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New York's School Segregation Crisis: Open the Court Doors Now

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OPEN THE COURT DOORS NOW

INTRODUCTION

In the eyes of some, New York State is a "progressive bastion."[1] And yet—home to 2.6 million public school students[2]—New York State has the most segregated school system of any state in the nation.[3] This problem is not abating either. Statewide, since 2010, the rate of attendance in segregated schools for Black and Latino students has increased.[4] In New York City, the country's most populous and heterogenous city,[5] half of the public schools have populations that are at least 90 percent Black and Latino.[6] This has manifested in "segregation by educational outcomes."[7]

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[1] Vivian Wang & Jesse McKinley, *A Profound Democratic Shift in New York: 'We Seized the Moment,'* N.Y. TIMES (June 22, 2019), https://www.nytimes.com/2019/06/22/nyregion/albany-laws-ny-progressive.html [https://perma.cc/5GR5-8Z63].

[2] *New York State Education at a Glance*, N.Y.S. DEP'T OF EDUC., https://data.nysed.gov/ [https://perma.cc/PXT6-SBML].

[3] JOHN KUCSERA & GARY ORFIELD, UCLA C.R. PROJECT, NEW YORK STATE'S EXTREME SCHOOL SEGREGATION: INEQUALITY, INACTION AND A DAMAGED FUTURE, at vi (2014) [hereinafter UCLA C.R. PROJECT 2014 REP.], https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/ny-norflet-report-placeholder/Kucsera-New-York-Extreme-Segregation-2014.pdf [https://perma.cc/74QU-ZVPS]; *see also* Nikole Hannah-Jones, *It Was Never About Busing*, N.Y. TIMES (July 12, 2019), https://www.nytimes.com/2019/07/12/opinion/sunday/it-was-never-about-busing.html [https://perma.cc/E6UK-MLXG] (explaining that 65 percent of Black students attending public schools in New York State were attending schools with a student body that is more than 90 percent minority—the highest rate of any state in the country); Ethan Geringer-Sameth, *New York City Is Waist-Deep in a School Desegregation Conversation—How Did We Get Here?*, GOTHAM GAZETTE (Sept. 3, 2019), https://www.gothamgazette.com/city/8769-new-york-city-waist-deep-school-desegregation-conversation-how-did-we-get-here-de-blasio [https://perma.cc/8SA5-V832] (explaining that 57 percent of Latino students attended schools that were more than 90 percent minority, ranking New York State in the bottom three nationally in terms of Latino-white segregation).

[4] DANIELLE COHEN, UCLA C.R. PROJECT, NYC SCHOOL SEGREGATION REPORT CARD: STILL LAST, ACTION NEEDED NOW 10 (2021) [hereinafter UCLA C.R. PROJECT 2021 REP.] (noting also that the median Black, Latino, and American Indian student in New York State now attends schools with 78 percent low-income students, up from 68 percent in just 2010).

[5] UCLA C.R. PROJECT 2014 REP., *supra* note 3, at 12 (noting that the student population is more than 50 percent Black and Latino and more than 12 percent Asian).

[6] Beth Fertig & Yasmeen Kahn, *School Integration 2.0: How Could New York City Do It Better?*, WNYC (June 9, 2016), https://www.wnyc.org/story/integration-20-how-could-new-york-city-do-it-better/ [https://perma.cc/F2M3-CWZ9].

[7] Gary Orfield, *Foreword* to UCLA C.R. PROJECT 2021 REP., *supra* note 4, at 4 (noting that segregated Black and Latino schools lag dramatically behind predominantly white and Asian schools in test scores and other performance metrics).

In short, federal and state courts have failed to provide guardrails against the rampant segregation in New York's schools, instead allowing for politics, hypocrisy, bigotry, and powerful parents to shape policy for decades.[8] To finally transcend those forces, this note calls on the New York State Legislature to bring the power of New York's state courts into the decades-long fight for integration—led by students, parents, and advocates[9]—by amending the education article of the New York State Constitution.

In 1954, in *Brown v. Board of Education of Topeka*, the Supreme Court of the United States held that segregation of students in public schools "solely on the basis of race" was a violation of the Fourteenth Amendment's equal protection clause.[10] However, nearly seven decades removed from *Brown*, New York has done little beyond clearing *Brown*'s baseline mandate of not *explicitly* segregating students on the basis of race—known as *de jure* segregation.[11] In fact, since the 1960s, schools in the Northeast, which now has the most segregated schools of any region in the country, have only been growing steadily more segregated.[12]

There is no reason that New York State cannot demand more of its school districts. As other states demonstrate with their constitutional frameworks, the education article of the New York State Constitution could serve as a powerful tool to move the state well beyond *Brown* and towards educational equity and greater integration.[13] Unfortunately, as currently interpreted by New York's highest court, the education article completely fails to protect students against intense segregation,

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[8] *See generally* MATTHEW F. DELMONT, WHY BUSING FAILED 23–53 (2016) (noting that *Brown* brought historic change to the United States of America, but in only barring *explicit* racial segregation in schools, where admissions are made "on the basis of race," *see* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954), the Supreme Court's ruling was not felt in the North).

[9] *See generally id.* at 23–44 (detailing the decades of local organizing and advocacy in New York pushing for greater school integration); *IntegrateNYC—Building School Integration and Education Justice*, INTEGRATENYC, https://integratenyc.org/ [https://perma.cc/5BEL-JA8C] (highlighting the work of student advocates actively fighting for greater equity and justice in New York schools).

[10] *Brown*, 347 U.S. at 493; *see also* U.S. CONST. amend. XIV, § 1.

[11] *See* Keyes v. Sch. Dist. No. 1, Denver, 413 U.S. 189, 208 (1973) (applying *Brown* and explaining that "the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate").

[12] Hannah-Jones, *supra* note 3; Orfield, *supra* note 7, at 6 (explaining that New York City's history shows that "the default has been expanding segregation" as "[s]egregation is a self-sustaining system").

[13] *See* Jim Hilbert, *Restoring the Promise of Brown: Using State Constitutional Law to Challenge School Segregation*, 46 J.L. & EDUC. 1, 50 (2017) (explaining that because the US Constitution does not include an education clause, there is no supremacy over the states' ability to regulate their respective school systems under state specific education clauses).

regardless of the impact on learning outcomes.[14] The relevant section of the New York State education article reads: "The legislature shall provide for the *maintenance and support* of a system of free common schools, wherein all the children of this state may be educated."[15]

Presently, to leverage this language in court, plaintiffs in New York are able to bring "adequacy suits" that allege the state has not adequately provided for the "maintenance and support" of a given school district.[16] Unfortunately, for advocates seeking greater integration, the state's highest court has set a remarkably low bar for the state to meet this burden.[17] The state meets its burden so long as students have access to minimally adequate physical facilities and classrooms, instrumentalities of learning, and reasonably up-to-date curricula.[18] As long as the state has met these minimum "input" requirements—which are largely centered on funding and physical resources—poor academic outcomes and hypersegregation[19] do not alone give plaintiffs standing.[20]

In 2003, the New York Court of Appeals in *Paynter v. State* cemented that allegations of academic failure attributable to segregation—in the absence of any claim that the state was depriving the school of adequate inputs—are simply insufficient to state a cause of action under the education article.[21] However, as other states demonstrate, the scope of

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[14] *See, e.g.*, Andrea Alajbegovic, *Still Separate, Still Unequal: Litigation as A Tool to Address New York City's Segregated Public Schools*, 22 CUNY L. REV. 304, 324 (2019) (explaining that "if the state merely provides 'adequate resources,' it 'satisfies its constitutional promise under the Education Article, even though student performance remains substandard,' segregated student body notwithstanding" (citations omitted)).

[15] N.Y. CONST. art. XI, § 1 (emphasis added).

[16] *See infra* Section III.C.

[17] *See id.*

[18] 94 N.Y. JUR. 2D *Schools, Universities, and Colleges* § 9, Westlaw (database updated Aug. 2021).

[19] This note does not hold to a rigid definition of hypersegregation but draws from various definitions in common usage. *See* ULRICH BOSER & PERPETUAL BAFFOUR, CTR. FOR AM. PROGRESS, ISOLATED AND SEGREGATED: A NEW LOOK AT THE INCOME DIVIDE IN OUR NATION'S SCHOOLING SYSTEMS 26 (2017), https://americanprogress.org/wp-content/uploads/2017/05/SESintegration-report2.pdf [https://perma.cc/RY6B-86QX] (defining hypersegregation as "[t]he proportion of schools with poverty rates that significantly vary from the district average"); *see also* UCLA C.R. PROJECT 2014 REP., *supra* note 3, at vi (defining intense segregation as schools with "less than 10% white enrollment"); PAUL L. TRACTENBERG & RYAN W. COUGHLAN, THE CTR. FOR DIVERSITY & EQUAL. IN EDUC. N.J., THE NEW PROMISE OF SCHOOL INTEGRATION AND THE OLD PROBLEM OF EXTREME SEGREGATION: AN ACTION PLAN FOR NEW JERSEY TO ADDRESS, at vii (2018), https://bit.ly/3reQTz5 [https://perma.cc/5M2X-5MW4] (defining intense segregation as schools with "fewer than 10% non-white students").

[20] Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 384 (2012).

[21] *Id.*

remedial powers in state adequacy suits can be incredibly expansive.[22] Plaintiffs harmed by school segregation in New York simply need a refashioned legal predicate for tapping into the broad power of the state courts.

This note proposes a specific amendment to the education article of the New York State Constitution that aims to satisfy two objectives. First, by turning to the education article language used in both New Jersey and Minnesota, where promising claims challenging extreme segregation have survived motions to dismiss, the proposed amendment seeks to allow for a broader range of adequacy litigation—namely, litigation challenging extreme segregation in New York schools. Second, by drawing from seminal early cases in both Kentucky and Connecticut, which underscored the imperative of specificity, the proposed amendment seeks to guarantee that "reasonably integrated" schools are considered part of the New York state courts' adequacy definition. Perhaps most critically, by opening the courthouse doors to plaintiffs seeking to challenge unreasonable segregation in their school district, this proposal aims to empower all students, parents, and advocates to be the drivers of change, not merely those with political sway.

The United States is again in the midst of a national reckoning on race, but the country has been here before and failed to take decisive action.[23] New York State must now reckon with the segregation crisis that ensnares the 2.6 million public school children in its charge.[24] To make good on the decades of activism in the fight for better integrated schools, New York State must open the doors of its state courts to litigants fighting school segregation. To do this, the courts must be made to redefine a constitutionally adequate education in a manner that draws on the reams of social science research on the benefits of integrated learning environments.[25] The education article of the New York State Constitution[26]—if amended—presents a clear and powerful pathway for New York to do this.

