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"Settling" *Brown*'s Promise: Seeking More Equal Access to Quality Education Through Settlement

Rachel Dow

ABSTRACT

Education is universally acknowledged as fundamentally important. Yet, education advocates have long struggled to bring about effective school reform through both legislative and judicial avenues for a myriad of reasons including budgetary constraints, a lack of consensus regarding what reforms are most effective, and racist perceptions of reform. In recent years, school reform litigation efforts have been met by a judiciary that is increasingly unwilling to even entertain claims of educational harms. But in California, education reform advocates have found success bringing lawsuits that focus on discrete harms to a limited group of students that stem from specific educational resource inadequacies. In these cases, not only has the State been willing to settle, but the negotiated remedy has also been more extensive than that sought in the original complaint.

In this Comment, I argue bringing these discrete cases with the intention to settle is the most assured avenue to secure relief in school reform litigation. I also submit that the need for settlement to achieve school reform is alarming as it reflects the increasingly limited opportunities for students of color and low-income students to demand and secure their right to a meaningful education. Consequently, settlement underscores just how far this country has moved away from *Brown*'s promise of an equal education for all students.

AUTHOR

J.D. 2022, University of California Los Angeles, School of Law.

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INTRODUCTION

> "Over the past fifty years we have learned and relearned that *Brown v. Board of Education* was not a victory of institutional and structural biases and racism, but one battle in a long and continuing struggle."[1]

In its landmark decision in *Brown v. Board of Education* nearly seventy years ago, the U.S. Supreme Court concluded, "in the field of public education the doctrine of 'separate but equal' has no place."[2] *Brown* declared education to be "a right which must be made available to all on equal terms." The case also cemented the importance of education in American society by articulating that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[3]

But today's schools, including those in liberal California, are far from equal. By some measures, California is the most segregated state for both Black[4] and Latinx students.[5] In 2020, 95 percent of Black students in California attend schools that are at least 50 percent non-white.[6] In 2019, the California Attorney General even sued a Bay Area school district for "establish[ing] an intentionally

1. Jeannie Oakes & Martin Lipton, *"Schools That Shock the Conscience"*: Williams v. California *and the Struggle for Education on Equal Terms Fifty Years After* Brown, 6 AFR.-AM L. & POL'Y REP. 152, 152; 11 ASIAN L.J. 234, 234; 15 BERKELEY LA RAZA L.J. 25, 25; 19 BERKELEY WOMEN'S L.J. 353, 353; CALIF. L. REV. (2004). This title was inspired by both Kimberly Jenkins Robinson, *Resurrecting the Promise of* Brown*: Understanding and Remedying How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787 (2010) and Thomas Saunders, *Settling Without "Settling": School Finance Litigation and Governance Reform in Maryland*, 22 YALE L. & POL'Y REV. 571 (2004).
2. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).
3. *Id.* at 493.
4. Gary Orfield & Danielle Jarvie, UCLA C.R. Project, Black Segregation Matters: School Resegregation and Black Educational Opportunity 31 (2020), https://www.civilrightsproject.ucla.edu/research/k-12- education/integration-and-diversity/black-segregation-matters-school-resegregation-and-black-educational-opportunity/BLACK-SEGREGATION-MATTERS-final-121820.pdf [https://perma.cc/8B2F-PX4A] (finding 51 percent of Black students in the state attend schools that are at least 90 percent non-white).
5. Gary Orfield & Jongyeon Ee, UCLA C.R. Project, Segregating California's Future: Inequality and Its Alternative 60 Years After Brown v. Board of Education 31 (2014), https://www.civilrightsproject.ucla.edu/ research/k-12-education/integration-and-diversity/segregating-california2019s-future-inequality-and-its-alternative-60-years-after-brown-v.-board-of-education/orfield-ee-segregating-california-future-brown-at.pdf [https://perma.cc/3S5X-NJS2] (finding more than 50 percent of California's Latinx students attend "intensely segregated" schools).
6. ORFIELD & JARVIE, *supra* note 4, at 31.

segregated school."[7] The state's test scores reflect a similarly tragic landscape. In 2019, white students scored at least twenty-five percentage points higher in both math and reading proficiency than their Black and Latinx peers.[8] When delineated by gender, the disparities become even greater. Three of every four Black boys do not meet reading and writing standards.[9]

Brown focused on the unequal resources provided to Black students attending segregated schools as the driving cause of educational inequalities.[10] But after more than three decades of the resulting integration efforts achieving little success, school reform litigation[11] yet again returned to bringing claims focused on unequal resources provided to low-income students and students of color.[12] After initial success, these claims premised on unequal resources were met with an outpouring of judicial recalcitrance. Courts became increasingly unwilling to hear school reform cases. When they did, courts created a stream of unfavorable precedent through their reluctance to hold systems unconstitutional, let alone find that plaintiffs asserted a judiciable harm.[13]

In response to courts' decreasing eagerness in adjudicating the traditionally broad school reform cases, education advocates in California began to bring

7. Complaint at 3, People v. Sausalito Marin City Sch. Dist., No. CGC-19-578227 (Super. Ct. S.F. Cnty. 2019). The case was ultimately settled, with the district agreeing to a desegregation plan. Final Judgement at 2, People v. Sausalito Marin City Sch. Dist., No. CGC-19-578227 (Super. Ct. S.F. Cnty. 2019). For a description of the three-year investigation and overview of settlement agreement, see Dana Goldstein & Anemona Hartocollis, *'Separate Programs for Separate Communities': California School District Agrees to Desegregate*, N.Y. TIMES (Aug. 9, 2019), https://www.nytimes.com/2019/08/09/us/sausalito-school-segregation.html [https://perma.cc/ZTB2-XFC4].

8. Ricardo Cano, *Mind the Achievement Gap: California's Disparities in Education, Explained*, CALMATTERS (June 23, 2020), https://calmatters.org/explainers/achievement-gap-california-explainer-schools-education-disparities-explained [https://perma.cc/PT2V-LQ45] (finding math proficiency for white, Black, and Latinx students at 54 percent, 20 percent, and 28 percent, and reading proficiency at 65 percent, 33 percent, and 40 percent respectively).

9. Matt Levin, *Data Exclusive: 75 Percent of Black California Boys Don't Meet State Reading Standards*, CALMATTERS (July 19, 2019), https:// calmatters.org/education/2017/05/data-exclusive-75-of-black-california-boys-dont-meet-reading-standards [https://perma.cc/B84N-JY2N] (finding only 24 percent of Black boys proficient in reading and writing as compared to 38 percent of Black girls, 59 percent of white boys, and 70 percent of white girls).

10. Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954).

11. In this Comment, I will use the broader term "school reform litigation," as opposed to "school finance litigation," in order to include desegregation and other nonfinance lawsuits. The bulk of the cases I discuss are school finance lawsuits.

12. *E.g.*, Rose v. Council for Better Educ., 790 S.W.2d 186, 213 (Ky. 1989) (finding the Kentucky public school financing scheme violated the state's constitution).

13. *See, e.g.*, Campaign for Quality Educ. v. State, 209 Cal. Rptr. 3d 888, 892 (Cal. Ct. App. 2016) (holding there was no right to education of "some quality" under the California Constitution).

discrete, resource centered lawsuits that focused on a small number of plaintiffs in a small number of schools.[14] These cases have largely settled, thus providing millions of dollars and new regulations to California's most underperforming and underresourced schools. While this strategy has seen much success in California, whether state defendants will continue to be willing to settle and for how long remain open questions. In the likely event that this strategy is eventually met with resistance, it is unclear what alternative litigation opportunities remain for plaintiffs seeking to reform our education system in the quest towards equity. As judicial remedies continue to evaporate and spending efforts in California remain eviscerated by Proposition 13 and its resulting limitations on generating revenue from property taxes, school reform advocates will need to look at avenues of change that exist outside of the law: grassroots organizing, retooling school boards, and the impossible task of convincing communities that education is a societal good, not a private one.

In this Comment, I argue that plaintiffs in California should allege claims focused on discrete resource inadequacies suffered by a limited number of students with the intention of seeking settlement. I refer to this strategy as the "settlement strategy." Part I of this Comment provides a history of school reform efforts in California by discussing California's judicial, ballot initiative, and legislative school reform history.

Part II examines school reform litigation and the barriers to reform that litigation erects. This Part first discusses why school reform litigation is necessary, then describes the waves of school reform litigation since the 1970s. Finally, I analyze the pitfalls of school reform litigation, including separation of powers concerns, a history of unsuccessful judicial activism, and the creation of unfavorable precedent.

Part III argues that the settlement strategy is the most assured pathway by which plaintiffs can achieve school reform in California today because settlement mitigates the political concerns associated with school reform and judicial intervention. I argue that settlement creates a role for the judiciary, legislature, and executive without implicating separation of powers concerns, avoids perceptions of advocacy in both the judiciary and legislature, and compensates for courts' limited institutional capacity to effectuate school reforms. Furthermore, by avoiding drawn out litigation, settlement circumvents the risk of creating unfavorable precedent, is both time and cost efficient for all parties, provides the

14. The overwhelming majority of these cases have been brought by Mark Rosenbaum of Public Counsel's Opportunity Under Law Project and formerly with the ACLU of Southern California.

fastest potential for relief, and fosters negotiations that both allow for nonparty participation and secure relief that is more extensive than that originally sought. Part III concludes with an examination of the history of school reform settlements in California.

Part IV offers a broad critique of the ways school reform efforts continue to disregard students of color and low-income students. This Part asserts that American society has failed to live up to *Brown*'s promise of equal education and will continue to do so as the number of opportunities for school reform, particularly for students of color, continues to shrink. First, Part IV provides research emphasizing the racially charged public perception of school reform efforts. Next, this Part focuses on broader systemic challenges facing students of color including nonwhite districts' lack of legislative and judicial power and the nationwide retreat from integration. Finally, this Part discusses how settlement can mitigate the racially charged aspects of school reform efforts, be responsive to external events, and succeed in a wide variety of social and political contexts both in California and in states across the country.

I. CALIFORNIA'S HISTORY OF SCHOOL REFORM

Seventeen years after *Brown*, the California Supreme Court articulated, "education is the lifeline of both the individual and society."[15] Despite its recognition of the importance of education, California struggles to provide an equitable, let alone adequate, education to many of its students. California's history of judicial decisions, ballot initiatives, and legislative school reform efforts makes plain the daylight between the state's acknowledgment of the fundamental importance of education and the action required to make equal access to education a reality.

A. Judicial History

The judicial history of school reform litigation in California consists of three main eras: (1) the *Serrano* litigation in the 1970s; (2) the resurgence of school reform litigation in the 1990s; and (3) the most recent litigation, beginning in 2016, focusing on discrete claims. The *Serrano* litigation established the right to education under the California Constitution. The resurgence in the 1990s focused on establishing the right to an adequate education, as opposed to an equal education. The most recent litigation has moved away from

15. Serrano v. Priest (*Serrano I*), 487 P.2d 1241, 1256 (Cal. 1971).

adequacy claims and instead emphasizes discrete resource disparities amongst schools in order to secure resources for the least advantaged students.

With the California Supreme Court's 1971 decision in *Serrano v. Priest* (*Serrano I*), California became the first state to find its public school financing system unconstitutional.[16] At the time, California public schools were largely funded by local property taxes.[17] As a result, wealthy areas could generate more revenue for their local schools while maintaining a lower property tax rate.[18] As the *Serrano I* court highlighted, residents of Baldwin Park paid a 5.48 percent tax rate in order to expend $577.49 per pupil whereas residents of Beverly Hills paid only a 2.38 percent tax rate and could still expend $1,231.72 per pupil.[19] The majority of Beverly Hills residents are white,[20] whereas the majority of Baldwin Park residents are Latinx.[21]

The *Serrano I* court ultimately held that the school financing system was unconstitutional under both the U.S. and California constitutions' equal protection clauses.[22] The court found the financing scheme violated federal equal protection principles because the right to education is a fundamental interest.[23] Furthermore, the school finance systems in question discriminated on the basis of wealth,[24] and were not justified by a compelling state interest.[25] While the *Serrano*

16. *Id.* at 1263.
17. *Id.* at 1246. At the time, over 90 percent of public school funds came from either local district taxes on real property or aid from the State School Fund, which ensured that each school district received a basic level of funding per pupil. *Id.* Local tax on real property tax was by far the major source of school revenue. *Id.*
18. *Id.* at 1245 ("[A]s a direct result of the financing scheme…[parents in less wealthy areas] are required to pay a higher tax rate than taxpayers in many other school districts in order to obtain for their children the same or lesser educational opportunities.").
19. *Id.* at 1248, 1250.
20. U.S. Census Bureau, *Beverly Hills Quick Facts*, https://www.census.gov/quickfacts/fact/table/US/RHI125219#RHI125219 [https://perma.cc /DUX3-7CSY] (last accessed June 1, 2021) (reporting that residents of Beverly Hills are 76 percent white).
21. U.S. Census Bureau, *Baldwin Park Quick Facts*, https://www.census.gov/quickfacts/fact/table/baldwinparkcitycalifornia/PST045219 [https:// perma.cc/N5BK-P988] (last accessed June 1, 2021) (reporting that residents of Baldwin Park are 75 percent Latinx).
22. *Serrano I,* 487 P.2d at 1244 (concluding that "[t]he financing scheme[] fails to meet the requirements of the equal protection clause of the Fourteenth Amendment of the United States Constitution and the California Constitution").
23. *Id.* at 1258 ("We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest.'").
24. *Id.* at 1255 (finding "that the school financing system discriminates on the basis of the wealth of a district and its residents").
25. *Id.* at 1249 ("[I]n cases involving suspect classifications or touching on fundamental interests, the court . . . subject[s] the classification to strict scrutiny. Under the strict standard [the state must establish] not only that it has a Compelling interest which justifies the law but that the distinctions drawn . . . are Necessary to further its purpose.") (internal cites omitted).

I court made clear that reliance on local property taxes to finance public schools violated equal protection, it did not impose any remedy.[26] Nevertheless, as a result of *Serrano I*, revenue generated from local property taxes could be redistributed throughout the state for the purpose of equalization education spending.[27] The promise of a more equal school system became seemingly more attainable.

Five years later, the California Supreme Court heard *Serrano* again (*Serrano II*).[28] After *Serrano I*, the California Legislature passed SB 90 and AB 1267.[29] Although the bills provided an increase in the minimum per-pupil amount, both bills retained the property tax oriented foundation of the school financing system that *Serrano I* found unconstitutional.[30] In the years between *Serrano I* and *Serrano II*, the U.S. Supreme Court's holding that wealth is not a suspect classification had undermined *Serrano I*'s federal equal protection holding.[31] Nevertheless, the California Supreme Court found California's school financing system continued to violate the California Constitution[32] and reaffirmed the holding in *Serrano I*.[33] Despite the *Serrano* litigation, school funding remained unequal.

26. Kirk Stark & Jonathan Zasloff, *Tiebout and Tax Revolts: Did* Serrano *Really Cause Proposition 13?*, 50 UCLA L. REV. 801, 834 (2003) (explaining that *Serrano I* did not impose any remedy).
27. *Id.* at 811.
28. Serrano v. Priest (*Serrano II*), 557 P.2d 929 (Cal. 1976).
29. *Id.* at 931.
30. *Id.* at 935.
31. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18 (1973) (finding the Texas school financing system, which was nearly identical to California's financing scheme pre-*Serrano*, constitutional because wealth is not a suspect classification and education is not a fundamental interest within the meaning of the Fourteenth Amendment).
32. *Serrano II*, 557 P.2d at 949 ("We . . . think it is clear that *Rodriguez* undercuts our decision in *Serrano I* . . . . However . . . our decision in *Serrano I* was based not only on the provisions of the federal Constitution but on the provisions of our own state Constitution as well."). Federal courts have largely foreclosed any opportunity to assert the right to an education under the U.S. Constitution. *See, e.g.*, *Rodriguez*, 411 U.S. at 18 (holding education is not a fundamental interest); Milliken v. Bradley, 418 U.S. 717, 752–53 (1974) (prohibiting the use of a multidistrict desegregation remedy); Gary B. v. Whitmer, 957 F.3d 616 (6th Cir. 2020), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020) (vacating the finding that the Due Process Clause provides students with a fundamental right to a basic education). For an argument that the Constitution does provide a federal right to an adequate education, see Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 96 (2013) (arguing the Constitution provides a federal right to an adequate education in the same way it does the right to bear arms in self-defense and the right to have an abortion).
33. *Serrano II*, 557 P.2d at 951.

Spurred by a nationwide surge of education focused litigation, school reform litigation in California saw a resurgence in the 1990s.[34] In *Butt v. State*, the California Supreme Court held that the State had a constitutional duty to prevent a school from closing six weeks early and thereby depriving its students of "basic educational equality."[35] In April 1991, the Richmond Unified School district announced it planned to end the school year six weeks early because it lacked the funds to complete the school year. Despite finding that the California Constitution did not guarantee a uniform term length, the Court found that closing the school six weeks early would "cause an extreme and unprecedented disparity in educational service and progress."[36] *Butt* continued the California Supreme Court's legacy of protecting students' right to education.

Despite the California Supreme Court's history of promoting school equality,[37] plaintiffs began to encounter strong judicial resistance in 2016. On the same day, the California Supreme Court denied review to two school finance reform cases: *Vergara* and *Campaign for Quality Education*.[38] In *Vergara*, nine

34. This resurgence is credited to the decision in *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989), because the court relied not only on the state constitution's education article but also the education that article requires the state provide. William S. Koski, *The Politics of Judicial Decision-Making in Educational Policy Reform Litigation*, 55 HASTINGS L.J. 1077, 1085–86 (2004); *Rose*, 790 S.W.2d at 189 ("[I]t is crystal clear that the General Assembly has fallen short of its duty to enact legislation to provide for an efficient system of common schools throughout the state. In a word, the present system of common schools in Kentucky is not an 'efficient' one in our view of the clear mandate of [the education article in the state constitution]").

