Positive Education Federalism: The Promise of Equality after the Every Student Succeeds Act

by Christian B. Sundquist*

INTRODUCTION

The accepted narrative of the American public education system is one of decline, educational “crisis,”1 and systemic failure. Our public schools increasingly are segregated by race and class in the post-Brown era,2 while fundamental social inequalities persist among schools in regards to educational quality, financing, and outcomes. Long viewed as essential to the economic and democratic development of America’s citizenry, our unequal system of universal public education has forsaken the “faces at the bottom of [the] well” in an era of deregulation and decreased social welfare funding.3

* Professor of Law and Director of Faculty Research and Scholarship, Albany Law School. Carleton College (B.A., 1997); Georgetown University Law Center (J.D., 2002). The Author would like to thank the faculty affiliates of the Institute for Research on Poverty at the University of Wisconsin-Madison (“UW-Madison”) for their assistance in framing the ideas for this Article. I am also grateful to Professors Linn Posey-Maddox and Bianca Baldridge of the Educational Policy Studies department at UW-Madison for providing useful feedback on federal education policy.

1. Remarks by U.S. Deputy Secretary Tony Miller at The Church of God in Christ’s International AIM Convention in Houston, Texas, U.S. DEP’T OF EDUC. (July 7, 2011), available at http://www.ed.gov/news/speeches/partnering-education-reform (“[W]e recognize that if we are to successfully address the crisis confronting our education system, then the change that’s happening every day in pockets of promise nationwide needs to not only continue but to grow.”).


3. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM v (1992) (“Black people are the magical faces at the bottom of society’s well. Even the poorest whites, those who must live their lives only a few levels above, gain their self-esteem by gazing down on us. Surely, they must know that their deliverance depends on letting down their ropes. Only by working together is escape possible. Over time, many reach out, but
The federal government previously responded to the failure of Brown's promise of equal educational opportunity by introducing legislation—the No Child Left Behind Act of 2001 (NCLB)\(^4\) and the Race to the Top Act of 2009 (RTT)\(^5\)—that promoted educational reform informed by the classic market principles of consumer choice, competition, and accountability. Under this schema, the failure of America's public schools could be traced to an overregulation of education that has promoted bureaucratic stasis, ineffective teaching, and unaccountability at the cost of the individual liberty of parents and children to attend the school of their choice. The role of the federal government, then, was to utilize its fiscal block grant-in-aid powers to cultivate the private and market-based properties of public education.

The well-documented failures of the NCLB and RTT to promote student achievement, much less equality in education, led Congress to pass the Every Student Succeeds Act in December of 2015 (ESSA).\(^6\) The bipartisan ESSA has been hailed by both liberal and conservative education reformers for not only superseding the much-reviled NCLB and RTT framework, but also for shifting control over certain aspects of public education policy to state and local actors.

The new education act nonetheless largely leaves untouched the substantive framework of NCLB and RTT. The ESSA retains the core focus of the past education framework in its continued emphasis on promoting student achievement through consumer choice, accountability, high-stakes testing, and inter-school competition. If anything, the ESSA has broadened the market-based approach of federal education policy by shifting the responsibility for employing corporate measures of accountability to states (themselves serving as "laboratories of experimentation" subject to market demands).

And yet the crisis of America's system of public education is less a manifestation of under-incentivized schools, inadequate school choice, and poor teaching, than it is a reflection of unrelenting poverty and persistent racial discrimination. The modeling of education policy and law around the oft-criticized market assumptions of consumer choice, competition, and accountability have led to a deepening of the crisis confronting public schools. Since the adoption of market-based education legislation

---


such as NCLB and RTT in the last ten years, our public schools have been re-segregating at an accelerated rate and the achievement gaps between the rich and poor, and white and non-white have deepened.7

The market model of public education preserved through the new ESSA legislation does not provide answers to our current educational dilemma, but the model merely deflects the responsibility of providing an equitable public education from the public sphere of federal and state government to the private sphere. There are no easy answers to the public school crisis, and simply incorporating misplaced assumptions of competition, rational choice, and market accountability into public educational policy will not resolve the situation. We need to acknowledge that our school failures are not due to the absence of market incentives and processes in education, but are caused by systemic social inequalities—including poverty, racial discrimination and segregation, unequal school financing, and inadequate teacher compensation.

On the heels of the recent passage of the ESSA, this Article examines the appropriate federal role in developing and enforcing public educational policy and law. “Our federalism”8 demands not only that there be an appropriate balance between state and federal power when evaluating the constitutional feasibility of new laws, but also that there remain a sufficient demarcation between the public and private spheres of regulation. This Article argues that the existing market-oriented statutory approach to public education, as embodied by the ESSA, fails to advance the values of education federalism by encouraging the penetration of private market forces into the traditionally public sphere of universal education.

Part I of this Article explores traditional conceptions of federalism as a negative limit on the executive, legislative, and judicial power of the federal government. This section identifies the core values associated with such conceptions of “negative federalism,” while criticizing negative models as unprincipled and indeterminate. Part II examines the civic model of public education that pre-dated current education policy, while charting the historical expansion of the federal role in public education. This section argues that the values informing the Elementary and Secondary Education Act (ESEA),9 as influenced by the Brown v. Board of Education10 United States Supreme Court decision, recognize the important governmental role in maintaining educational equality. Part III

analyzes the current federal role in public education under the traditional negative model of federalism. This section argues that a competitive view of federalism has come to influence public education policy in the modern era, whereby the appropriate role of government has come to be seen as one that promotes market competition. As a result, the original de-segregative and equalizing dimension of education federalism envisioned by the ESEA and Brown has been forsaken. Finally, Part IV advances an alternative positive conception of education federalism, which stresses the obligation of the federal government to address failures in the system of public education in a manner that accords with principles of social justice and democratic equality. This section then develops substantive policy principles to guide future reauthorizations of federal education law.

