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Lightning in the Hand: Indians and Voting Rights

American Indians and the Fight for Equal Voting Rights

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In the interests of full disclosure, I note that I know, have worked with, and have long admired Laughlin McDonald, the author of the book that I am reviewing. One of the distinctive aspects of the voting rights bar is the relationship among practicing lawyers, law professors, and various social scientists. *See infra* text accompanying notes 58-67. To my mind, there is no field of public law in which practice and scholarship—and practicing lawyers and full-time scholars—more inform one another.

I take the title of this review from an Apache proverb that “it is better to have less thunder in the mouth and more lightning in the hand.” *See* John J. Lumpkin, *Native American Veterans Honored*, ALBUQUERQUE J., Nov. 12, 1998, at D1 (quoting Assistant Secretary of Defense Charles L. Cragin).

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In *Northwest Austin Municipal Utility District No. One v. Holder*,¹ the Supreme Court expressed its faith that, because of the Voting Rights Act, “we are now a very different Nation.”² Few lawyers are more responsible for that transformation than Laughlin McDonald, the longtime director of the American Civil Liberties Union’s voting rights project. In his most recent book, *American Indians and the Fight for Equal Voting Rights*,³ McDonald shows us, however, that we are not quite as different as the Supreme Court might think. In nearly every respect, full enfranchisement has come late to the descendants of America’s first inhabitants.⁴

When Congress amended section 2 of the Voting Rights Act in 1982 to forbid practices that result in a denial or dilution of minority voting strength regardless of the motivation behind them,⁵ it directed courts to conduct “a searching practical evaluation of the ‘past and present reality,’”⁶ taking into account “the context of all the circumstances in the jurisdiction in question.”⁷ McDonald’s book, based on a series of section 2 cases that he and his colleagues at the ACLU have litigated on behalf of Indian plaintiffs,⁸ takes a similar approach, offering detailed descriptions of the barriers to full political equality faced by Indians in communities in five Western states.⁹

In many important respects, those barriers resemble the ones confronted by blacks in the South and Latinos in the Southwest. Thus, many of McDonald’s individual chapters are organized around the presence of the “Senate factors”—nine aspects of political and socioeconomic life that Congress distilled from

1. 129 S. Ct. 2504 (2009).

2. *Id.* at 2516.

3. LAUGHLIN McDONALD, *AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS* (2010) [hereinafter McDONALD, *AMERICAN INDIANS*]. McDonald is also the author of an exhaustive study of the battle for voting equality in Georgia, LAUGHLIN McDONALD, *A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA* (2003), as well as several book chapters and scholarly articles.

4. See McDONALD, *AMERICAN INDIANS*, *supra* note 3, at 45.

5. Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973 (2006)).

6. S. REP. NO. 97-417, at 30 (1982) (quoting *White v. Regester*, 412 U.S. 755, 769-70 (1973)).

7. *Id.* at 27.

8. McDONALD, *AMERICAN INDIANS*, *supra* note 3, at vii-viii.

9. McDonald’s book thus complements another recent study of Indian voting rights, DANIEL MCCOOL, SUSAN M. OLSON & JENNIFER L. ROBINSON, *NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE* (2007), which contains several case studies—some overlapping with McDonald’s—as well as a systematic canvass of voting rights cases involving Indians. See *id.* at 48-67 tbl.3.1, 68 tbl.3.2.

those voting rights cases as “probative” of section 2 violations.¹⁰ In particular, McDonald describes, in detail both painstaking and painful to read, a history of exclusion and a level of ongoing polarization that rivals Mississippi or the Rio Grande Valley. If anything, South Carolina seems further along the path to political equality than South Dakota.¹¹

McDonald and his colleagues brought to their voting cases involving Indian plaintiffs a doctrinal framework and a set of litigation techniques honed in cases involving African-Americans. But, as McDonald explains, Indians occupy a distinctive status within the American political order.¹² Indians are citizens not only of the United States and the state where they reside but often also (and particularly in those regions where they are most likely to bring voting rights claims) of a separate sovereign as well—their tribe. This fact has inflected both the history of Indian disenfranchisement and the course of litigation under the Voting Rights Act.

Indian tribes, as the Supreme Court has repeatedly observed, “are ‘distinct, independent political communities, retaining their original natural rights’ in matters of local self-government.”¹³ Thus, like all political communities, they confront questions of membership, allocation of power, and political structure.

This Review explores these questions of disenfranchisement, dilution, and constitutional design. Part I describes the history of Indian disenfranchisement in light of their distinctive status. Indians’ exclusion from the political process reflected profound racism as pernicious and pervasive as the discrimination facing blacks in the South and Latinos in the Southwest. But it also involved complex constitutional and conceptual issues unique to Indians. Part II then turns to the relatively recent vote dilution litigation that forms the heart of McDonald’s book. Indian voting rights cases have followed a clear path blazed

10. S. REP. NO. 97-417, at 28-29; see *infra* note 63 (listing the nine factors).

11. McDONALD, *AMERICAN INDIANS*, *supra* note 3, at 140 (stating that although many covered jurisdictions in the South did not comply with section 5, “in none was the failure as deliberate and prolonged as in South Dakota”); see *id.* at 122-47 (discussing South Dakota’s continued resistance to the Voting Rights Act). For examples of McDonald’s work in South Carolina, see *McCain v. Lybrand*, 465 U.S. 236 (1984) (holding that jurisdictions seeking preclearance of election-related changes under section 5 of the Voting Rights Act must make unambiguous submissions of the changes involved); and *United States v. Charleston Cnty.*, 365 F.3d 341 (4th Cir. 2004) (finding a section 2 violation with respect to the county’s use of at-large elections).

12. McDONALD, *AMERICAN INDIANS*, *supra* note 3, at 3-29 (describing the volatile and contradictory nature of the United States’s approach to the political status of Indians and tribes).

13. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)).

by earlier cases involving blacks and Latinos. Nevertheless, themes related to Indians' distinctive political status crop up within the litigation at various points. Finally, Part III looks beyond Indians' claims under the Voting Rights Act to discuss issues related to internal tribal elections. Like other elections, these contests involve fundamental questions about enfranchisement and electoral design. Tribal answers to these questions sometimes depart dramatically from the rules governing federal, state, and local elections in ways that tie into ongoing debates extending far beyond Indian law.

I. INDIAN CITIZENSHIP AND THE FIGHT FOR ENFRANCHISEMENT

On April 6, 1880, the city of Omaha, Nebraska, was set to hold elections for its city council. John Elk, a city resident, showed up shortly before Election Day at the registrar's office seeking to have his name placed on the voting rolls. The registrar, Charles Wilkins, refused Elk's request on the grounds that Elk was an Indian. Elk sued Wilkins in federal district court, seeking \$6000 in damages for violation of his constitutional right to vote.

The Supreme Court held, however, that Elk could not invoke the Fifteenth Amendment's protection against racial discrimination in voting¹⁴ because that protection extended to "citizens of the United States," and Elk was not a citizen. The case turned on the Citizenship Clause in section 1 of the Fourteenth Amendment. That clause—so much in the news these days with anti-immigrant hysteria over purported "anchor babies"¹⁵—provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."¹⁶ Elk's position was that, having "severed his tribal relation" by moving off the reservation into white society and having thus "fully and completely surrendered himself to the jurisdiction of the United States,"¹⁷ he was a citizen.

The Court disagreed. Noting that "Indians not taxed"—essentially, Indians living on tribal lands—had been excluded from the population base for

14. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

15. See Editorial, *Xenophobia: Fear-Mongering for American Votes*, N.Y. TIMES, Aug. 6, 2010, at A22, available at <http://www.nytimes.com/2010/08/06/opinion/06fri1.html>.

16. U.S. CONST. amend. XIV, § 1, cl. 1.

17. *Elk v. Wilkins*, 112 U.S. 94, 99 (1884) (quoting from Elk's complaint). McDonald discusses Elk's case in his chapter on Nebraska. See MCDONALD, *AMERICAN INDIANS*, *supra* note 3, at 177-78.

apportioning seats in the House of Representatives under the original Constitution,¹⁸ the Court reiterated the longstanding view that Indians were members of “distinct political communities,” owing “immediate allegiance to their several tribes, and were not part of the people of the United States.”¹⁹

The Court then concluded that the Citizenship Clause of the Fourteenth Amendment did not change that essential fact. The Civil Rights Act of 1866, which became the basis for the Fourteenth Amendment, had defined as citizens “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed.”²⁰ The Court saw no significance to the omission of that exclusionary language from the Citizenship Clause, particularly given the continued exclusion of Indians not taxed from the basis for apportionment in section 2 of the Amendment.²¹ Since Indians living on tribal lands thus did not become U.S. citizens at birth, they could obtain citizenship only through naturalization. Naturalization could be accomplished only with the consent of the federal government, and not by the unilateral act of an individual Indian who decided to separate himself from his tribe.²² Elk had not been naturalized; he had simply moved to Omaha. The Court thus concluded that Elk, “not being a citizen of the United States under the Fourteenth Amendment of the Constitution, has been deprived of no right secured by the Fifteenth Amendment.”²³

Justice Harlan’s dissent did not dispute the proposition that Indians who remained affiliated with their tribe were not citizens of the United States unless the United States conferred citizenship on them wholesale.²⁴ Rather, he argued

18. U.S. CONST. art. I, § 2, cl. 3. That Clause also required that direct taxes be apportioned among the several states on the same basis and contained the infamous Three-Fifths Clause.

19. *Elk*, 112 U.S. at 99.

20. 14 Stat. 27 (1866).

21. U.S. CONST. amend. XIV, § 2. Since the ratification of the Sixteenth Amendment, there has been no constitutional requirement that direct taxes be apportioned. The other remaining provision in the Constitution that deals expressly with Indians is the Indian Commerce Clause. *Id.* art. I, § 8, cl. 3 (conferring power on Congress “[t]o regulate Commerce . . . with the Indian Tribes”).

22. *See Elk*, 112 U.S. at 106-07 (stating that “whether any Indian tribes, or any members thereof” should be “admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are and whose citizens they seek to become, and not by each Indian for himself”).

23. *Id.* at 109.

24. *Id.* at 116 (Harlan, J., dissenting). As the majority pointed out, contemporaneous with the ratification of the Fourteenth Amendment, the federal government had entered into treaties with a number of tribes, naturalizing their members. *See id.* at 103-05 (majority opinion)

only that the two prerequisites for citizenship in section 1—first, that the person be either born or naturalized in the United States and, second, that he be “subject to the jurisdiction thereof”—did not have to be fulfilled simultaneously. The Citizenship Clause, he argued, “implies in respect of persons born in this country, that they may claim the rights of national citizenship from and after the moment they become subject to the complete jurisdiction of the United States.”²⁵ Quoting Judge Thomas Cooley’s edition of Joseph Story’s *Commentaries on the Constitution of the United States*, he noted that when

the tribal relations are dissolved, when the headship of the chief or the authority of the tribe is no longer recognized, and the individual Indian, turning his back upon his former mode of life, makes himself a member of the civilized community, the case [under the Fourteenth Amendment] is wholly altered. He then no longer acknowledges a divided allegiance; he joins himself to the body politic²⁶

Indians were entitled to national citizenship when they “abandon[ed]” their tribe and became residents of one of the states. Otherwise,

the Fourteenth Amendment has wholly failed to accomplish, in respect of the Indian race, what, we think, was intended by it; and there is still in this country a despised and rejected class of persons, with no nationality whatever; who, born in our territory . . . are yet not members of any political community nor entitled to any of the rights, privileges, or immunities of citizens of the United States.²⁷

Even under Justice Harlan’s view, then, Indians would be entitled to invoke the Fifteenth Amendment’s protection of their right to vote only if they severed their ties with the Indian community.²⁸

(describing treaties with the Delaware, the Pottawatomie, the Sioux, the Ottawa, the Miami, the Peoria, the Winnebago in Minnesota, and the Stockbridge and Munsee in Wisconsin).

25. *Id.* at 121 (Harlan, J., dissenting).

26. *Id.* at 120 (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1933, at 655 (Thomas M. Cooley ed., Boston, Little, Brown & Co. 1873)).

27. *Id.* at 122–23.

28. Congress took a similar position. For example, the 1889 Enabling Act under which Washington, Montana, North Dakota, and South Dakota gained admission to the Union, provided that the states’ constitutions “shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed.” Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676–77.

That general view prevailed as a matter of federal law for the next forty years. The Dawes and Burke Acts conferred citizenship on the majority of Indians,²⁹ but only because they agreed to the division of their lands (“allotment”), left the reservation, or cut their ties to their tribes. As McDonald trenchantly observes, “Indians became citizens, but only by ceasing to be Indians.”³⁰

After a series of additional partial measures,³¹ Congress enacted the Indian Citizenship Act of 1924, unconditionally conferring U.S. citizenship on all Indians.³² Thus, as a formal matter, the Fourteenth and Fifteenth Amendments’ protections of voting rights finally were extended to Indians.

But as with African-Americans, whose formal right to vote had been recognized a half-century earlier by those same Amendments, disenfranchisement remained pervasive. States with large Indian populations used a variety of devices to keep Indians off the rolls. Some of these devices found their parallels in the techniques used to disenfranchise blacks and Latinos.³³ For example, the literacy tests that black and Latino citizens failed

29. See McDONALD, *AMERICAN INDIANS*, *supra* note 3, at 15.

30. *Id.* at 16. More precisely, Indians could achieve citizenship only to the extent that they appeared to nonnative eyes to have abandoned their identity. Many Indians continued to observe their traditions in private even once they had moved into nonnative society.

31. For example, in 1919, Congress conferred eligibility for citizenship on Indians who had served honorably in World War I. *Id.* at 18. For discussion of the relationship between military service and citizenship, see Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right To Vote*, 71 U. CIN. L. REV. 1345 (2003). See also MCCOOL ET AL., *supra* note 9, at 17 (noting that, in its 1948 brief attacking Arizona’s law denying on-reservation Indians the right to vote, the United States argued that Indians who had served in the military during World War II “rightly resented a situation where they are allowed to participate in upholding democratic principles as soldiers, but are considered unprepared to share in protecting those principles in peace time” (quoting Brief Amicus Curiae of the United States of America at 7, *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948) (No. 5065))).

32. See Indian Citizenship Act of 1924, 43 Stat. 253 (“*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.”). The current version is codified at 8 U.S.C. § 1401 (2006), which provides that persons “born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe” shall be “nationals and citizens of the United States at birth.” This unilateral declaration was controversial among some Indian populations who feared that it was yet another measure designed to force their assimilation. See *infra* note 102.

33. Compare *Lane v. Wilson*, 307 U.S. 268 (1939) (striking down a restrictive Oklahoma re-registration requirement designed to perpetuate disenfranchisement of blacks after the Supreme Court had struck down the state’s grandfather clause), with McDONALD,

often barred Indians too.³⁴ In the course of explaining why Congress had the power to suspend Arizona's literacy test,³⁵ Justice Brennan's opinion described

AMERICAN INDIANS, *supra* note 3, at 272 n.87 (referring to a Montana re-registration requirement that blunted the impact of the Indian Citizenship Act). Compare *Miss. State Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987) (holding that Mississippi's dual registration requirement, which necessitated that aspiring voters travel to the county courthouse to register, violated the Voting Rights Act because of its disparate impact on black citizens), *aff'd sub nom. Miss. State Chapter, Operation PUSH v. Mabus*, 932 F.2d 400 (5th Cir. 1991), with *MCDONALD, AMERICAN INDIANS*, *supra* note 3, at 123 (describing South Dakota's restrictive registration practices, including its requirement that voters register in person at the office of the county auditor).

34. See *MC COOL ET AL.*, *supra* note 9, at 18-19 (discussing the impact of literacy tests on Indians); see also *MCDONALD, AMERICAN INDIANS*, *supra* note 3, at 36-37 (discussing congressional references to this history).
35. In 1965, Congress suspended literacy tests for five years in jurisdictions with depressed levels of political participation. The coverage formula that Congress used to designate the jurisdictions swept in most of the states in the Deep South, Alaska, and a few jurisdictions elsewhere. See *MCDONALD, AMERICAN INDIANS*, *supra* note 3, at 31. Three counties in Arizona with large Indian populations were covered by this initial ban. See *Apache Cnty. v. United States*, 256 F. Supp. 903, 906 (D.D.C. 1966).

Congress permitted jurisdictions to "bail out" from under the Act's coverage if they could show that for the preceding five years their test had been administered without a discriminatory purpose or effect. See *MCDONALD, AMERICAN INDIANS*, *supra* note 3, at 31. Arizona sought to bail out and, over the objection of Navajo voters who sought unsuccessfully to intervene, a three-judge court entered an order permitting the counties to bail out. See *Apache Cnty.*, 256 F. Supp. at 913. Although the court took note of "past and present inadequacies of facilities" for registering and for voting on reservations, *id.* at 910, it found that the state was making appropriate efforts to remedy the problems. And the court described the Arizona literacy test as "bona fide." *Id.* Ironically, one piece of evidence on which the court relied to refute the Navajos' challenge was the fact that the test had been adopted during the period in which Indians were disenfranchised because they were not citizens. *Id.* at 910-11 & n.11. Even more ironically, the court downplayed the efforts of the Tribe's voting chairman to persuade the federal government to send registrars to the reservation under a provision of the 1965 Act that permitted such registrars in cases where significant complaints were made:

[Lloyd House, Deputy Registrar and Voting Chairman of the Tribe,] wrote to Attorney General Katzenbach on August 27, 1965, asking for Federal registrars, explaining the failure to supply 20 letters from Navajos denied registration as follows: "Our people are not capable in many instances of writing letters and because voting rights have been so meaningless for the past two (2) or three (3) decades, the people are not aware of the importance of this freedom of the American people." The inability to file 20 letters is plainly consistent with plaintiff's allegations [that there was no discrimination against Indian voters], if indeed it does not affirmatively support them.

Id. at 912 n.15.

In 1970, Congress amended the Voting Rights Act to extend the suspension of literacy tests for another five years and to impose the ban nationwide. Arizona refused to abandon

the high level of illiteracy among Indians as “the consequence of a previous, governmentally sponsored denial of equal educational opportunity,” pointing to the state’s admission that “many older Indians in the State were ‘never privileged to attend a formal school.’”³⁶ Justice Douglas went further, describing literacy tests as “a discriminatory weapon against some minorities, not only Negroes but Americans of Mexican ancestry, and American Indians.”³⁷ In 1975, recognizing the barriers to full participation that Indians continued to confront, Congress not only permanently prohibited literacy tests throughout the United States but also expressly included Indians within the Voting Rights Act’s special protections for minority groups.³⁸

its test, and the United States sued a number of states, including Arizona, whose literacy test it sought to enjoin. *Oregon v. Mitchell*, 400 U.S. 112, 117 n.1 (1970) (opinion of Black, J.).

36. *Oregon*, 400 U.S. at 234 (Brennan, J., dissenting in part and concurring in part) (quoting *Hearings on Amendments to the Voting Rights Act of 1965 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 91st Cong., 1st and 2d Sess. (1969-1970) (statement of Att’y Gen. of Ariz.)). Because the case involved so many issues, there was no opinion for the Court. See also *id.* at 132 (opinion of Black, J.) (pointing to the discriminatory impact of Arizona’s test on Latinos and Indians).
37. *Id.* at 147 (Douglas, J., dissenting in part and concurring in part). Literacy tests were racially discriminatory not only because they perpetuated the effects of prior discrimination in the educational system but also because they were often administered in a discriminatory fashion. See David Wilkins, *An Inquiry into Indigenous Political Participation: Implications for Tribal Sovereignty*, 9 KAN. J.L. & PUB. POL’Y 732, 738-39 (2000) (quoting the Cherokee Indian superintendent’s observation with respect to North Carolina’s literacy test, which required that aspiring voters show, “to the satisfaction of the registrar,” that they were able to read and write a section of the U.S. Constitution, that “[w]e have had Indian graduates of Carlisle, Haskell and other schools in instances much better educated than the registrar himself, turned down because they did not read or write to his *satisfaction*”).