35. Butt v. State, 842 P.2d 1240, 1256 (Cal. 1992).

36. *Id.* at 1252.

37. Even before *Serrano I*, California had upheld a variety of rights involving access to school and an education. *See, e.g.*, Kennedy v. Miller, 32 P. 558, 559 (Cal. 1893) (finding that the education sections of the California Constitution "import[] a unity of purpose, as well as an entirety of operation; and the direction to the legislature to provide 'a' system of common schools means one system which shall be applicable to all the common schools within the state."); Piper v. Big Pine Sch. Dist., 226 P. 926, 930 (Cal. 1924) ("[T]he common schools are doorways opening into . . . [o]pportunities for securing employment . . . . These are rights and privileges that cannot be denied."); Jackson v. Pasadena City Sch. Dist., 382 P.2d 878, 882 (Cal. 1963) ("The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause."); San Francisco Unified Sch. Dist. v. Johnson, 479 P.2d 669, 676 (Cal. 1971) ("Integration of the public schools, presenting prospects of raising the level of educational achievement of blacks without harming that of whites, may serve to overcome this inequality of educational opportunity, and to make possible that acquaintance and companionship necessary to break down racial stereotypes and prevent racial prejudice.").

38. Vergara v. State, 209 Cal. Rptr. 3d 532 (Cal. Ct. App. 2016), *rev. denied* (Aug. 22, 2016); Campaign for Quality Educ., 209 Cal. Rptr. 3d 888 (Cal. Ct. App. 2016), *rev. denied* (Aug. 22, 2016).

public school students sued California alleging that five statutes in the California Education Code governing teacher tenure violated the California Constitution's equal protection guarantee.[39] By constantly being exposed to ineffective teachers, the students claimed they were denied access to an equal opportunity for a quality education.[40] Plaintiffs cited two influential studies. The first study estimated that one year in a classroom with a highly ineffective teacher costs a student $1.4 million in lifetime earnings.[41] The second study determined, based on a study of the "Los Angeles Unified School District (LAUSD)", that students taught by a teacher in the lowest fiftieth percentile of effectiveness lost an estimated 9.5 to 11.5 months of learning compared to students assigned an average teacher.[42] Despite acknowledging the large degree to which ineffective teachers harm a student's ability to access an education, the California Court of Appeal determined that the plaintiffs failed to establish a violation of equal protection because they failed to show that the statutes made any certain group of students more likely to be taught by ineffective teachers.[43] The Court of Appeal did not apply strict scrutiny, even though a fundamental right, education, was at issue.[44] Ultimately, the Court of Appeal held that the five teacher tenure statues at issue did not violate California's constitution.[45]

In *Campaign for Quality Education*,[46] a coalition of nonprofit associations, guardians ad litem for students attending California public schools, several California school districts, and three property taxpayers sued the State of California alleging that the State was in violation of sections 1 and 5 of article IX of the California Constitution.[47] The plaintiffs alleged that all public school children

39. *Vergara*, 209 Cal. Rptr. 3d at 538.
40. *Id.* at 539.
41. *Id.* at 542. Raj Chetty defined highly ineffective teachers as those in the bottom 5 percent based on value-added measurements. *Id.*
42. *Id.* at 542–43.
43. *Id.* at 538. The Court of Appeal thus reversed the trial court which had struck down the five teacher statutes at issue. *Id.*
44. *Compare id.* at 555 (declining to apply strict scrutiny), *with id.* at 560 (Liu, J., dissenting) ("[A]n equal protection challenge may be brought and will trigger strict scrutiny 'whenever . . . the disparate treatment has a real and appreciable impact on a fundamental right or interest.'").
45. *Id.* at 538 ("With no proper showing of a constitutional violation, the court is without power to strike down the challenged statues. The court's job is merely to determine whether the statues are constitutional, not if they are 'a good idea.'").
46. Campaign for Quality Educ. v. State, 209 Cal. Rptr. 3d 888 (Cal. Ct. App. 2016). On appeal, *Campaign for Quality Education* was consolidated with *Robles-Wong v. State*, No. RG10515768 (Super. Ct. Alameda Cnty. 2010), *dismissed* (Nov. 3, 2011), *appealed* (Aug. 22, 2016).
47. *Campaign for Quality Educ.*, 209 Cal. Rptr. 3d at 891–92.

have a constitutional right to an education of "some quality" and that the legislature had failed to adhere to its constitutional duty by using of an irrational educational funding scheme.[48] The Court of Appeal concluded that there was no "constitutional right[] to an education of 'some quality' for public school children."[49] Furthermore, the court found the language in neither sections 1 nor 5 of article IX included qualitative funding elements that could be enforced by the courts.[50] Thus, the Court of Appeal dismissed the complaint for failure to state a claim for which judicial relief could be provided.[51]

Notably, Justice Mariano-Florentino Cuéllar and Justice Goodwin Liu of the California Supreme Court authored rare dissents to the court's denial of review of both *Vergara* and *Campaign for Quality Education*.[52] In their dissents to both denials of review, the two justices emphasized the importance of the California Supreme Court to hear cases that implicate a fundamental right,[53] acknowledged but rejected any concerns regarding the separation of powers,[54] and lamented the consequences of such unfavorable precedent for future plaintiffs seeking to ensure

48. Id.
49. *Id.* at 891.
50. Id.
51. Id.
52. Justice Chin also disagreed with the denial of review in both *Vergara* and *Campaign for Quality Education* but did not author a dissenting opinion to either denial.
53. *Campaign for Quality Educ.*, 209 Cal. Rptr. 3d at 928 (Liu, J., dissenting) ("We should not leave the schoolchildren of California to wonder whether their fundamental right to education under our state Constitution has real content or is simply hortatory. . . . [Plaintiffs] seek an education system that is truly capable of fulfilling its vital role for all children of the Golden State. These issues . . . deserve this court's full consideration."); Vergara v. California, 209 Cal. Rptr. 3d 532, 565 (Cal. Ct. App. 2016) (Cuéllar, J., dissenting) ("Difficult as it is to embrace the logic of the appellate court on this issue, it is even more difficult to allow the court's decision to stay on the books without review in a case of enormous statewide important. We grant review where necessary to forestall infringement of a fundamental right.").
54. *Vergara*, 209 Cal. Rptr. 3d at 567 (Cuéllar, J., dissenting) ("In considering this case, we must respect the role of the representative branches of government and the public itself in shaping education policy. But our responsibility to honor the court's proper constitutional role makes it as important for us to review a case that merits our attention as it is for us to avoid a dispute beyond the court's purview."); *Id.* at 563–64 (Liu, J., dissenting) ("As the state's highest court, we owe the plaintiffs in this case, as well as schoolchildren throughout California, our transparent and reasoned judgment on whether the challenged statutes deprive a significant subset of students of their fundamental right to education and violate the constitutional guarantee of equal protection of the laws."); *Campaign for Quality Educ.*, 209 Cal. Rptr. 3d at 929 (Cuéllar, J., dissenting) ("We consider that question against the backdrop of separation of powers principles that are vital to our government. Yet never have these principles meant that we should strain to avoid our responsibility to interpret the state Constitution simply because the right at issue touches on concerns the Legislature might ultimately address, or because the task of resolving a case implicating the right to education demands careful attention to the proper role of courts as well as our sister branches.").

their right to an education under the California Constitution.[55] Justice Liu also highlighted the extent to which the denials of review signaled a departure from the California judiciary's longstanding commitment to ensuring the right to an education:

> It is regrettable that this court, having recognized education as a fundamental right in a landmark decision 45 years ago, should now decline to address the substantive meaning of that right. The schoolchildren of California deserve to know whether their fundamental right to education is a paper promise or a real guarantee.[56]

B. Proposition 13

In June 1978, California voters approved the infamous Proposition 13.[57] Proposition 13 overhauled the state's property tax system, capping property tax for both residential and commercial property at 1 percent of the "full cash value" of a property.[58] Furthermore, it prohibited any increase in valuation of a property's full cash value beyond 2 percent per year.[59]

Proposition 13 was the result of a perfect storm in California. In the wake of skyrocketing taxes and inflation, growing government control and distrust, large

55. *Vergara*, 209 Cal. Rptr. 3d at 564 (Cuéllar, J., dissenting) ("The appellate court['s] [decision] erected a novel barrier—not only for . . . plaintiffs but for all California litigants seeking to raise equal protection claims based on a fundamental right.").

56. *Campaign for Quality Educ.*, 209 Cal. Rptr. 3d at 921 (Liu, J., dissenting) (internal citation omitted).

57. CAL. CONST. art. XIIIA, §§ 1–6.

58. CAL. CONST. art. XIIIA § 1(a). "Full cash value" means the valuation of real property at its 1975 value or the appraised value when "purchased, newly constructed, or a change in ownership has occurred. . . ." Art. XIIIA, § 2(a).

59. CAL. CONST. art. XIIIA § 2(b). For example, if someone bought a home in 1980 for $100,000, their property taxes for that first year would be $1000 or 1 percent of the full cash value. In 1986, the house's valuation could not go beyond $110,498 because of Prop 13's limitation on valuation increases of 2 percent per year. The property taxes in 1986 would thus be $1,104.98 or 1 percent of that year's valuation. Conversely, someone who bought the identical home next door in 1986 for $150,000 would be paying $1500 in property taxes the same year. This system not only restricts the amount of revenue a municipality can raise in property taxes but also leads to neighbors paying wildly uneven property taxes for nearly identical property. In one instance, a man paid 40 percent less in property taxes than his neighbor. *See* Matt Levin, *Similar Homes, Different Taxes: Is Prop. 13 Fair to New Homeowners?*, PROP13 (Oct. 22, 2018), http://projects.scpr.org/prop-13/stories/fairness [https://perma.cc/EFW4-9N2Q] (reporting that one neighbor paid $7000 in property taxes while their neighbor paid roughly $13,000).

demographic shifts, and school integration efforts,[60] California voters passed Proposition 13 in 1978. As school reform advocate Jonathan Kozol argued:

> As soon as Californians understood the implications of the plan [AB 65]—namely, that funding for most of their public schools would henceforth be approximately equal—a conversative revolt surged throughout the state. . . . Proposition 13, as the tax cap would be known, may be interpreted in several ways. One interpretation was described succinctly by a California legislator: "This is the revenge of wealth against the poor. 'If schools must actually be equal,' they are saying, 'then we'll undercut them all.'"[61]

The severe inflation of the 1970s caused property taxes, as well as other taxes such as income tax, to rise dramatically.[62] By 1978, property taxes in California were approximately 52 percent above the national average.[63] In San Francisco, prices for single-family homes grew by an annual rate of 18 percent between 1973 and 1978.[64] In Los Angeles, prices rose even faster—over 17 percent in just one year.[65] Property in California was assessed every two to three years, so many people experienced the dramatic rise in their property taxes in "one painful bite."[66]

As inflation soared, there was a growing "loss of faith in the integrity and effectiveness of government."[67] The sparse belief in government is well illuminated by the political and legislative struggles that surrounded the attempts to pass legislation that would bring the state's school financing system into

60. Some argue the demographic shifts resulting from World War II led to desegregation. *See* Michael Finnegan, Seema Mehta & Melanie Mason, *School Busing in Berkeley During Kamala Harris' Childhood Was Voluntary and Volatile*, L.A. TIMES (June 30, 2019, 7:22 PM), https://www.latimes.com/politics/la-na-pol-2020-kamala-harris-berkeley-busing-20190701-story.html [https://perma.cc/8TY8-UW25] ("[The] large influx of African Americans during and after World War II and whites affiliated with UC Berkeley were pulling the local politics to the left, paving the way for desegregation. Black leaders raised concerns about segregation in the city starting in the late 1950s.").

61. William A. Fischel, *How* Serrano *Caused Proposition 13*, 12 J.L. & Pol. 607, 621 (1996) (quoting Kozol); *see also* JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 220 (1991).

62. DAVID O. SEARS & JACK CITRIN, TAX REVOLT: SOMETHING FOR NOTHING IN CALIFORNIA 21 (1982). Right before the passage of Proposition 13, the overall per capita burden of state and local taxes in California was exceeded only in Alaska and New York. *Id.*

63. *Id.*

64. *Id.* at 22.

65. *Id.* at 22, 28.

66. *Id.* at 22.

67. *Id.* at 24.

compliance with *Serrano*.[68] After *Serrano II*, the California Legislature approved AB 65 in order to comply with the court's requirement that wealth-related funding disparities had to be within $100 of the state average per pupil spending.[69] Yet, under AB 65, funding disparities for 90 percent of students were within $200 of the state average per pupil spending.[70] Nevertheless, AB 65 put the overwhelming control of education funding in the state's hands, as opposed to local governments. Increased control by the state led to "'a growing fear among some that the cherished American concept of local school control w[ould] be lost and that fiscal equalization w[ould] reduce all schools to a level of common mediocrity.'"[71] At the same time, the State Assembly passed AB 999, a tax relief package.[72] But the State Senate failed to pass the bill, thus failing to make tax relief a reality.[73] As a result, California residents faced skyrocketing taxes, a loss of local control over school funding, and a constitutionally insufficient attempt to equalize per pupil expenditures.

In addition to growing fiscal and political issues, California was experiencing an incredible demographic shift. As a consequence of World War II, large numbers of Black Americans migrated to California's port cities of San Francisco, Oakland, Richmond, and Los Angeles.[74] Between 1940 and 1945, Richmond's

68. Stark & Zasloff, *supra* note 26, at 849 (describing the political and legislative struggles in 1977 as a "perfect storm" of "weak leadership," ineffective governance, and "competing budgetary pressures").

69. *See* 1977 Cal. Stat. 2675; Serrano v. Priest (*Serrano II*), 557 P.2d 929, 929 (affirming the trial court's judgment that wealth-related disparities between school districts should amount to "considerably" less than $100.00 per pupil within six years); *see also* JON SONSTELIE, ERIC BRUNNER & KENNETH ARDON, FOR BETTER OR FOR WORSE? SCHOOL FINANCE REFORM IN CALIFORNIA 47 (2000), https://www.ppic.org/content/pubs/report/R_200JSR.pdf [https://perma.cc/54MD-YRJJ] (summarizing the reasoning of *Serrano II* trial court judge, Judge Bernard Jefferson).

70. Stark & Zasloff, *supra* note 26, at 845 ("90 percent of pupils were equalized within $200—double the *Serrano* [*II*] mandate."). The California Supreme Court denied review to a challenge to AB 65 in December 1977. *Id.*

71. Robert Reinhold, *John Serrano Jr., et al, and School Tax Equality*, N.Y. TIMES (Jan. 10, 1972), https://www.nytimes.com/1972/01/10/archives/ john-serrano-jr-et-al-and-school-tax-equality-serrano-jr-et-al-and.html [https://perma.cc/P2G9-46FF].

72. Stark & Zasloff, *supra* note 26, at 843. AB 999 was estimated to cost California $4.8 billion over five years. *Id.*

73. *Id.* at 848–49.

74. Gary Kamiya, *When WWII Brought Blacks to the East Bay, Whites Fought for Segregation*, S.F. CHRON. (Nov. 23, 2018, 3:11 PM), https:// www.sfchronicle.com/chronicle_vault/article/When-WWII-brought -blacks-to-the-East-Bay-whites-13417228.php [https://perma.cc/ 6UWW-WJNB]; Arthur C. Verge, *The Impact of the Second World War on Los Angeles*, 63 PAC. HIST. REV. 289, 303 (1994) (explaining that from 1940 to April 1944, the Black population in Los Angeles grew from 55,114 to 118,888).

Black population grew from 270 to 5673, Oakland's Black population grew from 8462 to 21,770, and San Francisco's Black population grew from less than 5000 to 32,000.[75] In Los Angeles, the Black community more than doubled.[76]

California also saw a large increase in its non-European immigrant population. In the decade leading up to the passage of Proposition 13, immigrants from Asia, Africa, and Central or South America began to outnumber those from European nations.[77] The Latinx population grew fourfold between 1970 and 1998.[78] The Asian population grew over fivefold during the same period.[79]

California's expanding diversity coincided with the state and national push for desegregation.[80] Despite more publicly favored integration methods like low-income housing in middle-income areas or changed school boundaries, busing became the dominant method of integration across the United States.[81] In Northern California, Berkeley sought to become the first city to fully desegregate

75. Kamiya, *supra* note 74.

76. Verge, *supra* note 74, at 312 (discussing the complicated social and economic legacy of World War II on Los Angeles).

77. Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 276 (1996) (arguing the passage of the Immigration and Nationality Act of 1965 was motivated more by a desire for racial equality than as previously understood). This surge in non-European immigration resulted from Congress passing legislation that effectively eliminated the race and national origin quota system which had overwhelming prioritized immigration from Northern and Western Europe. Immigration and Nationality Act of 1965 (amending the Immigration and Nationality Act of 1952); *see also* Tom Gjelten, *The Immigration Act That Inadvertently Changed America*, ATLANTIC (Oct. 2, 2015), https://www.theatlantic.com/politics/archive/2015/10/immigration-act-1965/408409 [https://perma.cc/BD6Q-HSF8]. *See generally* 8 U.S.C. §§ 1101-1537 (governing immigration to and citizenship in the United States).

