

EQUAL PROTECTION AS A VEHICLE FOR EQUAL ACCESS AND OPPORTUNITY: CONSTANCE BAKER MOTLEY AND THE FOURTEENTH AMENDMENT IN EDUCATION CASES

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INTRODUCTION

Constance Baker Motley, the first female attorney of the NAACP Legal Defense Fund (LDF),¹ was dedicated to reimagining the nature and scope of civil rights protections in American jurisprudence. Motley's legal career chronicles the ways in which litigation served to bring about revolutionary social changes in our society.² Motley, a staunch believer in the power of the law to bring about the transformations necessary for a more just society,³ earned the distinct reputation for being a masterful courtroom strategist and litigator. Although Motley would later become most well known for being the first African American woman appointed to the federal bench, the impact of Motley's work as a litigator was most greatly felt in the field of educational opportunity and access.⁴

This Essay proceeds as follows. Part I focuses on Motley's role as an attorney and notes the importance of cases litigated after *Brown v. Board of Education*.⁵ Part II argues that Motley's groundbreaking work as an attorney helped shape the ways in which the judiciary engages with equal

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1. Women and the Movement, NAACP Legal Def. & Educ. Fund, Inc., <http://www.naacpldf.org/vra-at-50-day-17> [<http://perma.cc/XBG8-RDEG>] (last visited Aug. 27, 2017).

2. See generally Constance Baker Motley, *Equal Justice Under Law* (1998) [hereinafter Motley, *Equal Justice Under Law*] (providing accounts of Motley's cases and how they facilitated social changes in society).

3. Motley understood the powerful role of federal courts as a vehicle for social change. See Constance Baker Motley, *Civil Rights-Civil Liberties Litigation in the U.S. Supreme Court: Are the State Courts Our Only Hope?*, 9 *Harv. Blackletter J.* 101, 102 (1992) (“The success of the Civil Rights Movement in changing the course of America's social and political history led other petitioners to the doors of the federal courthouses.”).

4. See generally Motley, *Equal Justice Under Law*, *supra* note 2, at 102–11, 137–47 (describing Motley's tireless work for equal access to education).

5. 347 U.S. 483 (1954).

protection claims in the realm of education. Finally, Part III highlights Motley's work as a jurist, specifically in the realm of education.

I. ATTORNEY MOTLEY, LEGAL DEFENSE FUND, AND EDUCATION LITIGATION

While the NAACP LDF is known most prominently as the firm that litigated the landmark case *Brown*, the subsequent litigation that resulted from state and school district attempts to implement school integration and desegregation⁶ became equally important for the students and families struggling to receive equal access to education.⁷ Research has shown that African American students in particular received harsh discipline in districts that were ordered to desegregate as a result of *Brown*.⁸ The systematic denial of education through disciplinary action that dispropor-

6. The terms "integration" and "desegregation" will be used interchangeably throughout this Essay. For a more thorough discussion on the legal differences and social implications of the two terms, see generally Erica Frankenberg, *School Segregation, Desegregation, and Integration: What Do These Terms Mean in a Post-Parents Involved in Community Schools, Racially Transitioning Society?*, 6 *Seattle J. Soc. Just.* 533 (2008) (examining how judicial decisions and empirical conceptualizations of segregation have affected our understanding of segregation and integration).

7. See *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2415 (2016) (holding strict scrutiny should be used to determine the constitutionality of a university's race-sensitive admissions policy); *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (upholding the affirmative action policy at the University of Michigan Law School); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 32 (1971) (upholding the use of busing as an adequate means of desegregation); *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 437-38 (1968) (holding "freedom-of-choice" plan schools must adequately adhere to a school board's responsibility to ensure admission); *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958) (holding states must abide by federal decisions even if they disagree on a nonracial basis); see also Motley, *Equal Justice Under Law*, supra note 2, at 110 ("At times, [Thurgood Marshall] seemed immobilized by the inherent responsibility to move forward with implementation; at other times, he was literally overwhelmed by the onrush of events that the decision set in motion.").

8. See Courtland Milloy, *Improving Teacher Behavior, School Discipline*, *Wash. Post*, Sept. 13, 1987, at B3 (on file with the *Columbia Law Review*). Milloy stated:

In a county still sensitive and sore from years of fierce desegregation fights, some Prince George's residents may be reluctant to look beneath the surface of the disciplinary report released last week by Superintendent John A. Murphy, which stated that of the 17,000 suspensions last year, 77 percent went to black students. Black students make up 61 percent of the 102,500-student system. . . .

"I don't know why white teachers write suspension letters only for black kids," said Arthur Thomas, director for the Dayton, Ohio-based Center for the Study of Student Citizenship, Rights and Responsibilities. "Whenever a school is desegregated, more black students than white students are suspended. I don't understand that. Nor do I understand why for the same offense white youngsters are suspended and black youngsters are expelled."

Id.; see also William Moss, *School Desegregation: Enough Is Enough* 128 (1992) (detailing how in Columbus, Ohio, during the height of school-desegregation efforts from 1979 through 1988, African American students composed 56% to 61% of the students subjected to corporal punishment).

tionately affected African Americans was symptomatic of pre-*Brown* race-based sentiments.⁹ With Motley at the helm, the NAACP LDF began to litigate many cases to address such disparities at the local level on behalf of students attending schools attempting to desegregate.¹⁰

As Motley described it, *Brown* had an unexpected “psychological impact on African-American communities around the South” whose effect “manifested itself in a grass-roots anti-segregation revolt that took everyone by surprise in Montgomery, Alabama in 1956 with the bus boycott initiated by Rosa Park’s refusal to move to the back of the bus.”¹¹ The African American communities of the South “understood that dismantling the segregated school system would take time and would even be resisted by some elements in the African-American communities themselves who benefitted from segregation.”¹² Moreover, many of the communities “initiated efforts to bring down racial segregation in local transportation, department store lunch counters, and in municipal government generally.”¹³ Understanding the momentum¹⁴ caused by *Brown*, particularly among African Americans, Motley sought to use legal means to redress efforts to quell civil rights demands.¹⁵ Included within Motley’s illustrious career

9. See *Hawkins v. Coleman*, 376 F. Supp. 1330, 1337 (N.D. Tex. 1974) (“It is apparent that the program thus far in effect in the DISD has not worked to materially change the existing racism which, in the opinion of this Court, is the chief cause of the disproportionate number of Blacks being suspended and given corporal punishment.”).

10. See *Lucy v. Adams*, 350 U.S. 1, 2 (1955) (reinstating an injunction that prevented officials at the University of Alabama from denying enrollment to applicants “solely on account of their race and color”); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 642 (1950) (holding that an African American student admitted to a “state-supported graduate school . . . must receive the same treatment at the hands of the state as students of other races”); *Sweatt v. Painter*, 339 U.S. 629, 633 (1950) (finding that a separate law school for African American students lacked “substantial equality” in “educational opportunities” compared to law schools for white students); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631, 633 (1948) (holding that the denial of an African American applicant to the only state law school in Oklahoma violated the Equal Protection Clause of the Fourteenth Amendment); *Meredith v. Fair*, 305 F.2d 343, 361 (5th Cir. 1962) (finding “no valid, non-discriminatory reason” for the University of Mississippi’s refusal to accept an African American applicant); *United States v. Wallace*, 218 F. Supp. 290, 290 (N.D. Ala. 1963) (enjoining the Governor of Alabama from interfering with court-ordered desegregation in the University of Alabama); *Holmes v. Danner*, 191 F. Supp. 394, 410 (M.D. Ga. 1961) (finding that the University of Georgia denied admission to an African American applicant solely because of his race and granting a permanent injunction requiring his admission).

11. Constance Baker Motley, *The Historical Setting of Brown and Its Impact on the Supreme Court’s Decision*, 61 *Fordham L. Rev.* 9, 16 (1992).

12. *Id.*

13. *Id.*

14. See *Florida ex rel. Hawkins v. Bd. of Control*, 350 U.S. 413, 414 (1956) (requiring the immediate admission of an African American man to graduate school); *Augustus v. Bd. of Pub. Instruction*, 306 F.2d 862, 868–69 (5th Cir. 1962) (using the premise of *Brown* to reassign teachers to schools on a nonracial basis).