The literacy test ban was made permanent in 1975. See 42 U.S.C. § 1973aa(a)-(b) (2006) (providing that citizens cannot be denied the right to vote because of “failure to comply with any test or device” and defining “test or device” to include, among other things, “any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, [or] (2) demonstrate any educational achievement or his knowledge of any particular subject”).

38. Indians and Alaskan Natives – as well as Latinos and Asian-Americans – are protected by the Voting Rights Act as language minorities, rather than as racial groups. The Act uses the terms “language minorities” and “language minority group” to mean “persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage,” *id.* § 1973l(c)(3), regardless of whether those persons actually speak a language other than English. Section 4(f)(2) of the Act provides that “[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.” *Id.* § 1973b(f)(2).

Section 2 of the Voting Rights Act prohibits a state or political subdivision from using a voting practice “which results in a denial or abridgement of the right of any citizen of the

But in addition to confronting the same exclusionary practices that black and Latino citizens faced, Indians encountered unique barriers, as states used Indians' distinctive status to defeat their right to vote. Many states formally disenfranchised "Indians not taxed,"³⁹ by which they meant Indians living on reservations or other federal land that was not subject to property taxes.⁴⁰ The ostensible justification for this exclusion was "no representation without taxation"⁴¹: individuals who did not contribute to the government's revenue should not be entitled to influence how that revenue was spent. Even on its own terms, the bar was overbroad: Indians had no exemption from a wide

United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2)." *Id.* § 1973(a). Similarly, section 5 of the Voting Rights Act—which applies only to specified jurisdictions, including several with large Indian populations (most notably, the states of Alaska and Arizona and two counties in South Dakota, *see* 28 C.F.R. pt. 51 app. (2009))—contains a similar prohibition on those jurisdictions' making any change to their election laws unless they can show that the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title." 42 U.S.C. § 1973c(a).

In addition to these provisions, many jurisdictions with significant Indian populations are covered by section 203 of the Voting Rights Act, 42 U.S.C. § 1973aa-1a, which requires the provision of bilingual ballot materials in jurisdictions with a significant number of citizens of voting age with limited English proficiency. For a list of jurisdictions required to provide minority-language voting assistance to Indian populations, *see* McDONALD, AMERICAN INDIANS, *supra* note 3, at 46.

39. *Id.* at 19 (noting that Idaho, Maine, Mississippi, New Mexico, and Washington used this formulation).
40. The poll tax was a major disenfranchising device in the South. *See, e.g., Harman v. Forssenius*, 380 U.S. 528 (1965) (striking down Virginia's poll tax for federal elections because it was enacted and maintained for racially discriminatory reasons); J. MORGAN KOUSSE, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE RISE OF THE ONE-PARTY SOUTH, 1880-1910, at 63-72 (1974) (discussing the poll tax). The rationale for disenfranchising Indians was a bit different: it was not their failure to pay a tax that was owed but rather their exemption from certain taxation to begin with. In fact, states made no real effort to collect the poll tax, as opposed to taxes on income or property; the point of the poll tax was to make it harder to vote, and not really to raise revenue. *See, e.g., VIRGINIA FOSTER DURR, OUTSIDE THE MAGIC CIRCLE: THE AUTOBIOGRAPHY OF VIRGINIA FOSTER DURR* 176-78 (Hollinger F. Barnard ed., 1985) (describing her difficulties in attempting to pay Virginia's poll tax).
41. *See Prince v. Bd. of Educ.*, 543 P.2d 1176, 1178 (N.M. 1975) (describing this argument in the context of a suit in which non-Indian plaintiffs sought to invalidate a school district bond election on the grounds that on-reservation Navajo should not have voted because they did not pay the property taxes used to repay the bonds); *see also In re Liquor Election*, 163 N.W. 988, 990 (Minn. 1917) (stating that it would be "repugnant to our form of government" for "those who do not come within the operation of the laws of the state" to "have the power to make and impose laws upon others" and charging that "[t]he tribal Indian contributes nothing to the state").

range of state and local taxes, most notably state and local sales taxes for off-reservation purchases and real estate taxes for land held in fee simple. Moreover, the disqualification was expressly racial in character: none of these states disqualified whites who were not subject to property taxes.⁴²

Sometimes, the argument was offered at one remove, taking the form that on-reservation Indians were not really residents of the state or any political subdivisions within which the reservation was located. In *Allen v. Merell*,⁴³ for example, the Utah Supreme Court upheld the state's treatment of on-reservation Indians as nonresidents⁴⁴ on the theory that they were both potentially subject to disproportionate "influence and control" by federal officials—a justification reminiscent of pauper disqualification provisions⁴⁵—and "much less concerned with paying taxes and otherwise being involved with state government and its local units" than other citizens.⁴⁶ The Utah court

42. McDONALD, *AMERICAN INDIANS*, *supra* note 3, at 19. In 1938, the Solicitor of the Department of the Interior issued an opinion that "the Fifteenth Amendment clearly prohibits any denial of the right to vote to Indians under circumstances in which non-Indians would be permitted to vote." Jeanette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 AM. INDIAN L. REV. 167, 185 (1991) (quoting the opinion). Nevertheless it took several decades to vindicate this principle. For example, in 1948, a three-judge district court struck down New Mexico's disenfranchisement of on-reservation Indians as a violation of the Equal Protection Clause and the Fifteenth Amendment:

Any other citizen, regardless of race, in the State of New Mexico who has not paid one cent of tax of any kind or character, if he possesses the other qualifications, may vote. An Indian, and only an Indian, in order to meet the qualifications to vote must have paid a tax. How you can escape the conclusion that makes a requirement with respect to an Indian as a qualification to exercise the elective franchise and does not make that requirement with respect to the member of any race is beyond me.

Id. at 185-86 (quoting from the unpublished district court opinion in *Trujillo v. Garley*, No. 1353 (D.N.M. 1948)).

43. 305 P.2d 490 (Utah 1956).

44. The provision of the Utah election code at issue declared that "[a]ny person living upon any Indian or military reservation shall not be deemed a resident of Utah within the meaning of this chapter, unless such person had acquired a residence in some county in Utah prior to taking up his residence upon such Indian or military reservation." *Id.* at 491 (quoting the now-repealed provision). The U.S. Supreme Court struck down such provisions with respect to military personnel in *Carrington v. Rash*, 380 U.S. 89 (1965). For a wonderful discussion of *Carrington*, see CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 8-13 (1969).

45. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 21-22 (3d ed. 2007) (discussing the pauper exclusions and the idea that individuals receiving government assistance might be subject to undue influence).

46. *Allen*, 305 P.2d at 492.

unselfconsciously expressed its alarm at the prospect that Indians might actually influence election outcomes:

[I]n a county where the Indian population would amount to a substantial proportion of the citizenry [sic], or may even outnumber the other inhabitants, allowing them to vote might place substantial control of the county government and the expenditures of its funds in a group of citizens who, as a class, had an extremely limited interest in its functions and very little responsibility in providing the financial support thereof.⁴⁷

Arizona adopted perhaps the most ingeniously disingenuous explanation for its disenfranchisement of on-reservation Indians. The state acknowledged that Indians living within its boundaries were residents.⁴⁸ But Arizona's constitution (like the constitutions of many other states both then and now) denied the right to vote to resident citizens who were "under guardianship, non compos mentis, or insane."⁴⁹ Exploiting Chief Justice John Marshall's description of the relationship between Indian tribes and the Federal Government as "resembl[ing] that of a ward to his guardian,"⁵⁰ the state supreme court declared that individual Indians were therefore "persons under guardianship" and ineligible to vote.⁵¹ It took a generation for the Arizona courts to repudiate that view, acknowledge that individual Indians were entirely competent to manage their own affairs, and admit that Chief Justice Marshall's metaphor should never have been taken literally.⁵²

47. *Id.* at 495. This statement echoes V.O. Key's famous backlash hypothesis that resistance to black enfranchisement increases as the black share of the population goes up. See V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 315-16 (1949); James E. Alt, *The Impact of the Voting Rights Act on Black and White Voter Registration in the South*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990*, at 351, 359-60, 370-71 (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter *QUIET REVOLUTION*] (offering more recent empirical support).

The Utah legislature repealed the provision while the case was on appeal to the U.S. Supreme Court. See McDONALD, *AMERICAN INDIANS*, *supra* note 3, at 20. On the other hand, as late as 1966, Colorado's legislature took the position that Indians living on reservations were not residents of the state for purposes of voting. *Id.* at 149.

48. *Porter v. Hall*, 271 P. 411, 415 (Ariz. 1928). For a contemporaneous analysis of the opinion, see N.D. Houghton, *The Legal Status of Indian Suffrage in the United States*, 19 CALIF. L. REV. 507 (1931).

49. ARIZ. CONST. art. VII, § 2.

50. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

51. *Porter*, 271 P. at 415-18.

52. See *Harrison v. Laveen*, 196 P.2d 456, 463 (Ariz. 1948) (overruling *Porter*).

Even after states repealed—or were forced by federal law to abandon—outright disenfranchisement of Indians, Indian registration and voting rates remained low. The repeal of literacy tests nonetheless left in place the use of monolingual election materials that posed difficulties to Indians who communicated primarily in their native tongues and had only limited English proficiency.⁵³ Jurisdictions' indifference or hostility resulted in restrictive registration practices,⁵⁴ a lack of accessible polling places,⁵⁵ harassment of Indian voters,⁵⁶ and depressed participation. Even beyond these first-generation problems,⁵⁷ Indians faced significant difficulties in electing the

53. See McDONALD, *AMERICAN INDIANS*, *supra* note 3, at 62–63 (discussing language usage among Crows and Northern Cheyennes in Montana). One indication of the depth and breadth of the problem: the federal government subsequently required eighty jurisdictions with substantial Indian populations to provide bilingual (or multilingual) ballot materials under a provision requiring such materials for political subdivisions that contain “all or any part of an Indian reservation,” where more than five percent of the voting age population “are members of a single language minority and are limited-English proficient,” and where the illiteracy rate among Indians is above the national illiteracy rate. 42 U.S.C. § 1973aa-1a(b)(2)(A) (2006). See McDONALD, *AMERICAN INDIANS*, *supra* note 3, at 46 (listing these jurisdictions).

54. For example, South Dakota required aspiring voters who did not pay property taxes to register in person at the county auditor's office. (Property taxpayers were automatically registered.) The in-person requirement posed two difficulties. First, getting to the county seat from the reservation was difficult for Indians who lacked transportation. Second, South Dakota classified three counties in which a majority of the residents were Indian as “unorganized” counties. Aspiring voters in these counties had to travel to the next county to register. See McDONALD, *AMERICAN INDIANS*, *supra* note 3, at 123.

Along the same lines, Montana restricted eligibility to serve as a deputy registrar of voters to “taxpaying” residents of a precinct. *Id.* at 61. The state did not repeal this provision, which had the effect of denying Indians “access to voter registration in their own precincts on the reservation,” until 1975. *Id.*

55. See MCCOOLE ET AL., *supra* note 9, at 72–73 (discussing cases involving the number or location of polling places); McDONALD, *AMERICAN INDIANS*, *supra* note 3, at 127 (residents of the Cheyenne River Sioux Reservation had to travel up to 150 miles roundtrip to vote until a federal court ordered the establishment of polling places on the reservation in 1986).

56. See McDONALD, *AMERICAN INDIANS*, *supra* note 3, at 82–83 (discussing problems in Big Horn County, Montana).

57. Voting rights scholars have identified three generations of voting rights claims. See, e.g., LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 32–33, 49 (1994); Chandler Davidson & Bernard Grofman, *Editors' Introduction to QUIET REVOLUTION*, *supra* note 47, at 3, 14–15; Pamela S. Karlan, *Democracy and Dis-Appointment*, 93 MICH. L. REV. 1273, 1274–76 (1995); Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709–19 (1993). The first generation involves challenges to outright denial of access, either to registration rolls or voting booths. The second generation involves claims of vote dilution. The third involves questions of governance and the allocation of power among elected officials.

candidates of their choice. Those second-generation claims, and the operation of section 2 of the Voting Rights Act, form the heart of McDonald's book.

II. INDIAN VOTERS AND THE FIGHT FOR REPRESENTATION

One striking feature of voting rights law is the way in which scholarship and practice contribute to one another. The leading empirical study of the Voting Rights Act, *Quiet Revolution in the South*,⁵⁸ contains a series of state-level studies jointly written by lawyers who litigated many of the most significant cases and various social scientists, many of whom participated in cases as expert witnesses.⁵⁹ Despite Judge Harry Edwards' much-discussed complaint that scholars are no longer writing for practitioners and that courts are no longer reading what scholars write,⁶⁰ that is not true with respect to voting rights.⁶¹

Moreover, Indian citizens continue to face first-generation problems. For one recent example, see *Spirit Lake Tribe v. Benson Cnty.*, No. 2:10-cv-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010) (granting a preliminary injunction preventing a county from closing polling places on a reservation given the problems that Indian voters would then face in casting their ballots).

In jurisdictions covered by the Voting Rights Act's special preclearance requirement, see *supra* note 38, the prohibition on administering any change to voting-related laws without first satisfying federal authorities that the change has neither a discriminatory purpose nor a discriminatory effect can serve as an important safeguard against new forms of disenfranchisement.

58. QUIET REVOLUTION, *supra* note 47.

59. McDonald, along with political scientist Michael B. Binford and Ken Johnson (the deputy director of the Southern Regional Council), contributed the chapter on Georgia. Laughlin McDonald, Michael B. Binford & Ken Johnson, *Georgia*, in QUIET REVOLUTION, *supra* note 47, at 67.

60. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

61. The Supreme Court has cited work by law professors in several voting-related cases. See, e.g., *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2512 (2009) (quoting Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 208 (2007)); *Bartlett v. Strickland*, 129 S. Ct. 1231, 1242 (2009) (citing Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1539 (2002)); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 515 (2007) (Souter, J., dissenting) (quoting Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1707 (1999)); *Vieth v. Jubelirer*, 541 U.S. 267, 279 (2004) (plurality opinion) (quoting SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 886 (2d ed. 2002)).

Perhaps the most striking example of this close relationship is the framework that the Supreme Court imposed on section 2 vote dilution cases. When Congress amended section 2, it directed courts to engage in a totality-of-the-circumstances inquiry.⁶² And it provided a list of nine factors probative of a section 2 violation.⁶³ In its first case interpreting the amended section 2,

For examples, in addition to McDonald's work, of important voting rights scholarship written by practicing lawyers, see FRANK R. PARKER, *BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965* (1990); James U. Blacksher, *Dred Scott's Unwon Freedom: The Redistricting Cases as Badges of Slavery*, 39 HOW. L.J. 633 (1996); James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1 (1982); Armand Derfner, *Racial Discrimination and the Right To Vote*, 26 VAND. L. REV. 523, 525-44 (1973); and Edward Still, *Alternatives to Single-Member Districts*, in *MINORITY VOTE DILUTION* 249 (Chandler Davidson ed., 1984).

Law school faculty with extensive litigation experience have produced important work explicitly based on prior litigation. See, e.g., LANI GUINIER, *LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE* (1998); BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT* (2007).

Finally, and not surprisingly, social scientists who serve as expert witnesses in voting rights cases have also produced extensive scholarship, sometimes based in part on their litigation experience. See, e.g., J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* (1999); MCCOOL ET AL., *supra* note 9; QUIET REVOLUTION, *supra* note 47; Richard L. Engstrom & Charles J. Barrilleaux, *Native Americans and Cumulative Voting: The Sisseton-Wahpeton Sioux*, 72 SOC. SCI. Q. 388 (1991); Richard L. Engstrom, Delbert A. Taebel & Richard L. Cole, *Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico*, 5 J.L. & POL. 469 (1989).

62. 42 U.S.C. § 1973(b) (2006) (providing that a violation of section 2 “is established if, based on the totality of circumstances, it is shown that” minority citizens “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice”).

63. The nine factors are:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education,

Thornburg v. Gingles,⁶⁴ the Supreme Court substituted a relatively objective three-prong test for the more fluid totality-of-the-circumstances inquiry:

While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group. . . . First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances . . . —usually to defeat the minority’s preferred candidate.⁶⁵

The *Gingles* test was lifted, almost verbatim, from an article by two veteran voting rights lawyers, Jim Blacksher and Larry Menefee,⁶⁶ who had litigated the case that prompted the amendment of section 2, *City of Mobile v. Bolden*.⁶⁷

employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction. . . .

[8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

[9.] whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. REP. NO. 97-417, at 28-29 (1982). The factors were derived from the Supreme Court’s decision in *White v. Regester*, 412 U.S. 755 (1973), as analyzed in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff’d sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976).

64. 478 U.S. 30 (1986).

65. *Id.* at 48-51 (footnotes omitted).

66. See Blacksher & Menefee, *supra* note 61, at 51 (arguing that dilution occurs “when jurisdiction-wide elections permit a bloc-voting majority, over a substantial period of time, consistently to defeat candidates publicly identified with the interests of and supported by a politically cohesive, geographically insular racial or ethnic minority group” (emphasis

The vote dilution cases on which McDonald focuses were all litigated within the doctrinal framework established in *Gingles*. Courts first determine whether plaintiffs can establish the three *Gingles* preconditions and only then consider the remaining Senate Report factors.⁶⁸ Over time, as courts have grown increasingly skeptical of vote dilution claims—largely, I believe, on normative grounds having to do with a distaste for discussions of racial justice, rather than on empirical grounds—the *Gingles* prongs have become more restrictive. For example, the Supreme Court recently held that plaintiffs must prove that they constitute “more than 50 percent of the *voting-age* population in the relevant geographic area,”⁶⁹ and several circuits have gone further by requiring that plaintiffs prove the possibility of a single-member district in which members of the minority group would be a majority of the *citizens* of voting age.⁷⁰ Courts also seem more amenable to accepting defendants’

omitted)). In the following pages of their article, Blacksher and Menefee tease out the various strands of this requirement. Justice Brennan’s opinion in *Gingles* cites the article a dozen times.

67. 446 U.S. 55 (1980).

68. See *Bartlett v. Strickland*, 129 S. Ct. 1231, 1241 (2009) (plurality opinion) (“In a § 2 case, only when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances.”). The second Senate factor—“the extent to which voting in the elections of the state or political subdivision is racially polarized”—is in many ways a shorthand for the second and third prongs of the *Gingles* test. S. REP. NO. 97-417, at 29.

McDonald and I worked together, along with several colleagues, on an amicus brief in *Bartlett*. See Motion for Leave To File Brief of Amici Curiae NAACP et al. in Support of Petitioners, *Bartlett*, 129 S. Ct. 1231 (No. 07-689). McDonald volunteered to take on the daunting task of summarizing all of the voting rights litigation in North Carolina since 1982, along with reviewing all of the Department of Justice’s North Carolina objection letters.

69. *Bartlett*, 129 S. Ct. at 1245 (emphasis added).

70. See *Negrón v. City of Miami Beach*, 113 F.3d 1563, 1568-69 (11th Cir. 1997) (directing courts to consider the citizen voting-age population in evaluating the first prong of the *Gingles* test); *Campos v. City of Hous.*, 113 F.3d 544, 548 (5th Cir. 1997) (same); *Romero v. City of Pomona*, 883 F.2d 1418, 1425-26 (9th Cir. 1989) (same). The “CVAP” requirement has its biggest bite in cases involving Latinos, whose population is both younger and more likely to contain recent noncitizen immigrants than other groups. Cf. *Garza v. Cnty. of L.A.*, 918 F.2d 763, 773 nn.4-5 (9th Cir. 1990) (showing that in Los Angeles County, the most heavily Latino supervisory district had roughly thirty percent fewer citizens of voting age than the most heavily Anglo district, even though the most heavily Anglo district had a slightly smaller population).