Part I of this note reviews why the federal courts are closed off to plaintiffs working to challenge school segregation. Part II discusses why integration is worth fighting for. Part III looks at the forces that have consistently enshrined segregation

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[22] Hilbert, *supra* note 13, at 50.

[23] Michael A. Fletcher, *America Is Facing a Reckoning over Race, but We've Seen this Before*, UNDEFEATED (July 2, 2020), https://theundefeated.com/features/america-is-facing-a-reckoning-over-race-but-weve-seen-this-before/ [https://perma.cc/4XWH-3V2W].

[24] *New York State Education at a Glance*, *supra* note 2.

[25] Alajbegovic, *supra* note 14, at 324.

[26] N.Y. CONST. art. XI, § 1.

in New York in the absence of court intervention, the current New York State education article language, and the cases that highlight its shortcomings. Part IV assesses the education article language used in states across the nation, highlighting states where a given education article has served as a viable predicate for challenging segregation. Finally, Part V proposes a new education article for New York State that both raises the state's standard for an adequate education and serves as a predicate for seeking equitable remedies.

I. ABSENCE OF THE FEDERAL COURTS AND NATIONAL TRENDS

The Supreme Court's ruling in *Brown v. Board of Education* is among the most celebrated opinions in American jurisprudence.[27] The Court ruled that separating children in public schools, based solely on race, is a violation of the Fourteenth Amendment's equal protection clause.[28] Yet, in New York State and much of the Northeast, segregation is not a product of admissions policies explicitly centered around race. This means that the federal courts have largely been closed off as a tool for desegregating schools in the Northeast.[29] In the words of constitutional law scholar, Erwin Chemerinsky, "[t]he promise of *Brown* of equal educational opportunity has been unfulfilled."[30]

The fateful distinction ultimately drawn by the Supreme Court in the wake of *Brown* was between *de jure* and *de facto* segregation.[31] In short, for a school district to fall within the scope of *Brown*, the public school's admission policy needs to be *explicitly* separate "on the basis" of race—known now as "*de jure*" segregation.[32] Fatefully, segregation in northern schools was,

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[27] *See, e.g.*, Hilbert, *supra* note 13, at 44–45 (explaining that *Brown* is seen among legal practitioners and scholars as a sacred, off-limits affirmation of American values).

[28] U.S. CONST. amend. XIV, § 1; Brown v. Bd. of Ed. of Topeka, 347 U.S. 483, 495 (1954) (explaining that "[s]eparate educational facilities are inherently unequal," and that "such segregation is a denial of the equal protection of the laws").

[29] Hilbert, *supra* note 13, at 13 (writing that desegregation of northern schools would become largely impossible after the Supreme Court hardened the distinction between *de jure* and *de facto* segregation); *see also* UCLA C.R. PROJECT 2021 REP., *supra* note 4, at 4 (explaining that the South became less segregated than the North in large part because it had explicit segregation on the basis of race in public school admissions, and thus civil rights law was enforced and admissions policies reshaped).

[30] Erwin Chemerinsky, *Making Schools More Separate and Unequal: Parents Involved in* Community Schools v. Seattle School District No. 1, 2014 MICH. ST. L. REV. 633, 634 (2014).

[31] Hilbert, *supra* note 13, at 12.

[32] *Id.* at 11–12; *Brown*, 347 U.S. at 493; Derrick A. Bell, Jr., *'*Brown v. Board of Education*' and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 527 (1980) (noting that after *Brown*, even segregation that is the "natural and foreseeable" consequence of admissions policy may not give rise to a claim absent explicit segregation on the basis of race (quoting Columbus Bd. of Educ. v. Penick, 99 U.S. 2941, 2950 (1979))).

and remains, largely de facto segregation, as students' admissions are not explicitly based on race.[33] Instead, as an example, admissions may be based on factors such as whether a student lives within a certain geographic zone, whether a sibling attends the school, test scores, or various other non-race-based admissions screens.[34] Unchecked by the limited reach of *Brown*, the percentage of segregated schools in the Northeast has climbed steadily from 43 percent in 1968 to 51 percent in 2011.[35]

In 1973, in *Keyes v. School District No. 1, Denver, Colorado*, the Supreme Court cemented the distinction between de jure and de facto segregation. The Court stated that, "the differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate."[36] In narrowing *Brown* to only cover explicit racial segregation, rather than segregation that was merely the byproduct of admissions policies not based explicitly on race, efforts to desegregate schools in the North were dealt a crippling blow.[37] Just one year later, in *Milliken v. Bradley*, the Court—for the first time—overturned a district court's desegregation decree.[38] The Court held that an integration plan attempting to combine Detroit's school zone with that of surrounding suburban districts could not stand absent a showing that the existing attendance zones had been explicitly drawn with discriminatory intent.[39] In a stinging dissent, Justice Thurgood Marshall—who had won the *Brown* case as a litigator with the NAACP—wrote that, "After 20 years of small, often difficult steps toward that great end, the Court today takes a giant step backwards."[40]

In the wake of *Milliken*, legal advocates largely moved away from seeking integration through the courts, instead

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[33] *See* Erica Frankenberg & Kendra Taylor, *De Facto Segregation: Tracing A Legal Basis for Contemporary Inequality*, 47 J.L. & EDUC. 189, 192–93 & n.25 (2018) (explaining de facto segregation was often a result of school admissions techniques, such as the "neighborhood school system" or "freedom of choice"); DELMONT, *supra* note 8, at 6 (quoting James Baldwin in 1965, "De facto segregation means Negroes are segregated, but nobody did it.").

[34] *The Match: How Students Get Offers*, N.Y.C. DEP'T OF EDUC., https://www.schools.nyc.gov/enrollment/enroll-grade-by-grade/how-students-get-offers-to-doe-public-schools [https://perma.cc/U8KW-D6H9].

[35] Hannah-Jones, *supra* note 3.

[36] Keyes v. Sch. Dist. No. 1, Denver, 413 U.S. 189, 208 (1973) (emphasis omitted).

[37] Hilbert, *supra* note 13, at 12; *Keyes*, 413 U.S. at 219 (Powell, J., concurring in part and dissenting in part) ("In my view we should abandon a distinction which long since has outlived its time, and formulate constitutional principles of national rather than merely regional application.").

[38] Milliken v. Bradley, 418 U.S. 717, 753 (1974).

[39] *Id.* at 744–45, 759 (explaining that for a court-ordered desegregation decree to stand, there must be a showing of explicitly racially discriminatory "state action"); *see also* DELMONT, *supra* note 8, at 17 (noting that this ruling "place[s] a nearly impossible burden of proof on those" working to desegregate, "requiring evidence of deliberate segregation").

[40] *Milliken*, 418 U.S. at 782 (Marshall, J., dissenting).

focusing on school funding litigation.[41] Equally significant, *Milliken* elevated the concept of local control over school admissions to something of a national norm.[42] Local control of school policies and standards—including admissions—is based on the laudable idea that community input and support for local school policies is vital to educational quality.[43] However, as Derrick Bell Jr., legal scholar and pioneer of Critical Race Theory, describes, it often results in the "maintenance of a status quo that will preserve superior educational opportunities and facilities for whites at the expense of blacks."[44] This sacrosanct conception of local control remains at the heart of New York State jurisprudence.[45]

Most recently, the US Supreme Court ruled in *Parents Involved in Community Schools v. Seattle School District No. 1* that strict scrutiny[46] is to be applied to all racial classification cases under the equal protection clause.[47] The Court held that the use of race in any desegregation plan would only be seen as a sufficiently compelling government interest if the plan was needed to remedy the effects of past, intentional, racial discrimination, or if the plan qualified as a diversity plan within higher education.[48] In short, public school admissions can only account for race for the purpose of remedying a past admissions policy that explicitly segregated students along lines of race.

Decades removed, *Brown* and its progeny have largely confined the reach of federal courts to explicit racial segregation.[49]

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[41] Erika K. Wilson, *Gentrification and Urban Public School Reforms: The Interest Divergence Dilemma*, 118 W. VA. L. REV. 677, 700 (2015).

[42] *Milliken*, 418 U.S. at 741–42 ("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 maintenance of community concern and support for public schools and to quality of the educational process."); *see also* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977) (finding that "our cases have just as firmly recognized that local autonomy of school districts is a vital national tradition").

[43] *Milliken*, 418 U.S. at 741–42.

[44] Bell, *supra* note 32, at 527.

[45] *See* N.Y. C.L. Union v. State, 824 N.E.2d 947, 951 (N.Y. 2005) (stating that local control is a "constitutional principle that districts make the basic decisions on funding and operating their own schools"); *see also* Paynter v. State, 797 N.E.2d 1225, 1249 (N.Y. 2003) (Smith, J., dissenting) (arguing that there is nothing inconsistent with a suit challenging segregation and the principle of local control of education, as "local control has always taken a backseat to larger state interests").

[46] Chemerinsky, *supra* note 30, at 636 (defining strict scrutiny review as the requirement that the government demonstrate its actions are "necessary to achieve a compelling purpose").

[47] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 702 (2007).

[48] *Id.* at 705 (overruling a pair of integration plans—one in Seattle and the other in Louisville—on the grounds that they were simply "racial balancing" and were not sufficiently tailored to meet either of the two aforementioned government interests); Chemerinsky, *supra* note 30, at 636.

[49] *See* Kevin E. Jason, *Dismantling the Pillars of White Supremacy: Obstacles in Eliminating Disparities and Achieving Racial Justice*, 23 CUNY L. REV. 139, 169 (2020)

As Bell asked, "How could a decision that promised so much and, by its terms, accomplished so little have gained so hallowed a place among some of the nation's better-educated and most-successful individuals?"[50] Ultimately, *Brown*'s limited scope is not wholly to blame for the fact that schools in the Northeast have only grown more segregated in recent decades. For New York State specifically, *Brown*'s shortcomings only ring as loud as they do today because of the state's repeated failure to demand more.

