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Education and Minorities in the Modern Era: Working Civil Rights into Practice, Policy, and Procedure.

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INTRODUCTION

"EDUCATION AND MINORITIES IN THE MODERN ERA: WORKING CIVIL RIGHTS INTO PRACTICE, POLICY, AND PROCEDURE"

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I commend *The Scholar: St. Mary's Law Review on Minority Issues* both for dedicating its Symposium to the important, historic, and timely issue of education civil rights of minorities and for inviting and editing four excellent articles on the topic for publication. In this Introduction, I comment on the pattern of the ebbs and flows of development of

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education civil rights law in general and then on how these articles fit together and into that pattern.

I. The Pattern of the Ebbs and Flows of Education Civil Rights

Different education civil rights have, in general, gone through four phases: (1) identification and recognition of the right; (2) strong enforcement of the right in the courts and legislation, as well as administrative enforcement; (3) developed opposition to the right and litigation, legislation, and administrative inattention or opposition to dilute or ignore the right; and (4) changes in power and enforcement of the right depending on the approach of the courts and administrative agencies.

The prototypical example of these phases is school desegregation for African-Americans. The National Association for the Advancement of Colored People (NAACP)[1] and attorneys for Mexican-Americans[2] followed a well-designed and ultimately successful strategy to persuade the United States Supreme Court to reverse the "separate but equal" doctrine,[3] and declare that the United States Constitution does not allow segregation by race in education and that "[s]eparate educational facilities are inherently unequal."[4] So the right not to be segregated in elementary and secondary education was finally recognized by the U.S. Supreme Court and Congress.[5]

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1. The NAACP's efforts began with desegregation in higher education. These cases were successful but only when the courts were convinced that the separate schools set up for African-American students were not equal. McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 642 (1950); Sweatt v. Painter, 339 U.S. 629, 633–36 (1950); Leland Ware, *The Story of* Brown v. Board of Education*: The Long Road to Racial Equality*, *in* Education Law Stories 19, 19–20, 24–36 (Michael A. Olivas & Ronnna Greff Schneider eds., 2007) (providing a detailed history of the development of the desegregation strategy from the founding of the NAACP to the *Brown* case).

2. *See* Mendez v. Westminster Sch. Dist., 64 F. Supp. 544, 551 (C.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947) (holding, in a precursor to *Brown v. Board of Education*, that segregation had permanent negative effects on Mexican-American children's educational development).

3. *See* Plessy v Ferguson, 163 U.S. 537, 552 (1896), *overruled by* Brown v. Bd. of Educ. (Brown I), 347 U.S. 483 (1954) (establishing the "separate but equal" doctrine in public accommodations).

4. *Brown I*, 347 U.S. at 495.

5. In 1964, Congress passed the Civil Rights Act of 1964, which includes the powerful Title VI (42 U.S.C. § 2000d (2006)) and Title VII (42 U.S.C. § 2000e (2006)).

After its tepid requirements for a remedy for segregation[6] and the glacial pace of desegregation,[7] the Supreme Court, in a series of decisions from 1964 to 1971, required that schools "terminate dual school systems at once and . . . operate now and hereafter only unitary schools."[8] And the development and full enforcement reached its zenith in *Swann v. Charlotte-Mecklenburg Board of Education*, in which the Court specified specific remedies for desegregation including special programs, attendance zone modifications, and busing.[9] In addition to the Supreme Court standards, administrative enforcement of Title VI became the most direct and powerful tool to require desegregation in hundreds of school districts.[10] These cases and the administrative enforcement of non-discrimination laws had real and irrefutable effects on the actual desegregation of the schools. There was little integration right after *Brown v. Board of Education*, but significant desegregation between 1964 (when 2.3% of African-Americans in the South attended majority White schools) and 1988 (when 43.5% of African-Americans attended majority White schools).[11]

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6. *See* Brown v. Bd. of Educ. (Brown II), 349 U.S. 294, 301 (1955) (requiring desegregation with "all deliberate speed" and listing factors that should be considered by local district courts in making these decisions).

7. Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1598 (2003); GARY ORFIELD, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 3 (2001), http://www.civilrightsproject.ucla.edu/research/deseg/Schools_More_Separate.pdf ("From 1954 until 1964, the enforcement effort faced almost uniform local and state resistance in the South." (footnote omitted)).

8. Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969) (citing Green v. County Sch. Bd., 391 U.S. 430, 438–39 (1968); Griffin v. County Sch. Bd., 377 U.S. 218, 234 (1964)); Leland Ware, *The Story of* Brown v. Board of Education*: The Long Road to Racial Equality*, *in* EDUCATION LAW STORIES 19, 42–43 (Michael A. Olivas & Ronnna Greff Schneider eds., 2007).

9. 402 U.S. 1, 22–30 (1971).

10. *See* Comment, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321, 321–22 (1967) (explaining how Title VI was intended to ensure desegregation in our nation's schools); GARY ORFIELD, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 3 (2001), http://www.civilrightsproject.ucla.edu/research/deseg/Schools_More_Separate.pdf ("During [the 1960s,] desegregation policy was transformed from a very gradual antidiscrimination policy to one of rapid and full integration.").

11. GARY ORFIELD, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 29 (2001), http://www.civilrightsproject.ucla.edu/research/deseg/Schools_More_Separate.pdf. This study was summarized by Professor Chemerinsky as follows:

> In 1954, at the time of [*Brown v. Board of Education*], only 0.001% of African-American students in the South attended majority [W]hite schools. In 1964, a decade after [*Brown*], this number increased to just 2.3%. From 1964 to 1988, there was significant progress: 13.9% in 1967; 23.4% in 1968; 37.6% in 1976; 42.9% in 1986; and 43.5% in 1988. But since 1988, the percentage of African-American students attending majority

In the next phase, the retrenchment began. In the mid-1970s, the Court quashed efforts to desegregate urban areas by use of multi-district school desegregation plans designed to integrate predominately minority schools in urban districts with predominately White schools in surrounding suburban districts.[12] The Court also required a finding of purposeful discrimination in a significant part of a school district to support a desegregation remedy.[13] In the 1990s, the Court issued a series of decisions that, in effect, instructed district courts to dismiss older school desegregation cases and greatly limited the remedies that could be imposed on districts still under desegregation orders.[14] This resistance to school

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> [W]hite schools has declined. By 1991, the percentage of African-American students attending majority [W]hite schools in the South had decreased to 39.2% and over the course of the 1990s this number dropped: 36.6% in 1994; 34.7% in 1996; and 32.7% in 1998.

Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1598 (2003) (footnotes omitted).

12. Milliken v. Bradley, 418 U.S. 717, 752–53 (1974). This argument is fully developed in Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597 (2003).

13. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208 (1973) (holding "that a finding of intentionally segregative school board actions in a meaningful portion of a school system" establishes "a prima facie case of unlawful segregative" practices). This holding applied to school districts that had no history of de jure discrimination; but given the clear pattern of residential desegregation in most urban areas, the decision made it very difficult to prove purposeful discrimination by the schools. Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1609–10 (2003).

14. Missouri v. Jenkins, 515 U.S. 70, 102 (1995); Freeman v. Pitts, 503 U.S. 467, 490 (1992) ("[I]n the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations."). A school district must have the freedom to apply desegregation orders in a way most suitable to the district. *Freeman*, 503 U.S. at 490. Therefore, "upon a finding that a school system subject to a court-supervised desegregation plan is in compliance in some but not all areas, the court in appropriate cases may return control to the school system in those areas where compliance has been achieved, limiting further judicial supervision to operations that are not yet in full compliance with the court decree." *Id.* at 491; Bd. of Educ. v. Dowell, 498 U.S. 237, 249–50 (1991) (holding that a district court should only determine whether a school district "complied in good faith with [a prior] desegregation decree" and "whether the vestiges of past discrimination had been eliminated to the extent practicable"); *see also* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1618 (2003) ("Disparity in test scores is not a basis for continued federal court involvement."). "In several cases, the Court concluded that school systems had achieved 'unitary' status and thus that federal court desegregation efforts were to end. These decisions resulted in the cessation of remedies, which had been effective, and ultimately resegregation resulted." Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1615 (2003); Leland Ware, *The Story of* Brown v. Board of Education*: The Long Road to Racial Equality*, *in*

desegregation was manifested even more clearly in a set of "reverse discrimination" cases in which students sued school districts that were voluntarily (or after a declaration that they were unitary) desegregating by using race as one of many factors in individual decisions on school attendance or admission to special programs.[15]