The defendants in one of the cases that McDonald discusses—*Stabler v. County of Thurston*, which involved a section 2 challenge to a county commission election system in Nebraska—actually went still further: they argued that because Indian turnout was depressed, Indians would need a population supermajority of around seventy-five percent in order to be an effective voting majority and contended that the plaintiffs’ inability to draw

alternative explanations for differences in voting patterns.⁷¹ For example, in one of the cases that McDonald discusses—*Cottier v. City of Martin*⁷²—the en banc Eighth Circuit recently held that, despite the fact that Indians had never been able to elect a representative from the Indian community to the city council,⁷³ the plaintiffs had failed to satisfy the third *Gingles* precondition. To reach this conclusion, the court looked to exogenous elections⁷⁴—in this case, elections for offices other than the Martin City Council—and to elections in which no Indian candidates had run.⁷⁵ The court acknowledged that *Indian*

such a district should be a defense to liability. The district court rejected that argument. See MCDONALD, AMERICAN INDIANS, *supra* note 3, at 193.

71. One of the primary arguments that courts have accepted is that the minority group is unable to elect its candidates for political, rather than racial, reasons. I have explained elsewhere why I think that this position is incorrect both theoretically and empirically. See Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201 (1996). Perhaps exploiting the Supreme Court's statement in *Morton v. Mancari*, 417 U.S. 535 (1974), that a Bureau of Indian Affairs' hiring preference for Indians was political rather than "racial," *id.* at 553-54, defendants are apparently beginning to argue in Indian cases that Indians are losing elections for political reasons. For a discussion of this issue, see Carole Goldberg, *Not So Simple: Voting Rights for American Indians in State Elections*, 7 ELECTION L.J. 355, 359 (2008) (reviewing MCCOOL ET AL., *supra* note 9).

But precisely because tribes are political entities, intertribal political conflict can occur. See, e.g., *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 690 (D. Ariz. 1992) (discussing the decision to place Navajo and Hopi populations in Arizona in separate congressional districts), *aff'd*, 507 U.S. 981 (1993); cf. Frank J. Macchiarola & Joseph G. Diaz, *The 1990 New York City Districting Commission: Renewed Opportunity for Participation in Local Government or Race-Based Gerrymandering?*, 14 CARDOZO L. REV. 1175, 1211 (1993) (discussing councilmanic redistricting in New York and the conflict between Dominicans and Puerto Ricans in upper Manhattan and between American-born and Caribbean-born blacks in Brooklyn).

72. 604 F.3d 553 (8th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 598 (Nov. 15, 2010). The case involved a challenge to the three districts used to elect the Martin City Council. Although nearly forty-five percent of the city's population was Native American, the Indian community was "fragmented" among the three districts, each of which had a white majority. MCDONALD, AMERICAN INDIANS, *supra* note 3, at 141-42.
73. *Id.* at 142.
74. "Exogenous" elections are any elections other than the elections for the offices at issue." *Cofield v. City of LaGrange*, 969 F. Supp. 749, 760 (N.D. Ga. 1997). "Endogenous" elections are elections for the offices that are at issue in the litigation." *Id.*

Courts look at exogenous elections when there are not enough endogenous elections—that is, elections for the office at issue—to get a reliable sense of whether there is racially polarized voting. In looking at the exogenous elections, courts ask how the candidates fared within the jurisdiction under review. For example, a court might ask how Indian and non-Indian candidates for countywide office or state legislative office performed within Martin.

75. See *Cottier*, 604 F.3d at 560.

candidates generally lost⁷⁶ but concluded that, when the white-on-white contests were added to the ledger, the results “taken as a whole show almost equal numbers of victories for Indian-preferred candidates and non-Indian-preferred candidates. They do not compel a finding that a white majority in Martin votes sufficiently as a bloc usually to defeat the Indian-preferred candidate.”⁷⁷ To paraphrase McDonald’s observation that Indians became citizens only by ceasing to be Indians,⁷⁸ it seems that they can now elect the candidates of their choice, but only as long as Indians don’t run.

But the more depressing conclusion comes not from the cases that Indians are losing, but from the cases that they are winning. The picture that emerges from McDonald’s accounts of litigation in Montana, South Dakota, Colorado, Nebraska, and Wyoming is that usually it is all too straightforward to establish liability in the relatively few communities that have significant Indian populations.⁷⁹

76. See *id.* The plaintiffs in *Cottier* were somewhat hamstrung in analyzing the city council elections because the city used only three precincts, each coterminous with one of the councilmanic districts. Thus, the usual statistical techniques for determining voting behavior were unavailable. The plaintiffs did present testimony suggesting that the Indian-preferred candidate had lost in all seven contests conducted under the challenged plan. See Petition for a Writ of Certiorari at 5, *Cottier*, No. 10-335 (filed Sept. 1, 2010), *cert. denied*, 131 S. Ct. 598 (2010).

77. *Cottier*, 604 F.3d at 560 (citing *Johnson v. Hamrick*, 296 F.3d 1065, 1078 (11th Cir. 2002) (stating that while courts “may give more weight to elections involving [minority] candidates than those involving all white contestants, there is no requirement that a district court *must* do so” (alteration in original))).

78. See *supra* text accompanying note 30.

79. In the 2000 census, nationwide roughly 4.1 million people identified themselves as American Indians or Alaska Natives. See U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000, at 1 (2002), available at <http://www.census.gov/prod/2002pubs/c2kbr01-15.pdf>. Nationwide, Indians and Alaska Natives make up approximately one and a half percent of the population.

A group’s political power is, of course, substantially a function of its size. At the statewide level, there are only three states—Alaska (nineteen percent), Oklahoma (eleven percent), and New Mexico (ten percent)—where Indians or Alaska Natives make up at least ten percent of the population. At the county level, Indians or Alaska Natives constitute a majority of the population in fourteen counties within Alaska, Arizona, Montana, and Utah and in twelve counties within South Dakota, Wisconsin, North Dakota, and Nebraska. See *id.* at 4. (For a wonderful map illustrating population proportions by county, see *id.* at 7.)

Many of the cases that McDonald discusses come from those jurisdictions where Indians constitute a substantial (and sometimes a majority) share of the population. See, e.g., MCDONALD, AMERICAN INDIANS, *supra* note 3, at 143-44 (discussing litigation in eighty-three percent Indian Buffalo County, South Dakota); *id.* at 179-94 (discussing litigation in Thurston County, Nebraska, where Winnebago and Omaha reservations “officially comprise the entire land area” of the county).

The first prong of the *Gingles* test seldom poses an obstacle; the fact that most of the cases involve on-reservation Indians or Indians who continue to live close to reservations means that the plaintiffs can easily establish that they constitute a sufficiently large, geographically compact community. What is dispiriting is how often those communities have been “cracked” among several districts so that they form an ineffectual minority in each, “packed” into one or only a few districts so that the remaining districts are easier for white voters to control, or “stacked” into at-large systems when districted systems would yield majority-Indian constituencies.⁸⁰

Turning to the second and third prongs of the *Gingles* inquiry—which operate as the flip sides of an inquiry into racially polarized voting—McDonald paints pictures of highly polarized societies. He describes stunning levels of bloc voting⁸¹ easily comparable to figures from early cases in the Deep South.

80. For a discussion of all three techniques, see Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 249-50 (1993).

For examples of the cracking of Indian communities, see *Klahr v. Williams*, 339 F. Supp. 922, 927 (D. Ariz. 1972), which discusses an Arizona state legislative reapportionment in which the Navajo Indian Reservation was divided among three legislative districts at the insistence of an incumbent who might otherwise have lost his seat and concludes that “[t]here is ample basis to suspect that ‘the Indians were done in,’” *id.* (quoting *Ely v. Klahr*, 403 U.S. 108, 119 (1971) (Douglas, J., concurring)); MCDONALD, *AMERICAN INDIANS*, *supra* note 3, at 104, which discusses how the 1992 Montana state legislature assigned the Rocky Boy’s and Fort Belknap reservations to different districts, in both of which Indians were unable to elect a representative of their choice; and *id.* at 142, which discusses *Cottier*.

For examples of packing, see *id.* at 133, which discusses how the Cheyenne River Sioux were packed into an overpopulated, ninety-percent Indian state legislative district, thereby depriving them of the ability to form a majority in an adjacent district as well; *id.* at 143, which discusses Buffalo County, South Dakota, where whites, although only seventeen percent of the population, controlled two of three districts; and Glenn A. Phelps, *Mr. Gerry Goes to Arizona: Electoral Geography and Voting Rights in Navajo Country*, 15 AM. INDIAN CULTURE & RES. J. 63, 77-79 (1991), which discusses the packing of the Navajo in Arizona.

For examples of stacking—which involves the use of at-large elections to submerge concentrations of minority voters who could form a majority if districts were used instead—see MCDONALD, *AMERICAN INDIANS*, *supra* note 3, at 87-89, which discusses Big Horn County, Montana.

The prevalence of cracking and packing in redistricting plans illustrates one of the reasons that section 5 of the Voting Rights Act is so important: it requires federal preclearance before decennial redrawing of district lines goes into effect.

81. For example, the expert testimony in *Windy Boy v. County of Big Horn*, 647 F. Supp. 1002 (D. Mont. 1986), a challenge to at-large elections in a Montana county, established that in general elections, about ninety percent of Indian voters preferred Indian candidates while eighty-seven percent of non-Indian voters voted for non-Indian candidates. MCDONALD, *AMERICAN INDIANS*, *supra* note 3, at 87-88; see also *id.* at 131 (in legislative races in South Dakota House District 28, eighty-one percent of Indians favored the Indian candidates while

And when he turns to evidence regarding the Senate factors, the facts are equally stark.⁸² Indians in all five jurisdictions endured a history of discrimination both inside and outside the political process.⁸³ They continue to suffer from marked socioeconomic deprivations that make it more difficult for them to participate effectively in the electoral process.⁸⁴ They are subject to racial appeals in campaigns⁸⁵ and to unresponsive governments afterwards.⁸⁶ Virtually no Indians are elected from constituencies that are not majority Indian.

The litigation that McDonald describes more closely resembles the initial vote dilution suits in which black and Latino plaintiffs faced “exclusion, plain and simple,”⁸⁷ than the contemporary cases involving black and Latino voters. It was possible to publish (and for McDonald to contribute to) a study entitled *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990*.⁸⁸ By contrast, an account of the Voting Rights Act’s impact in Indian country during that period would have been a slim pamphlet with a far less triumphant title. It was not until 1983, long after litigation had begun to transform the

ninety-three percent of white voters favored other candidates); *id.* at 191 (in Thurston County, Nebraska, the average level of support for Indian candidates was eighty-six percent among Indians, but only eleven percent among non-Indians).

82. See, e.g., *id.* at 88-89 (summarizing the district court’s findings with respect to the Senate Report factors in *Windy Boy*); *id.* at 92 (summarizing the district court’s findings with respect to the Senate Report factors in *United States v. Blaine County*, a section 2 challenge to at-large elections for a county commission in Montana); *id.* at 168-69 (summarizing the district court’s findings with respect to the Senate Report factors in *Cuthair v. Montezuma-Cortez School District No. RE-1*, a challenge to at-large school board elections in a Colorado community).
83. See, e.g., *id.* at 58-71 (discussing the history of discrimination in Montana); *id.* at 123-24 (doing the same for South Dakota); *id.* at 158-68 (doing the same for Montezuma County, Colorado); *id.* at 184-88 (doing the same for Thurston County, Nebraska); *id.* at 206-12, 216-25 (doing the same for Fremont County, Wyoming).
84. See, e.g., *id.* at 110 (discussing socioeconomic disparities in Montana); *id.* at 125 (doing the same for South Dakota); *id.* at 189-90 (doing the same for Thurston County, Nebraska); *id.* at 227-29 (doing the same for Fremont County, Wyoming).
85. See *id.* at 89 (reporting such findings by the district court in *Windy Boy*).
86. See, e.g., *id.* at 80 (discussing the failure to employ Indians in county government and the exclusion of Indians from juries in Big Horn County, Montana); *id.* at 136-37 (describing discriminatory law enforcement in Bennett County, South Dakota); *id.* at 188-89 (describing the lack of responsiveness to Indians’ concerns in Thurston County, Nebraska).
87. Samuel Issacharoff, *Groups and the Right To Vote*, 44 EMORY L.J. 869, 880 (1995).
88. QUIET REVOLUTION, *supra* note 47.

Deep South and Hispanic Southwest, that the ACLU Voting Rights Project brought its first vote dilution suit in Indian country.⁸⁹

While Indians still struggle to elect candidates at all, the central issue for African-American communities often involves consolidating and preserving the gains achieved over four decades of vigorous litigation by the voting rights bar and administrative enforcement by the Department of Justice.⁹⁰ Contemporary vote dilution cases often raise complex questions. Are black voters better off under an electoral structure that allows them to elect a few representatives who are accountable only to them, or is a plan in which they exercise influence, but not outright control, over a larger number of representatives superior? Is there a tradeoff between “descriptive representation”—black voters’ ability to elect black candidates—and “substantive representation”—their ability to obtain public policies that they prefer? Should support from black elected officials for a challenged plan influence judicial analysis under the Voting Rights Act?⁹¹ Has the minority community in some sense been too successful—that is, has the system taken race into account too much in drawing minority districts?⁹² Indian communities have not yet had to face these hard questions because they are still facing the antecedent ones about their ability to elect representatives at all. They face a real risk during the upcoming redistricting following release of

89. See McDONALD, *AMERICAN INDIANS*, *supra* note 3, at 48 (discussing *Windy Boy*). The ACLU’s involvement was a happy accident. One of the two local tribal attorneys involved in planning the lawsuit “was married to the director of the Montana ACLU affiliate, who was aware of the ACLU’s national projects and called the Voting Rights Project in Atlanta.” MCCOOL ET AL., *supra* note 9, at 41. Last year, when a kitchen fire at a civil rights conference forced McDonald and me out into a pasture to eat our lunches, he recalled his introduction to Indian voting rights issues in *Windy Boy* and brought me up to date concerning the lead plaintiff, Janine Windy Boy (now Janine Pease). He described with genuine delight how she later received her doctorate in education, founded Little Big Horn College, and received a MacArthur Foundation fellowship.

90. Michael Pitts refers to the current situation as one of “maintenance.” Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903 (2008).

Latino communities are in a somewhat intermediate position. On the one hand, they have achieved tremendous gains in representation since the early 1970s and, like the black community, are seeking to preserve those gains. On the other hand, burgeoning Latino populations, both in jurisdictions with longtime communities, such as Texas or California, and in jurisdictions where Latino populations were previously small or nonexistent, are creating new potential opportunities to draw districts from which they can elect candidates of their choice.

91. For discussion of these issues, see *Georgia v. Ashcroft*, 539 U.S. 461 (2003); and ISSACHAROFF ET AL., *supra* note 45, at 778-89.

92. This is the so-called *Shaw* question, named after the Supreme Court’s decision in *Shaw v. Reno*, 509 U.S. 630 (1993). For a comprehensive discussion of the *Shaw* cases, see ISSACHAROFF ET AL., *supra* note 45, at 724-60.

the 2010 census data. Not only may hostile jurisdictions try to take back Indians' gains over the past decade—a battle in which section 5's preclearance requirement provides some protection to Indians in Arizona and parts of South Dakota, but not in Nebraska or Wyoming—but the Supreme Court also seems poised to relax some of section 2's protections against vote dilution on the grounds that they are no longer needed, failing to recognize that Indian voters are a generation behind in their quest for effective political power.

Moreover, Indian voters face some complexities that black and Latino voting rights plaintiffs have been spared. Just as non-Indians offered distinctive arguments for disenfranchising Indians, they have tried to offer distinctive defenses to vote dilution claims brought by Indian plaintiffs. For example, Gros Ventre and Assiniboine voters living on the Fort Belknap Reservation in Blaine County, Montana, brought a section 2 suit challenging the use of at-large elections for the county commission. Although Indians constituted roughly forty-five percent of the total population, and thirty-nine percent of the voting-age population, no Indian had ever been elected to the commission.⁹³ The county advanced two unusual arguments against the district court's finding that the plaintiffs had satisfied *Gingles*'s requirement of political cohesiveness.⁹⁴ First, it argued that despite overwhelming evidence of racial bloc voting—the county's own expert witness “conceded that American Indians voted cohesively in one hundred percent of County Commissioner elections and ninety-five percent of exogenous elections for county, state, and national offices”⁹⁵—the plaintiffs lacked any distinctive political concerns.⁹⁶ Second, it argued that the relatively low turnout among the Indian community undercut any finding of political cohesion.

93. See *United States v. Blaine Cnty.*, 363 F.3d 897, 900 (9th Cir. 2004).

94. The county also challenged the constitutionality of the Voting Rights Act's use of disparate impact standards. See *McCOOL ET AL.*, *supra* note 9, at 122-23 (referring to the county's motion for summary judgment arguing that section 2 could not apply to Blaine County or Montana because Congress had virtually no “evidence”—and the brief put that word in quotation marks—of discrimination against Indians). The Ninth Circuit rejected that challenge. See *Blaine Cnty.*, 363 F.3d at 900, 903-09.

95. *Id.* at 910.

96. See Brief for Appellants at 30-34, *Blaine Cnty.*, 363 F.3d 897 (No. 02-35691); see also *McCOOL ET AL.*, *supra* note 9, at 125 (describing the county's position before the district court that “American Indians are not and cannot be politically cohesive for want of distinct political interests that could be furthered by the Blaine County Board of Commissioners” in light of the fact that “the Tribe provides all the services that might normally be provided by county government”).

The Ninth Circuit rejected both arguments. It refused to “second guess voters’ understanding of their own best interests.”⁹⁷ The county’s suggestion that the Indians’ identified interests were “unfounded . . . essentially asks us to deny the validity of American Indian voters’ self-professed interests. Were we to do so, we would be answering what is inherently a political question, best left to the voters and their elected representatives.”⁹⁸ Blaine County’s argument, then, was reminiscent of the discredited position taken by the Arizona Supreme Court in *Porter*⁹⁹ that Indians were incapable of self-government. The Ninth Circuit pointed out that the county’s arguments regarding low turnout

would undermine section 2’s effectiveness. After all, “[l]ow voter registration and turnout have often been considered evidence of minority voters’ lack of ability to participate effectively in the political process.” Thus, if low voter turnout could defeat a section 2 claim, excluded minority voters would find themselves in a vicious cycle: their exclusion from the political process would increase apathy, which in turn would undermine their ability to bring a legal challenge to the discriminatory practices, which would perpetuate low voter turnout, and so on.¹⁰⁰

McDonald explores a related form of this argument, which he terms the “reservation defense”: low turnout among on-reservation Indians is a function of their focus on tribal elections instead.¹⁰¹ To be sure, there has been debate within the Indian community over whether on-reservation Indians should participate in U.S. elections.¹⁰² But that debate should not eclipse the fact that

97. *Blaine Cnty.*, 363 F.3d at 910.

98. *Id.*

99. See *supra* text accompanying notes 48–52.

100. *Blaine Cnty.*, 363 F.3d at 911 (alteration in original) (citation omitted) (quoting *Gomez v. City of Watsonville*, 863 F.2d 1407, 1416 n.4 (9th Cir. 1988)).

101. See McDONALD, AMERICAN INDIANS, *supra* note 3, at 255 (describing South Dakota’s reliance on this argument in *Emery v. Hunt*, a challenge to the state’s 1996 interim legislative redistricting plan).

102. Compare, e.g., Goldberg, *supra* note 71, at 359 (describing arguments that Indians “should be full players in [state and local] elections”), and John P. LaVelle, *Strengthening Tribal Sovereignty Through Indian Participation in American Politics: A Reply to Professor Porter*, 10 KAN. J.L. & PUB. POL’Y 533 (2000) (arguing that political participation is vital to protecting Indians’ interests), with Mark A. Michaels, *Indigenous Ethics and Alien Laws: Native Traditions and the United States Legal System*, 66 FORDHAM L. REV. 1565, 1577 (1998) (claiming that while “[n]on-Indian Americans generally consider citizenship a blessing,” the Indian perspective “is radically different” and quoting a Mohawk woman stating that “my

Indians do seek to participate in U.S. elections and that electoral structures that deny them a realistic opportunity to elect representatives of their choice may deter them from voting. McDonald comes down strongly in the camp of those who believe that depressed levels of political participation among Indians are a product of past discrimination, rather than present separatist sentiment.¹⁰³

The reservation defense does, however, raise one intriguing question that ranges beyond the scope of McDonald's book.¹⁰⁴ What about voting rights and electoral structure on the reservation—that is, in tribal elections?

