

Revitalizing American Democracy Through Education Reform

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I. INTRODUCTION

Living in the world of COVID-19, one is always reminded of the economic injustices that bedevil our country. At the start of the crisis, this was manifest in the difference between those of us in the professional middle classes, who kept our pay while working from home, and those in the lower-paid service sector, who either lost their jobs or relied on unemployment benefits for survival.¹ There were also the even more vulnerable, such as migrant workers, cashiers, and hospital orderlies, who were continuously exposed to the lethal virus based on their “essential worker” designation. Now that we have been living with COVID for almost two years, it occurs to me that, exhausting as it has been for my wife and I to raise our five-year-old without either preschool, a nanny, or extended family in our adopted city of Knoxville, Tennessee, it was feasible for us in view of the flexibility, job security, compensation, and benefits afforded to us as academics. This certainly is not the case for all workers.

After the reopening of our daughter’s preschool, my wife and I feared that it would close, once again, due to COVID-19. We discussed “podding”² with other households to share preschool obligations from home or even hiring teachers as a group to instruct and care for our children. All of this, however, takes either social networks or money that most American households, especially racial minority and rural households lack. Candidly, the fact we have these unfair advantages due to socioeconomic class gives us little pause as we struggle to cope with life under this brutal pandemic. That said, what is to be done for those children whose households lack these networks and resources? How do we maintain a cohesive democracy when our country’s residents face problems so unequally?

In truth, the pandemic merely highlights socioeconomic inequalities that have become pathologically rigid since the Cold War’s

1. Francisco H.G. Ferreira, *Inequality in the Time of COVID-19*, 58 FIN. & DEV. 20, 20–21 (2021), imf.org/external/pubs/ft/fandd/2021/06/pdf/fd0621.pdf.

2. See Alyssa Tufts, *Can ‘Podding’ Be the Key to Successful Pandemic Education?*, AZ BIG MEDIA (Sept. 8, 2020), <https://azbigmedia.com/business/can-podding-be-the-key-to-successful-pandemic-education/> (“The practice of podding involves one or more households getting together in-person regularly at each other’s homes for small educational groups with agreed-upon measures to try and manage COVID-19 exposure risks.”).

end. Indeed, in the world before COVID-19, one of the great benefits of working at a law school in beautiful downtown Knoxville is that it enabled me to integrate into the local legal community. For example, I co-chair the Knoxville Bar Association's Diversity in the Profession Committee, which consists of a wonderful group of local lawyers, all committed to inclusion and cultural competence within the local bar. One member who has befriended me in recent years is a truly generous soul who heads a significant local foundation, supports several local charities, and always does what he can to advance progressive causes both locally and nationally. He and his wife, who are both high-income earners, inherited large bequests from their parents and have a son who recently graduated from a very exclusive and prestigious local private high school. This afforded him unparalleled opportunities, including an outstanding foreign language program and inclusion in varsity athletics that enabled him to compete for athletic scholarships at elite private and public universities nationwide. In conjunction with his high grades and ACT test scores, these opportunities enabled him to obtain admission to numerous highly prestigious undergraduate programs, including several in the Ivy League. The extremely prestigious university he chose to attend, which lists tuition at nearly \$55,000 per year, offered him a varsity athletic scholarship package for a non-revenue generating sport that covered tuition, fees, room, board, and supplemental tutoring for four years. This is a tremendous achievement and, taking a monographic perspective, I am obviously happy for him and his parents. By what measure, however, is this a progressive allocation of resources? Why does his chosen university offer varsity athletic scholarships for non-revenue generating sports?

Although there is a rationale explaining the nationwide addiction to college football and other revenue generating varsity sports, the same does not apply for non-revenue generating sports, which tend to be favored by children from high-wealth households. The fact that very few children from poor and middle-income households can compete for most athletic scholarships evidences their purpose, namely social exclusivity under the guise of sportsmanship and excellence. Indeed, if this scholarship is typical of most merit-based scholarships nationwide, it will be funded not through endowment, but by charging full "sticker-price" tuition to lower credentialed students from lower-

wealth households whose access to higher education is contingent upon access to non-dischargeable federal student loans.³

Contrast this with another one of my local friends who I know from the downtown YMCA, one of the few places where all cross-sections of Knoxville society socialize. As a middle-income earner for this area, he lives in a modestly priced home in a working-class neighborhood. The public school his son attends, situated where it is, lacks the opportunities afforded to students at elite private schools or public schools in affluent neighborhoods. Although his son did well in school, he never enrolled in an ACT preparatory course and was denied admission to the state's flagship public university, the University of Tennessee-Knoxville (UTK). He will instead enroll at the less prestigious and competitive East Tennessee State University, which lacks the same caliber faculty, alumni network, prestige, and networking opportunities afforded UTK students.

Though both sets of parents are deservedly proud of their sons, which of the two children is more likely to achieve high-income status in America today? Which one of them will have student loan debt that will dramatically reduce his net worth at the end of his work-life? Which one of them is likely to earn admission to a highly selective graduate school? Which one of them is likely to find more interesting and high paying work? Which one of them will find it easier to afford housing in an auspicious neighborhood? If we are honest about it, which one of them is more likely to have an easier time finding a companion to marry and start a family? Finally, which one of them will receive a sizeable bequest when their parents die that will assure them financial security for the rest of their lives?

My concern here is not so much with income and wealth inequality between the two households, but the fact that the two children's futures are almost predetermined in America today. Although my attorney friend's son works extremely hard, the fact is that he was destined to succeed based on the opportunities available to him at birth. The same is not true for my YMCA friend's son and is even less true for most rural Whites and racial minority children nationwide.

3. Cf. Herschel I. Grossman, *The Economics and Politics of Scholarships*, 8 ACAD. QUESTIONS 59, 59–60 (1995), <https://www.nas.org/academic-questions/8/3> (discussing the Ivy colleges' collective decision to not use their endowments to fund merit-based scholarships).

As evidenced by the attempt by secessionists to storm the U.S. Capitol,⁴ the U.S. is suffering from a level of authoritarianism in its politics that is a sharp reversal of the electorate's democratic engagement and civic responsiveness during the first generation after World War II. A definite cause is the electorate's zero-sum worldview, brought about by socioeconomic immobility for the bulk of Americans, which has become more pronounced since the Cold War's end.⁵ This undermines the generosity of spirit that the great liberal philosopher Isaiah Berlin identified as a necessary predicate for a functional democracy.⁶ As set forth more fully below, much of the socioeconomic immobility is caused by a sclerotic and outdated system of primary, secondary, and tertiary education that rigidifies and worsens the country's class divide.

My recommendation is for Congress to resuscitate socioeconomic mobility by giving states a true choice in revitalizing primary and secondary public schooling. The first option is for Congress, as a condition of continued federal aid, to offer states a chance to disentangle the quality of a child's education from neighborhood wealth, by mandating that states dramatically alter their funding framework to progressively provide greater education funding per pupil for less affluent schools, inclusive of teacher salaries. States are free to reject this proposal. States, however, that reject this proposal can continue receiving federal education subsidies if they adopt Congress's second option, which is for states, as a remedial measure, to recharacterize school districts attendance zones to further socioeconomic integration and consequently socioeconomic mobility.⁷

With respect to higher or tertiary education, the federal government should condition access to federal financial aid on colleges and universities taking steps to facilitate the favorable matriculation of

4. See, e.g., Azi Paybarah & Brent Lewis, *Stunning Images as a Mob Storms the U.S. Capitol*, N.Y. TIMES (Jan. 16, 2021), <https://www.nytimes.com/2021/01/06/us/politics/trump-riot-dc-capitol-photos.html>.

5. See generally THOMAS PIKETTY, *CAPITAL AND IDEOLOGY* 20 (Arthur Godhammer trans., The Belknap Press of Harvard Univ. Press 2020) (2019).

6. See, e.g., ISIAH BERLIN, *THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS* (Henry Hardy & Roger Hausheer eds., Random House 2013) (1997) (collecting Berlin's most celebrated writings).

7. Taryn Williams, *Outside the Lines: The Case for Socioeconomic Integration in Urban School Districts*, 2010 BYU EDUC. & L.J. 435, 462.

children from low-wealth backgrounds. The first step would be to place a cap on federal student loans. This will encourage colleges and universities to reallocate resources to control tuition and fee inflation. The second step would be for Congress to condition the availability of federal financial aid and student loans, to tertiary institutions providing an equal amount of need- and merit- based scholarships, such that students from low-wealth households are no longer systematically subsidizing their higher wealth peers. These changes, if successfully implemented by Congress based on the Biden Administration's recommendation of my proposal, will significantly improve primary, secondary, and tertiary education and go a long way to prevent further democratic retrogression.

This Article proceeds as follows. Part II explores how socioeconomic inequality, which narrowed in the generation after World War II, grew dramatically after the Cold War due to the enactment of neoliberal fiscal policies of the Reagan Administration. Part III describes how the country's socioeconomic inequality risks political authoritarianism. Part IV analyzes the requirements for maintaining a liberal democracy governed by the rule of law and describes the risk of democratic retrogression in the zero-sum world of socioeconomic stagnation. Part V provides a brief primer on advances and setbacks in expanding education opportunities in the U.S., while part VI examines the federal government's role in K-12 public education. Part VII discusses unequal access to higher education, while Part VIII provides a detailed explanation of the government's current role in higher education. Part IX is my proposal for Congress to implement conditions on access to federal education subsidies to improve primary, secondary, and tertiary education nationwide. Part X is a brief conclusion that calls for immediate attention to my proposal to avoid the risk of political authoritarianism and further democratic retrogression.

II. A RECENT HISTORY OF WEALTH INEQUALITY IN THE U.S. AND BEYOND

In his magisterial study of left-wing European political parties in the twentieth century, the British historian Donald Sassoon writes that their electoral support was strongest during periods of high economic growth. Such a period was the thirty years after World War II, which was referred to as "Les Trentes Glorieuses" by the French

economist and demographer Jean Fourastie.⁸ This is because higher rates of growth enable higher material living standards that, in turn, facilitate a “generosity” in the electorate such that a perceived surplus of resources is available to governments to pay for social welfare programs. These programs include high quality public schooling, access to affordable higher education, and, in the case of western Europe, Canada, and to a lesser extent, the U.S., generous social welfare programs that facilitated high rates of socioeconomic mobility until the Cold War’s end.⁹ This, in turn, corresponded with high rates of trust in government, consensus-based politics, and broad-based political support for the rule of law.¹⁰

In the case of the U.S., this period corresponded with several key changes including: (1) bipartisanship in international relations; (2) increased access to affordable and quality higher education; (3) the *de jure* and eventual *de facto* racial desegregation of public schools nationwide;¹¹ and (4) the bipartisan enactment of President Johnson’s Great Society legislation, including the Civil Rights Act of 1964,¹² the Voting Rights Act of 1965,¹³ the Social Security Amendments of 1965 (also known as Medicare and Medicaid),¹⁴ which provide health insurance coverage to seniors and the indigent, respectively, and Titles XVIII and IX of the Civil Rights Act of 1968, better known as the Fair Housing Act,¹⁵ which prohibits housing discrimination. This dramatically increased the integration of historically excluded groups into the mainstream of American life.¹⁶ It also corresponded with a rate of socio-economic mobility that enabled individuals born into poor and

8. See JEAN FOURASTIE, *LES TRENTE GLORIEUSES, OU LA RÉVOLUTION INVISIBLE DE 1946 À 1975* (1979) (“les trentes glorieuses” can be translated in English to the thirty glorious years).

9. PIKETTY, *supra* note 5, at 34–35.

10. See DONALD SASSOON, *ONE HUNDRED YEARS OF SOCIALISM: THE WEST EUROPEAN LEFT IN THE TWENTIETH CENTURY* 445–46 (rev. ed. 2010).

11. See *Brown v. Board of Educ.*, 347 U.S. 483, 483 (1954); *cf.* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007).

12. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

13. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

14. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965).

15. Fair Housing Act of 1968, Pub. L. No. 90-284, §800, 82 Stat. 73, 81 (1968).

16. See *generally* Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968).

working class households to climb into the middle and upper middle classes, and, as a matter of logic, for those born in the upper middle and middle classes to fall into the lower classes as measured by income and wealth.¹⁷ By 1973, 91% of black children in the American south and border states attended school with White children.¹⁸

The support for social welfare legislation and center-left political parties ended in the U.S. with the “stagflation” that characterized the 1970s.¹⁹ But for Jimmy Carter’s ineffectual one-term caretaker Presidency,²⁰ the Republican Party controlled the White House from 1969 to 1993, and it was President Reagan who, at his 1981 inaugural address, scapegoated the federal government as being the source of the country’s problems.²¹ Although Reagan’s election as President was undoubtedly facilitated by the Carter administration’s incompetence both in domestic and international affairs, it was also helped by growing public opposition to the federal government’s provision of increased economic, educational, and health care opportunities for all Americans, especially racial minorities.²² Examples include: mass

17. See generally SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* (2004).

18. Nikole Hannah-Jones, *Choosing a School for My Daughter in a Segregated City*, N.Y. TIMES MAG. (June 9, 2016), <https://www.nytimes.com/2016/06/12/magazine/choosing-a-school-for-my-daughter-in-a-segregated-city.html>.

19. See SASSOON, *supra* note 10, at 456–68; PIKETTY, *supra* note 5, at 19–20. The causes of the 1970s stagflation are hard to clearly identify. Scholars have posited it was caused by higher labor costs brought about by collective bargaining, lower productivity growth, higher inflation due to labor unrest, and the general rise in commodity and petroleum prices, especially due to the Arab oil embargo that followed the 1973 war between Israel and several Arab states.

20. Carter won the Presidency by razor thin margin in 1976 notwithstanding the then-weakness of the Republican Party due to President Nixon’s Watergate Scandal.

21. Larry Kudlow, *What Did Reagan’s Inaugural Say?*, NAT’L REV. (Jan. 19, 2009, 9:03 PM), <https://www.nationalreview.com/2009/01/what-did-reagans-inaugural-say-larry-kudlow/> (statement of President Ronald Reagan) (““In this present crisis, government is not the solution to our problems; government is the problem.””).

22. Shaylyn Romney Garrett & Robert D. Putnam, Opinion, *Why Did Racial Progress Stall in America?*, N.Y. TIMES (Dec. 4, 2020), <https://www.nytimes.com/2020/12/04/opinion/race-american-history.html>. Although President Carter achieved many things, including ratification of the Panama Canal Treaty, the Camp David Accords, and SALT II, I am referring to the Carter administration’s failure to work with members of his own party on Capitol Hill to enact significant social

opposition by Whites nationwide to the integration of public schools; “White flight” from cities into the suburbs; public and interest group objection to the provision of universal health care legislation; opposition to the “war” on poverty; the economic collapse of majority-minority urban communities; and the parallel development of a mass incarceration state that has made the U.S. a pronounced outlier among mature democracies on the issue.²³

Although much of this is undoubtedly attributable to institutional racism and a White backlash against the Great Society,²⁴ an entirely race-based explanation is altogether unsatisfying. After all, similar progressive backsliding in terms of social welfare legislation occurred in Canada, the UK, France, Germany, Italy, and Scandinavia, notwithstanding their lack of pronounced racial cleavages as compared to the U.S.²⁵ Sassoon effectively demonstrates that the dramatically reduced economic growth rate in Western Europe since the 1970s explains the failures of the left-of-center parties, both electorally and in their goals of expanding the social welfare state.²⁶

This delegitimizing of the left-of-center parties, the ideologies of social democracy, and Keynesian liberalism,²⁷ in turn, led to the ascendancy of neoliberal conservatism.²⁸ This undermining of the left happened most pronouncedly in the U.S., where majoritarian social populism fused with neoliberal economics to facilitate a dramatic realignment of state interests prioritizing economic growth, national security, and deregulation over social and redistributive justice.²⁹ This was also facilitated by the obvious failures of totalitarian communism and

welfare legislation, make progress in the area of civil rights, and his abject failure to respond effectively to the Iran Hostage crisis.