78. JENNIFER CHENG, ELLIOT CURRIE, DANIEL FRAKES, HANS P. JOHNSON, ELIZABETH BRONWEN MARCO, DEBORAH REED, BELINDA I. REYES, JOSE SIGNORET, & JOANNE SPETZ, A PORTRAIT OF RACE AND ETHNICITY IN CALIFORNIA: AN ASSESSMENT OF SOCIAL AND ECONOMIC WELL-BEING 8 (Belinda I. Reyes ed., 2001), https://www.ppic.org/content/pubs/report/R_201BRR.pdf [https://perma.cc/VR74-XQTF].

79. *Id.*

80. *See* Stark & Zasloff, *supra* note 26, at 837 (claiming desegregation "exacerbated voters' perceptions of inevitable egalitarianism."). Seven years before *Brown*, California began integrating schools as a result of *Westminster v. Mendez*, 161 F.2d 774, 781 (9th Cir. 1947) (finding the segregation of Mexican American school children violated the Fourteenth Amendment).

81. Nellie Bowles, *Kamala Harris and Classmates Were Bused Across Berkeley. The Experience Changed Them.*, N.Y. TIMES (June 30, 2019), https://www.nytimes.com/2019/06/30/us/politics/kamala-harris-berkeley-busing.html [https://perma.cc/3EAB-PTM5] (explaining Berkeley's busing program). According to a 1973 Gallup poll, only 9 percent of Black people and 5 percent of white people preferred busing over alternative methods. *Id.*

schools by busing.[82] According to one study, Berkeley's two-way busing program, where both Black and white students would be bused, was "the boldest desegregation plan yet devised in a city exceeding 100,000 population."[83] The superintendent of Berkeley Unified School District declared in 1967, "We will set an example for all the cities of America . . . . The children of Berkeley will grow up in a community where justice is part of their pattern of life."[84]

Despite the high hopes for integration by some, busing efforts were met with strong resistance. In Berkeley, there was an attempt to recall the School Board members who supported desegregation.[85] In Los Angeles, the mandatory busing program was abandoned after three years as a result of court fights and the mass number of white families who moved to suburban districts without busing programs or pulled their children out of public school altogether.[86] Elsewhere in the country, the response to busing grew violent.[87]

As a state constitutional amendment, Proposition 13's requirements applied to all legislation, such as AB 65.[88] Before Proposition 13, California relied on local property taxes as the main source of funding for local government and public schools. Because Proposition 13 severely reduced revenue, the legislature was

82. *50th Anniversary of Berkeley's Pioneering Busing Plan for School Integration*, BERKELEY PUB. SCHS. (Dec. 17, 2018), https://www. berkeleyschools.net/2018/12/50th-anniversary-of-berkeleys-pioneering-busing-plan-for-school-integration [https://perma.cc/S5ER -B478] (describing Berkeley's plan for desegregation and the city's response). While other districts in the country had previously attempted to integrate, Berkeley was the first larger city with a large percentage of Black students that opted for a two-way busing program. *Id.*

83. *Id.* (quoting a 1968 study by UC Riverside and Riverside Unified School District).

84. Bowles, *supra* note 81 (quoting the superintendent of Berkley School District).

85. *50th Anniversary of Berkeley's Pioneering Busing Plan for School Integration*, *supra* note 82 (although the recall petition gained enough signatures to hold an election, 61 percent ultimately voted against recalling the School Board).

86. Robert Lindsey, *Los Angeles Busing Ends After 3 Years*, N.Y. TIMES (Apr. 21, 1981), https://www.nytimes.com/1981/04/21/us/los-angeles-busing-ends-after-3-years.html [https://perma.cc/3EZU-BMTP] (describing the switch from the mandatory busing program to a voluntary program); Howard Blume, *School Busing and Race Tore L.A. Apart in the 1970s. Now, Kamala Harris Is Reviving Debate*, L.A. TIMES (June 28, 2019, 1:09 PM), https://www.latimes.com/local/lanow/la-me-busing-schools-los-angeles-harris-biden-20190628-story.html [https://perma.cc/54ET-AQZN] (explaining Los Angeles's attempt at a busing program and the city's response).

87. In Boston, for example, Black students required police escorts when they were bused into predominately white schools because mobs as large as five hundred gathered outside the schools each morning. John Kifner, *Violence Mars Busing in Boston*, N.Y. TIMES (Sept. 13, 1974), https://www.nytimes.com/1974/09/13/archives/violence-mars-busing-in-boston-mayor-restricts-gatherings-to.html [https://perma. cc/X5LH-8M5N] (describing the ongoing violent response to Boston's busing efforts).

88. Fischel, *supra* note 61, at 612.

forced to use its budget surplus to bail out local governments and school districts.[89] The equalized spending goal of the *Serrano* litigation and AB 65 were ultimately met, but at a dramatically reduced level of spending.

The impact of Proposition 13, both directly and indirectly, on education in California cannot be overstated.[90] California public school finance dropped from near the top in national per-pupil spending to near the bottom.[91] Some commentators refer to this drastic drop in spending as the "Mississippification" of California.[92] Through 2015, California's per-pupil spending was 13 percent below the national average.[93] California has continued to find itself in the bottom fifth, if not bottom five, of states in various school spending metrics.[94] The decline in expenditures on public schools also assisted in the vast expansion of private education in California.[95]

Proposition 13 also impacted de facto housing segregation and, consequently, de facto school segregation because "California's patterns of property ownership in the 1970s reflected racial wealth disparities, prior housing and lending discrimination, and recent racialized immigration policy."[96] In their article, *Exclusionary Taxation*, Shayak Sarkar and Josh Rosenthal label Proposition 13, and similar discriminatory tax policies, as "exclusionary

89. *Id.*
90. *See, e.g.*, *id.* at 613 ("Most observers agree that Proposition 13 left California school finance in a shambles.").
91. James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 465 (1999).
92. *See* Louis Sahagun & Duke Helfand, *ACLU Sues State Over Conditions in Poor Schools*, L.A. TIMES (May 18, 2000, 12:00 AM), https://www. latimes.com/archives/la-xpm-2000-may-18-mn-31352-story.html [https://perma.cc/DM5S-7BE8] (quoting then ACLU attorney Mark Rosenbaum, "[t]his is the 'Mississippification' of California's schools, a separate and unequal system for the have-nots"); *see also* PETER SCHRAG, PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE 148–49 (1998) (describing the "Mississippification" of California after Proposition 13).
93. *Proposition 13*, PUB. POL'Y INST. OF CAL., https://www.ppic.org/blog/ tag/proposition-13 [https://perma.cc/FW54-PRFY] (last updated 2021) (detailing the evolution of school spending in California as compared to the country). In a 2017 study, California ranked forty-sixth in the country for per-pupil spending. John Fensterwald, *How Does California Rank in Per-Pupil Spending? It All Depends*, EDSOURCE (Feb. 28, 2017), https://edsource.org/2017/how-does-california-rank-in-per- pupil-spending-it-all-depends/577405 [https://perma.cc/7QAL-P4T6] (providing various metrics and statistics regarding how California ranks in per-pupil spending as compared to the rest of the country).
94. Fensterwald, *supra* note 93.
95. *See* Fischel, *supra* note 61, at 614 (attributing the expansion of private education in California between 1973 and 1979 to both *Serrano* and Proposition 13).
96. Shayak Sarkar & Josh Rosenthal, *Exclusionary Taxation*, 53 HARV. C.R.-C.L. L. REV. 619, 677 (2018).

taxation."[97] Proposition 13 "exclude[s] by entrenching segregated housing patterns (such as by encouraging a lack of mobility), which limit the ability of members of that group to move into certain areas."[98] Proposition 13 entrenched segregated housing patterns by benefitting 1970s homeowners who were overwhelming white,[99] disincentivizing property owners from moving,[100] providing preferential treatment to transfers of property to children[101] and grandchildren,[102] and penalizing newer California homeowners who were and are commonly nonwhite.[103] Because students attend their local public schools, the history of housing segregation entrenched by

97. *Id.* at 623.
98. *Id.* at 623–24.
99. In 1970, 65.2 percent of white families owned homes across the country whereas only 41.6 percent of Black families and 46.2 percent of Latinx families owned homes. F. JOHN DEVANEY, U.S. DEP'T OF COM., TRACKING THE AMERICAN DREAM: 50 YEARS OF HOUSING HISTORY FROM THE CENSUS BUREAU: 1940 TO 1990 29 (1994), https://www.huduser.gov/portal/Publications/pdf/HUD-7775.pdf [https://perma.cc/8JUU-MP9U] (providing national housing trends from 1940 to 1990); *see also* Sarkar & Rosenthal, *supra* note 96, at 670–71 (arguing Proposition 13 has a statistically significant effect favoring white homeowners, particularly long-term owners of high-value homes). Notably, the homeownership gap between Black and white households was larger in 2019 than it was before the passage of the 1968 Fair Housing Act. *See* JUNG HYUN CHOI, ALANNA MCCARGO, MICHAEL NEAL, LAURIE GOODMAN & CAITLYN YOUNG, URBAN INSTITUTE, EXPLAINING THE BLACK-WHITE HOMEOWNERSHIP GAP: A CLOSER LOOK AT DISPARITIES ACROSS LOCAL MARKETS 9 (2019), https://www.urban.org/sites/default/files/publication/101160/explaining_the_black-white_homeownership_gap_2.pdf [https://perma.cc/62KU-L9HZ] (citing the homeownership gap between Black and white households in 2019 as exceeding thirty percentage points).
100. Sarkar & Rosenthal, *supra* note 96, at 672 (describing how Proposition 13, by disincentivizing property owners from moving, "calcifies existing, segregated housing patterns").
101. Cal. Proposition 58 (1986); CAL. REV. & TAX CODE § 63.1.
102. Cal. Proposition 193 (1996); CAL. REV. & TAX CODE § 63.1*; see also* Sarkar & Rosenthal, *supra* note 96, at 673 (noting that the preferential treatment of transfers to children and grandchildren increases the discriminatory effect). Proposition 19, passed by voters in the November 2020 election with 51.1 percent of the vote, will remove such preferential treatment for inheritance of property. *See* Kathleen Pender, *Prop. 19 Passes, but Questions About California Property Tax Measure Remain*, S.F. CHRON. (Nov. 12, 2020 8:19 PM), https:// www.sfchronicle.com/business/networth/article/Prop-19-passes-but -questions-about-California-15722774.php [https://perma.cc/2Y57 -35F3] (discussing the potential impact of Proposition 19 on California's system of property taxation).
103. Sarkar & Rosenthal, *supra* note 96, at 671 (reporting that the Asian American and Hispanic shares of California's population both more than doubled between 1980 and 2015). Because newer California homeowners, who are presumably more likely to be people of color, bought their houses later, the benefit they receive from Proposition 13 will be less than their white neighbors. *Id.*

Proposition 13 permits the continued de facto segregation of the state's public schools.[104]

C. Attempts to Alleviate the Impact of Proposition 13

The impact of Proposition 13 on school funding has led to numerous attempts to amend the school finance system in California. In 1988, ten years after the passage of Proposition 13, voters passed Proposition 98.[105] Proposition 98 added constitutional provisions to establish a minimum guaranteed level of funding, thus establishing a funding floor as opposed to attempting to equalize per pupil spending.[106] In 2012, voters passed Proposition 30, which imposed temporary tax increases to support K–12 and community college education.[107]

The California Legislature has tried an enormous number of legislative avenues to improve education and school funding including: the Charter Schools Act of 1992,[108] the Class Size Reduction Program enacted in 1996,[109] the Public School Accountability Act of 1999,[110] the creation of the California High School Exit Exam in 1999,[111] the adoption of the Common Core State Standards in 2010,[112] and, most notably, the creation of the "Local Control Funding Formula

104. But, even where neighborhoods, and thus schools, are more integrated, white families opt out of public education. JARED SCHACHNER, JOINT CTR. FOR HOUSING STUD. OF HARV. UNIV., RACIAL STRATIFICATION AND SCHOOL SEGREGATION IN THE SUBURBS: THE CASE OF LOS ANGELES COUNTY 3 (2020), https://www.jchs.harvard.edu/sites/default/files/media/imp/harvard_jchs_suburbs_racial_stratification_la_schachner_2020.pdf [https://perma.cc/DB9Y-TTBP] (finding that white and Asian American families in Los Angeles are more likely to opt out of public school when there are higher concentrations of Black and Latinx students).

105. Cal. Proposition 98 (1988); CAL. CONST. art. XVI (codifying Proposition 98).

106. CAL. CONST. art. XVI, § 8. Proposition 98 was amended two years later by Proposition 111, which added new school funding formulas to the Constitution. *Id.*

107. CAL. CONST. art. XIII, § 36(e).

108. CAL. ED. CODE, §§ 47600–47663.

109. CAL. ED. CODE, former §§ 52120.

110. CAL. ED. CODE, §§ 52050–52077 (permitting California's compliance with the federal No Child Left Behind Act of 2001).

111. In 2017, Governor Jerry Brown abolished the exam. *See* Theresa Harrington & Louis Freedberg, *California Joins Trend Among States to Abandon High School Exit Exam*, EDSOURCE (Oct. 12, 2017), https://edsource.org/2017/california-joins-trend-among-states-to-abandon-high-school-exit-exam/588640 [https://perma.cc/GQ6J-LRLD].

112. Paul Warren & Patrick Murphy, *Implementing the Common Core State Standards in California*, PUB. POL'Y INST. CAL. (Apr. 2014), https://www.ppic.org/publication/implementing-the-common-core-state-standards-in-california/#:~:text=The%20Common%20Core%20State%20Standards%20(CCSS)%E2%80%94adopted%20in%202010,off%20to%20a%20slow%20start [https://perma.cc/3M24-L329].

(LCFF)" in 2013.[113] LCFF was the first major attempt to revamp California school funding since Proposition 13.[114] While LCFF has helped lead to more equitable funding across districts,[115] access to other revenue streams will continue to perpetuate the financial divide across public schools in California.[116]

113. CAL. ED. CODE, §§ 42238.02–42301.1. "Local Control Funding Formula (LCFF)" seeks to establish equitable school funding based on student need, greater local level decision making, and utilization of metrics other than test scores to measure school achievement. *Local Control Funding Formula Guide*, EDSOURCE (Feb. 2016), https://mk0edsource0y23p672y.kinstacdn.com/wp-content/uploads/2016/02/lcff-guide-print-version.pdf [https://perma.cc/Y35L-DZRY].

114. By the time it is fully implemented, LCFF should increase funding for K–12 education by $18 billion. *California's Local Control Funding Formula Is Increasing Student Achievement and Graduation Rates*, LEARNING POL'Y INST. (Feb. 2, 2018), https://learningpolicyinstitute.org/press-release/californias-local-control-funding-formula-increasing-student-achievement [https://perma.cc/F2W4-6CQN].

LCFF delineates funding based on need, establishing a uniform per-pupil base amount for every grade range that all districts receive. *Id.* Districts receive an additional 20 percent of the base grant for each high-needs student enrolled in the district. Julien Lafortune, *School Resources and the Local Control Funding Formula: Is Increased Spending Reaching High-Need Students?*, PUB. POL'Y INST. CAL. 8 (Aug. 2019), https://www.ppic.org/wp-content/uploads/school-resources-and-the-local-control-funding-formula-is-increased-spending-reaching-high-need-students.pdf [https://perma.cc/UMD5-8UYJ]. When a district's enrollment is at least 55 percent high needs, the district receives a grant equal to 50 percent of the base grant for every high-needs student. *Id.* High-needs students include those who are low-income, English language learners, experiencing homelessness, or in foster care. *Id.*

115. *Id.* (finding spending rose over $500 per pupil in high-needs districts as compared to low-needs districts).

116. Districts that take in more property taxes than the base grant under LCFF are designated as "basic aid" or "excess tax" districts. MARGARET WESTON, PUB. POL'Y INST. CAL., BASIC AID SCHOOL DISTRICTS (2013), https://www.ppic.org/content/pubs/report/R_913MWR.pdf [https:// perma.cc/3GNH-8C7G]. Although this designation existed before the advent of LCFF, many districts will keep their designation as basic aid or excess tax districts even as LCFF raises the base amount. *Id.* Notably, basic aid or excess tax districts have a white resident population between fifty-nine and seventy-nine percent. *Id.*

Many basic aid or excess tax districts supplement their school funding by levying parcel taxes and with private donations. Nearly a third of basic aid districts levy parcel taxes. *Id.* Parcel taxes, which are largely implemented by districts in the Bay Area, allow districts to raise more revenue from taxing land. *Id.* Private donations, particularly in the Bay Area's basic aid districts, also supply a large amount of funding. In 2015, the Palo Alto school foundation, Partners in Education, provided 2.6 percent of the district's funding while the Woodside School Foundation provided 21 percent of the district's budget. Barbara Wood, *Woodside Elementary Is a District With Resources*, ALMANAC (Dec. 3, 2015, 11:34 AM), https://www.almanacnews.com/news/2015/12/01/woodside-elementary-is-a-district-with-resources [https://perma.cc/55VW-XBVH]. Notably, since 1999, Woodside has not only passed two parcel taxes but has also passed three bond measures. *Id.* The bond measures

II. OVERVIEW OF SCHOOL REFORM LITIGATION

Education is universally acknowledged as fundamentally important.[117] Yet, despite this consensus, "history demonstrates that democratic processes have failed to provide for the educational needs of every child, particularly those who are poor, who are members of minority groups, or who live in rural areas."[118] School reform litigation is necessary because legislators, despite any personal beliefs in reform efforts, are unwilling to champion school reform because such efforts have proven unpopular with voters. But unlike the legislature, "the judiciary *must* respond to the complaints of the aggrieved."[119]

School reform often requires financial changes, specifically raising taxes. Legislators do not want to be associated with new taxes, as new taxes are unwelcomed by their constituencies.[120] Furthermore, legislators who support reform are likely to be outnumbered in the legislature by representatives of middle-class and wealthy suburbs, who often oppose school reform initiatives because any revenue resulting from newly raised taxes is likely to go to schools

alone have garnered $30.7 million. *Id.* Collectively, basic aid districts on the coast of California have raised approximately $1000 per pupil in additional revenue. *Id.*

117. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments."); Serrano v. Priest (*Serrano I*), 487 P.2d 1241, 1256 (Cal. 1971) ("[E]ducation is the lifeline of both the individual and society."). President-Elect Joe Biden called educators "the most important profession in the United States." Valerie Strauss, *Biden Tells Teachers Their Profession Is 'The Most Important' on Same Day Trump Trashes Public Schools*, WASH. POST (July 5, 2020, 12:17 PM), https://www.washingtonpost.com/education/2020/07/05/biden-tells-teachers-their-profession-is-most-important-same-day-trump-trashes-public-schools [https://perma.cc/6MDM-CZ84].

