

# Democratic School Desegregation: Lessons from Election Law

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## ABSTRACT

Despite their joint relevance to democracy, no article to date has attempted to analyze election law alongside education law. This Article examines the relationship between the doctrinal threads of these bodies of law. From this study, this Article concludes that, while election law is imbued with democratic principles to guide courts and policymakers—such as the one-person one-vote principle—education law is not guided by any such democratic principles. Additionally, while electoral boundaries are viewed as malleable under federal law, school district boundaries are not. In light of these doctrinal differences, and in light of the importance of education to democracy, this Article advocates a policy of democratic school desegregation based on a principle focused on reducing socioeconomic isolation in schools. This democratic principle, referred to in this Article as the 60/40 principle, has the ultimate goal of ensuring that no child in the United States attends a school with a low-income student majority. Under this principle, school district boundaries are not sacrosanct and may be adjusted as a last resort to achieve the ideals of democratic school desegregation.

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## INTRODUCTION

One of the most basic needs of any democratic nation is a well-informed citizenry that is prepared to participate and vote in elections. This ideal has not been met in the United States, where a substantial proportion of the population—particularly the socioeconomically disadvantaged—is undereducated and therefore ill-prepared to engage effectively in the electoral process.<sup>1</sup> Moreover, educational deficiencies contribute to low voter turnout in the United States, and voter participation would improve if these deficiencies were addressed.<sup>2</sup>

The problem certainly is not that people do not recognize the democratic ideals that flow from an educated society. John Dewey recognized the basic principle in his seminal work *Democracy and Education* almost 100 years ago, where he explained that “a government resting upon popular suffrage cannot be successful unless those who elect and who obey their governors are educated.”<sup>3</sup> According to Dewey, a society that purports to be a land of opportunity—that is, a place that fosters upward mobility and equality of opportunity—“must see to it that its members are educated to personal initiative and adaptability.”<sup>4</sup> And, as Amy Gutmann explained over 25 years ago,

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1. The rural United States population is also known to receive a subpar education in many circumstances. Though this Article primarily discusses urban educational settings, the democratic school desegregation proposal advanced here could apply to rural settings as well, depending on the income distribution of students in those settings.

2. See, e.g., Kevin Milligan, Enrico Moretti & Philip Oreopoulos, *Does Education Improve Citizenship: Evidence from the U.S. and U.K.* 21 (Nat’l Bureau of Econ. Research, Working Paper No. 9584, 2003) (finding that “education improves participation not only as measured by voter turnout, but also in broader measures”).

3. JOHN DEWEY, *DEMOCRACY AND EDUCATION* 101 (1916). See, e.g., NEL NODDINGS, *EDUCATION & DEMOCRACY IN THE 21ST CENTURY* 22 (2013) (noting the importance of education in “guiding [students] toward deliberative thinking and communication”); *EDUCATION, JUSTICE, AND DEMOCRACY* 14 (Danielle Allen & Rob Reich eds., 2013) (noting the importance of “a commitment to the view that, if adults are to succeed in educating their children to steer democracy effectively when it is their turn, those adults must constantly work to educate themselves so they might become better educators”).

4. DEWEY, *supra* note 3, at 102.

The democratic truth in equalization is that all children should learn enough to be able not just to live a minimally decent life, but also to participate effectively in the democratic processes by which individual choices are socially structured. *A democratic state, therefore, must take steps to avoid those inequalities that deprive children of educational attainment adequate to participate in the political processes.*<sup>5</sup>

Numerous other scholars have recognized the connections between democracy and education.<sup>6</sup>

Nonetheless, when people think of “democracy,” they typically think about free and fair elections before thinking about education. Thus it is unsurprising that our Supreme Court has consistently, over the past 50-plus years, recognized voting as a fundamental right protected by the Fourteenth Amendment of the U.S. Constitution.<sup>7</sup> In contrast, as the Supreme Court made clear in *San Antonio v. Rodriguez*,<sup>8</sup> education has never been accorded “fundamental right” status. Even so, *Rodriguez* recognized the importance of education in promoting democracy, explaining that “[c]ompulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.”<sup>9</sup> Other Supreme Court cases have also recognized the inevitable link between democracy and education.<sup>10</sup>

Though our law acknowledges the important role education plays in our democracy, it does little to ameliorate the antidemocratic ends that existing school district boundaries promote; in many cases, these boundaries are roadblocks to promoting racial and socioeconomic integration between and among schools. Although the lines separating

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5. AMY GUTMANN, *DEMOCRATIC EDUCATION* 134 (1987).

6. See Aaron J. Saiger, *The School District Boundary Problem*, 42 *URB. LAW.* 495, 521–23 (2010).

7. U.S. CONST. amend. XIV.

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

9. *Id.* at 29–30 (quoting *Brown v. Bd. of Educ.* 347 U.S. 483, 493 (1954)).

10. See, e.g., *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979) (recognizing the link between democracy and education, citing John Dewey, and explaining that “[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions”); *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring). Justice Frankfurter wrote:

The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards. To regard teachers -- in our entire educational system, from the primary grades to the university -- as the priests of our democracy is therefore not to indulge in hyperbole.

*Id.*

electoral districts are viewed as malleable—particularly in the wake of the Supreme Court’s establishment of the one-person one-vote principle in *Reynolds v. Sims*<sup>11</sup> and the principles established by the Voting Rights Act of 1965<sup>12</sup>—the lines separating school districts have been viewed as far more sacrosanct. Indeed, as a result of reapportionment and the one-person one-vote principle, electoral district lines at both the federal and state levels are redrawn once every ten years.<sup>13</sup> These changes to electoral maps are subject to judicial scrutiny pursuant to § 2 of the Voting Rights Act<sup>14</sup> and the equal protection principles of the Constitution.<sup>15</sup>

This Article argues that, given the importance of education to democracy, school district boundaries should not be viewed as sacrosanct, nor should they be treated as such, under our law. Accordingly, this Article proposes a solution to the segregation problem whereby, via a duly passed federal law (or corresponding state laws), states and school districts, guided by a democratic equalization principle, may revisit school district boundaries as necessary.<sup>16</sup> This principle, which this Article refers to as the 60/40 principle,<sup>17</sup> is a democratic

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11. *Reynolds v. Sims*, 377 U.S. 533 (1964) (establishing the one-person one-vote principle).

12. Voting Rights Act of 1965, 42 U.S.C. §§ 1973 to 1973aa-6 (2012).

13. *See* 2 U.S.C. § 2a(a) (2012) (reapportioning the number of representatives allotted to each state pursuant to each decennial census); *id.* § 2c (requiring that the number of electoral districts equal the number of representatives allotted to each state). Although federal law does not expressly compel states to redistrict on or before a certain date, nearly every state in the union requires that it redistrict within a certain time frame after each decennial census. *See* NAT’L CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2010, at 155–60 (2009) (illustrating that 40 states set a deadline for redistricting, which typically occurs prior to the election following the census). Even though some of the states do not formally set a deadline with their own laws, those states still redistrict in practice. *See State Legislative and Congressional Redistricting After the 2010 Census*, BALLOTPEDIA,

[http://ballotpedia.org/State\\_Legislative\\_and\\_Congressional\\_Redistricting\\_after\\_the\\_2010\\_Census](http://ballotpedia.org/State_Legislative_and_Congressional_Redistricting_after_the_2010_Census) (last visited March 29, 2015) (indicating that Arizona, California, Georgia, Michigan, Nebraska, New Hampshire, New Mexico, Rhode Island, South Carolina, Tennessee, and West Virginia have engaged in redistricting efforts after the 2010 census).

14. 42 U.S.C. § 1973.

15. *See Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (invalidating the coverage formula of § 4 of the Voting Rights Act, rendering the preclearance requirement of § 5 hollow).

16. For example, school district boundaries could be altered every ten years, after each decennial census. *See Saiger, supra* note 6, at 531–48 (presenting the theoretical outlines of a similar proposal).

17. Under this principle, every school district must, at minimum, distribute its students such that fewer than 60% of the students in each of its schools comprise low-income students. Each school district should further provide incentives such that, over time, fewer than 40% of the students in each of its schools comprise low-income students. One proxy for “low-income” students is free and reduced price lunch.

equalization principle which seeks to minimize the socioeconomic isolation of public school students—whether rich or poor. Such a principle could be advanced by the federal government at-large, through, for example, an incentive program like Race To The Top (“RTTT”) or the next reauthorization of No Child Left Behind (“NCLB”), or by individual state-law initiative.

Assuming that such a democratic equalization principle were adopted, numerous democratic advantages would follow. First, under such a regime, lawmakers could consider a wide array of solutions to the socioeconomic isolation problem, including both *intra*- and *inter*- district solutions that would not require redrawing of school district boundaries.<sup>18</sup> Eventually, if these initial solutions do not reasonably ensure progress toward the goals of the principle, lawmakers could eventually consider measures that would alter existing school district boundaries. Such redistricting efforts would transform school district boundaries into tools that could be used to promote de jure integration—rather than entrench them and promote de facto segregation. Periodically redrawing school district boundaries will provide legal benefits because such a regime would more appropriately align existing Supreme Court jurisprudence—such as that articulated in *Swann v. Charlotte-Mecklenburg Board of Education*<sup>19</sup> and *Milliken v. Bradley*<sup>20</sup>—with the ideals of democratic school desegregation. Moreover, insofar as lawmakers and legal scholars analyze education as a democratic “good,”<sup>21</sup> they can apply principles of antitrust and competition law to analyze the degree to which school district boundaries promote a procompetitive or anticompetitive “market” for accessing quality education.<sup>22</sup>

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18. Examples of such methods that have proven somewhat effective include interdistrict magnet school programs and interdistrict transfer programs. See Ann Mantil, Anne G. Perkins & Stephanie Aberger, *The Challenge of High-Poverty Schools: How Feasible Is Socioeconomic School Integration?*, in *THE FUTURE OF SCHOOL INTEGRATION* 155, 191–93 (Richard D. Kahlenberg ed., 2012). Other methods are also discussed in more detail below.

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

20. *Milliken v. Bradley*, 418 U.S. 717 (1974).

21. See, e.g., Maxine Eichner, *Who Should Control Children's Education? Parents, Children, and the State*, 75 U. CIN. L. REV. 1339, 1369 (2007) (“But we are not only a liberal polity; we are also a democracy. The claim to legitimacy of collective self-rule therefore provides an alternative source of justification through which the issue of civic education must be analyzed.”).

22. Although beyond the scope of this Article, a literature of political antitrust has emerged that seeks to analyze the law of democracy and the provision of democratic goods under an antitrust framework. For a summary of this literature, see generally Yen-Tu Su, *Retracing Political Antitrust: A Genealogy and Its Lessons*, 27 J.L. & POL. 1 (2011).

Additional benefits will also accrue from the proposal advanced in this Article. First, revisiting school district boundaries every decade or so can, over time, erode the prevailing cultural view that school district boundaries must remain static over time, making the national consciousness more receptive to such changes. For example, because students and parents will expect that school district boundaries can and may change at relatively frequent intervals, these individuals are more likely to be invested in the success of school districts at-large—rather than *simply* the local school district in which they currently live. Individuals, for example, may need to confront the possibility that they could be “redistricted” into a neighboring district. This would maintain the ideal of local control in the sense that everyone will retain a “home” school district but, at the same time, create enough uncertainty such that local control will not come at the complete neglect of the interests of adjoining school districts or a larger metropolitan area. And, to the extent that individuals do not become receptive to school district boundary changes, the 60/40 principle will provide incentives to achieve socioeconomic diversity in schools *without* redrawing those boundaries, as noted above.

The 60/40 principle builds on existing school desegregation law and policy literature. First, this is the only Article in the law-review literature that has comprehensively contextualized the challenges education law faces by undertaking a parallel examination of election law. Second, this Article’s democratic school desegregation policy proposal supplements the existing policy literature. Policy proposals in the desegregation literature either have suggested consolidating entire metropolitan areas into larger school districts<sup>23</sup> or, more recently, have offered remedies involving voluntary desegregation plans that include, among other things, regional magnet schools and *inter*-district transfers between urban and suburban districts.<sup>24</sup> While some have suggested general policies of

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23. See, e.g., Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825, 844–45 (1996) (“[A] metropolitan desegregation plan is very likely to put all students in majority white schools or, perhaps, evenly balanced magnet schools.”).

24. See, e.g., AMY STUART WELLS ET AL., CHARLES HAMILTON HOUSTON INST. FOR RACE & JUSTICE, BOUNDARY CROSSING FOR DIVERSITY, EQUITY AND ACHIEVEMENT 3 (2009), available at [http://www.charleshamiltonhouston.org/wp-content/uploads/2013/06/Wells\\_BoundaryCrossing.pdf](http://www.charleshamiltonhouston.org/wp-content/uploads/2013/06/Wells_BoundaryCrossing.pdf); Elizabeth DeBray-Pelot & Erica Frankenberg, *Federal Legislation To Promote Metropolitan Approaches to Educational and Housing Opportunity*, 17 GEO. J. ON POVERTY L. & POL’Y 265, 271 (2010); Daniel Kiel, *The Enduring Power of Milliken’s Fences*, 45 URB. LAW. 137, 176 (2013); Philip Tegeler, *The “Compelling Government Interest” in School Diversity: Rebuilding the Case for an Affirmative Government Role*, 47 U. MICH. J.L. REFORM 1021, 1045 (2014); Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1465–67 (2014).

altering school district boundaries to foster integration,<sup>25</sup> only one article's proposal to date has suggested redrawing school district boundaries periodically according to a democratic principle.<sup>26</sup> However, the democratic equalization principle adopted in that article is quite different from the one proposed here and, while theoretically provocative, would likely be less practical than the proposal advanced in this Article.<sup>27</sup> Additionally, whereas the proposal of that article seems to contemplate perpetual redistricting, this Article emphasizes the primacy of the democratic equalization principle, views redistricting as a last resort, and seeks a steady state wherein legally-compelled redistricting is or would no longer be necessary.

This Article will proceed in five parts. Part I will explain existing principles of election law, including the Supreme Court's fundamental rights jurisprudence and the legislative and judicial principles that compel both federal and state electoral districts to be redrawn after each decennial census. Next, Part II will explain how—despite the apparent similarities between voting and education as democracy-promoting tools—Supreme Court jurisprudence in the education arena diverges dramatically from election-law jurisprudence. This divergence exists

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25. See, e.g., Margaret C. Hobday, Geneva Finn & Myron Orfield, *A Missed Opportunity: Minnesota's Failed Experiment with Choice-Based Integration*, 35 WM. MITCHELL L. REV. 936, 975 (2009) (“Integrated schools are possible, even after *Parents Involved*, if states adjust school district attendance boundaries to maximize integrated school attendance zones.”); see also Taryn Williams, Note, *Outside the Lines: The Case for Socioeconomic Integration in Urban School Districts*, 2010 BYU EDUC. & L.J. 435, 461–64 (proposing redrawing school districts to be “flower-petal” districts that emanate from the center of a city to capture socioeconomic diversity or, in the alternative, statewide district consolidation).