15. See Motley, *Equal Justice Under Law*, *supra* note 2, at 110 (“My feeling after *Brown* I was often one of depression. Awaiting the Court’s 1954 decision had been about

with the NAACP LDF as a Supreme Court litigator are at least two dozen cases in which Motley continued to tackle the issue of educational access on behalf of all students.¹⁶ Additionally, Motley litigated hundreds of educational equality cases in federal district courts and circuit courts of appeals,¹⁷ as well as in state-level courts.¹⁸

Although attacking state-sanctioned illegal apartheid was at the forefront of Motley's work with the NAACP LDF, the team also created space to legally challenge school processes that merely superficially desegregated while failing to provide all students with equal access in admissions to—and subsequent participation in—high-quality education. In *Lucy v. Adams*, the NAACP LDF urged the court to recognize that the University of Alabama was summarily denying prospective students an opportunity for admission solely on the basis of their race, in violation of the Fourteenth Amendment.¹⁹ The court accepted as fact that the prospective students dutifully applied to the university, were sent letters that they were accepted into the university, and received acknowledgment that their deposits for their dormitories were accepted.²⁰ However, upon the students' arrival at the university to register for classes, the university promptly returned the dormitory fees, reversed the admission decisions, and suggested that the prospective students seek admission at Alabama State College.²¹ The court maintained that the university did not deny the applications on the ground that the plaintiffs lacked the requisite scholastic requirements for admission but rather arbitrarily denied their admission on the basis of race, in violation of the Fourteenth Amendment.²² The court held that there was no written policy or rule excluding prospective students from admission to the university on account of race or color; however, there was a tacit policy to that effect.²³

all the stress we could bear. I kept thinking: How will we manage? The staff was small, our funds meager, our plans sketchy; thousands of school districts were involved.”).

16. See *Calhoun v. Latimer*, 377 U.S. 263, 264–65 (1964) (reviewing school-desegregation efforts in Atlanta); *Gibson v. Harris*, 322 F.2d 780, 782 (5th Cir. 1963) (resolving school-desegregation issues in Georgia); *Northcross v. Bd. of Educ.*, 302 F.2d 818, 824 (6th Cir. 1962) (finding Tennessee's school-desegregation law to be insufficient to comply with *Brown*); *Taylor v. Bd. of Educ.*, 294 F.2d 36, 40 (2d Cir. 1961) (affirming the lower court's plan to combat school desegregation in New York); *La. State Bd. of Educ. v. Allen*, 287 F.2d 32, 32 (5th Cir. 1961) (finding continued segregation in trade school).

17. See *Singleton v. Bd. of Comm'rs of State Insts.*, 356 F.2d 771, 772–73 (5th Cir. 1966) (discussing desegregation in Florida state reform schools); *Hammond v. Univ. of Tampa*, 344 F.2d 951, 951 (5th Cir. 1965) (considering “an injunction to prevent the University of Tampa from continuing its policy of restricting admissions to white persons”).

18. See Motley, *Equal Justice Under Law*, *supra* note 2, at 249–62 (providing a comprehensive list of cases in which Motley either served as counsel or submitted briefs and petitions).

19. 134 F. Supp. 235, 236–37 (N.D. Ala.), *aff'd*, 228 F.2d 619 (5th Cir. 1955).

20. *Id.* at 237.

21. *Id.* at 238–39.

22. *Id.*

23. *Id.* at 239.

After the university was ordered to admit the students, Motley and her team at the NAACP LDF received national attention²⁴ when attempting to ensure that Autherine Lucy, the first African American to attempt to enroll in the University of Alabama, was allowed to actually register.²⁵ In this instance, mob riots ensued upon Lucy being permitted on campus.²⁶ The school concluded that the best way to quell the riots was to remove Lucy from campus and take no action against the rioters.²⁷ As a result, the NAACP LDF filed contempt charges and alleged Fourteenth Amendment violations against the dean of admissions for failing to secure Lucy's peaceful attendance at the university that she was rightfully attempting to attend and for denying her participation and educational access on the basis of her race.²⁸ The court held that the respondents denied African American admitted students the right to enroll in the university and pursue their education solely on account of their race and color.²⁹

Not long after, in *Holmes v. Danner*, the court rendered a surprising decision that allowed African American students to be admitted to the University of Georgia.³⁰ After deliberate consideration of all of the evidence admitted at the trial, the court held that the plaintiffs would have been admitted to the university had they been white applicants; thus, the university had violated the Fourteenth Amendment by refusing them admission.³¹ The court further held that, although the university maintained no written policy or rule excluding African Americans from admis-

24. See, e.g., Ethel L. Payne, Autherine Lucy Youngest of Nine in Alabama Family, *Chi. Defender*, Feb. 8, 1956, at 5 (on file with the *Columbia Law Review*) (providing an account of protests against Lucy's admission to the University of Alabama).

25. Although Lucy was admitted, she was denied access to dormitories and dining halls. See E. Culpepper Clark, *The Schoolhouse Door: Segregation's Last Stand at the University of Alabama* 58 (1993).

26. Motley, *Equal Justice Under Law*, supra note 2, at 122.

27. *Id.*

28. *Id.*

29. *Lucy v. Adams*, 134 F. Supp. 235, 239 (N.D. Ala.), *aff'd*, 228 F.2d 620 (5th Cir. 1955). The NAACP LDF also brought contempt charges against the dean of admissions for violating the previous order that mandated Lucy's enrollment. *Lucy*, 228 F.2d at 620. The court found that the dean was not in contempt. *Id.* at 621. After the NAACP LDF withdrew the charges against the board of trustees, the University of Alabama immediately expelled Lucy on the ground that she brought false accusations against the board. Motley, *Equal Justice Under Law*, supra note 2, at 123. Given the threat of continued violence against her and the assurance that the federal government would not send in federal troops to the University of Alabama to help secure her safety, Lucy subsequently withdrew from the case. *Id.* at 124. In 1988, Lucy's expulsion was expunged by the university. Frederic O. Sargent, *The Civil Rights Revolutions: Events and Leaders, 1955–1968*, at 16 (2004).

30. 191 F. Supp. 394, 394 (M.D. Ga. 1961). This decision was stunning because of the entrenched race-based segregated culture of Georgia. See Robert A. Pratt, *We Shall Not Be Moved: The Desegregation of the University of Georgia* 7 (2002) ("By the end of World War II, Georgia's segregated social system had hardened into a rigid caste structure accepted by virtually all whites and a substantial number of blacks as an immutable fact of life.").

31. *Holmes*, 191 F. Supp. at 401–02.

sion based on race or color, the defendants acted in practice and policy in this prohibited manner.³² The court was clear to indicate that the evidence it used to base its opinion of the tacit discriminatory practices included: (1) the fact that no African Americans had ever been enrolled at the University of Georgia; (2) the fact that prior to September 29, 1950, no African American had ever applied for admission; (3) the fact that at the time of the trial only four African Americans, including plaintiffs, had applied for admission to the university, all on or since September 29, 1950, but none had yet been admitted; and (4) the discriminatory analysis used on admission interview questions of candidates.³³

Shortly after the students were admitted to the university, riots ensued in opposition to their admission and enrollment. School officials suspended the students under the premise that their removal from campus would be the only way to ensure their safety. Once again, Motley found herself working to have students reinstated and forcing school officials to devise adequate plans to ensure their safety.³⁴

In *Woods v. Wright*, Motley represented students of the City of Birmingham who were suspended for unlawfully participating in a peaceful demonstration against racial segregation.³⁵ The court questioned whether a temporary injunction should be issued to relieve the students of the suspension rendered upon them by the school superintendent and school board. The court maintained that, while the school may choose to discipline students if they engage in unlawful activity, "discipline for truancy or for any other wrongdoing cannot be made an instrument of racial discrimination or imposed for asserting a constitutional right or privilege."³⁶ With this work, Motley affirmed the fundamental right to due process that students enjoy with respect to educational access and educational opportunity within the schoolhouse gates. Her role as an attorney and advocate was crucial for changing the ways in which the judiciary approached the issue of discrimination in American schools.

32. *Id.* at 402.