23. Romney Garrett & Putnam, *supra* note 22.

24. *See id.* The Great Society refers to the Johnson administration’s domestic legislative agenda, which saw the enactment of the Civil Rights Acts of 1964 and 1968, the Voting Rights Act of 1965, the Fair Housing Act of 1968, and the Medicaid entitlement of health care coverage for the indigent.

25. SASSOON, *supra* note 10, at 445–61.

26. *Id.*

27. *See id.* By this I mean, per the British economist John Maynard Keynes, a use of government spending to limit the harsh effects of a cyclically-driven economic contraction.

28. *See id.* In other words, a framework relying upon free markets to allocate resources, in conjunction with a low-tax and regulatory framework.

29. *See id.*

the U.S.-led victory of mature democracies against the Soviet Union and its Warsaw Pact “allies” during the Cold War.³⁰ The result has been a dramatic increase in income and wealth inequality worldwide.

As the French economist and public intellectual Thomas Piketty has demonstrated, unless government enacts redistributive fiscal policies, the level of wealth and income inequality will worsen over time.³¹ This is because the value of accumulated savings, including inherited wealth, tends to increase at a higher rate than economic growth. This worsens inequality because wealthy households have more savings and capital than their low-wealth counterparts.³² The problem is compounded by the fact that highly compensated employees are better situated, and with lower marginal tax rates, incentivized to negotiate more lucrative pay packages.³³ The U.S. government’s fiscal policy framework since the Reagan Administration has worsened the inequality problem by dramatically reducing taxes on passive income, earned income, corporate income, and intergenerational wealth transfer.³⁴ The resultant wealth and income inequality has led to socioeconomic hardening that undermines national cohesion and leads to democratic retrogression.

A potential remedy is to revitalize the country’s education system, which has fallen into disrepair and become a facilitator of social exclusion. I take this position because the country’s abandonment of fiscal progressivism has enabled the wealthy to accumulate housing and other forms of wealth that are dramatically beyond the means of most Americans, has had baneful consequences for educational justice.³⁵ Because the U.S.’s public schooling framework prioritizes local control and is inordinately funded based on local assessments, greater

30. *See id.*

31. *See generally* THOMAS PIKETTY, *CAPITAL IN THE TWENTY FIRST CENTURY* (Arthur Goldhammer trans., The Belknap Press of Harvard Univ. Press 2017) (2013) [hereinafter *TWENTY FIRST CENTURY*].

32. *Id.* at 34–35.

33. *See id.* at 365–72.

34. *See* Mohamed Akram Faizer, *Seven Steps to Truly Reform the Tax Code and Engender Socio-Economic Mobility*, 82 *ALB. L. REV.* 601, 620 (2019).

35. *See* Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 *WAKE FOREST L. REV.* 287 (2013) [hereinafter *High Cost*] (outlining the systematic ways that education federalism has hampered past efforts to ensure equal educational opportunity).

wealth discrepancies lead to greater educational discrepancies based on socioeconomic class.³⁶ The resulting stratification of education resources has corresponded with a collapse in income growth and wealth for the majority of the U.S. population.³⁷

This is an ahistorical development—for most of the country’s history, income and wealth inequality in the U.S. was much lower than that of western Europe and Asia, and socioeconomic mobility was atypically high.³⁸ Although partly due to the less rigid class structure of a relatively young country, it was also explained by the fact the U.S. spent dramatically more than other countries on education. Unlike the United Kingdom, France, or Germany, the U.S. achieved near universal primary schooling in the middle of the nineteenth century and universal secondary education in the middle of the twentieth.³⁹ This enabled the U.S. to have far higher worker productivity, leading to higher living standards, higher rates of socioeconomic mobility, and a more equal income and wealth distribution, as compared to Western Europe and Asia.⁴⁰ Revitalizing the country’s education system, therefore, can close the income and wealth inequality gap in the U.S. and make the country a leader in socioeconomic mobility once more.

III. THE U.S. TODAY—SOCIOECONOMIC IMMOBILITY AND POLITICAL AUTHORITARIANISM

The U.S. today has an atypically low rate of intergenerational socio-economic mobility.⁴¹ Between forty and fifty percent of American income inequality is passed on to the next generation. For this reason, U.S. class rigidity is more like developing countries such as Brazil, South Africa, Peru, and China, than it is to other mature democracies such as Australia, Canada, Denmark, Sweden, Norway, and Finland

36. *Id.* at 287–88.

37. PIKETTY, *supra* note 5, at 436.

38. *Id.*

39. *Id.*

40. *Id.*

41. Miles Corak, *Economic Mobility*, PATHWAYS, Special Issue 2016, at 51, 51–52, <https://inequality.stanford.edu/sites/default/files/Pathways-SOTU-2016-2.pdf>.

where the intergenerational socioeconomic mobility rate is dramatically higher.⁴²

Socioeconomic mobility is also dropping in absolute terms. To illustrate, while most Americans born in 1940 ended up wealthier than their parents, “[o]nly half of those born in 1980 have surpassed their parent’s family income.”⁴³ This is explained by many factors, including lower Gross Domestic Product (GDP) growth rates and, more importantly, greater inequality in the growth distribution since the 1980s, such that economic growth typically fails to significantly increase living standards or increase socio-economic mobility.⁴⁴

Socioeconomic exclusion also corresponds with being a historically oppressed racial minority. A recent study by the Federal Reserve Bank of Boston evidenced that while White households in metropolitan Boston have a median wealth of \$247,500, Boston’s U.S. Blacks have a median net wealth of close to zero.⁴⁵ The study also evidenced that while 56% of White households own retirement accounts, only 20% of U.S. and Caribbean Blacks, 8% of Dominicans, and 16% of Puerto Ricans have retirement accounts.⁴⁶ Moreover, while 79% of Whites own their home, only one-third of U.S. Blacks, and less than one-fifth of Dominicans and Puerto Ricans own their own home.⁴⁷ The study sets forth that, because national and metropolitan Boston’s population growth is being driven by growth of the racial minority population, the socioeconomic exclusion of racial minorities “is a first-order public

42. *Id.*; see also Richard V. Reeves & Eleanor Krause, *Raj Chetty in 14 Charts: Big Findings on Opportunity and Mobility We Should All Know*, BROOKINGS (Jan. 11, 2018), <https://www.brookings.edu/blog/social-mobility-memos/2018/01/11/raj-chetty-in-14-charts-big-findings-on-opportunity-and-mobility-we-should-know/>.

43. Reeves & Krause, *supra* note 42.

44. Raj Chetty, David Grusky, Maximilian Hell, Nathaniel Hendren, Robert Manduca, & Jimmy Narang, *The Fading American Dream: Trends in Absolute Income Mobility Since 1940* 3 (Nat’l Bureau of Econ. Rsch., Working Paper No. 22910, 2016), https://opportunityinsights.org/wp-content/uploads/2018/03/abs_mobility_paper.pdf.

45. ANA PATRICIA MUÑOZ, MARLENE KIM, MARIKO CHANG, REGINE O. JACKSON, DARRICK HAMILTON, & WILLIAM A. DARITY JR., *THE COLOR OF WEALTH IN BOSTON 2022* (2015), <https://www.bostonfed.org/publications/one-time-pubs/color-of-wealth.aspx>.

46. *Id.* at 12–13.

47. *Id.* at 15–16.

policy problem requiring immediate attention.”⁴⁸ This is indeed a nationwide imperative because the U.S. is projected to become a minority White country by 2045.⁴⁹

This socioeconomic disparity also varies by region, with cities in the Deep South and Midwest being the least socioeconomically mobile parts of the U.S.⁵⁰ This means that helping families relocate from less socioeconomically mobile regions can increase overall well-being.⁵¹ It also correlates with income, such that “[t]he chances of going to college soon after high school are very strongly related to household income;” this ends up making a college education a “great stratifier” as opposed to a potential equalizer.⁵² The U.S.’s low rate of socioeconomic mobility is due to lower rates of growth, a skewed income distribution, and the concomitants of these factors, including wealth inequality and unequal access to quality education, that, in turn, worsens the problem over time.⁵³ This also breeds cynicism in the electorate that furthers the troubling authoritarian trend in the American political culture. The nexus between socioeconomic immobility and authoritarianism necessarily must be addressed.

IV. THE RULE OF LAW AND THE RISK OF DEMOCRATIC RETROGRESSION

What is paradigmatic in reading scholarship on the current state of Western democracy and the rule of law is the frequency of incorrect criticisms of the great American political philosopher Francis Fukuyama and his 1992 book *The End of History and the Last Man*. Fukuyama posited that, at the Cold War’s end, Western democracy’s lack of ideological competitors meant that we had collectively arrived at an

48. *Id.* at 2.

49. William H. Frey, *The US Will Become ‘Minority White’ in 2045*, *Census Projects*, BROOKINGS (Mar. 14, 2018), <https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects/>.

50. Reeves & Krause, *supra* note 42.

51. *Id.*

52. *Id.*

53. MICHAEL GREENSTONE, ADAM LOONEY, JEREMY PATASHNIK, & MUXIN YU, THE HAMILTON PROJECT, THIRTEEN ECONOMIC FACTS ABOUT SOCIAL MOBILITY AND THE ROLE OF EDUCATION 8–10 (2013), https://www.brookings.edu/wp-content/uploads/2016/06/thp_13econfacts_final.pdf. *See generally* PABLO A. MITNIK & DAVID B. GRUSKY, ECONOMIC MOBILITY IN THE UNITED STATES 1–9 (2015), https://www.pewtrusts.org/~media/assets/2015/07/fsm-irs-report_artfinal.pdf.

Hegelian ideological endpoint.⁵⁴ His critics seize on worldwide authoritarianism, democratic retrogression, and ethno-nationalism to claim the passage of time has proven Fukuyama wrong.⁵⁵ These critics, however, misrepresent Fukuyama, who never said that western democracies had achieved perfection. Rather, he concluded that liberal democracy would no longer face a serious ideological competitor as was the case with totalitarian communism during the Cold War.⁵⁶

Indeed, the evidence demonstrates that few Westerners truly believe that ideologies hostile to western liberalism, such as the authoritarian nationalism found today in China and Russia, are preferable to democratic liberalism and the rule of law.⁵⁷ Where Fukuyama's 1992 book arguably fell short is its failure to recognize that liberal democracy's lack of ideological competition risked leading to its corrosion and decay. This is what he concluded in 2011's *The Origins of Political Order*⁵⁸ and 2014's *Political Order and Political Decay*,⁵⁹ which argued that liberal democracies such as the United States, unless forced to constantly reevaluate themselves, are prone to a patrimonial trap that results in institutional sclerosis.⁶⁰ The patrimonial trap refers to the natural tendency for humans to prioritize the well-being of their family over the broader society.⁶¹ This lamentable reality was, according to

54. See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 245–53 (1992).

55. See, e.g., Eliane Glaser, *Bring Back Ideology: Fukuyama's 'End of History' 25 Years On*, *THE GUARDIAN* (Mar. 21, 2014, 5:30 AM), <https://www.theguardian.com/books/2014/mar/21/bring-back-ideology-fukuyama-end-history-25-years-on>.

56. FUKUYAMA, *supra* note 54, at 328–39.

57. Lee Drutman, Joe Goldman & Larry Diamond, *Democracy Maybe: Attitudes on Authoritarianism in America*, DEMOCRACY FUND VOTER STUDY GRP. 7–10 (June 2020), <https://www.voterstudygroup.org/publication/democracy-maybe>.

58. See generally FRANCIS FUKUYAMA, *THE ORIGINS OF POLITICAL ORDER: FROM PREHUMAN TIMES TO THE FRENCH REVOLUTION* (2011) [hereinafter *THE ORIGINS OF POLITICAL ORDER*].

59. See generally FRANCIS FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE PRESENT DAY* (2014) [hereinafter *POLITICAL ORDER AND POLITICAL DECAY*].

60. *THE ORIGINS OF POLITICAL ORDER*, *supra* note 58, at 17; *POLITICAL ORDER AND POLITICAL DECAY*, *supra* note 59, at 23.

61. *THE ORIGINS OF POLITICAL ORDER*, *supra* note 58, at 17; *POLITICAL ORDER AND POLITICAL DECAY*, *supra* note 59, at 23.

Fukuyama, overcome by the world's first great civilization, Imperial China, which created a government structure that rewarded merit over birthright.⁶² China did so by way of institutions, such as a professional civil service, that prioritized competence over patrimonial mediocrity by way of entrance examinations and other means of incentivizing excellence.⁶³

Institutional sclerosis, according to Fukuyama, refers to the tendency of interest groups to, over time, effectively control state institutions and eventually undermine institutional renewal and overall well-being by using their power to veto or hinder needed change.⁶⁴ Since the Cold War's end, this is what has happened in the U.S. more than in other mature democracies.⁶⁵ For an example of the descent towards patrimonialism, compare the Kennedy Administration's "Best and Brightest" with the "Friends and Family" Trump Administration.⁶⁶ With respect to institutional sclerosis, contrast the U.S. Senate's relative bipartisanship in the confirmation of Presidential appointees to the executive branch and federal judiciary during much of the Cold War with the scorched earth partisanship of today.⁶⁷ Fukuyama's analysis of political order in liberal democracies rests on three pillars—political accountability; a strong, effective state; and the rule of law.⁶⁸ Accountability involves making rulers responsive to electorates.⁶⁹ This means not only free and fair multiparty elections, but, according to Fukuyama, institutions of accountability supplemented by a central government

62. THE ORIGINS OF POLITICAL ORDER, *supra* note 58, at 21.

63. *Id.*

64. POLITICAL ORDER AND POLITICAL DECAY, *supra* note 59, at 447–87.

65. *Id.* at 503–05.

66. *See, e.g.*, DAVID HALBERSTAM, THE BEST AND BRIGHTEST (Twentieth-Anniversary ed. 1992); Dana Milbank, Opinion, *Trump Isn't Hiring Enough Friends and Family*, WASH. POST (Feb. 27, 2018), https://www.washingtonpost.com/opinions/trump-isnt-hiring-enough-friends-and-family/2018/02/27/94b27788-1bfe-11e8-ae5a-16e60e4605f3_story.html.

67. Compare the 98-0 Senate vote in favor of then Judge Antonin Scalia in 1986 with the Senate's refusal to grant confirmation hearings to then-Judge Merrick Garland in 2016 and the highly partisan Senate votes that confirmed President Trump's three Supreme Court nominations.

68. THE ORIGINS OF POLITICAL ORDER, *supra* note 58, at 3–19.

69. *Id.*

that can get things done with rules and regulations that apply equally to everyone.⁷⁰

U.S. political development has gone into reverse because its government has become weaker, less efficient, and more corrupt.⁷¹ One cause is growing economic inequality and the geographic concentration of wealth, which has allowed elites to purchase immense political power and manipulate the system to further their own interests.⁷² Another cause is the permeability of American political institutions to interest groups, allowing an array of unrepresentative factions to exercise disproportionate influence and, in effect, control the government.⁷³ The result is a vicious cycle whereby the government is rendered incapable or unwilling to deal with national problems in a way that breeds a cynicism in the electorate. In turn, this leads to the state's being starved of resources and authority, which leads to even poorer performance.⁷⁴

Although liberal democracy is the best form of government, it is, absent continuous reform, susceptible to the patrimonial trap, institutional decay, and sclerosis.⁷⁵ This is the U.S. government's current predicament, which due to patrimonialism and institutional sclerosis, has failed to address a growing trend of socio-economic immobility that has undermined the quality of American democracy and the rule of law.⁷⁶ Because the U.S. has allowed its education systems to become

70. See Sheri Berman, *Global Warning*, N.Y. TIMES (Sept. 11, 2014), <https://www.nytimes.com/2014/09/14/books/review/francis-fukuyamas-political-order-and-political-decay.html>. See generally THE ORIGINS OF POLITICAL ORDER, *supra* note 58.