26. See Saiger, *supra* note 6, at 496–97.

27. The principle Saiger adopts seeks to maximize within-district variances in wealth. See Aaron J. Saiger, *Local Government without Tiebout*, 41 URB. LAW. 93, 128 (2009) (“The analogue of one-person-one-vote is therefore to draw local boundary lines so as to maximize mean within-district variance in individual wealth. . . . Like one-person-one-vote, a variance-in-wealth-maximizing rule incorporates not a substantive definition of equality but a prophylaxis against structural political failure.”); see also Saiger, *supra* note 6, at 541. This principle would ensure that the widest possible ranges of income reside within each school district. While this principle makes sense theoretically, it would likely be difficult to implement because it lacks a clear baseline from which he seeks to maximize variance. For example, does Saiger assume that the number of school districts remains constant or that it could change? If he assumes it could change, the theoretical maximum variance would always be obtained by creating an at-large school district comprising the entire state. He also acknowledges, but does not address, the problems associated with *intra*-district segregation, suggesting that the problems would be solved organically in a diverse school district. See *id.* at 538 (“A diverse polity, all things equal, is better situated to resist sub-district sorting than a homogeneous one, where sorting is preordained.”). My proposal would explicitly require efforts to reduce *intra*-district segregation through its goal of ensuring that all schools are less than 50% low-income.



both in terms of the nature of the right and the law's treatment of electoral and school district boundaries. Part III will then reflect on the lessons that can be drawn from the examination in Parts I and II and will consider the implications of these lessons on a prospective principle for "democratic school desegregation." Part IV will outline the contours of the proposal, guided by the 60/40 principle, that would promote desegregation by facilitating periodic redrawing of school district boundaries on an as-needed basis, and will explain how such a law could be passed and implemented at either the state or federal level. Finally, Part V will list the advantages of such a proposal while also recognizing some of the challenges that could arise in implementing it, particularly at this preliminary stage.

I. A PRIMER ON EXISTING ELECTION LAW AND THE MALLEABLE NATURE OF ELECTORAL DISTRICT BOUNDARIES

This Part briefly explains the election-law backdrop that has set the stage for modern electoral redistricting in the United States. It explains that, until the middle of the twentieth century, there were few legal constraints on electoral districting and courts had been hesitant to enter the political thicket of adjudicating disputes over electoral boundaries. However, as time wore on, both Congress and the courts established democratic electoral principles that guide policymakers to this day.

A. *The Early Years: A Complete Lack of a Democratic Equalization Principle*

It is often assumed that single-member electoral districts of equal population were always the norm in the United States. But that is not correct: prior to 1842, Congress had not even mandated the use of single-member districts in congressional elections, and many states used multi-member districts or conducted at-large elections for their representatives.<sup>28</sup> The Reapportionment Act of 1842 compelled states to create single-member districts—that is, "districts composed of contiguous territory equal in number to the number of Representatives to which said [s]tate may be entitled"<sup>29</sup>—but Congress did not require these

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28. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 1191 (3d ed. 2007). Issacharoff, Karlan, and Pildes explain:

Frequently, it is assumed that the United States has always used single-member districts to elect members of Congress. . . . But this is inaccurate. Only after a lengthy struggle did Congress eventually come in 1842 to use its powers under Art. I, § 4 of the Constitution to legislate and require single-member districts.

See *id.*

29. See *id.* at 1192–93; see also Act of June 25, 1842, ch. 47, 5 Stat. 491.

districts to have equal populations. In 1872, Congress added a requirement of substantial equality of inhabitants, which it reinforced in 1911.<sup>30</sup> The 1911 act required the single-member districts to be “compact” in addition to contiguous and equally populated,<sup>31</sup> but that requirement, along with all requirements pertaining to single-member districts, lapsed with the passage of the Reapportionment Act of 1929.<sup>32</sup> States thus had both single- and multi-member districts from 1929 to 1967 when Congress enacted legislation that reinstated the single-member district requirement once and for all.<sup>33</sup>

Given this backdrop, courts were hesitant to intervene in electoral redistricting, let alone require equally-populated districts. For example, in the Supreme Court’s 1946 decision in *Colegrove v. Green*,<sup>34</sup> petitioners sought review of an electoral districting scheme wherein certain Illinois congressional districts had populations that were far larger than those in other districts.<sup>35</sup> Indeed, the “Illinois legislature ha[d] failed to revise its congressional Representative districts in order to reflect great changes, during more than a generation, in the distribution of its population.”<sup>36</sup> However, the applicable federal Reapportionment Act of June 18, 1929,<sup>37</sup> as noted above, “ha[d] no requirements ‘as to the compactness, contiguity, and equality in population of districts.’”<sup>38</sup> Justice Frankfurter wrote for the majority that the redistricting issue was a political question unfit for judicial resolution, concluding that “the petitioners ask[ed] . . . what is beyond [the Court’s] competence to grant”<sup>39</sup> and that “[c]ourts ought not enter this political thicket.”<sup>40</sup>

### B. *One-Person One-Vote: A Democratic Equalization Principle*

Nonetheless, attitudes toward redistricting changed in the 1960s. *Baker v. Carr*,<sup>41</sup> like *Colegrove*, featured a scenario where a state

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30. See Act of Feb. 2, 1872, ch. 11, 17 Stat. 28; Act of Aug. 8, 1911, ch. 5, 37 Stat. 13–14.

31. See Apportionment Act of 1911, ch. 5, 37 Stat. 13, 14 (mandating that members of Congress “shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants”).

32. See *Wood v. Broom*, 287 U.S. 1, 6 (1932).

33. See ISSACHAROFF ET AL., *supra* note 28, at 1193; see also Act of Dec. 14, 1967, Pub. L. No. 90-196, 81 Stat. 581 (enacting 2 U.S.C. § 2a).

34. *Colegrove v. Green*, 328 U.S. 549 (1946).

35. *Id.* at 550.

36. *Id.* at 552.

37. See Act of June 18, 1929, ch. 28, 46 Stat. 26; 2 U.S.C. § 2a (2012).

38. *Colegrove*, 328 U.S. at 551 (quoting *Wood v. Broom*, 287 U.S. 1, 8 (1932)).

39. *Id.* at 552.

40. *Id.* at 556.

41. *Baker v. Carr*, 369 U.S. 186 (1962).

(Tennessee) had failed to reapportion for over a generation.<sup>42</sup> Unsurprisingly, the population had redistributed substantially over that long period, resulting in allegations that Tennessee's distribution of legislative seats was arbitrary and without any rational basis.<sup>43</sup> The Court explained that the case was justiciable because, *inter alia*, "[j]udicial standards under the Equal Protection Clause [we]re well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."<sup>44</sup> Although *Baker* did not establish a one-person one-vote standard,<sup>45</sup> it foreshadowed such a standard by invoking the Equal Protection Clause to suggest that apportionment questions were justiciable. Anticipating this, Justice Frankfurter spent a substantial portion of his dissent in *Baker* explaining that no clear equality principle could be discerned from the Constitution—for example, the Constitution could have called for "geographic" equality of representation as much as it may have potentially called for "population" based equality of representation—and it was not the Justices' role to choose "among competing theories of political philosophy."<sup>46</sup>

Notwithstanding Justice Frankfurter's concerns, the Court established the one-person one-vote standard in 1964 in *Reynolds v. Sims*.<sup>47</sup> Explaining that "the right of suffrage is a fundamental matter in a free and democratic society" that required strict scrutiny under the Constitution,<sup>48</sup> *Reynolds* identified the need for a principle to protect that fundamental right. Chief Justice Warren famously proclaimed that "[l]egislators represent people, not trees or acres,"<sup>49</sup> and the rest is history. The *Reynolds* Court explained that that "the Equal Protection Clause requires that a [s]tate make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal

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42. *See id.* at 191 ("In the more than 60 years since [the 1901 Apportionment Act], all proposals in both Houses of the General Assembly for reapportionment have failed to pass.").

43. *See id.* at 207; *see also id.* at 253 (Clark, J., concurring) ("It appears from the record that 37% of the voters of Tennessee elect 20 of the 33 Senators while 40% of the voters elect 63 of the 99 members of the House.").

44. *Id.* at 226 (majority opinion).

45. *See, e.g., id.* at 265 (Stewart, J., concurring) ("[T]he Court does not say or imply that 'state legislatures must be so structured as to reflect with approximate equality the voice of every voter.'" (quoting Harlan, J., dissenting)).

46. *Baker*, 369 U.S. at 300 (Frankfurter, J., dissenting).

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

48. *Id.* at 561–62.

49. *Id.* at 562.

population as is practicable.”<sup>50</sup> *Wesberry v. Sanders*<sup>51</sup> extended the one-person one-vote principle to apply to congressional districts.<sup>52</sup> Although the Supreme Court tolerates state legislative districting schemes that deviate from equal population by ten percent or more,<sup>53</sup> it tolerates little to no deviation from the equal population principle for congressional districts.<sup>54</sup> After these rulings, the Supreme Court was both ready and willing, after each decennial census, to strike down electoral districting plans that did not conform to these standards; thus, assuming any non-negligible shifts in population after each decennial census, states that failed to redraw electoral districts would likely face legal challenges.

C. *Other Principles Under the Equal Protection Clause and Section 2 of the Voting Rights Act*

Beyond the one-person one-vote principle, the Supreme Court established other constitutional constraints on redrawn electoral districts. Vote dilution was one such constraint. For example, although § 5 of the Voting Rights Act has now been effectively nullified,<sup>55</sup> that statute was applied in numerous cases and did not allow covered jurisdictions to redistrict after a census in ways “that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”<sup>56</sup> Moreover, under the Equal Protection Clause, the Court, as early as 1973, compelled state multi-member districts to be converted to single-member districts where the multi-member districts effectively excluded blacks and Hispanics from the political process (that is, they diluted these groups’ voting strength).<sup>57</sup> The Court retreated

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50. *Id.* at 577.

51. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

52. *Id.* at 17–18.

53. *See* *Mahan v. Howell*, 410 U.S. 315, 323–29 (1973) (explaining that state legislative districts may deviate somewhat from the equal population principle based on the State’s interest in regional representation and that the rule that applies to districts applies to both houses of a state’s legislature, including its senate); *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 734–35 (1964).

54. *See* *Karcher v. Daggett*, 462 U.S. 725, 732–33 (1983) (rejecting a Congressional redistricting plan that resulted in a one percent population deviation between the largest and smallest districts in the state of New Jersey).

55. *See* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (effectively nullifying § 5 of the Voting Rights Act by striking down the coverage formula of § 4).

56. *Beer v. United States*, 425 U.S. 130, 141 (1976). Although *Beer* held that “a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the ‘effect’ of diluting or abridging the right to vote on account of race within the meaning of § 5,” it made clear that schemes that had retrogressive effects would not be pre-cleared under § 5. *Id.*

57. The effective exclusions were due to a flawed primary process that disfavored blacks as well as conditions, such as poor voter registration, that made it virtually

from striking down districting schemes that only had discriminatory effects and articulated an intentional discrimination requirement in *Mobile v. Bolden*<sup>58</sup> in 1980. However, in contrast to the constitutional requirement, Congress amended § 2 of the Voting Rights Act in 1982 to make clear that proof of an invidious purpose was not required to show a § 2 vote-dilution violation, and courts could assess objective factors to determine whether challenged redistricting resulted in minorities being denied equal access to the political process.<sup>59</sup>

Congress's amendment of § 2 facilitated more challenges to electoral districting schemes that impinged on the democratic voting power of minorities. For example, in *Thornburg v. Gingles*,<sup>60</sup> the Supreme Court struck down a North Carolina redistricting plan similar to the plans at issue in *White v. Regester*<sup>61</sup> and *Bolden*, wherein black voting power had been diluted in multi-member districts.<sup>62</sup> In *Thornburg*, the Supreme Court explained the conditions for establishing whether a districting scheme encouraged racially polarized voting: a districting scheme could be declared unlawful where (1) a minority group is sufficiently large and compact to constitute a majority in a single-member district; (2) the minority group is politically cohesive; and (3) the districting scheme is nonetheless designed so that whites may vote as a block to reject the minority group's preferred candidate.<sup>63</sup> When these conditions were met, courts compelled lawmakers to redraw districts in a race-conscious manner, such that the minority group could

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impossible for Hispanics to elect candidates of their choice in the multi-member districts. See *White v. Regester*, 412 U.S. 755, 767–68 (1973).

58. See, e.g., *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980), *superseded by statutory amendment*, Voting Rights Act of 1965, 42 U.S.C. § 1973 (2012).

59. See, e.g., *Section 2 of the Voting Rights Act*, U.S. DEP'T OF JUSTICE, [http://www.justice.gov/crt/about/vot/sec\\_2/about\\_sec2.php/](http://www.justice.gov/crt/about/vot/sec_2/about_sec2.php/) (last visited Jan. 25, 2015); see also S. REP. NO. 97-417, at 27 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205. The Senate Report states:

The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of practice in order to establish a violation. Plaintiffs must either prove such intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.

*Id.* (citation omitted).

60. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

61. *White v. Regester*, 412 U.S. 755 (1973).

62. See *Gingles*, 478 U.S. at 34.

63. See *id.* at 50–51. The Court also considers other factors set forth in *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973). These factors were also written in the senate report accompanying the 1982 Amendment. See S. REP. NO. 97-417, at 22.

elect the candidate of its choice (as was possible in majority-minority districts, for example).

Despite *Gingles*, the Court has made clear that lawmakers should not draw majority-minority districts at every opportunity<sup>64</sup> and has struck down majority-minority districts where race was the predominant reason for their creation,<sup>65</sup> or where minorities are “packed” into a district so as to create an overwhelming majority, preventing them from electing candidates of their choice in other districts.<sup>66</sup> Moreover, where efforts to create a majority-minority district cannot yield an electoral district that is greater than 50 percent minority, § 2 does not compel redistricting efforts toward creating an “effective minority district” (that is, a district where a coalition of minority and non-minority voters come together to vote for the minority group’s preferred candidate).<sup>67</sup>

As the above brief history illustrates, electoral districting has evolved drastically over the past century. In the early 20th century, the United States generally did not rely upon single-member districts to elect its representatives, relying instead on primarily multi-member districts and at-large elections. It was not until the middle of the century that single-member electoral boundaries became ubiquitous, representing a drastic departure from past practice. Initially, no uniform legal principles guided single-member electoral districts, and indeed such boundaries often remained unchanged despite drastic swings in population that undermined democratic equality, as illustrated by both *Colegrove* and *Baker*. Nonetheless, from a complete lack of a universal principle arose

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64. For example, in *Johnson v. De Grandy*, 512 U.S. 997, 1021–22 (1994), the Court declined to strike down a districting plan wherein additional Hispanic majority-minority districts could have been created where Hispanics’ voting power statewide approximately mirrored their proportion of the voting age population.