II. WHY INTEGRATION IS WORTH FIGHTING FOR

Integrated classrooms are worth urgently fighting for. Integrated classrooms generate uniquely equitable and progressive outcomes, as they benefit students of all "racial and socioeconomic backgrounds."[51] Reams of national research have shown that diverse classroom settings, where students have the opportunity to learn amongst students with varying perspectives and circumstances, promote students to be more creative and motivated, while enhancing problem-solving, learning, and critical thinking skills.[52] And vitally, there is no evidence to suggest that any demographic group, across ages and subject areas, is harmed by better integrated schools.[53]

With respect to academic achievement, the research on the benefits of integration is voluminous. Across the country, racially diverse schools have been shown to bridge test score gaps between students of different racial backgrounds, and not because white students are performing worse, but because "[B]lack and/or Hispanic student achievement [has] increased."[54] Nationally, these achievement gaps were at their narrowest in the 1980s when the positive impact of integration was at its greatest.[55] Vitally, as segregation has increased in

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(noting, ironically, that the Fourteenth Amendment, "enacted to combat white supremacy," has been largely reshaped and repurposed to actively bar race-based considerations).

[50] Jelani Cobb, *The Man Behind Critical Race Theory*, NEW YORKER (Sept. 13, 2021), https://www.newyorker.com/magazine/2021/09/20/the-man-behind-critical-race-theory [https://perma.cc/357W-4RJA].

[51] Jason, *supra* note 49, at 166.

[52] AMY STUART WELLS ET AL., THE CENTURY FOUND., HOW RACIALLY DIVERSE SCHOOLS AND CLASSROOMS CAN BENEFIT ALL STUDENTS 14 (Feb. 2016), https://bit.ly/3O2BVWm [https://perma.cc/4HM8-484G].

[53] Roslyn Arlin Mickelson, *School Integration and K-12 Outcomes: An Updated Quick Synthesis of the Social Science Evidence*, RSCH. BRIEF NO. 5 (The Nat'l Coal. on Sch. Diversity, Wash. D.C.), Oct. 2016, at 2.

[54] STUART WELLS ET AL., *supra* note 52, at 12.

[55] George Theoharis, *'Forced Busing' Didn't Fail. Desegregation Is the Best Way to Improve Our Schools*, WASH. POST (Oct. 23, 2015), https://www.washingtonpost.com/posteverything/wp/2015/10/23/forced-busing-didnt-fail-desegregation-is-the-best-way-to-improve-our-schools/ [https://perma.cc/37YZ-8L2F].

every region of the country in the decades since, these gaps in achievement have widened again.[56]

This research has been borne out in New York City, where academic achievement gaps have been shown to track closely with segregation in schools.[57] Specifically, while 91 percent of white and Asian students have tested in the top 20 percent of English language arts achievement, a majority of Black and Latino students graded in the bottom 20 percent.[58] In math, the inequities are even more stark.[59] While there are myriad factors beyond school and classroom composition that bear on academic achievement gaps, the role of segregation is undeniable.[60]

The benefits of integrated classrooms on students of all backgrounds go beyond test scores.[61] As young students gain exposure to a wider spectrum of ideas, working to reconcile new perspectives with their own preexisting understandings and beliefs, cognitive development is accelerated.[62] Further, integration has been shown to have an enormously positive impact on school climate at large.[63] There are markedly reduced levels of violence in better integrated schools, and these schools are more likely to have stable teacher staffing, which some identify as among the most important factors for academic achievement.[64]

Integrated schools are also shown to have powerfully beneficial impacts on social awareness and development.[65] Research suggests that exposure to diverse learning environments often dramatically reduces implicit bias among students, driving them to foster enhanced tolerance for varied ways of viewing a broad spectrum of issues.[66] As the Century Foundation notes, there is an essential link between this ability to discuss various issues among people with differing viewpoints and the well-being of our democratic systems.[67]

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[56] *Id.* (adding that while busing was declared a failure in the 1970s and 1980s, there were marked advancements in educational equity over that era, much of which has been eroded in subsequent decades as segregation has grown. Specifically, in the 1970s, when the National Assessment of Educational Progress began tracking the reading gap, there was an average discrepancy between white and Black seventeen-year-olds of 53 points; a gap that had narrowed to just 20 points by 1988, after a nearly two-decade commitment to integration.).

[57] UCLA C.R. PROJECT 2021 REP., *supra* note 4, at 11.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 17 (noting that "[s]egregated schools of poverty generally have fewer resources and this leads to achievement gaps and lower lifetime opportunities and success").

[61] *See* STUART WELLS ET AL., *supra* note 52, at 6.

[62] Aprile D. Benner & Robert Crosnoe, *The Racial/Ethnic Composition of Elementary Schools and Young Children's Academic and Socioemotional Functioning*, 48 AM. EDUC. RES. J. 621, 640 (2011).

[63] STUART WELLS ET AL., *supra* note 52, at 12.

[64] *Id.*

[65] *Id.* at 9.

[66] *Id.* at 15.

[67] *Id.* at 18.

Of particular note to policymakers and judges, research also suggests that there are various benchmarks that can ensure the benefits of integration are maximized for all students. Specifically, studies indicate that the earlier students are exposed to integrated settings the greater the benefits of integration are likely to be.[68] Further, recent research has focused on the need to achieve a "critical mass" of same-race/ethnicity classmates to help promote both the academic and socioemotional gains of integration.[69] The National Research Council indicates that meeting a threshold level of 15 percent of same-race/ethnicity peers in a classroom can help to ensure students feel comfortable in their learning environment.[70]

Finally, it must be emphatically stated that no single policy solution—better integrated schools among them—is a panacea. As Bell noted, "Diversity [alone] is not the same as redress" for underserved communities, and "[diversity] could provide the appearance of equality while leaving the underlying machinery of inequality untouched."[71] Even within integrated settings, rates of discipline are disproportionately higher among Black students, and Black students are more commonly referred to special education classes.[72] Issues of school climate, faculty-parent engagement, innovative pedagogy, and more cannot be singularly achieved by more equitable access to facilities and school resources.[73] These issues of integration and access, however, are not entirely divorced. As the UCLA Civil Rights Project notes, integration can bring with it the access to "funding, resources, and networks of opportunity" that are typically associated with students at predominantly white and Asian schools.[74]

All told, as currently construed, the New York State education article, adopted in 1894,[75] has a narrow focus that

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[68] Benner & Crosnoe, *supra* note 62, at 622.

[69] *Id.* at 635.

[70] *Id.* at 631.

[71] Cobb, *supra* note 50.

[72] Vanessa Siddle Walker, *Second-Class Integration: A Historical Perspective for a Contemporary Agenda*, 79 HARV. EDUC. REV. 269, 279 (2009).

[73] *Id.*

[74] UCLA C.R. PROJECT 2021 REP., *supra* note 4, at 17; *see also* Matt Gonzales, *Taking Up the Mantle on a Forgotten History: New York City Integration*, NYU STEINHARDT, https://steinhardt.nyu.edu/metrocenter/vue/taking-mantle-forgotten-history-new-york-city-integration [https://perma.cc/XT23-PEER] (noting that "segregationist mindsets are threats to equity and have resulted in models of education premised on scarcity, hyper-competition, and opportunity hoarding").

[75] *See* Albany L. Sch. Gov't L. Ctr. & Rockefeller Inst. of Gov't, Protections in the New York State Constitution Beyond the Federal Bill of Rights 6 (Apr. 18, 2017) (unpublished manuscript) [hereinafter Protections in the New York State Constitution], https://www.nysenate.gov/sites/default/files/article/attachment/protections_in_the_new_york_state_constitution_beyond_the_federal_bill_of_rights.pdf [https://perma.cc/CTA7-P5YN].

entirely ignores decades of contemporary research.[76] Segregation in schools is objectively detrimental to learning outcomes, but for this fact to be germane in New York's courts, the education article must be amended.

III. NEW YORK CITY AND STATE HISTORY

In the absence of both federal and state judicial intervention, the same forces of power, politics, and bigotry have dramatically shaped admissions policies in New York State for decades.[77] Nothing underscores these forces more clearly than the chilling parallels in language and approach amongst those who have fought against integration efforts in the years after *Brown* through to the present day.[78] Section III.A explores these parallels to show that little has changed, and that New York's worst-in-the-nation school segregation crisis is not likely to simply dissipate with time. Section III.B grapples with recent, more localized efforts to integrate school districts and explores their limited potential as a model on a larger scale. Finally, Section III.C explores the current language of the New York State education article and highlights the acute shortcomings with the state courts' reading of the existing language. All in all, unchecked by both state and federal courts, the same powerful constituencies continue to safeguard the segregated status quo.

A. Power, Politics, and Bigotry: The Controlling Forces in Lieu of Court Intervention

In February of 1964, roughly 460,000 students—predominantly Black and Puerto Rican—held a walkout from their New York City schools, protesting overcrowding and segregation.[79] The February 1964 student walkout was, at the time, "the largest civil rights demonstration in the history of the United States"—even larger than the March on Washington that occurred just months prior.[80] Fatefully though, these protests did not garner

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[76] Alajbegovic, *supra* note 14, at 324.

[77] *See generally* DELMONT, *supra* note 8, at 23–52 (exploring the immense political power held by small groups of largely white parents, and the intransigence of elected officials, and media, in refusing to be swayed by the activism and organizing of Black and Latino students and parents).

[78] *See* Chana Joffe-Walt, *Nice White Parents, Episode Three: 'This Is Our School, How Dare You?*,*'* N.Y. TIMES (Aug. 6, 2020) [hereinafter *Nice White Parents, Episode Three*], https://www.nytimes.com/2020/07/23/podcasts/nice-white-parents-serial.html [https://perma.cc/2RC2-Q3AD].

[79] Hannah-Jones, *supra* note 3 (explaining that many of the schools across the city that Black and Puerto Rican students were zoned to were so overcrowded that students had to attend school in shifts).

[80] DELMONT, *supra* note 8, at 24.

support from the people and institutions with sway over local policy.[81] Echoing the calls of white parents, *The New York Times* (the *Times*) "described the [student] boycott as a 'violent, illegal approach of adult-encouraged truancy.'"[82] In an editorial, illustrating a talking point still used widely today,[83] the *Times* added, "Given the pattern of residence in New York City, the Board of Education can do just so much to lessen imbalance in the schools."[84]

A few months after the February 1964 walkout, a group of more than ten thousand white parents—organized under the name "Parents and Taxpayers"—marched from Brooklyn to City Hall in Manhattan to protest desegregation efforts and calls for expanded student busing.[85] The parents there largely adopted race-neutral language, suggesting that their children had a right to remain in their "neighborhood schools" and be kept off buses.[86] This protest underscores not just the fervor of opposition to desegregation, but the calculated manipulation of language adopted widely in the Northeast.[87]

Ten years before the "Parents and Taxpayers" march to preserve the segregated status quo, in the immediate wake of the *Brown* ruling, then New York City Schools Superintendent William Jansen claimed, "We have natural segregation here—it's accidental."[88] The superintendent went so far as to ask advocates to avoid using the word "segregation,"[89] suggesting it inferred a "deliberate act of separating."[90] Instead, the city pushed phrases like "separation" and "imbalance," which *Why Busing Failed* author, Matthew Delmont, describes as suggesting that school segregation in the North was "innocent, natural, and lawful, while perpetuating the myth that racism structured spaces and opportunities in the South but not the North."[91] By the mid-1970s, after two decades of white resistance and white flight, then New York City Schools Chancellor Irving

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[81] *See id.* at 43.