In recent years, desegregation has gone through its ebbs and flows. The No Child Left Behind Act did make the reduction of the gaps between minority and White performance on standardized tests its linchpin.[16] With significant limitations, *Grutter v. Bollinger* upheld the use of race as a factor in admission decisions in higher education,[17] and the majority in the *Parents Involved in Community Schools v. Seattle School Dist. No. 1* allowed the use of race in some group decisions in the public school context.[18]

II. How These Phases Relate to School Finance, LEP Instruction, Accent Discrimination, and Education of Gifted and Talented Students

A. *School Finance*

Meaghan Field has proposed an ingenious way to reconcile the at times complementary and at times contradictory theories of adequacy and equity in school finance litigation and scholarship.[19] By redefining equity as a requirement of "end-result equality of opportunity" or "fairness," she artfully combines the requirement that every student must have access to the resources necessary to provide an opportunity to succeed, as well as extra resources necessary to make up for deficiencies.[20] Ms. Field's useful Note gives us a summary of the development of the theories in this confusing policy and litigation arena and then shows us how to apply her approach to existing and future school finance cases. Dealing with the broad issue of resources, the Note also provides a nice framework for

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Education Law Stories 19, 44 (Michael A. Olivas & Ronnna Greff Schneider eds., 2007).

15. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 725 (2007).

16. *See* No Child Left Behind Act of 2001 § 1001, 20 U.S.C. § 6301 (2006) ("The purpose of this title is to . . . clos[e] the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students . . . .").

17. 539 U.S. 306, 341 (2003).

18. *Parents Involved*, 551 U.S. at 725 (concluding that race may be a factor but not the sole factor for a child's admission to a school).

19. Meaghan Field, Note, *Justice As Fairness: The Equitable Foundations of Adequacy Litigation*, 12 Scholar 403, 407 (2010).

20. *Id.*

consideration of the other articles. In her Note, Ms. Field summarizes both the successful—from point of view of plaintiff low-wealth school districts—school finance cases in California and New Jersey[21] and the unsuccessful cases in Oklahoma and Louisiana.[22] Though it is not covered in Ms. Field's Note, the Texas school finance litigation is an example of the phases of litigation I have outlined.[23] And the ebbs and flows of school finance litigation in fifteen states have been recently summarized in articles written by the attorneys in the cases.[24]

B. *Programs for Limited English Proficient Students*

Jennifer Solak's Article summarizes the history of legislation and litigation designed to improve the education of children of Limited English Proficiency (LEP).[25] Focusing on national legislation and policies and the complicated and turbulent history of LEP litigation and programs in Texas, Ms. Solak gives us a clear summary of national and Texas LEP programs and the issues before the courts in the *United States v. Texas*[26] litigation in 2009. Ms. Solak also quickly summarizes the phases of legislation and litigation on behalf of LEP students, from the recognition of the right by Health Education and Welfare interpretations of Title VI, to real protection of the right in passage of the Equal Educational Opportunities Act, section f,[27] and the seminal case of *Lau v. Nichols*,[28] through the negative response of the courts in the first appeal of the *United States v. Texas (Bilingual)* case. Bilingual education advocacy and litigation has been on an up and down cycle with victories for LEP students in Albuquerque, New Mexico and losses in Berkeley, as well as ebbs and flows in legislation.[29]

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21. *Id.* at 419–31.

22. *Id.* at 432–36.

23. *See generally* Albert H. Kauffman, *The Texas School Finance Litigation Saga: Great Progress, Then Near Death by a Thousand Cuts*, 40 ST. MARY'S L.J. 511 (2008) (analyzing the evolution of school finance jurisprudence in Texas).

24. *See generally* INST. FOR EDUC. EQUITY & OPPORTUNITY, A QUALITY EDUCATION FOR EVERY CHILD: STORIES FROM THE LAWYERS ON THE FRONT LINES (David Long ed., 2009) (evaluating seventeen important school finance and educational equity cases from the perspectives of the lawyers who litigated them).