65. The Supreme Court has held that gerrymandering to create a majority-minority district can be an equal protection violation where the resulting majority-minority district comprises geographically segregated regions of the state. See *Shaw v. Reno*, 509 U.S. 630, 657–58 (1993). Similarly, courts have struck down districts drawn for predominantly race-based reasons, see *Bush v. Vera*, 517 U.S. 952, 972 (1996), and where the district tries to combine “two far-flung segments of a racial group with disparate interests” in creating a majority-minority district. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433 (2006); see also Nicholas Stephanopoulos, *The Future of the Voting Rights Act*, SLATE (Oct. 23, 2013, 4:37 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/10/section\\_2\\_of\\_the\\_voting\\_rights\\_act\\_is\\_more\\_effective\\_than\\_expected\\_new\\_research.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/10/section_2_of_the_voting_rights_act_is_more_effective_than_expected_new_research.html) (“Section 2 . . . doesn’t apply to districts that are strangely shaped or whose minority populations fall below 50 percent or are too socioeconomically varied.”). But see *Easley v. Cromartie*, 532 U.S. 234, 257 (2001) (declining to strike down a majority-minority district where the record “d[id] not show that racial considerations predominated in the drawing of District 12’s boundaries” because the lines were drawn to achieve partisan goals, rather than racial ones).

66. See *Voinovich v. Quilter*, 507 U.S. 146, 153–54 (1993).

67. See *Bartlett v. Strickland*, 556 U.S. 1, 14 (2009).

a democratic equalization principle—the one-person one-vote principle—which finally forced states and localities around the nation to think critically about how to design electoral districts to promote democratic ends. Moreover, the racial vote dilution principles enforced under § 2 of the Voting Rights Act compelled these states and localities to reflect on the impact of redistricting efforts on the voting rights of minority groups. Guided by these principles, electoral redistricting of single-member districts is now an unquestioned fact, even though such electoral boundaries rarely changed—or existed—less than a century ago. As this Article will explain, this history should inform policymakers’ thinking about school district boundaries and our willingness to change them.

## II. THE PRIMACY OF LOCAL CONTROL SINCE *BROWN* AND ENTRENCHED SCHOOL DISTRICT BOUNDARIES IN MODERN EDUCATION LAW

Ever since *Brown v. Board of Education*,<sup>68</sup> our nation has aspired toward an ideal of equality of opportunity in education.<sup>69</sup> Education, like voting, is democracy-enhancing and is inextricably intertwined with the electoral process. However, 60 years after *Brown*, educational inequities persist.<sup>70</sup> Local control, which has allowed school districts to take exclusionary measures to “control every objectionable thing that may try to enter [their] limits[,]” has perpetuated these inequalities.<sup>71</sup> Thus, when racially isolated minorities and low-income individuals from urban areas sought refuge in suburban school districts after *Brown*, schools denied them access.<sup>72</sup> School district boundaries have historically “divid[ed] races and classes” because local governments took it upon themselves to use, among other things, resident inspection and zoning laws to exclude

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68. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

69. See *id.* at 493.

70. Indeed, many recent books and articles have lamented the fact that *Brown*’s ideal has not been realized. See, e.g., ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 1, 24, 26 (1st paperback prtg. 2013); MARTHA MINOW, *IN BROWN’S WAKE* 5 (2010).

71. KENNETH T. JACKSON, *CRABGRASS FRONTIER* 151 (1985) (quoting Editorial, *MORGAN PARK POST*, Mar. 9, 1907).

72. See, e.g., ANDERSON, *supra* note 70, at 28 (discussing “exclusionary zoning” that prevented blacks from moving to the suburbs); ALEXANDER POLIKOFF, *WAITING FOR GAUTREAUX: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO* 351 (2006) (explaining that even after passage of the Fair Housing Act in 1968, “overwhelming” evidence of housing discrimination persisted and blacks “were often steered to black neighborhoods”); NANCY BURNS, *THE FORMATION OF AMERICAN LOCAL GOVERNMENTS* 35–37 (1994); J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE* 223 (1979) (“Housing policies, more than school decisions, had metropolitan consequences, because housing discrimination in one jurisdiction, by definition, requires blacks to locate in another.”).

minorities and low-income families they deemed “objectionable.”<sup>73</sup> Such policies “encourage[] political fragmentation rather than community” by promoting discrete units of government “reflective of [each school district’s] socioeconomic, ethnic, and ideological character.”<sup>74</sup> Indeed, the exclusionary zoning practices struck down in the celebrated *NAACP v. Mount Laurel*<sup>75</sup> decision were rooted in a desire to prevent the economically disadvantaged from entering an affluent community.<sup>76</sup> These policies and practices promote a damaging cycle which fuels racial and class-based prejudices<sup>77</sup> and thereby prevents meaningful democratic deliberation across race and class. This is not to say that local control is fundamentally antidemocratic. In fact, one of the primary justifications for local control is that it allows communities to democratically self-determine their educational policies, and some undeniable benefits flow from local control of schooling.<sup>78</sup>

However, as this Part will explain, education law in the United States has reinforced the primacy of local control of schools as a nationwide policy—and has done so in ways that are antidemocratic. Thus, in contrast to election law—where the Voting Rights Act and our Supreme Court’s precedents combine to employ fundamental principles

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73. See BURNS, *supra* note 72, at 35–37; POLIKOFF, *supra* note 72, at 352. Polikoff notes:

To housing discrimination must be added ubiquitous ‘exclusionary zoning’ by suburban cities and towns—requiring large lot sizes, banning multifamily housing, and the like. . . . [T]he effect of such zoning is to prevent poorer families—disproportionately black—from even having a chance to rent or buy in large portions of cities or towns from coast to coast.

*Id.*

74. GREGORY R. WEIHER, *THE FRACTURED METROPOLIS* 181 (A. Gary Dworkin ed., 1991).

75. *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975). *Mount Laurel* was a New Jersey Supreme Court case which held that exclusionary zoning practices in a suburban community were unconstitutional. *Id.* at 187–88.

76. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 50 (1992). Briffault explains:

Mount Laurel was not so much antigrowth as concerned about the type of growth that occurred. The town was open to development and new residents provided they did not detract from the average wealth of the community. Nor was Mount Laurel unusual. The court found that zoning had become a primary weapon in the interlocal struggle for ‘good ratables’ and against the immigration of residents who could increase local public service costs.

*Id.*

77. See GUTMANN, *supra* note 5, at 162 (“The problem is that not integrating schools perpetuates racial prejudice among whites, which in turn perpetuates the most damaging cycle of discrimination ever fostered by our society. *De facto* school segregation is therefore unacceptable by democratic principles even it is often supported by democratic politics.”).

78. See *infra* Part III.C.



that compel state and local governments to redraw electoral district boundaries toward democratic ends—our law has merely acted to entrench school district boundaries. Historically, courts have not viewed these boundaries as malleable, but rather as fences that—in large part—wall off socioeconomically and racially distinct groups from each other. Accordingly, the courts—and particularly the Supreme Court—have never endeavored to establish fundamental principles to guide the creation and alteration of school district boundaries to promote democratic ends.

A. *Green, Swann, and Flexible Desegregation Remedies After Brown*

The picture did not always seem so bleak. Although the Supreme Court did little to promote school integration in the initial years following *Brown*,<sup>79</sup> it did show signs that it would affirmatively compel integration in the late 1960s and early 1970s. The Court even arguably suggested that school district boundaries were not sacrosanct.

1. Flexible Remedies in Large County-Wide School Districts

First, in *Green v. County School Board*,<sup>80</sup> the Court struck down a county school board’s “freedom of choice” plan as unconstitutional. Under this plan, the school district had no defined attendance zone and therefore was an “at-large” district where black students could “choose” to go to white schools and vice versa. But the Court ruled that this was not enough to comply with *Brown*: “the fact that in 1965 the Board opened the doors of the former ‘white’ school to [n]egro children and of the ‘[n]egro’ school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system.”<sup>81</sup> And beginning the inquiry there, it was clear that the “free choice” plan had not worked as 85 percent of the black children in the district continued to attend the black school that had been established pre-*Brown*.<sup>82</sup> Thus, the school board was “charged with the affirmative duty to take whatever steps might be necessary to convert to

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79. Many, for example, are familiar with its admonition to remedy segregation with “all deliberate speed” in *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955). See also WILKINSON, *supra* note 72, at 79 (“From 1955 to 1968 the Supreme Court remained largely inactive in school desegregation. . . . [Its] pronouncements, important as they were, failed to touch the real problem, which was understood all along to be school desegregation.”).

80. *Green v. Cnty. Sch. Bd.*, 391 U.S. 430 (1968).

81. *Id.* at 437.

82. *Id.* at 441.

a unitary system in which racial discrimination would be eliminated root and branch.”<sup>83</sup> Although the Court did not categorically reject “freedom of choice” plans, the Court made clear that, where there are “reasonably available other ways, such . . . as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, ‘freedom of choice’ must be held unacceptable.”<sup>84</sup> Given its endorsement of rezoning as a tool to promote integration, it seemed that the Court was encouraging school districts to take significant steps—including altering attendance boundaries within the district—to achieve integration.

The Court’s decision in *Swann v. Charlotte-Mecklenburg Board of Education* seemed at first blush to continue along this same course.<sup>85</sup> Charlotte-Mecklenburg, a large county school district that comprised over 550 square miles and served over 84,000 students, had failed to desegregate as of 1969—15 years after *Brown*. Two-thirds of the black students in the district, for example, still attended schools that were over 99 percent black in population.<sup>86</sup> In response, the district court created a plan—the Finger Plan—that used high-school attendance zones that were shaped like the wedges of a pie; while oddly shaped, these attendance zones allowed the district to reassign black students to the outlying portions of the district that were predominately white.<sup>87</sup> The proposal would also rezone junior high attendance areas and create “satellite zones.”<sup>88</sup> For elementary schools, the Finger Plan proposed a strategy that used pairing and grouping techniques in addition to zoning.<sup>89</sup> The strategy promised to achieve a 9 percent to 38 percent range of black enrollment in elementary schools and a roughly 17 percent to 36 percent black enrollment in high schools,<sup>90</sup> as opposed to the 99 percent black enrollment that had been typical before.<sup>91</sup> Invoking *Green*, the *Swann* Court lamented the “dilatory tactics” that were preventing integration in Charlotte-Mecklenburg and issued additional guidance.<sup>92</sup> It explained that the school district could alter attendance zones and that bus

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83. *Id.* at 437–38.

84. *Id.* at 441.

85. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31–32 (1971).

86. *Id.* at 7.

87. *Id.* at 8–9.

88. *Id.* at 9.

89. *Id.* at 9.

90. *Swann*, 402 U.S. at 9. In addition to achieving better integration, the district court’s Finger Plan also required less busing than the school district’s proposed plan. See POLIKOFF, *supra* note 72, at 131.

91. *Swann*, 402 U.S. at 7.

92. *Id.* at 13 (“Deliberate resistance of some to the Court’s mandates has impeded the good-faith efforts of others to bring school systems into compliance. The detail and nature of these dilatory tactics have been noted frequently by this Court and other courts.”).

transportation, having been “an integral part of the public education system for years” and an “accepted tool of educational policy,” could be utilized to reassign students to schools within those altered attendance zones.<sup>93</sup>

These decisions seemed particularly promising for the “idea” of malleable school district boundaries. Though both *Green* and *Swann* concerned a single school district and only endorsed the idea of redrawing attendance zones *within* those particular districts, both appeared to stand for the principle that desegregation remedies could include relatively far reaching solutions that included both busing and redrawing attendance boundaries. However, as the education reform community would learn, this interpretation ignored *Swann*’s fine print.

## 2. *Swann*’s Fine Print

Despite the aspects of *Swann* that suggested it was a “great liberal victory,” the case also foreshadowed the Court’s impending emphasis on local control and the limited scope of school district integration remedies.<sup>94</sup> It was not clear that courts would prescribe rezoning, busing, and reassignment remedies in future cases, even though *Swann* seemingly endorsed them. As the Court explained:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of [n]egro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities;<sup>95</sup> *absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy.*<sup>96</sup>

Thus, without a constitutional violation, a presumption existed that only local school boards and districts—and not the courts—had discretionary authority to remedy segregation. Meanwhile, what a “violation” looked like remained unclear: the Court declined to answer whether “a showing that school segregation is a consequence of other

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93. *Id.* at 29–30.

94. See WILKINSON, *supra* note 72, at 147–48.

95. *Swann*, 402 U.S. at 16. Interestingly, such an overt racial balancing policy, though said to be squarely “within the broad discretionary powers of school authorities” in *Swann*, even if voluntary, would now be unconstitutional under *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 at 721. See *infra* Part II.C.

96. *Swann*, 402 U.S. at 16 (emphasis added).

types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree.”<sup>97</sup> In other words, the Court declined to answer the question of whether exclusionary zoning practices by states or municipalities (or other state practices that promote segregated schools) would warrant a desegregation remedy. This would be a difficult question, as the Court had no principle or theory from which it could analyze whether a desegregation violation had occurred.

*B. Rodriguez, Milliken, and Inflexible Boundaries*

As discussed above, courts did not always assume that voting was a “fundamental right” or that all voters were entitled to an equally-weighted vote for a candidate elected from single-member electoral districts—these principles were not formally adopted until *Reynolds*, and the cases that followed established the one-person one-vote principle.<sup>98</sup> In *Reynolds*, along with cases like *Baker*, the Justices observed statewide electoral schemes with entrenched boundaries that instinctively felt problematic because of the drastic disparities in population between electoral districts. It appears that the Justices viewed voting as so fundamental that they felt morally compelled to adopt a democratic principle to preserve that right—and such a principle was apparent to them. Thus, they established the one-person one-vote principle, even though the states had already adopted electoral boundaries, and electoral structures had taken myriad different forms. The Voting Rights Act and other legal principles—such as those governing racial vote dilution claims—soon followed. Nevertheless, prior to *Reynolds*, nothing in the Constitution compelled these results in the education law context, and the Court could just as easily have chosen to enter the political thicket in education.<sup>99</sup> Despite the similar democracy-enhancing benefits of education to society, *San Antonio v. Rodriguez* and the cases that followed illustrated that the Court would not adopt such a democratic principle in the education context.

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97. *Id.* at 23.

98. *See supra* Part I.

99. Our constitutional history does not compel the one-person, one-vote principle: for example, Justice Frankfurter explained that there were many possible equality principles that could have guided an equal protection analysis in the electoral process. *See supra* Part I.B. Indeed, that the principle of geographic equality is enshrined in our Constitution is reflected in the fact that, by the Constitution’s design, drastically different numbers of people in each state elect equal numbers of senators to this day. Moreover, nothing in the Constitution even compels an affirmative right to vote, as voting rights are only expressed in the negative; and “the original Constitution reflected a particularly elite conception of democratic politics,” concentrating the franchise in property-holding, male elites. ISSACHAROFF ET AL., *supra* note 28, at 8.