[82] *Id.* (quoting an editorial from *The New York Times*).

[83] *See* Jason, *supra* note 49, at 187–88 (explaining then Mayor De Blasio's consistent reinforcement of the idea that people have a right to attend neighborhood schools because of the investment they make "to live in a certain area").

[84] DELMONT, *supra* note 8, at 43 (quoting an editorial from *The New York Times*).

[85] *Id.* at 23.

[86] *Id.*

[87] *See id.*; *see also* Hannah-Jones, *supra* note 3 ("The term 'busing' is a race-neutral euphemism that allows people to pretend white opposition was not about integration but simply about a desire for their children to attend neighborhood schools. But the fact is that American children have ridden buses to schools since the 1920s.").

[88] DELMONT, *supra* note 8, at 23, 30.

[89] *Id.* at 32 (emphasis omitted).

[90] *Id.*

[91] *Id.*

Anker announced that integration efforts, both large and small, should end.[92]

Jumping ahead more than six decades—and still unchecked by both the federal *and* state courts—the same veiled language and political deference to those who wield it remains just as pervasive.[93] For the first five years of his mayoralty, then Mayor Bill de Blasio refused to publicly use the word "segregation" to describe New York City schools.[94] Just as Superintendent Jansen had suggested in the 1950s that integrationists just wanted to "build Rome in a Day,"[95] then Mayor de Blasio suggested that he could not simply "wipe away 400 years of American history."[96] The insinuation of Mayor de Blasio was often that segregation in schools is just a natural by-product of segregated housing patterns that existed long before his mayoralty.[97] However, there is little innocence to admissions policies creating stability for one group of families and instability for others.[98] In the nearly seven decades since *Brown*, integration efforts in New York City have largely been limited to white parents choosing or volunteering to allow Black and Latino students to attend schools with their children.[99] As Noliwe Rooks, Professor in the Africana Studies and Research Center at Cornell University writes: "Time and time again, they have refused." She also notes, "Worse still, it looks as if it may no longer be a priority to even try."[100]

With a reimagined education article, the courts could provide families and advocates a pathway for changing the status quo of segregation that is not currently available. Most critically, a path through the courts could entirely transcend the political forces that have held admissions policies in a vice grip for so long.[101]

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[92] UCLA C.R. PROJECT 2014 REP., *supra* note 3, at 22.

[93] *See* Noliwe Rooks, *Why, 65 Years Later, School Segregation Persists: New York City Is a Perfect Case Study*, N.Y. DAILY NEWS (May 17, 2019, 6:00 AM), https://www.nydailynews.com/opinion/ny-oped-why-65-years-later-school-segregation-persists-20190517-4hh4w7shabbv5hbbnkk6zmd4hi-story.html [https://perma.cc/8G76-NX88].

[94] Eliza Shapiro, *De Blasio Acts on School Integration, but Others Lead Charge*, N.Y. TIMES (Sept. 20, 2018), https://www.nytimes.com/2018/09/20/nyregion/de-blasio-school-integration-diversity-district-15.html [https://perma.cc/36MX-2ZG4].

[95] DELMONT, *supra* note 8, at 35 (quoting George Cornell, *Tension Runs High in N.Y. Race Plan*, BIG SPRINGS DAILY HERALD (May 3, 1957)).

[96] Christina Veiga & Alex Zimmerman, *Mayor de Blasio: I Can't 'Wipe Away 400 Years of American History' in Diversifying Schools*, CHALKBEAT N.Y. (May 11, 2017, 7:13 PM), https://ny.chalkbeat.org/2017/5/11/21099812/mayor-de-blasio-i-can-t-wipe-away-400-years-of-american-history-in-diversifying-schools [https://perma.cc/LFE3-YCPT].

[97] *See id.*

[98] *See* Ujju Aggarwal & Donna Neval, *Building Justice: Segregation in NYC Schools Is No Accident*, CITY LIMITS (Oct. 24, 2016), https://citylimits.org/2016/10/24/building-justice-segregation-in-nyc-schools-is-no-accident/ [https://perma.cc/NW4L-P7SJ].

[99] Rooks, *supra* note 93.

[100] *Id.*

[101] *See* Hilbert, *supra* note 13, at 50.

B. Recent Integration Efforts in New York City

Since the 1970s, New York City's efforts at integration have largely relied on the hope of voluntary integration.[102] Among other longer standing efforts, the city has introduced "option programs, magnet schools, [and] dual language programs."[103] Magnet schools—schools typically based around a school-wide theme, designed to attract students from a wider geographic base extending beyond usual admissions zones[104]—have struggled to gain "ideological commitment from [city] leaders" and parents.[105] Similarly, dual language programs—programs designed to teach students in both "English and their home language,"[106] and again designed to attract diverse students—often only "serv[e] . . . enclaves [of] affluent students," even within more integrated schools.[107] Voluntary integration programs shaped by local communities and officials can also succeed, but absent the threat of judicial intervention, the aggregate impact of these efforts has been modest.[108]

In recent years, select local school districts have taken up efforts at more targeted desegregation.[109] There have been some successes, as Community Education Councils 1, 3, and 15 have created their own diversity plans, largely centered around "controlled choice."[110] However, it is often only when the highest

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[102] UCLA C.R. PROJECT 2014 REP., *supra* note 3, at 22.

[103] *Id.* ("[O]ption programs use student achievement levels as a way to achieve racial and economic diversity and retain white middle class families from leaving the district. The goal of these schools is to enroll a major portion of students who are reading at grade level, and then smaller but equitable portions of students who are at above and below reading grade levels.").

[104] *Id.* at v; *see also Frequently Asked Questions*, N.Y.C. MAGNET SCHS., https://www.magnetschools.nyc/faqs [https://perma.cc/P7DG-H23U].

[105] *See* UCLA C.R. PROJECT 2014 REP., *supra* note 3, at 23–24; UCLA C.R. PROJECT 2021 REP., *supra* note 4, at 3 (explaining that New York City has failed to commit to "building high quality magnet schools" with admissions safeguards, instead opting for free-market magnet and charter schools that have only become more segregated than "traditional public schools").

[106] *Program Options*, N.Y.C. DEP'T OF EDUC., https://www.schools.nyc.gov/learning/multilingual-learners/programs-for-english-language-learners [https://perma.cc/2J3P-VW28].

[107] UCLA C.R. PROJECT 2014 REP., *supra* note 3, at 24; *Nice White Parents, Episode Three*, *supra* note 78 (explaining how a French Dual Language program at an increasingly integrated Brooklyn Heights elementary school was almost exclusively used by white students).

[108] *See* UCLA C.R. PROJECT 2014 REP., *supra* note 3, at 22 (explaining that school desegregation from the 1950s to 1980s was an important issue in New York, but most voluntary and school choice focused integration plans have been abandoned in recent decades).

[109] *Joint Hearing on School Segregation in New York City Schools Testimony Before the N.Y.C. Council Comm. on Educ. & Comm. on Civ. & Hum. Rts.*, Council Sess. 2018–2021 (2019) [hereinafter *Joint Hearing on School Segregation*] (written testimony of the New York Civil Liberties Union and the American Civil Liberties Union).

[110] *Id.*; WNYC Data News Team, *'Controlled Choice' for Integrating Schools: What It's All About*, WNYC (June 6, 2016), https://www.wnyc.org/story/controlled-choice-public-schools-explainer/ [https://perma.cc/J5E8-M7P7] (defining "controlled choice" as an admissions framework that has parents rank a subset of schools that they want their

performing schools reach a tipping point of overcrowding that these efforts at integration begin.[111] In short, conversations around integration are only being spurred by parents who have been pushed out of top performing schools. Derrick Bell generally described these types of integration efforts, often led by white parents, as "Interest Convergence."[112] He used this term to convey that Black interests in achieving a vision of racial equity were only being met when they converged with the interests of their white peers.[113]

Bell's theory of "Interest Convergence" has been used to describe recent efforts led largely by a group of white parents in Brooklyn's District 15.[114] These District 15 parents began calling for a new admissions plan geared towards "integration" of local middle schools when their children were getting crowded out of the district's three highest performing middle schools—schools that minority students had largely been excluded from for decades.[115] In short, white parents began supporting changes in District 15 because "things had gotten so intense and so competitive that even the most advantaged people were losing."[116] The integration efforts in District 15 have been heralded as a positive,[117] but it is difficult to suggest that the reliance on interest convergence to catalyze such efforts presents a model for districts statewide. Of particular note, the first proposals for District 15 integration in June 2018 came some fifty-four years after Black and Puerto Rican families had demanded such a plan.[118] A predicate for court intervention can provide *all* communities the agency to seek recourse on their own terms.

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children to be enrolled in, while also allowing the city to consider and ensure that a certain percentage of students, such as those qualified for free or reduced priced lunch, are afforded admission to each school).

111 *See* Chana Joffe-Walt, *Nice White Parents, Episode Five: 'We Know It When We See It,'* N.Y. TIMES (Aug. 20, 2020) [hereinafter *Nice White Parents, Episode Five*], https://www.nytimes.com/2020/07/23/podcasts/nice-white-parents-serial.html [https://perma.cc/K9TB-RYP7].

112 *Id.*; David Shih, *A Theory to Better Understand Diversity, and Who Really Benefits*, NPR CODE SWITCH (Apr. 19, 2017), https://www.npr.org/sections/codeswitch/2017/04/19/523563345/a-theory-to-better-understand-diversity-and-who-really-benefits [https://perma.cc/7QTT-GKED] ("Interest convergence stipulates that black people achieve civil rights victories *only* when white and black interests converge.").

113 Bell, *supra* note 32, at 523–24 (suggesting that even the decision in *Brown* "cannot be understood without some consideration of the decision's value to whites" and the primary value of the decision to whites was that it improved America's credibility abroad, bolstering US prestige and tethering America to its founding principle that "all men are created equal").

114 *Nice White Parents, Episode Five*, *supra* note 111; *District 15*, INSIDESCHOOLS, https://insideschools.org/districts/15 [https://perma.cc/2RZ9-PBL6] (District 15 covers Carroll Gardens through Sunset Park, and includes parts of the Park Slope, Windsor Terrace, Boerum Hill, Fort Greene, and Red Hook neighborhoods in Brooklyn).