I. ON FEDERALISM, STATE SOVEREIGNTY, AND INDIVIDUAL LIBERTY

The development of the American system of federalism has been influenced by constitutional structure, judicial interpretation, and political advocacy. Our Constitution establishes a federalist system of governance, with the country's constitutional responsibilities towards its citizens divided between a single national government and multiple state governments. At its most basic and descriptive level, the concept of American federalism is thus quite easy to understand: it refers generally to a theory of political governance that divides power between a large, centralized state and smaller, localized political units.

The inherent complexity of federalism becomes apparent, however, when one attempts to define the boundaries of power between the central government and its constituent states. An array of legal and political theories have been advanced to resolve questions regarding the appropriate federal and state roles in dealing with social problems such as public education, including the concepts of cooperative federalism, dual federalism, and competitive federalism. While quite different in many respects, an important common feature of traditional theories of federalism is that they prescribe a negative vision of the limits and boundaries of government action. The concept of federalism, then, is most often invoked to provide a constitutional basis for limiting the ability of one level of government (typically the federal government) to respond to matters of great social concern.

A. Traditional Theories of Federalism

A variety of related visions of negative federalism have impacted the development of public education policy. The theory of dual federalism
resounds in much of the Supreme Court's jurisprudence, and dual federalism is invoked principally to invalidate federal legislative action and prevent federal judicial review of alleged constitutional deprivations. This conception of federalism stresses the independent sovereignty of states as a constitutional barrier to certain federal actions. Under this view of the zones of state and federal sovereignty, state governments occupy an exclusive sphere of authority that is completely independent from that of the national government. Justice David Brewer described such an approach to federalism:

We have in this Republic a dual system of government, National and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts.

Dual federalism dominated the rights-restrictive jurisprudence of the early twentieth century Supreme Court before losing ground to a broader conception of the federal government's authority to regulate under the Commerce Clause during the progressive era of the New Deal. The Supreme Court shifted its view of federalism during the New Deal era from one characterized by strict, separate spheres of national and state authority to one that acknowledged that national and state authority were largely concurrent. Justice Hugo Black, writing for the majority in the seminal case Younger v. Harris, has conceived of cooperative federalism as requiring:

a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights

12. Younger, 401 U.S. at 52.
and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.17

The cooperative or concurrent view of federalism "requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation,"18 and has been relied on by the Court to both invalidate federal legislation19 and prevent federal judicial review20 where such actions might impinge upon legitimate state interests. As such, this framework—envisioning a shared regulatory authority between the federal and state governments—remains a negative conception of the boundaries of federal authority.

A reformed version of dual federalism was espoused by the Rehnquist Court during the 1990s. During this period, the Court sharply distinguished between "what is truly national and what is truly local."21 In United States v. Morrison,22 for example, the Supreme Court invalidated the civil remedy provision of a federal statute, the Violence Against Women Act of 1994 (VAWA),23 on grounds that the federal action attempted to regulate non-economic and local conduct.24 The Rehnquist Court also strained to restrict federal authority to subject states to civil litigation25 and to control state governmental operations on dual federalism grounds.26 The Court made the following clear in Printz v. United States: "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program . . . such commands are fundamentally incompatible with our constitutional system of dual sovereignty."27

17. Id. at 44.
25. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996) ("Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.").
27. Id. at 935.
An alternative conception of the nature of our system of governance, embodied by the theory of dynamic federalism, provides for an overlapping distribution of authority between national and state governments. Rather than focusing solely on the cooperative aspects of federal-state interaction, the dynamic federalism model recognizes that there exists "multiple, independent sources of political authority." Under this view, "[n]either the federal government nor the states can eliminate the independent lawmaking authority of the other."

Negative models of federalism cite a litany of constitutional values that are promoted by limiting federal authority, such as (a) reducing the likelihood of federal governmental tyranny, (b) promoting state experimentation, (c) protecting individual liberty, (d) preserving the "original meaning" of the Constitution, (e) enhancing democratic processes, and (f) fostering competition and choice. Nonetheless, as Erwin Chemerinsky has documented, the oft-stated values of traditional conceptions of federalism tend to bear little relation to judicial decision-making. The inherent indeterminacy of traditional federalism jurisprudence can be explained by the common observation that "federalism is consistently... employed [by courts] only derivatively, as a tool to achieve some other ideological end, rather than as a principled end in and of itself." Empirical studies of U.S. Supreme Court decisions have borne out this observation, confirming that political ideology is strongly associated with case outcomes in the federalism context. Traditional conceptions of negative federalism have thus historically inhibited the ability of the federal

29. Id. at 286.
31. CHEMERINSKY, supra note 30, at 116 (analyzing how Supreme Court decisions have historically borne little to "no relationship to the underlying values of federalism"). Id.
government to promote educational equality and respond to racial discrimination in public education.\textsuperscript{34}