1. *Rodriguez*: No Fundamental Right to Education

When confronted with the opportunity to proclaim that the Constitution protected education as a fundamental right, the *Rodriguez* Court did not have the same instinct as the *Reynolds* and *Baker* Courts. *Rodriguez* presented the “fundamental right” question in the context of a school finance lawsuit; such lawsuits challenge the constitutionality of school funding regimes that allocate education funds based on local property taxes. Although such regimes aim to ensure that each district receives a “foundation level” of school funding, wealthier school districts are invariably left with far more resources to educate their students than poorer districts despite the fact that poorer districts typically tax their residents at higher rates.<sup>100</sup>

Confronted with the constitutionality of such an inequitable regime, the Court declined to adopt a democratic equalization principle of “equal funding” for schools, despite the fact that it viewed education as democracy-enhancing.<sup>101</sup> Though it acknowledged the importance of education to democracy, the Court explained that it “ha[s] never presumed to possess either the ability or the authority to guarantee to the citizenry *the most effective* speech or the *most informed* electoral choice.”<sup>102</sup> Thus, while the Court recognized the fundamental right to participate in elections on an equal basis,<sup>103</sup> it declined to establish such a

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100. Such was the case in *Rodriguez*. See Michael Heise, *The Story of San Antonio Independent School Dist. v. Rodriguez: School Finance, Local Control, and Constitutional Limits*, in *EDUCATION LAW STORIES* 51, 53 (Michael A. Olivas & Ronna Greff Schneider eds., 2008). Heise describes per pupil spending in 1968:

In 1968, the distribution of school resources in Texas followed a pattern typical for that era. Per pupil spending in Edgewood, an overwhelmingly poor and minority school district, was \$356, while per pupil spending in the predominately white and affluent neighboring Alamo Heights district was \$594, or two-thirds more. . . .

Making matters worse was that the per pupil spending disparity arose even though Edgewood residents taxed themselves at a rate higher than the Alamo Heights residents.

*Id.* (citations omitted).

101. Emphasizing the “vital role of education in a free society,” the Court made clear that “[c]ompulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973). The Court also did not dispute that “[t]he electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.” *Id.* at 35–36.

102. *Id.* at 36 (emphasis added).

103. See *id.* at 34 n.74 (“*Dunn* fully canvasses this Court’s voting rights cases and explains that ‘this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.’” (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972))). Moreover, in Justice Stewart’s concurrence, citing *Reynolds*, *Kramer*, and *Dunn*, he admitted that “[i]t has been

right—or a remedy—in the education context.<sup>104</sup> At the point education was not recognized as a fundamental right, it is unsurprising that the Court failed to establish a democratic equalization principle to enforce that right. Indeed, it was precisely because the Warren Court “framed the obligation to reapportion on an equipopulational basis as an individual right to an equally weighted franchise” that it could adopt the one-person one-vote principle without colliding head-on with the political question doctrine.<sup>105</sup>

In contrast to voting, where the democratic equalization principle that could be used to ensure equal voting rights seemed somewhat clear, the solution was not so apparent in education. When *Rodriguez*, a school funding case, is juxtaposed against *Brown* and its progeny, serious questions arise about the meaning of “equality of opportunity” in the educational context. For example, once the Supreme Court opens the door to school funding challenges, difficult questions arise regarding the appropriate levels of funding necessary to provide equal educational opportunities.<sup>106</sup> As one commentator has noted, “[n]o doubt owing to the complexity and uncertainty surrounding these issues, courts since *Rodriguez* remain split over their understanding of the relation between school funding and student achievement.”<sup>107</sup> Similar challenges attach to establishing a clear desegregation principle. As discussed in the next subsection, “local control” would become a touchstone of education law that has enabled courts to defer to school district boundaries that have become entrenched as a result of local decision-making. But as at least one scholar has explained, “[t]he deference to local school authorities has become a leading remedial approach in part because the other factors for

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established in recent years that the Equal Protection Clause confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State’s population.” *Id.* at 59 n.2 (Stewart, J., concurring).

104. This was the case even though—as with education—an affirmative right to vote is not expressly mentioned in the Constitution. *See id.* at 34 n.74 (majority opinion) (noting that “[t]he constitutional underpinnings of the right to equal treatment in the voting process can no longer be doubted even though, as the court noted in *Harper v. Virginia Bd. of Elections*, 383 U.S. at 665, ‘the right to vote in state elections is nowhere expressly mentioned’” in the Constitution).

105. *See* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 608 (2002).

106. I have discussed this in my review of two books that provide detailed insights into school finance litigation. *See generally* Christopher A. Suarez, *Courthouse, Statehouse, or Both? Redefining Institutional Roles in School Finance Litigation*, 28 YALE L. & POL’Y REV. 539 (2010).

107. Heise, *supra* note 100, at 64.

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determining the scope of the school desegregation remedy are highly indeterminate.”<sup>108</sup>

## 2. *Milliken*: “Local Control” Prevails

In the voting cases described in Part I.B., the Court seemed unconcerned with the disruptive nature of its creation of the one-person one-vote principle, notwithstanding the fact that the principle would uproot state and local election systems and the boundaries that were used in those systems. In education cases, in contrast, the Court was concerned with the effect that analogous remedies may have on local control over educational policy. *Rodriguez* invoked local control as a rational basis for the inequitable school finance scheme upheld there because, “[w]hile assuring a basic education for every child in the [s]tate, it permits and encourages a large measure of participation in and control of each district’s schools at the local level.”<sup>109</sup>

After *Rodriguez* constitutionalized local control, the Court in *Milliken v. Bradley* reconfirmed its importance one year later.<sup>110</sup> In *Milliken*, Detroit had undertaken measures to promote segregation within its school system, and the question was about the scope of the remedy for the intentional discrimination within the district. Because a remedial solution that only included Detroit students would have left many schools 75 to 90 percent black, District Judge Roth adopted a metropolitan, *inter*-district remedy which would comprise 780,000 students from several districts, 310,000 of which would be transported to school by bus.<sup>111</sup>

District Judge Roth believed that the segregation in inner-city Detroit was a metropolitan problem that required a metropolitan solution. Besides Detroit’s perpetuated intentional segregation, the judge made findings that governments “at all levels, federal, state[,] and local, have combined, with . . . private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish . . . residential segregation throughout the Detroit metropolitan area,”<sup>112</sup> and that government entities advocated racially segregated, “harmonious”

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108. Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM. & MARY. L. REV. 1691, 1737 (2004); see also *id.* (“The school desegregation right is largely unknowable without reference to the remedy.”); *id.* at 1743 (“[I]n school desegregation the connection between right and remedy is so exceptionally close that distinction between the two is largely meaningless.”).

109. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49 (1973).

110. *Milliken v. Bradley*, 418 U.S. 717 (1974).

111. WILKINSON, *supra* note 72, at 218–19.

112. *Bradley v. Milliken*, 338 F. Supp. 582, 587 (E.D. Mich. 1971), *rev’d*, 418 U.S. 717 (1974).

neighborhoods.<sup>113</sup> Thus, metropolitan housing policies which promoted segregation had contributed to Detroit's segregation. Nonetheless, the Sixth Circuit, in reviewing the district court record, did not "rel[y] at all upon testimony pertaining to segregated housing."<sup>114</sup> Thus, the Supreme Court would decline to address the housing question—just as it would fail to address the exclusionary zoning question in *Swann*.<sup>115</sup>

By eliminating housing and exclusionary zoning from the equation, the only remaining evidence relied upon to support the metropolitan remedy had been the intentional efforts of school officials in Detroit to segregate its schools. The record showed no evidence of intentional efforts by school officials in *Detroit's suburbs* to maintain the segregation that persisted throughout the greater metropolitan area.

This brings us back to *Swann's* fine print,<sup>116</sup> which explained that "the nature of the violation determines the scope of the remedy."<sup>117</sup> The *Milliken* Court invoked this legalism and explained that the only "condition alleged to offend the Constitution" was "the segregation within the Detroit City School District."<sup>118</sup> Because the Court framed the "violation" (which did not include housing), as being confined to Detroit's "condition," the remedy could not cross school district boundary lines. The Court then invoked local control and explained that:

Boundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief, but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the

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113. Specifically, Judge Roth found that "for many years FHA [Federal Housing Administration] and VA [the Veterans Administration] openly advised and advocated the maintenance of 'harmonious' neighborhoods, *i.e.*, racially and economically harmonious. The conditions created continue." *Id.* Further, "[t]he affirmative obligation of the [school] [b]oard has been and is to adopt and implement pupil assignment practices and policies that compensate for and avoid incorporation into the school system the effects of residential racial segregation." *Id.* at 593.

114. *Bradley v. Milliken*, 484 F.2d 215, 242 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

115. *See supra* Part III.A.2.

116. *See supra* Part III.A.2

117. *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) (emphasis added).

118. *See id.* The Court also expressed concerns that the originally filed complaint did not seem to envision a multidistrict remedy, notwithstanding the fact that there was some evidence of a metropolitan violation in the record. *See id.* at 752 n.24 ("Apparently, when the District Court, *sua sponte*, abruptly altered the theory of the case to include the possibility of multidistrict relief, neither the plaintiffs nor the trial judge considered amending the complaint to embrace the new theory.").



maintenance of community concern and support for public schools and to quality of the educational process.<sup>119</sup>

However, this notion of local control had virtually nothing to do with local educational policy in terms of the instruction offered or the educational approaches of the district—instead, the Court’s ruling endorsed that aspect of local control that promotes exclusion and entrenched boundaries. Because of this ruling, parties now needed to show intentional discrimination by suburban school districts to have any chance of obtaining an interdistrict remedy—otherwise, courts could not impose a remedy beyond the city limits.<sup>120</sup> For example, if a party could show that an adjacent school district drew its district lines or used other intentional means to promote interdistrict segregation, an interdistrict remedy against that district may have been possible.<sup>121</sup>

Of course, nothing in the record showed that the district lines were intentionally drawn to promote race discrimination. The Court emphasized that:

The boundaries of the Detroit School District, which are coterminous with the boundaries of the city of Detroit, were established over a century ago by neutral legislation when the city was incorporated; there is no evidence from the record, nor is there any suggestion by the respondents, that either the original boundaries of the Detroit School District, or any other school district in Michigan, were established for the purpose of creating, maintaining, or perpetuating segregation of races.<sup>122</sup>

Of course, the legislation that—in various states—fixed electoral boundaries for decades in violation of the one-person one-vote principle had similarly been fixed for decades pursuant to ostensibly neutral legislation.<sup>123</sup> Proof of such intentional efforts to promote segregation using these boundaries would have been virtually impossible to obtain.<sup>124</sup>

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119. *Id.* at 741–42.

120. The *Milliken* Court explained that an interdistrict remedy was not justified because there was “no showing of significant violation by the 53 outlying school districts and no evidence of any interdistrict violation or effect.” *Id.* at 745.

121. *See id.* (concluding that “racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation” to obtain an interdistrict remedy, such as where “the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race”).

122. *Milliken*, 418 U.S. at 748.

123. *See, e.g., supra* notes 34–40 and accompanying text.

124. The analysis would perhaps be different if a state assumed the duty of periodically redrawing school district boundaries, however, because in such a situation maintaining discriminatory boundaries could arguably be viewed as an intentional effort to maintain segregation.

And although the Supreme Court explained that school district boundaries were not sacrosanct in theory,<sup>125</sup> they would be in practice as a result of the Court's decision.

In the words of Judge Wilkinson some 35 years ago, "*Milliken* . . . was an act of absolution."<sup>126</sup> And Judge Edwards—one of the Sixth Circuit judges who had heard *Milliken* on appeal—said that the Supreme Court's decision:

imbued school district boundaries . . . with a constitutional significance which neither federal nor state law had ever accorded them . . . . [I]t can come to represent a formula for American Apartheid. I know of no decision by the Supreme Court of the United States since the Dred Scott decision which is so fraught with disaster for this country.<sup>127</sup>

These predictions have thus far been proven correct, as school district boundaries between cities and suburbs have remained virtually unchanged since the ruling,<sup>128</sup> and the Supreme Court has only reinforced the principles of local control and rigid boundaries that produced the

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125. Specifically, *Milliken* recognized that "[s]chool district lines and the present laws with respect to local control, are not sacrosanct and if they conflict with the Fourteenth Amendment federal courts have a duty to prescribe appropriate remedies." *Milliken*, 418 U.S. at 744. Also, *Milliken* cited various cases wherein states or localities took affirmative steps with respect to district boundaries that were constitutionally problematic:

*See, e.g., Wright v. Council of the City of Emporia*, 407 U.S. 451, 453 (1972); *United States v. Scotland Neck Board of Education*, 407 U.S. 484, 489 (1972) (state or local officials prevented from carving out a new school district from an existing district that was in process of dismantling a dual school system); *cf. Haney v. County Board of Education of Sevier County*, 429 F.2d 364, 367 (CA8 1970) (State contributed to separation of races by drawing of school district lines); *United States v. Texas*, 321 F. Supp. 1043 (ED Tex. 1970), *aff'd* 447 F.2d 441 (CA5 1971) . . . (one or more school districts created and maintained for one race). . . .

*Id.* Justice Stewart's concurrence similarly recognized the propriety of interdistrict remedies where, for example:

[S]tate officials had contributed to the separation of the races by drawing or redrawing school district lines, by transfer of school units between districts, or by purposeful racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines. . . .

*Id.* at 755 (Stewart, J., concurring) (citations omitted).

126. WILKINSON, *supra* note 72, at 224.

127. *Bradley v. Milliken*, 519 F.2d 679, 680–81 (6th Cir. 1975) (Edwards, J., concurring) (citations omitted).

128. *See, e.g., WILLIAM A. FISCHER, MAKING THE GRADE: THE ECONOMIC EVOLUTION OF AMERICAN SCHOOL DISTRICTS* 214–15 (2009) (explaining that the school district boundaries of Chicago's suburbs remain virtually unchanged since 1938 and that the districts surrounding Cleveland (Cuyahoga County) remain virtually unchanged since 1926).

socioeconomic and racial segregation at issue in *Milliken*.<sup>129</sup> In light of these trends, one can hardly expect any federal court to take affirmative steps to redraw school district boundaries in the near future.

C. *Parents Involved and Its Impact on Race-Based School Redistricting*

Due to § 2 of the Voting Rights Act and equal protection vote-dilution standards, states can—and must—rely upon race in redrawing electoral district boundaries. Indeed, if it is possible to draw a new majority-minority district based on demographic or other shifts, a state runs a risk of a legal challenge if it does not redraw boundaries to account for that shift in racial demography. State legislators and policymakers must consider race—at least to some degree—in ensuring democratic equality with respect to voting. This is true regardless of whether a § 2 or equal protection violation has been demonstrated in the state that performs the redistricting, because the state has a continual duty to fulfill the requirements of those laws.