71. POLITICAL ORDER AND POLITICAL DECAY, *supra* note 59, at 478–87.

72. See *id.*; Berman, *supra* note 70.

73. See POLITICAL ORDER AND POLITICAL DECAY, *supra* note 59; Berman, *supra* note 70.

74. See POLITICAL ORDER AND POLITICAL DECAY, *supra* note 59; Berman, *supra* note 70.

75. See POLITICAL ORDER AND POLITICAL DECAY, *supra* note 59; Berman, *supra* note 70.

76. See Alexi Gugushvili, *Social Origins of Support for Democracy: A Study of Intergenerational Mobility*, 30 INT'L REV. SOCIO. 376 (2020); T. DeLene Beeland, *Is Social Mobility Essential to Democracy?*, KELLOGG INSIGHT (Apr. 5, 2018), <https://insight.kellogg.northwestern.edu/article/is-social-mobility-important-to-democracy>. This same problem manifests itself, albeit to a lesser degree, in other mature democracies, including France and the United Kingdom.

a socioeconomic stratifier, a level of cynicism in the electorate has undermined faith in the country's institutions, has furthered democratic retrogression, and has led to increased support for authoritarianism.⁷⁷

An unequal and stratifying education system is not the sole cause of incipient authoritarianism. My previous writings have argued for other policy changes to revitalize a country that, notwithstanding its superpower status, is characterized by numerous pathologies feeding the democratic retrogression problem. These include: a proposal to dramatically increase the size of the House of Representatives, in conjunction with a reform of the nation's districting system, from single member plurality to proportional representation; to increase government capacity; reduce administrative overreach; and minimize polarization by forever precluding gerrymandering and vote dilution.⁷⁸

I have also written that a potential judicial remedy to the problem is to resuscitate the Fourteenth Amendment's long dormant Privileges or Immunities Clause to provide all Americans with what are called "second generation" socio-economic rights consistent with a first-world democracy.⁷⁹ Additionally, I have advocated for a revitalized tax structure that eliminates the socioeconomically regressive and harmful payroll tax and replaces it with more progressive consumption taxes, in conjunction with triggers, to assure their political viability.⁸⁰ Most recently, I recommended an amendment to the Wills Act to allow for the probate of electronic documents and the exemption of smaller estates from the crushing effect of state intestacy laws, to protect poorer households from the wealth-draining consequences of collective ownership.⁸¹ If implemented, these recommendations will definitively improve American living standards and increase socioeconomic mobility, which would, over time, partially remedy the problem of illiberal

77. See Gugushvili, *supra* note 76; Beeland, *supra* note 76. This is especially true among middle income and wealthy households whose jobs are most susceptible to economic downsizing due to technology and global trade.

78. Mohamed A. Faizer, *Resurrecting Congress to Reduce Administrative Chaos*, 14 TENN. J.L. & POL'Y 19, 24 (2019).

79. Mohamed A. Faizer, *The Privileges or Immunities Clause: A Potential Cure for the Trump Phenomenon*, 121 PA. ST. L. REV. 61, 66 (2017).

80. Faizer, *supra* note 34, at 623.

81. Mohamed A. Faizer, *Bridging the Divide: A Proposal to Bring Testamentary Freedom to Low-Income and Racial Minority Communities*, 99 TEX. L. REV. (ONLINE EDITION) 20 (2020).

authoritarianism by combating its root causes, namely citizen apathy and distrust in government brought about by a zero-sum worldview.⁸² However, these recommendations do not go far enough.

To explain, many of the rich countries that have seen the growth of authoritarianism and opposition to liberal democracy use proportional representation and offer far more generous safety nets than offered by the U.S.⁸³ France, for example, which is lauded for its politically sophisticated electorate and cradle to grave safety net, has seen the racist and far-right National Rally's Presidential candidates, Jean-Marie Le Pen and Marine Le Pen, succeed to the second round Presidential run-off in both 2002 and 2017, respectively.⁸⁴ The United Kingdom, home of the National Health Service, voted by a referendum margin of 52% to 48%, to exit the European Union ("Brexit") and has since done so under the right wing populist Government of Prime Minister Boris Johnson.⁸⁵ Even Denmark, Norway, and Sweden, with their exceedingly high living standards, have seen the dramatic growth in popularity of the far-right political parties. This is based largely on opposition to in-migration from the developing world and socioeconomic immobility for much of the population.⁸⁶ The U.S., however, is an outlier in that its rate of socioeconomic inequality is dramatically higher and its framework for access to primary, secondary, and tertiary education is significantly more regressive.

82. See generally TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018).

83. These countries include Austria, Belgium, Denmark, Finland, Germany, Holland, Israel, Italy, Norway, Spain, Sweden, and Switzerland. See Phillip Inman, *Social Mobility in Richest Countries 'Has Stalled Since 1990s'*, THE GUARDIAN (June 15, 2018, 12:33 PM), <https://www.theguardian.com/society/2018/jun/15/social-mobility-in-richest-countries-has-stalled-since-1990s>; ORGANISATION FOR ECON. COOP. & DEV., *A BROKEN SOCIAL ELEVATOR? HOW TO PROMOTE SOCIAL MOBILITY: OVERVIEW AND MAIN FINDINGS* (2018), <https://www.oecd.org/social/soc/Social-mobility-2018-Overview-MainFindings.pdf>.

84. National Rally is the new name for the far-right political party previously named the National Front.

85. *U.K. Leaves E.U., Embarking on an Uncertain Future*, N.Y. TIMES (Jan. 31, 2020), <https://www.nytimes.com/2020/01/31/world/europe/brexit-britain-eu.html>.

86. Jochen Bittner, Opinion, *How the Far Right Conquered Sweden*, N.Y. TIMES (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/opinion/how-the-far-right-conquered-sweden.html>.

The great British liberal philosopher Isaiah Berlin has written how an important aspect of liberalism is moderation and a refusal to insist on a monographic truth to stymie debate.⁸⁷ This, in turn, furthers democratic responsiveness and the rule of law by encouraging citizens and elites to value the deliberative process of democracy and the institutional legitimacy of the election result more than the election outcome itself. This, however, requires a generous disposition in the citizenry that is contingent upon socioeconomic mobility and improving living standards. Lon Fuller defined a democracy as a society with three institutional predicates that are necessary for a reasonable level of democratic responsiveness and unbiased elections.⁸⁸ The three institutional predicates are namely: “(1) periodic free-and-fair elections in which a losing side cedes power; (2) the liberal rights to speech and association that are closely linked to democracy in practice; and (3) the stability, predictability, and integrity of law and legal institutions,” also known as the rule of law, which, according to Fuller, is necessary to allow for democratic engagement by citizens without fear or coercion.⁸⁹

By this measure, the U.S. undoubtedly remains a constitutional republic that retains the features of a liberal democracy. This does not mean that the quality of American democracy has either improved or remained steady. Rather, the U.S. is suffering from democratic retrogression. Scholars Aziz Huq and Tom Ginsburg define this as a process of incremental and substantial decay in Fuller’s three basic predicates of democracy brought about by five potential specific mechanisms, namely: “(i) constitutional amendment; (ii) the elimination of institutional checks; (iii) the centralization and politicization of executive power; (iv) the contraction or distortion of a shared public sphere; and (v) the elimination of political competition.”⁹⁰

Although the U.S. has not seen a federal constitutional amendment since the relatively unimportant Twenty-seventh Amendment, the federal courts have, to paraphrase Justice Kagan, effectively weaponized the First Amendment to undermine legislative attempts to insure

87. BERLIN, *supra* note 6.

88. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 *UCLA L. REV.* 78, 87 (2018).

89. *Id.*

90. *Id.* at 118.

free and fair elections and increase democratic responsiveness.⁹¹ Political polarization has facilitated the undermining of institutional checks on executive branch abuses of power,⁹² and profit-driven partisan media has distorted the public sphere to the point where political partisans increasingly rely on ideologically monographic dogma over empiricism when analyzing public policy. Perhaps most importantly, the country's failure to update its democratic institutions has facilitated the undermining of true democratic competition consistent with public opinion.⁹³

In short, although the U.S. remains the world's most important rich-world democracy, it has, since the Cold War's end, suffered from what Huq and Ginsburg would describe as democratic retrogression.⁹⁴ Middle income voters, who believe the economy is "rigged" against them, increasingly support authoritarian candidates for office, who ostensibly prioritize "real citizens" over the rule of law and the rights of historically marginalized groups.⁹⁵ The source of this problem is a stratified and rigidified class structure that is worsened by an institutionally sclerotic and outdated system of primary, secondary, and tertiary education.

91. Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html>. The Twenty-seventh Amendment, which was ratified in 1992, disallowed varying the compensation of senators and representatives before the next election of representatives. See generally *Shelby Cnty v. Holder*, 570 U.S. 529 (2013) (invalidating the VRAs' preclearance formula); *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (concluding that partisan gerrymanders that inordinately harm progressives are nonjusticiable); *Citizens United v. FEC*, 558 U.S. 310 (2010) (concluding that federal election campaign laws aimed at restricting corporate spending in elections violates the First Amendment's Speech Clause).

92. These include President Trump's abuse of power, Congress's failure to take up the Mueller Report, the Senate's refusal to call witnesses during the Trump impeachment trial, and the overall parlous reaction to President Trump's bungled response to the COVID-19 pandemic, and his refusal to concede the 2020 Presidential election to his opponent.

93. For example, partisan gerrymandering has facilitated the election of incumbents and undermined democratic responsiveness.

94. See generally Huq & Ginsburg, *supra* note 88.

95. *Id.*

V. U.S. EDUCATION—A PRIMER ON ADVANCEMENTS AND SETBACKS

The U.S. was a global pioneer in public education and provided universal primary and secondary education and near universal literacy for the bulk of its population when schooling was available only to an elite in Europe and other parts of the world.⁹⁶ The U.S. achieved this under a system of local control such that education outcomes tended to vary pronouncedly based on region and race.⁹⁷ The U.S. education advantage was also in tertiary or higher education, as a far higher percentage of Americans were awarded tertiary degrees through the Twentieth Century as compared to Australians, Canadians, Europeans, or Japanese.⁹⁸

The U.S.'s lead in primary, secondary, and tertiary education set it apart from other rich countries for much of the Twentieth Century, and it enabled the U.S. middle class to have enviable living conditions by international standards, facilitated by an atypically high rate of socioeconomic mobility.⁹⁹ This, in turn, corresponded with U.S. leadership in the international system, which featured a bipartisan consensus on a broad range of issues including national security; the provision of civil and political rights to racial minorities; the development of an economic safety net for the poor and seniors; and, all things considered, a welcoming approach to international migrants.¹⁰⁰

Public education has a long history in the United States dating as far back as 1648.¹⁰¹ Education in Colonial America varied greatly by region, based on perceived need and political culture, though, as a

96. See Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 777 (2018); see also 1 JAMES A. RAPP, EDUCATION LAW § 5.01 (2021).

97. *High Cost*, *supra* note 35, at 288–89.

98. See generally PIKETTY, *supra* note 5, at 415–648.

99. *Id.*

100. See, for example, the bipartisan enactment of the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Social Security Amendments Act of 1968, the Immigration and Nationality Act of 1965. See also TODD S. PURDUM, AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES, AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964 (2014); WALTER ISAACSON & EVAN THOMAS, THE WISE MEN: SIX FRIENDS AND THE WORLD THEY MADE (paperback ed. 2013).

101. See, e.g., Black, *supra* note 96, at 777; see also Eugenia Frodge Toma, *Public Funding and Private Schooling Across Countries*, 39 J.L. & ECON. 121, 130 (1996).

whole, the colonists were a relatively literate and learned population who relied inordinately on their families and churches for education.¹⁰² The most prominent early American to put forward a comprehensive proposal for public education was Thomas Jefferson, who, in 1779, presented the Virginia legislature with a Bill for the More General Diffusion of Knowledge, which proposed a three-tiered education system, arguing that education was necessary to safeguard democracy.¹⁰³

In the northern states, public education took hold in the late 18th century, developed substantially on the eve of the Civil War, and was largely funded from various land grants.¹⁰⁴ After these funds proved insufficient, various revenue enhancing measures, including lotteries, local license fees and occupational taxes funded public education.¹⁰⁵ Most of the taxes were indirect and designed to avoid the earlier resistance to fund public schools via direct taxes.¹⁰⁶ By 1840, the free common school providing primary schooling was paradigmatic in the American Union States.¹⁰⁷ In the states of the former Confederacy, it was only “sporadically available” through the efforts of public, private, and religious institutions.¹⁰⁸ Georgia, for example, provided in its 1777 Constitution that “schools shall be erected in each county and supported at the general expense of the State, as the legislature shall hereafter point out and direct.”¹⁰⁹ Notwithstanding such language, the discrepancies in education attainment between North and South were stark. For example, among Whites, the illiteracy rate was four times higher in the South than in the North, where universal primary

102. Ian Bartrum, *The Political Origins of Secular Public Education: The New York School Controversy, 1840–1842*, 3 N.Y.U. J.L. & LIBERTY 267, 271 (2008); see also 1 RAPP, *supra* note 96, at § 5.01.

103. Bartrum, *supra* note 102, at 273.

104. Black, *supra* note 96, at 777.

105. *Id.*; see also 1 RAPP, *supra* note 96, at § 5.01.

106. See generally Black, *supra* note 96.

107. *Id.*

108. *Id.* at 777.

109. James E. Flynn III & Jefferson A. Holt, *Elementary and Secondary Education: Revise Provisions Relating to Payment of Fees for Advances Placement Tests; Revise Provisions Regarding Expenditure Controls for the 2003–2004 School Year; Revise Provisions Regarding Maximum Class Size for the 2003–2005 School Year*, 29 GA. ST. UNIV. L. REV. 1, 4 (2012) (quoting GA. CONST. of 1777 art. LIV).

education had been achieved by the 1850s, such that the Union states had become the global leader in primary school education.¹¹⁰

Indeed, before the Civil War, mass education was seen by many in the South as a threat to the social hierarchy. Many in the North, especially radical Republicans and Abolitionists in Congress, saw the lack of universal primary education in the South as a key cause of the Confederacy and the resulting war to preserve the Union because it tilted the South's political culture in favor of the Slavocracy.¹¹¹ This explains why ensuring access to education in the South was a key component of Reconstruction and prerequisite for the former Confederate states' readmission to the Union because public education was seen as a necessary component for readmission under the U.S. Constitution, Article IV's requirement of a "Republican Form of Government."¹¹²

Based on this implied requirement of public education, Georgia's 1868 Constitution, for example, provided that "the general assembly . . . shall provide a thorough system of general education, to be forever free for all the children of the State, the expense of which shall be provided for by taxation or otherwise."¹¹³ Two years later, in 1870, the Georgia General Assembly enacted comprehensive education legislation that, among other things, established the State Board of Education; created school districts in each Georgia county to manage local schools; and allowed for state creation of separately authorized schools aside from those managed by the county school districts.¹¹⁴ Although public education was implicitly required for readmission of the first ten formerly Confederate states, explicit education requirements were imposed on the last three—Mississippi, Texas, and Virginia.¹¹⁵ Further, explicit right to education clauses were required of the four new entrants to the Union in the 1860s: Kansas, West Virginia, Nevada, and Nebraska.¹¹⁶

The U.S., however, has suffered the historical legacy of racially segregated or imbalanced public schooling, which was universally

110. Black, *supra* note 96, at 777; *see also* PIKETTY, *supra* note 5.

111. Black, *supra* note 96, at 777; *see also* PIKETTY, *supra* note 5.

112. Black, *supra* note 96, at 782–83; *see also* U.S. CONST. art. IV.

113. Flynn III & Holt, *supra* note 109, at 4 (citing *Gwinnett Cnty. Sch. Dist. v. Cox*, 710 S.E.2d 773, 775 (2011) (quoting from GA. CONST. of 1868 art. VI, § 1)).