B. The Substance of Federalism

Traditional models of federalism are typically regarded as being primarily procedural and structural in nature: given the federalist structure of our government, certain actions are simply within the sole province of states. Under this perspective, courts mechanically apply the federalism doctrine to cleanly demarcate the appropriate spaces of federal and state control. Negative models of federalism, however, also have a substantive dimension—whereby judicial decision-making and legislative policy are shaped by values in divining when it is appropriate for the federal government to respond to social inequality.\textsuperscript{35} The principal norm advanced by the Court under traditional conceptions of federalism is the “protection\textsuperscript{36} of liberty.”\textsuperscript{36} Our history ironically demonstrates, however, that negative conceptions of federalism informed by “liberty” have typically been wielded by the Court to limit the protection of constitutional rights while invalidating federal action.\textsuperscript{37} Indeed, the liberty cited by past proponents of negative federalism has often been of states to preserve systems of racial control.\textsuperscript{38}

C. Competitive Federalism

The dualist, cooperative, and dynamic conceptions of federalism represent related visions of when federal authority must be abrogated in order to protect state sovereignty. And yet not all classic theories of negative federalism are designed around competing procedural notions of

\begin{itemize}
\item \textsuperscript{34} Cumming v. Bd. of Educ. of Richmond Cty., 175 U.S. 528, 545 (1899); Gong Lum v. Rice, 275 U.S. 78, 85-86 (1927); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44 (1973).
\item \textsuperscript{35} See CHEMERINSKY, supra note 30, at 4.
\item \textsuperscript{36} Printz, 521 U.S. at 921 (“This separation of the two spheres is one of the Constitution’s structural protections of liberty.”); see also United States v. Lopez, 514 U.S. 549, 552 (1995) (“This constitutionally mandated division of authority ‘was adopted by the Framers to ensure protection of our fundamental liberties.’”); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (“Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”).
\item \textsuperscript{37} See Printz, 521 U.S. at 933; CHEMERINSKY, supra note 30, at 106-08; see also Erwin Chemerinsky, Does Federalism Advance Liberty?, 47 WAYNE L. REV. 911, 913 (2001) (“[O]verwhelmingly, the Supreme Court’s federalism decisions are ‘rights regressive’—that is, they limit rather than enhance individual liberties.”).
\item \textsuperscript{38} See infra Part II.
\end{itemize}
state sovereignty. The model of competitive federalism, for instance, asserts that the core substance of "American federalism" is the protection of markets. Most proponents of a market-based conception of federalism argue in some form that "governmental competition . . . is central to the U.S. Constitution," thus providing "the political foundation of markets." A market-based understanding of federalism is appropriate, according to proponents, as the Founders sought to "emphasize competition between states and the federal government" through the Constitutional structure and a focus on protecting individual liberty. The "essence of federalism" under this view is to provide "a sustainable system of political decentralization." Adherents believe that "by harnessing competition among jurisdictions, federalism secures in the political arena the advantages of economic markets—consumer choice and satisfaction, innovation, superior products at lower prices."

The model of competitive federalism, then, seeks to promote a deregulated "free market" at both the state and federal level through incorporation of the economic principles of consumer choice and competition. Such a view necessarily assumes that "individuals [are] self-seeking and utility-maximizing actors with highly varied preferences and that the proper function of government was to protect their freedom to seek satisfaction of those diverse preferences." As such, competitive federalism is as concerned with the federal-state relationship as it is with the distinction between public and private spaces.

The current regulatory structure in public education has been greatly influenced by such notions of competitive federalism. As will be discussed in more detail in Part III of this Article, the legislative histories

41. MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 18-25, 1112 (1999) (arguing that federalism jurisprudence became distorted during the New Deal era in that it moved away from its constitutional beginnings as a mechanism to ensure government competition, and towards a process-oriented version that focused on state sovereignty).
42. Weingast, supra note 40, at 4.
43. GREVE, supra note 41, at 3.
44. Id. at 2 (arguing that the values of "competitive federalism are choice and competition"); see Donahue, supra note 39, at 74; Craig Volden, The Politics of Competitive Federalism: A Race to the Bottom in Welfare Benefits?, 46(2) AM. J. POL. SCI. 352, 360 (2002) (arguing that "one significant aspect of American federalism is competition among the states"); F.E. Guerra-Pujol, Coase and the Constitution: A New Approach to Federalism, 14 RICH. J.L. & PUB. INT. 593 (2011).
45. Purcell, supra note 30, at 687.
of both Acts demonstrate that the intent of Congress was to promote educational "reform" through deregulation and privatization. The appropriate federal role in public education under this competitive federalist viewpoint, then, is to allow free market forces the opportunity to restructure education through enhanced competition, accountability, and consumer choice. That is, the proper federal role under this schema is to redirect responsibility for public education from the public government to private market forces.

This Article focuses less on the procedural dimension of federalism (the vertical relationship of authority between the states and the national government), and more on the substantive dimension of federalism. Within the context of public education, this Article argues that education federalism has substantively incorporated classic market economic principles to guide the proper allocation of power between the federal and state governments. This Article will show that this focus on economic principles is misplaced, as the substance of education federalism remains rooted in a *Brown* era understanding of class and racial equality.