III. INDIAN ELECTIONS AND THE FIGHT OVER SELF-GOVERNMENT

Sophisticated tribal governments existed long before Europeans arrived in North America. The Iroquois, for example, claim theirs is the world's "oldest

parents always taught us that once you vote, you stop being an Indian"), Michael D. Oeser, *Tribal Citizen Participation in State and National Politics: Welcome Wagon or Trojan Horse?*, 36 WM. MITCHELL L. REV. 793, 799-801 (2010) (suggesting that "reservation citizens are embracing the demise of tribal governments if they continue to participate in federal and state elections without taking steps to avoid the sovereign conflict that results" and arguing that while tribal participation in federal elections may be beneficial, tribal participation in local elections is not), and Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 152-54 (1999) (arguing against recent efforts to increase Indian participation in state and local elections).

For a general discussion of Indian participation in off-reservation politics, see Wilkins, *supra* note 37. For a historical account of the argument and Indians' dual citizenship status, see Christopher K. Riggs, *Dual Citizenship and the Struggle for American Indian Voting Rights in the Southwest in the 1940s* (Apr. 19, 2006) (unpublished manuscript) (on file with author).

103. See McDONALD, *AMERICAN INDIANS*, *supra* note 3, at 255-58. In an earlier article, McDonald contended that the reservation defense

overlooked the fact that the state, by historically denying Indians the right to vote, had itself been responsible for denying Indians the opportunity to develop a "loyalty" to state elections. As the court concluded in *Bone Shirt*, "the long history of discrimination against Indians has wrongfully denied Indians an equal opportunity to get involved in the political process."

Laughlin McDonald, *The Voting Rights Act in Indian Country: South Dakota, a Case Study*, 29 AM. INDIAN L. REV. 43, 66 (2004) (quoting *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1022 (D.S.D. 2004)).

104. McDonald does describe, in relatively brief terms, some aspects of tribal self-government, but he does so in the context of discussing federal policy and thus treats the internal operation of tribal governments as essentially opaque. See McDONALD, *AMERICAN INDIANS*, *supra* note 3, at 3-29.

continuously functioning democratic constitution,”¹⁰⁵ and there is a rich scholarly literature on the intellectual contributions that Indian practices made to the Founders’ democratic theory.¹⁰⁶

There remains a staggering diversity of governmental forms among tribes.¹⁰⁷ But, to the extent that tribes embrace democratic principles, they, like other polities, confront questions about who should participate and how votes should be aggregated to determine electoral outcomes. While a comprehensive analysis of these questions is obviously beyond the scope of this Review, the ways in which tribal governments have addressed these questions illustrate some important themes that dovetail with questions about Indian participation in federal, state, and local elections.

The question of who should be entitled to vote in tribal elections has at least two important dimensions: citizenship and residence. There is no ironclad rule that the franchise must be limited to citizens or to residents: in U.S. history, we have examples of voters who are not citizens¹⁰⁸ and voters who are

105. Donald A. Grinde Jr., *Native Americans and the Founding of the United States*, in *NATIVE AMERICANS* 3, 4 (Donald A. Grinde Jr. ed., 2002).

106. See, e.g., BRUCE E. JOHANSEN, *THE FORGOTTEN FOUNDERS: BENJAMIN FRANKLIN, THE IROQUOIS, AND THE RATIONALE FOR THE AMERICAN REVOLUTION* 18 (1981); Donald A. Grinde, Jr., *Iroquois Political Theory and the Roots of American Democracy*, in *EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION* 227 (Oren Lyons et al. eds., 1992).

107. See NELL JESSUP NEWTON & ROBERT ANDERSON, *COHEN’S HANDBOOK OF FEDERAL INDIAN LAW* § 4.06[1] (2005 ed.) (stating that although most tribes now elect at least some tribal officials, many continue also to use traditional consensus-based systems to make important decisions); Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 844-45 (2007) (noting that “Nations such as the Pueblos, the Hopi, the Onondaga and the Meskwaki, for example, organize tribal government theologically” and “religion plays a dominant role in the selection of leaders,” including those who exercise political leadership); Paul W. Shagen, *Safeguarding the Integrity of Tribal Elections Through Campaign Finance Regulation*, 8 CARDOZO PUB. L. POL’Y & ETHICS J. 103, 165-73 (2009) (listing a variety of electoral forms for tribal governments); Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1358 (1969) (discussing governmental structures among various tribes).

108. See *Minor v. Happersett*, 88 U.S. 162, 177 (1875) (noting that “citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage” and that in nine states “persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote”); ISSACHAROFF ET AL., *supra* note 45, at 55-56 (discussing contemporary noncitizen voting in the United States and elsewhere); André Blais, Louis Massicotte & Antoine Yoshinaka, *Deciding Who Has the Right To Vote: A Comparative Analysis of Election Laws*, 20 ELECTORAL STUD. 41, 52-54 (2001) (discussing the surprisingly widespread enfranchisement of noncitizens).

not residents¹⁰⁹ (although no examples, as far as I know, of someone who was neither a citizen nor a resident being entitled to vote). Nor, of course, is there any rule that all citizens must be permitted to vote.¹¹⁰ Even leaving aside controversial restrictions on the franchise—such as the disenfranchisement of persons convicted of a crime¹¹¹ or persons suffering from various cognitive impairments¹¹²—the disenfranchisement of children, for example, occasions no real debate.

There is extensive literature on the controversial question of tribal citizenship.¹¹³ Rather than wading into it, I want to highlight the narrower question whether nonresident, “off-reservation” citizens of a tribe should participate in its elections.¹¹⁴

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- 109. The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. §§ 1973ff-1 to 1973ff-6 (2006), allows U.S. citizens who have moved overseas to continue voting in federal elections by casting an absentee ballot in the jurisdiction where they were last domiciled. *See also* ISSACHAROFF ET AL., *supra* note 45, at 57-65 (discussing residency as a requirement for voting and giving examples of nonresident voting); Peter J. Spiro, *Perfecting Political Diaspora*, 81 N.Y.U. L. REV. 207, 211 (2006) (stating that “[b]lanket franchise ineligibility for nonresident citizens appears to be increasingly the minority practice”).
 - 110. *See Minor*, 88 U.S. at 170-78 (holding that the right to vote is not a privilege or immunity of citizenship protected by the Fourteenth Amendment).
 - 111. *See Richardson v. Ramirez*, 418 U.S. 24 (1974) (upholding offender disenfranchisement as consistent with the Equal Protection Clause). For more extensive discussion of offender disenfranchisement provisions, *see* Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147 (2004).
 - 112. *See* Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917 (2007) (discussing this issue); Charles P. Sabatino & Edward D. Spurgeon, *Facilitating Voting as People Age: Implications of Cognitive Impairment*, 38 MCGEORGE L. REV. 843 (2007).
 - 113. *See* Carole Goldberg, *Members Only: Designing Citizenship Requirements for Indian Nations*, in AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 107, 107 (Eric D. Lemont ed., 2006) (noting that “Indian nations’ constitutional reform efforts encounter some of their most paralyzing conflicts over criteria for membership”); L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 721 (2001) (describing the range of criteria that federally recognized tribes use for determining membership). The citizenship status of descendants of the Cherokee Freedmen—the black slaves held by Cherokee members prior to Emancipation—is perhaps the most visible current controversy. *See Allen v. Cherokee Nation Tribal Council*, No. JAT 04-09, slip op. at 8 (Okla. Trib. 2006) (holding that Freedmen could be citizens); *see also* Vann v. Kempthorne, 534 F.3d 741, 744 (D.C. Cir. 2008) (permitting a suit by disenfranchised Freedmen descendants to proceed against federal and tribal officials for recognizing the results of a Cherokee election from which they were excluded); Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 652-53 (2009) (discussing the issue).
 - 114. Federal law governs the right to vote in tribal elections involving ratification or amendment of tribal constitutions. *See* 25 U.S.C. § 476(a)(1) (2006) (providing that “[a]ny Indian tribe

This question has great practical and theoretical significance. Many tribes are, to borrow Kim Barry's phrase, "emigration states"¹¹⁵: a significant proportion of their citizens—in many cases, a majority—lives outside their territorial boundaries.¹¹⁶ The potential participation of off-reservation citizens in tribal self-government raises a number of issues.¹¹⁷ On the one hand, participation can solidify an individual's sense of identity and strengthen her bonds to the tribe. Enfranchisement thus performs an important expressive function.¹¹⁸ On the other hand, on-reservation and off-reservation citizens may have different policy preferences. For example, in tribes now receiving substantial revenue from natural resource development or Indian gaming, on-reservation members may want those funds to be spent on infrastructure and economic development, while off-reservation members may prefer that revenues be distributed directly to tribal members on a per capita basis.¹¹⁹ At the same time, arguments of on-reservation citizens to restrict the franchise to residents because they have more of a stake run the risk of recapitulating some of the historic justifications used to disenfranchise on-reservation Indians, particularly to the extent that tribal elections determine more than geographically based policies. And there is some irony in denying tribal citizens the right to vote to the extent that a lack of opportunity in Indian country was one factor impelling them to move off the reservation.

shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when . . . ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary [of the Interior] under such rules and regulations as the Secretary may prescribe"). In some cases, "[a]ny duly registered adult member regardless of residence shall be entitled to vote on the adoption of a constitution and bylaws" and nonresident members can vote absentee. 25 C.F.R. § 81.6(a) (2010) (providing for such rules if a tribe "is acting to effect reorganization under a Federal Statute for the first time"). In other cases only "adult duly registered member[s] physically residing on the reservation shall be entitled to vote." *Id.* § 81.6(b)(1).

115. Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 11, 12 (2006).

116. See Goldberg, *supra* note 71, at 358 n.14 (stating that approximately two-thirds of all Indians live outside Indian country, "though many of these individuals maintain ties to their homelands").

117. See Goldberg, *supra* note 113, at 108-10 (describing the tension in one tribe between members who had remained on the reservation and those who had left to pursue economic security).

118. See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000) (discussing the expressive functions that law can play).

119. See Goldberg, *supra* note 113, at 111.

Tribes have sought to accommodate these tensions in innovative ways. Some tribes simply restrict voting to members who reside on the reservation.¹²⁰ But if tribes do choose to enfranchise off-reservation voters, they have, broadly speaking, two possible ways to do so. “Assimilated representation” assigns voters to their “last place of in-country residence” and thus simply incorporates nonresident voters into a preexisting system of geographically based representation.¹²¹ By contrast, “discrete representation” creates separate electoral constituencies for nonresidents.¹²² To the extent that the United States permits nonresident citizens to vote,¹²³ it uses an assimilated approach. But nations as diverse as France, Colombia, and the Cape Verde Islands use discrete systems where émigré voters choose their own representatives.¹²⁴ One advantage that discrete representation can have is the ability to calibrate the level of political power to be accorded nonresidents.¹²⁵

To see how these practices play out, consider the approach taken by the Cherokee Nation. Under its 1992 Code, the Tribal Council—the Cherokee Nation’s legislative body—consisted of fifteen members elected from nine “representative districts within the historical boundaries/jurisdiction of the Cherokee Nation.”¹²⁶ Representation among the districts was based on the

120. See *Daly v. United States*, 483 F.2d 700, 707 (8th Cir. 1973) (noting that, under the Crow Creek Sioux Constitution, voting rights are limited to “those residing on the Reservation at the time of the election”).

121. Spiro, *supra* note 109, at 226. If one were voting for a single-member office, nonresident voting would be assimilated almost by definition.

The desire to avoid dealing with how to handle the allocation of nonresident voters to territorial electoral districts may explain why some nations permit nonresident voters to cast ballots in the presidential election but not in legislative elections. For a discussion of the Mexican experience in this regard, see Robert Courtney Smith, *Contradictions of Diasporic Institutionalization in Mexican Politics: The 2006 Migrant Vote and Other Forms of Inclusion and Control*, 31 *ETHNIC & RACIAL STUD.* 708 (2008).

122. See Spiro, *supra* note 109, at 226.

123. See *supra* note 109 (discussing UOCAVA).

124. See Rainer Bauböck, *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, 75 *FORDHAM L. REV.* 2393, 2432–33 (2007) (surveying the range of practices); Spiro, *supra* note 109, at 214–15 (same).

And beyond the question whether off-reservation members should be enfranchised lies the question of how they should cast their ballots. A system that requires them to return to tribal land to vote has corresponding advantages (requiring some level of commitment) and disadvantages (making it harder to vote). The Navajo, for example, permit absentee voting, see 11 *NAVAJO NATION CODE ANN.* tit. 11, § 121 (1995), but some tribes do not.

125. See Bauböck, *supra* note 124, at 2433 (stating that discrete representation “can be used to give either greater or smaller weight to the expatriate vote”).

126. *CHEROKEE NATION CODE ANN.* tit. 26, § 4 (1993).

total population of tribal members.¹²⁷ Tribal members who lived within the national boundaries were required to register “in the district of their residence.”¹²⁸ But tribal members who lived outside the Nation’s boundaries could “choose any district in which to register to vote.”¹²⁹ The Cherokee subsequently amended their election code to provide instead for a seventeen-member Council, with fifteen members elected as before and two members elected at large to represent the forty percent of Cherokee citizens “who live outside the boundaries of the Cherokee Nation.”¹³⁰ The choice to adopt discrete representation of off-reservation citizens avoids the risk that the voters in a particular representative district could have their preferences swamped by off-reservation voters, as could easily happen given the relatively large number of nonresident citizens. And it also allows the tribe to give greater weight to the ballots of on-reservation voters: with sixty percent of the population, they control eighty-eight percent of the legislative seats.

Obviously, then, the Cherokee have relaxed one fundamental principle of contemporary U.S. democracy: one person, one vote. In *Wesberry v. Sanders*,¹³¹ the Supreme Court held that the Constitution requires that “as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.”¹³² Thus, “[t]he fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote.”¹³³

The question whether and how one person, one vote applies to tribal elections offers a final insight into the distinctive constitutional status of Indians. Tribal governments are not bound directly by the protections in the Bill of Rights.¹³⁴ They are, however, bound by the provisions of the Indian Civil Rights Act (ICRA), which provides, in pertinent part, that “[n]o Indian

127. *Id.*

128. *Id.* § 5.

129. *Id.*

130. *Cherokee Nation Tribal Government*, CHEROKEE NATION, <http://www.cherokee.org/Government/Default.aspx> (last visited Jan. 25, 2011); *see also* Goldberg, *supra* note 113, at 129 (noting that forty percent of Cherokee live off-reservation).

131. 376 U.S. 1 (1964).

132. *Id.* at 7–8.

133. *Reynolds v. Sims*, 377 U.S. 533, 567 (1964).

134. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2724 (2008); *see* *Talton v. Mayes*, 163 U.S. 376, 382–85 (1896) (refusing to apply the Due Process Clause to Cherokee proceedings); *see also* *Twin Cities Chippewa Tribal Council v. Minn. Chippewa Tribe*, 370 F.2d 529, 530 (8th Cir. 1967) (refusing to find subject-matter jurisdiction over a challenge by enrolled off-reservation members of a tribe to the voting rolls and conduct of a tribal election).

tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws.”¹³⁵ Notably, the ICRA deliberately omitted the Fifteenth Amendment’s prohibition on denying the right to vote on account of race.¹³⁶

Potential arguments for giving different weight to the votes of on-reservation and off-reservation citizens are essentially extensions of the arguments for disenfranchising nonresidents altogether.¹³⁷ The question of whether a tribal election system can discriminate among on-reservation citizens, though, is harder to answer.

In the years immediately following ICRA’s passage, tribal elections were a frequent source of litigation.¹³⁸ In *White Eagle v. One Feather*¹³⁹ and *Daly v. United States*,¹⁴⁰ the Eighth Circuit held that the requirement of one person, one vote applied to tribal elections, at least when the tribe “has established voting procedures precisely paralleling those commonly found in our culture, if not taken verbatim therefrom.”¹⁴¹ In *Daly*, however, the court offered an intriguing qualification: while requiring that tribal apportionments be “based on the population of the Tribe and not solely those eligible to vote,”¹⁴² it

135. 25 U.S.C. § 1302(8) (2006).

136. See *Groundhog v. Keeler*, 442 F.2d 674, 682 (10th Cir. 1971) (pointing out this omission). There was, as far as I am aware, no real discussion of Fourteenth Amendment-based constraints on tribal electoral processes.

137. But cf. *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (per curiam) (declaring that although “[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States,” once a state chooses to select its electors by popular election, “the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another”). Even here, however, the word “arbitrary” leaves open the possibility that there might be nonarbitrary reasons for valuing votes differently.

138. Gary D. Kennedy, *Tribal Elections: An Appraisal After the Indian Civil Rights Act*, 3 AM. INDIAN L. REV. 497, 497 (1975).

139. 478 F.2d 1311 (8th Cir. 1973) (per curiam).

140. 483 F.2d 700 (8th Cir. 1973).

141. *White Eagle*, 478 F.2d at 1314. But see *Wounded Head v. Tribal Council of the Oglala Sioux Tribe of the Pine Ridge Reservation*, 507 F.2d 1079, 1083 (8th Cir. 1975) (refusing to require that a tribe permit eighteen to twenty-one-year-olds to vote because, although “it is not a significant interference with any important tribal values to require that a tribe treat equally votes cast by members of the tribe already enfranchised by the tribe itself . . . employing the ICRA to require a tribe to enfranchise a new class of the tribal population would present a real question of whether, to some extent, this court was ‘forcing an alien culture . . . on this tribe’”).

142. *Daly*, 483 F.2d at 706.

“express[ed] no opinion” on how to deal with off-reservation members: “That is a purely internal decision which must be made by the Tribe itself.”¹⁴³

Since the Supreme Court’s decision in *Santa Clara Pueblo v. Martinez*,¹⁴⁴ Indian apportionment challenges in federal court have essentially been foreclosed; ICRA claims must instead be litigated in tribal fora.¹⁴⁵ But the substantive question remains exactly how the ICRA’s equal protection clause should apply in tribal elections. Neither the language nor the legislative history of the ICRA definitively answers the question whether the rationality (or the compelling nature) of a tribe’s reason for structuring its electoral arrangements in a particular way “is to be tested by Indian or non-Indian cultural standards.”¹⁴⁶ But because one of the purposes behind the ICRA was “furthering Indian self-government,”¹⁴⁷ it would be ironic if the Act were used to foreclose tribes from selecting the electoral form that best accommodates their distinctive interests. The Supreme Court has directed that terms in a treaty between the federal government and an Indian tribe should be construed “in the sense in which they would naturally be understood by the Indians.”¹⁴⁸ Perhaps the same principle should inform construction of the equal protection clause of the ICRA. Under such a framework, a tribe might well be able to show that its decision to deviate from pure population equality in apportioning representatives serves sufficiently substantial reasons to survive judicial scrutiny.

CONCLUSION

One of the most famous passages ever written in a law review came from the pen of Felix Cohen, the great scholar of Indian law: “Like the miner’s canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of

¹⁴³ *Id.* at 707.

¹⁴⁴ 436 U.S. 49 (1978).

¹⁴⁵ In *Santa Clara Pueblo*, the Court held that ICRA claims can be brought in federal court only under the Act’s habeas provision, *see id.* at 65, which is unavailable for voting rights claims. *But cf.* Riley, *supra* note 107, at 814-16 (noting that challenges to disenrollment from a tribe or banishment of tribal members could be litigated under the ICRA’s habeas provision).

¹⁴⁶ Note, *supra* note 107, at 1360.

¹⁴⁷ *Santa Clara Pueblo*, 436 U.S. at 62 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

¹⁴⁸ *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 676 (1979) (quoting *Jones v. Mehan*, 175 U.S. 1, 11 (1899)).

other minorities, reflects the rise and fall in our democratic faith.”¹⁴⁹ Laughlin McDonald’s pathbreaking work—in the field litigating Indian voting rights cases and in this book describing them—reminds us that Cohen was right as well as poetic. The ongoing resistance to Indians’ claims for full political equality shows that the work of the Second Reconstruction remains incomplete.

149. Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 *YALE L.J.* 348, 390 (1953).

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The Common School Before and After *Brown*: Democracy, Equality, and the Productivity Agenda

In Brown's Wake: Legacies of America's Educational Landmark

BY MARTHA MINOW

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INTRODUCTION

In recent years, economic forces of global magnitude have placed the substance and value of education in the national spotlight. With jobs for college graduates in short supply, political pundits and news commentators have placed different estimates on the worth of a college degree and the continued utility of the liberal arts.¹ Economists tie specific educational factors to future income. A high school diploma, we are told, can translate into an additional \$300,000 in lifetime salary.² A highly effective kindergarten teacher likewise carries a value-added benefit of \$320,000, the additional income that a classroom of today's students may earn over the course of their collective careers.³ This frenzy over outcomes has heightened public fears and influenced attitudes and behavior. Educated parents rush to enroll their preschoolers in Chinese immersion programs to enhance future career options. As the documentary film *Waiting for "Superman"* dramatically portrays, poor and working class parents agonize over lotteries that may or may not offer their children admission to academically challenging charter schools, run by private organizations with public funds.⁴

Current federal and state policy initiatives, along with local practices, both mirror and energize this bottom-line mentality. States feverishly compete for federal funds that used to be allocated according to student need, buying into a strict regime of testing, standards, and accountability as they "race to the top."⁵ The federal Secretary of Education assures us that "[i]nvesting in this new kind of education will sustain the country's economy" and will even prevent a recurrence of the present economic crisis.⁶ Local school officials use all of the tools in their power to raise standardized test scores, the talisman of academic success. Parents worry that their children will be left behind. Teachers worry that their jobs are on the line.

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1. See, e.g., Nancy Cook, *The Death of Liberal Arts*, NEWSWEEK, Apr. 5, 2010, <http://www.newsweek.com/blogs/jobbed/2010/04/05/the-death-of-liberal-arts.html>; Ramesh Ponnuru, *The Case Against College Education*, TIME, Feb. 24, 2010, <http://www.time.com/time/nation/article/0,8599,1967580,00.html>.
 2. Gary Fields, *The High School Dropout's Economic Ripple Effect*, WALL ST. J., Oct. 21, 2008, at A13.
 3. David Leonhardt, *The Case for \$320,000 Kindergarten Teachers*, N.Y. TIMES, July 28, 2010, at A1.
 4. WAITING FOR "SUPERMAN" (Electric Kinney Films 2010).
 5. Race to the Top Fund, 74 Fed. Reg. 59,688, 59,813 (Nov. 18, 2009).
 6. Arne Duncan, *Through the Schoolhouse Gate: The Changing Role of Education in the 21st Century*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 293, 303 (2010).

To be sure, no one would deny the connection between education and economic success or the value of quality schooling. The fact that education is critical to the individual and to the nation is irrefutable. Holding schools accountable for student learning is unquestionable. Yet, listening to the constant drumbeat of quantitative outcomes and productivity, one senses that schooling has taken a definitive turn from the distant and not-so-distant past. Lost in this narrative is a concern for developing responsible citizens (the goal of early school reformers) and for providing equal opportunities based on individual student differences (the goal of modern-day civil rights activists).

For common-school crusaders a century and a half ago, the purpose of mass compulsory schooling was political. Facing the challenges of nationalization, industrialization, and immigration in a relatively young republic, they believed that education should impart the understandings and principles necessary for democratic citizenship.⁷ Though today's challenges have shifted to globalization and post-industrialization, we are now witnessing another wave of mass migration, while schools still play a crucial role in preparing an even more religiously and racially diverse group of students for democratic participation.

In the mid-twentieth century, the Supreme Court's landmark decision in *Brown v. Board of Education*⁸ laid the foundation for broadening the mission of schools; the Court's goals moved beyond political interests to include a child-centered social view where equal educational opportunity, and the government's obligation to provide it, became the national mantra. As the federal government became increasingly involved in education policy, however, a backlash began to mobilize. This was prompted in part by glaring achievement gaps between white and racial-minority students, by opposition to court-ordered busing to achieve racial integration, and by controversies over bilingual classes and mainstreaming of children with disabilities.⁹ Those concerns, heightened by fears of growing competition from across the globe, carried education to the present day when testing and accountability are the rallying cries for reform. In today's education discourse, the political and social purposes of schooling appear largely eclipsed by seemingly more pressing

7. ROSEMARY C. SALOMONE, *VISIONS OF SCHOOLING: CONSCIENCE, COMMUNITY, AND COMMON EDUCATION* 14 (2000).

8. 347 U.S. 483 (1954).

9. See PATRICIA ALBJERG GRAHAM, *SCHOOLING AMERICA: HOW THE PUBLIC SCHOOLS MEET THE NATION'S CHANGING NEEDS* 158 (2005).

economic interests aimed at creating human capital to compete in a global economy.¹⁰

Set against these ongoing developments, Martha Minow's new book, *In Brown's Wake*,¹¹ is a timely and sobering reminder that education is not simply about the global marketplace. The book addresses *Brown's* impact on education rights across a wide range of student differences and group identities and touches on themes implicitly related to the purposes of schooling. In this Review, I use the framework of *Brown's* legacy to examine more explicitly those purposes. In doing so, I both widen Minow's lens and, at the same time, narrow it. On the first count, I situate *Brown* more definitively in the broad historical evolution of the common school. On the second, I look more critically at the federal government's growing control and oversight of a system initially designed to preserve state and local autonomy over schooling. I survey historic moments, from mid-nineteenth-century interests in nation building, to mid- to late-twentieth-century concerns with equalizing opportunities beyond individual differences, to current economic and global pressures. I begin with the common school's early history and then move on to *Brown's* dramatic impact on the federal role in education, the apparent retreat from equal educational opportunity, the current accountability and testing movement, and the implications for American schooling.

Guided in part by initiatives announced subsequent to the publication of *In Brown's Wake*, I maintain that today's productivity agenda falls short in fulfilling *Brown's* dual promise: (1) to break down barriers that impede equal opportunity (a well-developed theme of the book) and (2) to preserve democratic government and the nation's political standing as a world leader (a point that the literature has heretofore underaddressed). With a less sanguine view than Minow's on equality's enduring force, I conclude that we risk sacrificing one *Brown* legacy for another. While abandoning equal opportunity as an overarching principle, we are moving toward a more assertive federal role with a one-size-fits-all view of schooling that, in reality, undercuts post-*Brown* guarantees to an appropriate and meaningful education and may, in the end, more deeply divide students by race and social class.

10. See David Tyack, *School for Citizens: The Politics of Civic Education from 1790 to 1990*, in *E PLURIBUS UNUM?* 331, 362 (Gary Gerstle & John Mollenkopf eds., 2001).

11. MARTHA MINOW, IN *BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK* (2010).

I. *IN BROWN'S WAKE*

For more than a half-century, scholars from a mix of disciplines have dissected the Court's decision in *Brown*. What did equality mean as the Justices saw it then? What has it come to mean over the years?¹² Martha Minow now adds to that vast store of scholarship, providing a thoroughly researched and panoramic view of the ways in which the decision has influenced education law and policy across indices of race, national origin, wealth, disability, gender, religion, and sexual orientation. A leading legal academic known for her foundational work in feminist jurisprudence and current dean of the Harvard Law School, she has spent the past three decades both as an advocate for equality-based school reforms and as a scholar mining the depths of *Brown's* equality mandate across the educational terrain.¹³

The book explores a number of themes, including the tension between separation and integration, the nuances of sameness and difference, the utility and limits of social science evidence, the federal role in education, the equity arguments supporting parental choice broadly conceived, and *Brown's* influence on the law of foreign countries. Minow walks us through the pre- and post-*Brown* landscape, introducing us to key political and legal actors and the equally bold, but unsung, plaintiffs who transformed education in the mold of equality. Along the way, we meet activists, like W.E.B. DuBois, who strove tirelessly to upend Jim Crow laws in the South. We also encounter the efforts of lawyers like Charles Hamilton Houston, former dean of Howard Law School, who along with Justice Thurgood Marshall helped design and implement the legal strategy that, case by case, culminated in the *Brown* decision.¹⁴

We come upon plaintiffs like Kinney Kinmon Lau—a young boy born in Hong Kong whose lawsuit against the San Francisco school system dramatically influenced federal law and education programming on behalf of

12. See, e.g., DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976); GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1997); WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001).

13. See, e.g., *JUST SCHOOLS: PURSUING EQUALITY IN SOCIETIES OF DIFFERENCE* (Martha Minow, Richard A. Shweder & Hazel Rose Markus eds., 2008); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990).

14. MINOW, *supra* note 11, at 13-16.

English language learners.¹⁵ We also meet federal judges like J. Skelly Wright, whose decision striking down ability-tracking in the District of Columbia schools¹⁶ inspired subsequent litigation¹⁷ and legislation¹⁸ and hastened the end of the exclusion of children with disabilities from mainstream schooling.¹⁹ We encounter distinguished scholars and dedicated advocates like Michael McConnell who, building on the equality norm from prior case law, tenaciously worked at laying the constitutional groundwork for extending *Brown's* legacy to the expressive rights of religious students in public schools and to the allocation of government funds to families whose children attend religious schools.²⁰

Dean Minow goes further into two areas typically overlooked in the commentary on equality in general and *Brown* in particular. Her discussion on the rights of American Indian and Native Hawai'ian students is especially insightful. The checkered history of educational policies for both groups underscores the tension between the dangers of sorting individuals into separate schools by identity and the beneficial effects of group-based remedies on group affirmation and mobilization. Equally enlightening is her discussion of *Brown's* influence on equal educational opportunities for minorities in countries like Northern Ireland, South Africa, and the Czech Republic. Whether invoked explicitly by judges or used by advocates as a persuasive argument, the decision, with its core doctrine that separate education is "inherently unequal," remains an inspirational bulwark against unjust treatment of children around the globe. Her conclusion that *Brown* "now belongs to the world" is ripe for further examination.²¹

15. See *Lau v. Nichols*, 414 U.S. 563 (1974); MINOW, *supra* note 11, at 37.

16. See *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

17. See, e.g., *Pa. Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971).

18. See Education Amendments of 1974, Pub. L. No. 93-380, § 614(d), 88 Stat. 484 (requiring "procedures to insure that, to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped . . ."); Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355 (codified as amended at 29 U.S.C. § 794 (2006)).

19. MINOW, *supra* note 11, at 71.

20. MINOW, *supra* note 11, at 85-87; see, e.g., Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1 (1985); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000). For examples of the Supreme Court's receptivity to such arguments, see *Zelman v. Simmons-Harris*, 536 U.S. 639, 662-63 (2002); and *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001).

21. MINOW, *supra* note 11, at 187.

What most strikingly sets this book apart from many others is the author's objective eye. With each chapter, she impressively refrains from turning the discussion into a liberal polemic or a disheartening diatribe on the failure of *Brown* to dismantle segregated schooling or to create a racially integrated society. Throughout the book, including her discussion on social science evidence to support social integration,²² she evenhandedly presents the pros and cons of each issue without betraying her progressive stripes or compromising her commitment to equal opportunity for all students, particularly the least advantaged. She realistically measures the progress made while noting the tasks left undone and the obstacles that remain in the way. Moreover, she does not summarily dismiss controversial concepts, like single-sex schooling or school choice (including vouchers and charter schools) as merely driven by political conservatives through equality's back door. To her credit, she acknowledges the equality arguments supporting such initiatives while recognizing problems in their implementation.

On single-sex schools and classes, she recognizes the limitations of social science evidence in justifying the separation of students by sex given the "politicized context" of the research and lack of a perfect control setting for comparison.²³ Examples of these defects include: (1) that many studies suffer from selection bias, failing to account for parental involvement and socioeconomic status; (2) that research findings typically come from other countries, thus calling into question their applicability to the United States; and (3) that researchers tend to have a bias for or against the concept being tested.²⁴ Minow further raises concerns that single-sex programs can revive outmoded gender stereotypes.²⁵ Reported practices, like encouraging girls to write about wedding dresses and boys about hunting, understandably invite litigation.²⁶ Despite these reservations, she concludes that such programs are worthy of experimentation when offered as a voluntary alternative to coeducation.²⁷

22. *Id.* at 146-62.

23. *Id.* at 155.

24. *Id.* at 63.

25. *Id.* at 65.

26. See Emily Richmond, *Single-Sex Classes Being Praised on Many Levels: Jury Still Out. But Some Educators Already Convinced of Benefits*, LAS VEGAS SUN, July 19, 2009, available at <http://www.lasvegassun.com/news/2009/jul/19/single-sex-classes-being-praised-many-levels/>; Elizabeth Weil, *Teaching to the Testosterone*, N.Y. TIMES, Mar. 2, 2010, § 6 (Magazine), at 38.

27. MINOW, *supra* note 11, at 66.

On the matter of school choice, though a measured supporter, Minow warns against the potential for families to use choice options to self-segregate and for school officials to facilitate that result. She suggests that regulations might temper those tendencies.²⁸ And while she cautions that government vouchers to attend religious schools can promote social segregation, she notes that under some circumstances they also promote greater diversity, as in the case of inner-city Catholic schools that enroll substantial numbers of non-Catholic students, many of them racial minorities.²⁹ On the other hand, though she recognizes that accommodating religious beliefs and activities in public schools can prove divisive, she also understands that such accommodations avoid the isolation of many religiously affiliated schools, inducing religious observers into the mainstream.³⁰

In a similar vein, she evaluates ethnically themed schools which, critics claim, "balkanize American identity."³¹ She gives the example of the Twin Cities International Elementary and Middle Schools in Minnesota, serving mainly students from Somali immigrant families. If viewed as transitional institutions, she says, such schools provide opportunities for parents to pass on their traditions to their children and for their children to intermingle with others while developing skills in two languages.³²

Minow skillfully navigates the muddy waters of sameness and difference in her discussion of single-sex schooling and bilingual education. Here she demonstrates how extending the sameness/difference dichotomy beyond race has both challenged the original homogeneity of the common school and strained the contours of equality. Though a central objective of the Court's holding in *Brown* was to eradicate the notion that race signified any inherent differences between people, gender continues to be viewed as a marker of real and natural differences.³³ While the origins of sex differences in aptitudes and attitudes (whether biological or culturally conditioned) are highly debatable,³⁴

28. *Id.* at 135.

29. See JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* 109-30 (1978) (arguing that school choice can promote racial integration); JOSEPH P. VITERITTI, *CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY* (1999) (arguing that school choice promotes equal educational opportunity for economically disadvantaged children).

30. MINOW, *supra* note 11, at 90.

31. *Id.* at 46.

32. See *id.*

33. *Id.* at 33.

34. Cf. ROSALIND BARNETT & CARYL RIVERS, *SAME DIFFERENCE: HOW GENDER MYTHS ARE HURTING OUR RELATIONSHIPS, OUR CHILDREN, AND OUR JOBS* (2004) (discounting such

differences in language and culture for English language learners are definitively social and incontestable. Minow demonstrates that it remains controversial whether the “separate is inherently unequal” doctrine applies with equal force to single-sex³⁵ and bilingual programs³⁶ as it does to racial segregation.

Minow’s arguments on integration and separation are similarly nuanced, though her repeated references to the “integration ideal” that flows from *Brown* can be confusing, especially to the uninformed reader. Given the racial politics of that day, particularly in the South, the Court reasonably did not impose a legal mandate for affirmative racial mixing but rather viewed integration as an aspirational vision for the future. Nonetheless, she rightly laments *Brown*’s failure to achieve racial integration in the schools.³⁷ And though she expresses some reservation over Richard Kahlenberg’s argument for socioeconomic integration,³⁸ she recognizes that this may be the most viable option given the Supreme Court’s retreat from even voluntary race-based remedies.³⁹ She further concedes that integration is not the only way to achieve equal opportunity in the case of certain groups like students with disabilities.⁴⁰

I depart from Dean Minow—and this goes to the central thesis of this Review—with regard to her optimistic belief in the equality ideal as a predominant force driving current education policy. I suspect that some education observers would question her recurring affirmations that equal opportunity remains the “established,”⁴¹ “undisputed”⁴² goal and “settled

differences); ROSEMARY C. SALOMONE, *SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING* 103 (2003) (recognizing that many observed differences—though not all—are culturally conditioned, and suggesting that innate differences are enhanced by cultural factors); LEONARD SAX, *WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES* 29 (2005) (arguing for sex-based biological differences on the basis of brain scans).

35. MINOW, *supra* note 11, at 67; *see, e.g.*, Jesse Ellison, *The New Segregation Debate*, NEWSWEEK, June 22, 2010, www.newsweek.com/2010/06/22/the-new-segregation-debate.html.

36. MINOW, *supra* note 11, at 47.

37. *Id.* at 32.

38. RICHARD D. KAHLENBERG, *ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE* (2001).

39. *See* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (prohibiting the use of student racial identities in school assignments to achieve racial balance absent a finding of official intent to discriminate); MINOW, *supra* note 11, at 126, 152–53.

40. MINOW, *supra* note 11, at 78.

41. *Id.* at 27.

42. *Id.* at 147.

touchstone”⁴³ of American schooling. Looking at the facts as she presents them, one is likely to find a disconnect between the rhetoric of equality and the reality of policy and practice. Continued achievement gaps between minority and white students, differences in the quality of education afforded the middle class and the poor, and parental enthusiasm for inner-city charter schools as an escape from failing public schools all point in that direction. As Jack Balkin noted a decade ago, “By the end of the century, the principle of *Brown* seems as hallowed as ever, but its practical effect seems increasingly irrelevant to contemporary public schooling.”⁴⁴ Ten years later, as I will discuss, even the rhetoric seems to be growing dimmer in the push toward testing, accountability, and productivity.

The book could have more effectively teased out that reality had it directly and more fully discussed how the gradual shift since the mid-1970s from equal access to equal outcomes threatens to undermine the equity-based reforms that lie at the core of *Brown*’s legacy. It is true that Minow addresses market-driven rationales for school choice.⁴⁵ She also mentions the federal No Child Left Behind Act (NCLB) several times in passing.⁴⁶ She notes the problems with high-stakes tests, especially for English language learners,⁴⁷ and for students with disabilities though she supports the use of tests as accountability measures.⁴⁸ She briefly acknowledges that the Obama Administration “focuses on school improvement, not racial integration,”⁴⁹ without further elaboration or judgment. Yet these points seem isolated and merely peripheral to her overall discussion. Admittedly, this may be a tall order for a book of already such ambitious scope. And, concededly, some of the most controversial federal initiatives now debated in the press started emerging as the book went to press. That being said, eight years of NCLB provide perspective and a rich store of

43. *Id.* at 31.

44. Jack M. Balkin, *Brown as Icon*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID*, *supra* note 12, at 8.

45. MINOW, *supra* note 11, at 117-18; see JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA’S SCHOOLS* (1990); Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* 123 (Robert A. Solo ed., 1955).

46. See, e.g., MINOW, *supra* note 11, at 29 (noting mandated performance measures focusing on student race); *id.* at 48 (discussing provisions on standardized tests); *id.* at 112-13 (noting the constraints on the option of parents to obtain a waiver for their children to leave a failing school for a higher-performing one); *id.* at 147 (discussing mixed results from state testing programs).

47. *Id.* at 48.

48. *Id.* at 80.

49. *Id.* at 31.

information on the changing federal role in education, a role that *Brown* and its aftermath both shaped and energized and that NCLB took to a higher level.