33. *Id.*

34. Motley, *Equal Justice Under Law*, *supra* note 2, at 145–46; see also Calvin Trillin, *An Education in Georgia: Charlayne Hunter, Hamilton Holmes, and the Integration of the University of Georgia* 22–24 (Univ. of Ga. Press 1991) (1964) (discussing the legal strategies Motley and the NAACP LDF pursued to ensure the integration of the University of Georgia).

35. 334 F.2d 369, 369–70 (5th Cir. 1964).

36. *Id.* at 375.

II. ROLE OF THE FEDERAL JUDICIARY IN DETERMINING THE APPLICATION OF THE FOURTEENTH AMENDMENT WITH RESPECT TO EDUCATIONAL OPPORTUNITY³⁷

One of the most remarkable outcomes of the twentieth century was the highly prominent role played by the federal judiciary with respect to enforcement of the inalienable rights promised to American citizens through the Constitution.³⁸ The United States Constitution, as ratified in 1787, contained no provisions affording all members of its citizenry equal protection of the rights bestowed in the document.³⁹ Between 1865 and 1870, the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution were ratified to provide such protections to the formerly enslaved populace.⁴⁰ The conditions under which these amendments, particularly the Fourteenth, were proposed and accepted by all of the states were extremely atypical, and their legitimacy was thereby questioned.⁴¹ Although state acceptance⁴² of the legal validity of the Four-

37. Chief Justice Earl Warren famously pronounced from the bench one of the most well-known statements regarding equality of educational opportunity:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

38. See Robert J. Kaczorowski, *Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866–1876*, at 1 (Fordham Univ. Press 2005) (1985) (“Judges reasoned that, since natural rights were now secured by the United States Constitution to United States citizens as such, Congress possessed plenary authority to protect these rights in whatever manner it deemed appropriate, consistent with the Constitution.”).

39. See Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 *Iowa L. Rev.* 891, 904–05 (1990) (explaining that principles of state equality and equality across branches of government were central to the drafting of the Constitution, but failing to mention any discussion between the drafters of equality among citizens).

40. U.S. Const. amend. XIII, § 1; *id.* amend. XIV; *id.* amend. XV.

41. See *Coleman v. Miller*, 307 U.S. 433, 448–49 (1939) (describing the tumultuous ratification process of the Fourteenth Amendment, wherein some states formally withdrew consent after ratification and others rejected the Amendment before subsequently ratifying it).

42. When several southern states rejected the proposal of the Fourteenth Amendment, Congress specified that rebel states would not be admitted to the Union unless each state ratified the Fourteenth Amendment. See *Reconstruction Act of 1867*, ch. 153, § 5, 14 Stat. 429.

teenth Amendment is no longer an issue for the union of state governments,⁴³ the dilemma of how and when the Fourteenth Amendment should be applied to state regulations continues to plague the country.⁴⁴

At the height of the Civil Rights Movement, the federal judiciary, which stands as an ultimate symbol of American independence, morality, promise, and prestige, was tasked through the application of the Fourteenth Amendment with the privilege of unifying the groups of American people who remained subjugated by various state actions post-Reconstruction,⁴⁵ despite assurances⁴⁶ of equal protection of the laws.⁴⁷ Prior to the Civil

43. See, e.g., John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. Chi. L. Rev. 375, 375 (2001) (reviewing “legal rationales under which the constitutional amendments were valid even if there were serious illegalities in the creation of the southern state governments”).

44. For example, Professor Mark Tushnet recognized tensions in the Supreme Court’s application of the Fourteenth Amendment during the Court’s 1972 term. See Mark Tushnet, “. . . And Only Wealth Will Buy You Justice”—Some Notes on the Supreme Court, 1972 Term, 1974 Wis. L. Rev. 177, 180 (“[T]he Court was willing to invoke the equal protection clause to invalidate legislation that might harm its friends and neighbors but unwilling to strike down legislation that harmed only the poor.”).

45. See C.V. Woodward, *The Strange Career of Jim Crow* 7 n.* (3d rev. ed. 1974) (discussing how Jim Crow laws sanctioned a “racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking”). As Woodward noted, “[Racial] ostracism extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons and asylums, and ultimately to funeral homes, morgues, and cemeteries.” *Id.* See generally Taylor Branch, *At Canaan’s Edge: America in the King Years, 1965–68* (2006) (telling the story of the Civil Rights Era with an emphasis on both the sung and unsung heroes of the movement); Taylor Branch, *Parting the Waters: America in the King Years, 1954–63* (1988) (examining Martin Luther King’s rise to prominence during a period of broad social upheaval in American history); Taylor Branch, *Pillar of Fire: America in the King Years, 1963–65* (1998) (depicting America in turmoil following the Kennedy assassination and exploring how two pivotal years shaped the Civil Rights Movement); Juan Williams, *Eyes on the Prize: America’s Civil Rights Years, 1954–1965* (1987) (describing how blacks were treated differently than whites post-Reconstruction).

46. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (holding that categorical exclusion of African Americans from juries is unconstitutional but failing to state that African Americans are entitled to racially mixed juries). It should be noted that even though the Court attempted to confer additional protections of the law in *Strauder*, the language used to describe African Americans would further justify maltreatment. For example, the Court wrote that “[i]t was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence.” *Id.* at 306; see also *Virginia v. Rives*, 100 U.S. 313, 319–20 (1879) (holding that a denial of a motion made by an African American that some portion of his jury be composed of his own race is not a violation of the Fourteenth Amendment).

47. See J. Harvie Wilkinson III, *From Brown to Bakke: The Supreme Court and School Integration: 1954–1978*, at 3–6 (1979) (discussing the Court’s role in implementing desegregation at the zenith of the Civil Rights Movement); see also Kenneth L. Karst, *Justice O’Connor and the Substance of Equal Citizenship*, 2003 Sup. Ct. Rev. 357, 384 (“The nation’s realization of the principle of equal citizenship begins in the abolition of caste. For the organized community to treat an individual as a member of a subordinate caste—as a nonparticipant in public life—is a violation of the Fourteenth Amendment.”).

Rights Movement, the main equal protection issue before the courts was whether Congress could protect African Americans from private as well as public discrimination-based exclusion.⁴⁸ However, by 1896, the Court not only permitted states to discriminate on the basis of race—it ordered individual citizens to do the same.⁴⁹ Using the rationale exerted in *Brown* of the application of the Fourteenth Amendment as a guarantee of individual protection from discriminatory exclusion, the NAACP LDF spearheaded the charge to force the judicial branch to test the legal limits of integration in all spaces in American society.⁵⁰

Few people would argue that the role of education is paramount to success in today's society. The belief that education can not only lead to full membership in society but also provide for financial security is well established.⁵¹ Given the exceptionally serious consequences of not obtaining an education, the quest to receive a high-quality education is paramount.

The notion of how educational opportunities should be distributed among the citizenry has been a conundrum for American education policymakers for decades.⁵² Some have argued that equality in educational

48. See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) (noting that the Fourteenth Amendment is not intended to protect individual rights against individual invasion but to nullify and make “void all state legislation and state action . . . which impairs the privileges and immunities of citizens of the United States”).

49. See *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896) (“[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia . . .”). But see *Smith v. Allwright*, 321 U.S. 649, 661–62 (1944) (holding that the right to vote in a primary election for the nomination of candidates without discrimination by the state, like the right to vote in a general election, is a right secured by the Constitution).

50. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (holding that “[w]hat is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on basis of race or other impermissible classification”); *Williams v. Wallace*, 240 F. Supp. 100, 105 (M.D. Ala. 1965) (holding that the interference by the governor and other officials of Alabama with the attempted march by African Americans from Selma to Montgomery along U.S. Highway 80 constituted an unconstitutional deprivation of their right of assembly and free movement); *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala.) (holding that segregation on buses of the City of Montgomery and its police jurisdiction was unconstitutional), *aff’d*, 352 U.S. 903 (1956).

51. Elizabeth Anderson, *Fair Opportunity in Education: A Democratic Equality Perspective*, 177 *Ethics* 595, 595 (2007) (“[E]ducation is not just an intrinsic good for the individual but an important instrumental good with positional features. It opens up access to the most rewarding careers and leadership positions in society in virtue of endowing individuals with relatively superior qualifications.”); see also James S. Coleman, *Equality of Educational Opportunity*, at iii–iv (1966) (highlighting the seminal study mandated by the 1964 Civil Rights Act that highlighted the importance of various social connections to educational opportunities including economic class, family structure, and race).