II. FEDERALISM AND THE CIVIC MODEL OF PUBLIC EDUCATION

Our history of using negative federalism to constrain the federal role in public education has coincided with our enduring efforts to normalize social inequality. American society has long struggled with reconciling the dilemma borne from ascribing to liberal equality in the face of persistent and unrelenting social inequality. Previously, I have summarized the following:

The call for universal rights by non-propertied social classes clashed with the strong bourgeoisie notions of capitalism and the free market that displaced the old order of monarchy and feudalisim. The inherent inequality that stemmed from the private ownership of property led Adam Smith and other thinkers to believe that there had to be limits and exceptions to "universal equality" in order to protect the "natural" rights of propertied classes . . . Early theories of "race" [and other notions of difference] . . . filled the void left by feudal hierarchy in explaining class distinctions, and reconciled the unequal treatment of certain groups of people with liberalism's embrace of universal equality.

46. See infra Part III.
The following variety of artifices have historically been used to rationalize this long-standing contradiction of American democracy: the development of biological race theory, the construction of gender, culture of poverty theories, and the normalization of poverty as caused by either a neutral market, cultural forces, or both. The equality dilemma of American democracy has consequently been rationalized on grounds of purported difference (cultural or biological), which allowed inequality to become viewed by many as a naturally occurring consequence of a market economy. Through this process of normalizing privilege, federal governmental action has typically been deemed unnecessary, ineffective, or improper to respond to issues of social inequality (including educational inequity).

A. The Early Federal Role in Public Education: Individualism and the

48. See generally GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944).


53. See Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989) (holding that city plan awarding contracts to minority businesses violated the Equal Protection Clause because the City of Richmond "failed to identify the need for remedial action"); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436-37 (1976) (holding that the school district was not required to ensure that a racially-neutral attendance pattern stayed in place once the initial remedial measure was taken); Milliken v. Bradley, 418 U.S. 717, 752 (1974) (holding that an inter-district desegregation plan was beyond the scope of federal authority because respondents failed to demonstrate that segregation of a school district had an inter-district effect); see also Cumming, 175 U.S. at 545; Rice, 275 U.S. at 85-86; Rodriguez, 411 U.S. at 44.

54. See supra note 53.

55. Lopez, 514 U.S. at 549, 557, 561; see Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1638 (2014) (holding that there was no federal authority to invalidate an amendment to the Michigan constitution eliminating affirmative action); United States v. Morrison, 529 U.S. 598, 617 (2000); Missouri v. Jenkins, 515 U.S. 70, 100 (1995); Carson v. Warlick, 238 F.2d 724, 728 (4th Cir. 1956).
Decentralized State

The pre-war role of the federal government in public education policy was fairly minimal, in large part due to the prevailing view that social inequality was a natural result of market processes that could not be effectively resolved through governmental intervention. The abolition of chattel slavery in the United States did not eliminate the temptation to think of racial and class inequality as the normal consequence of biological or cultural difference. The failure of the federal government to respond to Jim Crow segregation, racial discrimination, and poverty could be seen as morally justifiable only if such inequities were natural market results that could not be eliminated through direct state action.

An influential political and pseudo-scientific movement of the time, Social Darwinism, embodied pre-war efforts to rationalize racial and class inequality through a misguided application of evolutionary theory. Social Darwinists believed that social inequality could be traced to racial and class genetic difference, unsurprisingly arguing that “the white race” was more highly evolved than non-white “races.” The Social Darwinist movement asserted that humans could only evolve through unfettered market competition, and thus, opposed all efforts by the federal (or state) government to eliminate social inequality.

While the federal government passed a series of acts that would eventually become the precedent for future grant-in-aid programs (such as ESEA, NCLB and RTT), education policy for much of our history was decentralized and regarded as a matter of local and state authority.


57. Sundquist, Genetics, Race and Substantive Due Process, supra note 49.

58. Id. at 357-58.


The decentralized nature of public education following the Civil War established the conditions necessary for former slave states to invoke federalism as a tool to maintain racial control. Under the banner of "states' rights," Southern states advanced a dual conception of federalism as part of a broader effort to deny African-American (and other non-white) students access to quality education.62

The United States Supreme Court provided the official imprimatur for segregative education practices, rejecting equal protection challenges under the Fourteenth Amendment while citing the historical local control states enjoyed over education policy. The Court's infamous decision in *Plessy v. Ferguson*63 upheld the police powers of states to require racial segregation in the public sphere. In upholding Louisiana's law requiring the segregation of public conveyances, the Court cited with approval prior decisions upholding "the establishment of separate schools for white and colored children."64 The Court viewed such de jure segregation as "valid exercise[s] of the legislative power"65 of states, while refusing to locate federal authority under the Fourteenth Amendment to ensure social equality:

If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . [I]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.66

The Court's conceptualization of negative federalism through the lens of (white) individualism played a pivotal role in shaping education policy for the next fifty years. Three years after the *Plessy* decision, the Court

63. 163 U.S. 537 (1896).
64. *Id.* at 544.
65. *Id.*
66. *Id.* at 551-52.
upheld a Georgia school board's policy barring African-American students from attending public high schools.\textsuperscript{67} The Court rejected the Fourteenth Amendment challenge largely on federalism grounds, holding the following:

\begin{quote}
[T]he education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.\textsuperscript{68}
\end{quote}

The failure of the local school board to provide a high school education to tax-paying African-American students, while maintaining a separate high school for white students, was not regarded as a sufficiently serious "disregard" of constitutional rights by the Court to justify departing from its traditional federalism policy of state deference on education matters.\textsuperscript{69}