The book also underplays democratic citizenship and the mission of schools to make “good citizens” as key components of *Brown*’s ruling.⁵⁰ Minow notes that “*Brown* underscored the importance of schooling as the key entry point for jobs and civic participation,⁵¹ makes several references to citizenship and civic engagement,⁵² and acknowledges the interests of early common-school reformers in building a democracy.⁵³ She makes no mention, however, of democracy among the three “memorable ideas” that stand out in *Brown*.⁵⁴ Like many others, she hails the decision as “central” to the protection of individual rights and recognizes the inherent tension with group rights to a shared identity.⁵⁵ But she fails to emphasize that the Court, perhaps in a nod to patriotic fervor, also underscored “the importance of education to our democratic society,” calling it “the very foundation of good citizenship” and “a principal instrument in awakening the child to cultural values.”⁵⁶ In doing so, the Justices implicitly tied their ruling to the past and future, validating the rationale underlying the common school while foreshadowing the equality-based reforms that followed.

I now fill in what *In Brown’s Wake* left unsaid, examining the early common school, the expansion of the federal role following *Brown*, and the accountability and testing movement. Each represents a critical moment in the nation’s history, and each opens a particular window on the legacy of *Brown* as it relates to the mission of schooling in America.

II. THE COMMON SCHOOL AND PRESERVING DEMOCRACY

Education, as embodied in the common school, dates back to the early Athenians, who believed in training males of certain birth to perpetuate the

50. See generally *MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY* (Diane Ravitch & Joseph P. Viteritti eds., 2001) (interrogating the normative place of politics and values in civic education).

51. MINOW, *supra* note 11, at 35.

52. See, e.g., *id.* at 139 (suggesting civic engagement and democracy as possible success measures of social integration); *id.* at 150 (presenting the integration ideal as a “crucial element of preparing individuals for successful and productive lives as . . . civic participants in a pluralistic, democratic society”).

53. *Id.* at 160.

54. *Id.* at 19.

55. *Id.* at 104–05.

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

state's most cherished values. Their concept of *paideia* joined citizenship and learning around a shared set of norms and values under the legal and moral authority of the *politeia*, or prevailing culture.⁵⁷ Though the state did not establish or finance education, it rigidly supervised and regulated the curriculum.⁵⁸ In a modified fashion, modern nation-states have relied on mass compulsory schooling to indoctrinate the young in a common core of principles, the rationale being to promote solidarity through a shared sense of identity.

In the United States, the link between education and the political needs of a secular society did not emerge until the late eighteenth century. Up to that time, especially in the colonies, local schools typically operated under the direction of religious denominations, even though they were funded with tax revenues. Among the nation's Founders, it was Thomas Jefferson who institutionalized the ideas of the ancient Greeks, tying schooling to citizenship. For Jefferson, education was a mechanism for producing citizens of virtue and intelligence (albeit only white males) to meet the demands of republican government. In addition to realizing democracy, it was a means for advancing social reform.⁵⁹

Nineteenth-century architects of the American common school universalized that view and opened it to women. They relied heavily on the Swiss educator Johann Heinrich Pestalozzi, who advocated teaching the masses "to love God and country" and to improve their work performance, without posing any threat to the ruling class. Yet unlike Pestalozzi, who emphasized spontaneity and creativity in educating the whole child, early school reformers focused on the interests of society and of the nation.⁶⁰ The tension between these two competing visions, one centered on the individual student and the other directed toward the collective good, would dominate education discourse throughout the coming century and to the present day.

As Minow affirms, the common-school cause "attracted reformers seeking social improvement."⁶¹ But again the motive was largely statist. For Horace Mann, the first Secretary of the Massachusetts Board of Education and a leading figure behind the movement, public schooling was necessary to

57. LORRAINE SMITH PANGLE & THOMAS L. PANGLE, *THE LEARNING OF LIBERTY: THE EDUCATIONAL IDEAS OF THE AMERICAN FOUNDERS* 58 (1993).

58. 1 ELLWOOD CUBBERLEY, *THE HISTORY OF EDUCATION* 26 (1909).

59. See SALOMONE, *supra* note 7, at 12-13.

60. FREDERICK M. BINDER, *THE AGE OF THE COMMON SCHOOL 1830-1805*, at 24 (1974); CLARENCE J. KARIER, *THE INDIVIDUAL, SOCIETY, AND EDUCATION: A HISTORY OF AMERICAN EDUCATIONAL IDEAS* 224 (2d ed. 1986).

61. MINOW, *supra* note 11, at 115.

preserve republican institutions and to create a political community “out of a maze of conflicting cultural traditions.”⁶² The segregation of immigrants in distinct communities, their lack of economic means, and their low literacy rates threatened the vitality of the Republic. The school would teach the newcomers the principles of American democracy and lead them to appreciate the institutions of American society.⁶³ It would be “common” in that it would be “open to all and free of charge,” and it would instill in students a “common core of values” combining “religion, politics, and economics in [a] vision of a redeemer nation.”⁶⁴ Mann and his fellow reformers saw those values as a nonsectarian compromise grounded in what they considered widely accepted religious truths that, in reality, clearly reflected those of white, middle-class, Anglo-American, mainstream Protestantism.⁶⁵ In the interests of promoting equality while improving the quality of schools, they encouraged uniformity—in “standards of pedagogy, schoolbooks, and even schoolhouses”—that sometimes proved “stultifying, rigid, and inhumane,” especially in urban school districts.⁶⁶

As eager as the common-school crusaders were to promote their nationalistic goals, they also understood that a state-imposed ideology would meet political obstacles from an American culture that was deeply suspicious of central government. And so they built a “two-tiered governance structure” whereby the state would maintain general oversight while local governments would be responsible for the operation and primary funding of the schools.⁶⁷ In this way, the transmission of political, economic, and social knowledge would remain in the hands of each community. As David Tyack explains, the common school movement initially was a “grassroots phenomenon” wherein

62. Lawrence A. Cremin, *Horace Mann's Legacy*, in *THE REPUBLIC AND THE SCHOOL: HORACE MANN ON THE EDUCATION OF FREE MEN* 3, 8 (Lawrence A. Cremin ed., 1957).

63. LAWRENCE A. CREMIN, *THE AMERICAN COMMON SCHOOL: AN HISTORIC CONCEPTION* 44-47 (1951); SALOMONE, *supra* note 7, at 14.

64. DAVID TYACK & ELISABETH HANSOT, *MANAGERS OF VIRTUE: PUBLIC SCHOOL LEADERSHIP IN AMERICA, 1890-1980*, at 20 (1982).

65. Jeffrey E. Mirel, “*Between God and the Youth of Our City*”: *Conflicts over Religion and Education in Detroit, 1842-1949*, 22 *URB. EDUC.* 203, 205-06 (1987).

66. David Gamson, *From Progressivism to Federalism: The Pursuit of Equal Educational Opportunity, 1915-1965*, in *TO EDUCATE A NATION: FEDERAL AND NATIONAL STRATEGIES OF SCHOOL REFORM* 180 (Karl F. Kaestle & Alyssa E. Lodewick eds., 2007).

67. SALOMONE, *supra* note 7, at 16.

local citizens consciously embraced the concept and directly determined what their children learned.⁶⁸

Through the late 1800s, the public school curriculum gradually became more secular as the school population became more heterogeneous with the addition of newly arrived Catholics and Jews who challenged the pan-Protestant compromise. Educators and policymakers realized that it was more important to Americanize the newcomers than to Protestantize them. The move toward secularization continued into the new century and through the mid-1900s. What became known as progressive education, most identified with the pragmatist John Dewey, blended the romantic emphasis on the needs of the child embraced by Jean-Jacques Rousseau,⁶⁹ and later Pestalozzi, with a “democratic faith” in the common school inherited from Jefferson and Mann.⁷⁰ For Dewey, the school was an organ of social mobility, as well as a mechanism for promoting both community awareness and a sense of national identity by nurturing good citizens. The religion of the public schools more definitively became the religion of democracy. Yet to their credit, Dewey and his progressive followers rejected the nativist tendencies of the day, incorporating an appreciation for cultural differences into the notion of community.⁷¹

At the same time, other voices within education took the concept of individual difference down a darker path. Academic elites like Ellwood P. Cubberley, the dean of the Stanford School of Education, urged urban educators to forsake the “exceedingly democratic idea that all are equal, and that our society is devoid of classes.”⁷² With the aid of intelligence and other ability tests, school officials classified children into categories with a prescribed curriculum. Democracy meant that educational “opportunity” would be selectively delivered; “accepting one’s place” took precedence over “equality.”⁷³ And though the United States could pride itself as one of the few developed countries that spread education across all classes largely by local initiative, the system was highly stratified. Some students, primarily the children of immigrants and racial minorities, were found to lack the inherent capacity for academic pursuits and were tracked into vocational and “life adjustment”

68. David Tyack, *Preserving the Republic by Educating Republicans*, in *DIVERSITY AND ITS DISCONTENTS: CULTURAL CONFLICT AND COMMON GROUND IN CONTEMPORARY SOCIETY* 63, 65 (Neil J. Smelser & Jeffrey C. Alexander eds., 1999).

69. See JEAN-JACQUES ROUSSEAU, *EMILE: OR, ON EDUCATION* 37 (William Boyd trans. & ed., Teachers College 1965) (1762).

70. See Martin S. Dworkin, *John Dewey: A Centennial Review*, in *DEWEY ON EDUCATION* 9 (1959).

71. SALOMONE, *supra* note 7, at 25.

72. ELLWOOD P. CUBBERLEY, *CHANGING CONCEPTIONS OF EDUCATION* 57 (1909).

73. Gamson, *supra* note 66, at 183.

programs. That view persisted into the 1950s until *Brown* jolted prevailing assumptions about innate abilities and equal educational opportunity.

Related in part to progressive thinking, patriotism reached an almost feverish pitch in the aftermath of World War I, when a number of states adopted laws mandating varied forms of nationalistic instruction, including courses in U.S. history and citizenship, flag displays, recitation of the Pledge of Allegiance, and patriotic school assemblies.⁷⁴ The push toward aggressive “Americanization” continued full-throttle during the period between the two world wars as the United States closed its doors to most foreigners and turned its sights inward.⁷⁵ At the same time, the nation closed its eyes to the evils of racial segregation and discrimination within its borders.

Global events surrounding World War II and the years that followed eventually demanded a turnaround in policies on both immigration and race, all of which veered the common school once again in a new direction. The imperative need for the Supreme Court to speak definitively as it did in *Brown* crystallized in the pressures of the Cold War and the international embarrassment of racial segregation.⁷⁶ The unequal status of blacks, globally visible in the wartime military, had become grist for the Soviet propaganda mill. The injustice itself seriously threatened the nation’s moral standing as leader of the free world. Similar concerns compelled political forces to reconsider restrictive immigration policies.

As for progressivism, its more extreme innovations had become irrelevant to the times by the late 1950s. Though classrooms had become more energized, permissiveness and anti-intellectualism had distorted Dewey’s dream, a development that Dewey himself lamented.⁷⁷ By all objective measures, progressives seemed inexplicably blind to domestic and global changes that demanded greater emphasis on history, foreign languages, and technology. They also seemed insensitive to the racial and class ramifications of separating students by “ability” into academic, general, and vocational tracks.⁷⁸ In the end, the enduring effects of the movement on the curriculum remain open to debate, though the connection between school and society, envisioned by

74. SALOMONE, *supra* note 7, at 24.

75. See ROSEMARY C. SALOMONE, *TRUE AMERICAN: LANGUAGE, IDENTITY, AND THE EDUCATION OF IMMIGRANT CHILDREN* 30-41 (2010).

76. See generally MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000) (demonstrating the role played by the Cold War and foreign affairs in U.S. civil rights reforms).

77. Dworkin, *supra* note 70, at 10.

78. See DIANE RAVITCH, *THE TROUBLED CRUSADE: AMERICAN EDUCATION, 1945-1980*, at 78-80 (1983).

Dewey, resonates in *Brown* and continues to pervade America's approach to education.

III. *BROWN*, EQUALITY, AND THE FEDERAL ROLE

The Court's decision in *Brown* was indeed a significant event that indelibly changed the power configuration of public education. As Minow comprehensively describes, the Court set the groundwork for equality to guide numerous public policy decisions, initially at the federal level and subsequently across the states, for decades to come. Until the mid-twentieth century, the federal government had moved cautiously on education matters, stimulating rather than regulating local activity primarily through categorical grants for discrete projects, often in response to a perceived national "crisis."⁷⁹ In fact, up to that point, the U.S. Office of Education, established during the Reconstruction Era, had done little more than compile "obscure statistical reports."⁸⁰

By the mid-1960s, the political aims embraced by Mann and Dewey had fallen into the shadows as the state's interest in schooling took a new turn and reformers sought to wed the social with the economic. With equality of opportunity as their policy objective, architects of President Lyndon Johnson's Great Society programs justified their proposals on a theory of education as "investment in human capital."⁸¹ For them, human skills and knowledge were resources in which the nation ought to invest for the general welfare. That compelling economic argument soon folded into a broader vision, one emphasizing individual rights, as *Brown* and its aftermath propelled public schooling into the orbit of equal educational opportunity.

Education more definitively became a leveling agent to foster social justice along with economic growth. The rationale was as follows: poverty was a root cause of educational failure; the poor tended to live in specific geographic areas; and additional government assistance would grant them equal access to educational opportunity which, in turn, would make them productive members of society. Ironically, Horace Mann, looking to garner support from business interests a century earlier, had reluctantly made a similar economic

79. ROSEMARY C. SALOMONE, *EQUAL EDUCATION UNDER LAW: LEGAL RIGHTS AND FEDERAL POLICY IN THE POST-BROWN ERA* 2 (1986).

80. *Id.*

81. See 111 CONG. REC. 5736 (1965) (statement of Rep. Carl Perkins) ("If we can reduce the costs of crime, delinquency, unemployment, and welfare in the future by well-directed spending on education now, certainly, on this count alone, we will have made a sound investment."); see also Theodore W. Schultz, *Investment in Human Capital*, 51 AM. ECON. REV. 1 (1961).

pitch, though his decision to do so was purely pragmatic and contrary to his moral instincts.⁸²

In combating the effects of poverty and promoting equality, the Johnson Administration developed a two-pronged attack of carrots and sticks, using the power of the federal purse to induce compliance with the Administration's civil rights agenda. Congress first had to adopt a series of prohibitions to assure that racial minorities were afforded equal treatment. Those prohibitions initially appeared in the Civil Rights Act of 1964 and its various provisions, particularly Title VI outlawing race and national origin discrimination, and granted the Executive Branch authority to enforce the law's provisions.⁸³ The following year Congress passed Title I of the Elementary and Secondary Education Act of 1965 (ESEA). Title I provided federal funds for remedial instruction to meet the educational needs of educationally disadvantaged children by channeling monies to communities with high concentrations of families living below the poverty level.⁸⁴ School districts that did not conform would be found ineligible for much-needed federal aid.

The Administration, however, understood that such a dramatic expansion in the federal role would raise concerns among the states. Affirming public statements made by the President himself, both Francis Keppel, then Commissioner of Education, and Democratic Congressman Adam Clayton Powell, Chairman of the House Education and Labor Committee, made clear that "the Federal Government must participate—not to seek domination, but to serve as a partner in a vital enterprise"⁸⁵ whose "determination" and "execution" would belong "to local and State educational authorities."⁸⁶

Despite these assurances, government intervention gradually became more sweeping as the years wore on. Each additional dollar brought greater programmatic specifications and more federal control. In the process, the economic purposes of schooling became swallowed up in the spirit of equality. Though Keppel had hailed a "revolution of American education," joining quality and equality,⁸⁷ the outputs of student performance in fact were used

82. HORACE MANN, FIFTH ANNUAL REPORT, *reprinted in* THE REPUBLIC AND THE SCHOOL, *supra* note 62, at 53.

83. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601-02, 78 Stat. 252, 252-53 (codified in scattered sections of 42 U.S.C.).

84. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

85. 111 CONG. REC. 880 (1965) (statement of Francis Keppel, Comm'r of Ed.).

86. 111 CONG. REC. 5734 (1965) (statement of Rep. Adam Clayton Powell).

87. FRANCIS KEPPEL, THE NECESSARY REVOLUTION IN AMERICAN EDUCATION 17 (1966).

merely as a tool for assessing federally funded programs. Equality of opportunity, or equal access, was no longer a means to a more productive society but an end in itself.

Meanwhile, the Cuban Revolution, the Vietnam War, and (in particular) the Hart-Cellar Immigration Act of 1965 dismantling immigration quotas set in motion a diverse flow of newcomers into the country. Together with the "Chicano" movement among Mexican-Americans, these seemingly disconnected events created a robust notion of group identity and interest group politics. They consequently posed new questions concerning the relationship between race and national origin that bore on equal educational opportunity and the government's role in providing it.

As Minow demonstrates, within the rapidly changing political environment of the 1970s, the Civil Rights Act served as a template for subsequent laws that enabled federal regulators and the courts to enforce and extend *Brown's* equality mandate beyond racial minorities and those faced with poverty to include the physically and emotionally handicapped,⁸⁸ linguistic minorities,⁸⁹ and women.⁹⁰ In that context, the concept became legally tied to notions of adequate, appropriate, and meaningful education. These measures were challenging for courts to define and for school officials to implement. By the mid-1970s, the social and economic strands of equality were colliding as the Court's 1971 decision upholding intradistrict busing provoked rancorous debate and elected officials feared the political fallout.⁹¹

As that debate escalated, the Supreme Court and Congress quietly crafted a legal and political basis for the accountability movement that soon followed. In several key decisions and acts, each institution measured the right to equal access and the remedy for denial not by racial integration or equal resources

88. See Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. §§ 701-7961 (2006)) ("No otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

89. See Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, § 204, 88 Stat. 514, 515 (requiring states "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs").

90. See Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 236, 373 ("No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.") (codified as amended at 20 U.S.C. § 1681 (2006)).

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

but by student academic performance or outcomes.⁹² In 1974 in *Lau v. Nichols*,⁹³ and again in 1977 in *Milliken v. Bradley (Milliken II)*,⁹⁴ the Court tied the remedy directly to compensatory programs designed to improve the quality of education and the academic gains of the plaintiff children. In the first, the Justices affirmed the right of Chinese-speaking students in San Francisco to a “meaningful” education that took into consideration their language differences.⁹⁵ In the second, the Court broadened desegregation remedies and goals beyond busing to achieve racial balance; upheld the use of remedial reading programs, guidance and counseling services; and revised testing measures to remedy the lingering effects of past discrimination.⁹⁶

The link between instructional quality and student achievement, in fact, was central to the plaintiffs’ arguments in *Lau*, a case decided not under the Equal Protection Clause but under Title VI of the Civil Rights Act of 1964.⁹⁷ The Equal Educational Opportunities Act of 1974 (EEOA),⁹⁸ adopted just subsequent to the *Lau* decision, similarly focused on instruction and its effects on academic achievement. Feeling the sting of public opposition to court-ordered busing, in 1972 President Nixon had proposed that the Act’s emphasis on the quality of education programs would accomplish civil rights goals far more effectively.⁹⁹ Essentially intended as anti-busing legislation, the Act also prohibited the states from denying “equal educational opportunity” based on national origin and required states “to take appropriate action to overcome language barriers.”¹⁰⁰ In 1974 when the EEOA was finally passed, Congress

92. Adam R. Nelson, Rodriguez, Keyes, Lau, and Milliken Revisited: *The Supreme Court and the Meaning of “Equal Educational Opportunity,” 1973-1974*, in *TO EDUCATE A NATION*, *supra* note 66, at 202-24.

93. 414 U.S. 563 (1974).

94. 433 U.S. 267 (1977).

95. 414 U.S. at 566.

96. 433 U.S. 267.

97. For a discussion of the *Lau* litigation, see SALOMONE, *supra* note 74, at 119-36; Rachel F. Moran, *The Story of Lau v. Nichols: Breaking the Silence in Chinatown*, in *EDUCATION LAW STORIES* 111 (Michael A. Olivas & Ronna Greff Schneider eds., 2008).

98. Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, § 204, 88 Stat. 514.

99. Address to the Nation on Equal Educational Opportunities and School Busing, 8 WEEKLY COMP. PRES. DOC. 590 (Mar. 16, 1972), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=3775&st=Busing&st1>.