114. *Id.* at 4–5.

115. Black, *supra* note 96, at 790.

116. *Id.*

mandated as a matter of either state law or local custom.¹¹⁷ Based on the efforts of the great abolitionist, Charles Sumner, Massachusetts became the first state to outlaw segregated public schooling in 1855.¹¹⁸ However, because of a pronounced racial hierarchy, furthered by a myth that separate could ostensibly be equal, segregated public schooling was legally mandated in much of the nation until *Brown v. Board of Education* concluded it violated the Fourteenth Amendment's Equal Protection Clause and that desegregation, under the aegis of the federal district courts, should proceed with "all deliberate speed."¹¹⁹ In his unanimous opinion, Chief Justice Warren wrote that "education is perhaps the most important function of state and local government" and that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."¹²⁰ This explained why the Court concluded public school racial segregation, that resulted in unequal education provisions and outcomes, violated the Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment.¹²¹

Although progress was made, it was very slow and tenuous, based on several factors, including recalcitrant White opposition and continued prioritization of local control. In the end, the Court's invitation of delayed compliance in *Brown II*; White flight to racially homogeneous suburbs; the failure to enunciate the required nature and scope of desegregation remedies; and the federal courts' "rush to return [school] districts to local control" worked in conjunction to undermine integration efforts.¹²² Robinson writes that the failure to adequately

117. See Kimberly Jenkins Robinson, *Introduction: The Essential Questions Regarding a Federal Right to Education*, in *A FEDERAL RIGHT TO EDUCATION* 9 (Kimberly Jenkins Robinson ed., 2019).

118. *Id.*

119. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) [hereinafter *Brown I*]; *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) [hereinafter *Brown II*] (concluding, in a unanimous decision, that segregated public schooling deprives black children the Fourteenth Amendment's guarantee of Equal Protection of the Laws). In *Brown II*, the Court concluded that desegregation plans were to be implemented under federal court supervision and the courts were to ensure desegregation proceeded with "all deliberate speed."

120. *Brown I*, 347 U.S. at 493.

121. *Id.* at 495.

122. Robinson, *supra* note 117, at 9.

integrate public schools precluded a more meaningful reduction in the racial opportunity gap for children.¹²³

Based on a change in Presidential administration after the 1968 election and the resulting replacement of the Warren Court with that of Chief Justice Burger, an eventual gutting of desegregation remedies proceeded. This is not to say that no progress was made. Indeed, from 1968 to 1980, the proportion of black children attending majority-minority public schools fell from 77% to 63% nationwide and from 81% to 57% in the American South.¹²⁴ When the integration of public schools reached its peak, in 1988, high school graduation rates and standardized test scores for Black students improved significantly, and the achievement gap between White and Black students was at its lowest since the government began collecting data on the matter.¹²⁵ This, in turn “led to higher income[s], more years of education and better health outcomes for blacks” without harming learning outcomes for White children.¹²⁶ Indeed, when Black children routinely attend low-poverty majority White schools, their standardized math test scores generally improve by twenty points.¹²⁷

The gutting of racial integration was adumbrated by the Supreme Court’s decision in *Milliken v. Bradley*,¹²⁸ which stemmed from a lawsuit brought by plaintiffs, including the NAACP, who sought to end pronounced racial segregation of the metropolitan Detroit public school system that, for historical and socioeconomic reasons, was composed of almost entirety poor and racial minority children while the adjacent suburban school districts were disproportionately comprised

123. *Id.*

124. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 805 (2007) (Breyer, J., dissenting).

125. Elise C. Boddie & Dennis D. Parker, Opinion, *Linda Brown and the Unfinished Work of School Integration*, N.Y. TIMES (Mar. 30, 2018), <https://www.nytimes.com/2018/03/30/opinion/linda-brown-school-integration.html>.

126. *Id.*

127. See Emma Garcia, *Schools are Still Segregated, and Black Children are Paying a Price*, ECON. POL’Y INST. (Feb. 12, 2020), <https://www.epi.org/publication/schools-are-still-segregated-and-black-children-are-paying-a-price/> (finding that math test scores for black students in high poverty schools average 255 while test scores for black children in low poverty, majority white schools, is 275).

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

of White children from higher wealth households.¹²⁹ This racial segregation was historically brought about by the Detroit Board of Education's creation of "optional attendance zones," and plaintiffs sought their replacement with an enlarged and racially integrated unitary school district that would include fifty-three wealthier suburban school districts in a metropolitan area consisting of eighty-five school districts.¹³⁰

In a dramatic narrowing of *Brown II*, Chief Justice Burger concluded that an inter-district remedy would improperly create a "vast new super school district" that would undermine local control.¹³¹ It would also improperly make the supervising District Court a super-legislature without evidence that a constitutional violation by the adjacent metropolitan district had resulted in segregation within the City of Detroit School District.¹³² The result of the decision, as noted in Justice White's dissent, was to insulate the state from liability for intentional discrimination because a remedy "would cause what the Court considers to be undue administrative inconvenience to the State."¹³³ *Milliken* precluded effective judicial enforcement of racial integration in schooling by disallowing inter-district remedies under a framework of racially imbalanced district lines.

The previous year, the Court, in *San Antonio Independent School District v. Rodriguez*,¹³⁴ rejected a challenge brought against Texas's unequal funding of public schools based on local assessments, which favored wealthy and disproportionately Anglo-White schoolchildren compared to children in disproportionately Mexican-American neighborhoods.¹³⁵ The Court's refusal to consider socio-economic status as a basis for heightened judicial scrutiny under the Fourteenth Amendment's Equal Protection Clause and instead prioritize local control over equality in the allocation of public school resources, marked

129. Kalyn Belsha & Koby Levin, *45 Years Later, This Case is Still Shaping School Segregation in Detroit—and America*, CHALKBEAT (July 25, 2019, 11:50 AM), <https://www.chalkbeat.org/2019/7/25/21121021/45-years-later-this-case-is-still-shaping-school-segregation-in-detroit-and-america>.

130. *Milliken*, 418 U.S. 725, 733.

131. *Id.* at 742–44.

132. *Id.*

133. *Id.* at 763.

134. 411 U.S. 1 (1973).

135. *Id.* at 38–40.

a tragic switch point in American history facilitated by today's highly regressive public school funding framework, implemented under the guise of local control.¹³⁶

Milliken and *Rodriguez* lamentably anticipate the current problem of socioeconomic stagnation and polarization because the greater income and wealth inequality that followed the Reagan tax cuts dovetailed with local control to undermine the ability of public schools to be socioeconomic escalators. They have instead become stratifiers that solidify achievement gaps based on household income, neighborhood wealth, and race.¹³⁷ The evidence is striking. The process of gradual racial integration in public schooling, which began after *Brown*, reversed itself such that by the year 2000, the percentage of African American children in majority-minority schools increased to 72% nationwide and 69% in the South.¹³⁸ As of 2002, almost 2.4 million Black or Latino students—5% of all public school enrollees—attended schools where the proportion of White children was fewer than 1%.¹³⁹ In 2014, 44.1% of Black elementary and secondary school students attended schools where a majority of their peers were also Black, and 56.7% of Hispanic elementary and secondary school students went to schools where at least half the students were also Hispanic.¹⁴⁰ At least

136. The conservative bias of the Court is most likely because Republican presidents from the time of Nixon have appointed twelve justices to the Court, whereas Democratic presidents have appointed only four. This is partly due to a rightward shift in the nation's political culture, the fact that President Carter was never given an opportunity to appoint a Supreme Court Justice, and due to increased political polarization in the nominating process. See Adam Liptak, *The Polarized Court*, N.Y. TIMES: THEUPSHOT (May 10, 2014), <http://www.nytimes.com/2014/05/11/upshot/the-polarized-court.html>; see also *Supreme Court Nominations 1789–Present*, U.S. SENATE, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited Dec. 31, 2021).

137. See Dick Startz, *The Achievement Gap in Education: Racial Segregation Versus Segregation by Poverty*, BROOKINGS (Jan. 20, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/01/20/the-achievement-gap-in-education-racial-segregation-versus-segregation-by-poverty/> (theorizing about what Dr. Martin Luther King would say about the achievement gap in education).

138. *Id.*

139. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 805 (2007) (Breyer, J., dissenting).

140. A.W. Geiger, *Many Minority Students Go to Schools Where at Least Half of Their Peers Are Their Race or Ethnicity*, PEW RSCH. CTR. (Oct. 25, 2017),

one in six Black children attend a school whose student body is between 99% to 100% minority, and Black children are more than twice as likely as Whites to enroll in high poverty schools.¹⁴¹ Today more than half of the nation's children attend schools where over 75% of the students are either White or non-White.¹⁴² This regressivity remains in place, despite clear evidence that for similar learning outcomes to be achieved, children in high poverty districts need more per pupil funding than their counterparts in high-wealth districts.¹⁴³ Low-wealth students are provided weaker curricula and facilities, less qualified and less experienced teachers, and inferior instructional materials, technology, and support.¹⁴⁴

The U.S.'s local control framework applies to more than 14,000 school districts containing more than 98,000 schools, each receiving a mixture of federal, state, and local funding.¹⁴⁵ During the 1920s, local property taxes typically raised 83% of revenues for public education, and as late as 1969, local assessments accounted for 55.8% of public school funding.¹⁴⁶ The historical legacy of this funding framework is compounded by the fact that there are staggering per pupil funding discrepancies between states, such that New York spends more than three

<https://www.pewresearch.org/fact-tank/2017/10/25/many-minority-students-go-to-schools-where-at-least-half-of-their-peers-are-their-race-or-ethnicity/>.

141. *Id.*; Emma Garcia, *Schools Are Still Segregated, and Black Children Are Paying a Price*, ECON. POL'Y INST. (Feb. 12, 2020), <https://www.epi.org/publication/schools-are-still-segregated-and-black-children-are-paying-a-price/> (high poverty schools can be defined as schools where between 51% and 100% of students are eligible for free or reduced-price lunch).

142. Keith Meatto, *Still Separate, Still Unequal: Teaching about School Segregation and Educational Inequality*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/learning/lesson-plans/still-separate-still-unequal-teaching-about-school-segregation-and-educational-inequality.html>.

143. Robinson, *supra* note 117, at 9, 12–13 (only 11 states provide sufficient equalization funding to reverse this funding gap).

144. *Id.* at 5.

145. Abigail Margaret Frisch, Note, *The Class is Greener on the Other Side: How Private Donations to Public Schools Play into Fair Funding*, 67 DUKE L. J. 427, 428 (2017).

146. *Id.* at 436 (citing data from *Table 152: Revenues for Public Elementary and Secondary Schools, by Source of Funds*, NAT'L CTR FOR EDUC. STAT. (2005), https://nces.ed.gov/programs/digest/d05/tables/dt05_152.asp).

times as much per pupil as does Idaho and, more relevant for this paper, great spending discrepancies persist within each state.¹⁴⁷

The Supreme Court's decision to prioritize local control over integrated and progressively funded schools is paradigmatic of what Fukuyama would call institutional sclerosis, or the failure of the country's institutions, in this case public schools, to be updated in view of manifest need. It is also an example of what he would call the patrimonial trap in that vested interests within the U.S. education system that benefit from the system as currently structured, have effectively gutted reform attempts. The most obvious manifestation is the priority placed on palliating local constituencies, including teachers and parents over aggregate learning outcomes.¹⁴⁸ Focus on local control is to the detriment of racial minorities and the poor between and within school districts because both groups tend to lack political power at the local level.¹⁴⁹ This means that more than other mature democracies, American education outcomes tend to regressively correlate with household income and wealth.¹⁵⁰

This regressive approach to school funding was firmly rejected by other mature democracies, which were forced to modernize their school systems to facilitate economic recovery based on increased worker productivity after the economic catastrophe of World War II.¹⁵¹ Indeed, having modernized their education systems, rich European and Asian countries began to overtake the United States in terms of learning

147. Lauren A. Webb, Note, *Education Opportunities for All: Reducing Intra-district Funding Disparities*, 92 N.Y.U. L. REV. 2169, 2177 (2017); see also Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CAL. L. REV. 1309 (2017) [hereinafter *Abandoning the Federal Role in Education*].

148. See generally JOHN MERROW, *ADDICTED TO REFORM: A 12-STEP PROGRAM TO RESCUE PUBLIC EDUCATION* (2017).

149. See Robinson, *supra* note 117, at 4 (demonstrating that majority White school districts receive a total of \$23 billion more in aggregate funding than majority non-White school districts despite serving the same number of children nationwide).

150. *Id.*; see also Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods: A Constitutional Insult*, 7 RACE & SOC. PROBS. 21 (2014), <https://doi.org/10.1007/s12552-014-9134-1>; Anna K. Chmielewski, *The Global Increase in the Socioeconomic Achievement Gap, 1964 to 2015*, 84 AM. SOCIO. REV. 517 (2019), <https://journals.sagepub.com/doi/pdf/10.1177/0003122419847165>.

151. See PIKETTY, *supra* note 5, at 32–33.

outcomes by the 1980s.¹⁵² Since then, calcification of U.S. education has resulted in lower rates of socioeconomic mobility in the U.S., brought about by a myriad of factors including lower worker productivity growth, caused by education inequality, as compared to other rich countries.¹⁵³ A post-mortem on this state of affairs would blame both the unanticipated consequences of the Reagan-era tax cuts as well as the U.S.'s inordinate reliance on local assessments for education funding, in conjunction with misplaced and insufficient state and federal assistance for high poverty schools.¹⁵⁴ By contrast, in other mature democracies, per pupil funding is determined at the national or state/provincial level and effectuated on a progressive basis such that per pupil funding increases for children in higher poverty areas and regions to protect against socioeconomic hardening.¹⁵⁵

The U.S.'s inequality problem is compounded by the fact that many of the wealthier, majority White school districts, tend to be smaller and drawn around higher assessed valuation neighborhoods that, in effect, benefit the few to the detriment of the many.¹⁵⁶ State funding programs, meant to equalize statewide funding discrepancies, have, especially in recent years, been underfunded due to state budget imperatives.¹⁵⁷

Robinson writes that, even where litigation has led courts to demand more in terms of state funding for education, “the changes too often tinker at the margins of school funding while leaving the expectations of middle-class suburbanites untouched.”¹⁵⁸ This is because local assessments remain the primary means of funding public schools,

152. *Id.*

153. *See Labour Productivity Growth in the Total Economy*, ORGANISATION FOR ECON. COOP. & DEV., <https://stats.oecd.org/Index.aspx?DataSetCode=PDYGTH> (last visited Dec. 31, 2021).

154. Robinson, *supra* note 117; *see also* PIKETTY, *supra* note 5.

155. *See* Chmielewski, *supra* note 150, at 537–40.