52. See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 139 (1873) (holding that proscription of women from admission to the bar on the basis of their gender does not run afoul of the Constitution); see also *Lum v. Rice*, 275 U.S. 78, 87 (1927) (holding that the denial of a

opportunity requires equal distribution of such opportunities,⁵³ as measured by equality in educational outcomes or equalized funding per student.⁵⁴ Others have argued that equality in educational opportunity can be achieved once all students have received an adequate education⁵⁵ and that disparity in educational outcomes is expected and compatible with ideals of equality of educational opportunity.⁵⁶ The school-desegregation cases and the subsequent litigation that ensued as a result of *Brown* were an attempt for the judiciary to provide definitive solutions to the conun-

student from a high school on the basis of his Chinese ancestry is not violative of the Fourteenth Amendment); *Mendez v. Westminster Sch. Dist.*, 64 F. Supp. 544, 547–48 (S.D. Cal. 1946) (holding that segregating Mexican students in “Mexican only” schools was a violation of the Constitution). “[E]qual protection of the laws pertaining to the public school system in California is not provided by furnishing in separate schools the same technical facilities, text books and courses of instruction to children of Mexican ancestry that are available to the other public school children regardless of their ancestry.” *Id.* at 549; see also *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE–1, 137 S. Ct. 988, 992 (2017) (“It cannot be right that the IDEA generally contemplates grade-level advancement for children with disabilities who are fully integrated in the regular classroom, but is satisfied with barely more than *de minimis* progress for children who are not.”).

53. See Lesley A. Jacobs, *Equality, Adequacy, and Stakes Fairness: Retrieving the Equal Opportunities in Education Approach*, 8 *Theory & Res. Educ.* 249, 249 (2010) (describing differences between educational opportunity and educational adequacy in education policy).

54. See, e.g., *Serrano v. Priest*, 487 P.2d 1241, 1248 (Cal. 1971) (noting plaintiff’s argument that the California school finance system, which relied heavily on local property tax, disadvantaged the students in districts with lower income), *aff’d*, 557 P.2d 929 (Cal. 1976); *Robinson v. Cahill*, 303 A.2d 273, 297–98 (N.J. 1973) (holding that a school finance system based heavily on local property taxes violated the state constitutional guarantee of access to a “thorough and efficient” public education system). The *Brown* Court maintained that equality of educational opportunity meant more than merely ensuring that a school district spent the same amount of money or provided the same physical educational materials to students. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.”).

55. John White, *The Dishwasher’s Child: Education and the End of Egalitarianism*, 28 *J. Phil. Educ.* 173, 177–78 (1994) (arguing “that the pursuit of equality for its own sake is a misguided ambition” and that the central task of educators “should be to equip everyone with the conditions for leading a flourishing life” through the adequacy model of educational opportunity).

56. But see *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 211 (Ky. 1989) (holding that the Kentucky state-school funding system violated the Kentucky Constitution and affirming adequate education as a fundamental constitutional right); *Campaign for Fiscal Equity v. State*, 655 N.E.2d 661, 690 (N.Y. 1995) (Smith, J., dissenting) (noting plaintiff’s argument that the New York school funding system was unconstitutional because it did not provide adequate funding to public schools, thus denying students access to the constitutionally guaranteed right to a basic education); *Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 368–69 (N.Y. 1982) (acknowledging that inequality existed in the per-pupil spending between districts but concluding that the disparity was not great enough to run afoul of the constitutional right to education).

drum of the application of the Fourteenth Amendment and determine how to provide for educational quality and access for students.⁵⁷

Through the desegregation cases, the federal judiciary ushered in the use of injunctions. In courts of equity, an injunction is a remedy that requires a party to a case to cease or perform a specific act or face criminal or civil penalties for failing to cooperate.⁵⁸ Through the highly lauded *Brown* case and its progeny, the federal courts used such equitable principles as their guide to shape school-desegregation decrees.⁵⁹ With these developments to the federal bench, the Due Process Clause of the Fourteenth Amendment became the primary instrument the federal judiciary used to reform and reshape American education and thereby our society and cultural norms. For some, *Brown* heralded the promise of equality in educational opportunities, which would serve to dismantle the system of oppression and legally sanctioned apartheid in this country. Many hoped that *Brown's* promise of equal access to high-quality education, free from the stigma that racial classifications carried, would mean that children who had been subjected to such systems could now better secure their position in what would be a more just American society.

Despite the hope that the federal judiciary might have the power to advance the cause of equality as guaranteed by the Declaration of Independence, the desegregation cases unfortunately have had very little impact on educational opportunities. More than sixty years after the Supreme Court struck down the legal precedent of racially separate but equal facilities and accommodations, American public schools have remained racially polarized and woefully unequal.⁶⁰

In the pre-*Brown* America, the legal mandate of “separate but equal”⁶¹ not only allowed states to require different educational facilities

57. See, e.g., *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 197–98 (1973) (holding that the school district could not consider a school desegregated simply because it had both Latino and African American students, since both groups of students were similarly discriminated against); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 29–30 (1971) (upholding a district court order that busing be used to integrate public schools in the Charlotte-Mecklenburg school district); *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 441–42 (1968) (holding that school districts must adopt realistic plans for active integration).

58. See Jack Bass, *Unlikely Heroes* 21 (1981) (“The injunctive process concentrates power in judges because they can decide without a jury whether to grant relief, and they possess contempt powers to enforce their orders. This allows them to act by whatever legal means are necessary.”).

59. See *Bd. of Educ. v. Dowell*, 375 F.2d 158, 165 (10th Cir. 1967) (“The trial court was clearly within its equitable powers in ordering the board to present an adequate plan for desegregation of the school system.”).

60. See Sean F. Reardon & Anne Owens, *60 Years After Brown: Trends and Consequences of School Segregation*, 40 *Ann. Rev. Soc.* 199, 199 (2014) (“Limited evidence on school economic segregation makes documenting trends difficult, but students appear to be more segregated by income across schools and districts today than in 1990.”).

61. See *Plessy v. Ferguson*, 163 U.S. 537, 548 (1896) (upholding the doctrine of separate but equal by stating “the enforced separation of the races . . . neither abridges the

on the basis of race but also permitted differences in social treatment of American citizens on the basis of race.⁶² It was presumed that the post-*Brown* years would usher in an opportunity for African American children not only to attend schools that were better resourced and equipped but also to attend schools where educators treated them with equal respect and tolerance offered to white students.⁶³ It was assumed that these students, amid the backdrop of a federally mandated integrated society, would now also receive greater educational opportunities.⁶⁴ While the Supreme Court subsequently maintained that there is no constitutional right to an education,⁶⁵ the *Brown* Court concluded on the basis of the Fourteenth Amendment Equal Protection Clause “that in the field of public education, the doctrine of ‘separate but equal’ has no place.”⁶⁶

In the years post-*Brown*, there have been many accolades⁶⁷ for the progress that school desegregation has effectuated for African American students’ educational opportunities, including increased high school graduation rates and increased college enrollment and completion.⁶⁸

privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws”).

62. See *Lum v. Rice*, 275 U.S. 78, 85–87 (1927) (holding that excluding children from school on the basis of their Chinese ancestry did not violate the Constitution).

63. See *Hampton v. Jefferson Cty. Bd. of Educ.*, 102 F. Supp. 2d 358, 379 (W.D. Ky. 2000) (“*Brown* and its progeny established a moral imperative to eradicate racial injustice in the public schools.”); see also Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality*, at x (2004) (arguing that no other Supreme Court opinion has “affected more directly the minds, hearts, and daily lives of so many Americans”); Mark A. Graber, *The Price of Fame: Brown as Celebrity*, 69 *Ohio St. L.J.* 939, 940 (2008) (“Presently invoked to support every popular decision on racial inequality, the 1954 school segregation cases no longer stand for any contested proposition or are identified in any distinctive way with the civil rights movement. *Brown*, like Paris Hilton, is now famous largely for being famous.”).

64. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[T]hese days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”).

65. See *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (reinforcing earlier decisions holding that public education is not a right); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (“Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”).

66. *Brown*, 347 U.S. at 495.

