not all* such disparities and deficiencies are legally corrigible. Illustrating the impact of that concession is the “universal belief” that the similar compromise underlying Title VII has fallen short of “eradicat[ing] . . . discrimination” in employment.<sup>153</sup> But, at least in the context of K–12 education, with generation after generation of poor and minority children suffering the effects of egregious outcome deficiencies and disparities with *no* redress in sight from bureaucratic public law litigation—and given evidence that evolutionary learning remedies can make gradual progress in eliminating disparities and increasing the welfare of disadvantaged individuals<sup>154</sup>—a new strategy is worth trying.

---

152. See *supra* notes 111–119 and accompanying text.

153. Chuck Henson, Title VII Works—That's Why We Don't Like It, 2 U. Miami Race & Soc. Just. L. Rev. 41, 42 (2012).

154. See *supra* notes 24, 53–56, 69, 74, 78–95, 116–119 and accompanying text.

E. *Traditional and Novel Strategies in Recent Constitutional Litigation in the K–12 Education Context*

In a recent law review note, Rebecca Yergin imagines how successful transitions from command-and-control to evolutionary-learning-based public law litigation in other contexts might extrapolate to constitutional challenges to deficiencies and disparities in K–12 education.<sup>155</sup> Under Yergin’s approach, states and districts would have an obligation to take note of serious educational deficiencies or racial disparities, systematically explore ways to mitigate them without undue costs or harms to other children, and either extend innovations that prove to be effective with some disadvantaged students to others similarly situated or provide the latter students with equally or more effective alternative solutions.<sup>156</sup>

To elaborate Yergin’s approach and illustrate how much of a change in education litigation it implies, this section locates seven recently filed educational-deprivation lawsuits on a spectrum from old-style to new-age public law litigation. Two of the suits—*D.R. v. Michigan Department of Education*<sup>157</sup> and *Gary B. v. Snyder*,<sup>158</sup> both filed in Michigan federal courts—seek to enforce a federal constitutional right to an adequate education. Both rely on the magnitude of educational deprivation in, respectively, Flint and Detroit, Michigan, to remove *Rodriguez* as an obstacle to that objective.<sup>159</sup> The complaint in *Gary B.* is illustrative. The sickening conditions in the six Detroit schools it describes are so intolerable and the constitutional right to basic literacy that the complaint asserts is so modest that it is hard to imagine a federal judge turning a blind eye.<sup>160</sup> To remedy the situation, however, the prayer for relief takes a classically bureaucratic approach. Calling upon the court to substitute itself for the failed district- and state-level bureaucracies, the complaint asks the court to identify, then order the schools to implement, “appropriate literacy instruction at all grade levels, including instruction in the alphabetic principle, fluency, and comprehension in grades K–3, and instruction in comprehension, motivation, word study, fluency, and vocabulary in grades

---

155. Yergin, *supra* note 21, at 1596 (positing a new litigation strategy to reform failing school systems based on a duty of responsible administration).

156. *Id.*

157. Class Action Complaint at 120–21, *D.R. v. Mich. Dep’t of Educ.*, No. 2:16-cv-13694-AJT-APP, 2017 WL 3642131 (E.D. Mich. Aug. 24, 2017) [hereinafter *D.R. Class Action Complaint*], 2016 WL 6080952.

158. Class Action Complaint at 123–24, *Gary B. v. Snyder*, No. 2:16-cv-13292-SJM-APP (E.D. Mich. filed Sept. 13, 2016) [hereinafter *Gary B. Class Action Complaint*], <http://www.publiccounsel.org/tools/assets/files/0812.pdf> [<http://perma.cc/KQ7Y-3BNB>]; see also Tawnell D. Hobbs, *Lawsuit Targets Detroit Public Schools for Failing Students*, *Wall St. J.* (Sept. 13, 2016), <http://www.wsj.com/articles/lawsuit-targets-detroit-public-schools-for-failing-students-1473808179> (on file with the *Columbia Law Review*).

159. *D.R. Class Action Complaint*, *supra* note 157, at 5–7; *Gary B. Class Action Complaint*, *supra* note 158, at 1–17.

160. See, e.g., *Gary B. Class Action Complaint*, *supra* note 158, at 1–17.

4–12.”<sup>161</sup> To impel Michigan officials to operate as a better bureaucracy themselves, the prayer for relief asks the court to order them to identify and remove “conditions antithetical to literacy instruction in Plaintiffs’ schools, such as insufficient teacher capacity, deplorable school conditions, and [the absence of] trauma-informed practices.”<sup>162</sup> As compelling as the complaint’s facts and asserted right to basic literacy seem to be, the very enormity of the fiscal, physical, pedagogical, and trauma-related calamities afflicting the plaintiff children might lead a federal judge to despair of acquiring the centralized prescience that the suit’s bureaucratic frame would require in order to prescribe effectively ameliorative policies.