118. Molly Townes O'Brien, *At the Intersection of Public Policy and Private Process: Court-Ordered Mediation and the Remedial Process in School Funding Litigation*, 18 OHIO ST. J. ON DISP. RESOL. 391, 396–97 (2003).

119. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1308 (1976).

120. *See* Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL'Y 569, 573 (2004) (positing that a legislator's most important disincentive for not acting is the fear of being associated with new taxes); Koski, *supra* note 34, at 1103 (suggesting legislators from wealthy districts, even if they privately support reform, will be unlikely to publicly support reform efforts out of the fear of electoral consequences). There is some belief that governors might be more willing to act than legislators but often require some catalyst in order to take action. Obhof, *supra*, at 574. In the *Williams* litigation, Governor Arnold Schwarzenegger settled quickly after his election so he could move on to his own agenda. *See* Christopher R. Lockard, Note, *In the Wake of* Williams v. State*: The Past, Present, and Future of Education Finance Litigation in California*, 57 HASTINGS L.J. 385, 411 (2005) (explaining that Schwarzenegger was determined to reach an agreement after his election).

outside their own districts.[121] In addition to electoral pressures, school reform efforts are constrained by the enormous amount of money involved.[122] School reform initiatives are not only in direct competition with all other budgetary issues, but also "may create a tidal wave that upsets important programs or that requires reform of the entire system of state taxation."[123]

In the face of legislative aversion, plaintiffs turn to the judiciary to achieve the necessary school reforms. Below, I describe the three main eras of school reform litigation as well as three main challenges: (1) concerns regarding the separation of powers; (2) the history of unsuccessful judicial activism; and (3) the creation of unfavorable precedent.

A. Recent School Reform Litigation

The history of school finance reform litigation in the United States has been described as occurring in waves,[124] and is exemplified by the three eras of school reform litigation in California described in Part I.[125] Recent school reform litigation is a part of the third wave of school finance cases and focuses on the equity of school funding systems.[126] This third wave (1989–present) marked the transition from claims premised on theories of equity to claims premised on theories of adequacy.[127] The definition of educational adequacy "'refers to resources which are sufficient (or adequate) to achieve some educational result, such as a minimum passing grade on a state achievement test,' or some other measurement of educational attainment."[128] Furthermore, "[a]dequacy also changes the focus from inputs to outputs and 'leaves behind the idea of equal resources for all.'"[129] This was the reasoning applied in *Butt*, where the California

121. Obhof, *supra* note 120, at 573–74.
122. O'Brien, *supra* note 118, at 402.
123. *Id.*
124. *See* Koski, *supra* note 34, at 1084 (referencing the work of William Thro and the advent of the wave metaphor). Although I focus on school reform more generally throughout this Comment, *see supra* note 11, for purposes of providing context for settlement, I focus on school finance reform here.
125. *See supra* Subpart I.A.
126. *Id. See* Robinson v. Cahill, 303 A.2d 273, 297 (N.J. 1973) (finding that the large per- pupil disparity in school funding as a result of the state's school finance system's heavy reliance on local taxation violates the New Jersey Constitution).
127. Koski, *supra* note 34, at 1085–86. The 1989 Kentucky school litigation is credited with launching the third wave. *Id.*; *see also* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215 (Ky. 1989) (finding the entire Kentucky common school system unconstitutional).
128. Obhof, *supra* note 120, at 582–83.
129. *Id.* at 583.

Supreme Court focused not on a uniform school year but rather on enough of a school year to ensure students' right to an education.[130]

While adequacy-focused litigation saw more success than the previous equity-focused litigation,[131] adequacy claims began facing judicial roadblocks in 2016,[132] as illustrated by the denial of review for both *Vergara*[133] and *Campaign for Quality Education*.[134] The rise of judicial recalcitrance resulted from a combination of previous judicial action that did not improve school funding schemes,[135] the difficulty in determining what constitutes an adequate education based on a state's constitution,[136] growing concerns regarding justiciability[137] and

130. *See supra* text accompanying notes 34–35.

131. *See* William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Education Rights Litigation*, 117 COLUM. L. REV. 1897, 1905 (2017) (explaining that, as a strategy, the "the adequacy standard appear[ed] to enjoy a conceptual clarity that equality of educational opportunity lack[ed]" and thus was more successful); *see also* Obhof, *supra* note 120, at 584 (finding that court-ordered reforms have increased spending in poor and median districts by 11 percent and 7 percent, while wealthy district spending has remained constant).

132. *See* Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. C.R. & C.L. 83, 95 (2010) (observing that more recent adequacy plaintiffs "encountered a judiciary reluctant to entertain their claims or to offer them meaningful remediation"); Jared S. Buszin, *Beyond School Finance: Refocusing Education Reform Litigation to Realize the Deferred Dream of Education Equality and Adequacy*, 62 EMORY L.J. 1613, 1623 (2013) (explaining that state courts are still challenged despite any advantages of adequacy claims).

133. *See supra* text accompanying notes 37, 38–45.

134. *See supra* text accompanying notes 37, 46–51.

135. *See, e.g.*, DeRolph v. State (*DeRolph IV*), 97 Ohio St. 3d 434, 2002-Ohio-6750, 780 N.E.2d 529, at ¶¶ 1–11 (concluding the court no longer had jurisdiction over the matter after continued legislative resistance despite previously holding that the public school funding system was unconstitutional under the Ohio Constitution). In Washington, it took the state Supreme Court six years of litigation, including a contempt order and $100,000 per day fines against the State, to motivate lawmakers to implement a new school funding plan. Joseph O'Sullivan, *Washington Supreme Court Ends Long-Running* McCleary *Education Case Against the State*, SEATTLE TIMES (June 9, 2018, 10:51 AM), https://www.seattletimes.com/seattle-news/washington-supreme-court-ends-100000-per-day-sanctions-against-state-in-mccleary-education-case [https://perma.cc/F7GE-GDS7] (describing the history of the litigation from 2007 to 2012 and the way in which the 2012 ruling, and subsequent contempt order, forced lawmakers to increase school funding); *see also* McCleary v. State, 269 P.3d 227, 261 (Wash. 2012) (finding the State had "consistently provid[ed] school districts with a level of resources that falls short of the actual costs of the basic education program."). The Washington Supreme Court lifted the contempt order, $100,000 daily sanctions, and oversight of the case in 2018. *Id.*

136. Buszin, *supra* note 132, at 1623 (describing the challenge of figuring out what constitutes an adequate education in "sparse" constitutional text).

137. *Id.* at 1624–25.

separation of powers,[138] and the realization that more funding per pupil does not lead to better academic achievement.[139]

In response to courts' growing weariness to entertain broader adequacy claims and the resulting unfavorable precedent,[140] plaintiffs have since moved towards claims that focus on discrete harms to discrete groups of students.[141] This "next generation"[142] of adequacy-based litigation still relies on education articles in state constitutions, but does not argue that money alone is the cause of the identified harm.[143] Because the targets of the necessary reform and the scope of the litigation are more discrete, this litigation is perceived as judicially manageable. In contrast to broad claims, courts adjudicating this current generation of litigation see themselves as more capable of playing an effective role in school reform and education policy.[144] In addition to courts being more willing to hear cases, the narrow framing of harms and remedies has also encouraged state defendants to settle, and to settle quickly.[145]

B. Structural Challenges With School Reform Litigation

Before discussing why the settlement strategy is advantageous for both plaintiffs and defendants, it is important to understand the issues litigation poses to courts and, consequently, to parties in school reform cases.[146] As Abram Chayes wrote in 1973:

138. Simon-Kerr & Sturm, *supra* note 132, at 83 ("[S]eparation of powers concerns have begun to drive state courts out of this important avenue of education reform.").
139. Buszin, *supra* note 132, at 1630 (explaining that both scholars and economists have found that increased expenditures have not led to better academic achievement).
140. Simon-Kerr & Sturm, *supra* note 132, at 87 (arguing that adequacy claims, particularly those focused on a "pot of money," will result in unfavorable precedent and foreclose future causes of action premised on state education clauses).
141. *See* Koski, *supra* note 131, at 1915–16 ("This next-generation litigation focuses on specific, identifiable educational 'wrongs' that allegedly result in specific, identifiable educational 'harms' to specific, identifiable students.").
142. *Id.* at 1899.
143. *See id.* at 1900 (explaining that plaintiffs are moving away from arguing that money is the cause of educational harms).
144. *Id.* Professor Koski identifies three main reasons why the "next generation" litigation is a "judicially attractive" strategy. *Id.* at 1916. First, drawing a causal line between wrong and harm with a specific harm to specific students is simpler than doing so with broad financial inadequacies. *Id.* Second, a court can strike down a problematic statue or demand a specific resource as opposed to being forced to address school finance or broader reforms. *Id.* Third, because the remedies are narrow, they are more manageable for a court. *Id.*
145. *Id.* at 1918.
146. *See supra* text accompanying notes 131–139.

> Recognition of the policy functions of litigation feeds the already intense pressure against limitations on standing, as well as against the other traditional limitations on justiciability—political question, ripeness, mootness, and the like. At the same time, the breadth of interests that may be affected by public law litigation raises questions about the adequacy of the representation afforded by a plaintiff whose interest is narrowly traditional.[147]

Below, I discuss the specific issues of separation of powers, history of judicial activism, and creation of unfavorable precedent, whereby court decisions make it increasingly more difficult for future plaintiffs to engage in school reform litigation. While each issue is distinct in the way it is addressed by the courts and presents challenges from school reform plaintiffs, collectively these issues highlight the broader concern of institutional limitation. The challenges facing school reform litigation's ability to effectuate change ties directly back to the institutional limitations on the judiciary's power.

1. Separation of Powers Concerns

Courts and critics alike have begun to push separation of powers concerns to rationalize courts' move away from judicial intervention in school reform cases.[148] Some courts have gone as far as finding that questions of educational quality invoke the "political question" doctrine.[149] Separation of powers worries in the school reform arena involve three specific concerns: (1) courts lack the institutional capacity required for school reform;[150] (2) policy is traditionally within the realm of the legislative branch;[151] and (3) any court-ordered remedy would require legislative action anyways.[152]

Making education policy requires consideration of a multitude of issues including statewide taxation schemes, school district organization, and teacher

147. *See* Chayes, *supra* note 119, at 1295.
148. Obhof, *supra* note 120, at 585 (citing the judiciary's inability to "balance the principles of judicial review and separation of powers").
149. Comm. for Educ. Rts. v. Edgar, 672 N.E.2d 1178, 1191 (Ill. 1996) (citing Baker v. Carr, 369 U.S. 186, 210 (1962)). In invoking the political question doctrine, the court reasoned "the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion." *Id.* For an example of a court rejecting the political question argument, *see* A.C. v. Raimondo, No. 18-645, 2020 WL 6042105, at *9–*10 (D.R.I. Oct. 13, 2020).
150. Obhof, *supra* note 120, at 594 (arguing courts do not possess the institutional competence "to act in an area as complex as school funding").
151. Simon-Kerr & Sturm, *supra* note 132, at 96.
152. Koski, *supra* note 34, at 1102–03.

hiring and tenure. Compared to the legislature, courts do not have the necessary institutional capacity to do things like evaluate competing interests and financial obligations.[153] Because policy is traditionally a role reserved for the legislature, courts are hesitant to impose new policy requirements as doing so would require "craft[ing] a remedy that would encroach on traditional legislative prerogatives."[154] So "long as the legislature is deemed to be making a good faith effort to reform the school system," courts are highly unlikely to rule against the state.[155]

Even when courts find for plaintiffs, they are constrained from effectuating school reform relief.[156] When courts do find issues with educational finance schemes, they commonly order declaratory relief, as is typically sought by plaintiffs.[157] In doing so, courts force legislatures, the defending parties, to create new policies that comply with the courts' requirements.[158] Despite taking court mandated action, legislatures still faces the same impediments as they do when trying to create school reform policy outside of a litigation context.[159]

153. *Id.* at 1101 ("Courts are not well-equipped to design educational finance policy and they do not enjoy the latitude to make the necessary tradeoffs among competing interests and obligations of state government and its limited budget."); Harv. L. Rev. Ass'n, *The Misguided Appeal of a Minimally Adequate Education*, 130 HARV. L. REV. 1458, 1468 (2017) ("[N]ot only is the judiciary poorly prepared to assess the merits of competing education policies, but it also lacks the democratic legitimacy and structural authority to address the difficult political questions that educational-adequacy litigation tends to raise.").

154. Simon-Kerr & Sturm, *supra* note 132, at 96; *see also* Thompson v. Engelking, 537 P.2d 635, 640 (Idaho 1975) ("We reject the arguments advanced by the plaintiffs . . . . To do otherwise would be an unwise and unwarranted entry into the controversial area of public school financing, whereby this Court would convene as a 'super-legislature,' legislating in a turbulent field of social, economic and political policy.").

155. Simon-Kerr & Sturm, *supra* note 132, at 102. Courts have largely recognized a difference between "legislative deficiency" and "legislative abdication." *Id.* at 96.

156. *See* Koski, *supra* note 34, at 1099. For example, in *Raimondo*, which held the U.S. Constitution does not guarantee a right to a civics education, Judge William Smith seemed pained in his inability to find for the plaintiffs. *See* A.C. v. Raimondo, No. 18-645, 2020 WL 6042105, at *18 (D.R.I. Oct. 13, 2020). He wrote:

> Plaintiffs should be commended for bringing this case. It highlights a deep flaw in our national education priorities and policies. The Court cannot provide the remedy Plaintiffs seek, but in denying that relief, the Court adds its voice to Plaintiffs' in calling attention to their plea. Hopefully, others who have the power to address this need will respond appropriately.

Id. at *21.

157. Koski, *supra* note 34, at 1101–02.

158. *Id.*; O'Brien, *supra* note 118, at 422 (explaining that a state court in a school finance case will leave the task of designing a remedy to the "rights-violating party").

159. *See supra* text accompanying notes 120–123; *see also* Koski, *supra* note 34, at 1102 (explaining that the legislature faces the same pressures in seeking remedies as it does effectuating school reform in the first place). Courts must take responsibility for any consequences that may

2. History of Unsuccessful Judicial Activism

While adequacy claims found initial success in courts, such success did not always translate to reform.[160] Furthermore, even when there was reform, plaintiffs continued to bring more claims of educational harms. Courts are thus growing wary of their role and impact in the realm of school reform.[161] The issue of an acceptable remedy has grown particularly troubling for courts.[162] Particularly where courts have already found educational harms, they are becoming unwilling to find for plaintiffs.[163]

3. Creation of Unfavorable Precedent

As courts grow wary of engaging in school reform, so too grows the risk that new litigation will result in unfavorable precedent for future school reform litigation efforts. This phenomenon is acutely relevant in California with the Supreme Court's denial to review both *Vergara* and *Campaign for Quality Education* in 2016.[164]

The two denials to review not only left open the question of "whether [students'] fundamental right to [an] education is a paper promise or a real guarantee,"[165] but also left in place the appellate courts' decisions which "erected a

adversely affect nonparties. *See* Chayes, *supra* note 119, at 1293, 1295–96 ("[I]f litigation discloses that the relevant purposes or values have been frustrated, the relief that seems to be called for is often an affirmative program to implement them. And courts, recognizing the undeniable presence of competing interests, many of them unrepresented by the litigants, are increasingly faced with the difficult problem of shaping relief to give due weight to concerns of the unrepresented."). In addition, state legislatures do not always comply with court orders. *See supra* text accompanying note 135; *see also* Koski, *supra* note 34, at 1102.

160. *See supra* text accompanying notes 156–159. *See also* Simon-Kerr & Sturm, *supra* note 132, at 97 (arguing the success of early adequacy cases in reforming school systems is now problematic for future litigation).

161. Koski, *supra* note 131, at 1899 (observing that state court judges "may be signaling their weariness with and the limitations of the quarter-century-old adequacy litigation movement.").

162. Simon-Kerr & Sturm, *supra* note 132, at 97.

163. For example, in contrast to the *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 2015–13 (Ky. 1989), decision finding the state's school funding scheme unconstitutional, a Kentucky court in 2007 entirely dismissed plaintiffs' adequacy claims reasoning plaintiffs "ask[ed] the Court to exceed the rule from *Rose* by going beyond mere constitutional interpretation . . . [to] stipulate the manner by which the General Assembly must carry out its responsibilities." Simon-Kerr & Sturm, *supra* note 132, at 105 (citing Young v. Williams, Nos. 03-CI-00055 & 03-CI-01152, slip op. 3 (Ky. Cir. Ct. Feb. 13, 2007)).

164. *See supra* text accompanying notes 38–51.