The Court again utilized a peculiar conception of dual federalism to reject constitutional challenges to state education policy in \textit{Gong Lum v. Rice}.\textsuperscript{70} In \textit{Gong Lum}, the petitioner challenged a Mississippi law requiring the segregation of "colored" and white students in public schools.\textsuperscript{71} The Court upheld the state law, citing the \textit{Cummings} and \textit{Plessy} decisions for clearly establishing "[t]he right and power of the state to regulate the method of providing for the education of its youth at public expense."\textsuperscript{72} The Court concluded by holding that racial segregation of public schools is a "decision . . . within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment."\textsuperscript{73}

These pre-war cases demonstrate the minimal role played by the federal government, and its courts, in setting public education policy. States were allowed to exercise their "historic police powers" with respect to education with little to no federal influence or judicial oversight. As a result, many states embraced the "separate but equal" mythology as a method to preserve social and educational inequality for non-white children.\textsuperscript{74}

\textsuperscript{67.} \textit{Cumming}, 175 U.S. at 545.
\textsuperscript{68.} \textit{Id.}
\textsuperscript{69.} \textit{Id.}
\textsuperscript{70.} 275 U.S. 78 (1927).
\textsuperscript{71.} \textit{Id.}
\textsuperscript{72.} \textit{Id.} at 85.
\textsuperscript{73.} \textit{Id.} at 87.
\textsuperscript{74.} See, e.g., \textit{The Beginnings of Black Education}, VA. HIST. SOCY, http://www.vahistorical.org/collections-and-resources/virginia-history-explorer/civil-rights-movement-virgin
B. The Post-war Era of Education Federalism

The end of World War II created the conditions necessary for significant changes to American social policy, including a new understanding of the appropriate federal role in public education. The post-war world was compelled by the atrocities of the Holocaust to acknowledge the falsity of biological racial difference, and, as a result, lost an important artifice in rationalizing unequal treatment based on "race." The historian Peter B. Levy summarizes this occurrence:

The impact of World War II on the nation's ideology cannot be understated. The war put white supremacy on the defensive through propaganda put forth by the United States in opposition to the Nazi regime and by means of official proclamations, such as the Atlantic Charter and the founding documents of the United Nations, which reaffirmed America's belief in the principles expressed in the Declaration of Independence. Despite segregation in the armed forces and racial violence at home, the overall message of the war effort was that proponents of racial supremacy were wrong and that America would prosper because of its faith in equality and freedom for all. The Holocaust, which revealed to the world the atrocities that could be committed by a people driven by the ideology of racial supremacy, strengthened the American public's belief in the ideal of equality for all and marginalized open advocates of white supremacy.

75. THE RACE QUESTION, UNESCO 6-7 (1950). The UNESCO committee held that "race [was] not so much a biological phenomenon as a social myth" and that "given similar degrees of cultural opportunity to realize their potentialities, the average achievement of the members of each ethnic group is about the same." Id. at 7; see also Sundquist, The Meaning of Race, supra note 47, at 232 (explaining that after World War II, there was increased understanding of race as merely a socio-political construct without any basis in biology); Christian B. Sundquist, The Dialectics of Racial Genetics, 76 ALB. L. REV. 1751, 1755 (2013) (observing that the incorrect belief that race has biological meaning has been used to justify the mistreatment of races deemed inferior); Sundquist, Navigating the Final Frontier, supra note 49, at 59 ("Following the horrific and coldly technical application of unsound scientific theories of race by Nazi Germany in World War II, the world flatly rejected biological conceptions of race and advocated a perception of race as a social and historical construction.").

76. Sundquist, Genetics, Race and Substantive Due Process, supra note 47, at 365 (quoting Peter B. Levy, THE CIVIL RIGHTS MOVEMENT 46 (1998)).
Our society was thus forced to acknowledge that racial and social inequalities were based on structural distortions which could only be alleviated through federal governmental action. As a result, the “separate but equal” doctrine sanctioning educational segregation began to become untenable under American constitutional law. In *McLaurin v. Oklahoma State Regents*, the Court held that the State of Oklahoma had deprived George W. McLaurin, an African-American student enrolled in a Ph.D program, of equal protection of the laws through its “separate but equal” segregation practices in higher education. In this pre-*Brown* decision, the Court referenced the changing social views concerning racial inequality, while recognizing that federal judicial action was necessary to remove “[s]tate-imposed restrictions which produce... inequalities.”

In its more celebrated companion case, *Sweatt v. Painter*, the Court unanimously held that the segregated legal education offered to Heman Sweatt (an African-American student) was not sufficiently equal to comport with the guaranteed protection provided by the Fourteenth Amendment. The Court held that the separate educational experience offered to Heman Sweatt to study law was not equivalent to the legal education offered to white students at the University of Texas Law School (to which Heman Sweatt was denied admission under Texas’ “separate but equal” laws).

The decisions in *McLaurin* and *Sweatt*, however, did not overturn de jure segregation in education or the “separate but equal” doctrine. The Court in *Sweatt* took pains to explain its refusal to reexamine the constitutionality of *Plessy v. Ferguson* in the mechanical terms of constitutional avoidance. The Court finally addressed the continuing legality of segregated educational facilities in the widely celebrated decision of *Brown v.*

---

79. *Id.* at 642.
80. *Id.* at 641 (“Our society grows increasingly complex, and our need for trained leaders increases correspondingly.”).
81. *Id.*
83. *Id.* at 635.
84. *Id.* at 631.
85. *Id.* at 631, 636. “Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court.” *Id.* at 631. As such, the Court states that there is no need to “reach
Board of Education. As is well known, in the Brown decision the Court invalidated "separate but equal" practices under Plessy v. Ferguson by holding that "[s]eparate education facilities are inherently unequal." The Court recognized the need for federal intervention in equalizing public educational opportunities, in part influenced by the changing post-war views of social inequality. The Brown decision, as well as the Court's subsequent decision allowing the desegregation of public schools to proceed with "all deliberate speed," have been rightly criticized as being examples of "contradiction closing case[s]" that were decided only because the Nation's internal and external interests converged with those of African-Americans. While these and other criticisms of Brown

petitioner's contention that Plessey v. Ferguson should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation." Id. at 636.