67. Valerie Strauss, *How, After 60 Years, Brown v. Board of Education Succeeded—and Didn’t*, *Wash. Post* (Apr. 24, 2014), http://www.washingtonpost.com/news/answer-sheet/wp/2014/04/24/how-after-60-years-brown-v-board-of-education-succeeded-and-didnt/?utm_term=.7d29f152b788 (on file with the *Columbia Law Review*).

68. But see *Children’s Def. Fund, Wash. Research Project, Inc., School Suspensions: Are They Helping Children?* 63–64 (1975), http://diglib.lib.utk.edu/cdf/data/0116_000050_000205/0116_000050_000205.pdf [<http://perma.cc/H45E-YMFL>] (drawing national attention for the first time to the problems of suspension, expulsion, and racial disparities in how discipline was being used in schools); Charles J. Ogletree, Jr., *All Deliberate Speed: Reflections on the First Half Century of Brown v. Board of Education* 302 (2004) (explaining

However, Article III courts, entrusted⁶⁹ to enforce the mandates of *Brown*,⁷⁰ have historically been at odds in determining the full reach of the Fourteenth Amendment in the field of education.⁷¹ Courts have historically given great deference to local school authorities in addressing internal school and district matters.⁷² Federal courts have often provided conflicting perspectives on the reach of the Fourteenth Amendment in assessing disparate treatment of students in public schools.⁷³

In 1968, a suit was brought on behalf of all children throughout Texas living in school districts with low property valuations and thereby lower property taxes set aside for schools, challenging the method of

that minority children are, relative to white children, disproportionately more likely to be assigned to remedial learning classes and be disciplined).

69. See, e.g., *Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 229, 233 (S.D. Ohio 1977) (“[T]he real reason that courts are in the school desegregation business is the failure of other governmental entities to confront and produce answers to the many problems in this area . . . [O]ur courts must always protect the constitutional rights of all our citizens.”), *aff’d in part, remanded in part*, 583 F.2d 787 (6th Cir. 1978), *aff’d*, 443 U.S. 449 (1979).

70. Legislatures and some lower courts did not accept the Court’s pronouncement of school integration, despite the Court’s constitutional decisions being the law by which lower courts and legislatures frame their decisions and actions. See Stephen Breyer, *Making Our Democracy Work: A Judge’s View* 49–67 (1st Vintage Books ed. 2011) (2010) (discussing the conditions in Little Rock, Arkansas, post-*Brown*). For example, after refusing to follow *Brown*, the governor and legislature of Arkansas argued that the states could nullify federal court decisions if they felt that the federal courts were violating the Constitution. The Court unanimously rejected this argument and held that only the federal courts can decide when the Constitution is violated. See *Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958). However, on the very day the Court announced the ruling, the Arkansas legislature responded by (1) enacting a law permitting the governor to close any public school in the state and (2) stripping local school districts of their decisionmaking authority so long as the governor determined that local officials could not maintain a suitable educational system. See Act of Sept. 12, 1958, No. 4, 1958 Ark. Acts 2000, 2000–01. For a discussion of a similar legislative response in Louisiana, see *Bush v. Orleans Par. Sch. Bd.*, 187 F. Supp. 42, 44–45 (E.D. La. 1960) (holding all statutes that directly or indirectly required segregation of public schools unconstitutional and thus invalidating the Louisiana legislature’s effort to resist integration by granting the governor the authority to supersede any school board’s decision to integrate).

71. See Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 *St. Louis U. L.J.* 885, 889–91 (1993) (discussing several post-*Brown* cases in which the Supreme Court overturned a lower court’s desegregation ruling as overbroad or too stringent).

72. See Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 *Suffolk U. L. Rev.* 441, 455 (1999) (noting that courts tend to defer to the expertise of school officials). However, courts have not shown such deference when there is evidence of student abuse at the hands of school officials. For example, as early as the nineteenth century, courts found it reprehensible for students to be abused in school. See, e.g., *Gardner v. State*, 4 *Ind.* 632, 635 (1853) (holding a teacher liable for striking a student with whips and kicking him in the face because he had misspelled a word and refused to try again).

73. See Wilkinson, *supra* note 47, at 80 (discussing the lack of uniformity in post-*Brown* desegregation cases and the “personal leanings of the federal district judge”); Carter, *supra* note 71, at 889–91 (discussing cases in which courts appear to reach different conclusions on the reach of the Fourteenth Amendment).

state financing for public elementary and secondary education.⁷⁴ The three-judge district court panel held that Texas's system of financing public education discriminated on the basis of wealth by permitting citizens of affluent districts to provide a higher-quality education for their children, while the plaintiffs, who were only able to pay lower taxes, were denied equal protection of the laws.⁷⁵ However, in a swift reversal, the Supreme Court in *San Antonio Independent School District v. Rodriguez* ruled that if school officials are motivated by legitimate educational considerations, then the strict judicial scrutiny test under the Fourteenth Amendment does not apply.⁷⁶ The Court maintained that the Texas system assured basic education for every child in the state and that, therefore, it is legitimate to permit and encourage local school districts to participate in significant control of their local schools. Further, even if an imbalance in school funding levels occurs as a result of such local control among districts, such an imbalance does not violate the Equal Protection Clause of the Fourteenth Amendment.

In 1972, African American plaintiffs attending school in Dallas Independent School District (DISD) filed a class action lawsuit in federal district court, contesting the disproportionate enforcement of the suspension and corporal-punishment policies of the district.⁷⁷ The plaintiffs argued that the policies were violative of their Fourteenth Amendment right to equal protection under the law.⁷⁸ The district had attempted to integrate the previous year. The court held that rules governing student suspensions were not violative of procedural due process, but school records revealed that there was a disproportionate number of blacks being suspended and given corporal punishment within the school district.⁷⁹ The

74. Brief for Appellees at 4, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (No. 71-1332), 1971 WL 134333.

75. See *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 283-85 (W.D. Tex. 1971) (striking down the financing scheme due to the defendants' failure to demonstrate a compelling state interest advanced by the scheme), rev'd, 411 U.S. 1.

76. 411 U.S. at 36-39. State-level courts deciding the constitutionality of disparate impact education cases on the basis of state funding systems have often held state funding systems based on property tax valuation unconstitutional under the Fourteenth Amendment. See *Serrano v. Priest*, 487 P.2d 1241, 1244 (Cal. 1971) (holding that the method of funding schools based on property taxes violates the Fourteenth Amendment's equal protection clause), aff'd, 557 P.2d 929 (Cal. 1976); *Abbott v. Burke*, 575 A.2d 359, 363 (N.J. 1990) (holding that the education of children in poor communities was unconstitutionally inadequate); cf. *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 396 (Tex. 1989) (recognizing that unequal funding of public school districts violates the Texas State Constitution).

77. *Hawkins v. Coleman*, 376 F. Supp. 1330, 1331 (N.D. Tex. 1974).

78. *Id.* In deciding the case, the court reviewed statistics that established that "there exists within the DISD a disproportionate suspension ratio between black students and white students." *Id.* at 1333. The statistics evidenced that in the 1972-1973 school year, with 38.7% enrollment of black students and 50.4% enrollment of white students in the DISD, black students made up 60.5% of those suspended, while white students made up only 30.2% of those suspended. *Id.*

79. *Id.* at 1330.

court maintained that these disproportionate punishments were the result of the existence of racism.⁸⁰ Most notably, the court accepted evidence that maintained, because of the existence of racism in the district schools, black students will become more frustrated as the institutions continue to refuse to respond to their needs, thereby causing such frustrations to result in increased “suspendable behavior.”⁸¹ The court held that there was a need for the school district to be responsive to needs of black students by acting in terms of institutional and structural changes to lessen white institutional racism in the district.⁸²

By 1981, the Fifth Circuit began to rule differently in disparate impact school discipline cases arising from Dallas Independent School District. In *Tasby v. Estes*,⁸³ parents of black students sought injunctive relief on the basis of the Fourteenth Amendment from the school district’s disciplinary practices, arguing that black students were punished more harshly than white students. The plaintiffs relied on expert testimony that black students were disciplined more frequently than other students, statistical evidence showing that black students received the most extreme forms of punishment compared with other student groups, and data evidencing disciplinary disparity with an imbalance between the race of school personnel and the race of the students.⁸⁴ The court dismissed the case, holding that plaintiffs did not present evidence that such disparities were the result of racial discrimination on the part of school officials.⁸⁵

In *Sweet v. Childs*, a group of black students from Jackson County, Florida, schools sued school administrators, the school board, and various state officials under 42 U.S.C. §§ 1981 and 1983 and the Equal Protection Clause, alleging that school officials engaged in racial discrimination when disciplining them.⁸⁶ The students asserted that as a result of racially based fighting and subsequent protests that ensued, the school disproportionately suspended more black than white students.⁸⁷ The court held that “[t]here was no showing of arbitrary suspensions or expulsions of black students nor of a failure to suspend or expel white students for similar conduct.”⁸⁸ The court reaffirmed the belief that disciplinary matters should be left at the discretion of local school authorities and did not find evidence of discrimination on the part of the school officials.⁸⁹

80. *Id.* at 1337.