156. Sarah Mervash, *How Much Wealthier Are White School Districts Than Nonwhite Ones? \$23 Billion, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/education/school-districts-funding-white-minorities.html>. In 2016, majority-minority districts received \$23 billion less in funding nationwide than majority white districts. *Id.* On average, for every enrolled student, majority nonwhite school districts receive approximately \$2,200 less than a majority White school district. *Id.*

157. *Id.*

158. Robinson, *supra* note 117, at 13.

and the courts, which have abided by the local control framework, refuse to redraw school district lines to effectively redress wealth and resource inequality.¹⁵⁹ The result is extreme inequality. “Twenty-three states spend[d] more on affluent districts than high poverty districts” with states such as Pennsylvania spending one-third more state and local government funds on affluent than high-poverty districts.¹⁶⁰ This discrepancy has worsened based on a political failure to increase overall government spending on education and the resulting increased reliance on Parent Teacher Association fundraising to cover program costs.¹⁶¹ This has the unintended consequence of exacerbating funding inequalities between and within school districts.¹⁶²

These funding differences result in poorer, typically non-White or rural children using older textbooks, and offered less access to classroom technology, and extra-curriculars.¹⁶³ As Strand has written, regressive provision of public education invites private augmentation in the form of enrichment expenditures and other forms of parental investment that worsens inequality.¹⁶⁴ The imbalance, which has grown since the Reagan tax cuts, will worsen over time due to growing economic inequality.¹⁶⁵ The stark reality of nationwide socio-economic

159. *Id.*

160. Catherine Brown, Scott Sargrad, & Meg Benner, *Hidden Money*, CTR. FOR AM. PROGRESS (Apr. 8, 2017, 12:46 PM), <https://www.americanprogress.org/issues/education-k-12/reports/2017/04/08/428484/hidden-money>.

161. See PIKETTY, *supra* note 5 (noting that government spending on education in rich countries including the U.S. has not increased as a percentage of national income, notwithstanding greater demand than in the past).

162. Mervash, *supra* note 156; Suzanne Cope, *The Power of a Wealthy PTA*, ATLANTIC (Nov. 5, 2019), <https://www.theatlantic.com/education/archive/2019/11/pta-fundraising-schools/601435>; Dylan Matthews & Byrd Pinkerton, *How Can it Be Wrong to Give to Your Kid's School?*, VOX (Jul. 10, 2019, 9:58 AM), <https://www.vox.com/future-perfect/2019/7/10/18629811/parent-teacher-association-rich-poor-schools>.

163. Mervash, *supra* note 156.

164. Palma Joy Strand, *Education-as-Inheritance Crowds out Education-as-Opportunity*, 59 ST. LOUIS L.J. 283, 292–95 (2015) (noting that wealthy parents spend more time with their children on activities such as homework and spend sizable amounts of money on enrichment expenditures to facilitate the learning and advancement of their children).

165. See, e.g., Thomas W. Mitchell, *Growing Inequality and Racial Economic Gaps*, 56 HOW. L.J. 849 (2013); Ross Wiener, *Opportunity Gaps: The Injustice Underneath Achievement Gaps in Our Public Schools*, 85 N.C. L. REV. 1315 (2007).

polarization ushered in by the Reagan era also stratified educational discrepancies within the majority-White community such that White children from lower assessed valuation communities are offered far worse learning opportunities than White children from first tier suburban public schools.¹⁶⁶

Strand writes that the country's incomplete system of pre-schools, its unequal provision of K-12 schools, dramatic differentials in parental enrichment expenditures and support, the uneven availability of college prep, and unequal financial access to college results in marked education discrepancies based on wealth.¹⁶⁷ For example, while poor children receive lower-quality, less extensive, and predominantly public education, wealthy children receive comprehensive, higher-quality, more extensive, and mixed public and private education.¹⁶⁸

U.S. schools are no longer a vehicle for economic opportunity and socioeconomic mobility. Rather, they operate to rigidify the country's class system and undermine our democratic ethos. Much of this is attributable to the cult of local control on education and the federal government's refusal to take a more active role in the funding of and allocation of resources in public schooling. A closer look at the federal government's role in primary, secondary, and tertiary education provides insight into how its current role can be modified under the Spending Clause to resuscitate education as a socioeconomic escalator.

VI. THE FEDERAL GOVERNMENT'S ROLE IN K-12 PUBLIC EDUCATION

School district funding is typically determined through a combination of federal and state funding, as well as local real estate assessments.¹⁶⁹ Federal funds account for 9% of aggregate public school

166. See e.g., John Dayton, *Rural Children, Rural Schools and Public School Funding Litigation: A Real Problem in Search of a Real Solution*, 82 NEB. L. REV. 99 (2003); see also *Abandoning the Federal Role in Education*, *supra* note 147, at 1320. In other words, the funding and education outcome discrepancy between public schools in wealthy communities and disproportionately white rural and exurban communities has also grown due to the growth of income and wealth inequality.

167. See Strand, *supra* note 164.

168. *Id.* at 296.

169. Toma, *supra* note 101, at 130; see also BRUCE D. BAKER, DANIELLE FARRIE, & DAVID SCIARRA, *IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD 2* (7th ed. 2018),

funding, with states and local sources accounting for an average of 46% and 45%, respectively.¹⁷⁰ This makes the federal government a relatively minor player in K-12 education and means that unless federal and state funds are spent in a pronouncedly progressive manner, higher assessed valuation neighborhoods and districts are able to raise and spend more funds on schools than their lower-wealth counterparts.¹⁷¹ Some states have sought to remediate funding discrepancies by using extra state funding or equalization to further fund districts with high concentrations of low-wealth students.¹⁷² The majority of states have “flat” or regressive funding patterns that ignore the needs of high poverty school districts.¹⁷³ As of 2015, only eleven states had progressive funding schemes, such that the vast majority of American schoolchildren attend schools that reinforce rather than remediate socioeconomic inequality.¹⁷⁴

These discrepancies are important because greater state funding typically increases staffing, improves facilities and, importantly, facilitates the recruitment and retention of qualified teachers, which best facilitates education outcomes because low student to teacher ratios and high teacher retention rates are most consequential in economically distressed schools.¹⁷⁵ Additionally, although the correlation is not as strong as some conjecture, higher per pupil funding corresponds with increased high school graduation rates, higher test scores, higher earnings, and lower poverty rates in adulthood.¹⁷⁶ This is because higher per pupil funding facilitates the recruitment and retention of the best teachers and the provision of better facilities and learning environments, which, in turn, leads to higher education outcomes.¹⁷⁷ There is

https://edlawcenter.org/assets/files/pdfs/publications/Is_School_Funding_Fair_7th_Edit.pdf.

170. BAKER, FARRIE, & SCIARRA, *supra* note 169, at 2.

171. *See* Webb, *supra* note 149, at 2177 (describing the discrepancy in funding at the state level); *see also* BAKER, FARRIE, & SCIARRA, *supra* note 171.

172. Webb, *supra* note 147, at 2177–78.

173. BAKER, FARRIE, & SCIARRA, *supra* note 169.

174. Webb, *supra* note 147, at 2178.

175. BAKER, FARRIE, & SCIARRA, *supra* note 169.

176. *Id.*

177. *See* Joy Dodge, Note, *Redrawing School District Lines: Reducing the Link Between Educational Inequality and Economic Inequality*, 26 GEO. J. ON POVERTY L. & POL’Y 165, 173–74 (2018).

otherwise a strong link between teacher quality, student achievement, and school district wealth because teachers are drawn to work in districts that typically provide not only higher salaries, but the best teaching environment for themselves and their students, which typically means higher wealth districts.¹⁷⁸

The federal government's role in education funding commenced during the Great Society with the Elementary and Secondary Education Act of 1965 (ESEA), which, using the Spending Clause, funded supplemental services for economically disadvantaged children.¹⁷⁹ The ESEA was part of President Johnson's War on Poverty and his Administration's effort to make good on *Brown v. Board of Education's* desegregation mandate.¹⁸⁰ It enabled the U.S. Department of Education to disburse funds to schools and school districts with a high percentage of students from low-income families and sought to close the skills gap in reading, writing, and mathematics.¹⁸¹ The ESEA Amendments of 1969 were signed into law by President Nixon and included Title II funding for programs for refugee children and children residing in low-rent public housing, Title VI funding for education of children with disabilities, and Title VII funding that expanded Vocational Education.¹⁸² In 1981, President Reagan, who won the Presidency by scapegoating the federal government for the country's ills, signed the Education Consolidation and Improvement Act to reduce federal control over ESEA Title I funds and largely replace federal supervision with a block grant framework that delivered money directly to the states with minimal conditions imposed.¹⁸³ This furthered a funding discrepancy

178. *Id.* at 177–78.; see also *Abandoning the Federal Role in Education*, *supra* note 147.

179. *High Cost*, *supra* note 35, at 304.

180. *Abandoning the Federal Role in Education*, *supra* note 147, at 1317 (finding that by accepting federal education funds, states and districts also agreed to comply with Title VI of the Civil Rights Act of 1964's antidiscrimination mandate and administrative enforcement scheme).

181. *Id.* at 1317–19; Catherine A. Paul, *Elementary and Secondary Education Act of 1965*, VA. COMMONWEALTH UNIV., <https://socialwelfare.library.vcu.edu/programs/education/elementary-and-secondary-education-act-of-1965/> (last updated Apr. 29, 2018); *Every Student Succeeds Act (ESSA)*, U.S. DEP'T OF EDUC., <https://www.ed.gov/essa?src=rn> (last visited Jan. 2, 2022).

182. Paul, *supra* note 181.

183. *Id.*; *Abandoning the Federal Role in Education*, *supra* note 147, at 1321–22.

framework, thereby allowing the gap between disadvantaged and privileged schools to expand.¹⁸⁴ The 1993 Assessment of Title I led to passage of the Improving America's Schools Act of 1994 (IASA), which sought to coordinate state, federal, and local efforts to improve education outcomes by, among other things, granting more local control and leeway over federal funds.¹⁸⁵

The ESEA's 2002 reauthorization, known as the No Child Left Behind Act (NCLB), required greater accountability from schools using annual standardized tests that measured student achievement as compared to the Title I baseline.¹⁸⁶ Under NCLB, schools were held accountable for failure to meet Adequate Yearly Progress targets (AYP), requiring students' standardized test scores to improve, as compared to the previous year's class, to avoid punitive measures being taken against school budgets.¹⁸⁷ Schools were required to plan for restructuring if they failed to make AYP for three years after being identified for improvement.¹⁸⁸ NCLB also required teachers, if hired with Title I funds, to be "highly qualified," and required provision of "one high, challenging standard," assessment, as measured by the state, for all students statewide.¹⁸⁹ The goal was to ensure that students received high-quality curricula and learning opportunities in a manner consistent with local educational control.¹⁹⁰

NCLB required states to ensure that schools met certain benchmarks and required that all students achieve proficiency in language

184. *Abandoning the Federal Role in Education*, *supra* note 147, at 1322.

185. Paul, *supra* note 181.

186. *Id.*; see also Robert L. Linn, Eva L. Baker, & Damian W. Betebenner, *Accountability Systems: Implications of Requirements of the No Child Left behind Act of 2001*, 31 EDUC. RESEARCHER 3, 3 (2002), https://www.jstor.org/stable/3594432?seq=1#metadata_info_tab_contents.

187. Paul, *supra* note 181. The AYP goal is to have all students reaching proficient levels in reading and math as measured by performance on state tests. See Educ. Week Staff, *Adequate Yearly Progress*, EDUC. WEEK (Sept. 10, 2004), <https://www.edweek.org/policy-politics/adequate-yearly-progress/2004/09>. Progress on those standards must be tested yearly in grades 3 through 8 and in one grade in high school. *Id.* The results are then compared to prior years and, based on state-determined AYP standards, used to determine if the school has made adequate progress towards the proficiency goal. *Id.*

188. Paul, *supra* note 181.

189. *Id.*; Linn, Baker, & Betebenner, *supra* note 186.

190. *Abandoning the Federal Role in Education*, *supra* note 147, at 1324.

arts, math, and science by 2014, with states setting their own interim targets that must be met by individual schools.¹⁹¹ NCLB also applied proficiency targets to subgroups within schools, such that schools had to disaggregate their test scores by sex, race, ethnicity, disability, language status, and socioeconomic class to ensure each subgroup satisfied the proficiency benchmarks.¹⁹²

NCLB was problematic in many ways. It unrealistically mandated 100% student proficiency, which inadvertently incentivized states to focus monographically on test scores such that struggling schools increasingly “taught to the test” at the expense of an adequately broad curriculum.¹⁹³ By 2012, 80% of the nation’s public schools were not making AYP and had almost no hope of achieving full proficiency by the Act’s deadline.¹⁹⁴

The bipartisan-enacted Every Students Succeeds Act (ESSA)—signed into law by President Obama in December 2015 as a replacement to NCLB and reauthorization of the ESEA—ostensibly afforded states more flexibility in setting their performance standards for both schools and students.¹⁹⁵ It also circumscribed the role of the U.S. Department of Education with continued testing of all children, provided federal support for pre-K education, and created new mandates regarding expectations and requirements for students with disabilities.¹⁹⁶ As of 2015, the ESSA was funded in the amount of \$15.8 billion for fiscal year 2018.¹⁹⁷ These funds were disbursed to the state education agencies (SEAs) and local education agencies (LEAs).¹⁹⁸ The problem with ESSA is that it represents an almost complete abdication of the federal government’s oversight role in K-12 education and enabled states to use Title I funds for “school wide programs” as opposed to programs benefiting primarily low-income students.¹⁹⁹ The ESSA’s architect, former U.S. Senator Lamar Alexander, stated that short “of

191. *Id.*

192. *Id.*

193. Paul, *supra* note 181.

194. *Abandoning the Federal Role in Education*, *supra* note 147, at 1330.

195. Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 (2018); *Every Student Succeeds Act (ESSA)*, *supra* note 181.

196. 20 U.S.C. § 6301; *Every Student Succeeds Act (ESSA)*, *supra* note 181.

197. *Every Student Succeeds Act (ESSA)*, *supra* note 181.

198. *Id.*

199. *Abandoning the Federal Role in Education*, *supra* note 147, at 1332.

abolish[ing] the Department of Education,” the ESSA could not have done much more to return power to the states.²⁰⁰

The other major piece of federal subvention in nationwide K-12 education is the Individuals with Disabilities Education Act (IDEA) that is designed to provide all disabled children with a Free and Appropriate Public Education (FAPE) tailored to individual needs.²⁰¹ Enacted as an amendment to the Education for Handicapped Children Act in 1975, IDEA requires public schools receiving federal funding to evaluate children with disabilities and create an individualized education plan (IEP) with parental input to emulate as closely as possible the education experience of children without disabilities.²⁰² The IEP describes the child’s present level of academic achievement and functional performance, and how the child’s disabilities would affect her performance in the general education curriculum.²⁰³ Further, the IEP should specify the services provided, the frequency of such services, and the accommodations and modifications to be provided in the least restrictive environment appropriate to the student’s needs that allows for maximal interaction with children without disabilities.²⁰⁴ Currently, approximately 6.7 million children in the U.S. receive special education services through IDEA.²⁰⁵ Problematically, Congressional IDEA funding, at \$12 billion annually, covers only 14.6% of additional program costs, which represents a systematic failure to fulfill the federal government’s pledge to cover 40% of IDEA expenses.²⁰⁶ This

200. *Id.* at 1341.

201. Individuals with Disabilities Education Act, 20 U.S.C. § 1400.

202. *See, e.g.*, SCOTT F. JOHNSON, NEW HAMPSHIRE SPECIAL EDUCATION LAW MANUAL (5th ed. 2009) (guiding parents, educators, and professionals on IDEA’s requirements).