87. Id. at 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place.").
88. Id. at 487 ("In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis.").
89. Id. at 492-93 ("In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation.").
91. David Gillborn, The Policy of Inequity: Using CRT to Unmask White Supremacy in Education Policy, in HANDBOOK OF CRITICAL RACE THEORY IN EDUCATION 135 (Marvin Lynn & Adrienne D. Dixson eds., 2013) ("[The] concept [of a contradiction-closing case] refers to shifts in policy that appear to address an obvious injustice; hence they remove the apparent contradiction between, on one hand, a clear injustice and, on the other hand, the official rhetoric of equality and fairness. However, the cases' long-term impact is by no means as progressive as is usually assumed.").
92. Bell, supra note 77, at 524-25. The late Professor Bell explained his interest-convergence theory thusly:

The decision in Brown to break with the Court's long-held position on these issues cannot be understood without some consideration of the decision's value to whites, not simply those concerned about the immorality of racial inequality, but also those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation. First, the decision helped to provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples. . . . Advanced by lawyers for both the NAACP and the federal government. And this point was not lost on the news media. Time magazine, for example, predicted that the international impact of Brown would be scarcely less important than its effect on the education of black children: "In many countries, where U.S. prestige and leadership have been damaged by the fact of U.S. segregation, it will come as a timely reassertion of the basic American principle that 'all men are created equal.'” Second, Brown offered much needed reassurance to
may well be true, the *Brown* decision nonetheless forever changed the trajectory of the federal role in public education.

The *Brown* decision was critically important not only for invalidating de jure segregation in public education, but also for laying the foundation for a larger federal role in advancing educational equality. As Patrick McGuinn observes, “the Court's powerful statement in *Brown* . . . would help to give rise to a public conception of education as the birthright of a free citizenry and essential to social justice.” Indeed, the *Brown* decision at the very least fomented the fight for social equality while sowing the seeds for the nascent Civil Rights Movement.

The success of the Civil Rights Movement in seizing upon America’s hypocrisy in matters of social and racial inequality led directly to greater federal involvement in fighting racial discrimination and poverty. As a result of these efforts, the federal role in public education expanded significantly with the passage of the ESEA. Owing in large part to the

American blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home. Returning black veterans faced not only continuing discrimination, but also violent attacks in the South which rivaled those that took place at the conclusion of World War I. Their disillusionment and anger were poignantly expressed by the black actor, Paul Robeson, who in 1949 declared: “It is unthinkable . . . that American Negroes would go to war on behalf of those who have oppressed us for generations . . . against a country [the Soviet Union] which in one generation has raised our people to the full human dignity of mankind.” It is not impossible to imagine that fear of the spread of such sentiment influenced subsequent racial decisions made by the courts. Finally, there were whites who realized that the South could make the transition from a rural, plantation society to the sunbelt with all its potential and profit only when it ended its struggle to remain divided by state-sponsored segregation. Thus, segregation was viewed as a barrier to further industrialization in the South.

Id. at 524-25.


94. McGUINN, supra note 61, at 27.


post-war society’s fleeting recognition of the systemic nature of racial and class inequality, education was seen for the first time less as an excludable private good subject only to local oversight and more as a public good requiring federal intervention to promote equality.

Post-war society, once forced to confront the “American dilemma,” finally admitted that educational disparities were borne out of both poverty and racial discrimination (rather than cultural differences, biological inferiority, or neutral market outcomes). The ESEA, as informed by Brown, was thus implemented with explicit legislative intent to combat educational inequality through enhanced funding and services to segregated and impoverished school districts. Indeed, the ESEA “was part of a larger campaign to provide educational opportunities to poor and minority children that began with the landmark Brown v. Board of Education decision of 1954 that prohibited racial segregation in schools." Therefore, the ESEA intended to address not only poverty through enhanced federal funding, but to also assist public schools with “comply[ing] with the desegregation mandate” articulated in Brown. The substantive dimension of public education federalism in the modern era accordingly centered on the “first principles” of both class and racial equality.
III. NEGATIVE FEDERALISM AND THE COMPETITIVE MODEL OF PUBLIC EDUCATION

The lofty social justice goals of both Brown v. Board of Education and the ESEA became perverted in time, as the substantive values informing education federalism shifted from promoting equality through a race and class-regarding use of public funds to enhancing the private market aspects of public education in order to promote consumer choice, competition, and accountability. The changed view of the appropriate federal role in education was influenced by a reversion to poverty and discrimination "neutral" rationalizations of social inequality. Educational inequality along the lines of race and class was once again justified on the grounds of either cultural difference, market outcomes, or both.