81. *Id.* at 1336.

82. *Id.* at 1338.

83. 643 F.2d 1103 (5th Cir. 1981).

84. *Id.* at 1107.

85. *Id.* at 1108.

86. 507 F.2d 675, 677 (5th Cir. 1975).

87. *Id.* at 680.

88. *Id.* at 681.

89. *Id.* at 680–81 (noting that school boards are invested with authority to adopt local rules to control and discipline students).

Two African American students expelled from a private school in Illinois asked the court in *Parker v. Trinity High School* to consider their equal protection claim that they were disciplined more harshly than similarly situated white students.⁹⁰ The court maintained that, while the plaintiffs did suffer irreparable harm, they did not cite a sufficient cause of action that would show that the school officials who decided upon the expulsions had acted with discriminatory animus.⁹¹

Although *Brown* was decided in 1954, Humnoke School District in Arkansas continued to maintain segregated schools until 1968. Plaintiffs in *Sherpell v. Humnoke School District No. 5* maintained that the attempts of integration provoked ongoing racial tensions through 1985.⁹² The plaintiffs argued, among other things, that African American students in the district were subjected to harsher punishment and to racial slurs made by students and teachers.⁹³ In this instance, the court did not ask for statistical evidence when reaching the conclusion that school officials engaged in discriminatory harassment.⁹⁴

90. 823 F. Supp. 511, 512 (N.D. Ill. 1993).

91. *Id.* at 520.

92. 619 F. Supp. 670, 673 (E.D. Ark. 1985). Many argue that if desegregation does not rapidly exhibit gains in test scores, the practice should be abandoned. See Gary Orfield, Unexpected Costs and Uncertain Gains of Dismantling Desegregation, in *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education* 73, 104-05 (Gary Orfield, Susan E. Eaton & Harvard Project on Sch. Desegregation eds., 1996). Orfield, however, takes the view that, because desegregation is an effort to transcend a basic social cleavage, it often requires difficult changes within schools before its value can be realized and, therefore, its efficacy should be evaluated over a longer period of time. *Id.*

93. *Sherpell*, 619 F. Supp. at 677.

94. To establish their concerns, the plaintiffs proffered evidence that the court summarized as follows:

1. Blacks constitute approximately 45% of the total population in the Humnoke School District, but no black has ever been elected to the Humnoke School Board because of polarized voting along racial lines. Moreover, a current board member who did not intend to run for reelection decided to run in order to keep "niggers" off the school board.

2. There are no blacks serving in any administrative positions in the district, i.e., superintendent, principals, and assistant principals.

3. Blacks are not welcomed at school board meetings and are urged to communicate with a designated board member on an one-to-one basis in order to register any grievances regarding school matters.

4. Blacks are not afforded the opportunity to make use of school facilities after school hours and on week-ends as white patrons are. Basketball goals were removed from the school campus in order to keep black children out of the Humnoke community on the week-ends.

5. During the 1966-67 school term, there were nine black teachers employed by the district to teach at the all-black school, but only two black teachers were transferred to the previously all-white school in January 1968, when the black school was closed. These two black teachers were required to teach segregated classes in the previously all-white school under the purported unitary system.

Many districts adopted desegregation policies post-*Brown* but continued to maintain racially separate schools in practice. For example, although Wilmington, Delaware, schools were ordered by the Delaware Supreme Court to adopt a desegregation plan in 1952, it was not until 1974 that courts forced the state board of education to end its practice of de facto segregation and to consider consolidating school districts to effectuate desegregated schools.⁹⁵ In 1991, the federal district court in Delaware took a bold step⁹⁶ in *Coalition to Save Our Children v. State Board of Education (Save Our Children I)* when it held that, although the Red Clay school district (one of the districts that was ordered to consolidate) could prove that its attendance configurations were in technical compliance with the court's desegregation order, the district had not achieved "unitary"

6. Significantly, white faculty members and administrative personnel have referred to black students as "niggers", "blue-gums" and "coon" without any sanctions being imposed by the school board, although the superintendent, principal and certain board members were knowledgeable of the use of these derogatory terms.

7. A substantial number of white faculty members, including the principal, have not been certified by the State Department of Education, but are permitted to teach, while black teachers currently teaching were required to be certified.

8. The parent-teacher association was abolished by the Board of Directors following the closing of the all-black school and the transfer of the black students to the previous all-white school.

9. While the Humnoke School District is only approximately sixty square miles in area, the District is divided into two separate distinct communities, one exclusively black identified as Allport which has a black Mayor and Town Council; and the other is Humnoke, with a white Mayor and Town Council. Because of the existence of deep-rooted racial discrimination over the years, any prospective black candidate cannot campaign effectively in the essentially all-white Humnoke Community.

10. Black patrons of the Humnoke School District bear the effect of past discrimination in educational achievements, income and low socioeconomic status. It is plain that the Board of Directors and their administrators have consistently put the interest of white patrons in the school district on a priority status.

Id. at 679.

95. *Evans v. Buchanan*, 379 F. Supp. 1218, 1219–21, 1224 (D. Del. 1974). The original Delaware Supreme Court decision mandating desegregation was appealed to the U.S. Supreme Court and consolidated with *Brown v. Board of Education*, 347 U.S. 483 (1954). *Evans*, 379 F. Supp. at 1220.

96. Just weeks before the district court issued its opinion, the Supreme Court held that the Board of Education of Oklahoma City desegregation order may be removed even though the likely result would be that schools would become resegregated. See *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249–50 (1991). The Court stated that "[d]issolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that 'necessary concern for the important values of local control of public school systems . . .'" *Id.* at 248 (quoting *Spangler v. Pasadena City Bd. of Educ.*, 611 F.2d 1239, 1245 n.5 (9th Cir. 1979) (Kennedy, J., concurring)).

status.⁹⁷ This was because the plan had not resulted in the eradication of the vestiges of prior segregation, including problems of dropouts, minority suspensions, absenteeism, low achievement scores, overrepresentation of African Americans in special education, low college-matriculation rates, and other racial disparities in performance and disciplinary concerns.⁹⁸ Using the force of the Fourteenth Amendment, the court held:

The court's jurisdiction and authority to act . . . are derived from the violations of the rights of the plaintiff class under the Equal Protection Clause of the United States Constitution Thus, the court's duty is limited to assuring that the separate and inherently unequal schools . . . and their lingering effects are eliminated to the extent practicable The [F]ourteenth [A]mendment requires an equal education. There is no constitutional guarantee of a quality education. The constitution is satisfied if all of the students in Red Clay receive an equally bad education, regardless of race.⁹⁹

In *Fuller ex rel. Fuller v. Decatur Public School Board of Education School District 61*, African American high school students from public schools in Decatur, Illinois, sought legal relief when they were expelled due to fighting.¹⁰⁰ The school district argued that, given the severity of the fight and the number of bystanders injured as a result of the fight, expulsion was an appropriate consequence of the untoward actions.¹⁰¹ The plaintiffs responded that their expulsions were racially motivated as evidenced by the fact that the district maintained a policy and practice of arbitrary and

97. 757 F. Supp. 328, 336, 349–50 (D. Del. 1991) (describing the “Substantive Problems” that the petitioners identified regarding desegregation, finding that the Red Clay district had not made progress regarding those problems, and holding that the Red Clay district was not in compliance with the Equal Protection Clause); see also *Coal. to Save Our Children v. State Bd. of Educ. (Save Our Children II)*, 901 F. Supp. 784, 793 (D. Del. 1995) (describing the 1991 decision). Just four years later the court took a different approach with respect to the eradications of the vestiges of segregation. Although plaintiffs provided data with respect to lower rates of placement in honors courses, lower rates of college attendance, disproportionately low participation in extracurricular activities, and other such markers of lost educational opportunity, *id.* at 796–822, the court held that “[t]he record demonstrates that black and white children who are neighbors do attend the same public school (although the school itself most likely is not located in that neighborhood), and there is no credible evidence linking any current racially identifiable conditions to the prior violation,” *id.* at 823 (footnote omitted). Further, the court indicated that “[t]here is no credible evidence demonstrating that the differences between black and white children’s success in school can be attributed to the former *de jure* segregated school system.” *Id.* For a similar approach, see *Missouri v. Jenkins*, 515 U.S. 70, 101 (1995) (“The basic task of the District Court is to decide whether the reduction in achievement by minority students attributable to prior *de jure* segregation has been remedied to the extent practicable.”).