165. Campaign for Quality Educ. v. California, 209 Cal.Rptr.3d 888, 921 (Liu, J., dissenting).

novel barrier—not only for . . . plaintiffs but for all California litigants seeking to raise equal protection claims based on a fundamental right."[166]

In particular, the decision to deny review in *Campaign for Quality Education* rejected the idea that California public school children have a constitutional right to an education of "some quality," and therefore constricted the types of claims future plaintiffs alleging inadequate school funding may bring [167] Although California's students are guaranteed a fundamental right to education under *Serrano I*,[168] the Court of Appeal determined that the right is no longer robust enough to guarantee an education of any quality. The Court of Appeal, and the Supreme Court by denying review, rejected *Serrano* and California's longstanding judicial commitment to ensuring more equal access to education over the past five decades.[169]

III. THE EFFICACY OF THE SETTLEMENT STRATEGY

Settlement is the most efficient and likely means by which plaintiffs can achieve school reform in California as a result of the legislative pitfalls of school reform and the increasingly limited claims courts will entertain. Furthermore, settlement recognizes that both plaintiffs and defendants in school reform litigation share a desire for effective education for all students[170]—a stark contrast to the inherently adversarial character of drawn-out litigation. Settlement is also a more ideal process for reforming complex school systems, particularly as compared to litigation, because the settlement process is flexible, can incorporate the broad participation of diverse constituencies, and facilitates cooperation

166. Vergara v. State, 209 Cal.Rptr.3d 532, 564 (Cal. Ct. App. 2016) (Cuéllar, J., dissenting).

167. *Campaign for Quality Educ.*, 209 Cal.Rptr.3d at 891–92. *But see* Harvard Law Review Association, *supra* note 153, at 1476–77 (arguing California's equal protection jurisprudence still allows for successful challenges where "some state action necessarily provides a starkly different educational experience" to a particular suspect class).

168. Serrano v. Priest (*Serrano I*), 487 P.2d 1241, 1263 (Cal. 1971).

169. The outcome of the *Campaign for Quality Education* litigation is also notable because of the rejection of plaintiffs' claim despite the "motley" nature of the plaintiff coalition. Koski, *supra* note 131, at 1913. Some believe that a broad plaintiffs' coalition possesses more potential to convince a court to find in their favor. *See, e.g.*, DeRolph v. State (*DeRolph I*), 677 N.E.2d 733, 737 (Ohio 1997) (finding for plaintiffs' coalition that consisted of Ohio's rural and urban school districts by declaring that the current system "fails to provide for a thorough and efficient system of common schools, in violation of . . . the Ohio Constitution).

170. *See, e.g.*, Stephen Chang, *Towards Moderate Teacher Tenure Reform in California: An Efficiency-Effectiveness Framework and the Legacy of* Vergara, 104 CALIF. L. REV. 1503, 1545–46 (2016) (describing that all parties share mutual interests such as saving costs and "avoid[ing] a landmark California Supreme Court decision").

amongst public entities.[171] Finally, when settlement is perceived as a primary mechanism by which to achieve reform, it is more likely to be successful.[172]

Although intentionally seeking settlement is a rather new strategy in school reform litigation,[173] the strategy has grown quite robust in other types of public law litigation.[174] Federal administrative agencies, such as the Securities and Exchange Commission and Federal Trade Commission, actively seek to keep cases entirely out of court by relying on settlement agreements.[175] The Attorney General possesses the power to enter into settlements that "make policy or otherwise constrain the future exercise of executive-branch discretion or policy making."[176] The recent history of California settlements makes plain the potential effectiveness of the settlement strategy in school reform litigation. As described below, settlement both dilutes political concerns, such as separation of powers, and avoids litigation concerns, including the creation of unfavorable precedent. By circumventing political and litigation concerns, the California settlements have addressed a broad range of educational issues including access to advanced courses, learning time, literacy, and trauma.

A. Settlement Dilutes Political Concerns

School reform litigation is politically problematic because it implicates coequal branches of government.[177] The settlement strategy creates a role for the judiciary, legislature, and executive without implicating separation of powers

171. *See* O'Brien, *supra* note 118, at 436 ("Litigation and its traditional remedial processes provide an unsatisfactorily blunt tool for the task of re-designing a complex school funding system . . . .Mediation . . . may be the device that is most ideally crafted for the job.").
172. *See id.* at 437 (contending that when mediation is considered as the primary avenue in institutional reform cases, it is more likely to be successful).
173. *See* Thomas Saunders, *Settling Without "Settling": School Finance Litigation and Governance Reform in Maryland*, 22 YALE L. & POL'Y REV. 571, 589 (2004) (describing settlement in school finance litigation as the "exception rather than the rule").
174. Public law litigation is litigation with the objective of "vindicat[ing] . . . constitutional or statutory policies." *See* Chayes, *supra* note 119, at 1284.
175. Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1172 (2014). Approximately 90 percent of the Security and Exchange Commission's and 80 percent of the Equal Employment Opportunity Commission's and Federal Trade Commission's enforcement actions are settled. *Id.*
176. Simon Brewer, The Attorney General's Settlement Authority and the Separation of Powers, 130 YALE L.J. 174, 184 (2020).
177. *See* O'Brien, *supra* note 118, at 401–02 (detailing that school finance is particularly problematic because the defendants include a coequal branch of government acting within their traditional area of expertise).

concerns[178] and avoids perception of activism in both the judiciary and legislature.[179] As discussed above, courts have limited institutional capacity to effectuate policy changes.[180] By requiring participation of the coequal branches of government, the settlement process and remedy is not constrained by courts' limited institutional capacity.

Furthermore, whereas school reform litigation commonly results in a court ordering declaratory relief, with which legislatures and governors do not necessarily comply,[181] the settlement process allows the preparation of a remedy that can be presented to the legislature as a comprehensive plan requiring only an up-or-down vote.[182] The settlement process may also provide the pressure necessary to ensure such an agreement is not only passed but also subsequently complied with.[183]

While the settlement strategy can provide a more efficient process for securing relief and a guaranteed remedy, it still frustrates the traditional separation of powers framework. As previously discussed, courts have invoked separation of powers concerns in school reform litigation because of the belief that the judiciary was infringing upon the responsibilities of the legislature. Arguably, the settlement strategy could be perceived as more violative of the separation of powers as it permits private parties to participate in the work of the legislature without the approval of the general public. Nevertheless, the manner by which the settlement strategy mitigates political concerns enables school reform to persist in

178. *See* Saunders, *supra* note 173, at 588 (arguing settlement in *Bradford v. Maryland State Board of Education* avoided the "separation of powers concerns to question the ability of a court to order the legislature to appropriate additional money or restructure the Baltimore school system"); *see also* Complaint at 12, Bradford v. Md. State Bd. of Educ., No. 94340058 (Md. Cir. Ct., Dec. 6, 1994) (alleging the state failed to provide every child with an adequate education).

179. Historically, courts would provide the "political cover" that legislatures required in order to effectuate school reform policies so that legislatures wouldn't been seen as "activist." Koski, *supra* note 34, at 1103. Judiciaries were often perceived as "activist" in that they could "use[] the guise of 'constitutionality' to achieve the implementation of a desired public policy." *See* Chang, *supra* note 170, at 1519.

180. *See supra* text accompanying notes 150, 153–158.

181. *See supra* text accompanying note 146.

182. *See* Saunders, *supra* note 173, at 572–73 (explaining that the settlement in the *Bradford* litigation "allowed the plaintiffs and sympathetic figures within state government to negotiate the details of the remedy in advance and present the legislature with a comprehensive plan for an up-or-down vote rather than a vague command to bring the system into compliance with amorphous constitutional standards").

183. In the *Bradford* litigation, the threat of returning to court highly encouraged the General Assembly to approve the settlement. Saunders, *supra* note 173, at 592. Furthermore, when the state later failed to comply with the settlement, Maryland had to pay $55 million in addition to the $265 million judgment. Saunders, *supra* note 173, at 597–99.

the absence of legislative action and can ensure relief to student plaintiffs, at least in the short term.

B. Settlement Avoids Litigation Concerns

Not only is settlement politically advantageous, but it also avoids the hazards associated with litigation. Settlement is preferable to drawn out litigation in that it avoids the creation of unfavorable precedent,[184] is both time and cost efficient, provides fast relief, and permits an expansive remedy. Because courts do not issue opinions in settlements, settlement prevents courts from creating unfavorable precedent and removes the uncertainty of an unfavorable court ruling in both the initial case and subsequent appeals.[185] Consequently, "a good-faith settlement is in the interest of all parties: the plaintiffs receive the relief they sought; the government faithfully executes its vision of the law; and the public saves the expense of litigation."[186]

The settlement process, particularly when sought as a primary avenue for relief, is often faster than conducting a full trial.[187] The speed of the settlement process means that it is also more cost efficient for both parties.[188] Both private and state parties, plaintiffs and defendants, bear the burden of these exorbitant costs in litigating school reform issues. Collaboration helps ensure the final remedy will be accepted by all parties, permitting both parties to save the financial costs that would be incurred in a longer process.

The settlement process provides plaintiffs the fastest potential for relief. Relief occurs faster through the settlement process than drawn out litigation because the settlement process is inherently faster than conducting a full trial.[189]

184. *See* Subpart II.B.3.

185. *See* Saunders, *supra* note 173, at 588 (discussing how the settlement in Maryland "hedged against the uncertainty of an unfavorable court ruling").

186. Brewer, *supra* note 176, at 192 (discussing the efficacy of the Attorney General's settlement authority).

187. *See* Saunders, *supra* note 173, at 588–89.

188. *Id.* at 589 (describing how settlement "saved the plaintiffs the expense of conducting a full trial" and years of subsequent appeals). In the *Vergara* litigation, for example, plaintiffs' counsel Gibson Dunn billed $1.1 million. *See* Chang, *supra* note 170, at 1510. Gibson Dunn represented Students Matter, the education organization that brought the suit on behalf of the student plaintiffs, for profit. *Id.*

189. *See* Saunders, *supra* note 173, at 589 (discussing how settlement prevented plaintiffs from having to spend years arguing their case through appeals). For example, the litigation in *Campaign for Quality Education* lasted six years from the filing of the first complaint to the California Supreme Court's denial of review. Complaint, Campaign for Quality Educ., No. RG10524770 (Alameda Sup. Ct. 2010); Campaign for Quality Educ. v. State,

Additionally, whereas court ordered relief is typically declaratory and places the legislature in charge of creating new policy, the settlement process encourages plaintiffs and defendants to work together.[190]

Furthermore, the settlement process permits a broad resolution both in the secured remedy as well as in the participation of nonparties in negotiations. School reform litigation is "'sprawling and amorphous,' affecting many parties who are not before the court, some of whom may have no entitlement to a remedy in the case at hand, but who may be in a position to thwart the eventual implementation of the court's order."[191] By inviting more parties to the table, the settlement process helps ensure the settlement's eventual approval by both the legislature and executive as well as compliance by other stakeholders.[192] Similarly, the settlement process has the ability to prevent nonparty entities, who would frustrate the negotiation process, from being able to participate.[193] Finally, the relief achieved through the settlement process can be broader than that sought in the original

209 Cal. Rptr. 3d 888 (Ct. App. 2016). Conversely, many of the settlements discussed in Subpart III.C were settled within three years of the initial complaint. *See, e.g.*, Settlement Agreement, Cruz v. State, No. RG14727139 (Cal. Super. Ct. 2014); Settlement Implementation Agreement, Ella T. v. State, No. BC685730 (Cal. Super. Ct. 2017).

190. In the *Bradford* litigation, the settlement process empowered "plaintiffs to forge a partnership with the defendants. . . . [T]hey emerged from negotiations as allies. . . . . The political leaders who endorsed the settlement then went back to the General Assembly and worked as insiders to shepherd the remedy through the legislature. . . ." Saunders, *supra* note 173, at 589.

191. O'Brien, *supra* note 118, at 400–01.

192. *See id.* at 405 (arguing that when parties and nonparty stakeholders play an important role in creating the remedy, the outcome is more often complied with than an adjudicated outcome); Brewer, *supra* note 176, at 193 (explaining that involving nonparties in negotiations helps design better policies because of the added expertise and insulates policies against any ex post challenges). In the *Bradford* litigation, the success of the negotiations was credited to the extensive involvement of the politicians in charge of implementing the eventual settlement. Saunders, *supra* note 173, at 585. The same can be said for nongovernment entities as for government entities. For example, the "California Teachers Association (CTA)" spent over $290 million on candidates and causes between 2000 and 2016. Chang, *supra* note 170, at 1520–21. It would be nearly impossible to effectuate legislative reform in teacher tenure, and subsequent compliance, without the participation of the CTA. *See* Michael J. Mishak, *California Teachers Assn. a Power Force in Sacramento*, L.A. TIMES (Aug. 18, 2012, 12:00 AM) https://www.latimes.com/local/la-xpm-2012-aug-18-la-me-cta-20120819-story.html [https://perma.cc/PKY7-H8EU] (naming the chief lobbyist of the CTA as one of the "three. . . most powerful people in state government," along with the Assembly speaker and Senate leader, and describing the CTA as "arguably the most potent force in state politics). "Backed by an army of 325,000 teachers and a war chest as sizable as those of the major political parties, CTA can make or break all sorts of deals." *Id.*

193. In the *Bradford* litigation, representatives from Montgomery County, the wealthiest subdivision, were not present at the negotiations which most parties agreed increased the participants' ability to reach a settlement. Saunders, *supra* note 173, at 585.

complaint, which not only positively impacts more students but also leads to reform in more areas of education.[194]

The settlement strategy can create problems for school reform advocates. While avoiding the creation of unfavorable precedent is of acute importance for future plaintiffs given courts' growing hesitance towards school reform litigation, the settlement strategy also prevents the creation of favorable precedent. As such, when a settlement agreement provides, for example, increased funding for reading intervention programs to a few schools, guaranteeing the same programs for similar schools across the state would require bringing lawsuits premised on similar theories against an enormous number of schools and school districts. By not creating favorable precedent, the settlement strategy possesses a level of inefficiency not shared by court ordered relief.

C. California Settlement Cases

Settlement has not been common in school reform litigation nationwide, but California is an exception. Beginning in 1999, education advocates in California began to bring lawsuits that were very discrete in scope; they focused on a specific harm resulting from a specific resource inadequacy to a specific, often small, group of students. These settlements have impacted access to "Advanced Placement (AP)" courses,[195] improved educational resources such as learning materials and buildings,[196] addressed high teacher turnover as a result of budget cut

194. *See* Brewer, *supra* note 176, at 193 (arguing settlements may provide broader relief than that which would be available in an adjudicated outcome).

195. Complaint, Daniel v. State, No. BC214156 (Cal. Super. Ct. July 27, 1999). The case was dismissed when legislation was passed expanding access to "Advanced Placement (AP)" courses. *See* S.B. 1504, 1999–2000 Leg., Reg. Sess. (Cal. 2000) (enacted). This case was one of the first to directly challenge Proposition 209, the successful ballot initiative that outlawed affirmative action in California. *See* Proposition 209 (Cal. 1996); CAL. CONST. art. I, § 31. In November 2020, Proposition 16, which sought to overturn Proposition 209, failed by over a 14 percent margin, thus keeping California as one of only ten states to have laws against affirmative action. *See California Proposition 16 Election Results: Repeal Ban on Affirmative Action*, N.Y. TIMES, https://www.nytimes.com/interactive/2020/11/03/us/elections/results-california-proposition-16-repeal-ban-on-affirmative-action.html [https://perma.cc/EJS4-3PRS] (last updated Dec. 12, 2020) (reporting that 57.2 percent of California voters voted against Proposition 16 whereas 42.8 percent of voters voted for the measure).

196. Stipulation for Settlement & Order for Judgment Pursuant to CCP § 664.6 on the Award of Attorneys' Fees & Costs to Plaintiffs' Counsel, Williams v. State, No. 312236 (Cal. Super. Ct. 2000).

layoffs,[197] regulated how learning time is tracked,[198] and, most recently, helped recognize the right to basic literacy.[199]

1. *Daniel*

In 1999, school reform advocates sued California on behalf of low-income Black and Latinx students in Inglewood who were not given the same access to AP courses as students in wealthier, whiter schools.[200] As detailed in the complaint, Inglewood High School, whose student body is 97.4 percent Black and Latinx, offered only three AP courses whereas Beverly Hills High School, whose student body is 76.6 percent white, offered fourteen AP courses.[201] Plaintiffs asserted that such unequal access to AP courses violated their right to an equal education.[202] Furthermore, plaintiffs argued that such unequal access to AP courses infringed both on their ability to be admitted to and succeed in college.[203] The *Daniel* lawsuit was eventually dismissed when the California Legislature

197. Final Settlement Agreement and Release of Claims, Reed v. State, No. BC432420 (Cal. Super. Ct. 2010).

198. Settlement Agreement, Cruz v. State, No. RG14727139 (Cal. Super. Ct. 2014).

199. Settlement Implementation Agreement, Ella T. v. State, No. BC685730 (Cal. Super. Ct. 2017).

200. Complaint, Daniel v. State, No BC214156 (Cal. Super. Ct. July 27, 2000). The case was brought by Mark Rosenbaum and the ACLU of Southern California on behalf student plaintiffs. *Id.*; *see also* Alina Tugend, *Who Benefits From the Expansion of A.P. Classes?*, N.Y. TIMES MAG. (Sept. 7, 2017), https://www.nytimes.com/2017/09/07/magazine/who-benefits-from-the-expansion-of-ap-classes.html [https://perma.cc/AQ7L-2DAA] (suggesting that just expanding access to AP courses is not enough to close the achievement gap). *Daniel* was one of the first direct challenges to the "race-neutral" admissions processes implemented by the University of California after the passage of Proposition 209. *See* Karen Miksch, *Widening the River: Challenging Unequal Schools in Order to Contest Proposition 209*, 27 CHICANA/O-LATINA/O L. REV. 111, 111–12 (2008) (discussing the impact of AP course access on the ability of Black and Latinx students to be admitted to University of California schools after Proposition 209).