115 *Nice White Parents, Episode Five*, *supra* note 111.

116 *Id.*

117 UCLA C.R. PROJECT 2021 REP., *supra* note 4, at 33.

118 *Nice White Parents, Episode Five*, *supra* note 111.

Similarly, in District 3,[119] covering the Upper West Side and much of Harlem, the city began considering an elementary school rezoning only in response to overcrowding at one of the district's highest performing, predominantly white, elementary schools—Public School (P.S.) 199.[120] At the time that the city began working to address overcrowding in P.S. 199, District 3 already had schools even more segregated than its housing.[121] To address the overcrowding, the city would need to redraw zone lines and send some P.S. 199 students to the nearby P.S. 191—a predominantly Black and Latino school, with significant underenrollment.[122] The modest plan was met with ferocious resistance. At a public meeting discussing a proposed redrawing of elementary school zone lines, one Upper West Side parent leader in 2016 claimed, "I can't be faulted for buying a home in a neighborhood where I don't want to send my child to school."[123] At a separate meeting, another parent expressed that they felt their children were being "punished" in the pursuit of diversity.[124] Some 2,600 people signed a petition demanding the city to "respect our community."[125] In District 3, as Ujju Aggarwal—a researcher and Assistant Professor at the New School for Social Research[126]—describes, "wealthy families increasingly express a belief that they have a special 'pact with the city' that ensures them access to a certain school."[127]

Ultimately, after nearly four years of heated public debate, the city approved a modest rezoning.[128] As a commentary in *The Atlantic* covering the rezoning described though, "it's hard to call this a model of integration."[129] Not only was P.S. 191 moved into a "shiny new [school] building" to attract privileged

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[119] *District 3*, INSIDESCHOOLS, https://insideschools.org/districts/3 [https://perma.cc/K7UR-4NM4] (District 3 covers schools from West 59th Street to West 122nd Street in Manhattan.).

[120] Patrick Wall, *The Privilege of School Choice: When Given the Chance, Will Wealthy Parents Ever Choose to Desegregate Schools?*, ATLANTIC (Apr. 25, 2017), https://www.theatlantic.com/education/archive/2017/04/the-privilege-of-school-choice/524103/ [https://perma.cc/24Y3-RPF7].

[121] Eliza Shapiro, *New Upper West Side School Integration Plans Reignite an Old Fight*, POLITICO (Oct. 25, 2016, 5:44 AM), https://www.politico.com/states/new-york/city-hall/story/2016/10/upper-west-side-school-integration-fight-goes-back-50-years-106679 [https://perma.cc/KT5R-ZSNB].

[122] *Id.*

[123] Aggarwal & Neval, *supra* note 98.

[124] Emma Whitford, *UWS Parents: We're Being 'Punished' in the Name of Diversity*, GOTHAMIST (Sept. 29, 2016, 6:38 PM), https://gothamist.com/news/uws-parents-were-being-punished-in-the-name-of-diversity [https://perma.cc/X83L-36MW].

[125] *Id.*

[126] Profile of *Ujju Aggarwal*, THE NEW SCH. FOR SOC. RSCH., https://www.newschool.edu/nssr/faculty/ujju-aggarwal/ [https://perma.cc/DV6F-255K].

[127] Aggarwal & Neval, *supra* note 98.

[128] Wall, *supra* note 120.

[129] *Id.*

parents, but the city only first waded in to address overcrowding at one of its highest performing elementary schools.[130] While the outcome may have been positive, it is clear again that some degree of interest convergence was a catalyzing force.[131]

The lesson of District 15, District 3, and other local districts is not that bold change cannot happen absent a court order. However, amending New York State's education article can open a pathway for all New Yorkers to objectively attack segregation on its merits, on their own terms, without waiting on interest convergence to drive change.[132]

C. New York State: Constitutional Requirements and Notable Litigation

This note argues that a reimagined education article of the New York State Constitution[133] can provide an incredible tool to those fighting for school integration. By contrast, the current education article language, and the state courts' interpretation of it, has effectively barred plaintiffs from challenging de facto school segregation.[134]

As in other states, the education article of New York's Constitution gives rise to "adequacy claims," whereby plaintiffs allege that the state has failed to adequately meet the required standard for the state's schools.[135] In New York, the education article requires the state legislature to adequately provide for the "maintenance and support" of a system of free common schools,[136] which the New York Court of Appeals has read to require that all students be provided with a "sound basic

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[130] *Id.*

[131] *See id.* (explaining that the rezoning was initiated because of overcrowding at P.S. 199, not because of intense district-wide segregation).

[132] *See* Shapiro, *supra* note 121.

[133] N.Y. CONST. art. XI, § 1.

[134] Paynter v. State, 797 N.E.2d 1225, 1227–28 (N.Y. 2003) (holding that plaintiffs' claim challenging school segregation in Rochester, NY did not constitute a claim under the education article, and was correctly dismissed by the lower court); Alajbegovic, *supra* note 14, at 324 (explaining that the state merely must provide "adequate resources" to meet its constitutional burden under the education article, even if the student body is segregated and student performance is substandard).

[135] Josh Kagan, Note, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2272–73 (2003) (explaining that once a court has defined adequacy, in terms of both broad goals and specific input requirements, the court's remedy is simply to "order the state to provide whatever input it found inadequate"); New York C.L. Union v. State, 824 N.E.2d 947, 949 (N.Y. 2005) (explaining that to bring an adequacy claim under the education article, a plaintiff must demonstrate two elements: (1) "the deprivation of a sound basic education"—i.e., the state has failed to adequately provide one of the established inputs to a school district—and (2) "causes attributable to the state").

[136] N.Y. CONST. art XI, § 1.

education."[137] This "sound basic education" standard mandates the state to provide all students with the opportunity to receive an education that will allow them to "function productively as civic participants capable of voting and serving on a jury,"[138] and to "compete for jobs that enable them to support themselves."[139] To meet this burden, the Court of Appeals has established that the state is simply required to provide school districts with "minimally adequate" physical facilities, equipment, and teaching.[140] In short, if the state can demonstrate it has provided these specific threshold "inputs" to a "minimally adequate" degree,[141] it has satisfied its constitutional burden under the education article.[142] In turn, if a school district is plagued by hypersegregation, but the state has provided it with minimally adequate inputs—facilities, equipment, teaching, etc.—the education article does not provide a cause of action.[143]

In the context of suits challenging de facto segregation, the painful limitations of the "sound basic education" standard are illustrated in both the 2003 decision in *Paynter v. State* and the 2005 decision in *New York Civil Liberties Union v. State* (*NYCLU*). In *Paynter*, a class of fifteen Black students in Rochester, New York brought an education article action alleging that racial and socioeconomic segregation had prevented them from receiving a sound basic education.[144] The New York Court of Appeals upheld this dismissal of plaintiffs'

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[137] Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 493 N.E.2d 359, 369 (N.Y. 1982) ("Interpreting the term education, as we do, to connote a sound basic education."); Paynter v. State, 797 N.E.2d 1225, 1228 (N.Y. 2003) (noting that in *Levittown* the court established that "students have a constitutional right to a 'sound basic education' and could prove a violation of this right by demonstrating 'gross and glaring inadequacy' in their schools").

[138] Maisto v. State, 64 N.Y.S.3d 139, 143 (2017) (quoting Aristy-Farer v. State, 81 N.E.3d 360, 363 (N.Y. 2017)).

[139] *Id.* (quoting Aristy-Farer v. State, 81 N.E.3d 360, 363 (N.Y. 2017)).

[140] *Paynter*, 797 N.E.2d at 1228 (quoting Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 661 (N.Y. 1995)); *see* Alajbegovic, *supra* note 14, at 324 (writing that the constitutional promise of the education clause is satisfied so long as a given district has minimally adequate resources, without any regard to the segregation of the student body).

[141] *Paynter*, 797 N.E.2d at 1228 ("[M]inimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn[;] . . . access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks[;] . . . [and] minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas." (quoting Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 661 (N.Y. 1995))).

[142] Alajbegovic, *supra* note 14, at 323.

[143] *See Paynter*, 797 N.E.2d at 1226–27.

[144] *Id.* at 1227 (Plaintiff's allegation was that schools in Rochester have high levels of both "poverty concentration and racial isolation" which correlates directly with substandard academic performance, thereby preventing this class of students from receiving a sound basic education.).

claim without ever even considering the merits of the allegation.[145] The court held that racial integration of schools had no bearing on the inputs it considers in determining whether a school district is meeting the requirements of "adequacy."[146] The court wrote that the plaintiffs' "novel theory" around the "composition of the student bod[y]" did not allege an inadequacy of teaching, facilities, or instrumentalities of learning.[147] Perhaps most striking in the court's analysis in *Paynter* is the open acknowledgement that school segregation may well lead to "terrible educational results."[148]

Just two years later, in *NYCLU*, the New York Civil Liberties Union and other interested parties brought an education article claim alleging the state had failed to provide students from twenty-seven different schools across New York State with "a sound basic education."[149] Rather than allege a deficiency attributable to the state though, plaintiffs asked "the [s]tate [to] determine the causes of [academic] failure."[150] Again, the court found that an allegation of "academic failure"—an output—without a specific allegation that the state has failed to adequately provide a certain required input, is insufficient to state a cause of action.[151]

The best known and perhaps most successful case invoking New York's education article is *Campaign for Fiscal Equity, Inc. v. State* (*CFE*), which attacked the "adequacy" of the state's education financing system for New York City's public schools.[152] As a result of the suit, the court ordered the state legislature to provide a framework for ensuring New York City schools were adequately funded.[153] The ruling led the state

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[145] *Id.*

[146] *Id.* at 1229; Black, *supra* note 20, at 384 (explaining that "[e]ven if the plaintiffs established inadequate education in Rochester, they did not connect the inadequacy to a resource deprivation attributable to the state").

[147] *Paynter*, 797 N.E.2d at 1225, 1226–27.

[148] *Id.* at 1228–29 (acknowledging the strong research correlating concentrated poverty and racial isolation in schools with "poor educational performance").

[149] N.Y. C.L. Union v. State, 824 N.E.2d 947, 949 (N.Y. 2005) (Plaintiffs contended they, along with the schools cited in their case, were representative of a class of approximately 75,000 students across roughly 150 schools statewide.).

[150] *Id.*

[151] *Id.* at 951–52 (underscoring that an action under the education article must allege that the state has failed in its obligation to provide adequate support to a school *district*, not an individual school, and that the state's responsibility is to provide minimally adequate support to school districts, who then—in keeping with local control—have discretion to make local decisions about school operation, rather than specific schools).