98. *Save Our Children I*, 757 F. Supp. at 336, 349–50.

99. *Id.* at 350.

100. 78 F. Supp. 2d 812, 823–25 (C.D. Ill. 2000), *aff’d*, 251 F.3d 662 (7th Cir. 2001).

101. *Id.* at 814–19.

disparate expulsions with regard to African American students.¹⁰² A summary of past expulsions introduced to the court indicated that although 82% of the students expelled between 1996 and 1999 were African American, African American students composed only about 46% to 48% of the student body population.¹⁰³ Acknowledging the statistics, the court stated that “the statistics produced during trial could lead a reasonable person to speculate that the School Board’s expulsion action was based upon the race of the students,” but that the “court cannot make its decision solely upon statistical speculation.”¹⁰⁴

Furthermore, the court observed that “none of the Caucasian students who were expelled for physical confrontations or fighting can be considered ‘similarly situated’ to the students involved in this case” because of the magnitude of this particular fight.¹⁰⁵ Therefore, because the students failed to show that any similarly situated Caucasian students were treated less harshly, the plaintiffs failed to establish a Fourteenth Amendment violation with respect to the school board’s expulsion decision.¹⁰⁶

In 1977, while the Supreme Court was addressing evidence of disparate impact in the context of housing,¹⁰⁷ at least one court addressed segregative effects (without evidence of invidious intent) in the education context.¹⁰⁸ The *Penick* district court maintained that to hold plaintiffs in school-desegregation cases to a standard that requires direct proof of a “racial motive” on the part of a school board would “border on the impossible.”¹⁰⁹ The court posited that it was reasonable to draw inferences from facts, even when the elements of proof were supplied from inferences drawn.¹¹⁰ Finding that the school district was in violation of the due process rights of the plaintiffs, the court held that the school board’s adherence to the neighborhood-school concept “with full knowledge of the predictable effects of

102. *Id.* at 823–25.

103. *Id.* at 824.

104. *Id.*

105. *Id.* at 825.

106. See *id.*; see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (holding that proof of discriminatory impact might provide “an important starting point” in an equal protection claim); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“[D]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . .”).

107. *Arlington Heights*, 429 U.S. at 266.

108. *Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 229, 232, 254–55 (S.D. Ohio 1977) (questioning a school board’s policy that may cause segregative effects), *aff’d in part, remanded in part*, 583 F.3d 787 (6th Cir. 1978), *aff’d*, 443 U.S. 449 (1979).

109. *Id.* at 255.

110. *Id.* But cf. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973) (holding that evidence of discriminatory intent by the school board in one portion of a school system shifts the burden of proving that other de facto segregated schools are not also the result of discriminatory intent).

such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.”¹¹¹

III. “THIS COURT CANNOT OVERSTATE THE IMPORTANCE OF EDUCATION FOR YOUNGSTERS IN GENERAL”¹¹² JUDGE MOTLEY’S LEGACY TO EDUCATIONAL ACCESS FROM THE BENCH

Motley’s acclaimed legal prowess is demonstrated by her illustrious career as a public servant.¹¹³ As a young lawyer, she understood and believed in the power of the judiciary to alter the course of societal norms.¹¹⁴ Although Motley through her work at the NAACP LDF sought to increase opportunities on behalf of previously disenfranchised people, her mere presence and appointment to the firm as the first woman to serve the NAACP LDF was an equal protection accomplishment as well.¹¹⁵ Motley would go on to serve as many “firsts” in her various public service roles, including as the first black woman elected to the New York State Senate, the first woman to serve as President of the Borough of Manhattan, the first woman to serve on the New York City Board of Estimate, the first woman to be appointed as a federal judge to the Southern District of New York,¹¹⁶ and the first black woman appointed to the federal judiciary.¹¹⁷

Motley served the federal bench with preeminence and esteemed honor.¹¹⁸ She believed that the federal judiciary could serve to ensure the

111. *Penick*, 429 F. Supp. at 255.

112. *Handberry v. Thompson*, 92 F. Supp. 2d 244, 249 (S.D.N.Y. 2000).

113. Motley joined the legal staff of the NAACP LDF while still in her third year at Columbia Law School. William E. Hellerstein, Foreword: Judge Constance Baker Motley, 62 *Brook. L. Rev.* 529, 529 (1996). She went on to become associate counsel and the firm’s principal trial attorney. *Id.*

114. See Thurgood Marshall, *The Reminiscences of Thurgood Marshall* (1977), reprinted in *Thurgood Marshall: His Speeches, Writings, Arguments, Opinions and Reminiscences* 413, 502 (Mark V. Tushnet ed., 2001) (explaining that young lawyers, including Constance Baker Motley, did not need to be persuaded to join the Legal Defense Fund despite the low salaries because “[t]hey all wanted to” and “[t]hey knew enough about it”); see also, e.g., Constance Baker Motley, *My Personal Debt to Thurgood Marshall*, 101 *Yale L.J.* 19, 21 (1991) [hereinafter *Motley, My Personal Debt*] (describing the impact of several desegregation cases she personally tried—and won).

115. *Motley, My Personal Debt*, supra note 114, at 19 (“[I]n June 1946, Marshall received Board approval to hire a woman lawyer.”).

116. *Motley, Equal Justice Under Law*, supra note 2, at 226 (“In my view, I did not get to the federal bench because I was a woman. I understood my appointment as based on my accomplishments as a civil rights lawyer.”).

117. *Id.*; see also Hellerstein, supra note 113, at 530.

118. See President Clinton Awards the Presidential Citizens Medals, Clinton White House (Jan. 8, 2001), http://clintonwhitehouse5.archives.gov/WH/new/html/Mon_Jan_8_141714_2001.html [http://perma.cc/N2AV-GFJ6] (describing Judge Motley as a “key legal strategist of the civil rights movement” and recognizing her as a recipient of the medal); see also Constance Baker Motley, Nat’l Women’s Hall of Fame, <http://www.womenofthehall.org/>

rights of all that the Constitution guaranteed.¹¹⁹ During her tenure on the bench, Motley heard over 2,500 cases.¹²⁰ She issued several significant orders from the bench, including admonishing the use of peremptory challenges¹²¹ and invalidating the baseball commissioner's exclusion of female sports reporters from the locker rooms of city-owned baseball stadiums.¹²²

In 1996, Motley heard a case that would ultimately extend the right to an adequate education to all school-aged children, even those incarcerated.¹²³ In 2000, she issued a decision that effectively barred the City of New York from continuing to deny adequate educational services to city prison inmates under age twenty-one, in violation of their due process rights, because the state's education code guaranteed people under age twenty-one without a high school diploma the right to receive schooling.¹²⁴ In this case, plaintiffs provided uncontroverted evidence that detainees at Rikers Island Correctional Facility "received no educational services for significant lengths of time."¹²⁵ In particularly egregious examples, the plaintiffs offered "unrefuted evidence that hundreds of adolescent inmates held in special housing areas (such as homosexual housing, protective custody, mental observation, administrative segregation and punitive segregation) received absolutely no schooling during many semesters."¹²⁶ The plaintiffs also provided uncontradicted evidence that a substantial number of class members suffered from learning disabilities that rendered their educational entitlements subject to the Individuals with Disabilities Education Act (IDEA)¹²⁷ as well as New York laws govern-

inductee/constance-baker-motley/ [http://perma.cc/2JSX-7SAM] (last visited Aug. 7, 2017) (inducting Judge Motley into the Women's Hall of Fame).