Four of the remaining suits, all of them filed in state court—*Davids v. State*<sup>163</sup> (in New York), *Forslund v. State*<sup>164</sup> (in Minnesota), *H.G. v. Harrington*<sup>165</sup> (in New Jersey), and *Vergara v. State*<sup>166</sup> (in California)—challenge state personnel rules governing the rapid conferral of tenure, the use of seniority rather than teacher quality to sequence reductions in force, and the procedure for dismissing teachers for poor performance.<sup>167</sup> Because all four complaints attack classically bureaucratic procedures, alleging that they disproportionately saddle disadvantaged children with ineffective teachers by denying school officials the flexibility needed to

161. *Id.* at 128; see also *D.R. Class Action Complaint*, supra note 157, at 128–32 (requesting detailed relief, including specific procedures for health screening and employee training and appointment of a special monitor to collect and implement expert recommendations).

162. *Gary B. Class Action Complaint*, supra note 158, at 128–29.

163. Verified Class Action Complaint, *Davids v. State*, No. 101105/2014 (N.Y. Sup. Ct. Oct. 22, 2015) [hereinafter *Davids* Complaint], <http://assets.documentcloud.org/documents/1212617/nyc-parents-union-class-action-lawsuit.pdf> (on file with the *Columbia Law Review*). The court denied the subsequent motion to dismiss while granting a stay pending appeal. See *Davids*, 2015 WL 7008097, at \*2.

164. First Amended Complaint, *Forslund v. State*, No. 62-CV-16-2161 (Minn. Dist. Ct. Oct. 26, 2016) [hereinafter *Forslund* Complaint], 2016 WL 8608311. The court subsequently dismissed the complaint and plaintiffs appealed. See *Forslund*, 2016 WL 8578375, at \*1, appeal filed, No. 62-CV-16-2161 (Minn. Ct. App. Jan. 9, 2017).

165. Complaint, *H.G. v. Harrington*, No. MER-L-2170-16 (N.J. Super. Ct. Law Div. May 4, 2017) [hereinafter *H.G.* Complaint], <http://edjustice.org/wp-content/uploads/2016/10/Complaint-H.G.-v.-Harrington-Stamped-copy.pdf> [<http://perma.cc/2AHC-GDQK>]. The court subsequently dismissed the complaint and plaintiffs appealed. See *H.G.*, No. MER-L-2170-16 (N.J. Super. Ct. Law Div. May 4, 2017), appeal filed, No. MER-L-2170-16 (N.J. Super. Ct. App. Div. May 24, 2017).

166. Complaint, *Vergara v. State*, No. BC484642 (Cal. Super. Ct. Aug. 24, 2014) [hereinafter *Vergara* Complaint] (on file with the *Columbia Law Review*). Plaintiffs prevailed in the trial court but the Court of Appeal reversed on appeal. *Vergara v. State*, 209 Cal. Rptr. 3d 532 (Ct. App.), review denied, 209 Cal. Rptr. 3d 532, 652 (2016).

167. *Vergara* Complaint, supra note 166, at 4, 11, 13, 16–17 (making each of these challenges); *Forslund* Complaint, supra note 164, at 21–22, 25 (challenging several Minnesota statutes that purport to cause each of the above-identified problems); *H.G.* Complaint, supra note 165, at 23 (challenging a New Jersey statute mandating that teacher workforce reduction decisions be made on the basis of tenure rather than effectiveness); *Davids* Complaint, supra note 163, at 4–5 (challenging New York’s extensive process for the dismissal of ineffective teachers as “far exceed[ing] the level of protection required under the Constitution”).



match teachers to student needs,<sup>168</sup> the lawsuits might seem to fall on the evolutionary learning side of the litigation spectrum. The structure of the litigation itself, however, has more affinity with bureaucratic public law litigation than with evolutionary learning. Rather than using iterative testing and demonstrated success in particular contexts to define the duty or remedy at issue, the suits seek to replace the challenged policies with unproven blanket alternatives of the plaintiffs' or courts' choosing. That approach makes the suits susceptible—as already has occurred in *Vergara*—to adverse rulings that the alleged violations and requested remedies are not sufficiently related to the particular educational deficiencies and disparities shown.<sup>169</sup>