100. Equal Educational Opportunities Act § 204(f).

further amended the Bilingual Education Act,¹⁰¹ significantly increasing targeted funds to local school districts to promote this same goal.¹⁰²

As these events unfolded in Washington, a confluence of forces—including an economic downturn with spiraling inflation—increased unemployment, decreased tax revenues, and forced spending cuts at the local and state levels.¹⁰³ The public began to question federal expenditures for compensatory programs and underfunded mandates, demanding greater accountability for educational outcomes from the public schools. That backlash fueled a state-level testing and standards movement that set the groundwork for stepped-up federal initiatives. As the 1970s drew to a close, and as the achievement gap between white and racial minority students continued to grow, there emerged a groundswell of opposition ostensibly to the equality principle but in fact to the specific reforms that were shaping *Brown's* legacy.

IV. ACCOUNTABILITY, TESTING, AND THE PRODUCTIVITY AGENDA

By the early 1980s, many states had adopted minimum competency tests as requirements for high school graduation. Proponents saw them as a means to assess and thereby to improve student learning. A federal appeals court decision lent constitutional legitimacy to that argument.¹⁰⁴ Critics, on the other hand, assailed the use of such high-stakes tests for the severe consequences that they imposed, especially on disadvantaged and minority students.¹⁰⁵

In 1983, a flood of disquieting reports inundating American educators and the public further supported the reliance on test scores.¹⁰⁶ The most publicized

101. Elementary & Secondary Education Amendments of 1974, Pub. L. No. 93-380, § 833, 88 Stat. 603.

102. Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CALIF. L. REV. 1249, 1271-72 (1988).

103. Nelson, *supra* note 92, at 203.

104. *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. Unit B May 1981), *reh'g en banc denied*, 654 F.2d 1079 (5th Cir. Sept. 1981) (remanding for further proceedings because the record was insufficient with regards to content validity, but indicating that tests would be constitutional if covered materials were strictly from the curriculum).

105. See generally GEORGE MADAUS, MICHAEL RUSSELL & JENNIFER HIGGINS, *THE PARADOXES OF HIGH STAKES TESTING: HOW THEY AFFECT STUDENTS, THEIR PARENTS, TEACHERS, PRINCIPALS, SCHOOLS, AND SOCIETY* (2009) (providing a history of educational testing in the United States and highlighting the dangers of using a single quantitative measure for all students and schools as the key instrument for reform).

106. The year 1983 appeared to be the “year of the report.” The major studies published included: ERNEST L. BOYER, *HIGH SCHOOL: A REPORT ON SECONDARY EDUCATION IN AMERICA* (1983); EDUC. COMM’N OF THE STATES TASK FORCE ON EDUC. FOR ECON. GROWTH,

and influential among them, *A Nation at Risk*,¹⁰⁷ rallied and energized the outcomes movement. President Ronald Reagan's Secretary of Education Terrel Bell had commissioned the report after the White House refused to sponsor it. Subtly invoking national security fears, the report warned of a "rising tide of mediocrity" imperiling American education.¹⁰⁸ The nation had expected too little of its schools over the previous two decades, having "squandered the gains in student achievement made in the wake of the Sputnik challenge" and committing "an act of unthinking, unilateral educational disarmament."¹⁰⁹

The report's central thesis was that the performance of U.S. students was on a downward spiral and thereby threatened the nation's technological, military, and economic performance. The report cited test scores measuring a variety of aptitudes and subjects to demonstrate that the schools were failing. It then proposed standardized testing as a method to improve educational quality and thereby maintain the nation's position among its competitors. Though more overtly alarmist, the hauntingly familiar drift of the report both reflected the 1960s "War on Poverty" and foreshadowed the current "Race to the Top."

The compelling rhetoric of competition immediately caught the national imagination while equal educational opportunity swiftly fell from public attention. The first result is readily understandable. The second is somewhat more complicated. Patricia Albjerg Graham explains the shift as follows:

The goal of the policy, equal educational opportunity, was admirable. Making it happen was very difficult. . . . Efforts, undoubtedly inadequate, to provide equal opportunity failed to provide equal results. . . . Americans woke up to the fact that many of their children, particularly ones of color, had not mastered academic subjects. . . . For many Americans who did not want to be called racist, it seemed easier to fight for greater academic achievement, a goal that few would

ACTION FOR EXCELLENCE (1983); JOHN J. GOODLAD, *A PLACE CALLED SCHOOL: PROSPECTS FOR THE FUTURE* (1983); NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATION REFORM* (April 1983) [hereinafter *A NATION AT RISK*], available at <http://www2.ed.gov/pubs/NatAtRisk/index.html>; and TWENTIETH CENTURY FUND TASK FORCE ON FED. ELEMENTARY AND SECONDARY EDUC. POLICY, *MAKING THE GRADE* (1983).

107. *A NATION AT RISK*, *supra* note 106; see also *A Nation at Risk: A 20-Year Reappraisal*, 79 PEABODY J. OF EDUC. 1 (2004) (providing a retrospective examination of the report and addressing whether the state of public schooling in the early 1980s was actually placing the nation at risk, which of the recommended policies were adopted and whether they led to educational improvement, and what risks and opportunities faced the nation twenty years later).

108. *A NATION AT RISK*, *supra* note 106, at 5.

109. *Id.*

dispute, than to deal with disparities in opportunity between blacks and whites, rich and poor directly.¹¹⁰

Apart from its historical and social significance, one would have expected *A Nation at Risk*'s troubling news to propel Washington into action. But those were the Reagan years and the President had ridden into the White House on the horse of "New Federalism." Arguing for the interests of state and local control and individual freedom, the Administration advanced an attack on numerous fronts—"budget reductions, deregulation, program consolidation," and cutbacks in civil rights enforcement among them.¹¹¹ In the end, though these measures reduced the size of the federal share of education funding from nine percent to 6.5 percent over eight years, they barely "touched its contours."¹¹² Other key proposals for granting tuition tax credits and dismantling the newly created Department of Education, together with efforts to erode equity-based programs for special student populations, remained stymied in Congress.

A Nation at Risk merely alluded to the achievement gap between white middle-class and low-income and minority students, with only a brief note on "equit[y]" and the dangers of "undemocratic elitism."¹¹³ Yet despite the apparent oversight, the report's emphasis on test scores as a measure of the nation's productivity inevitably led to a more intense examination of those glaring student disparities. In 1984, the Department of Education began ranking the states according to scores attained by college-bound students on the ACT and SAT.¹¹⁴ Within a year, thirty-five states had adopted new graduation requirements, twenty-two had enacted curriculum reforms, and twenty-nine had set new policies on testing.¹¹⁵ As Michael Heise points out, state efforts to develop and implement standards and testing in turn gave political legitimacy to federal policies moving in the same direction.¹¹⁶ In 1988, the ESEA reauthorization for the first time explicitly presented states as partners in federal reform efforts. It also was the first time that the law focused on educational outputs and not merely on inputs, tying academic performance

110. GRAHAM, *supra* note 9, at 159-60.

111. SALOMONE, *supra* note 79, at 190-91.

112. PAUL MANNA, SCHOOL'S IN: FEDERALISM AND THE NATIONAL EDUCATION AGENDA 69 (2006).

113. *A NATION AT RISK*, *supra* note 106, at 13.

114. MARIS A. VINOVSIS, FROM A NATION AT RISK TO NO CHILD LEFT BEHIND: NATIONAL EDUCATION GOALS AND THE CREATION OF FEDERAL EDUCATION POLICY 18 (2009).

115. U.S. DEP'T OF EDUC., THE NATION RESPONDS: RECENT EFFORTS TO IMPROVE EDUCATION 144-46 (U.S. Government Printing Office 1984).

116. Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 133 (2006).

of Title I students to state-defined achievement levels as a means of identifying poorly performing schools.¹¹⁷

Beyond the Reagan years of federal retreat, and through successive presidential administrations, *A Nation at Risk* continued to inspire a push for national standards and increased federalization of education policy. The reform movement began to take clearer shape under President George H.W. Bush with the introduction of “America 2000,” a set of goals for U.S. schools to meet by the new millenium. Under the plan, the states would lead, and the federal government would provide support. Though the legislation failed to pass Congress, it served as the blueprint for President Bill Clinton’s “Goals 2000” program. Both Presidents Bush and Clinton considered themselves “education presidents.”¹¹⁸

Goals 2000 was a grant program meant to help states develop and implement standards for all students, not just for those participating in Title I programs. Congress adopted the initiative in 1994 to support the ESEA reauthorization known as the Improving America’s Schools Act. Together they more definitively transformed Title I and hence the federal role. To be eligible for funds under the Act, states had to create “challenging” content and performance standards in reading and math for all students, develop coordinated assessments, and establish plans for sanctioning failing schools.¹¹⁹ Achievement standards for Title I and non-Title I students for the first time had to be the same. The Administration’s increased demands on state and local education agencies in exchange for federal dollars presaged even larger exactions in the decade to follow. But President Clinton’s plan to launch national standards never materialized.

Federal involvement in education, depending on how one looks at it, both increased and decreased under President George W. Bush. Paying lip service to civil rights protections while cutting back on enforcement, his administration dove deeply into state and local discretion over education programming. As the Great Society architects had overstated the importance of inputs to promote equal access, the Bush White House erred in the opposite direction. Achieving equal results took center stage while *Brown*’s equality mandate receded into the background. The centerpiece of that effort, the NCLB of 2001,¹²⁰ was the basis

117. MANNA, *supra* note 112, at 73.

118. VINOVSIS, *supra* note 114, at 35, 61.

119. Improving America’s Schools Act, 20 U.S.C. §§ 6311(b)(A), (C) (2006); see JOHN F. JENNINGS, WHY NATIONAL STANDARDS AND TESTS? POLITICS AND THE QUEST FOR BETTER SCHOOLS 154-70 (1998).

120. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (expired September 30, 2007, but automatically extended until a new bill is enacted).

for a sweeping overhaul of federal education programs and priorities with testing and accountability as its driving force.

Using a similar but more comprehensive approach than the Improving America's Schools Act, the most significant changes in NCLB related to teachers, testing, and accountability.¹²¹ Adopted with broad bipartisan support and the endorsement of liberal Democrats including its cosponsor Senator Edward Kennedy, NCLB presented far-reaching changes in the ESEA.¹²² Yet, like the original ESEA, it used a carrot-and-stick approach to induce states and school districts into complying with federal requirements. Though NCLB expired in 2008, Congress has yet to reauthorize or replace it.

NCLB shifts the terminology from offering "equal educational opportunity" and "equal access" to closing the "achievement gap," a term now generally favored in education circles. The centerpiece of NCLB is a detailed system of student testing and school accountability. It requires each state to develop its own set of standards, which by the 2004-05 school year had to be linked to a state-developed program of annual assessments in reading and math for third to eighth grade students. The ultimate goal is for every student to perform at a proficient level by the year 2014. In the interim, each state has to submit to the U.S. Department of Education a report mapping out the annual yearly progress that schools are expected to make. If a school fails to meet that mark for more than two consecutive years, corrective action, which might lead to staff dismissals and school closings, must be taken. Failing schools must offer students free after-school tutoring and the opportunity to transfer to another school.

States applying for federal funds must agree to participate in the reading and math segments of the National Assessment of Educational Progress (NAEP). The NAEP, referred to as "The Nation's Report Card," is a federal testing program begun in 1969 that periodically assesses a representative sampling of students in grades four, eight, and twelve in several core academic subjects. It also tests a sample of students at ages nine, thirteen, and seventeen for long-term trends and aggregates scores by race, sex, and locale.¹²³ Comparisons between NAEP and state standardized test scores serve to measure the quality of the standards that states have adopted on their own.

121. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 939 (2004).

122. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified in scattered sections of 20 U.S.C.).

123. National Center for Education Statistics, U.S. Department of Education, *NAEP Overview* (Aug. 16, 2010), <http://nces.ed.gov/nationsreportcard/about/>.

NAEP scores have been used to support successive waves of education reform since the 1970s.

The Obama Administration's *Blueprint for Reform*, released in March 2010, revisits a number of NCLB provisions.¹²⁴ It eliminates NCLB's school ratings based on the "annual yearly progress" on student test scores.¹²⁵ It also replaces the 2014 proficiency deadline with the goal for all students to leave high school "college and career ready" by 2020.¹²⁶ It thus attempts to avoid some of the weaknesses of NCLB. Yet its tone and substance are still long on testing and accountability and short on measures that directly support equal access. It calls on states to develop new academic standards along with statewide assessments that move students toward that goal. To that end, the National Governors Association has coordinated an effort among the states to develop the Common Core Standards, which, as of February 2011, had been adopted by forty-two states and territories and the District of Columbia.¹²⁷ The *Blueprint* assures that the federal government will continue to meet the needs of diverse learners, including English language learners and students with disabilities, though it offers no details. It also pledges support for additional public-school-choice options.

The plan reaffirms the Administration's Race to the Top initiative, announced in 2009.¹²⁸ Designed as a grant program, the initiative placed states in competition, based on meeting certain criteria, for \$4.35 billion in education stimulus funds allocated for fiscal year 2010. Applicants had to create data-driven systems for training and evaluating teachers and principals, encourage the establishment of high-quality charter schools, develop plans for turning around failing schools, demonstrate statewide political consensus for proposed reforms, and adopt the national education standards.

V. THE RHETORIC AND REALITY OF REFORM

Both the No Child Left Behind Act and the more recent Obama Administration proposals raise a number of contentious issues that bear

124. U.S. DEP'T OF EDUC., A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT (2010), available at <http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf>.

125. *Id.* at 9-10.

126. *Id.* at 4.

127. COMMON CORE STANDARDS INITIATIVE, <http://www.corestandards.org/in-the-states> (last visited Dec. 28, 2010).

128. Race to the Top Fund, 74 Fed. Reg. 59,836 (Nov. 18, 2009).

directly on *Brown*'s legacy and the equality ideal. The most widely debated of these involves testing. Since 2002, all fifty states have implemented standardized testing schemes that measure student academic achievement in English reading (or language arts) and math. Twenty-six states use statewide tests as a graduation requirement or plan to do so in the near future.¹²⁹ The testing question provokes sharp disagreements, even among those who advocate on behalf of minority students. Some have employed tests as a sword, others as a shield. Some maintain that test results hold school officials' feet to the fire to move students successfully toward meeting state standards. But even here they argue that current testing fails to consider differences among students.¹³⁰ Many educators contend that the law "sets impossible goals for students and schools and humiliates students and educators when they fall short."¹³¹

As Diane Ravitch recently explained, "The problem with using tests to make important decisions in people's lives is that standardized tests are not precise instruments."¹³² Even testing experts, she tells us, advise school officials that test scores should not be used "in isolation" but as part of a broader assessment of student performance including school grades, class participation, homework, and teacher assessments.¹³³ A striking irony of the accountability and testing movement is that sanctions for failure, the very means used to improve student achievement, have actually lowered the goals. As James Ryan and others have noted, NCLB left states to decide how difficult their tests would be, thus creating a perverse incentive for states to dilute their academic standards and proficiency thresholds, transforming a "race to the top" to a

129. CTR. ON EDUC. POLICY, STATE HIGH SCHOOL EXIT EXAMS: TRENDS IN TEST PROGRAMS, ALTERNATE PATHWAYS, AND PASS RATES 1 (2010), http://www.cepd.org/index.cfm?fuseaction=document_ext.showDocumentByID&nodeID=1&DocumentID=297.

130. See *Impact of No Child Left Behind on English Language Learners: Hearing Before the Subcomm. on Early Childhood, Elementary and Secondary Educ. of the H. Comm. on Educ. and Labor*, 110th Cong. 28-33 (2007) (statement of Peter Zamora, Co-Chair, Hispanic Education Coalition); WORKING GRP. ON ELL POLICY, IMPROVING EDUCATIONAL OUTCOMES FOR ENGLISH LANGUAGE LEARNERS: RECOMMENDATIONS FOR THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 6-7 (Mar. 25, 2010), <http://ellpolicy.org/wp-content/uploads/ESEAFinal.pdf>.

131. Sam Dillon, *Obama To Seek Sweeping Change in "No Child" Law*, N.Y. TIMES, Feb. 1, 2010, at A1.

132. DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* 152 (2010).

133. *Id.*

“race to the bottom.”¹³⁴ Rather than focusing on the quality of the educational experience for all students, states have “dumbed down” the test. The dramatic drop in New York City’s recalibrated scores on state-mandated tests, in the wake of tougher state standards, brought this reality to light.¹³⁵ The results should have come as no surprise to state and city officials. The tests were short and predictable and released publicly, thus making coaching each year easier.¹³⁶

For critics of NCLB, like linguist Jim Cummins, federal and state policies impose a “pedagogical divide” in which “poor kids get behaviorism and rich kids social constructionism”—in other words, “skills for the poor and knowledge for the rich.” To underscore the absurdity of the situation, Cummins recounts the experience of a Maryland English-as-a-Second-Language (ESL) teacher who calculated that in the 2004-05 school year, English language learners in a fifth-grade class had missed thirty-three days of ESL classes, or about 18 percent of their English instruction, due to standardized testing.

Cummins and others agree that relegating lower-achieving students, many of them racial minorities, to a steady diet of English and math via “teaching to the test” denies them the comprehensive and enriching education—including the arts, social studies, science, literature, creative writing, civics, and foreign languages—that students from wealthier communities and private schools enjoy.¹³⁷ These subjects are often seen as the hook that gets students low in math and reading skills to “care about school” and to appreciate the point of reading beyond identifying “the main idea.”¹³⁸ A constant focus on test preparation also denies students the critical thinking and higher-order analytic skills essential for college and the workplace. Deep learning entails more than practicing strategies and memorizing facts. Not only are standardized tests inadequate for assessing important intellectual proficiencies, but evidence also suggests that high scores may actually correlate with a superficial approach to

134. JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* 10-11 (2010); see also Heise, *supra* note 116, at 144.

135. Jennifer Medina, *New Standards Mean More F's in State Testing*, N.Y. TIMES, July 29, 2010, at A1.

136. Jennifer Medina, *State Long Ignored Red Flags on Test Scores*, N.Y. TIMES, Oct. 11, 2010, at A1.

137. Meteor Blades, *Jim Cummins Demolishes NCLB's Ideology and Practice*, DAILY KOS (July 26, 2007, 11:49:56 AM), <http://www.dailykos.com/story/2007/7/26/131722/394> (quoting Jim Cummins's remarks in a speech before the annual conference of the California Teachers of English to Speakers of Other Languages Association in San Diego on July 25, 2007).

138. LINDA PERLSTEIN, *TESTED: ONE AMERICAN SCHOOL STRUGGLES TO MAKE THE GRADE* 123 (2007).

learning.¹³⁹ The situation brings to mind the oft-quoted statement typically attributed to Albert Einstein: “Not everything that counts can be counted, and not everything that can be counted counts.”¹⁴⁰

Recent data on the ACT test for college admissions (which covers English, reading, math, and science) give credence to the curriculum gap. While the numbers of black and Hispanic students taking the test have grown by 55% and 84% respectively over the past five years, both groups are far less likely than their white or Asian counterparts to have taken a minimum core curriculum that prepares them for college admissions. It is thus not surprising that in 2010, only 4% of blacks and 11% of Hispanics reached ACT score levels that are predictive of college success, as compared to 30% of white students and 39% of Asians.¹⁴¹

The Obama Administration’s reform proposals, in particular, contain a number of conditions for the receipt of competitive funds that have provoked vigorous debate. Supporters credit the approach with fueling innovation. Critics, on the other hand, question the wisdom of expending fiscal and political capital on programs like charter schools,¹⁴² “turnaround” models,¹⁴³

139. See ALFIE KOHN, *THE CASE AGAINST STANDARDIZED TESTING: RAISING THE SCORES, RUINING THE SCHOOLS* 10 (2000).

140. See *THE NEW QUOTABLE EINSTEIN* 293 (Alice Calaprice ed., 2005) (suggesting that the quotation probably did not originate with Einstein); WILLIAM BRUCE CAMERON, *INFORMAL SOCIOLOGY* 13 (1967) (representing the possible origin of the quotation).