The same cannot be said, however, in the context of school districts. In *Parents Involved v. Seattle School District No. 1*,<sup>130</sup> school districts in Louisville and Seattle sought to reduce racial and socioeconomic isolation *within* their own school district boundaries.<sup>131</sup> In so doing, these districts used race as a factor to assign students to schools within the district. When parents of white students challenged this practice after the school district denied their children access to their preferred schools, the Supreme Court seized the opportunity to place strong limitations on voluntary, affirmative efforts to integrate schools. The case divided the Court four to one to four. The plurality opinion, written by Chief Justice Roberts and joined by the most conservative members of the Court, held

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129. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 92–94 (1995) (rejecting a remedy ordering “the interdistrict transfer of students” where the district court “created a magnet district of the [Kansas City Metropolitan School District] in order to serve the interdistrict goal of attracting nonminority students from the surrounding [Suburban School District’s] and redistributing them within the [Kansas City District]” because that remedy was “beyond the scope” of the District Court’s authority in that case) (emphasis added). As one commentator explained, “*Jenkins* officially completed a process that *Milliken* prompted—federal judicial blessing to district boundaries, even in the face of regional inequity in either student makeup (*Milliken*) or school quality (*Jenkins*).” Kiel, *supra* note 24, at 143; see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721 (2007) (“We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that the Constitution is not violated by racial imbalance in the schools, without more.”) (internal quotation omitted).

130. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721 (2007).

131. *Id.* at 709–11.

that there was no compelling interest in using race to assign students when it was not necessary to remedy past intentional discrimination committed by the school district.<sup>132</sup> Because this opinion did not carry a majority, however, courts recognize Justice Kennedy's opinion, which provided the fifth vote for the majority, as the controlling opinion in the case. Justice Kennedy made clear that the plans at issue in *Parents Involved* were unconstitutional because they *only* used race to assign students to schools within the district.<sup>133</sup> He, moreover, rejected the plurality's conclusion that affirmative efforts to integrate schools were not a legitimate interest, noting that:

School districts can seek to reach *Brown's* objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests that the Constitution mandates that state and local authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.<sup>134</sup>

Ultimately, then, Kennedy left the door somewhat ajar in *Parents Involved*. He made clear that “[s]chool boards may pursue the goal of bringing together students of diverse backgrounds and races” by using methods that may take race into account to some degree, such as “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.”<sup>135</sup> What districts cannot do, however, is assign each student to a school “according to a crude system of individual racial

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132. *Id.* at 720–21. The Court reasoned:

[P]rior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past intentional discrimination. Yet the Seattle public schools have not shown that they were ever segregated by law, and were not subject to court-ordered desegregation decrees. The Jefferson County public schools were previously segregated by law and were subject to a desegregation decree entered in 1975. In 2000, the District Court that entered that decree dissolved it. . . .

*Id.* (citations omitted).

133. Justice Kennedy made clear that districts “are free to devise race-conscious measures to address the [diversity] problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.” *Id.* at 788–89 (Kennedy, J., concurring).

134. *Id.* at 788.

135. *Parents Involved*, 551 U.S. at 789.

classifications.”<sup>136</sup> In assigning students, “[r]ace may be one component . . . but other demographic factors, plus special talents and needs, should also be considered.”<sup>137</sup> After *Parents Involved*, various school districts have implemented desegregation plans that use race-neutral factors (such as socioeconomic status) to assign students,<sup>138</sup> and race-conscious efforts to redraw attendance zones within school districts may be permissible.<sup>139</sup>

Interestingly, despite its preeminence in *Rodriguez* and *Milliken*, local control did not take center stage in *Parents Involved*. The plurality opinion did not mention it at all. The dissent emphasized the irony that, despite past decisions that placed such great importance on local control, the Court was rejecting the local educational decisions of local school boards.<sup>140</sup> Dismissing the dissent’s discussion of local control as merely “rhetorical,” Justice Kennedy failed to meaningfully engage the local control question.<sup>141</sup>

### III. LESSONS LEARNED AND LEGAL FOUNDATIONS FOR A DEMOCRATIC SCHOOL DESEGREGATION PROPOSAL

Courts and policymakers can draw several lessons from the descriptive discussion above, which makes clear that voting and education—while similar in terms of their democracy-enhancing effects—have followed drastically different legal trajectories. These lessons, once assembled, form the foundation for this Article’s democratic school desegregation proposal. Here, this Article will describe the various lessons learned.

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136. *Id.*

137. *Id.* at 798.

138. See Erica Frankenberg, *Integration After Parents Involved: What Does Research Suggest About Available Options*, in *INTEGRATING SCHOOLS IN A CHANGING SOCIETY* 53, 58–60 (Erica Frankenberg & Elizabeth DeBray eds., 2011).

139. *Id.* at 57 (reasoning that geographical boundary redrawing within districts may comply with *Parents Involved* “[b]ecause such plans consider the racial composition of a neighborhood, and not of an individual student”).

140. See *Parents Involved*, 551 U.S. at 849 (Breyer, J., dissenting) (“Indeed, in the context of school desegregation, this Court has repeatedly stressed the importance of acknowledging that local school boards better understand their own communities and have a better knowledge of what in practice will best meet the educational needs of their pupils.”).

141. *Id.* at 791 (Kennedy, J., concurring) (“The dissent emphasizes local control, the unique history of school desegregation, and the fact that these plans make less use of race than prior plans, but these factors seem more rhetorical than integral to the analytical structure of the opinion.”).

A. *Seemingly Arbitrary Boundaries Have Highly Consequential Results.*

1. School District Boundaries Vary Widely Across the United States.

School districts in the United States are of numerous different sizes and configurations. Different geographical and regional conditions have led to these different configurations. An understanding of these differences is useful in understanding the interplay between school district boundaries and their impact on democratic outcomes in education. William Fischel performed the most comprehensive study of American school districts to date. His study makes clear that the sizes of school districts vary widely across the United States based on various regional factors.<sup>142</sup> In much of the North and West, school district lines are frequently not coterminous with town boundaries and cross county lines,<sup>143</sup> while district lines in the New England states are frequently coterminous with the town lines.<sup>144</sup> Some district lines, in fact, even cross state lines and exist by virtue of interstate compacts or other arrangements.<sup>145</sup> Districts in the South tend to be larger and consolidated, as many such states had minimized the effects of black influence by disenfranchising black voters and diluting their voting power by operating larger districts.<sup>146</sup> Indeed, as Fischel explains:

Disfranchisement was specifically embraced so that schools could be *locally* controlled by whites. In much of the South, the combination of disfranchisement and local taxation to expand educational opportunities for whites was regarded as a progressive idea. Once the possibility that blacks could swing local funds toward themselves was eliminated, white constitution makers felt confident enough to permit localities to tax themselves for schools.<sup>147</sup>

Thus, lawmakers had effectively created the larger school districts of the South to dilute the black vote. But, in an interesting irony, by making the districts larger to dilute black influence, those large districts were subject to broader desegregation orders post-*Brown*, based on the “scope

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142. See FISCHEL, *supra* note 128, at 159–61. Indeed, Fischel uses Google Earth to identify six categories of school district boundaries, ranging from districts that are virtually coterminous with town lines to those where town lines may span three or more school districts. See *id.* at 200–01, 201 fig.5.6.

143. *Id.* at 161.

144. *Id.* at 162–63.

145. *Id.* at 163–64.

146. *Id.* at 174–75.

147. FISCHEL, *supra* note 128, at 175.

of the violation” remedial jurisprudence advanced in *Swann*, *Milliken*, and other cases.<sup>148</sup>

Although states eliminated 90 percent of American school districts between 1930 and 1970,<sup>149</sup> the North was less willing than the South to consolidate its school districts into larger districts.<sup>150</sup> Because northern states have far smaller school districts than those in the southern states, it is much more difficult to obtain a broad desegregation remedy in a northern state, especially in light of *Milliken*. Courts and policymakers cannot expect these boundaries (or their permeability) to change any time soon, absent either a legal or cultural shift. These boundaries are entrenched to ensure that fences are maintained between members of different socioeconomic and racial classes,<sup>151</sup> and the Supreme Court has put up barriers of its own that prevent meaningful challenges to the practices that maintain those fences.<sup>152</sup>

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148. As Fischel explains, “[t]he modern irony is that the South’s oversize school districts, which were created to assure white control of black schools, now make it difficult for Southern whites to avoid desegregation by moving to the suburbs with independent school districts.” *Id.* at 183.

149. See Kiel, *supra* note 24, at 140; Saiger, *supra* note 6, at 510 (“The fewer than 15,000 school districts that existed in the United States in 1970 are the successors to approximately 200,000 school districts that existed in 1900.”); *Change Is a Constant for US School Districts*, MAPONICS, <http://www.maponics.com/about-us/resources/school-geography-guide/change-is-a-constant-for-us-school-districts> (last visited Jan. 25, 2015) (“Of the 200,000 districts that existed in 1900, fewer than 14,000 still exist. Because of continuing and sometimes dramatic population shifts and economic factors, many areas of the country are grappling with the need to redraw school district boundaries.”).

150. See FISCHEL, *supra* note 128, at 211 (“Suburban residents were uniformly and strongly opposed to city-suburb consolidation because they thought school quality would decline and taxes would rise.”).

151. See WEIHER, *supra* note 74, at 191–92. Weiher explains:  
Quite frequently, [school district boundaries] . . . are social boundaries, separating socioeconomic and ethnic groups from one another. This is not accidental. Research in one metropolitan area after another indicates that this congruence of political, geographic, and social boundaries is often created by decisions taken within the educational system expressly for that purpose.  
*Id.* (citations omitted). As noted above, these boundaries are maintained using zoning and other intentional mechanisms. ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 12, 39 (2010) (“Where once whites kept blacks down by legally prohibiting anyone from teaching them to read, now an elaborate set of laws—including fragmentation of local governments, zoning regulations, and local financing of schools—works with nonlegal mechanisms sustaining residential racial segregation to exclude blacks from good schools.”); Saiger, *supra* note 6, at 503.

152. See WEIHER, *supra* note 74, at 94. Weiher summarizes:  
In a series of cases, the court upheld a California law which required that local voters approve all public housing proposals; upheld the right of localities to engage in restrictive zoning; and imposed a strict standard that zoning prohibiting subsidized housing should be invalidated only if intent to discriminate on racial grounds is proven.

2. *Swann* and *Milliken* Involved Similar Circumstances But Different Boundaries.

These pre-determined boundaries have had profound consequences on the legal results in school desegregation cases such as *Swann* and *Milliken*.<sup>153</sup> The difference in outcomes in those cases illustrates the apparent arbitrariness of school district boundaries in impacting a locality's ability to create policies that promote socioeconomic and racial integration. The Charlotte-Mecklenburg district was about the same size as the area covered by the metropolitan remedy rejected in *Milliken*. It would have taken a fairly long bus ride to get from one side of the Charlotte-Mecklenburg school district to the other, just as it would have for the students who would have been part of Detroit's consolidated school plan contemplated in *Milliken*.<sup>154</sup> But *Milliken*'s metropolitan remedy, unlike the remedy in *Swann*, would have spanned multiple school districts. Thus, the boundaries of the districts were different, but the experiences of students in each integration plan would have been similar. Had the district boundaries simply been different in *Milliken*, the segregated conditions would have likely been akin to those at issue in *Swann*, where the Court upheld the metropolitan remedy.

3. *Gautreaux*: Are "Housing Market Boundaries" Conceptually Distinct from "School District Boundaries"?

*Hills v. Gautreaux*,<sup>155</sup> although a housing case,<sup>156</sup> further illustrates the arbitrary nature of boundaries that govern legal outcomes. In *Gautreaux*, the U.S. Department of Housing and Urban Development

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*Id.* (citing *James v. Valtierra*, 402 U.S. 137 (1971); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)).

153. See *supra* Part II.A–B.

154. Cf. FISCHER, *supra* note 128, at 183 ("Many of the largest cities in the South are within unified city-country school districts, such as Miami-Dade, Florida, Charlotte-Mecklenburg, North Carolina, and Nashville-Davidson, Tennessee, from which a 'flight to the suburbs' is a long trip indeed.").

155. *Hills v. Gautreaux*, 425 U.S. 284 (1976).

156. As many have stated or implied, "education policy is housing policy." See Lewis W. Diuguid, *Continued Segregation Is Failure of Brown Ruling*, THE KANSAS CITY STAR (May 11, 2014, 5:00 PM), <http://www.kansascity.com/2014/05/11/5013949/continued-segregation-is-failure.html> (quoting the Economic Policy Institute); see also WILKINSON, *supra* note 72, at 223 (reasoning that in the school desegregation context, "victimization could not be understood or genuine restoration attempted without looking at housing"); Heather Schwartz, *Housing Policy Is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland*, in THE FUTURE OF SCHOOL INTEGRATION, *supra* note 18, at 27.



(“HUD”) and the Chicago Housing Authority (“CHA”) had discriminated on the basis of race in administering its housing programs in the greater Chicagoland area.<sup>157</sup> The question was whether the remedy for this housing discrimination should extend beyond Chicago. The United States argued that *Milliken* should apply and constrain the remedy to Chicago’s city limits. The Court, however, concluded that:

[I]t [was] entirely appropriate and consistent with *Milliken* to order CHA and HUD to attempt to create housing alternatives for the respondents in the Chicago suburbs. Here the wrong committed by HUD confined the respondents to segregated public housing. The relevant geographic area for purposes of the respondents’ housing options is the Chicago housing market, not the Chicago city limits.<sup>158</sup>

Moreover, the Court distinguished *Milliken* on the grounds that that ruling “reflected the substantive impact of a consolidation remedy on separate and independent school districts.”<sup>159</sup>

*Gautreaux* is interesting for several reasons. First, it illustrates how a simple reframing of the legal argument can dramatically (and, again, somewhat arbitrarily) alter a legal result. Just because the context of the legal issue in *Gautreaux* changed to housing—and not education—the scope of the violation was understood as having a wider boundary—an entire housing market instead of a single school district. Even though the inner-city residents of Chicago had virtually no chance of participating in the suburban housing market,<sup>160</sup> they were viewed as part of that market. Yet, these very same markets furnish the reason why the socioeconomically disadvantaged cannot obtain housing in suburban housing markets and are therefore fenced out of the school districts that serve those markets. Second, *Gautreaux*’s ruling led to a fairly extensive housing voucher program that allowed many disadvantaged Chicago residents to move to the suburbs and send their children to wealthier suburban school districts: though many families did not avail themselves of this option after the *Gautreaux* ruling, research suggests that those who moved to the suburbs stayed there and succeeded in school.<sup>161</sup> *Gautreaux* requires policymakers and courts to reflect on the fact that housing and education are inextricably intertwined.

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157. *Gautreaux*, 425 U.S. at 286–87.

158. *Id.* at 299.

159. *Id.* at 296.

160. It is safe to assume that, in many cases, these residents were either priced out of the suburban market—or zoned out.

161. See Frankenberg, *supra* note 138, at 67; Schwartz, *supra* note 156, at 32.

As the above illustrates, school district boundaries matter, despite their seemingly arbitrary nature. Any meaningful solution cannot ignore this fact.