201. Complaint, *Daniel*, No. BC214156, at 5. While Black and Latinx students compose 45 percent of California's public school students, they account for only 13 percent of California's AP test takers. *Id.* at 7. Furthermore, of the 144 public high schools that offer more than fifteen AP classes in California, 65 percent have more than 50 percent white and Asian students. *Id.* at 6–7.

202. *Id.* at 1.

203. *Id.* at 22–23 ("[T]he immense benefits that necessarily stem from the AP program [include]: AP students can boost their GPA's above 4.0 and hence have a better chance of receiving admissions in colleges and universities, earn college credit, minimize the financial burden of expensive college tuitions, challenge themselves academically, and grow intellectually and emotionally."). For example, students admitted to UCLA for Fall 1998 took an average of 16.8 honors and AP courses. *Id.* at 25.

improved access to AP courses by establishing the Advanced Placement Challenge Grant Program.[204]

Although there was no formal settlement agreement in *Daniel* because of the legislature's passing of SB 1504, the case is still informative for evaluating the settlement strategy. Rather than focusing explicitly on funding disparities, plaintiffs focused on a very specific school program disparity—the wide discrepancy in number of AP courses offered at public high schools. Furthermore, the remedy sought, and eventually achieved through SB 1504, could be effectively and efficiently implemented because AP courses already existed in larger numbers at numerous high schools within plaintiffs' school district and across the state. The legislature's swift action as a result of the *Daniel* filing provides future plaintiffs a more concrete conception of the type of harm and relief that state lawmakers perceive as more effortlessly actionable. Future advocates can look to *Daniel* as a model for bringing suit on the basis of large discrepancies in advanced educational offerings, particularly those with secondary consequences (like college admissions)[205] or offered through third parties (such as the case with the College Board and AP courses).[206]

2. *Williams*

A year after *Daniel*, school reform advocates sued California on behalf of thousands of students attending public school across the state.[207] In *Williams*, plaintiffs alleged that "[t]ens of thousands of children attending public schools

204. SB 1504 1999–2000 Leg., Reg. Sess., (Cal. 2000) (enacted). *See* CAL. EDUC. CODE, CH. 8.3 §§ 52240–52242 (resulting amendments from SB 1504). *But see* Koski, *supra* note 131, at 1930 (arguing that offering more AP courses does "not guarantee meaningful access to high-quality instruction and academic success for those students.").

205. Because students in California do not have the right to an education of some quality, see Campaign for Quality Educ. v. State, 209 Cal. Rptr. 3d 888, 892–93 (Ct. App. 2016), plaintiffs would be advised to allege harms that extend beyond that of just access to a particular number of courses.

206. Relief through expanding access to third party offerings, like that of the College Board, may be easier for the legislature to agree to because the number of course offerings and academic standards of the curricular offerings are handled by a private entity and thus do not have to be designed by the legislature.

207. First Amended Complaint for Injunctive & Declaratory Relief, Williams v. State, No. 312236 (Cal. Super. Ct. 2000). The case was brought on behalf of student plaintiffs by Mark Rosenbaum and the ACLU of Southern California, Public Advocates, the "Mexican American Legal Defense and Educational Fund (MALDEF)," other civil rights organizations, and Morrison & Foerster LLP. *Id.*

located through the State . . . must go to schools that shock the conscience."[208] These substandard schools were largely attended by low-income, nonwhite, and English language learning students.[209] Plaintiffs' argument was twofold. First, plaintiffs alleged the State's failure to provide students with basic resources necessary for education violated both the equal protection and due process clauses of the California Constitution. Second, plaintiffs alleged they were denied their fundamental right to an education.[210] Plaintiffs demanded that California establish a baseline standard of the minimal resources required for education, create a system of statewide accountability, and provide basic educational necessities to public school children.[211]

Whereas *Daniels* was quickly dismissed as the result of expedient legislative action, the story of *Williams* is quite different. Over the first three years of litigation, the case proceeded through numerous motions, attempts at negotiations, and issued orders.[212] In addition, by April 2003, then Governor Gray Davis had spent $13 million in legal fees defending the state.[213] Not until a trial date was set, the State's legal bills were approaching $18 million, and Governor Arnold Schwarzenegger took office, did the State seriously approach the option of settlement.[214]

The *Williams* settlement is by far the largest of the California settlements in terms of relief as well as the length and cost of presettlement litigation. The

208. *Id.* at 6. These schools lacked "trained teachers, necessary education supplies, classrooms, even seats in classrooms, and facilities that meet basic health and safety standards." *Id.* The schools were also described as in "slum conditions," and as part of the Mississippification of California schools. *Id.* at 9.

209. *Id.* at 6. More than 50 percent of the student body in 37 of the 46 schools detailed in the complaint were eligible for free or reduced lunch. *Id.* at 6–7. Almost all of the plaintiffs were Black, Latinx, or Asian. *Id.* at 7. In 42 of the 46 schools, nonwhite students comprised more than 50 percent of the student body. *Id.* In 30 of the 46 schools, over 30 percent of the student body was still learning English. *Id.*

210. *Id.* at 70–74. Plaintiffs also alleged that, because of the racially discriminate impact of these schools, the State had violated Title VI of the Civil Rights Act of 1964. *Id.* at 72.

211. *Id.* at 74–75.

212. *See* Lockard, *supra* note 120, at 409–11 (describing the various events of the first three years of litigation).

213. Jonathan D. Glater, *Fight Over California Schools Raises New Issue of Priorities*, N.Y. TIMES (Apr. 18, 2003), https://www.nytimes.com/2003 /04/18/us/fight-over-california-schools-raises-new-issue-of-priorities. html [https://perma.cc/QA6G-Z8X2](explaining the arguments at the core of the *Williams* litigation). Governor Davis argued that the schools' problems were the responsibility of local school districts, not the state. *Id.*

214. Lockard, *supra* note 120, at 411. *See also* Chang, *supra* note 170, at 1536–37 (arguing that Governor Schwarzenegger settled quickly upon taking office so that he could return his focus to his own agenda).

settlement, and resulting five pieces of legislation,[215] held the state accountable for delivering fundamental resources, such as textbooks, qualified teachers, and safe school facilities, and provided approximately $1 billion to accomplish the outlined goals.[216]

The *Williams* settlement was not only large, but arguably highly successful. In the 2012–13 school year, only 4.5 percent of low-performing schools had textbook insufficiencies.[217] From 2004 to 2008, 16 percent of low-performing schools had textbook insufficiencies.[218] The percentage of schools with emergency facilities needs dropped from 13 percent to 4 percent.[219] The settlement also decreased the number of misassigned certified staff,[220] increased compliance with "School Accountability Report Cards (SARCs)" reporting,[221] and reduced teacher vacancies.[222]

Williams epitomizes the vast divergence between the response to specific resource harms, like access to textbooks, and less physically visible harms, like de facto school segregation. *Williams* resulted in five bills addressing educational harms, but not one addressed the continued siloing of low-income students,

215. *See* S.B. 550, 2003–04 Leg., Reg. Sess. (Cal. 2004) (enacted); Assemb. B. 2727, 2003–04 Leg., Reg. Sess. (Cal. 2004) (enacted); Assemb. B. 1550, 2003–04 Leg., Reg. Sess. (Cal. 2004) (enacted); Assemb. B. 3001, 2003–04 Leg., Reg. Sess. (Cal. 2004) (enacted) and S.B. 6, 2003–04 Leg., Reg. Sess. (Cal. 2004) (enacted). SB 550 and AB 2727 "established minimum standards for school facilities, teacher quality, and instructional materials" while also creating "an accountability and enforcement structure;" AB 1550 "pledged to eliminate multitrack, year-round schools by 2012;" AB 3001 sought to place "qualified teachers in low-performing schools" as well as "made it easier for qualified, out-of-state teachers" to get teaching jobs in California; and SB 6 appropriated money for emergency facility repairs. Lockard, *supra* note 120, at 412.

216. SALLY CHUNG, ACLU FOUND. OF S. CAL., WILLIAMS V. CALIFORNIA: LESSONS FROM NINE YEARS OF IMPLEMENTATION 11–12 (2013), https://decentschools.org/settlement/Williams_v_California_Lessons_From_Nine_Years_Of_Implementation.pdf [https://perma.cc/4TF5-MNLR].

217. *Id.* at 16.

218. *Id.*

219. *Id.* at 26.

220. *Id.* at 40 (reporting that in the 2005–06 school year, 29 percent of staff was misassigned as compared to the 2010–2011 school year where only 13 percent of staff were misassigned).

221. *Id.* at 53–54. Beginning in 1988, California law has required all public schools to generate "School Accountability Report Cards (SARCs)" reports. *Id.* at 53. In 2006, barely 50 percent of all schools published their SARC report on time and 75 percent failed to include critical data. *Id.* By 2009, the large majority of schools were in compliance. *Id.*

222. *Id.* at 10 (reporting that in 2007–08, the California Teachers Association reported 5547 vacancies but in 2010–11, there were only 235 reported vacancies). For more details on the *Williams* settlement and subsequent amendments to legislation, see *Settlement Information*, DECENT SCHOOLS FOR CALIFORNIA, https://decentschools.org/settlement.php [https://perma.cc/F3XY-RPB5] (last visited Mar. 15, 2021).

students of color, and English language learners in California's public schools. Many have highlighted the parallels between *Brown* and *Williams* in that both cases were able to successfully address school conditions that denied students the opportunity to an equal education.[223] While *Williams* "provide[d] sobering evidence that, although much has changed since *Brown*, much of the underlying reasoning and prejudicial logic that shapes law and legislation remain[s] the same,"[224] it also makes plain the potential for resource-focused school reform lawsuits in California. Furthermore, the cost of the *Williams* litigation provides a cautionary tale to state actors who might hesitate to settle future school reform cases.

3. *Reed*

Since *Williams*, school reform litigation in California has begun to narrow the scope of the harms and number of plaintiffs.[225] In 2010, school reform advocates sued California on behalf of students at three middle schools in Los Angeles Unified School District (LAUSD).[226] In *Reed*, plaintiffs alleged that LAUSD's budget balancing method during the State's financial crisis denied

223. *See, e.g.*, Oakes & Lipton, *supra* note 1, at 353 (highlighting the similarities between the arguments in *Williams* and the arguments used by Charles Houston and Thurgood Marshall in the cases leading up to *Brown*). Some scholars argue *Williams* was a return to *Plessy*, not *Brown*. *See, e.g.*, Armen H. Merjian, *Relitigating* Plessy *in the 21st Century: Separate and Unequal Education in California*, 16 TEX. HISP. J.L. & POL'Y 1, 35 (2010) ("[T]he *Williams* plaintiffs found themselves in the 21st Century re-litigating not *Brown*, but *Plessy*.").

224. Oakes & Lipton, *supra* note 1, at 375.

225. In between *Williams* and *Reed*, there was another settlement agreement reached as the result of the *Valenzuela* litigation. *See generally* O'Connell v. Superior Court, 141 Cal. App. 4th 1452 (Cal. 2006) (issuing a preliminary injunction preventing the state superintendent from denying graduation diplomas to students who were eligible to graduate but had not passed the "California High School Examination (CAHSEE)"). The resulting legislation, AB 347, expanded services and instruction for students who had not passed the exam by the end of twelfth grade. Assemb. B. 347 2007–2008 Leg., Reg. Sess. (Cal. 2007); CAL. EDUC. CODE §§ 1240, 35186, 37254, 52380 (repealed 1988); *see also* JULIAN R. BETTS, ANDREW C. ZAU, YENDRICK ZIELENIAK & KAREN VOLZ BACHOFER, PASSING THE CALIFORNIA HIGH SCHOOL EXIT EXAM: HAVE RECENT POLICIES IMPROVED STUDENT PERFORMANCE? 10 (2020), https://www.ppic.org/content/pubs/report/R_612JBR.pdf. [https:// perma.cc/HF83-GY34] (finding AB 347 only marginally improved CAHSEE passage rates).

226. Second Amend. Complaint, Reed v. State, No. BC432420 (L.A. Super. Ct. 2010). Plaintiffs' middle schools were Gompers Middle School, Liechty Middle School, and Markham Middle School. *Id.* at 9. The case was brought on behalf of student plaintiffs by Mark Rosenbaum and the ACLU of Southern California, Public Counsel, and Morrison & Foerster LLP. *Id.* at 31.

students the basic education guaranteed under the California Constitution.[227] The State implemented a "Reduction in Force (RIF)," "decimat[ing]" the teaching staff at plaintiffs' schools.[228] When school districts implement a RIF, teachers with the least experience are the first to be let go.[229] Schools with high concentrations of low-income students, students of color, and English language learners have the highest concentrations of inexperienced teachers and thus are disparately impacted by a RIF.[230] At one of the plaintiffs' schools, 100 percent of the students were Black or Latinx, over one-third were English language learners, and 76 percent were economically disadvantaged.[231] The statistics at the other two schools were similar.[232] In implementing this RIF district wide, plaintiffs' schools lost half to two-thirds of their teachers whereas other schools saw teaching staff losses of less than 10 percent.[233]

Five months after filing *Reed*, the ACLU reached a proposed settlement agreement with LAUSD.[234] Despite this initial success, "United Teachers Los Angeles (UTLA)," the district's teachers' union, successfully challenged the settlement as an unlawful imposition on teachers.[235] Eventually, in 2014, *Reed* settled through an agreement to implement the School Investment Stabilization and Enhancement Program.[236] The settlement went beyond the scope of the relief initially sought in the complaint.[237] The settlement agreement was not limited to the three named middle schools but rather included thirty-seven LAUSD middle

227. *Id.* at 287.
228. *Id.* at 1. At the time of these budget cuts, California already ranked forty-sixth in the nation in per-pupil spending. *Id.*
229. *Id.* at 3.
230. *Id.* at 3.
231. *Id.* at 10.
232. *Id.* at 11.
233. *Id.* at 3. Specifically, 50 percent of teachers at Gompers, 57 percent of teachers at Markham, and 72 percent of teachers at Liechty were let go as a result of the "Reduction in Force (RIF)." *Id.* Plaintiffs further alleged that the RIF did not ultimately save the district money because of the amount of money that schools had to spend on professional development and teacher training. *Id.* at 24 (citing that Gompers Middle School spent $360,000 on teaching coaches from UCLA).
234. Chang, *supra* note 170, at 1534.
235. *Id.*
236. Settlement Agreement at 2, Reed v. State, No. BC432420, *settled* (Apr. 8, 2014). The ACLU settled with both "Los Angeles Unified School District (LAUSD)" and "United Teachers Los Angeles (UTLA)." *Id.* at 1.
237. *See* Buszin, *supra* note 132, at 1644 (explaining how the settlement went beyond the scope of the original court granted remedy).

and high schools.[238] In addition, the settlement provided additional professional development,[239] the assignment of at least two mentor teachers to the identified schools,[240] and an incentive payment program to retain effective principals.[241] The settlement ultimately required LAUSD to invest more than $25 million.[242]

Reed is instructive in regard to the settlement strategy because it elucidates the manner in which a small group of plaintiffs can seek relief for a larger group via settlement. *Reed* helps prove that state defendants can be quick to seek settlement when a lawsuit is narrow in terms of plaintiffs, alleged harms, and relief sought.[243] *Reed* also calls attention to what hurdles exist in the settlement strategy by showcasing both a failed and successful settlement within the same case. The first attempt at settlement occurred only five months after filing. Had the ACLU initially invited UTLA to the negotiating table, it seems plausible that a settlement agreement would have been achieved expeditiously. Furthermore, while the final settlement went beyond the scope of the initial relief sought, it was narrower than the first settlement attempt; the ultimate agreement identified seven fewer schools and did not address the issues of seniority and RIF.[244] *Reed* thus teaches future plaintiffs the importance of ensuring broad participation in settlement negotiations from the beginning of the process as well as reminds future plaintiffs that seeking narrower relief is more likely to result in a fast agreement.[245]

4. *Cruz*

In 2014, school reform advocates sued California on behalf of students at seven public schools in California.[246] In *Cruz*, plaintiffs alleged they were being

238. Settlement Agreement at 2, Cruz v. State, No. RG14727139 (Cal. Super. Ct. 2014). Thirty-three of these schools were selected based on high teacher turnover while four were selected based on their high student dropout rates. *Id.*
239. *Id.* at 5.
240. *Id.* at 4.
241. *Id.* at 7.
242. Chang, *supra* note 170, at 1534.
243. Buszin, *supra* note 132, at 1644.
244. Chang, *supra* note 170, at 1535.
245. I do not mean to suggest that the best relief is the fastest relief. But in the school resources context, a narrower and thus more efficient remedy could bring resources to schools and students in need years faster than more complicated or broad remedies. For issues like the number of teachers in a school, an efficient agreement is paramount.
246. Complaint, Cruz v. State, No. RG14727139 (Alameda Super. Ct. 2014). Mark Rosenbaum and the ACLU of Southern California, Public Counsel, and others sued on behalf of student plaintiffs. *Id.* The named schools were Castlemont High School (Oakland Unified School District), John C. Fremont High School (LAUSD), Nystrom Elementary School (West Contra Costa Unified School District), Franklin S. Whaley Middle School (Compton Unified School

denied their right to an "education that is not substantively inferior to the education received by other students in California public schools" under the California Constitution because they were "receiv[ing] far less meaningful learning time than their peers."[247] Like the student plaintiffs in *Daniel*, *Williams*, and *Reed*, the *Cruz* plaintiffs' schools served high concentrations of low-income students, students of color, and English language learners.[248] As a result in the disparity in meaningful learning time, "[p]laintiff students and their peers [were denied] an equal chance to obtain essential basic literacy and mathematical skills, and the opportunity to meet the mandated academic content standards that assume students have these skills."[249] The impact of such disparate access to meaningful learning time was evidenced by the state test scores. Students at plaintiffs' schools scored far below the state average in both English and math proficiencies on multiple assessments.[250]

Like so many school reform lawsuits, the plaintiffs in *Cruz* sought injunctive relief.[251] *Cruz*, however, settled after the legislature passed AB 1012 on September 11, 2015, sixteen months after *Cruz* was initially filed.[252] The settlement largely involved implementing procedures to ensure the effective application of AB 1012 to plaintiffs' schools.[253]

Cruz combined elements of both *Daniel* and *Reed*. Like *Daniel*, the argument driving *Cruz* appeared simple—students should be spending their time in school learning. Like *Reed*, the settlement negotiations brought about new regulations

District), Fremont High School (Oakland Unified School District), Florence Griffith Joyner Elementary School (LAUSD), and Compton High School (Compton Unified School District). *Id.* at 12.