As to the former, conservative legislators and sociologists "argued that disadvantaged students suffered from a 'culture of poverty' and that they could only succeed if they were taught middle-class values."\textsuperscript{102} New York Congressperson Daniel Patrick Moynihan, for example, published a report on "The Negro Family" the same year the ESEA was enacted which argued that the federal government should de-emphasize the issue of racism and discrimination in its social policy.\textsuperscript{103} The basis for the report's finding was the dubious conclusion that African-American inequality was "capable of perpetuating itself without assistance from the white world" and "at the heart of the deterioration of the fabric of Negro society is the deterioration of the Negro family."\textsuperscript{104} A few short years later, Congressperson Moynihan urged President Nixon that "the time may have come when the issue of race could benefit from a period of 'benign neglect'" as the "Subject" of race "had been too much talked about."\textsuperscript{105} "Culture of Poverty" theories soon came into sociological vogue,\textsuperscript{106} which were cited by legislators as grounds to de-emphasize the federal role in eliminating social and racial inequality.\textsuperscript{107}

\begin{itemize}
\item \textsuperscript{102} Mcguinn, supra note 61, at 31.
\item \textsuperscript{104} Id.
\item \textsuperscript{105} Peter Kihss, "Benign Neglect" on Race is Proposed by Moynihan, N.Y. Times, Mar. 1, 1970, at 1.
\item \textsuperscript{106} See, e.g., William Julius Wilson, The Declining Significance of Race 23 (1980).
\item \textsuperscript{107} African American Literature Beyond Race: An Alternative Reader 23-24 (Gene Andrew Jarrett ed., 2006).
\end{itemize}
A. The Market Model of Public Education

The more significant resistance to educational equality came in the form of “freedom of choice” and “school choice” policies designed to limit desegregation via the race-neutral artifices of “individual freedom” and “consumer preference.” It should not be surprising that “freedom-of-choice” plans in education became a euphemism for resurgent racial segregation. As Professor Martha Minow recounts, “school choice policies emerged shortly after the Supreme Court’s 1954 and 1955 decisions in Brown as a form of white southerners’ resistance to court-ordered desegregation.”

Indeed, classic-market economist Milton Friedman published his seminal report advocating school choice and “voucher” reform immediately after (and, arguably, in reaction to) the Brown decisions. In addition to promoting freedom of choice policies to prevent desegregation of public schools, many Southern states also resisted Brown by creating private schools of choice (also known as segregation academies) to facilitate white flight from desegregating public schools.

Educational inequality, according to choice proponents, owes its legacy not to systemic racism or poverty, but rather to distortions in the market caused by governmental intervention (such as Brown and the ESEA). Under this viewpoint, education policy should strive to promote competition and consumer choice in order to create an efficient marketplace of schools. The school choice movement thus has long been closely associated with, and informed by, privatization reform initiatives.

The allure of the school choice movement lies in its simplicity. Educational inequality is reduced to a matter of distorted market functions, which can be alleviated through deregulation and the restoration of competition and choice. The fault of disparate educational outcomes lies not

110. Id.
111. Id. at 116-17.
in complex systems of poverty and racial discrimination, under the choice viewpoint, but rather a mistaken view of the appropriate state role in establishing education policy. As former Assistant Secretary of Education Diane Ravitch explains:

There is something comforting about the belief that the invisible hand of the market, as Adam Smith called it, will bring improvements through some unknown force. In education, this belief in market forces lets us ordinary mortals off the hook... One need not know anything about children or education. The lure of the market is the idea that freedom from government regulation is a solution all by itself.116

The “comfort” of the choice movement lies in the luxury of rationalizing the existence of inequality without the need to interrogate existing class and racial privilege.117 Acknowledging the existence of privilege leads to cognitive dissonance for the privilege-holder, and “[t]he potential psychic damage... forces most to ignore and suppress alternative explanations for their status that depart from the assumption of naturalness and neutrality.”118 The evolution of “choice” and “competition” reform narratives can be traced in part to this psychological desire to normalize inequality by either ignoring or failing to fully appreciate the role that poverty and racial bias play in perpetuating educational disparities.119

The use of “federalism” to mediate this classic American dilemma (between democracy and inequality) has significantly impacted modern educational policy since Brown and the original ESEA.120 Both the No

117. Id. at 91-92 (explaining that the choice movement believes that “poverty can be overcome by effective teachers” and are necessary to rectify a “culture of excuse”).
119. John T. Jost, Outgroup Favoritism and the Theory of System Justification: A Paradigm for Investigating the Effects of Socioeconomic Success on Stereotype Content, in Cognitive Social Psychology: The Princeton Symposium on the Legacy and Future of Social Cognition 90 (2013) (explaining that System Justification Theory is the theory that “people use ideas about groups and individuals to reinforce existing social systems and preserve the sense that those systems are fair, legitimate, and justifiable”).
120. President Reagan, for example, embraced the choice movement in promoting his agenda of “New federalism” - a form of competitive federalism. In passing modifications to the ESEA, President Reagan “hoped either to eliminate the federal role in schools or to redefine the nature of the federal education policy regime by making privatization, choice,
Child Left Behind Act of 2001 (NCLB) and the Race to the Top Act of 2009 (RTT) reforms encourage inter-school competition by promoting parental choice while measuring school success through accountability standards, which are often developed by private entrepreneurs. The two acts "preserved testing, accountability and choice at the center of the federal agenda" while "open[ing] the door to huge entrepreneurial opportunities" funded by federal dollars for private tutoring and testing services.