[152] Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 347 (N.Y. 2003).

[153] *Id.* at 348 (holding that "[t]he State need only ascertain the actual cost of providing a sound basic education in New York City. Reforms to the current system of financing school funding and managing schools should address the shortcomings of the current system by ensuring, as a part of that process, that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education.").

legislature to pass the New York State Education Budget and Reform Act of 2007, which, drawing on the funding inadequacies highlighted in *CFE*, called for $5.5 billion to be paid to schools statewide over a four-year period.[154] However, most vital for present purposes is what *CFE* underscores: the court conceptualizes "inputs" needed to provide a constitutionally adequate education as "tangible resources such as buildings, books, teachers, and services."[155] While school funding fits squarely within this conception of resources, school demographics and inequitable admissions policies do not.[156]

The education article as currently construed and applied is entirely unsuited to addressing New York's worst-in-the-nation school segregation crisis.[157] New York's courts have spoken: the state's segregation crisis is not justiciable. For the state courts to serve as a hammer in the toolbox of students, parents, and advocates, the state's obligations for providing an "adequate" education must be raised and reimagined.

IV. UNDERSTANDING THE NEW YORK STATE EDUCATION ARTICLE THROUGH A NATIONAL LENS

To properly envision a reimagined education article for New York, it is important to contextualize the current language within the national landscape. While the US Constitution has

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[154] *Equity*, ALL. FOR QUALITY EDUC., https://www.aqeny.org/equity/ [https://perma.cc/5HQF-KLB9] (explaining that in 2007 Governor Spitzer signed the Foundation Aid formula into law and proclaim it was designed "to provide a statewide solution to the school-funding needs highlighted by the Campaign for Fiscal Equity lawsuit"); *see also* Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 ALB. L. REV. 1855, 1897–98 (2012) (noting that in the wake of the 2008 recession, the state has largely failed to carry out this financial commitment, and it does not now seem possible for the state to ever achieve the agreed upon funding levels as adjusted for inflation).

[155] Black, *supra* note 20, at 384. In more recent *CFE* decisions—centered on the state's continued failure to pay out the Foundation Aid it was originally ordered to pay out in 2006—the New York courts have clarified that they will review evidence of deficient "outputs", but only as evidence of deficient inputs. *See, e.g.*, Maisto v. State, 64 N.Y.S.3d 139, 143 (2017) (explaining that courts may review outputs—namely, student achievement—as evidence of a causal link to prove that inputs are inadequate and that greater inputs would improve student learning); Maisto v. State, 149 N.Y.S.3d 599, 604 (2021) (explaining that the first element of an adequacy violation is a causal link between constitutionally inadequate inputs and deficient outputs such as graduation rates or test scores; without an input deficiency within the narrow scope reviewable, no such causal link can exist).

[156] Black, *supra* note 20, at 384; Kagan, *supra* note 135, at 2275 n.183 (explaining that at the end of the trial court's seventy-six page opinion in *CFE*, the trial court had ordered the state to study the impact that racial segregation was having on the quality of education statewide. The Court of Appeals omitted this command from its remedial order though, and in *Paynter*—decided the same day as *CFE*—wrote that racial isolation and segregation has no relation to the objectives of the education article.).

[157] *See* Alajbegovic, *supra* note 14, at 324.

no explicit protection for education,[158] at least forty-eight state constitutions have a clause or article that explicitly safeguards public education.[159] The language in these education articles varies widely, but generally, the more specific and clear the language, the stronger the predicate for plaintiffs seeking to use litigation under an education article as a tool for reform.[160] The linchpin to state education article litigation is "adequacy."[161]

Adequacy claims under any given state's education article—whether challenging funding, segregation, or otherwise—require state courts to first define the scope and standard for adequacy that a given education article requires and then to determine if the state has met that standard.[162] Common education article language includes phrases such as "thorough" and "efficient," "ample" and "open," "uniform" and "general."[163] State courts have in turn interpreted these phrases, creating unique definitions of educational adequacy.[164] These definitions typically include some set of "goals" (such as civic participation) reached by requiring specific input requirements (such as adequate facilities and textbooks).[165] Crafting a remedy can be relatively straightforward, as a court simply requires the state to remedy whatever was deemed inadequate by making it adequate.[166] Critically, because education articles "place responsibility on the state," adequacy claims give litigants the right to target "state power over school districts."[167]

A revolutionary case brought in Kentucky state court in 1989 sent a charge through the education litigation landscape, underscoring the incredible power of education article suits.[168]

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[158] *Educational Equity and Quality:* Brown *and* Rodriguez *and Their Aftermath*, COLUM. UNIV.: OFF. OF THE PRESIDENT, https://president.columbia.edu/content/educational-equity-and-quality-brown-and-rodriguez-and-their-aftermath [https://perma.cc/SJA4-CSSX].

[159] *Id.*

[160] *See id.*; *see also* David Hinojosa & Karolina Walters, *How Adequacy Litigation Fails to Fulfill the Promise of Brown (but How It Can Get Us Closer)*, 2014 MICH. ST. L. REV. 575, 603–04 (2014) (describing the process of state courts weighing adequacy cases: "If the bar is set too low, it renders the constitutional duty of providing an adequate education meaningless. If the bar is set too high, it may become judicially unmanageable.").

[161] Kagan, *supra* note 135, at 2274.

[162] Hinojosa & Walters, *supra* note 160, at 603–04.

[163] *Id.* at 604; INST. FOR EDUC. EQUITY & OPPORTUNITY, EDUCATION IN THE 50 STATES: A DESKBOOK OF THE HISTORY OF STATE CONSTITUTIONS AND LAWS ABOUT EDUCATION 7–8 (2008) [hereinafter DESKBOOK OF STATE CONSTITUTIONS ABOUT EDUCATION], https://www.pubintlaw.org/wp-content/uploads/2012/04/EDU_50State.pdf [https://perma.cc/8R7D-PCM7].

[164] Kagan, *supra* note 135, at 2273.

[165] *See id.*

[166] *Id.* at 2272.

[167] *Id.* at 2273.

[168] *See* Hilbert, *supra* note 13, at 32.

The Kentucky Supreme Court in *Rose v. Council for Better Education, Inc.*, declared the entire state school system to be in violation of the state's education clause—or inadequate.[169] Most critically, the court did not merely direct the legislature to provide an "efficient" system of common schools as the state constitution provides; rather, the court enumerated seven specific requirements—known now as the "*Rose* factors"—that the state must meet to provide a constitutionally adequate education.[170] In so doing, the court provided the legislature with both the framework and the political "nerve" to make necessary changes.[171] While the *Rose* case did not specifically target segregation, it set a template for sweeping state-based education cases with the incredible specificity of the remedial order and its historic scope in declaring an entire state education system unconstitutional.[172]

Equally groundbreaking was *Sheff v. O'Neil*, decided by the Connecticut Supreme Court in 1996.[173] There, in ruling that both de jure and de facto segregation in Hartford public schools was a violation of the state education clause, Connecticut's highest court set off what many thought would be a groundbreaking new wave in education clause litigation.[174] Most vitally, *Sheff* demonstrated that the right to a constitutionally *adequate* education "need not be defined solely in monetary terms."[175] For the state of Connecticut, *Sheff*

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[169] Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 214 (Ky. 1989); Hilbert, *supra* note 13, at 32–33.

[170] *Rose*, 790 S.W.2d at 212 ("[A]n efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market."); Rebell, *supra* note 154, at 1910–11.

[171] Hilbert, *supra* note 13, at 55.

[172] *Id.* at 32; *see also* Rebell, *supra* note 154, at 1910 (explaining that "some courts"—here, the Kentucky Supreme Court—have gone further than New York in enumerating the specific skills that students will need to acquire to be productive citizens and workers, as required by the Kentucky State Constitution).

[173] Hilbert, *supra* note 13, at 39; *see also* Sheff v. O'Neill, 678 A.2d 1267 (1996).

[174] *See* Joshua E. Weishart, *Aligning Education Rights and Remedies*, 27 KAN. J.L. & PUB. POL'Y 346, 355 (2018).

[175] Will Stancil & Jim Hilbert, *Justiciability of State Law School Segregation Claims*, 44 MITCHELL HAMLINE L. REV. 399, 423 (2018).

established that educational adequacy required eliminating extreme segregation, a remedy having nothing to do with monetary inputs.[176] Unfortunately for other states, and momentum for state adequacy claims nationally, the ruling was tied to unique language in Connecticut's Constitution explicitly barring "segregation or discrimination," not common to other state constitutions.[177] In total, in establishing that segregated schools are constitutionally inadequate regardless of the cause, Connecticut made clear that states can indeed tackle de facto segregation and go well beyond the baseline set by *Brown*.[178] To do so, state courts simply need the constitutional language upon which to act.

The right to an adequate education certainly ought to include an education free from intense segregation,[179] but constitutional amendments are needed in New York State to realize that. One commentator, grouping state education articles and clauses into four categories, puts New York's articles in the weakest "bare minimum" category.[180] Another writes that New York's "laconic language . . . does not describe the level of education that must be provided."[181] Calling simply for the "maintenance and support" of "free common schools," the New York State language lacks the much stronger requirement, for instance, of "thorough and efficient" education.[182] Courts are limited to this language in shaping the parameters of "adequacy," and so the more emphatic the education article language, the more plaintiffs can utilize adequacy suits to pursue remedies that attack segregation.[183] New York must work to heighten its standard of adequacy by amending its education article and explicitly ensuring that unreasonably segregated schools are constitutionally inadequate.

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[176] *See id.*

[177] CONN. CONST. art. 1, § 20; Black, *supra* note 20, at 384 (explaining that the "holding [in *Sheff*] is not easily transferrable to other states because the court's theory was tied to an idiosyncratic constitutional clause").

[178] Hilbert, *supra* note 13, at 12.

[179] *Id.* at 20.

[180] Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 334–39 (1991).

[181] Kagan, *supra* note 135, at 2261 n.117.

[182] *See* McUsic, *supra* note 180, at 311, 324.

[183] Brown *and* Rodriguez *and Their Aftermath*, *supra* note 158.