203. *Id.* at 26–33.

204. *Id.*

205. Adam Liptak, *Justices Face “Blizzard of Words” in Special Education Case*, N.Y. TIMES (Jan. 11, 2017) [hereinafter *Blizzard of Words*], <https://www.nytimes.com/2017/01/11/us/politics/supreme-court-special-education.html>; *see also* NAT’L CTR. FOR LEARNING DISABILITIES, IDEA PARENT GUIDE: A COMPREHENSIVE GUIDE TO YOUR RIGHTS AND RESPONSIBILITIES UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA 2004), 5 (2006), <https://www.ncl.org/wp-content/uploads/2014/11/IDEA-Parent-Guide.pdf> (“Today, more than 6 million school-age children in the United States receive special education services.”).

206. *IDEA Full Funding: Why Should Congress Invest in Special Education?*, NAT’L CTR. FOR LEARNING DISABILITIES, <https://ncl.org/news/policy-and->

means that IDEA places an inordinate burden on low-wealth LEAs that are disproportionately located in rural and urban America.²⁰⁷

Although the local control framework enabled the United States to become the world leader in mass education by the mid-twentieth century, it has succumbed to institutional sclerosis. Public schooling has ceased to become a socio-economic escalator and has instead become a means of stratifying the nation's class structure. Though benevolently motivated, the current direction of federal funds to LEAs without altering the local control framework represents nothing more than *de minimis* tinkering that fails to address the grossly unequal treatment of children based on socio-economic status. Title I funds, which are allocated to school districts based on their percentage of high poverty students, only accounts for 8.3% of school funding, and though intended to remediate inequality, enables school districts to effectuate intra-district inequalities that are equally problematic.²⁰⁸ Federal Title I funds demand outcomes from individual schools without recognizing the negative effect on aggregate learning outcomes brought about by socioeconomically polarized districting and attendance zone requirements. It does nothing to enhance intergenerational mobility.

An obvious and simple reform, described more fully below, would be to condition federal funds to states by giving those states an actual choice to either increase state funding to schools or disaggregate the current school districting and attendance zone system to engender socioeconomic diversity within and between individual schools. The country's dramatically unequal public schooling framework not only denies a quality education to most children from low-wealth households, but bars them from tertiary education on favorable terms. Unequal primary and secondary education, therefore, results in unequal access to colleges and universities.

VII. UNEQUAL ACCESS TO HIGHER EDUCATION

At thirty-eight elite colleges and universities, more students come from the top 1% of households as measured by income, than the

advocacy/idea-full-funding-why-should-congress-invest-in-special-education/ (last visited Jan 2, 2022).

207. See *Blizzard of Words*, *supra* note 205.

208. Webb, *supra* note 147, at 2177.

entire bottom 60% of such households.²⁰⁹ A study of 146 elite colleges and universities evidenced that only 3% of their students come from the bottom quartile of households as measured by family income, while 74% come from the top quartile.²¹⁰ This socioeconomic polarization in the admissions profile at elite universities has worsened this century due to tuition and living expense inflation rates that have far exceeded household income gains.²¹¹

The share of students at elite colleges and universities from the top 1% of households, as measured by income, increased from 10% for the class of 2002, to 11.5% for the class of 2013.²¹² This increase is explained by many factors, including increased reliance on test scores that incentivize high-wealth parents to pay prices as high as \$1.5 million for full-service college prep packages and extracurriculars, including varsity sports, which, at elite colleges and universities, tend to be socioeconomically exclusive sports such as rowing, golf, squash, and fencing.²¹³ Making things worse, at thirty elite institutions, legacy applicants are more than three times as likely to be admitted than their non-legacy peers.²¹⁴ This advantage is more pronounced for applicants seeking early admissions, which favors wealthy applicants who can forego financial aid.²¹⁵ This has enduring consequences for the

209. Gregor Aisch, Larry Buchanan, Amanda Cox, & Kevin Quealy, *Some Colleges Have More Students from the Top 1 Percent than the Bottom 60. Find Yours.*, N.Y. TIMES: THEUPSHOT (Jan. 18, 2017), <https://www.nytimes.com/interactive/2017/01/18/upshot/some-colleges-have-more-students-from-the-top-1-percent-than-the-bottom-60.html>; Jerome Karabel, *Five Myths About the Ivy League*, WASH. POST (Mar. 22, 2019), https://www.washingtonpost.com/outlook/five-myths/five-myths-about-the-ivy-league/2019/03/22/13fdb0da-4bf0-11e9-93d0-64dbcf38ba41_story.html.

210. Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, THE CENTURY FOUND. 11 (Mar. 2003), https://www.immagic.com/eLibrary/ARCHIVES/GENERAL/TCF_US/C030320C.pdf; see also Strand, *supra* note 164, at 294–95.

211. See Strand, *supra* note 164, at 295.

212. Aisch, Buchanan, Cox, & Quealy, *supra* note 209.

213. Timothy Peck, *Top 10 Colleges with the Richest Students*, COLLEGEVINE BLOG (Apr. 8, 2020), <https://blog.collegevine.com/colleges-with-the-richest-students/>; see also Karabel, *supra* note 209.

214. Karabel, *supra* note 209.

215. *Id.*

country's class structure. For example, an affluent student who graduates from one of the "Ivy plus" universities—the Ivy League colleges, plus Duke, MIT, Stanford, and the University of Chicago—typically ends up earning a salary in the eightieth percentile of the income distribution, which is a full five points higher than for lower-wealth students who graduate from the same Ivy plus schools.²¹⁶

High-wealth students benefit from their parents' social networks and are afforded career development opportunities, including unpaid internships, that have become a paradigmatic means of resume building.²¹⁷ Low-wealth students, by contrast, often lack these social networks and opportunities, and typically incur significant student loan debt that limits their career options and lifetime potential.²¹⁸

Generally, students who grow up poor become poor adults and students who grow up affluent remain affluent through adulthood.²¹⁹ The evidence is striking—the child of a parent who earned a professional degree in the 1990s is 3.5 times more likely to also obtain a professional degree, while this number was 2.5 twenty years earlier.²²⁰ With respect to parents with doctoral degrees, their children are between 2.5 to 3 times more likely to be awarded doctoral degrees and nearly twice as likely to graduate with a professional degree.²²¹ Due to the wealth correlation in obtaining a professional or graduate degree, the percentage of U.S. workers over the age of twenty-five who possess such a degree has problematically stalled at only 14.6%, which limits the potential for socioeconomic advancement.²²²

216. Aisch, Buchanan, Cox, & Quealy, *supra* note 209.

217. Strand, *supra* note 164, at 295.

218. *Id.*

219. Adam Davidson, *Is College Tuition Really Too High?*, N.Y. TIMES MAG. (Sept. 8, 2015), <https://www.nytimes.com/2015/09/13/magazine/is-college-tuition-too-high.html>.

220. Bill Henderson, *Rocks on the Back of First-generation College Grads Attending Law School (182)*, LEGAL EVOLUTION (July 21, 2020), <https://www.legalevolution.org/2020/07/rocks-on-the-back-of-first-generation-college-grads-attending-law-school-182/>.

221. *Id.*

222. *Id.* (citing Richard L. Zweigenhaft, *The Role of Elite Education for White Men, White Women, and People of Color in the U.S. Corporate Elite*, WHO RULES AMERICA?, https://whorulesamerica.ucsc.edu/power/elite_education.html (last visited Jan. 2, 2022) (finding that among Fortune 500 Company Directors, 69.7% of the White males have graduate degrees, 74.5% of white females have graduate degrees, 88.8%

The vast majority of university and graduate degree students receiving grant-based financial aid or scholarships, are doing so on the basis of “merit.”²²³ This means that aid is tied to test scores and other academic or extra-curricular credentials that are valued in the admissions process.²²⁴ This is a highly regressive framework because the correlation between entrance credentials and socioeconomic status is strong and growing.²²⁵ To illustrate, “over the last 20 years, total dollars for merit-based grants have grown roughly 10x faster than total dollars available for need-based grants.”²²⁶ Henderson refers to this as a “prisoner’s dilemma of prioritizing affordability over prestige” because “changing priorities at the school level cannot be done without significant market consequences that weaken a school’s long-term market position and finances.”²²⁷ This results in the “largest subsidies [going] to students from the most affluent families.”²²⁸

Henderson found that “[a]s of 2015, 47% of first-generation law students were exiting law school with more than \$100,000 in [student loan] debt compared to 34% of students [who had at least one parent with a university degree].”²²⁹ First generation student status correlates with racial minority status; 48% of Hispanic law students and 43% of Black law students lack a parent with a university degree, a number that is 23% for White law students.²³⁰ Sixty-seven percent of White law students receive merit-based financial aid, while only 52% of Latino law students and 49% of Black law students receive merit-based aid.²³¹ The consequence is that Latino law students effectively pay a 50% premium to attend law school as compared to White law students, and Black law students pay twice as much as White law students.²³²

of Black American Directors have graduate degrees, and 94.7% of Asian American Directors have graduate degrees)).

223. Henderson, *supra* note 220.

224. *Id.*

225. *See id.* It is highly regressive in that test scores and auspicious extra curriculars correlate very strongly with socio-economic status.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

This results in dramatically different student loan debt burdens along racial lines—the median federal student loan debt burden is approximately \$207,000 for Black law students, \$167,000 for Latino law students, and \$94,500 for White law students.²³³ This regressivity precludes higher education from being a socioeconomic escalator.²³⁴

Access to tertiary education was not always so regressive. The U.S. became the first country to see a sizable segment of its population obtain tertiary or post-secondary degrees.²³⁵ In other words, for the entirety of the twentieth century, American colleges and universities graduated a far higher percentage of the population than the universities of any other country.²³⁶ “From 1900 to 1980, every generation born in the United States had about two more years of schooling than the [previous generation],” and American higher education dominance, which was not relegated to the highly selective Ivy plus universities and liberal arts colleges, had become paradigmatic based on relative affordability, high graduation rates, and excellent facilities.²³⁷ By providing an increasing proportion of the population with an affordable higher education degree, social mobility became commonplace due to increased job prospects brought about by a higher skill set in the context of a growing economy.²³⁸ An early manifestation of this phenomenon was seen after World War II, when returning American soldiers were able to enter the middle class based on the higher education benefits afforded them by the G.I. Bill.²³⁹ The U.S. system of affordable and accessible higher education led to increased worker productivity, which translated into higher growth and atypically high material living standards.²⁴⁰

233. *Id.*

234. See Isabel V. Sawhill, *Higher Education and the Opportunity Gap*, BROOKINGS (Oct. 8, 2013), <https://www.brookings.edu/research/higher-education-and-the-opportunity-gap/>.

235. Cf. PIKETTY, *supra* note 5, at 34–53 (discussing parental income and university access in the United States).

236. Cf. *id.*; see also Davidson, *supra* note 219.

237. Davidson, *supra* note 219.

238. See *id.*

239. *Id.*; see also *About GI Bill Benefits*, U.S. DEP’T OF VETERANS AFFS., <https://www.va.gov/education/about-gi-bill-benefits/> (last updated Dec. 30, 2020).

240. Davidson, *supra* note 219.

The process reversed itself such that the U.S. now ranks fourteenth globally in college attainment for those twenty-five to thirty-four years old.²⁴¹ This partly explains lower worker productivity growth in the U.S. as compared to other mature democracies, which furthers socioeconomic stagnation.²⁴² Of course, elite American colleges and universities, especially in the Ivy plus category, remain world leaders. However, these institutions, which have multibillion endowments and attract the most capable faculty and students, are unrepresentative of the 5,300 or so colleges and universities in the U.S.²⁴³ For the bulk of American colleges and universities, there is a constant struggle with covering costs in view of minimal direct government assistance, such that acceptance rates are dramatically higher and education outcomes significantly lower than their elite counterparts. Indeed, most American tertiary institutions, as measured by global university rankings, are worse than their European, Canadian, and Antipodean counterparts.²⁴⁴

Because these less well-resourced tertiary institutions are still competing for students, the bulk of their limited scholarship funds are given to higher credentialed students that, based on schooling inequality, typically come from higher wealth households.²⁴⁵ This means that at a typical American college or university, high achieving students from educated families receive a disproportionately larger share of financial assistance. This occurs while the lower credentialed students, who typically come from low-wealth public schools and whose parents are less equipped to assist them in paying for their educations, receive a disproportionately smaller share.²⁴⁶ With respect to the non-selective schools that enroll the bulk of American students, the struggle for money is even more acute such that four-year graduation rates are typically well below 50%, and students rely monographically on the federal student loan program to fund their educations.²⁴⁷

241. *Id.*

242. *See id.*

243. *See How Many Universities and Colleges are in the US?*, EDUC. UNLIMITED (Aug. 5, 2019), <https://www.educationunlimited.com/blog/how-many-universities-colleges-are-in-the-us/>.

244. *See* Davidson, *supra* note 219.

245. *Id.*

246. *Id.*

247. *Id.*

American colleges and universities, caught in an “arms race” to attract the best credentialed students via tuition discounts and expensive facilities, have raised tuition, fee, and dormitory costs well beyond consumer price inflation rates and the capacity of most households to save for their child’s higher education.²⁴⁸ Although middle income wages have been stagnant, in-state public university tuition has grown 212% over the preceding twenty years, while tuition and fees at private national universities has grown 144% in the same time frame.²⁴⁹ This inordinately high rate of higher education inflation is due to public funding cuts, a failure by colleges and universities to control expenses, and a market-driven ranking system that incentivizes institutions to “pay” for highly credentialed scholarship students by dramatically and systematically raising sticker price tuition, fee, and dormitory costs that are charged to lower credentialed students from disproportionately low-wealth households.²⁵⁰

This problem is made worse because the vast majority of colleges and universities lack sizable endowments, are inordinately dependent on tuition and dormitory revenue, and cannot remain competitive and still offer significant need-based tuition assistance to low-wealth students.²⁵¹ The result is a process whereby the bulk of Americans are either priced out of quality higher education, or, should they obtain a degree, bedraggled by startling amounts of non-dischargeable student loan debt, which now stands at over \$1.6 trillion.²⁵² Consequently, the U.S. has fallen into the middle of the pack of mature democracies in terms of tertiary education achievement rates.²⁵³ This is explained by many factors, especially very high tuition, insufficient need-based tuition assistance, unequal primary and secondary

248. Briana Boyington, Emma Kerr, & Sarah Wood, *20 Years of Tuition Growth at National Universities*, U.S. NEWS & WORLD REP. (Sept. 17, 2021, 9:30 AM), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/2017-09-20/see-20-years-of-tuition-growth-at-national-universities>.

249. *Id.*

250. *Id.*

251. Davidson, *supra* note 219.

252. Alice Kantor, *The \$1.6tn US Student Debt Nightmare*, FIN. TIMES (Dec. 26, 2019), <https://www.ft.com/content/0af6a04c-1881-4969-93d0-a943673ac4f2>; *see also* Davidson, *supra* note 219 (finding that student loan debt has overtaken credit card debt and is now the single biggest source of consumer debt in the country).

253. Davidson, *supra* note 219.

education that is characterized by low teacher quality, lack of adequate college counseling, and a lack of dropout prevention programs.²⁵⁴ Understanding the federal government's role in tertiary education is a necessary first step in determining how it can improve higher education access.