247. *Id.* at 1 (citing CAL. CONST. art. I, § 7(a); CAL. CONST. art. IV, § 16(a)).

248. *Id.* at 14.

249. *Id.* Plaintiffs identified multiple reasons for disparity in meaningful learning time including "[the] assignment of students to administrative tasks . . . because of insufficient curricular offerings and a lack of available qualified teachers," "violence or security disruptions," "late changes to the master course schedule," "unstable, transient teaching faculties and administrative teams," and "unaddressed student absenteeism." *Id.* at 15.

250. In 2013, 57 percent of California public school students were proficient in English and language arts whereas only 14 to 26 percent of students were proficient at plaintiffs' schools. *Id.* at 58–59. In the same year, 51 percent of California public school students were proficient in math whereas only 3 to 30 percent of students at plaintiffs' schools were proficient. *Id.* No plaintiffs' high school exceeded a 9 percent proficiency level in math. *Id.*

251. *Id.* at 70.

252. Settlement Agreement at 1, Cruz v. State, No. RG14727139 (Cal. Super. Ct. Nov. 5, 2015).

253. *Id.* at 2. The settlement focused on new regulations and procedures such as adding two numeric codes to the "California Longitudinal Pupil Achievement Data System (CALPADS)" course codes; oversight on plaintiffs' schools to ensure the lack of an incomplete master schedule, errors in individual student schedules, or students assigned "to 'courses without educational content'" or "'repeated courses.'" *Id.* at 2–3.

and oversight mechanisms to ensure students in California's lower-performing schools receive their constitutionally guaranteed right to an education.

Importantly, *Cruz* provides a framework for future plaintiffs in light of the *Campaign for Quality Education* decision two years later. As discussed above, the court in *Campaign for Quality Education* held that the California Constitution does not guarantee the right to an education of "some quality."[254] The *Cruz* plaintiffs argued they were "receiv[ing] far less meaningful learning time than their peers."[255] By relying upon tangible differences in their education experience, such as instructional time and test scores, plaintiffs made plain the quality of their education was vastly inferior without arguing that they were entitled to some amount or some quality of education.[256] Making such an argument seems essential post-*Campaign for Quality Education*.

5. *Ella T.*

In 2017, school reform advocates sued California on behalf of students at three of the lowest performing elementary schools in the state.[257] In *Ella T.*, plaintiffs alleged they were denied the fundamental right to education under the California Constitution by not being provided access to literacy.[258] "An education that does not provide access to literacy cannot be called an education at all."[259] One of the plaintiff's schools had a student body that was 98 percent Black and Latinx, 95 percent socioeconomically disadvantaged, and had one of

254. Campaign for Quality Educ. v. State, 209 Cal. Rptr. 3d 888, 892 (2016).
255. Complaint at 1, Cruz v. State, No. RG14727139 (Nov. 5, 2015).
256. Interestingly, this argument seems to be a return to arguments premised on equity, as opposed to adequacy, even though equity claims have found little success.
257. Complaint at 2, Ella T. v. State, No. BC685730 (L.A. Super. Ct. Dec. 5, 2017). Mark Rosenbaum and Public Counsel's Opportunity Under Law Project along with Morrison & Foerster LLP brought suit on behalf of student plaintiffs. *Id.* at 59. The named schools were La Salle Avenue Elementary School (LAUSD), Van Buren Elementary School (Stockton Unified School District), and Children of Promise Preparatory Academy (Inglewood Unified School District). *Id.* at 2. These three school districts represent some of the lowest performing school districts in the entire country. *Id.* At the time, LAUSD was ranked as the twenty-second lowest performing school district in the United States while Stockton Unified ranked third. *Id.*
258. *Id.* at 12. Plaintiffs also asserted that students had a fundamental right to literacy in California because lawmakers had codified the fundamental importance of literacy within the State's definition of a basic education. *Id.* at 13 (citing CAL. EDUC. CODE § 19985.5(a) ("Reading and literacy skills are fundamental to success in our economy and our society.") and CAL. EDUC. CODE § 300(h) (of "the skills necessary to become productive members of our society," "literacy in the English language is among the most important").
259. *Id.* at 3.

the highest percentages of foster children as students in LAUSD.[260] The student body demographics at the other two schools were similar.[261] During the 2016–17 school year, the school-wide literacy proficiency rates for plaintiffs' schools were 4 percent, 6 percent, and 11 percent.[262] For the school with the 4 percent literacy proficiency rate, this meant only 8 of the 179 children who took the state-administered literacy exam were proficient or above.[263]

While the literacy proficiency rates are shocking, plaintiffs contended they were representative of the state's well known literacy crisis.[264] In 2012, California's own literacy experts issued a report, the "Striving Readers Comprehensive Literacy Plan (SRCL Plan)," which warned that "'[t]he critical need to address the literacy development of California children and students cannot be underestimated .... [M]any students will be at academic risk if improved approaches to literacy instruction are not an immediate and central focus of California's educational system.'"[265] Despite the "sense of urgency" to address literacy, the State never implemented the SRCL Plan.[266] In addition to spotlighting the abysmal literacy rates at plaintiffs' schools, plaintiffs also emphasized the negative consequences of failing to provide basic literacy including the relationship between illiteracy and

260. *Id.* at 19.
261. The student body at Van Buren Elementary was 85 percent Black and Latinx and 90 percent socioeconomically disadvantaged. *Id.* at 28. The student body at Children of Promise was 99 percent Black and Latinx and 93 percent socioeconomically disadvantaged. *Id.* at 34.
262. *Id.* at 3. The statewide literacy proficiency rate for the same grade levels was forty-nine percent. *Id.* at 20.
263. *Id.* at 19.
264. *Id.* at 13.
265. *Id.* at 13–14 (alterations in original). The report specifically identified the literacy needs of English language learners, students with disabilities, socioeconomically disadvantaged students, and Black and Latinx students—students of similar populations to that of plaintiffs' schools. *Id.* at 13.
266. *Id.* at 14.

incarceration,[267] the role of literacy in participation in democratic citizenship,[268] and the significant economic barriers faced by those who cannot read.[269]

Plaintiffs sought injunctive relief that would require defendants "to ensure that Plaintiffs have the opportunity to attain literacy."[270] Plaintiffs identified a handful of instructional and intervention methods such as "appropriate literacy instruction," "appropriate screening for literacy problems," "timely and appropriate intervention," and "a system of statewide accountability" monitoring literacy conditions.[271] Like the previous school reform settlement agreements discussed above, plaintiffs achieved relief that was broader in scope than the initial relief sought and applied to schools beyond plaintiffs' schools. The *Ella T.* settlement, however, achieved the broadest relief, not only because of the size of the block grant awarded to each of the seventy five elementary schools but also because of the focus on addressing trauma.

The *Ella T.* settlement included a $53 million block grant for seventy-five of the lowest performing elementary schools in the State.[272] The settlement included a "Framework for Literacy Education" that specified four categories of programs and services for which the grant money could be used.[273] The first two categories, "Access to High-Quality Teaching" and "Support for Literacy Learning" reflected the relief sought in the *Ella T.* complaint.[274] The last two categories, "Student Supports" and "Families and Community," however, went beyond the initial relief

267. *Id.* at 15–16 (reporting that up to one-third of inmates in California read below the third-grade level, and up to half of all inmates read below the seventh-grade level) *see also* William Drakeford, *The Impact of an Intensive Program to Increase the Literacy Skills of Youth Confined to Juvenile Corrections*, 53 J. CORR. EDUC. 139, 139 (2002) (positing that illiteracy is the "strongest common denominator" amongst incarcerated people); ANABEL P. NEWMAN, WARREN LEWIS & CAROLINE BEVERSTOCK, NAT'L CTR. ON ADULT LITERACY, PRISON LITERACY: IMPLICATIONS FOR PROGRAM AND ASSESSMENT POLICY ix (1993) (maintaining that "illiteracy and criminality are umbilically joined").

268. Complaint at 17, Ella T. v. State, No. BC685730 (L.A. Super. Ct. 2017) ("Without basic literacy skills, citizens cannot engage in knowledgeable and informed voting," pass the armed services application test, or effectively serve on a jury).

269. *Id*. ("Individuals who have been denied access to literacy often experience significant barriers to securing economic self-sufficiency.").

270. *Id.* at 57–58.

271. *Id.*

272. Settlement Agreement, Exhibit A, Settlement Term Sheet at 1, *Ella T.*, No. BC685730 (L.A. Super. Ct. 2017), *settled* Feb. 20, 2020.

273. *Id.* at 3–4.

274. *Id.* These two categories specified programs such as the hiring of literacy coaches, utilization of data to identify and support struggling students, and purchasing literacy curriculum resources. *Id.* at 3.

sought.[275] Programs suggested in these last two categories included "[s]trategies to improve school climate, student connectedness, and . . . to reduce exclusionary discipline practices," "[e]xtended school day to enable implementation of Breakfast in the Classroom," and "[d]evelopment of trauma-informed practices and supports for students and families."[276] The settlement also included state guidance on new laws on discipline, including limiting grounds for suspension for grades K–8 and providing homework to suspended students,[277] as well as pushing for nonsuspension discipline and the elimination of racially disproportionate suspensions.[278]

Not only was the *Ella T.* settlement more extensive than the relief sought by the complaint, it also addressed many of the root problems that lead to large disparities in educational attainment, like trauma and food security. By attacking the insufficiency of basic literacy programs at three elementary schools, plaintiffs were able to expand access to mental health services for students and families, implement more restorative justice and trauma-informed practices, and mitigate the harms of suspension.[279]

The manner in which the *Ella T.* settlement addressed both the curricular and socio-emotional needs of students, as well as the financial need of schools to implement such programming, reveals the great potential of the settlement

275. *Id.* at 4. In the complaint, almost all of the sought relief focused on literacy interventions and parent and teacher supports. Complaint at 52–54, Ella T. v. State, No. BC685730 (L.A. Super. Ct. Dec. 5, 2017). The minimal discussion of trauma-related relief focused solely on the need for trauma informed teacher trainings and access to mental health support more generally. *Id.* at 54-55. Conversely, the settlement was much more explicit in its focus on trauma. The settlement requires implementation of two comprehensive frameworks, the "Multi-Tiered System of Supports (MTSS)" and "Response to Intervention (RTI)." Settlement Agreement, Exhibit A at 4, Settlement Term Sheet, *Ella T.*, No. BC685730 (L.A. Super. Ct. 2017), *settled* Feb. 20, 2020.

276. *Id.* at 1.

277. *Id.* at 7. SB 419 prohibited suspension in grades K–8 for "willful defiance." *Id.* AB 983 required "Local Educational Agencies (LEAs)" to provide homework assignments to suspended students. *Id.*

278. *Id.* at 4; *see also* CAL. EDUC. CODE § 48900.5 (Cal. 2019) (codifying the "Suspension or Expulsion" rules). Suspension and expulsion, particularly for nonwhite students, is a longstanding problem. Erin M. Carr, *Educational Equality and the Dream That Never Was: The Confluence of Race-Based Institutional Harm and Adverse Childhood Experiences (ACEs) in Post-*Brown *America*, 12 GEO. J.L. & MOD. CRIT. RACE PERSP. 115, 129 (2020). "[S]ince the 1970's the suspension rate for Black children has doubled" whereas the suspension rate for white children has increased by approximately one percent. *Id.* During the 2011–12 school year, the ABA reported that "260,000 students were referred to law enforcement and 92,000 were arrested on school property" for infractions that overwhelming "were relatively minor and subjectively-defined offenses, such as . . . disrespectful behavior." *Id.* at 127.

279. Settlement Agreement at 4, 7, *Ella T.*, No. BC685730.

strategy. If future plaintiffs continue to focus on academic educational disparities, such as access to particular courses or test scores, *Ella T*. suggests that state defendants may be willing to address additional, fundamental needs of students. For example, as of 2016, 57 percent of California public school districts did not employ nurses.[280] Studies show that the presence of school nurses improves student achievement by reducing chronic absenteeism.[281] Using *Ella T*. as a guide, future plaintiffs might use school reform litigation premised on substandard academic proficiencies to guarantee greater access to nurses in settlement. *Ella T.* may also be a useful guide for using settlement to address educational inequities that result from "Adverse Childhood Experiences (ACEs)."[282]

280. Ana B. Ibarra, *California's Glaring Shortage of School Nurses*, CAL. HEALTHLINE (May 25, 2016), https://californiahealthline.org/news/ californias-glaring-shortage-of-school-nurses [https://perma.cc/GUU 8-XPVP] (explaining California's inadequate number of on-site nurses in public schools partly as a result of the fact that schools in California are not legally obligated to hire nurses). These school districts are responsible for 1.2 million students. *Id.* In 2014, the ratio of students to school nurses was 2784 to 1. *Id.*

281. David Washburn, *Even When Districts Want More School Nurses, They Have Trouble Finding Them*, EDSOURCE (Feb. 24, 2019), https:// edsource.org/2019/even-when-districts-want-more-school-nurses-they-have-trouble-finding-them/609022 [https://perma.cc/5TB9-5T 3X] (discussing the need for more nurses as chronic conditions like obesity and asthma continue to grow).

282. "Adverse Childhood Experiences (ACEs)" are potentially traumatic events that occur from ages 0 to 17, such as experience abuse or having a family member attempt suicide. *Preventing Adverse Childhood Experiences*, CTR. FOR DISEASE CONTROL & PREVENTION (Apr. 3, 2020), https://www.cdc.gov/violenceprevention/aces/fastfact.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Facestudy%2Ffastfact.html [https://perma.cc/7WLL-F6EA]. ACEs "can result in low academic achievement, increased absenteeism," and increased need of special education services. *See* Carr, *supra* note 278, at 118. Six in ten Black children experience one ACE. *Id.* at 119. Issues of institutional racism can "magnify the consequences of ACEs." *Id.* The impact of ACEs can be mitigated by positive school environments and trauma-informed practices, which have been shown to improve graduation rates, teacher retention, and overall academic performance. *Id.* at 140.

Notably, cases premised on theories of trauma have already found success seeking settlement in California and elsewhere. *See* Complaint at ¶¶ 67–72, Peter P. v. Compton Unified Sch. Dist., 135 F. Supp. 3d 1098 (C.D.C.A 2015) (No. CV 15-3726-MWF) (alleging the district's failure to address complex trauma violated Section 504 of the Rehabilitation Act, the Americans with Disabilities Act of 1990, and various Department of Education regulations); Complaint at 81–91, Kevin S. v. Blalock, No. 1:18-cv-00896 (D.N.M. Sept. 22, 2018) (alleging New Mexico's child welfare system's failure to provide for trauma-impacted children violated Section 504 of the Rehabilitation Act, the Americans with Disabilities Act of 1990, Fourteenth Amendment Substantive Due Process, the Medicaid Aid, and the Indian Child Welfare Act); Complaint at 63, Stephen C. v. Bureau of Indian Affs., No. 3:17-cv-09004-SPL (D. Ariz. 2017) (alleging the U.S. government "fail[ed] to [p]rovide [m]eaningful [a]ccess to [e]ducation to Havasupai [y]outh [i]mpacted by [c]hildhood [a]dversity and [t]rauma").

The past two decades of California school reform settlements evidence a promising path for plaintiffs seeking better educational opportunities. The settlement strategy may provide quick relief to the students attending schools that are in the greatest need of reform and funding. Likewise, the settlement strategy permits legislators and governors who personally believe in school reform, but face political constraints in effecting such reform, the opportunity to provide meaningful relief to many of California's students.

IV. THE MOVEMENT AWAY FROM *BROWN*'S PROMISE OF EQUAL EDUCATION

My argument that the settlement strategy is the most advantageous avenue for school reform litigation implicates how far the country has moved from *Brown*'s promise of equal education. California schools are "intensely segregated."[283] More than half of all Black students in California attend schools in only twenty-five of the state's one thousand school districts.[284] The trend towards resegregation is occurring nationwide. From 1988, the least segregated year for Black students, to 2016, the share of schools that enroll 90 to 100 percent nonwhite students has more than tripled.[285] Racial segregation is not only harmful on its own, but it also has the effect of concentrating nonwhite students in high-poverty, less effective schools.[286] The overlap between nonwhite and low-income concentrated schools continues to grow.[287] By some estimates, over 50 percent of children of color live in neighborhoods where child poverty exceeds thirty percent.

283. Ricardo Cano, *Mind the Achievement Gap: California's Disparities in Education, Explained*, CALMATTERS (June 23, 2020), https://calmatters.org/explainers/achievement-gap-california-explainer-schools-education-disparities-explained [https://perma.cc/N7ND-FS 66] (discussing the state's disparity in literacy and math proficiency by race and ethnicity).