The seventh complaint—a Connecticut federal action styled *Martinez v. Malloy*—attacks rules and practices that keep the State from expanding the number of charter schools, racially integrated magnet schools, and interdistrict transfer options available to students despite evidence that students in the small number of these settings that the State has facilitated outperform their peers in traditional public schools.<sup>170</sup> On one reading, the complaint is classically bureaucratic, treating those three interventions as a “three-sizes-fit-all” fix for what ails Connecticut public education. On the other hand, by criticizing the State for failing to learn something from its own test cases about how to reduce massive outcome disparities among children,<sup>171</sup> the *Martinez* complaint has evolutionary learning leanings, and one of its several causes of action adopts a self-consciously evolutionary learning approach.<sup>172</sup> Hoping to spur progress toward the new form of public law litigation that *Martinez*, alone among recent education reform lawsuits, envisions, the next Part offers a detailed conceptualization of a constitutional duty of responsible administration of the nation's schools.

---

168. *Vergara* Complaint, supra note 166, at 11 (criticizing California's bureaucratic teacher-hiring and teacher-firing policy); *Forlund* Complaint, supra note 164, at 6 (discussing the negative effects of Minnesota's teacher-hiring and teacher-retention program); *H.G.* Complaint, supra note 165, at 2 (attacking New Jersey's “quality-blind teacher layoff and employment statutes”); *Davids* Complaint, supra note 163, at 3–5 (challenging New York's bureaucratic tenure laws).

169. *Vergara*, 209 Cal. Rptr. 3d at 557 (finding no constitutional violation, despite adverse consequences under the statutory scheme, because “[t]he evidence did not show that the challenged statutes inevitably cause this impact”).

170. Complaint at 22–23, 26, 34, *Martinez v. Malloy*, No. 3:16-01439 (D. Conn. filed Aug. 23, 2016), <http://studentsmatter.org/wp-content/uploads/2016/08/Martinez-v-Malloy-Complaint.pdf> [<http://perma.cc/FK4D-UUYZ>] (using the State's own testing data to show that its charter schools, interdistrict magnet schools, and transfer options offer a superior education compared to traditional public schools serving identical populations of low-income and minority students).

171. On average, Connecticut's poor and minority students perform several grade levels behind their more affluent and white peers. *Id.* at 18–19, 22–23, 26.

172. See *id.* at 67–68.

V. A CONSTITUTIONAL DUTY OF RESPONSIBLE ADMINISTRATION OF THE  
NATION'S SCHOOLS, IN DETAIL

This Part begins by identifying four premises—satisfied in many states and school districts—for a duty to undertake a responsible process for inquiring whether students' serious educational deficiencies and disparities can be diminished without significant harm to other interests:

1. Plaintiff poor and minority school children experience vast educational deficiencies and disparities compared to wealthier and white children in specified educational outcomes.<sup>173</sup>

2. In the state's own estimation, achieving those outcomes is crucial to children's future quality of life, exercise of liberty, and acquisition and enjoyment of property. To begin with, administrative, statutory, and constitutional law and guidance in nearly every state explicitly acknowledge the importance of these outcomes, commit the state to providing services that enable children to achieve them, and prescribe standards and measures for assessing whether they have been achieved.<sup>174</sup> Additionally, the law of all states treats children's access to those services and outcomes as sufficiently important to justify seriously curtailing parents' and children's liberty by requiring children to attend schools meeting state requirements during substantial portions of thirteen successive years.<sup>175</sup>

3. The state's estimation is widely shared, given (a) the recognition of a right to a public education in at least forty-nine of fifty state constitutions<sup>176</sup> and numerous state court decisions holding education to be a fundamental right;<sup>177</sup> (b) the proliferation of increasingly rigorous state

173. See, e.g., *supra* notes 157–172 (citing complaints alleging educational deficiencies and disparities in schools in California, Connecticut, Michigan, Minnesota, New Jersey, and New York).

174. See *supra* notes 99–102 and accompanying text.

175. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.”). States' compulsory attendance laws typically require children to attend schools meeting state standards for 180 days each year. See, e.g., N.Y. Educ. Law § 3604(7) (McKinney 2015). The Supreme Court has repeatedly recognized the seriousness of parents' and children's liberty interests that compulsory education laws curtail. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (balancing the State's interest in having children obtain an education against parents' interests in directing the upbringing of their children).

176. Avidan Y. Cover, Is “Adequacy” a More “Political Question” than “Equality?": The Effect of Standards-Based Education on Judicial Standards for Education Finance, 11 *Cornell J.L. & Pub. Pol'y* 403, 404 & n.6 (2002) (stating that forty-nine of fifty state constitutions have right-to-education clauses, and noting that scholars disagree as to whether Mississippi's constitution contains an education clause).