VIII. THE FEDERAL GOVERNMENT'S ROLE IN HIGHER EDUCATION

The U.S. became a world leader in higher education based on its outstanding private-pay elite colleges and universities and its excellent system of state public universities, which were funded based on mix of direct state subsidy and enrollment-based tuition revenue.²⁵⁵ Today public funding for higher education in the U.S. is more pronounced than many realize. To illustrate, public colleges and universities educate 70% of the nation's postsecondary students, and 98% of state and 71% of federal higher education funding flows to these schools.²⁵⁶ As of 2017, the aggregate of state and federal funding amounted to 34% of total revenue at public colleges and universities, with other revenue coming largely from tuition and fees, that are, in turn, largely funded by federal student loans.²⁵⁷

Although the U.S. is caricatured as a country relying almost exclusively on elite and costly private colleges and universities, the bulk of American undergraduates obtain bachelor's degrees with a mix of state and federal subvention—they attend relatively unselective public colleges and universities that are directly funded by state governments with the assistance of federal student loans and tax expenditures. Although the federal government's initial role in higher education was minimal as compared to the states, its subsequent systematic involvement has made it a more significant actor than state and local governments in nationwide higher education.²⁵⁸

254. *Id.*

255. THE PEW CHARITABLE TRUSTS, TWO DECADES OF CHANGE IN FEDERAL AND STATE HIGHER EDUCATION FUNDING: RECENT TRENDS ACROSS LEVELS OF GOVERNMENT 1–2 (2019), https://www.pewtrusts.org/-/media/assets/2019/10/fed-statefundinghigheredu_chartbook_v1.pdf.

256. *Id.* at 1–6.

257. *Id.*

258. Aaron Mohr, Note, *The Policy of Federal Student Loans: Looking Backward and Looking Forward*, 53 WASH. U. J.L. & POL'Y 341, 344–45 (2017) (citing

The federal role dramatically increased with the Higher Education Act of 1965 (HEA),²⁵⁹ which sought to provide institutional aid to colleges and universities and increase enrollment by low- and middle-income students.²⁶⁰ The HEA did this by appropriating \$804 million, or \$6.7 billion in 2021 dollars, for scholarships, funding low-interest guaranteed student loans called Stafford Loans, providing Basic Opportunity Grants (which became the Pell Grant program), extending the work-study program, and establishing a National Teachers Corp.²⁶¹ Importantly, when the HEA was first enacted, 68% of appropriated funds went directly to colleges and universities for expenses like physical improvement, while only 32% of the funds went to student aid.²⁶² This allocation has dramatically changed in favor of direct student aid under subsequent HEA reauthorizations such that, as of 1992, only 3% of federal funds went directly to colleges and universities and 97% went to students.²⁶³

Pell Grants were valued at up to \$6,195 for the 2019–2020 award year and go exclusively to students from families making less than \$50,000 per year.²⁶⁴ Although eligibility applies to almost one-

National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (1958) (repealed 1970)). “The 1958 Act’s authorized annual loans totaled \$47.5 million.” *Id.* at 344 n.22. In recent years, outstanding federal student loans exceeded \$1 trillion. Rohit Chopra, *A Closer Look at the Trillion*, CONSUMER FIN. PROT. BUREAU (Aug. 5, 2013), <http://www.consumerfinance.gov/about-us/blog/a-closer-look-at-the-trillion/>.

259. Mohr, *supra* note 258, at 344–45 (citing Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965)); Camilla E. Watson, *The Future of Lower-Income Students in Higher Education: Rethinking the Pell Program and Federal Tax Incentives*, 45 FLA. ST. U. L. REV. 1107, 1111–12 (2018).

260. Mohr, *supra* note 258, at 344–45.

261. See generally Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965), (codified throughout titles 20 and 42 of the United States Code); Watson, *supra* note 259, at 1112–13; Mohr, *supra* note 258, at 344.

262. Mohr, *supra* note 258, at 345.

263. *Id.* “Congress noted in 1992, the Higher Education Act transmuted, ‘from an Act which primarily supported higher education through the purchase of things, such as buildings and books,’ into ‘primarily . . . student aid programs.’” *Id.* at 345 n.38 (quoting H.R. REP. NO. 102-447, at 7 (1992)).

264. See Evan Gerstmann, *Trump’s Proposed Cut to Pell Grant Funds Is ‘Lunacy’*, FORBES (May 19, 2019, 12:43 PM), <https://www.forbes.com/sites/evangerstmann/2019/05/19/trumps-proposed-cut-to-pell-grant-funds-is-lunacy/#a8f391b32246>; *Issue Brief: Doubling the Maximum Pell*

third of the nation's approximately twenty-two million college students, the maximum grant covers no more than 29% of the cost of a state public university education, which is the lowest percentage in the Pell Grant program's history.²⁶⁵ Recent proposals to increase higher education access fail to address the nation's lack of socioeconomic mobility for the simple reason that they fail to address either higher education cost inflation, the lack of sufficient need-based scholarships for students from low-wealth households, and the fact that student loans have become a regressive means for low-wealth students to either subsidize high-wealth students at prestigious colleges and universities or underperforming colleges and universities that fail to adequately reduce costs. A needed reform would address these concerns.

Indeed, most of the enrollment increase since 2000 has been funded via the Federal Student Loan Program, which is now valued in excess of \$1.6 trillion and, being a larger source of debt than credit cards, effectively acts a regressive tax on poorer students.²⁶⁶ While college graduate income has risen 50% in the past fifty years, student loan debt has ballooned 183% in the twenty-three year period ending in 2012.²⁶⁷ Although this imbalance may be attributed to the conjunction of middle class wage stagnation and excessive consumer spending by households, it is also explained by the failure of colleges and universities to control costs.²⁶⁸ Indeed, since 2000 and particularly since

Grant, NAT'L ASS'N OF STUDENT FIN. AID ADM'RS (June 2021), https://www.nasfaa.org/issue_brief_double_pell.

265. *Id.*; Danielle Douglas-Gabriel, *Trump's Bid to Dip into Pell Grant Reserves to Fund NASA Faces Uphill Battle*, WASH. POST (May 15, 2019), <https://www.washingtonpost.com/education/2019/05/15/trumps-bid-dip-into-pell-grant-reserves-fund-nasa-faces-uphill-battle/>.

266. FED. RESERVE BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 3–4 (2019), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/hhdc_2019q2.pdf; Venoo Kakar, Gerald Eric Daniels Jr., & Olga Petrovska, *Does Student Loan Debt Contribute to Racial Wealth Gaps? A Decomposition Analysis*, 53 J. CONSUMER AFF. 1920, 1920 (2019).

267. Mohr, *supra* note 258, at 341.

268. DAVID O. LUCCA, TAYLOR NADAULD, & KAREN SHEN, FED. RESERVE BANK OF N.Y., CREDIT SUPPLY AND THE RISE IN COLLEGE TUITION: EVIDENCE FROM THE EXPANSION IN FEDERAL STUDENT AID PROGRAMS 2 (rev. Feb. 2017), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr733.pdf. They found that schools most affected by policy changes increased aid at the same time they raised their tuition more than would be expected. *Id.*

the Great Recession, this spending gap has reversed as state investments have declined, “particularly in general purpose support for institutions,” while federal support has grown, “largely driven by increases in the need-based Pell Grant financial aid program.”²⁶⁹ As of 2015, there was only a 12% gap between official state and federal levels.²⁷⁰ This, however, fails to tell the full story of government involvement.

To illustrate, as of 2017, state governments spent a total of \$87.1 billion a year on higher education, the bulk of it being general operational support, with smaller amounts directed to research and financial aid.²⁷¹ States spent a total of \$66 billion for general operating expenses at public colleges and universities, and \$10.2 billion “for the operation and administrative support of research facilities, agricultural experiment stations, cooperative extension services, health care public services, and medical colleges and universities.”²⁷² States also spent \$11 billion in “state financial aid programs, consisting mostly of grants that . . . need not be repaid.”²⁷³ This made higher education the third biggest expense in most state government budgets, after K-12 public schooling and Medicaid.²⁷⁴ By contrast, in 2017 the federal government officially spent \$74.8 billion, or roughly 2% of the annual federal budget, directly on higher education.²⁷⁵ Of this amount, roughly \$27.7 billion funded Pell Grants; \$26.5 billion funded grants, contracts, and cooperative agreements; and \$13.6 billion funded veterans’ education benefits, largely to cover the costs of education, job-training, and associated living-expenses for eligible military veterans.²⁷⁶ Direct federal spending, however, does not remotely tell the full story of federal involvement in higher education. This is because this number fails to include the value

269. THE PEW CHARITABLE TRUSTS, *supra* note 255, at 1.

270. *Id.*

271. *Id.* at 3.

272. *Id.* at 12–13.

273. *Id.* at 13.

274. *Id.* at 2.

275. *Id.* at 2–3 (direct federal funding currently pays for the cost of Pell Grants, other federal financial aid grants, federal research funding and federal veterans’ education benefits).

276. *Id.* at 3.

of federal student loans, which, at an annual \$94 billion as of 2018, makes it, by far, the country's largest source of student loans.²⁷⁷

Most of the growth in federal student loans has been in unsubsidized Stafford Loans, the grad PLUS program, and the parent PLUS program. Unsubsidized Stafford Loans have no financial eligibility requirement but limit the amount students can borrow.²⁷⁸ The grad PLUS program “lends to graduate students up to the cost of attendance,” and the parent PLUS program “allows parents to borrow up to the cost of attendance for their undergraduate dependents.”²⁷⁹ Also excluded from official federal government higher education expenditures is the foregone revenue brought about by education-related tax expenditures, measured at \$40.5 billion in 2017, consisting of credits, deductions, exemptions, and exclusions to offset education costs to American households.²⁸⁰ This means that the federal government's financial contribution to higher education, inclusive of loans and tax expenditures, totaled \$209.3 billion in 2018.²⁸¹ This is markedly more than the \$97.6 billion in aggregate state and local annual funding.²⁸²

The obvious benefit of student loans is that they facilitate access to higher education for students from low-wealth households. The negative is that their availability enables colleges and universities to avoid difficult cost control measures and “pay” for scholarships for better credentialed students by way of increasing tuition and fees charged to less-credentialed, low-wealth students. The tuition and fee ratchet is evidenced by the fact that in-state public university tuition has grown 211% over the preceding twenty years, while tuition and fees at national private universities has grown 144% during the same time frame.²⁸³ The consequence is that higher education is either increasingly inaccessible for students from low to moderate wealth households, or only feasible to such students provided they incur a devastating amount of non-dischargeable student loan debt. Aggregate student

277. *Id.* at 8 (the \$94 billion figure represents a 26% increase in real terms since 2007, although a marked decrease from the record \$119 billion worth of loans issued in 2011; by contrast, the states issued a paltry \$452 million in loans for 2018).

278. *Id.*

279. *Id.*

280. *Id.* at 9.

281. *Id.*

282. *Id.* at 3.

283. Boyington, Kerr, & Wood, *supra* note 248.

loan debt amounts correlate with racial minority status and contribute significantly to the nation's racial wealth gap because White college students and graduates receive more "merit-based" scholarships and have access to more family support than their racial minority classmates.²⁸⁴

A potential remedy, articulated by Mohr and others, is to limit student loans to the seventy-fifth percentile of average national tuition rate for four-year colleges and universities, with a potential written exemption for students enrolled in colleges and universities that can demonstrate their tuition and fee rates are an "exceptional value."²⁸⁵ The "exceptional value" would be measured by various objective criteria, including graduation, employment, and loan repayment rates.²⁸⁶ This should protect against excessive higher education cost inflation without undermining access to low- to moderate- income students.²⁸⁷

An additional measure to facilitate education access would be for Congress to implement conditions on both direct and indirect federal financial aid. Colleges and universities that benefit from this aid should be required to balance the provision of "merit based" and "need based" scholarships to protect against the economic exploitation of low-wealth students. Recognizing that my proposal would engender pronounced backlash at the state and local level, as well from the bulk of tuition-driven colleges and universities, many of whom might be forced to close, my proposal will place the federal government on the right side of distributional justice and help facilitate a realignment of education resources consistent with socioeconomic advancement.

284. See Kakar, Daniels Jr., & Petrovska, *supra* note 266, at 1939–45.

285. Mohr, *supra* note 258, at 356–57. For example, at Harvard, an undeniably prestigious yet expensive school, class of 2016 employed graduates reported salaries with a median range of \$ 70,000 to \$ 89,000. Cordelia F. Mendez, *The Graduating Class of 2016 by the Numbers*, HARV. CRIMSON, <http://features.thecrimson.com/2016/senior-survey/post-harvard-narrative/> (last visited Jan. 2, 2022). Using the midpoint of the range, \$79,500, as a point of comparison, Harvard graduates' starting salaries are approximately 57% higher than the national average starting salary for class of 2016 college graduates, \$ 50,556. See Susie Poppick, *Here's What the Average Grad Makes Right Out of College*, MONEY (Apr. 22, 2015), <http://time.com/money/3829776/heres-what-the-average-grad-makes-right-out-of-college/>.

286. Mohr, *supra* note 258, at 356.

287. *Id.* at 358; see also Chopra, *supra* note 258.

IX. A PROPOSAL FOR CONGRESS TO USE THE SPENDING CLAUSE TO PLACE CONDITIONS ON ACCESS TO FEDERAL EDUCATION SUBSIDIES TO IMPROVE PRIMARY, SECONDARY, & TERTIARY EDUCATION

The U.S. education system effectively works to undermine socioeconomic mobility and stratify the country's class structure. My recommendation is to revitalize primary, secondary, and tertiary education by way of Congress's Spending Clause. The federal government's power to tax and spend for the general welfare gives Congress the power to enhance primary and secondary education by implementing conditions on state and local governments receiving federal assistance, provided it is consistent with the Tenth Amendment and the Fourteenth Amendment's Equal Protection Clause. With respect to higher education, Congress should gradually cap the student loan program at a fixed amount and condition financial assistance to tertiary institutions on their balancing the allocation of merit- and need-based scholarships such that better-credentialed students from wealthy families are no longer regressively subsidized by their low-wealth peers. This will force all degree granting institutions to focus on effective cost control in their operations and minimize their economic exploitation less credentialed, low-wealth students.

A. Improving Primary and Secondary Education

Article I, Section 8 of the U.S. Constitution provides that "Congress shall have the power To Lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."²⁸⁸ This provision, known as the Spending Clause, authorizes the federal government's current role in education, including its ability to place conditions on schools, colleges, and universities receiving federal funds.²⁸⁹ Federal courts have interpreted the Spending Clause to be the broadest source of Congressional legislative power, finding that it supports the imposition of nationwide payroll taxes to fund entitlement programs,²⁹⁰

288. U.S. CONST. art. I, §8, cl.1.

289. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 15, 23–24 (1981); *see also* *Grove City Coll. v. Bell*, 687 F.2d 684, 701 (3rd Cir. 1982).

290. *See* *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937).

intrude upon areas of typical state prerogative such as education,²⁹¹ and implement the Patient Protection of Affordable Care Act's individual mandate tax penalty for individuals who remain uninsured.²⁹² The Supreme Court has concluded that the only power the federal government lacks under the Taxing and Spending Clause is that of coercing state governments to implement a federal regulatory program or commandeer state executive officials because these are state prerogatives protected by the Tenth Amendment.²⁹³

My proposal is to revive socio-economic mobility by placing conditions on continued congressional funding for primary, secondary, and tertiary education under the Spending Clause. These conditions will be constitutional and consistent with the Tenth Amendment because states, as set forth below, are to be given an actual choice as to whether to abide by the conditions imposed. Moreover, because the conditions never use the word race, sex, or other bases for heightened judicial scrutiny, they will neither alienate the public, nor violate the Fourteenth Amendment's Equal Protection Clause.²⁹⁴

As already stated, the first part of the proposal is to facilitate a redress of the inequality of nationwide public schools by conditioning Title I and IDEA funding of SEAs and LEAs on state governments being given a choice in how they improve the quality of their public schools should they want continued federal subvention. They could, as a condition for continued federal assistance, dramatically increase their state equalization funding assistance to low-wealth schools to remediate current funding imbalances between low-wealth and high-wealth schools. Alternatively, should they reject this choice and retain federal financial aid, if they reconstitute their school district lines and attendance zones to allow for socio-economic integration within public schools.