*B. There Is a Need for a Democratic Equalization Principle In Education.*

Although the election law cases illustrated the debate as to whether a democratic equalization principle should apply across the country,<sup>162</sup> the one-person one-vote standard emerged. This standard has been far from perfect—but it is *a* standard—and it ensures that equal protection claims are justiciable. Certainly, racial vote dilution challenges are much more difficult to assess than claims challenging whether districts are equally populated, but those legal claims are also bound by standards to some degree. The complexities and challenges of assessing racial vote dilution claims, as well as one-person one-vote claims, are beyond the scope of this Article. The point, simply put, is to learn from election law that there are relatively clear—and known—legal principles that guide courts and policymakers with respect to electoral redistricting.

As of now, no principle other than “local control” guides courts and policymakers with respect to school district boundaries, as *Milliken* makes clear. So long as school desegregation lawsuits cannot successfully demonstrate a school district’s overt intent to discriminate, local decisions that preserve existing school district boundaries may be made with impunity. No democratic equalization principle applies that would compel changes to the ways that school district boundaries are drawn or maintained. As a result, no one considers the democratic implications of such boundaries—for those who wish to maintain those boundaries, ignorance is bliss.<sup>163</sup> Thus, it is important to adopt a democratic equalization principle in the school district boundary context that would promote awareness of the socioeconomic and demographic effects of school district boundary decisions.

*C. A Viable Policy Solution Must Preserve Local Control of Schooling.*

Although local control is given far greater significance in the case law than is probably warranted, nothing is wrong with certain notions of

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162. See *supra* Part II.

163. See WEIHER, *supra* note 74, at x (“The drawing and redrawing of political boundaries is a more subtle strategy than confrontation, but its effects are more pervasive and enduring. Indeed, if political boundaries are appropriately drawn, confrontation is not required to maintain racial separation.”).

local control—indeed, principles of local control in education are beneficial insofar as they would, among other things, allow communities to democratically promote innovation and experimentation in educational methods. For example, local decisions could be made to tailor curricula to meet the local needs of the community, and these decisions would derive from a diverse set of school boards with vastly different educational interests; rural schools may have different educational priorities than urban schools.<sup>164</sup> Such second-order diversity across school districts is beneficial to our federalism,<sup>165</sup> and in this sense, local control is valuable. Indeed, the only aspects of local control that are problematic are those aspects that are used as a pretext to justify entrenched boundary lines that promote the exclusion and subordination of the socioeconomically disadvantaged.<sup>166</sup> Thus, if such boundary lines were redrawn to promote socioeconomic integration using a democratic equalization principle, many problems with local control would dissipate over time.<sup>167</sup>

Even though local control of schools has already been diminished to some degree as a result of the increased federal involvement in education,<sup>168</sup> such as in NCLB and RTTT,<sup>169</sup> policymakers cannot ignore

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164. *Milliken* itself recognized these specific benefits of local control, explaining that local control “permits the structuring of school programs to fit local needs, and encourages ‘experimentation, innovation, and a healthy competition for educational excellence.’” *Milliken v. Bradley*, 418 U.S. 717, 741–742 (1974) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973)).

165. See Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1128 (2008).

166. See, e.g., Briffault, *supra* note 76, at 72 (“[L]ocal land use regulation and local responsibility for funding basic public services would not be so problematic if local governments were either relatively equal in taxable wealth or populated by similar mixes of high, middle, and low-income residents.”).

167. See *id.* (noting that neither school funding equalization nor efforts to affirmatively promote housing diversity “would be necessary if local boundary lines were drawn in order to combine more and less affluent areas into common political and fiscal units” and that “[s]uch a standard for boundary-setting would eliminate fiscal inequality and much of the incentive for exclusionary regulation”).

168. As Michael Heise explains:

The Court’s fidelity to local control . . . rests increasingly uneasy in today’s education setting. Stylized notions about local control over America’s school policy, however powerful, have not accurately described the allocation of American education policy for decades. The influence of local school authorities on school policy has waned due to legislative assertions by states and the federal government. Thus, the Court displayed increased confidence in local control over school policymaking (including fiscal policy) as state and federal lawmakers encroached upon local autonomy. Since the 1970s the trend toward greater centralization of education policymaking authority has, if anything, accelerated and broadened.

Heise, *supra* note 100, at 66.

the Court's historic solicitude for local control in the context of school district boundaries. Therefore, any proposal that uses a democratic equalization principle to redraw school district boundaries must also thoughtfully articulate why and how it would maintain principles of local control. The proposal adopted here would not only be consistent with local control, but it would likely make local control of schools stronger in the long run.

#### IV. APPLYING THE LESSONS LEARNED: A PROPOSAL FOR DEMOCRATIC SCHOOL DESEGREGATION

Having gathered the lessons learned from both election and education law, this Article now explains the details of a hypothetical proposal for promoting democratic school desegregation. As noted above, it is impossible to create broad institutional changes unless we can agree on a democratic equalization principle. In light of the analysis in Part III, this principle likely will not come from the courts. The time has come and gone for the federal courts to enter the political thicket in education.<sup>170</sup> The proposed solution in this Article comes with the expectation that it will most likely be generated through legislation at the federal or state level, as explained in more detail below. The thrust of

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169. See Diane Ravitch, *Just Say No to Race to the Top*, EDUC. WK. (May 25, 2010, 7:56 AM), [http://blogs.edweek.org/edweek/Bridging-Differences/2010/05/just\\_say\\_no\\_to\\_the\\_race\\_to\\_the.html](http://blogs.edweek.org/edweek/Bridging-Differences/2010/05/just_say_no_to_the_race_to_the.html) ("Race to the Top erodes local control of education by prompting legislatures to supersede local school boards on any issues selected by federal bureaucrats."); Greg Toppo, *States Fight No Child Left Behind, Calling It Intrusive*, USA TODAY (Feb. 11, 2004, 8:54 PM), [http://usatoday30.usatoday.com/news/education/2004-02-11-no-child-usat\\_x.htm](http://usatoday30.usatoday.com/news/education/2004-02-11-no-child-usat_x.htm) (explaining that nine states took steps to opt out or block spending on No Child Left Behind because it was "an intrusion on local control").

170. This is not to say that I would consider it outside of the realm of possibility for a state court to adopt a democratic equalization principle. For example, in *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996), the Connecticut Supreme Court determined that the racial isolation of minority students in greater Hartford was unconstitutional under the Connecticut state constitution due to the "town boundaries" that were entrenched by the State's "school districting scheme." See *id.* at 1289. However, in that case, the court did not propose the democratic equalization principle or any other remedy. The remedy that has been implemented as a result of the parties' settlement primarily relies on magnet schools, interdistrict transfer programs, and annual targets for racial integration (the current goal in that regard is that 44% of Hartford students attend school in schools with reduced racial isolation). See John Moran, *Summary of New Sheff Agreement* (Jan. 27, 2014), <http://www.cga.ct.gov/2014/rpt/pdf/2014-R-0028.pdf>. Given that other statewide challenges to statewide school systems continue to be pursued, including another suit in Connecticut, there is reason to believe that a democratic equalization principle could be adopted in one of those suits in the not too distant future. See *Litigations Challenging Constitutionality of K-12 Funding in the 50 States*, NAT'L EDUC. ACCESS NETWORK (Apr. 2014), <http://schoolfunding.info/wp-content/uploads/2011/07/4.14.Litigations-Challenging-Constitutionality-of-K-12-Funding.pdf>.

the proposal is driven by a democratic equalization principle that espouses the goal that, in the long run, no child in the United States will attend a high poverty school—rather, all students would attend schools with a middle-class majority.

Movement toward such a goal will dramatically improve educational outcomes in the United States.<sup>171</sup> Derek Black articulates the motivation for ensuring that more schools comprise a respectably-sized middle-class:

Although high-poverty schools can undermine students' education, predominantly middle-income schools bring affirmative benefits to the learning environment. The crucial ingredient in the success of middle-income schools is the students who attend them. Middle-income students themselves are thus an educational resource. The quality of a student's educational experience can be as dependent on his peers as it is on his teachers, the quality of his school building, or the substance of his curriculum. First, students depend heavily upon one another for their learning. They study together, teach one another, and compete against one another, raising the academic bar. Due to the opportunities they receive outside of school, middle- and high-income students tend to bring more educational capital to school and, thus, elevate the learning of those around them. Second,

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171. See, e.g., Richard D. Kahlenberg, *Introduction: Socioeconomic School Integration*, in *THE FUTURE OF SCHOOL INTEGRATION*, *supra* note 18, at 1, 2. Kahlenberg notes that

districts, under increasing pressure to raise the achievement of low-income and minority students, are beginning to heed the evidence suggesting that one of the most effective ways to do so is to give low-income and working-class students a chance to attend predominantly middle-class schools. . . . [M]iddle-class schools are twenty-two times as likely to be high performing as high-poverty schools.

*Id.*; see also Brief of Amici Curiae The Lawyers' Committee for Civil Rights Under Law, The Poverty & Race Research Action Council, The Opportunity Agenda, and The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund, et al., In Support of Respondent The Exclusive Communities Project, Inc. at 27–31, *Tex. Dep't of Hous. & Cmty. Affairs v. The Inclusive Cmty. Project, Inc.*, 135 S. Ct. 46 (filed Dec. 23, 2014) (No. 13-1371); Jeanne L. Reid, *Socioeconomic Diversity and Early Learning: The Missing Link in Policy for High-Quality Preschools*, in *THE FUTURE OF SCHOOL INTEGRATION*, *supra* note 18, at 67, 69, 106–107 (explaining that pre-kindergarten students in classrooms with above-average economic socioeconomic compositions were positively impacted in their achievement in three areas: receptive language, expressive language, and math learning); ROSLYN ARLIN MICKELSON, NAT'L COAL. ON SCH. DIVERSITY, RESEARCH BRIEF NO. 5, SCHOOL INTEGRATION AND K-12 EDUCATIONAL OUTCOMES: A QUICK SYNTHESIS OF SOCIAL SCIENCE EVIDENCE (2011), available at <http://www.school-diversity.org/pdf/DiversityResearchBriefNo5.pdf>; GENEVIEVE SIEGEL-HAWLEY & ERICA FRANKENBERG, NAT'L COAL. ON SCH. DIVERSITY, RESEARCH BRIEF NO. 6, MAGNET SCHOOL STUDENT OUTCOMES: WHAT THE RESEARCH SAYS (2011), available at <http://www.school-diversity.org/pdf/DiversityResearchBriefNo6.pdf>.

middle-income students come from families that tend to have higher academic expectations for their children. When these students are the majority in a school, the students create a culture of high achievement that benefits everyone.<sup>172</sup>

Moreover, beyond the benefits that may accrue to the socioeconomically disadvantaged as a result of attending schools with middle and upper class peers, all children will benefit from attending schools with children of different economic backgrounds, as they will better appreciate differences and become better at adapting to a multi-cultural society.<sup>173</sup> Given these benefits, it is worth establishing a democratic equalization principle that focuses on socioeconomic school integration.

A. *The 60/40 Principle: The Principle and Its Enforcement*

The 60/40 principle is a democratic equalization principle that has three components: (1) a threshold requirement that all school districts comprise less than 60 percent low-income students; (2) an ongoing duty to reduce the proportion of low-income students to below 40 percent in all school districts (to facilitate the elimination of all high poverty schools in each district); and (3) an escape provision that provides additional autonomy once all school districts in a state eliminate high-poverty schools. Because this principle only takes socioeconomic status into account, it complies with *Parents Involved*.<sup>174</sup> The principle, moreover, maintains school districts as the political unit by which students are distributed—ensuring that local control of school districts remains possible—but, at the same time, recognizes that school district boundaries may need to be periodically redrawn as a last resort. However, the thrust of this democratic desegregation proposal is the

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172. Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 409 (2012).

173. See, e.g., Nancy Conneely, Note, *After PICS: Making the Case for Socioeconomic Integration*, 14 TEX. J. C.L. & C.R. 95, 115 (2008). Conneely explains: Attending diverse schools serves the interests of all students by preparing them for life in a multicultural world. Because children will grow into adults who work in pluralistic society, it is in their best interest to learn as early as possible how to interact with people whom they perceive to be different from themselves. It is beneficial to get different viewpoints, and to be exposed to and become comfortable with different cultures and ways of thinking.

*Id.* (citing Brief of 553 Social Scientists as Amici Curiae in Support of Respondents at 6, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Nos. 05-908, 05-915), 2006 WL 2927079).

174. See *supra* Part III.C. It may be possible to achieve the principle using methods that take race into account under *Parents Involved*, but there will be no race-based benchmarks under the proposal.

achievement of the goals consistent with the 60/40 principle itself—and not the redrawing of district boundaries.

### 1. Threshold Requirement

The central component of democratic school desegregation is a principle referred to as the 60/40 principle. This democratic equalization principle aims to ensure that, in the long run, no child in the United States will attend a “high-poverty” school.<sup>175</sup> This principle should be the starting point for a national conversation about educational equity. According to recent research, the proportion of low-income students in a given state ranges from approximately 19 percent to 72 percent.<sup>176</sup> Further, 95 percent of the states have a statewide low-income percentage below 60 percent.<sup>177</sup> Thus, under this proposal, the federal government (or a state) would establish a principle whereby all school districts must be configured such that, as a threshold matter, fewer than 60 percent of the students in each school district are from low-income backgrounds. The measurement of “low-income” would be an objective benchmark that could not be manipulated by state governments.<sup>178</sup> The reason for such an objective measurement would be to prevent a race-to-the-bottom, wherein districts redefine their definition of “low-income” so that they could meet the 60 percent requirement, similar to how states lowered their performance standards in response to NCLB.<sup>179</sup> The 60 percent

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175. “High-poverty” school, for purposes of this proposal, is a school that is over 50% low-income.

176. See Mantil et al., *supra* note 18, at 215–16 app. 5.1.

177. See *id.*

178. The measurement of low-income, for example, could be tied to the federal poverty line or to the qualifying standard for free and reduced-price lunch consistent with the U.S. Department of Agriculture’s Income Eligibility Guidelines. See *School Meals: Income Eligibility Guidelines*, U.S. DEP’T OF AGRIC. FOOD & NUTRITION SERV., <http://www.fns.usda.gov/school-meals/income-eligibility-guidelines> (last visited Jan. 25, 2015).

179. See Richard D. Kahlenberg, *Introduction* to *IMPROVING ON NO CHILD LEFT BEHIND* 1, 8 (Richard D. Kahlenberg ed., 2008). Kahlenberg explains that:

NCLB not only fails to encourage states to set rich and consistent content standards, it also allows them to set wildly different performance standards for what constitutes ‘proficiency.’ According to a 2007 study by Northwest Evaluation Associates and the Thomas B. Fordham Institute, passing scores vary from the sixth to the seventy-seventh percentile. Worse, by requiring 100 percent proficiency [in 2014], NCLB actually provides a perverse incentive for states to lower performance standards of proficiency in order to avoid having districts be sanctioned.

*Id.* (citations omitted).

would be a mandatory requirement<sup>180</sup> and would be a realistic goal given the distribution of poverty across the states.