A. A Model for Action and Reform: Active Litigation in New Jersey and Minnesota

Promising litigation challenging school segregation in both New Jersey and Minnesota provides a roadmap for what adequacy suits could look like in New York with an amended education article. The constitutions in both states require the state to provide a "thorough and efficient" system of public schools.[184] While neither suit has yet been resolved, courts in both states have ruled the isolated challenges to school segregation justiciable under their respective education articles.[185]

New Jersey also has a constitutional provision explicitly banning segregation in public schools,[186] formally eliminating the distinction between de jure and de facto segregation.[187] As a result, when some form of state action can be demonstrated, even "racial imbalance" has been deemed reviewable relative to the "thorough and efficient" language in the New Jersey Constitution.[188] In the present suit, plaintiffs—representing a class of public school students across New Jersey—allege that the state has been complicit in perpetuating segregation by implementing laws and policies that require students to attend public schools in the municipalities where they live, even when neighborhoods are known to have deep segregation.[189]

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[184] N.J. CONST. art. VIII, § 4, ¶ 1; MINN. CONST. art XIII, § 1.

[185] *See generally* John Mooney, *'Far Reaching' School Segregation Lawsuit Kicks off in Trenton*, NJ SPOTLIGHT (Jan. 13, 2020), https://www.njspotlight.com/2020/01/far-reaching-school-segregation-lawsuit-kicks-off-in-trenton/ [https://perma.cc/RM6T-E56S] (in clearing a case challenging school segregation in New Jersey to move ahead to discovery, Superior Court Judge Mary Jacobson stated that the statistics were "indisputable" and that the parties should prepare for a lengthy discovery and trial process); Cruz-Guzman v. State, 916 N.W.2d 1, 10 (Minn. 2018) (finding that the school segregation claims brought under the Minnesota Constitution are indeed justiciable).

[186] N.J. CONST. art. VIII, § 4, ¶1; N.J. CONST. art. I, § 5; *see* Rachel M. Cohen, *New Jersey Is Getting Sued Over School Segregation*, BLOOMBERG (Jan. 3, 2019, 2:34 PM), https://www.bloomberg.com/news/articles/2019-01-03/a-lawsuit-challenges-new-jersey-on-school-segregation [https://perma.cc/4UGQ-79J7].

[187] Booker v. Bd. of Educ. of Plainfield, 212 A.2d 1, 6 (N.J. 1965) ("It is neither just nor sensible to proscribe segregation having its basis in affirmative state action while at the same time failing to provide a remedy for segregation which grows out of discrimination in housing, or other economic or social factors.").

[188] *See, e.g.*, *In re* North Haledon Sch. Dist., 854 A.2d 327, 336 (N.J. 2004) ("We consistently have held that racial imbalance resulting from de facto segregation is inimical to the constitutional guarantee of a thorough and efficient education."); *see also* Jenkins v. Township of Morris Sch. Dist., 279 A.2d 619, 631 (N.J. 1971) (holding that the Education Commissioner has the "obligation to take affirmative steps to eliminate racial imbalance, regardless of its causes").

[189] Amended Complaint at ¶ 1, Latino Action Network v. State of New Jersey, MER-L-001076-18 (N.J. Sup. Ct. L. Div. Aug. 2, 2019) [hereinafter Latino Action Network Complaint]; *see also id.* ¶ 24 (explaining that 24.8 percent of "Black public school students" attended schools that were more than 99 percent nonwhite in the

It remains uncertain whether the parties will settle, but the plaintiffs' case has survived a motion to dismiss, and the presiding judge has described the data presented on segregation statewide as "indisputable."[190] Plaintiffs are seeking an injunction on the exclusive use of geographic boundaries as the means of assigning public school students to given schools, and are requesting the court order the state legislature to create a methodology to address racial segregation across the New Jersey school system.[191] In New York, in stark contrast, claims of academic failure caused by segregation have been found insufficient to even state a cause of action.[192]

Equally promising litigation is presently moving forward in Minnesota, where, as in New Jersey, the state Constitution requires a "thorough and efficient" system of public schools.[193] A class of plaintiffs enrolled in Minnesota public schools brought an adequacy action under the education article, arguing that "hyper-segregat[ion]" in their schools yields significantly worse academic outcomes.[194] Plaintiffs argue that the state has contributed to the segregation of schools through boundary decisions for attendance areas, use of federal and state desegregation funds for other purposes, and failure to implement effective desegregation remedies.[195] Plaintiffs allege that these actions have caused educational outcomes that are inadequate relative to the Supreme Court of Minnesota's interpretation of the "thorough and efficient" standard.[196] As such, the plaintiffs are seeking both "declaratory and injunctive relief compelling [the state to provide] 'an adequate and desegregated education.'"[197]

Most vitally, just as in New Jersey, the Minnesota Supreme Court has ruled all claims justiciable and has remanded for review.[198] By deeming plaintiffs' adequacy claims, predicated solely

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2016—2017 academic year, and another 24.4 percent attended schools with student populations between 90 percent and 99 percent nonwhite).

190 Mooney, *supra* note 185.

191 Latino Action Network Complaint, *supra* note 189, ¶ 79.

192 Black, *supra* note 20, at 383.

193 Cruz-Guzman v. State, 916 N.W.2d 1, 7 (Minn. 2018); MINN. CONST. art XIII, § 1.; Hilbert, *supra* note 13, at 46 (explaining that "*Cruz-Guzman* is the most recent in a limited series of educational-adequacy cases committed exclusively to restoring the promise of *Brown*").

194 *Cruz-Guzman*, 916 N.W.2d at 6 (plaintiffs also brought claims under the equal protection and due process clauses of the state constitution); Weishart, *supra* note 174, at 392 (explaining that "*Cruz-Guzman* resumes a prior legal challenge to segregated schools, *Minneapolis NAACP*, that previously settled in *Sheff's* wake").

195 *Cruz-Guzman*, 916 N.W.2d at 5–6.

196 *Id.*

197 Weishart, *supra* note 174, at 392 (quoting Cruz-Guzman v. State, 892 N.W.2d 533, 535 (Minn. App. 2017)).

198 *Cruz-Guzman*, 916 N.W.2d at 12, 15.

on hyper-segregation, to be reviewable on the merits, the court has sent a powerful message: under the "thorough and efficient" requirement of the state's education article, certain degrees of segregation present a constitutional inadequacy that the state can be held accountable for.[199]

While no state has yet established a perfect model for shaping integration remedies through education article litigation, it is clear that New York's education article, as currently construed, is "a dead end."[200] The "wave" of adequacy suits targeted at integration is still relatively new, with model litigation strategies still evolving.[201] New York must act with urgency in working to draw from the imperfect early victories in Kentucky and Connecticut, and the promising litigation in New Jersey and Minnesota which—in surviving summary judgment—have already progressed beyond any comparable suit in New York.[202] There is a groundswell of organizing and youth-led activism in New York right now, and if nothing else, the mere promise of a justiciable claim could provide enormous leverage to those working to shape policy outside the courts.[203] Amending the education article to mirror the "thorough and efficient" clauses of New Jersey and Minnesota, and to draw from the specificity of language used in Kentucky and Connecticut, could provide the vital opening for judicial intervention.

VI. REIMAGINING NEW YORK'S EDUCATION ARTICLE

New York State must embrace the potentially enormous power of its education article, drawing from the example of other states where plaintiffs have been able to use the state court system as a bludgeon in the fights for greater justice and equity in education. An education article that gives rise to justiciable claims challenging deep segregation is a tool that can transcend forces ranging from politics to bigotry, and it is a tool that can be wielded by all, without regard to race or class.[204] Unfortunately, the New York State education article has been read to ensure that each student receives only adequate "inputs"

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[199] Christie Geter, *Let's Try This Again, Separate Educational Facilities Are Inherently Unequal: Why Minnesota Should Issue a Desegregation Order and Define Adequacy in '*Cruz-Guzman v. State', 38 LAW & INEQ. 165, 179–80, 195 (2020).

[200] Alajbegovic, *supra* note 14, at 313, 324.

[201] Hilbert, *supra* note 13, at 32, 34.

[202] Black, *supra* note 20, at 382–84.

[203] *See generally IntegrateNYC—Building School Integration and Education Justice*, *supra* note 9 (highlighting the work of student advocates actively fighting for greater equity and justice in New York schools).

[204] *See* Hilbert, *supra* note 13, at 55 (describing how the Kentucky Supreme Court was able to give the state legislature the political "nerve" to make otherwise difficult decisions around education policy).

of teaching, equipment, and modern curriculum.[205] A stronger, more precise education article could allow plaintiffs to seek far broader remedies beyond minimally adequate physical resources and funding.[206] Further, a revised education article can ensure the standard of adequate education incorporates the overwhelming, contemporary evidence linking segregated schools and inadequate education.[207] New York must allow its courts to enter this fight.

This note proposes the following language as a reimagined New York State Education Article (Art. XI, § 1):

> The legislature shall provide for a *thorough, efficient, and equitable* system of free common schools, wherein all the children of this state *shall* be educated *in a reasonably integrated learning environment*.

The primary objectives of this proposed language are twofold: (1) to utilize the heightened "thorough and efficient" standard for constitutional adequacy seen in both Minnesota and New Jersey; and (2) to ensure "reasonably integrated" schools are codified as an input requirement of adequate schools, as seen in the Connecticut Constitution.[208]

In using the "thorough and efficient" language from Minnesota and New Jersey, plaintiffs will have the opportunity to shape judicial interpretation around those existing favorable interpretations.[209] While the litigation in those states is still ongoing, the "thorough and efficient" language has already been shown to require far more of the state than New York's existing language of "maintenance and support." Courts in both Minnesota and New Jersey have found allegations of segregation alone to be enough for plaintiffs to raise an education article claim, something that has not been achieved in New York.[210]

Further, in replacing "maintenance and support,"[211] the court will be required to begin anew in crafting a contemporary

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[205] Paynter v. State, 797 N.E.2d 1225, 1228 (2003).

[206] Kagan, *supra* note 135, at 2272.

[207] *See* Geter, *supra* note 199, at 199.

[208] Black, *supra* note 20, at 387–88 (explaining that Connecticut has a "unique constitutional clause" providing: "No person shall be denied the equal protection of the law *nor be subjected to segregation* or discrimination.").

[209] *See* DESKBOOK OF STATE CONSTITUTIONS ABOUT EDUCATION, *supra* note 163, at 7.

[210] *See* Mooney, *supra* note 185; *see also* Cruz-Guzman v. State, 916 N.W.2d 1, 8–9, 15 (Minn. 2018).