284. *Id.*

285. ERICA FRANKENBERG, JONGYEON EE, JENNIFER B. AYSCUE & GARY ORFIELD, UCLA C.R. PROJECT, CTR. FOR EDUC. & C.R., HARMING OUR COMMON FUTURE: AMERICA'S SEGREGATED SCHOOLS 65 YEARS AFTER *BROWN* 21 (2019), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf [https://perma.cc/8GST-N9XJ].

286. Cano, *supra* note 283. For an interactive study highlighting educational disparities across both California and the country, see *The Educational Opportunity Project*, STAN. UNIV., https://edopportunity.org [https://perma.cc/GPV4-HH8M].

287. FRANKENBERG, EE, AYSCUE & ORFIELD, *supra* note 285, at 23. In 2001–02, 88 percent of schools with 90 to 100 percent Black and Latinx students were schools where over 50 percent of students were from low-income households. *Id.* Ten years later, half of 90 to 100 percent Black and Latinx schools had 90 to 100 percent students from low-income households. *Id.*

By comparison, less than 17 percent of white children live in similar levels of poverty.[288]

When evaluating these trends against the various political and social hurdles to school reform initiatives, the extent to which the country has failed to adhere to *Brown*'s promise of equality becomes undeniable. Race plays an influential role in school reform initiatives and litigation.[289] As legal scholar James Ryan wrote over twenty years ago, "[O]ne cannot fully understand the dynamics and limitations of school finance reform without paying attention to the dynamics of race relations in general and school desegregation in particular."[290]

A. Public Perceptions of Race in School Reform Efforts

Race plays a role not only in the perception of who benefits from school reform efforts but also in who supports such reform efforts.[291] In two studies, one by Douglas Reed in New Jersey and the other by Kent Tedin in Texas, results indicated that white citizens perceive school finance reform primarily benefitting Black students.[292] In Texas, Tedin found the measurement indicating prejudice or hostility towards Black people was as likely to be correlated with living in a district that stood to lose school funding as it was with general opposition to equal school financing.[293] Reed found that race was a better predictor of support or opposition for a new funding scheme than income among parents in New Jersey.[294] Even white parents whose school districts would benefit from the new funding scheme opposed it.[295] Reed and Tedin's research highlights the extent to which school reform efforts are racially charged.[296] In addition to problems involved in school reform efforts more broadly, Tedin's and Reed's research serves to underscore the

288. *See* Carr, *supra* note 278, at 120.
289. Ryan, *supra* note 91, at 432 (arguing race appears to influence school reform in the same way it does welfare).
290. *Id.* at 476.
291. *Id.* at 432–33 (citing studies indicating that white citizens inaccurately perceive school reform as primarily benefitting Black citizens and that nonwhite citizens support school reform more than white citizens). *See generally* Douglas S. Reed, *Twenty-Five Years After* Rodriguez*: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 L. & SOC'Y REV. 175 (1998); Kent L. Tedin, *Self-Interest, Symbolic Values, and the Financial Equalization of the Public Schools*, 56 J. POL. 628 (1994).
292. Reed, *supra* note 291, at 211–12; Tedin, *supra* note 291, at 634 n.18.
293. Tedin, *supra* note 291, at 638, 646–47.
294. Reed, *supra* note 291, at 212.
295. *Id.* at 211–12.
296. *See* Ryan, *supra* note 91, at 475–76 (explaining that Reed's and Tedin's research illustrates that race plays a large role in explaining the level of support for school reform efforts).

social and political hurdles facing nonwhite legislative districts seeking to improve access to education and educational achievement outcomes.

B. Racial Power Imbalances in Both the Judiciary and Legislature

Nonwhite school districts are not as successful as white districts in both legislative and judicial school reform efforts.[297] Nonwhite districts struggle to bring about school reform in the legislature because of a lack of political clout and consensus.[298] In state legislatures, white suburban districts wield the most power.[299] Because of legislative resistance to school reform efforts, nonwhite school districts and plaintiffs must turn to the courts when searching for legal redress.[300] As such, litigation plays an outsized role in school reform efforts.[301]

While litigation plays a large role in school reform efforts, it too preferences white districts. School reform litigation is more successful when brought by suburban or rural white districts.[302] Predominately nonwhite districts have won nearly 50 percent less than predominately white districts.[303] Urban nonwhite districts have fared particularly poorly in litigation.[304] Even when nonwhite districts achieve a favorable judicial ruling, they struggle to push the legislature to pass reforms that adequately redress the recognized harm.[305]

C. Retreat From Integration

Despite *Brown*'s decree that segregated education was "inherently unequal,"[306] schools are as segregated as they were pre-busing.[307] The growth of resegregation is a result of both housing segregation and the growing belief that

297. *Id.* at 433.
298. *Id.* at 476.
299. *Id.* at 479.
300. *See id.* at 471 (noting the fierce opposition to directing more resources to majority nonwhite schools by both the legislature and the public).
301. *Id.* at 447.
302. *Id.* at 452, 455.
303. *Id.* at 455 (reporting that minority districts have won 3 of the 12 school finance challenges (25 percent) in which they were plaintiffs whereas white districts have won 11 of 15 cases (73 percent)).
304. *Id.*
305. *Id.* at 475.
306. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).
307. *See* FRANKENBERG, EE, AYSCUE & ORFIELD, *supra* note 285, at 21; Kimberly Jenkins Robinson, *Resurrecting the Promise of* Brown*: Understanding and Remedying How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 793 (2010).

desegregation is not the answer for improving access to quality education for Black and Latinx students.[308] Furthermore, resegregation is occurring as districts no longer have to comply with the court oversight that resulted from desegregation decrees.[309] Districts with voluntary desegregation programs have also begun to phase out desegregation programs.[310]

Resegregation is occurring while white students no longer represent the majority of public school students in the United States.[311] In 2016, the percentage of public school students in California who were white was 23.7 percent.[312] While California's student body is only 5.5 percent Black, about 51 percent of Black students attend schools that are 90 to 100 percent nonwhite.[313] Furthermore, while the state's student body is 54.2 percent Latinx, almost 60 percent of Latinx students attend schools that are 90 to 100 percent nonwhite.[314] Most white students attend schools that are roughly 70 percent or more white.[315]

The resegregation of schools has profound implications for the future of school reform initiatives and litigation efforts that seek to benefit nonwhite students. As resegregation continues and the push for integration softens, there appears to be more support for reforming the education provided by racially isolated schools.[316] Support for racially isolated schools, particularly when considering the overlap with high-poverty schools, is perhaps strategically advantageous. Because of the concentration of socioeconomically disadvantaged students in particular schools, some argue focusing on funding and resources

308. Robinson, *supra* note 307, at 815–16; *see also* Ryan, *supra* note 91, at 479 (describing how courts, advocates, and academics increasingly believe that increased resources, not desegregation, will improve the education of students of color). For an analysis of the ways in which white suburban families were able to consolidate resources and commodify education, see generally LaToya Baldwin Clark, *Education as Property*, 105 VA. L. REV. 397 (2019).

309. FRANKENBERG, EE, AYSCUE & ORFIELD, *supra* note 285, at 13; *see also* Ryan, *supra* note 91, at 446 (explaining that districts that have been receiving additional funding through court desegregation orders have been unable to retain the same level of funding once the segregation decrees have been lifted).

310. For example, in 1994, the Berkeley School Board voted to phase out its 1968 two-way busing program. *See 50th Anniversary of Berkeley's Pioneering Busing Plan for School Integration*, *supra* note 82.

311. White students comprise 48.4 percent of all public school students. FRANKENBERG, EE, AYSCUE & ORFIELD, *supra* note 285, at 10.

312. *Id.* at 19. The percentage of students who were Black and Latinx was 5.5 and 54.2 percent respectively. *Id.*

313. *Id.* at 28.

314. *Id.* at 19, 30.

315. *Id.* at 32.

316. Ryan, *supra* note 91, at 434 (noting the increasing support for reform efforts seeing to improve the quality of education at racially segregated schools).

will have a similar impact as racial integration.[317] Others insist that there is actually plenty of education funding and the focus should be allowing school administrators and families more choice.[318] Still others contend that the focus should not be on education reform but rather on voting reform efforts.[319] Perhaps school reform should occur through efforts entirely outside of the law, through reforms to local school boards and grassroots organizing.

Regardless of these arguments about what reform is needed, in the face of the large role race plays in the perception of school reform, the racially imbalanced access to both legislative and judicial avenues of reform, and the growing racial and socioeconomic resegregation across California and the United States, the efficacy of the settlement strategy is evident.

In light of recent events, the need for an efficient and reliable strategy for reform has only grown larger. Beginning at the end of February 2020, schools across the United States began to close in response to the COVID-19 outbreak.[320] As all schools shifted to a remote learning model, access to educational resources became unignorable. Despite needing the internet to attend remote classes, in June 2020 roughly 33 percent of households in California still did not have access to a learning device.[321] The numbers were worse for students of color. Forty-two

317. *See* Natalie Wexler, *Why Integration Won't Fix Educational Inequity*, FORBES (Sept. 25, 2019, 5:17 PM), https://www.forbes.com/sites/ nataliewexler/2019/09/25/why-integration-wont-fix-educational-inequity/?sh=6dfe4fa73700 [https://perma.cc/FB8V-NWGH] (positing that income-based gaps perpetuate educational discrepancies even in integrated schools). Notably, some districts have attempted integration programs based on the economic profiles of census tracts. *See* Blume, *supra* note 86 (discussing Berkeley Unified's attempt to implement an economic integration program).

318. Koski, *supra* note 131, at 1899 (describing a second path in the "Next Generation" of education rights litigation as targeting policies claimed to constrain administrative discretion and family choice and arguing that "there is plenty of money, it is just being spent poorly").

319. *See* Bruce Meredith & Mark Paige, *Reversing* Rodriguez*: A Siren Call to a Dangerous Shoal*, 58 HOUS. L. REV. 355, 362 (2020) (arguing that improving educational rights is first accomplished by securing equal access to voting).

320. *The Coronavirus Spring: The Historic Closing of U.S. Schools (A Timeline)*, EDUC. WEEK (July 1, 2020), https://www.edweek.org/ew/section/ multimedia/the-coronavirus-spring-the-historic-closing-of.html [https://perma.cc/W4JV-RZSH] (providing a timeline of the school response to the COVID-19 pandemic across the country).

321. NIU GAO, JULIEN LAFORTUNE & LAURA HILL, PUB. POL'Y INST. CAL, WHO IS LOSING GROUND WITH DISTANCE LEARNING IN CALIFORNIA? (2020). https:// www.ppic.org/wp-content/uploads/who-is-losing-ground-with-distance-learning-in-california-october-2020.pdf [https://perma.cc/ K8SL-AU5Y]*; see also* Tony Romm, *'It Shouldn't Take a Pandemic': Coronavirus Exposes Internet Inequality Among U.S. Students as Schools Close Their Doors*, Wash. Post (Mar. 16, 2020, 3:22 AM), https://www.washingtonpost.com/technology/2020/03/16/schools-internet-inequality-coronavirus [https://perma.cc/AH2U-TN2G] (discussing how this "homework gap" disproportionately impacts low-income families and people of color).

percent of Black households did not have access to a learning device in June 2020.[322] In November 2020, voters in California failed to pass Proposition 15, which sought to reform the state property tax system established by Proposition 13.[323] Experts estimate Proposition 15 would have generated between $6.5 and $11.5 billion annually, with 40 percent of the revenue to be distributed to schools through LCFF, which would allocate the new funding to districts based on the percentage of high-needs students in the district such as students who are low-income or English language learners.[324] Proposition 15's defeat means schools in California will continue to suffer from the funding crisis created over four decades ago by Proposition 13.

The efficacy of the settlement strategy may also be gaining moment outside of California. In Michigan, the State settled *Gary B.*, providing $94.4 million in funding for literacy related programs and initiatives for Detroit Public Schools.[325] In Delaware, the State settled *In re Delaware Public Schools Litigation*, providing between $35 and $60 million per year for "Opportunity Funding" statewide.[326]

Both settlements underscore how different plaintiffs bringing different claims in different political contexts can achieve enormous relief for students and help make the goal of equitable access to education for all students a little more

322. GAO, LAFORTUNE, & HILL, *supra* note 321, at 78. The same coalition of school reform advocates that brought the *Ella T.* lawsuit filed another lawsuit against the State. In *Cayla J.*, plaintiffs alleged the state's failure to provide remote education "left many already-underserved students functionally unable to attend school," thus depriving Black and Latinx students of their "fundamental right to a free and equal education guaranteed by the California Constitution." Complaint at 1–2, Cayla J. v. State, No. RG20084386 (Alameda Sup. Ct. 2020).

323. Cal. Proposition 15 (2020). Proposition 15 sought to implement a split-roll system of property taxation whereby commercial property would be taxed differently than residential property and at a rate unconstrained by the limitations required under the Proposition 13 scheme.

324. Roland Li, *Proposition 15, California's Sweeping Property Tax Reform, Defeated*, S.F. CHRON. (Nov. 11, 2020, 3:08 PM), https://www. sfchronicle.com/local-politics/article/Proposition-15-California-s-sweeping-property-15717865.php [https://perma.cc/YYF7-4SMJ] (explaining the outcome of the Proposition 15 measure).

325. Settlement Agreement at 2, Gary B. v. Whitmer, 957 F.3d 616 (6th Cir. 2020), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020), *settled* (May 14, 2020).

326. Settlement Stipulation and [Proposed] Order at 3–4, *In re* Del. Pub. Schs. Litig. (Del. Ch. 2018) (No. 2018-0029-VCL), *settled* (Oct. 12, 2020). The amount of funding per year will begin at $35 million and increase to $60 million by 2025. *Id.* When the lawsuit was filed, Delaware was one of just four states that did not give additional funds to schools with English language learners and one of only fifteen states to not provide additional funds for socioeconomically disadvantaged students. Jeanne Kuang & Natalia Alamdari, *Settlement of Delaware Education Suit Promises Historic Changes*, DEL. ONLINE (Oct. 13, 2020, 10:42 AM), https://www.delawareonline.com/story/news/2020/10/12/delaware-settles-education-funding-lawsuit/5973782002 [https://perma.cc/UC 7T-Y7TN].

attainable. The Delaware settlement showcases the way in which statewide funding schemes can be reformed through the settlement strategy without requiring a court to find the original funding scheme unconstitutional. The Michigan settlement provides yet another cautionary tale about school reform litigation, specifically the risk of bad precedent. A three judge panel for the Sixth Circuit originally found for plaintiffs by holding that the Fourteenth Amendment's Due Process Clause provides students a fundamental right to a basic education, which includes access to literacy.[327] Less than three weeks later, the Sixth Circuit, sitting en banc, vacated the decision sua sponte.[328] By settling the case before the Sixth Circuit reheard *Gary B.*, Governor Gretchen Whitmer not only ensured relief for plaintiffs but also prevented the court from hearing the case.[329] Without the settlement, it seems likely the court would have held that there was no fundamental right to a basic minimum education under the U.S. Constitution, thus significantly constraining the ability of future plaintiffs to bring school reform lawsuits under the U.S. Constitution.

The settlement strategy also draws attention to the shortcomings of *Brown*. The various inequalities in school resources and materials the settlement strategy is well positioned to address are direct and unfortunate consequences of *Brown*. *Brown* did not declare education a fundamental right, prohibit de facto segregation, or require school integration. Rather, the decision only prohibited de jure segregation. Without the inability to address structural issues such as housing segregation, white flight, and the distribution of state and local taxes, *Brown*'s heed of the value of an equal education continues to be but a future promise that the country continues to move further and further away from.

CONCLUSION

In this Comment, I argued plaintiffs seeking school reform through litigation in California should do so through the settlement strategy. As evidenced by the past two decades of school reform settlements in California, bringing narrow claims with an eye towards settlement can lead not only to faster relief than drawn out litigation, but also broader relief than that sought in the initial complaint for

327. Gary B. v. Whitmer, 957 F.3d 616, 621 (6th Cir. 2020) (recognizing a basic minimum education as a fundamental right).

328. Gary B. v. Whitmer, 958 F.3d 1216, 1216 (6th Cir. 2020) (vacating the previous decision).

329. Jennifer Chambers, *Federal Court Upholds Detroit Literacy Settlement*, Detroit News (June 11, 2020, 1:39 PM), https://www.detroitnews .com/story/news/education/2020/06/10/federal-court-upholds-detroit-literacy-settlement-dismisses-appeal/5337575002 [https://perma.cc/6MDG-A6FK] (explaining that the "settlement rendered the question [of whether there was a fundamental right to literacy] moot" and thus the case will not be heard en banc).

both plaintiffs and similarly situated nonparties. Furthermore, the settlement strategy allows for participation from the coequal branches of government who may otherwise be structurally or politically constrained from effecting school reform initiatives through other avenues.

While the settlement strategy seems to be a promising approach for relief, the reality that student plaintiffs, who are commonly low-income and students of color, have no other reliable means by which to achieve more equitable access to education is alarming. Despite the continual declarations that education is of fundamental importance to society and all students deserve an education, less than half of California's elementary school children are reading at grade level[330] and more students today attend segregated schools than forty years ago.[331] The realities of California's schools make plain the extent to which America has broken *Brown*'s promise that education is "a right which must be made available to all on equal terms."[332] We must do more to restore this promise.

330. Complaint at 20, Ella T. v. State, No. BC685730 (L.A. Super. Ct. Dec. 5, 2017).
331. FRANKENBERG, EE, AYSCUE & ORFIELD, *supra* note 285, at 21.
332. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).