## 2. Ongoing Duty

However, the 60/40 principle only starts with the 60 percent requirement. Once all school districts in a state reach the point where they have obtained a population that contains less than 60 percent low-income students, the state would have the affirmative duty to continue taking measures to further reduce the proportion of low-income students in each school district. That is, over time, the state would need to take steps toward the goal that all school districts in the state have less than 40 percent of its students identified as low-income. This is the goal because research suggests that such a cutoff would likely ensure that all students within each school district could then be assigned such that they would all attend schools that contain fewer than 50 percent low-income students.<sup>181</sup> Thus, the 40 percent portion of the 60/40 principle is meant to ensure the ultimate goal: that no child in the United States (or, at minimum, the state that implements the proposal) attend a high-poverty school, which, for the purposes of this Article, is defined as a school comprising more than 50 percent low-income students.

## 3. Escape Provision

Under the 60/40 principle, any state that meets the 40 percent threshold and maintains a districting scheme wherein all of its students are able to attend a school that has less than 50 percent low-income students, as objectively defined, would not need to meet any further requirements under the statute or program as long as that latter condition is continuously met during each enforcement period. Regardless of the design of the desegregation program that implements the principle, the most critical goal is that no child should attend a high poverty school, and creative solutions should be encouraged. Thus, such states would be allowed to maintain their school district boundaries if they so choose. This is because such states, given their substantial progress, should be

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180. I understand that this requirement may be impossible for the five states with over 60% low income to achieve, at least in the first few years of the program. For these states, the initial threshold percentage would be set higher and operate on a sliding scale, with the requirement eventually becoming 60%.

181. See Mantil et al., *supra* note 18, at 186 (stating that “[g]iven logistical and political constraints, a *district* SES [socioeconomic status] ceiling of 40 percent low-income may be needed to ensure a *school* SES ceiling of 50 percent low-income for all schools in the district”). Depending on nationwide data and state-by-state trends, the initial threshold may need to be set differently, and the 60% number advanced here is an estimate that may require adjustment.



given the autonomy to more freely experiment with their school districting and education system to continue the progress that has been made. Moreover, this policy ensures that policymakers, as well as state or federal agencies, can focus enforcement of the 60/40 principle on those states that need it most.<sup>182</sup>

*B. Adoption and Enforcement of the Principle*

One of three mechanisms could codify the democratic school desegregation principle into law. First, Congress may codify the principle through the upcoming NCLB reauthorization. The principle could then be tied to Title I funding or other federal grant programs, which would provide an incentive for states to adopt the principle. Such a solution would be most effective in covering nearly all states, with the exception of the states that may decline federal funds for political or other reasons.<sup>183</sup> Second, states may adopt the principle in response to a federal incentive grant program similar to the recent RTTT program.<sup>184</sup> If state legislatures adopted the principle through such a federal program, they would receive federal dollars as long as the states enforced the 60/40 principle on an ongoing basis. Third, state legislatures could adopt the 60/40 principle by their own accord and without federal incentives. No matter the mechanism, it is critical that individual states enact laws in support of the policy, as “endorsement from the state is an essential element for success in efforts to mitigate the educational inequities caused by district boundaries.”<sup>185</sup>

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182. I certainly think that states can—and should—do better than this goal. Nevertheless, I also believe that the key to a viable integration policy is that it be politically tenable and realistic. There is evidence that, for example, conservatives have begun to warm up to the idea of socioeconomic school integration. See Richard D. Kahlenberg, *Class No Longer Dismissed: Why Some Conservatives Are Warming to Socioeconomic School Integration*, WASH. MONTHLY (Jan./Feb. 2013), [http://www.washingtonmonthly.com/magazine/january\\_february\\_2013/on\\_political\\_books/class\\_no\\_longer\\_dismissed042129.php?page=all](http://www.washingtonmonthly.com/magazine/january_february_2013/on_political_books/class_no_longer_dismissed042129.php?page=all). Additionally, although *Milliken* was a case of racial desegregation, it was understood that “the true appeal of metropolitan remedies lay more in the need for class than racial interaction.” WILKINSON, *supra* note 72, at 220.

183. Various suits upheld the constitutionality of NCLB under the spending clause, and I would expect this proposal to similarly survive scrutiny under that clause. See Shannon K. McGovern, *A New Model for States as Laboratories for Reform: How Federalism Informs Education Policy*, 86 N.Y.U. L. Rev. 1519, 1534 n.84 (2011).

184. Race to the Top successfully triggered numerous statewide reforms with respect to charter schools and other federal initiatives. Thirty-four of the forty-seven applicants in Phases One and Two of Race to the Top changed state education law or policy in their bid for extra funding, even though most of them ultimately did not receive any funding. See *id.* at 1538; see also Kiel, *supra* note 24, at 150.

185. See Kiel, *supra* note 24, at 139.

The enforcement of the 60/40 principle will occur periodically in states where the policy is adopted. For example, enforcement could occur every ten years after each decennial census. After each ten-year period, the states and school districts within each state would need to reevaluate their existing policies to improve the socioeconomic status and educational opportunities of citizens and consider whether changes to those policies are needed—up to and including modifications of the state’s school district boundaries.<sup>186</sup> A critical component to enforcement will be that states, as part of the policy’s design, would assume an affirmative duty to meet the goals of the proposal during each enforcement period. The state laws that implement the policy, in turn, would impose an affirmative duty on local governments to make reasonable efforts to progress toward the requirements. As a result, states and local governments could be subject to suit (either at the state or federal level, depending on the circumstance) if they have not made reasonable efforts to progress toward the requirements of the law—including situations where states have not redrawn their school district boundaries when doing so would have been the most viable means for demonstrating progress toward the principle’s goals.

*C. Methods of Compliance with the 60/40 Principle*

To be clear, the 60/40 principle itself drives the proposal presented in this Article. Thus, assuming that states or the federal government adopted the 60/40 principle, the goals underlying the principle may be achieved using many different means. That is, states can and should be encouraged to do anything in their power to ensure that no children in their state attend a high-poverty school. This can include statewide efforts to reduce poverty generally (for example, by promoting policies that create jobs and improve the economy) or housing policies that ensure that more socioeconomically diverse populations attend schools in adjacent school districts.<sup>187</sup> It can also include education policies that promote academic improvements that enable families to improve their socioeconomic status over time. These sorts of solutions, by improving the economic standing of citizens, will reduce the number of children

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186. If such redrawing were not considered politically, the boundaries would likely return to a state that promoted segregation. See Saiger, *supra* note 6, at 531 (“If boundaries are enlarged or redrawn on a one-off basis, stratification can replicate itself.”).

187. See *supra* Part III (describing the *Gautreaux* case and the benefits resulting from vouchers facilitating moves from poorer to wealthier districts). Moreover, if a wealthy suburban area alters its zoning regulations to allow greater numbers of the disadvantaged to live in that district, that district will regress toward the median income. If the district continues to maintain practices that exclude such individuals, it may continue to do so, but it would need to open up the schools.

who attend “high-poverty” schools and will correlate with improved educational outcomes. However, states and school districts will likely need other policy measures in the near-term to comply with the principle.

### 1. *Intra-District Solutions*

As noted above, the ultimate goal of the 60/40 principle, properly functioning, is that no child attends a high-poverty school, where a “high-poverty” school is defined as a school that contains greater than 50 percent low-income students. Thus, even assuming that all districts comprise a population of less than 40 percent low-income students, it is possible that segregation remains *within* school districts such that a substantial number of students continue to attend high poverty schools.<sup>188</sup> As a result, under this Article’s democratic school desegregation proposal, measures need to be taken within each school district to ensure that all students attend individual schools that are less than 50 percent low-income. In districts where socioeconomic status is fairly uniformly distributed, this will likely be relatively simple once the district as a whole contains a population that is less than 40 percent low-income. However, in school districts (for example, urban school districts) where housing segregation separates the wealthier population from the poorer population, it may be necessary to draw attendance zones *within* the school district that facilitate socioeconomic integration (for example, the pie-shaped wedges that were used in *Swann*<sup>189</sup>) or to adopt student assignment policies that take socioeconomic status into account.<sup>190</sup> Other policies that states and school districts could implement include parental controlled choice programs, student transfer programs that take socioeconomic status into account, and preferential admissions to magnet schools that promote socioeconomic diversity within those schools.<sup>191</sup>

### 2. *Inter-District Solutions*

Although *intra*-district solutions may move the needle to some degree, states and local governments that seriously intend to comply with

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188. See, e.g., Kiel, *supra* note 24, at 146 (“School attendance zones, the boundaries that fix which school a student will attend, can cause similar problems to district lines. After all, a disparity often exists in educational experience *within* school districts that looks just like the . . . disparities *across* districts.”).

189. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 8–9 (1971); see also Sheneka Williams & Erica Frankenberg, *Using Geography to Further Racial Integration*, in *INTEGRATING SCHOOLS IN A CHANGING SOCIETY*, *supra* note 138, at 223, 224; *supra* text accompanying note 78.

190. See Williams & Frankenberg, *supra* note 189, at 224 (describing the Wake County Public School System).

191. See Mantil et al., *supra* note 18, at 184–85.

the 60/40 principle must at least be open to the possibility of using *inter*-district remedies to solve the problems. Given the current composition of school districts in the United States, only about 500,000 out of a possible 15,000,000 students in high-poverty schools could be reassigned to low-poverty schools as a result of *intra*-district strategies.<sup>192</sup> A recent study, however, suggests that *inter*-district strategies could reduce the number of high poverty schools by more than a third.<sup>193</sup> Some examples of *inter*-district solutions include regional magnet schools (such as those created in greater Hartford to comply with the *Sheff v. O'Neill* settlement<sup>194</sup>) and *inter*-district transfer programs.<sup>195</sup> Such programs could provide transportation to facilitate students' movement between and within school districts.

### 3. A Last Resort: Redrawing District Boundaries

If states are unable to comply with the 60/40 principle using any of the methods described above, a last resort under the proposal would be to redraw school district boundaries using a state level authority. Although such redrawing may be necessary in the early stages of democratic school desegregation, such redrawing would become less necessary as time progresses and the goals of the 60/40 principle are met. However, states would always have the duty to reconsider school district lines, if necessary, to comply with the principle. This could entail consolidating suburban and urban school districts into larger districts, making relatively minor boundary changes around property-poor urban or rural areas, or subdividing cities into smaller school districts.<sup>196</sup> With regard to the latter proposal, breaking up an urban district into smaller districts may, to some extent, reduce the stigma associated with the large urban school district.

To implement school district boundary redrawing, this Article proposes that each state, as part of the legislation, create a neutral state-level committee to propose a series of potential redistricting solutions

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192. *Id.* at 156, 188.

193. *Id.* at 207.

194. *Sheff v. O'Neill*, 678 A.2d 1267, 1270–71 (Conn. 1996) held that de facto racial segregation in Hartford, Connecticut violated provisions of the Connecticut State Constitution. Accordingly, the state undertook measures, such as inter-district magnet schools, to desegregate the schools in greater Hartford under the terms of a negotiated settlement, which is still in effect today.

195. Mantil et al., *supra* note 18, at 189–93.

196. For example, Fischel explains that “[i]t may be better for cities themselves to have smaller school districts”—indeed, nothing legally compels urban centers to have such large districts. FISCHEL, *supra* note 128, at 209.

with a recommendation during each enforcement period.<sup>197</sup> School districts, during this process, would be able to submit redistricting proposals to the committee for consideration. Those proposals the committee approves would then need further approval by the towns affected by the redrawing for a vote, thereby preserving local control.<sup>198</sup>

The committee should design an initial redistricting proposal to achieve the 60 percent threshold goal only, so as to minimize disruption of existing school district boundaries.<sup>199</sup> After the state achieves the 60 percent goal, states and school districts would need to submit revised plans in successive enforcement periods that would generate further progress toward the 40 percent goal (unless, of course, reasonable progress can be made in the districts using the other *intra*-district policy measures described above). Because school redistricting is a last resort under the 60/40 proposal, the goal during every decennial period should be to give the state and local governments within the state a chance to make progress toward the benchmarks of the 60/40 principle *without* using redistricting. Because the threat of *any* redistricting always looms in the background, however, this Article contends that this policy would motivate state actors to remedy fundamental issues pertaining to poverty and housing segregation that foster much of the segregation and inequality in the United States. The ultimate goal of the policy, of course, is to reach a steady state wherein there is never a need to redraw school district boundaries.

There is a risk that, even if a statewide committee provides school redistricting recommendations to the state legislature, existing local school districts may choose to reject any redistricting proposal. However, because the state laws that would implement the policy would impose an affirmative duty on local governments to make progress toward the 60/40 principle's goals, such local governments would be subject to suit if they did not have a bona fide justification for rejecting the proposal. Thus, a locality that chooses to reject a redistricting

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197. See also Saiger, *supra* note 6, at 533 (“[B]orders would be actively drawn by a larger, nonlocal polity, almost certainly the state, in accordance with state rules designed to assure interdistrict equity.”).

198. There is precedent for review boards that assess the propriety of proposed boundary changes but many of them require local consent. See Briffault, *supra* note 76, at 82–85. For example, if two suburban districts are consolidated into an urban district, the consent of the two suburban districts and the urban district would be needed to approve the proposal from the committee.

199. A proposal that does not make immediate, dramatic redistricting changes would be more politically tenable than one that would immediately merge entire suburban and urban districts together, for example. See, e.g., Kiel, *supra* note 24, at 157–64 (describing state legislative efforts to merge Memphis with suburban districts in Shelby County, Tennessee, and subsequent efforts by the suburban districts to create their own districts in view to circumvent the state law).

proposal without basis runs the risk that it will face a school redistricting map imposed by a state court. This Article hypothesizes that local governments would not want to run such a risk, as this may result in a redistricting map that the local government dislikes more than the one that they had a hand in proposing to the statewide committee. Moreover, such localities would likely lose the suit because the evidence that the district had not contributed to progress toward the 60/40 principle would be clear.

In response to this, critics may argue that states that implement this policy would impinge on the autonomy of local school districts. However, from a purely legal standpoint, local autonomy does not pose a problem. School districts are creatures of the state and are rarely granted “home rule” autonomy from the state.<sup>200</sup> Moreover, the Supreme Court recognizes that local government units, such as municipalities, exercise their powers “in the absolute discretion of the [s]tate” and “[t]he [s]tate . . . at its pleasure may modify or withdraw all such powers . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. . . . with or without the consent of the citizens, or even against their protest.”<sup>201</sup> Thus, while localities may express some political

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200. See Saiger, *supra* note 6, at 509 (“The blackest of black-letter doctrine insists that school districts, like other local governments, are but ‘creatures of the state.’”); Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 779–80 (1992). Briffault states:

Education is considered a subject of plenary state power. . . . Home rule and attendant concepts of local autonomy . . . are usually reserved for municipal corporations and other general purpose local governments. Home rule is rarely, if ever, extended to special districts, such as school districts. Thus . . . local school districts are likely to be considered arms of the state, and state power to create, alter, reorganize or destroy school districts is not affected by home rule. Indeed, in some states, the nexus between a local school board and the state is so tight that the local board lacks standing to sue the state.