[211] N.Y. CONST. art. XI, § 1; 94 N.Y. JUR. 2d *Schools, Universities, and Colleges* § 9, *supra* note 18 (explaining that the courts shaped the protection afforded by the current "maintenance and support" language to require students be provided with the opportunity for a "sound basic education" that provides minimally adequate facilities, equipment and curriculum); Note, *The Misguided Appeal of a Minimally Adequate Education*, 130 HARV. L. REV. 1458, 1465 n.61 (2017) (underscoring that the New York

standard for what adequacy under the education article requires.[212] This will provide an opportunity for plaintiffs to shape an understanding of a "thorough and efficient" education that makes use of the overwhelming research tying integrated learning environments with improved outcomes.[213] Plaintiffs will be able to argue that any twenty-first century constitutional amendment calling for a "thorough, efficient, and equitable" system of schools must make use of the twenty-first century research.[214]

With respect to redefining adequacy around the "thorough and efficient" standard, the amendment could even go further, borrowing from the Kentucky Supreme Court in *Rose*, by enumerating more specific criteria for an "efficient" system of schools.[215] In sum, the proposed language presents a powerful opportunity to redefine adequacy based off a contemporary "thorough and efficient" standard.

Beyond allowing litigants and the court to reshape the decades old definition of adequacy, the proposed amendment is explicit that reasonably integrated schools are a required element of constitutionally adequate schools. This specificity draws directly from both Connecticut and New Jersey, where their respective constitutions are among the few to explicitly bar segregation in schools independent of cause.[216] This is designed to guarantee that the court does not again take a narrow read—currently limited effectively to staffing and resources—on the required inputs for an adequate education.[217]

As discussed, the New York Court of Appeals in *Paynter* dismissed plaintiffs' claims challenging segregation in Rochester schools merely because extreme segregation and poor educational outcomes were not linked to any constitutionally required input of a minimally adequate education.[218] Through specifically requiring reasonable integration in the proposed amendment, such segregation would be a constitutional inadequacy. Put another way, claims challenging hyper-segregation in New York have not been dismissed because they are any less "indisputable"[219] than similar claims in New Jersey

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Court of Appeals has made clear that the protections of a "sound basic education" cannot be extended to guard against school segregation).

[212] Hinojosa & Walters, *supra* note 160, at 603.

[213] Michael A. Rebell, *Educational Adequacy, Democracy, and the Courts*, *in* NAT'L RSCH. COUNCIL, ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY 218, 230–31 (Timothy Ready et al. eds., 2002).

[214] *See* Jason, *supra* note 49, at 166.

[215] Hilbert, *supra* note 13, at 33.

[216] *See* CONN. CONST. art. 1, § 20; N.J. CONST. art. 1, § 5; *supra* Part IV.

[217] Black, *supra* note 20, at 384.

[218] *See supra* Section III.C.

[219] Mooney, *supra* note 185.

or Minnesota, but instead because racial segregation has been found to have "no relation to the discernible objectives of the [New York State] Education Article."[220] Under the proposed language, anything short of a "reasonably integrated learning environment" will mean the state has failed to adequately provide a "thorough" and "efficient" system of schools.

Finally, the proposed language makes reference to an "equitable system" that is "reasonably" integrated in an effort to allow the courts a degree of flexibility in crafting and approving remedies that account for distinctions in the demographic composition of given regions.[221] Ultimately, where the line is drawn on the degree of segregation or racial isolation in a school is a question the courts, litigants, and the legislature will need to grapple with.[222] In helping shape these thresholds though, plaintiffs here should make full use of contemporary research analyzing the "critical mass" of same-race/ethnicity peers shown to help maximize both the academic and socioemotional benefits of integrated classrooms.[223] As noted previously, the National Research Council recommends learning environments with a representation threshold of 15 percent to best mitigate feelings of isolation that can hinder learning.[224] The proposed language of "equitable" and "reasonable" is designed to avoid binding the courts or litigants to any specific integration target, while ensuring that modern research is accounted for in admissions policies and court ordered remedies.

All in all, the amendment proposed in this note is intended to ensure that anything short of reasonable integration will present a constitutionally actionable inadequacy that is attributable to the state. The proposed language is designed to spur the court to redefine adequacy through the more favorable frame of a "thorough and efficient" system of schools, with the requirement of reasonably integrated schools stated explicitly. A more precise education article, as proposed here, could allow plaintiffs to seek far more creative remedies—namely, various models for integration of schools—beyond adequate physical

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[220] Paynter v. State, 797 N.E.2d 1225, 1230 (N.Y. 2003).

[221] *See* Jason, *supra* note 49, at 162, 183 (explaining that "universal proposals may expend precious political capital without creating equitable outcomes" and that funding adequacy suits in New York have "lacked meaningful tools for equity" in that they have failed to use "statewide reform as an opportunity to close performance gaps").

[222] TRACTENBERG & COUGHLIN, *supra* note 19, at 68 (explaining, in the context of New Jersey, that "[a] threshold question as to the plan's goals is where the line should be drawn between adequate racial or socioeconomic 'balance' and 'segregation.'" The authors note that in Connecticut, in implementing the landmark 1995 *Sheff* decision, a rough benchmark was used: "a school is deemed segregated if more than 75% of its students are black and Hispanic.").

[223] *See supra* note 69 and accompanying text.

[224] *See supra* Part II.

resources.[225] It is ultimately the courts that will define what new educational opportunity in the state could look like,[226] but as in New Jersey and Minnesota, plaintiffs will have the opportunity to seek declaratory and injunctive relief requiring the state legislature to model integration plans that meet the unique needs of a district or region.[227] In New York State, the responsibility to provide a constitutionally adequate, sound, basic education does not fall to local municipalities or districts; rather, it falls squarely to the state.[228] Parties could bring suits challenging segregation in individual districts, or across multiple districts, and the state would carry the burden of establishing a remedy to reasonably address the inadequacy.[229] As illustrated originally by the Kentucky Supreme Court in *Rose*, state courts have incredibly broad remedial power in adequacy suits, such that they can invalidate large pieces of state education systems, or even entire systems.[230]

No single policy change is a panacea, but sufficiently integrated schools are well proven to bring more equitable and progressive learning outcomes for all students.[231] If New York is truly "on track to reclaim the mantle of progressive leader," as pundits have suggested, it must grapple head on with the dark cloud of inequity and segregation hovering over the 2.6 million public school students in its care.[232] In light of its worst-in-the-nation segregation crisis,[233] New York must respond and redefine the standard of an adequate education. The New York State Constitution has been amended over two hundred times since 1894, the same year that the current education article language was adopted.[234] It now must be amended again.

Nevertheless, there are a number of legitimate concerns with bringing courts into any fight over the nuances of education policy. It is the same state courts who commonly cite to concerns of local control, separation of powers, and judicial competency when wading into education matters, that will be made to breathe specific meaning into new education article language.[235]

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[225] Kagan, *supra* note 135, at 2272.

[226] Weishart, *supra* note 174, at 400.

[227] *Id.* at 392.

[228] Kagan, *supra* note 135, at 2277.

[229] *Paynter*, 797 N.E.2d at 470 (noting that "[i]t should not be assumed" that the "only remedy would entail the forced busing of students").

[230] Hilbert, *supra* note 13, at 32.

[231] Jason, *supra* note 49, at 166.

[232] Wang & McKinley, *supra* note 1.

[233] *See supra* Introduction.

[234] Protections in the New York State Constitution, *supra* note 75, at 6.

[235] Note, *Education Policy Litigation as Devolution*, 128 HARV. L. Rev. 929, 930 (2015); *see also* Elizabeth A. Harris, *Connecticut Supreme Court Overturns Sweeping*

In contemplating the role courts should be allowed to play in defining the nuances of a minimally adequate education, some argue that both institutional competency and lack of political accountability weigh strongly in favor of judicial restraint.[236] Further still, judicial intervention can be "too blunt of an instrument" in an area that calls for careful calibration.[237]

This said, there is good reason that scholars are urgently pushing for a new wave of litigation that seeks remedies beyond money, and the courts alone can meet that call.[238] Largely untouched by *Brown*, the Northeast, including New York State, has had more than six decades of opportunity for its policymakers and administrative agencies to try to tactfully integrate its schools. Unfortunately, segregation has only grown worse.[239] Of course, much of the blame here falls to the powerful forces of politics, bigotry, and fear that too often monopolize education policy decisions, but a constitutional predicate to challenge segregation in courts could transcend those pressures. Further, the arrival of the courts by no means precludes local districts and state education officials from working hastily to adapt their admissions and zoning policies, and in fact, the threat of litigation may help catalyze such work.[240] Opening the state courts simply gives advocates another pathway to effect substantive change.

Finally, and perhaps most critically, physical desegregation of schools alone is far from a "magic bullet to end the achievement and opportunity gaps."[241] Above all else—unlike so often in the past in New York—it is imperative that the expectations and desires of families for whom the system has worked against are centered.[242]

Education Ruling, N.Y. TIMES (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/nyregion/connecticut-supreme-court-education-funding.html [https://perma.cc/V2EK-7Z8P] (reporting that in 2018 Connecticut State Supreme Court ruling, the chief justice wrote, "It is not the function of the courts, however, to create educational policy or to attempt by judicial fiat to eliminate all of the societal deficiencies that continue to frustrate the state's educational efforts.").

[236] *The Misguided Appeal of a Minimally Adequate Education*, *supra* note 211, at 1458.

[237] *Id.* at 1459.

[238] Weishart, *supra* note 174, at 346.

[239] *See supra* Introduction.

[240] Hilbert, *supra* note 13, at 55.

[241] Theoharis, *supra* note 55; *see also Joint Hearing on School Segregation*, *supra* note 109 (written testimony of the New York Civil Liberties Union and the American Civil Liberties Union) ("Meaningful and purposeful school integration goes beyond placing students of different races/ethnicities, ability or performance in school with one another. The pursuit of physical desegregation alone is insufficient to deeply integrate cultures, values, and lived experiences.").

[242] Jason, *supra* note 49, at 9.

CONCLUSION

New York State needs bold action to tackle the segregation that dominates its school system. School segregation is not an issue that will naturally recede, in fact, the crisis only grows more intense.[243] Achieving structural change with truly equitable outcomes will no doubt require expenditure of "precious political capital," but bold reforms—in this case, reshaping the New York State education article—must be pursued.[244] *Brown v. Board of Education* may have had limited impact in the North, but this reality is not a cover for New York and its courts to hide behind.[245] It is long past time for New York's courts, and the sweeping power of educational adequacy suits, to be brought into the fight for greater equity and integration. New York's schools have been in the iron grip of segregation for decades; providing parents, students, and advocates with a key to the state court doors could finally break this hold.

Gus Ipsen[†]

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[243] Theoharis, *supra* note 55.

[244] Jason, *supra* note 49, at 162.

[245] Hinojosa & Walters, *supra* note 160, at 582 (noting that *Brown* "operated as the icebreaker" but remains an "unfulfilled promise . . . that the public can ill afford to abandon").

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