141. ACT, *THE CONDITION OF COLLEGE & CAREER READINESS* 3, 15 (2010), available at <http://www.act.org/research/policymakers/cccr10/pdf/ConditionofCollegeandCareerReadiness2010.pdf>.

142. See CTR. FOR RESEARCH ON EDUC. OUTCOMES, *MULTIPLE CHOICE: CHARTER PERFORMANCE IN 16 STATES* 3 (2009) available at http://credo.stanford.edu/reports/multiple_choice_cred.pdf (finding that charter school students performed the same or worse on math tests than did students in traditional schools); CAROLINE M. HOBY, SONALI MURARKA & JENNY KANG, *THE NEW YORK CITY CHARTER SCHOOLS EVALUATION PROJECT: HOW NEW YORK CITY’S CHARTER SCHOOLS AFFECT ACHIEVEMENT IV-4* (2009), available at http://www.nber.org/~schools/charterschoolseval/how_NYC_charter_schools_affect_achievement_sept2009.pdf (finding that charter schools closed the achievement gaps between inner-city students and their suburban counterparts).

143. See Andy Smarick, *The Turnaround Fallacy*, EDUC. NEXT, Winter 2010, at 21-26, available at <http://educationnext.org/the-turnaround-fallacy/> (reporting on studies finding that attempts to save failing urban schools by restructuring and other methods tend to prove unsuccessful and suggesting that they be closed); Richard D. Kahlenberg, *Turnaround Schools That Work: Moving Beyond Separate But Equal*, CENTURY FOUND., available at <http://tcf.org/events/pdfs/ev264/turnaround.pdf> (rejecting the conventional turnaround model of changing faculty and school governance in favor of conversion to a magnet school that attracts students of diverse socioeconomic class).

and tying teacher evaluations to student test scores,¹⁴⁴ that have yielded no consistent evidence of success on student test performance. As Diane Ravitch told the members of the National Education Association, “Equal educational opportunity is the American way. The race will have few winners and a lot of losers. That’s what a race means.” Tying teacher assessment, or even worse compensation, to test scores, she warned, “will promote teaching to not very good tests. It may or may not improve scores, but it definitely will not improve education.” She reminded the group that “[p]ublic schools are a cornerstone of our democratic society.”¹⁴⁵

Democracy neither forms part of the current standards-and-testing vernacular nor plays into the movement’s objectives. In the Race to the Top initiative, the juxtaposition of a winners/losers paradigm (it is, after all, a “race”) with the democratic mission of schooling is revealing. It specifically uses terminology like “points,” “winner announcements,” and “finalists” in a competition for funds based not on student need but on narrowly defined state abilities. It measures those abilities by the state’s adherence to certain rules without considering differences among students. As a result, it treats students merely as means for collecting data in the interests of national productivity rather than as potential democratic actors.¹⁴⁶

The composition of the second round of “winners” announced in August 2010 was especially eye-opening. Of the dozen states that received major grants, eleven were east of the Mississippi. The sole exception was Hawaii. It was clear that the rules favored densely populated Eastern states, placing the

144. See ECON. POLICY INST., EPI BRIEFING PAPER: PROBLEMS WITH THE USE OF STUDENT TEST SCORES TO EVALUATE TEACHERS (2010) (report prepared by leading education scholars questioning the validity of student test scores in determining teacher performance); NAT’L CTR. ON PERFORMANCE INCENTIVES, TEACHER PAY FOR PERFORMANCE: EXPERIMENTAL EVIDENCE FROM THE PROJECT ON INCENTIVES IN TEACHING (2010) (reporting on three-year randomized study in Nashville, Tennessee public schools and finding that performance-based teacher compensation neither affected student achievement in math nor damaged school culture); NAT’L CTR. FOR EDUC. EVALUATION AND REGIONAL ASSISTANCE, ERROR RATES IN MEASURING TEACHER AND SCHOOL PERFORMANCE ON STUDENT TEST SCORE GAINS (2010), available at <http://ies.ed.gov/ncee/pubs/20104004/> (finding notable chance of teachers being misjudged by ranking systems based on only several years of student test scores); Stephen Sawchuk, *Merit-Pay Model Pushed by Duncan Shows No Achievement Edge*, EDUC. WK., June 9, 2010, at 1 (reporting on findings from Chicago showing no evidence that performance-based compensation for teachers boosted student achievement on math and reading tests).

145. Diane Ravitch, Educational Historian, Speech Delivered at the 2010 Representative Assembly (June 6, 2010), <http://www.nea.org/grants/40246.htm>.

146. Kathleen M. Collins & Joseph Valente, *[Dis]abling the Race to the Top*, TCHR. C. REC., June 17, 2010, <http://www.tcrecord.org/>.

nation's rural communities and sparsely populated Western regions at a competitive disadvantage. Small towns with just one school could not establish a charter school or attract new principals to failing schools. Rural states like Vermont, New Hampshire, Idaho, and Montana had neither the staff nor the resources to hire high-powered consulting groups like McKinsey to prepare proposals of 500-plus pages, as some of the winning states had done.¹⁴⁷ The results demonstrated how the Administration's overall shift from formula to competitive funding for such a large allocation of funds posed particular problems for small and underfunded school districts, diminishing equal access for their students.

In the Race to the Top Assessment Competition, all forty-four state applicants and the District of Columbia were part of at least one of the two winning consortia that agreed to develop a new generation of tests in math and English language arts for states to use voluntarily by the 2014-15 school year. One consortium will develop a series of interim tests administered throughout the school year with one end-of-year accountability test. The other will develop a series of formative assessments that will be averaged into one score for accountability purposes.¹⁴⁸ The new tests promise to measure higher-order thinking skills. Yet test results are valid for assessing learning only if they are tied to what students actually are taught, which demands a coordinated curriculum. In the meantime, funds for research and assessment development in other subject areas, like civics, foreign languages, and science, are given low priority and left to state discretion as part of a separate funding stream in the proposed ESEA reauthorization.

Aside from questions of validity and scope, there is the cost factor. Test construction, validation, and revision of this magnitude will undoubtedly demand billions of dollars, at a time when school districts nationwide are strapped for funds—science labs lack equipment; history classes use outdated books; school libraries lack technology; enrichment programs, including the

147. Sam Dillon, *Winners of Aid for Education Are Mostly in the East*, N.Y. TIMES, Aug. 25, 2010, at A3.

148. Arne Duncan, U.S. Sec'y of Educ., Remarks to State Leaders at Achieve's American Diploma Project Leadership Team Meeting, *Beyond the Bubble Tests: The Next Generation of Assessments* (Sept. 2, 2010), <http://www.ed.gov/news/speeches/beyond-bubble-tests-next-generation-assessments-secretary-arne-duncans-remarks-state-l>; Press Release, Dep't of Educ., U.S. Secretary of Education Duncan Announces Winners of Competition To Improve Student Assessments (Sept. 2, 2010), <http://www.ed.gov/news/press-releases/us-secretary-education-duncan-announces-winners-competition-improve-student-asse>.

arts and athletics, are being cut or are based on the payment of a fee; and class sizes are growing as teachers lose their jobs.¹⁴⁹

Though the Administration's strategies for improving education may resonate among the "winners," recent Gallup poll findings indicate that the same sentiment is not shared nationally. High grades for the President's performance in support of public schools are down from forty-five percent in 2009 to thirty-four percent. Four out of five Americans believe that it is not for the federal government but for the states to hold schools accountable for student achievement. Nor do Americans support firing teachers and principals or closing underperforming schools; rather, they prefer maintaining the existing staff with comprehensive outside support.¹⁵⁰

Viewed in this light, the Race to the Top and *Blueprint for Reform*, with their "standards" agenda, threaten to undermine the dual promise of *Brown*: to break down barriers that impede equal opportunity and to preserve democratic government. Both plans effectively marginalize the needs of the individual child and underscore the continued return to a state-centered system of schooling. Despite the Administration's rhetoric of opportunity, the lineup of winners makes it appear inevitable that urban and suburban schools, as well as poor and wealthier schools, educate different groups of students. That realization stands in stark contrast to the original vision of the common school where children from "all walks of life come together to be educated under one roof."¹⁵¹

As the Gallup poll results suggest, the heavy-handed barrage of mandates and conditions emanating from Washington defies a long tradition of local and state control over education and raises serious federalism concerns. It uses the power of federal funding not merely to induce but to coerce financially desperate states into jumping onto an accelerated standards-and-testing treadmill that remains disconnected from what is taught and leaves little room

149. See, e.g., Andrea Billups, *School Budget Cuts Threaten Gains*, WASH. TIMES, Mar. 11, 2009, at A1, available at <http://www.washingtontimes.com/news/2009/mar/11/schools-cut-budgets-where-it-hurts-children-most/print>; Stacy Teicher Khadaroo & Amanda Paulson, *School Budget Cuts Across the US Projected for Next Academic Year*, CHRISTIAN SCI. MONITOR, Apr. 20, 2010, at 4, available at <http://www.csmonitor.com/USA/Education/2010/0420/School-budget-cuts-across-the-US-projected-for-next-academic-year>.

150. William J. Bushaw & Shane J. Lopez, *A Time for Change: The 42nd Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools*, KAPPAN (Phi Delta Kappa Int'l, Bloomington, In.), Sept. 2010, at 8, 10-11 (2010), available at <http://www.hcsao.org/sites/default/files/PDKGallupPoll2010.pdf>.

151. RYAN, *supra* note 134, at 245.

for teacher creativity or student differences.¹⁵² It undermines the “partnership” relationship that architects of the Great Society programs promised in designing a new federal role four decades ago. And unlike the early common school, whose key objective to preserve democracy was truly for the public good, this slant toward economic production may not only harm some students but also poorly serve national interests. As a recent report pointedly stated, “America cannot be globally competitive in the 21st century . . . when we are able to identify by race, ethnicity, gender and zip code who is more likely to have an opportunity to learn.”¹⁵³

Most fundamentally, the almost single-minded fixation on productivity undercuts *Brown*’s legacy guaranteeing an effective, appropriate, and meaningful education. It runs the risk of denying students—especially the most disadvantaged—the means of self-realization through a broad-based curriculum including the arts and literature. At the same time, it fails to equip them with the knowledge and skills needed to compete in a global economy. What seems to be lost on Washington is the reality of why other nations consistently outrank the United States on the Programme for International Student Assessment (PISA) exam: those nations provide students not simply with standards but with a comprehensive, content-rich education in the liberal arts and sciences.¹⁵⁴ The now highly touted Finnish schools are a clear case on point. In the 1980s, the country closed a resistant achievement gap by replacing state-mandated tests with well-trained teachers and “curriculum and assessments” geared toward “problem solving, creativity, independent learning, and student reflection.”¹⁵⁵ Though the Common Core Standards are a step in the right direction, they are meaningless unless tied to a core curriculum that states within our federal system may adopt at their discretion and not under the gun of federal sanctions or denials of competitive funds.

Merely focusing on economic competition, without a more expansive vision of schooling, also disserves the nation’s position as a leader in democratic governance. Though knowledge is essential for democratic participation, neither the *Race to the Top* nor the *Blueprint* thoughtfully and directly addresses this correlation, especially as it relates to changing demographics.

152. See Heise, *supra* note 116, at 135–41 (discussing federal inducement versus coercion in the context of NCLB mandates).

153. SCHOTT FOUND. FOR PUB. EDUC., YES WE CAN: THE SCHOTT 50 STATE REPORT ON PUBLIC EDUCATION AND BLACK MALES 37 (2010), www.blackboysreport.org.

154. COMMON CORE, WHY WE’RE BEHIND: WHAT TOP NATIONS TEACH THEIR STUDENTS BUT WE DON’T 13–16 (2009), http://www.commoncore.org/_docs/CCreport_whybehind.pdf.

155. LINDA DARLING-HAMMOND, THE FLAT WORLD AND EDUCATION: HOW AMERICA’S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE 5 (2010).

Neither gives serious attention, for example, to the valuable linguistic and cultural resources that children from immigrant families, now twenty-two percent of the school-age population, bring to the school setting and the potential for those children to bridge the global divide.¹⁵⁶ Both plans likewise ignore the way in which mass migration is challenging notions of national identity and increasing the importance of citizenship education in promoting social cohesion.¹⁵⁷ There is no mention of the vital role that public schools play in cultivating the knowledge, values, and attitudes that make “good citizens” — citizens who embrace common political principles, a shared sense of allegiance and belonging, and a common historical memory while leaving room for differences at the margins.¹⁵⁸ Nor are there any defined objectives for promoting students’ critical and independent-thinking skills or active involvement that are crucial to a thriving democracy. These understandings and capacities are especially salient for the increasing number of children who live transnational lives, shuttling back and forth between the United States and their parents’ home countries, or whose families have little or no experience with democratic institutions.¹⁵⁹ The *Blueprint*, in fact, eliminates separate funding for foreign languages and civics, merging both into a larger competitive program including the arts, financial literacy, and environmental learning to ensure a “well-rounded education.”¹⁶⁰

Even the early school reformers, though overzealous in promoting the state’s interests over those of the individual child, understood the connection between education and democratic citizenship. The Court in *Brown* affirmed the importance of both factors in forging a just society. As President Lyndon Johnson noted over four decades ago “[F]reedom is fragile if citizens are

156. See SALOMONE, *supra* note 74, at 9; Nick Anderson, *U.S. Students in the Middle of Global Pack*, WASH. POST, Dec. 7, 2010, at A4.

157. See generally WOLFRAM SCHULZ ET AL., INITIAL FINDINGS FROM THE IEA INTERNATIONAL CIVIC AND CITIZENSHIP EDUCATION STUDY 13 (2010), available at http://www.ica.nl/fileadmin/user_upload/ICCS/ICCS_2010_Initial_Findings.pdf (studying the ways in which countries prepare their children to undertake their roles as citizens).

158. See CIRCLE (THE CENTER FOR INFO. & RES. ON CIVIC LEARNING & ENGAGEMENT) & CARNEGIE CORP. OF N.Y., THE CIVIC MISSION OF SCHOOLS (2003), <http://www.civicmissionofschoools.org/site/campaign/documents/CivicMissionofSchools.pdf&pli=1>.

159. See SALOMONE, *supra* note 74, at 238.

160. Rosemary C. Salomone, *The Foreign Language Defecit: A Problem in Search of an Obvious Solution*, TCHR. C. REC., Jan. 28, 2011, available at <http://www.tcrecord.org/PrintContent.asp?Contentid=16317>.

ignorant.”¹⁶¹ The productivity agenda, in the end, supports neither education nor democracy in its rush to win the global economic race.

All of this is not to suggest that the Obama Administration has turned its back on equal educational opportunity. To its credit, the Administration has taken up an ambitious civil rights agenda. With 102 positions added to its 2010 budget, the Department of Justice is pursuing civil rights violations on broad fronts including education.¹⁶² In a March 2010 speech marking the 45th anniversary of the “Bloody Sunday” march in Selma, Alabama, Secretary of Education Arne Duncan likewise laid out the Department of Education’s plans to “reinvigorate civil rights enforcement” in the nation’s schools, including compliance reviews to assure equal access to college-prep courses and equal treatment regarding school discipline.¹⁶³ The Department’s Office for Civil Rights (OCR), as of October 2010, was reviewing violations regarding English language learners in eight school districts while the Justice Department has opened fifteen similar investigations since January 2009.¹⁶⁴ OCR has launched five compliance reviews on racial disparities in school discipline while applying a disparate-impact analysis, a course of action that some civil rights leaders maintain was neglected during the previous Administration.¹⁶⁵ In October 2010, OCR issued guidelines on school bullying as a possible violation of civil rights laws.¹⁶⁶ These actions, focused on educational procedures, are indeed noteworthy and hopefully will serve as a bulwark against discriminatory practices in the schools. Nonetheless, they do not negate equity-based concerns over other federal initiatives, especially as they relate to conditions on federal funding that directly affect educational quality in a more substantive way.

161. President Lyndon B. Johnson, Special Message to Congress, *Toward Full Educational Opportunity* (Jan. 12, 1965), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=27448>.

162. Byron York, *Obama’s Zealous Civil Rights Enforcer Gets Busy*, THE EXAMINER (Aug. 6, 2010, 2:00 AM), <http://washingtonexaminer.com/print/politics/obamao39s-zealous-civil-rights-enforcer-gets-busy>.

163. Arne Duncan, U.S. Sec’y of Educ., *Crossing the Next Bridge: Remarks on the 45th Anniversary of “Bloody Sunday” at the Edmund Pettus Bridge, Selma, Alabama* (Mar. 8, 2010), available at <http://www2.ed.gov/print/news/speeches/2010/03/03082010.html>.

164. Mary Ann Zehr, *ELL Civil Rights Probes Span from Coast to Coast*, LEARNING THE LANGUAGE (Oct. 7, 2010, 2:54 PM), http://blogs.edweek.org/edweek/learning-the-language/2010/10/ell_civil_rights_probes_span_c.html.

165. Mary Ann Zehr, *School Discipline Inequities Become a Federal Priority*, EDUC. WK., Oct. 13, 2010, at 15.

166. Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. (Oct. 26, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

CONCLUSION

In sorting through the issues raised in current education debates, one senses that we are living through a transformative moment in American schooling. The affirmative move in program funding and conditions away from equality to productivity, with direct curricular implications, is cutting deeply into the nation's thinking on educational purposes and the federal government's role in shaping education policy. Never before have policymakers expected Americans uniformly to embrace "results," defined in terms of measurable achievement, as the overarching goal of public schooling.

Looking back at other key historic moments, this turn is indeed striking. A century ago, assimilation was the primary objective. Helping children "become American" simply meant English language proficiency and acceptance of society's cultural norms and political values. When the Great Society programs changed that objective to access, the project was to level the playing field, often by allocating additional funds so that students could effectively benefit from programs appropriate to their needs. Both of these purposes unquestionably have merit. Nonetheless, each standing alone and pushed to the "extreme" ultimately proved inadequate and demanded a rethinking of the school's role in society.¹⁶⁷

To be sure, academic achievement is a central purpose of schooling. And while social factors—including wealth, parental expectations, community social capital, and family stability—undeniably affect student test scores, schools need to be held accountable at least in part for student learning. Measuring the quality of schools simply by the resources that they receive shortchanges the students they are designed to serve. This is especially the case for black and Hispanic students whose test scores remain lower and whose dropout rates remain higher than those of their white and Asian counterparts.¹⁶⁸

Whether the Obama Administration's pending *Blueprint for Reform* or its civil rights enforcement efforts will survive a politically divided Congress remains a question. There already are signs that the now Republican-led

167. GRAHAM, *supra* note 9, at 160–61.

168. See SUSAN AUD, MARY ANN FOX & ANGELINA KEWALRAMANI, NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T EDUC., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS (2010), available at <http://nces.ed.gov/pubs2010/2010015.pdf> (examining the academic progress made by racial minority students and the persistent challenges that they face as compared with their white counterparts); PAUL E. BARTON & RICHARD J. COLEY, THE BLACK-WHITE ACHIEVEMENT GAP: WHEN PROGRESS STOPPED 5–6 (2010), available at <http://www.ets.org/Media/Research/pdf/PICBWGAP.pdf>.

House of Representatives will not enact the *Blueprint*.¹⁶⁹ Yet one thing is certain: the pendulum will continue to swing toward the pole of productivity. As it does, we must not lose sight of *Brown*'s dual promise to provide equal opportunities to all students regardless of individual circumstances or group identity as well as to promote democratic participation. As political leaders continue to roll out achievement-based proposals, we must avoid what appears to be a misguidedly narrow focus, understanding that schooling has multiple purposes—not the least of which are those underscored in the Court's groundbreaking decision.

In the end, we should strive toward designing an education agenda that incorporates, in a measured, way the political vision of the early common school and the social awareness of post-*Brown* reforms, while still maintaining the nation's competitive edge in the global economy.

169. Sam Dillon, *New Challenges for Obama's Education Agenda in the Face of a G.O.P.-Led House*, N.Y. TIMES, Dec. 12, 2010, at A36.