25. Jennifer Michel Solak, *TEXAS, WHY WAIT?: The Urgent Need to Improve Programming for Limited English Proficient Students*, 12 SCHOLAR 385, 387–93 (2010).

26. 572 F. Supp. 2d 726, 767 (E.D. Tex. 2008). An appeal is currently pending. Terrence Stutz, *Court Delays Deadline for New Bilingual Education Program in Texas*, DALLAS MORNING NEWS, Feb. 2, 2009, *available at* 2009 WLNR 1972844.

27. Equal Educational Opportunities Act of 1974 § 204(f), 20 U.S.C. § 1703(f) (2006).

28. 414 U.S. 563, 566 (1974) (stating that "students who do not understand English are effectively foreclosed from any meaningful education").

29. Jennifer Michel Solak, *TEXAS, WHY WAIT?: The Urgent Need to Improve Programming for Limited English Proficient Students*, 12 SCHOLAR 385, 387–93 (2010).

C. *Discrimination Against Students Because of Their "Accents"*

Professor William Chin's Article focuses on a rich literature on accent discrimination and its effects on African-American, Asian, Latina/o, and Arab students.[30] Professor Chin collects material from a wide variety of disciplines to document accent discrimination, and he then summarizes the literature on the effect of this discrimination on students of color in education in denial of access to charter schools, tracking, and classroom activities.[31] He then applies litigation concepts from desegregation and language minority cases to the development of legal theories that might be used to address this discrimination and concludes with a description of several practical education policies that could address this discrimination.[32] Professor Chin's Article will certainly be helpful to educators or litigators who wish to ameliorate the effects of this discrimination. Accent discrimination has been recognized in the social science literature but has not yet been specifically recognized in the courts or legislation. Articles like Professor Chin's can provide the research and theoretical base for later litigation and legislation.

D. *Discrimination Against Gifted and Talented Students*

Ms. Monica Aguon's Comment clearly describes the issues confronting the education of gifted and talented students and the federal and state legislative and administrative policies that might be used to improve the education of these students.[33] Ms. Aguon gives us a rich summary of the legislation and policy developments in educating gifted and talented students.[34] In addition, Ms. Aguon provides an interesting analysis of possible legal remedies available to gifted and talented students who have not been provided a meaningful education.[35] Using a Pennsylvania Supreme Court case[36] as a vehicle, Ms. Aguon explores the place of litigation in the struggle for rights for gifted and talented students.[37] The Comment also combines scholarship from the areas of the rights of disabled stu-

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30. William Y. Chin, *Linguistic Profiling in Education: How Accent Bias Denies Equal Educational Opportunities to Students of Color*, 12 SCHOLAR 355, 358–64 (2010).

31. *Id.* at 364–77.

32. *Id.* at 377–83.

33. Monica Aguon, Comment, *Equal Protection for the Gifted Student in the Public School System*, 12 SCHOLAR 443, 448–49 (2010).

34. *Id.* at 450–61.

35. *Id.* at 463–67.

36. Centennial Sch. Dist. v. Pennsylvania, 539 A.2d 785, 791 (Pa. 1988) (upholding state regulations requiring individualized educational plans (IEPs) for gifted and talented public school children).

37. Monica Aguon, Comment, *Equal Protection for the Gifted Student in the Public School System*, 12 SCHOLAR 443, 467–77 (2010).

dents and the No Child Left Behind Act to provide alternative remedies for the gifted.[38] Ms. Aguon has clearly explained and provided ways to expand the holding of the one major case protecting the rights of gifted and talented students. The Comment also provides a good research base and theoretical framework for the development of litigation and more focused legislation to protect the rights of these gifted students.

III. Conclusion

I have not summarized or even adequately cited the data on the increase in the number and percentage of minority students in our schools. All the most populous states in the country are now majority-minority, and that trend is increasing every year. Protecting, asserting, and guaranteeing the education rights of minority students will become even more important in the future, and I again commend *The Scholar: St. Mary's Law Review on Minority Issues* for continuing and advancing the research and literature in this crucial area of the law.

38. *Id.* at 470–71.