*Id.*; cf. *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 67 N.J. 151, 177 (1975) (“[I]t is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state.”).

201. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907), *overruled on other grounds by* *Kramer v. Union Free Sch. Dist. 2*, 395 U.S. 621 (1969); see *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (noting that, despite being overruled on other grounds, *Hunter* “continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that states have in creating various types of political subdivisions and conferring authority upon them”); *Reynolds v. Sims*, 377 U.S. 533, 575 (1964) (“Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.”); see also *Lee v. City of Harlingen, Tex.*, No. 1-10-233, 2011 WL 6371089, at \*4 (S.D. Tex. Dec. 19, 2011) (citing *Holt Civic Club* and noting that *Hunter* remains good law for this proposition).

disagreements with the 60/40 principle as adopted by the states, they will not likely be able to take legal action against the states that implement the policy.

*D. The Relevance of NCLB to the Proposal*

This proposal is not meant to be a complete replacement of NCLB in its current form. Though the current academic growth goals of NCLB (known as adequate yearly progress (“AYP”) goals) are unrealistic,<sup>202</sup> accountability and standards, including academic target growth goals, are worthwhile pursuits to the extent the goals that are set are reasonably attainable. A full-throated analysis of the advantages and disadvantages of NCLB is beyond the scope of this Article, but insofar as the democratic school desegregation proposal advanced here leads to alterations in either the population or boundaries of school districts, such shifts in population must be taken into account for purposes of NCLB’s academic accountability goals. It may, for example, be necessary to provide safe harbors for school districts that accept a significant number of lower income students in their districts.<sup>203</sup> These safe harbors could, for example, exclude from NCLB growth targets low-income students who move or are redistricted into a higher income district for a period of years. Alternatively, NCLB could reframe the standard to focus on the value added (or academic growth) achieved by individual students, rather

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*But see* Gomillion v. Lightfoot, 364 U.S. 339, 344–45 (1960) (explaining that the state’s power to alter municipal boundaries must “lie[] within the scope of relevant limitations imposed by the United States Constitution[,]” where a state legislature had unconstitutionally altered municipal boundaries to discriminate against blacks in violation of the Fifteenth Amendment by denying them from exercising the franchise in Tuskegee, Alabama).

202. For example, the AYP target for 2014—last year—was 100% proficiency. *See* Amit R. Paley, ‘No Child’ Target Is Called Out of Reach, WASH. POST (Mar. 14, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/13/AR2007031301781.html> (“No Child Left Behind, the landmark federal education law, sets a lofty standard: that all students tested in reading and math will reach grade level by 2014. Even when the law was enacted five years ago, almost no one believed that standard was realistic.”).

203. *See* Jennifer Jellison Holme & Amy Stuart Wells, *School Choice Beyond District Borders: Lessons for the Reauthorization of NCLB from Interdistrict Desegregation and Open Enrollment Plans*, in IMPROVING ON NO CHILD LEFT BEHIND, *supra* note 179, at 139, 202–03. The article states:

Without a temporary “safe haven” provision, suburban districts would be less likely to accept urban transfer students, particularly those who are low achieving. While the progress of these new transfer students should be monitored and districts should be held accountable for adding value and helping them achieve to a high standard, initially their state test scores should not be used to keep suburban districts from making AYP.

*Id.*

than on the absolute percentage of students who are deemed proficient on an assessment.

Additionally, this democratic school desegregation proposal is meant to complement NCLB. In NCLB's original implementation, it included a program to facilitate transfers of students from lower performing to higher performing schools.<sup>204</sup> However, only around one percent of students were able to take advantage of the program,<sup>205</sup> and it did not provide receiving schools with any incentives to accept transfer students: "[o]ne of the reasons is that while the federal Education Department has adopted language encouraging school districts to form *inter*-district transfer agreements, there are no financial or legal incentives to do so."<sup>206</sup> The democratic school desegregation proposal would thus complement the intended goal of NCLB's transfer policy.

#### *E. Financial Considerations*

Finally, in implementing the democratic school desegregation proposal advanced here, it will also be important to consider certain financial components. First, to the extent that states implement transfer programs that allow lower-income students to move to schools in wealthier school districts, those districts should be compensated for the transfer commensurate with their per-pupil spending if possible. Such funding would likely make the wealthier districts more amenable to the proposal.<sup>207</sup> Second, policymakers should provide state and federal funds to transport students under the program.<sup>208</sup>

### V. POTENTIAL ADVANTAGES AND CHALLENGES OF DEMOCRATIC SCHOOL DESEGREGATION

Democratic school desegregation, along with implementation of the 60/40 principle, will produce many advantages but would also face several challenges. This Part aims to anticipate some of the arguments for and against the proposal at a high level, with the understanding that the primary goal of this Article is to foster a fresh conversation about school diversity some sixty years after *Brown*. These lists are not meant to be exhaustive.

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204. See Meredith P. Richards, Kori J. Stroub & Jennifer Jellison Holme, *Can NCLB Choice Work? Modeling the Effects of Interdistrict Choice on Student Access to Higher-Performing Schools*, in *THE FUTURE OF SCHOOL INTEGRATION*, *supra* note 18, at 223, 224–25.

205. See *id.* at 224.

206. DeBray-Pelot & Frankenberg, *supra* note 24, at 271.

207. See Holme & Wells, *supra* note 203, at 168.

208. See *id.*



*A. Potential Advantages*

Numerous advantages could accrue from democratic school desegregation, assuming that the 60/40 principle (or another similar principle) is implemented at the state or national level. First, as discussed above, a democratic school desegregation principle will hold local school districts accountable for helping to reduce socioeconomic disparities across and within school districts. This accountability will not only improve individual school districts' focus on socioeconomic isolation in schools, but may also promote regional cooperation among and between neighboring groups of school districts.<sup>209</sup> The accountability will derive from codifying a principle like the 60/40 principle as a legal requirement that states and school districts must aim to reach on a consistent basis.

Second, by aspiring to ensure that all schools are less than 50 percent low-income, a greater proportion of low-income students will attend schools with higher-income peers. As the research widely shows,<sup>210</sup> such low-income students will benefit not only from the presence of the higher income students in the classroom, they will also benefit from the political clout that results from having more affluent parents in the school. In particular, research shows that the political preferences of the more economically advantaged disproportionately influence policy outcomes relative to those of the less advantaged.<sup>211</sup>

Third, the democratic school desegregation principle presented here would not undermine traditional notions of local control. So long as school districts and regional school district coalitions undertake efforts to achieve the goals associated with the 60/40 principle, they will be able to implement a wide-range of solutions consistent with local values and ideals. As discussed above, school districts may undertake customized solutions to problems of socioeconomic isolation and achieve advancement toward democratic school desegregation in many different ways.

Fourth, while promoting local innovation, implementation of the 60/40 principle will also promote larger investments in regional

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209. In a recent piece, for example, Erika Wilson emphasized the value of incentivizing regional cooperation or governance structures in implementing solutions to the desegregation problem. See Wilson, *supra* note 24, at 1478, 1479 (arguing that “regionalism in which the state requires or heavily incentivizes cooperation between local school districts, is necessary” and that regional school district governing bodies “would supplement local school districts by having policymaking authority to address regional equity issues such as regional diversity in schools and the sharing of resources”).

210. See *supra* note 171.

211. See generally MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2014).

communities—those that are comprised of several school districts—rather than only in smaller community units comprising a single school district. A redistricting possibility, while unlikely, could motivate parents to ensure that school districts in their greater community are high-performing—otherwise, they run the risk that their child could eventually be zoned into a less desirable school. Similarly, when redistricting is possible, the likelihood of high-income flight from districts will also decline because movement across boundaries would not necessarily guarantee placement in a preferred school district.<sup>212</sup>

Fifth, if school district boundaries were to change periodically, democratic school desegregation policies will generate the expectation that altering school district boundaries is a natural part of the democratic process, much like electoral districting. Once this cultural shift occurs, changes in district boundaries will be more tenable. Meanwhile, this view of boundaries will produce a robust, quantitative literature that will more proactively analyze the various permutations of school redistricting schemes. This analysis can incorporate antitrust principles to ensure that redistricting is done in a pro-competitive, democracy-enhancing manner.<sup>213</sup>

Sixth, the 60/40 principle is clear and will allow for easy implementation because it is based on sheer percentages of low-income students and the attainment of schools that do not have a majority of students in poverty. It will thus be guided by a judicially manageable standard,<sup>214</sup> much like the one-person one-vote standard. Questions may arise regarding the appropriate measure of low-income status (for example, a proxy for poverty other than free and reduced lunch may be

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212. See Saiger, *supra* note 6, at 531–32. When school redistricting is a possibility, Saiger explains that:

Periodic redistricting means that a family contemplating fleeing to a different, richer (or whiter) district would have to contemplate simultaneously that the boundaries of their old district, or one like it, might soon come flying after them. This reduces the expected value of flight, especially because the present value of future exclusivity is capitalized in home prices.

*Id.*

213. See, e.g., WEIHER, *supra* note 74, at 174 (noting that “the possibility of manipulating [school district] boundaries . . . presents the further potential for purposive manipulation of markets,” which can be done “with the specific intention of including congenial groups and excluding others”); see also *supra* note 22 (highlighting the literature of political antitrust).

214. See Saiger, *supra* note 6, at 539–40 (explaining that school redistricting does not force courts to consider questions of educational policy and that courts are used to handling redistricting in the election law context).

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needed<sup>215</sup>), but that question can be resolved when lawmakers deliberate over the policy.

*B. Potential Challenges*

There will likely be some challenges to democratic school desegregation and the 60/40 principle that would need to be addressed by policymakers. It is important to understand and consider these potential challenges as any democratic school desegregation policies are implemented.

First, many middle-class and affluent parents may resist democratic school desegregation, and some localities may thus be better able and prepared to implement the principle than others. For example, parents may resist efforts to create more socioeconomic diversity in schools on the grounds that wealthier students could suffer academic losses if they are integrated with lower-class students. However, research suggests that, for example, middle-income students are largely unaffected academically by the presence of larger proportions of low-income students in the classroom, especially where the proportion of low-income students is less than 50 percent.<sup>216</sup> At the outset, therefore, democratic school desegregation efforts may need to be incremental, rather than sweeping.

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215. Recent analysis suggests that free and reduced-price lunch numbers have become less effective indicators of low-income status and that it may be difficult to implement democratic school desegregation using this measure. In particular, a recent report determined that 21 states have more than 50% low-income students and that a majority of students throughout the nation are low-income. *See generally* S. EDUC. FOUND., A NEW MAJORITY: LOW INCOME STUDENTS NOW A MAJORITY IN THE NATION'S PUBLIC SCHOOLS (2015), available at <http://www.southerneducation.org/getattachment/4ac62e27-5260-47a5-9d02-14896ec3a531/A-New-Majority-2015-Update-Low-Income-Students-Now.aspx>. A better proxy measure to objectively identify "low-income" status may be needed.

216. *See* Halley Potter, *Boosting Achievement by Pursuing Diversity*, Faces of Poverty, EDUC. LEADERSHIP, May 2013, at 38, 40.

[A]ll students receive the cognitive benefits of a diverse learning environment; and middle-class students' performance seems to be unaffected up to a certain level of integration. Research about this last point is still developing. A recent meta-analysis found "growing but still inconclusive evidence" that the achievement of more advantaged students was not harmed by desegregation policies. It appears that there is a tipping point, a threshold for the proportion of low-income students in a school below which middle-class achievement does not suffer.

Estimates of this tipping point vary; many researchers cite 50 percent low-income as the maximum.

*Id.* (citations omitted), available at <http://www.ascd.org/publications/educational-leadership/may13/vol70/num08/Boosting-Achievement-by-Pursuing-Diversity.aspx>.

Second, even if the states or federal government successfully enacted the 60/40 principle into law, states and localities may face geographic and demographic constraints in reaching the targets associated with the 60/40 principle, particularly in rural areas.<sup>217</sup> In such areas, it may be less practical to adjust school district boundaries to achieve the goals of democratic school desegregation.

Third, cost may be an issue. Sufficient financial incentives need to be provided to school districts to implement the 60/40 principle. For example, there has been extensive debate and discussion over the original NCLB law and whether it constituted an “unfunded mandate.”<sup>218</sup> Democratic school desegregation, if implemented, cannot be perceived as an unfunded mandate. It must be backed by meaningful funding that provides the incentives to implement the law so that it promotes socioeconomic integration. Incentive programs like RTTT could be the vehicle to provide such funding, as discussed above.

Even though democratic school desegregation may face these and other challenges, the policy will foster a meaningful conversation about the socioeconomic realities of our public schools as we attempt to reform them in parallel using myriad other means, including teacher accountability measures, charter school proposals, and early childhood initiatives. Meanwhile, the advantages to democratic school desegregation would likely accrue, and at the same time, policymakers and voters could re-center conversations on the fact that education is important as a democratic good: a fact that has simply been lost in current discussions of education.

#### CONCLUSION

A review of election and education law illustrates their joint relevance to democracy. Nonetheless, the doctrinal paths of election law and educational law have been on opposite tracks. Federal election law has converged toward judge-made rules and principles that seek to redraw boundaries to ensure that all voters may cast “equally weighted votes” that are not diluted on account of one’s race, while federal education law eschews any such rules, entrenches boundaries, and generally defers to the districting decisions of local school authorities. The education community can learn from these divergent doctrinal paths

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217. See, e.g., Mantil et al., *supra* note 18, at 213 (“[I]n many areas, geography and demographic constraints would preclude even the most willing communities from undertaking SES-based student reassignments.”).

218. See, e.g., *No Child Left Behind is FUNDED*, HOUSE EDUC. & WORKFORCE COMM. (Jan. 2005), <http://archives.republicans.edlabor.house.gov/archive/issues/109th/education/nclb/nclbfneded.htm> (arguing that NCLB was not an unfunded mandate).

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that, in order to achieve the democratic ends that have been thus far realized in the election law context (and to get education law back on track), education reformers must be guided by a democratic equalization principle that removes the entrenchment of school district boundaries. This is especially true in education, where an infinite number of philosophies and perspectives could drive decision-making.

Additionally, policymakers must be mindful of the long history of local control of schooling in the United States. Socioeconomic school integration has been proposed here as an equalizing force in education, and, for that reason, this Article has outlined a democratic equalization principle that would focus on ensuring that no child in this nation attends a high-poverty school. This principle will facilitate movement toward an environment wherein state and local governments view district boundaries as more malleable than they are today, facilitating future discussions regarding equity and access to education that cross district lines. By providing a democratic principle that focuses on socioeconomic inequality, policymakers at the federal and state level will be able to think outside the box to address both poverty and socioeconomic integration of schools simultaneously. This Article does not claim to make the “right” proposal and recognizes that, over time, lawmakers will need to refine and develop policies that promote democratic school desegregation. However, this Article is meant to serve as a starting point that will prompt the conversations necessary to get serious about reincorporating integration as a reform option during the next reauthorization of NCLB and beyond.