177. See, e.g., *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993) (“[E]ducation is a fundamental right under the state constitution, not only because of its overall importance to the state but also because of the explicit language used to describe this constitutional mandate.”); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979) (“[T]he mandatory requirement of ‘a thorough and efficient system of free schools,’ found in Article XII, Section 1 of

and federal education standards;<sup>178</sup> (c) the Supreme Court's repeated recognition of "the importance of education to our democratic society" and of "a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause;"<sup>179</sup> and (d) the consensus that education is essential to individual, communal, and national well-being.<sup>180</sup>

4. The state can fairly be identified as a significant cause of the outcome deficiencies and disparities, and can justifiably be expected to do something about them, given that its own test cases (or, at least, those of states about which it does or should know) have enabled children similarly situated to the plaintiffs<sup>181</sup> to avoid or face significantly smaller deficiencies and disparities in regard to those outcomes.

Taken together with the judicial, legislative, and administrative precedents discussed above for recognizing an obligation of inquiry and responsible redress when important life, liberty, and property interests of the sort education implicates intersect with serious deprivations and racial, ethnic, and economic disparities,<sup>182</sup> these premises are sufficient to create a modest constitutional duty of evolutionary learning. In the education context, that duty requires the defendant state or school district to track high educational failure rates as well as racial and other disparities, study their likely causes, and test ways to diminish them. When the defendant state's own experience (or the well-documented experience of other states in similar circumstances) provides evidence that those disparities may be meaningfully diminished through reasonably available means—ones that do not pose significant harms to other important interests—the state must employ those ameliorative means, or others that are at least as effective in alleviating the disparities, while monitoring and adjusting based on the results. A state may avoid this

---

our Constitution, demonstrates that education is a fundamental constitutional right in this State."); *Washakie Cty. Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 333 (Wyo. 1980) ("In the light of the emphasis which the Wyoming Constitution places on education, there is no room for any conclusion but that education for the children of Wyoming is a matter of fundamental interest."); Liebman, *Desegregating Politics*, supra note 11, at 1494 n.156.

178. See supra notes 99–102 and accompanying text.

179. *Goss v. Lopez*, 419 U.S. 565, 574 (1975); *Brown*, 347 U.S. at 493; see also Liebman, *Desegregating Politics*, supra note 11, at 1494 n.156 (citing other Supreme Court decisions recognizing this right).

180. See, e.g., Greg J. Duncan & Richard J. Murnane, *Restoring Opportunity: The Crisis of Inequality and the Challenge for American Education* 8–9, 20–21 (2014) (noting the importance of education to intergenerational economic mobility in the United States); Michael Greenstone et al., *The Hamilton Project, A Dozen Economic Facts About K–12 Education* 1 (2012), [http://www.hamiltonproject.org/assets/legacy/files/downloads\\_and\\_links/THP\\_12EdFacts\\_2.pdf](http://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/THP_12EdFacts_2.pdf) [<http://perma.cc/G987-PYKF>] (citing the importance of education as a means for Americans to prosper and "share the bounty of our economy more equally").

181. See supra note 27 (defining the term "similarly situated" as used here).

182. See supra Part II; supra sections IV.A, IV.B (discussing the rise and fall of bureaucracy and its replacement by evolutionary learning).

duty only by providing a substantial explanation based on legitimate public policy—including the demonstrated absence of workable solutions—for why the state has taken no effective action.<sup>183</sup>

These obligations may be anchored, as well, in the Court's post-*Rodriguez* jurisprudence on the right to an education. In *Plyler v. Doe*<sup>184</sup> and *Kadrmas v. Dickinson Public Schools*,<sup>185</sup> the Supreme Court concluded that under certain egregiously aggravating circumstances, a state's denial of educational services to some but not all children—in *Plyler*, for example, to immigrant children unlawfully in the country—triggers “a heightened level of equal protection scrutiny” requiring a “substantial state interest” to justify the disparity.<sup>186</sup> Absent a substantial explanation grounded in state policy, the state classification in question is unconstitutional. This principle, together with the other legal doctrines discussed above at the confluence of the Constitution's protection of individual liberty and assurance

---

183. The explanation must be sufficient to keep the state's deficiency- or disparity-creating actions and failure to find ways to ameliorate the deficiencies and disparities from (i) conveying a message that plaintiff schoolchildren are less capable or deserving of achieving state-specified outcomes than other children, or (ii) showing that the state is “deliberately indifferent” to those children's failure to achieve those outcomes. The former test draws on the Court's Establishment Clause jurisprudence. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989) (noting that “governmental endorsement of religion ‘preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred’” (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring))); *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring) (defining Establishment Clause violations as government action “making adherence to a religion relevant . . . to a person's standing in the political community” by, for example, “send[ing] a message to nonadherents that they are outsiders, not full members of the political community”). The latter test draws on the Court's “deliberate indifference” standard in prison conditions cases. See, e.g., *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (“We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.”); Sabel & Simon, *Duty of Responsible Administration*, *supra* note 3, at 181–82 (“In the public sector, courts in 1983 cases have qualified the classical insistence on top-level authorization by holding that ‘deliberate indifference’ on the part of senior administrators will suffice.”).