119. See Motley, *Equal Justice Under Law*, supra note 2, at 202 ("In the twentieth century, the rights of black Americans under the Constitution were vindicated, and the federal judiciary emerged as the primary forum for recognizing these rights.").

120. See Florence Wagman Roisman, *An Extraordinary Woman: The Honorable Constance Baker Motley*, 49 *Ind. L. Rev.* 677, 691 (2016) (discussing the number and importance of decisions rendered by Judge Motley).

121. *Minetos v. City Univ. of N.Y.*, 925 F. Supp. 177, 177 (S.D.N.Y. 1996) (holding that "peremptory challenges per se violate equal protection").

122. *Ludtke v. Kuhn*, 461 F. Supp. 86, 96 (S.D.N.Y. 1978) (finding the state action of banning accredited female journalists from the Yankee Team Clubhouse infringed upon plaintiff's due process and equal protection rights and provided similarly situated male reporters a substantive advantage over their female colleagues).

123. Since Judge Motley's passing, this case has now been assigned to Judge George Daniels, one of the authors of this Essay. He considers it a professional and personal honor to continue the work that Judge Motley began during the time she presided over this matter.

124. *Handberry v. Thompson*, 92 F. Supp. 2d 244, 249 (S.D.N.Y. 2000) (describing the right to a "free and appropriate education" in New York for the class of inmates under twenty-one years old).

125. *Id.* at 248.

126. *Id.*

127. 20 U.S.C. §§ 1400–1482 (2012).

ing special education.¹²⁸ Motley held, “Just like the general entitlement to a free public education, the entitlement to special education services is not trumped by incarceration.”¹²⁹

Between 1996, when the case was filed, and 2000, when the case was heard,¹³⁰ the city defendant had implemented a number of changes that improved educational-service delivery to the prison inmates.¹³¹ However, given her understanding of the principles of justice and equal protection,¹³² Motley decided that the plaintiffs’ class action suit was not rendered moot because the inadequate educational access concerns could easily reoccur without appropriate judicial intervention.¹³³ In holding the city defendants liable for the failure to provide the class-member plaintiffs with adequate educational services, Motley reasoned that New York law granted the class members a property right to a free and appropriate education. She then ordered that the city defendants file a plan that would address how they would provide for full and complete educational service delivery “for all eligible inmates of Rikers Island.”¹³⁴

In 2002, the city defendants provided Motley with the plan that was previously ordered. She found that the plan was woefully insufficient and still lacking in many key areas of educational adequacy. For example, she held that the city failed to consistently and adequately follow notification procedures to inform city prison inmates between ages sixteen and twenty-one of their right to receive educational services; failed to provide city prison inmates with sufficient security personnel to ensure that they received the total number of educational contact hours to which they were legally entitled; failed to provide the inmates with the required three hours of instruction five days per week, in violation of state law; and failed to provide disabled city prison inmates with education-related services such as counseling, speech therapy, and vision services, as required under IDEA.¹³⁵ Motley ordered that the city continue to be supervised by a monitor who would report on the progress and initiatives required under the court order.¹³⁶

128. *Handberry*, 92 F. Supp. 2d at 248–49.

129. *Id.*

130. *Id.* at 245.

131. See *id.* at 247 (refusing to render the controversy moot despite the city’s changes to educational services provided).

132. See Motley, *Equal Justice Under Law*, *supra* note 2, at 240 (“The Supreme Court’s decision in *Brown* is not only a statement of what the equal protection clause requires but, more broadly speaking, a statement of what justice requires.”).

133. *Handberry*, 92 F. Supp. 2d at 247 (“[E]ven if such improvements were significant enough to raise the educational services up to the level required by law, plaintiffs’ claims would still survive any challenge of mootness as the controversy could easily recur.”).

134. *Id.* at 249.

135. *Handberry v. Thompson*, 219 F. Supp. 2d 525, 534–35, 537, 543 (S.D.N.Y. 2002), *aff’d in part, vacated in part*, 446 F.3d 335 (2d Cir. 2006).

136. *Id.* at 546.

Motley died in 2005. She did not live to know that in 2006 the Second Circuit recognized that the city defendants must follow the procedures of IDEA in screening inmates, developing Individual Education Plans and Special Education Plans, and implementing those plans for eligible inmates.¹³⁷ The court recognized that the eligible inmates have a due process interest¹³⁸ in the “minimum number of hours [of schooling] required by the [state] regulations.”¹³⁹

When the case was remanded to Judge Daniels, one of the authors of this Essay, in 2007,¹⁴⁰ he and Magistrate Judge James Francis appointed a special master to oversee the areas of concern that continue to be before the court. While it is evident that the city defendants continue to make strides in providing the educational access to inmates, upholding Motley’s initial commitment to justice requires continued vigilance.¹⁴¹

137. *Handberry*, 446 F.3d at 347–51 (upholding the majority of Judge Motley’s court order).

138. Although the plaintiffs argued that they had a Fourteenth Amendment property interest in a public education, *id.* at 352, the Second Circuit relied on analogous cases to reason that at least “a complete lack of education or one ‘wholly unsuited’ to the statutory goals” is required to constitute a deprivation of a property interest. *Id.* at 355. The court concluded that the plaintiffs were entitled to injunctive relief on due process grounds only as to the minimum number of hours required by the relevant state regulations. *Id.*

139. *Id.*

140. *Handberry v. Thompson*, No. 96 Civ. 6161 (GBD) (JCF), 2015 WL 10570793, at *3 (S.D.N.Y. Dec. 2, 2015), adopted by 2016 WL 1268265 (S.D.N.Y. Mar. 31, 2016).

141. Most recently, the court adopted in part the plaintiffs’ proposed order, which provides:

1. All eligible inmates shall receive a minimum of 3 hours of educational services every school day.
2. Placement in a restricted housing unit does not change an eligible inmate’s entitlement to educational services under any provision of this Order.
3. Unless stated explicitly to the contrary, any and all requirements set forth in this Order shall apply to all of the schools, programs and methods of instruction operated by DOE in DOC facilities.
4. DOC shall ensure that each eligible inmate is provided access to educational services consistent with ¶ 2 above in a timely manner, including if necessary providing escorts for travel to and from his or her place of educational instruction.
5. Inmates who are disabled and identified as in need of special education or related services shall receive such services, including when placed in a restricted housing unit or method of instruction. If necessary, an Individualized Education Plan (“IEP”) or Special Education Plan (“SEP”) may be modified in accordance with 20 U.S.C.A. § 1414(d) and 34 C.F.R. § 300.324, consistent with legitimate penal objectives. In the event this occurs, such modifications shall be the least restrictive necessary to accommodate the security needs of the jail.
6. The Court appoints Dr. Peter E. Leone to continue as the Court’s expert and monitor to serve a two-year term from the time of appointment. The monitor will assess the DOE and DOC’s compliance with this Order and provide the court and counsel with annual reports specifically iden-

Constance Baker Motley, the woman who was told to become a hairdresser upon graduation from high school,¹⁴² became known for many illustrious ideals in her accomplished career. As her legal career developed, she held fast to the virtue that the law was the major vehicle through which we could create a more just society for all. Motley understood that our greatest asset would be in teaching future generations to use the law to change hearts and minds.¹⁴³ While much can be learned from the determination and perseverance exhibited by Motley, it is imperative today that we pay heed to her lesson that education has the power to change hearts, minds, and lives. For her dedication, honor, integrity, and endearing legacy, we honor Judge Motley.

tifying any areas of noncompliance. Dr. Leone in his reports may also recommend specific changes in DOE and DOC policies and procedures.

7. Dr. Leone shall continue to have the same access to Rikers Island, to plaintiffs and defendants, and to relevant documents, as well as the same arrangement for compensation and reimbursement of expenses, as set forth in the Court's June 10, 2014 Order.

Id. at *12–13.

142. Motley, *Equal Justice Under Law*, supra note 2, at 41 (describing that her mother wanted her to become a hairdresser in spite of the fact that she indicated that wanted to become a lawyer).

143. Constance Baker Motley, *A Judicial Perspective on the New Law School*, 3 *N.Y.C. L. Rev.* 241, 244 (2000).