As detailed above, nationwide socioeconomic polarization has led to greater resource and education outcome discrepancies between

291. See *Sabri v. United States*, 541 U.S. 600 (2004); *South Dakota v. Dole*, 483 U.S. 203 (1987).

292. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

293. *Id.*; see also *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

294. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007) (concluding that use of race is apportioning students to public schools violates the Fourteenth Amendment's Equal Protection Clause).

schools situated in high-wealth as compared to low-wealth neighborhoods.²⁹⁵ This perpetuates inequality and stratifies class discrepancies over time. Applying the Fourteenth Amendment's Equal Protection Clause, the Supreme Court, in a decision by the Chief Justice Roberts, disallowed school districts from considering race as a means of integrating racially polarized schools where such polarization has historical roots and is socioeconomically derived.²⁹⁶ This decision, which stymied attempts to remediate the growing nationwide trend of racial imbalance in American life and public schooling, was issued one generation after the Court concluded that the Fourteenth Amendment's Equal Protection Clause is consistent with a regressive public school financing framework that allows for huge funding discrepancies between low-wealth and high-wealth schools.²⁹⁷ Both decisions, issued thirty-four years apart, although justifiable under a conservative reading of the Fourteenth Amendment's Equal Protection Clause, arguably undermine *Brown's* promise of integrated schooling such that racial and socioeconomic imbalance in American public schooling is now approaching Brobdingnagian proportions.²⁹⁸

However, nothing in the Supreme Court's jurisprudence precludes the socioeconomic integration of public schools, which, if implemented correctly, will increase integration without prompting the populist backlash that characterized successful opposition to school busing programs in the 1970s and facilitated a rise of anti-Black populism.²⁹⁹ Socioeconomically integrating public schools will dramatically increase aggregate nationwide learning outcomes because integrating poor students into middle class schools improves the learning outcomes for poor students without harming their middle class or wealthy peers.³⁰⁰ For example, the Wake County Public School System, North Carolina's largest, has effectuated socioeconomic integration to reduce the concentration of high poverty schools and raised student achievement in the process.³⁰¹ It also increased friendships across

295. Robinson, *supra* note 117, at 4.

296. *Parents Involved in Cmty. Schs.*, 551 U.S. at 747–48.

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

298. *See, e.g.*, Williams, *supra* note 7, at 348 (arguing that socioeconomic integration plans can achieve the same goals as racial desegregationists).

299. *See id.* *See generally* Milliken v. Bradley, 418 U.S. 717, 717 (1974).

300. Williams, *supra* note 7, at 436.

301. *Id.* at 447–48.

racial groups, decreased prejudice and racial stereotyping, improved communication and critical thinking skills, and increased civic engagement and health outcomes.³⁰² It was facilitated by consolidating Wake County and Raleigh City Schools at the height of the school desegregation era, facilitated by the County's decision to bus students based on economic disadvantage rather than race, such that no more than 40% of low-income students were allocated to any one school.³⁰³ Unlike the Seattle, Washington, and Jefferson County, Kentucky, school districts in *Parents Involved*, which used race as their means of integrating new students into public schools, Wake County's use of socioeconomic status to integrate its public schools was never found unconstitutional.³⁰⁴

Problematically, however, to the degree that integration plans of Wake's type tend to work, they require, for reasons of simple math, districts where a significant majority of the children come from non-poor households.³⁰⁵ As such, socioeconomic integration plans would not work in cities such as Buffalo, Chicago, Cleveland, Detroit, and Los Angeles, where most students in the district's public school system are both poor and racial minorities.³⁰⁶ This makes my proposal with respect to primary and secondary public schooling so imperative because it finally has the federal government taking the initiative to decouple the quality of a child's schooling from neighborhood wealth. Indeed, increased equalization is the best practice because the objective evidence demonstrates that the countries that have fared the best in terms of socioeconomic mobility and productivity growth spend more on the education of low-wealth children than their higher wealth peers.³⁰⁷ This means that federal "encouragement" to states to increase

302. Wilson Sayre, *As Wake School Segregation Worsens, a Push to Counter It*, N.C. PUB. RADIO (Jan. 3, 2020, 7:18 AM), <https://www.wunc.org/post/wake-school-segregation-worsens-push-counter-it>.

303. Williams, *supra* note 7, at 447–48; Grace Chen, *Wake County Public Schools: History and Overview*, PUB. SCH. REV., <https://www.publicschoolreview.com/blog/wake-county-public-schools-history-and-overview> (last updated Dec. 30, 2019) (this was successfully implemented using income levels reported by families in applications for federally subsidized school lunches).

304. Williams, *supra* note 7, at 447–48.

305. *Id.* at 449–50.

306. *See id.* at 449.

307. *See* Dan Kopf, *The Countries Where Children Are Most Likely to Be More Educated than Their Parents*, QUARTZ (May 24, 2018), <https://qz.com/1286122/the-world-banks-ranking-of-countries-where-children-are-most-likely-to-be-more->

their state equalization funding rates will most likely find allies within state government and the broader civil society.

Second, for states that are reluctant to, or lack resources to dramatically increase state equalization funding, reconstituting attendance zones to what Williams describes as “flower petal” districts, is a feasible alternative to engender socioeconomic integration and mobility.³⁰⁸ Under this framework, school districts can be rearranged like flower petals emanating from the city center such that the “distances [that] students and teachers would have to travel if they were assigned to a new school could be kept reasonable.”³⁰⁹ The logic is simple: high school students in Queens County, New York, can dramatically increase their likelihood of graduating from high school and obtaining higher education if they could crossover an artificial district line and attend school with children in Nassau County, New York, also on Long Island.³¹⁰ Allowing a liberalization of attendance zones would facilitate learning and socioeconomic integration because 68% of Queens school children are eligible for free or reduced price lunch while only 23% of Nassau County school children are so eligible.³¹¹ Also, the learning outcomes in the Nassau County school districts are dramatically higher and would not be reduced by allowing for the enrollment of lower-wealth students.³¹²

To those who argue that the current attendance zone framework is necessary for the well-being of children, who otherwise might be spending hours each day commuting, Williams points out that this is no longer the case in a society where both parents work outside the home and it is often preferable for children to attend a school situated more closely to their parents’ workplaces than their homes.³¹³ This is

educated-than-their-parents/; Niamh McIntyre, *Which Countries Are the Most (and Least) Committed to Reducing Inequality?*, THE GUARDIAN (July 17, 2017, 1:45 PM), <https://www.theguardian.com/inequality/datablog/2017/jul/17/which-countries-most-and-least-committed-to-reducing-inequality-oxfam-dfi>; William Duncombe & John Yinger, *How Much More Does a Disadvantaged Student Cost?*, 24 ECON. EDUC. REV. 513, 530 (2005).

308. Williams, *supra* note 7, at 461–62.

309. *Id.* at 461.

310. *Id.* at 462.

311. *Id.* at 464.

312. *Id.* at 462–63.

313. *Id.* at 465.

especially so for children who attend schools in high cost-of-living metropolitan areas, where their parents often work a second job.³¹⁴ Williams also recommends allowing districts to be completely porous such that children can attend any school within the state.³¹⁵ Although this would not realistically enable a child from north Nashville to attend a school in metropolitan Knoxville or Chattanooga, it would help low-wealth parents from north Nashville send their children to better resourced schools in other parts of a growing and economically dynamic metropolitan area.

B. Improving Tertiary Education

The second part of my proposal is to place a cap on federal student loans and condition federal financial aid and access to loans to colleges and universities that dramatically increase their provision of socioeconomic need-based scholarships. It would proceed as follows: Initially, Congress would amend the Student Loan program to place a cap on student loans to colleges and universities that is no higher than the seventy-fifth percentile of regional tuition and cost of living expenses. This will force all colleges and universities to control costs and deter them from economically exploiting their less credentialed, low-wealth students. Congress should also require all colleges and universities to demonstrate, as a condition for Student Loan program access, a demonstration that at least a certain percentage of their student body receive need-based, as opposed to merit-based scholarships. Ideally, Congress would require that both types of scholarships be equally funded, although some discretion should be afforded to enable distressed or mission-driven colleges and universities to play catch-up.

Historically Black Colleges and Universities (HBCU), for example, have played a hugely important role in fostering an African American middle class.³¹⁶ Most HBCUs, however, currently lack sufficient financial resources to offer both generous need-based scholarships and remain competitive in attracting higher credentialed African

314. *Id.*

315. *Id.*

316. Delece Smith-Barrow, *Many HBCUs Are Teetering Between Surviving and Thriving*, THE HECHINGER REP. (Oct. 23, 2019), <https://hechingerreport.org/many-hbcus-are-teetering-between-surviving-and-thriving/>.

American students.³¹⁷ Allowing colleges and universities to slowly balance their provision of merit-based and need-based scholarships, provided they have a detailed and comprehensive plan to graduate a socioeconomically diverse student body, will definitively resuscitate federal financial aid as a means to socioeconomic advancement for students from low-wealth families.

These changes to federal education funding will, over time, resuscitate U.S. education such that it can once again become a means of socioeconomic mobility. My recommendation to the Biden Administration is to make this a top policy priority, on par with its other goals to resuscitate living standards, namely their goals to safely revitalize the U.S. economy after the COVID-19 pandemic, reinvest in American infrastructure and enact updated voting rights legislation. I write this because President Biden's authoritarian predecessor, notwithstanding his bungled response to COVID-19, won over seventy-four million votes based on a promise to further erode the quality of U.S. democracy and the rule of law. With majorities in both houses of Congress, the Biden Administration is well-positioned to fundamentally reform a failing American education system. It may be the last best chance for American democracy.

X. CONCLUSION

Left-of-center movements worldwide have achieved many things, especially in the area of social policy. The list includes granting full equality under the law to women, sexual minorities, immigrants, and racial and ethnic minorities.³¹⁸ Where they have failed, especially since the Cold War's end, is in their remediation of socio-economic inequality. This paper's thesis is that this failure is not solely due to right-wing hegemony in the realm of fiscal and monetary policy. Rather, it is also a concomitant of a failure to equalize education systems to assure all inhabitants are given a legitimate chance at socio-economic mobility.

317. *Id.*; Peter Jacobs, *There's an Unprecedented Crisis Facing America's Historically Black Colleges*, INSIDER (Mar. 30, 2015, 11:52 AM), <https://www.businessinsider.com/hbcus-may-be-more-in-danger-of-closing-than-other-schools-2015-3>.

318. For example, all mature democracies have legalized sexual minority sex, same-sex marriage, reproductive rights, racial minority rights, and immigrant rights.

The U.S. education system was intended to be a socioeconomic mobilizer. Due to the unanticipated consequences of the Reagan tax cuts, in conjunction with its prioritization of local control and funding, it has ceased to be a means of socioeconomic advancement, and instead become a stratifier that fixes and rigidifies the country's class structure. This has led the electorate to view resource allocation and democratic well-being as a zero-sum game and not, to paraphrase President Kennedy, as a "rising tide lifting all boats."³¹⁹ It explains the pronounced trend toward authoritarian illiberalism and democratic retrogression that was manifest under President Trump.

In all countries, the affluent can use their own superior education, enviable social networks, high incomes, and savings to acculturate their children to success and provide them with every advantage. This includes better schools, extra-curriculars, tutoring and the best standardized test preparation courses. The opposite, of course, holds true for poor and middle-class households. Ideally, a country committed to socioeconomic mobility will progressively allocate education resources to make up for this imbalance and avoid a rigidified class structure that is antithetical to a democratic ethos.

The U.S. unfortunately worsens the inequality dynamic by allocating public school children to schools based on neighborhood location and then furthering this regressivity by inordinately relying on local assessments for funding purposes. Making matters worse, colleges and universities rely on socioeconomically regressive credentials, such as test scores and extra-curricular achievement, to determine who can enroll on advantageous terms. Inevitably, children from low-wealth households, who inordinately attend high poverty school districts, struggle to gain admission to colleges and universities that would enable them an opportunity for socioeconomic advancement. For low-wealth students who do gain admission, they typically fail to graduate within four years. Further, for those who do graduate, bedraggling and non-dischargeable student loan debt often precludes their entry into the propertied middle class. The result is socio-economic immobility, which contradicts the American dream, embitters the broader American electorate, and cultivates a level of cynicism, anxiety, and

319. President Kennedy used the phrase in 1963 to rebut the claim that a dam project was "pork barrel" spending. According to Kennedy's then-speechwriter, Ted Sorenson, the phrase originally came from the New England Council, which is a regional chamber of commerce.

insecurity that undermines the rule of law. It explains the zero-sum politics, democratic retrogression, and authoritarianism that characterizes the U.S. of today.³²⁰

My recommendation is to revitalize K-12 and higher education such that they can, once again, be socio-economic escalators. With respect to primary and secondary education, Congress should give states a choice in how they use federal education subsidies. The first option would have Congress, as a condition of continued federal aid, mandate that states dramatically alter their equalization formulae to progressively provide greater education funding per pupil for less affluent schools districts, inclusive of teacher salaries. This step, if taken, will facilitate disentangling a child's learning outcome and earning capacity from that of their parents and their neighborhood wealth. States, however, as separate sovereigns, are to be given a choice to reject this solution. If they do, Congress should offer them a second option, namely, to require them to either redistrict or alter school district attendance zones to increase socioeconomic integration and improve learning outcomes for children from low-wealth households and neighborhoods. States implementing one of the two options will, over time, see improved aggregate learning outcomes, especially for low-wealth children.

With respect to higher education, Congress should gradually cap the student loan program at a fixed amount and condition financial assistance and student loan access to tertiary institutions on their balancing the allocation of merit- and need-based scholarships such that better-credentialed students from wealthy families are no longer regressively subsidized by their lower-wealth peers. Doing this will force all degree granting institutions to focus on effective cost control in their operations and minimize their economic exploitation of less credentialed, low-wealth students.

Traditional American liberals and conservatives bemoan the trend toward authoritarianism and democratic retrogression in our political culture. This trend is global and has no single cause. Many scholars, including myself, have pointed to some of these causes, namely defects in our system of elections; inequalities in our tax code;

320. Huq & Ginsburg, *supra* note 88; Dalibor Rohac, Liz Kennedy & Vikram Singh, *Drivers of Authoritarian Populism in the United States*, CTR. FOR AM. PROGRESS (May 10, 2018, 12:01 AM), <https://www.americanprogress.org/issues/democracy/reports/2018/05/10/450552/drivers-authoritarian-populism-united-states/>.

the courts' improvident uses of judicial review; a tendency for left-of-center political parties to abandon traditional social hierarchies in favor of emancipating historically marginalized groups such as women, migrants, and racial and sexual minorities; and, of course, economic and cultural changes brought about by globalization and technology.

While many scholars criticize the U.S. system of education, their focus primarily is on the inequality of public schooling and how this keeps poorer children from socioeconomic advancement. I agree with this diagnosis completely. However, I go further to enunciate how this problem works, in conjunction with defects in higher education resource allocation, to point out that the U.S. education system exacerbates socioeconomic inequality and immobility and therefore rigidifies the class structure. The Biden Administration should act forthwith to use federal funds as a "carrot" to entice states and institutions of higher education to reform. This should be a top priority for the Administration—on par with reviving the economy after the COVID-19 pandemic, enacting a sizable infrastructure bill and voting rights. The previous Administration serves as a foreboding reminder of inaction.