184. 457 U.S. 202 (1982).

185. 487 U.S. 450 (1988).

186. *Id.* at 459 (discussing the “unique confluence of theories and rationales” that led the *Plyler* Court to apply “a heightened level of equal protection scrutiny” requiring proof “that [the challenged] classification advanced a substantial state interest” (internal quotation marks omitted) (quoting *Plyler*, 457 U.S. at 243 (Burger, C.J., dissenting))); see also *id.* at 224 (“In light of these countervailing costs, the discrimination contained in [the state action] can hardly be considered rational unless it furthers some substantial goal of the State.”); *Papasan v. Allain*, 478 U.S. 265, 283–85 (1986) (discussing levels of scrutiny applied in previous educational-rights decisions); *Plyler*, 457 U.S. at 217–18 (“[I]n these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State.”).

of equal protection of the laws, supports the relatively modest “middle-level” constitutional duty and scrutiny advocated here.<sup>187</sup>

Rather than seeking to have all of the moving parts of this argument come together immediately in a single evolutionary learning equivalent of the Court’s monumental decision in *Brown*, today’s advocates are again advised to follow the example of Judge Motley, her mentors, and her colleagues. In their decades-long lead-up to *Brown*, they started small, experimented widely,<sup>188</sup> and secured an iterative series of court victories against the day’s separate-but-equal orthodoxy: that a state could not pay black matriculants’ tuition at an out-of-state law school in lieu of admitting them to the state law school reserved for whites or providing them with their own, equal school;<sup>189</sup> that a separate black law school was unconstitutionally unequal to the law school the state provided for white students given the quality of its facilities, its more diverse curricula, its reputation, and the career opportunities it afforded;<sup>190</sup> and that a university was not providing equal education when it required blacks and whites to sit apart.<sup>191</sup> These cases built on each other, using lessons learned in each case to determine what was possible factually as well as legally and to improve the breadth and power of their arguments.<sup>192</sup> Rather, therefore, than setting sail immediately on a course expected to lead directly to a watershed Supreme Court decision—or, on the other hand, waiting to start until airtight plugs have been found for all the holes in the argument as currently conceived—advocates are encouraged to identify a range of starting points and directions and learn together as they go.

#### CONCLUSION

In working to replace the centralized command-and-control logic of the public law litigation that prevailed in the last century with the more flexible and iterative evolutionary learning model proposed here, education-rights advocates should be no less opportunistic than were Judge Motley and her contemporaries. Although imperfect in each case, all of the analogies drawn here—to judicial and administrative interpretations of Title VII, the Age Discrimination in Employment Act, the Fair Housing Act, the Individuals with Disabilities Education Act, and various funding limits

---

187. This argument draws support from the Supreme Court’s recent affirmation of the evolving content of the liberty interests the Constitution protects and of the close relationship between due process and equal protection in protecting those interests. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598, 2602–03 (2015).

188. See, e.g., Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality* 108, 132, 189–92, 259 (2004) (discussing legal strategies employed by the NAACP).

189. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349–50 (1938).

190. *Sweatt v. Painter*, 339 U.S. 629, 633–34 (1950).

191. *McLaurin v. Okla. State Regents*, 339 U.S. 637, 640–41 (1950).

192. See Kluger, *supra* note 188, at 16–18, 104, 109, 113–14, 189–92, 216–19, 225–32, 236–37, 287–94.

on support for racially disparate results; to the Supreme Court's application of the Fourteenth Amendment to preferential higher education admissions; and to lower courts' adoption of a constitutional duty of responsible administration of mental health facilities, prisons, and police forces—provide fodder, and, in the aggregate, encouragement, for litigative creativity on par with Motley's and her contemporaries' ingenuity.

Although the evolutionary learning in which school officials around the nation are voluntarily engaging to improve the academic outcomes of poor and minority children is the first line of attack on egregious educational deficiencies and disparities, judicial intervention is required where no such learning is taking place. If we are to continue today to build on the progress begun by Constance Baker Motely and her contemporaries, however, that review itself must be in service of learning—the courts' and school officials', as well as students'. Thankfully, the many analogies discussed here suggest that courts may be ready to take on that learning task.