The NCLB and RTT rest upon two bedrock principles: choice and accountability. NCLB provided specifically for school choice in allowing that "[p]arents of students in Title I schools identified for school improvement, corrective action, or restructuring will have the option to transfer to another public school in the district not in school improvement." As such, NCLB hoped to promote inter-school competition as a method to develop markets within school districts. One assumption underlying NCLB, therefore, is that parents and students would act as rational actors in exercising such choice so that schools would have a "substantial incentive. . . to improve." The Department of Education touted NCLB as stimulating educational innovation and progress through the promotion of market competition and choice: "Systems are often resistant to change no matter how good the intentions of those who lead them. Competition can be the stimulus a bureaucracy needs in order to change. For that reason, the administration seeks to increase parental options and influence."

Accountability standards were also incorporated into NCLB, in part to support consumer choice and the conditions for market competition. Parental choice under NCLB is only triggered once a school is deemed to be

---


124. Id.

“failing” under its accountability provisions. The designation of a school as failing not only allows students to enroll in a different school, but also pressures the school into converting into a privately-run charter school or ceding control to a private management company.126 These two “principles of high-stakes accountability and school choice plans of NCLB have been at the center of the modern conservative movement’s education reform plan” to redefine the federal role in public education.127

The competitive federalist nature of NCLB and RTT was left largely unchanged by the revisions made by ESSA in December 2015. ESSA continues NCLB’s focus on creating competitive education markets, implementing high-stakes testing, deregulation, and expanding consumer choice for parents.128 The most significant changes implemented by ESSA—enhanced state and local control of accountability and testing systems,129 expanded charter school funding,130 increased consumer choice,131 and deregulated professional standards for teachers132—preserve rather than transcend the neoliberal legacy of NCLB and RTT.

Liberal and conservative pundits have hailed the ESSA for “returning control to states and local districts” of the accountability methods used to evaluate school and student performance.133 Under the ESSA, states can choose to either adopt test-based accountability plans already approved

126. RAVITCH, REIGN OF ERROR, supra note 122, at 11, 97-98. Failing schools wishing to remain in compliance with NCLB also have the option of replacing the administration and staff, turning over control of the school to state authorities, or engaging in “any other major restructuring” of the school’s governance. Id. at 11.

127. Id.


129. Id. tit. I ("Improving Basic Programs Operated by State and Local Educational Agencies") and tit. V ("State Innovation and Local Flexibility").

130. Id. tit. IV ("21st Century Schools").

131. Id. tit. I and tit. IV.

132. Id. tit. II ("Preparing, Training and Recruiting High-Quality Teachers, Principals, or Other School Leaders").


PROHIBITIONS. "(i) STANDARDS REVIEW OR APPROVAL.—A State shall not be required to submit any standards developed under this subsection to the Secretary for review or approval. “(ii) FEDERAL CONTROL.—The Secretary shall not have the authority to mandate, direct, control, coerce, or exercise any direction or supervision over any of the challenging State academic standards adopted or implemented by a State.

ESSA § 1111(g), 129 Stat. at 1825.
by the federal government (such as the Common Core) or develop alternative accountability standards. It nonetheless remains unclear whether states will invest the significant time and money involved in developing alternative accountability standards, when such plans remain subject to approval by the federal Department of Education. In any event, ESSA appears to be a mere rebranding of the NCLB/RTT framework—even as it relates to the modified accountability provisions. Prior to the passage of the ESSA, an astounding forty-two states (as well as the District of Columbia) had already been granted waivers by the Department of Education from the stringent federal accountability measures "in exchange for states' commitment to 'setting their own higher, more honest standards for student success.'" As such, the shift of power contemplated by the ESSA merely seems to formalize what had become standard practice under NCLB and RTT.

The ESSA also continues the focus of NCLB and RTT on deregulating public education through the expansion of both charter schools and exemptions from university-based teacher preparation programs. In particular, Title II of the ESSA allows states to authorize non-university administered teacher preparation academies to prepare teachers for high-poverty schools. Such schools are then exempted from the "unnecessary restrictions on the methods the academy will use to train prospective teacher[s]," such as "advanced degrees," specific "undergraduate

---

134. ESSA, § 1111, 129 Stat. at 1820. Section 1111(b) of ESSA provides:

CHALLENGING ACADEMIC STANDARDS AND ACADEMIC ASSESSMENTS.—

"(1) CHALLENGING STATE ACADEMIC STANDARDS.—

"(A) IN GENERAL.—Each State in the plan it files under subsection (a), shall provide an assurance that the State has adopted challenging academic content standards and aligned academic achievement standards (referred to in this Act as 'challenging State academic standards'), which achievement standards shall include not less than 3 levels of achievement, that will be used by the State, its local educational agencies, and its schools to carry out this part.

A State shall not be required to submit such challenging State academic standards to the Secretary.

Id.

135. Id.

136. See, e.g., Alia Wong, The Bloated Rhetoric of No Child Left Behind's Demise, ATLANTIC (Dec. 9, 2015).

137. ESSA § 5101, 129 Stat. at 1994 (stating the legislative intent to, inter alia, "increase the number of high-quality charter schools available to students across the United States" and to "encourage States to provide support to charter schools for facilities financing in an amount more nearly commensurate to the amount States typically provide for traditional public schools").


139. Id.
coursework,” “the number of course credits,” or “obtaining accreditation.” 140 The deregulated provisions of the ESSA that lessen the standards states use to authorize new teachers in high-poverty schools appear to “have been primarily written to support entrepreneurial programs like those funded by venture philanthropists.” 141

The ESSA thus represents a political rebranding of the old NCLB and RTT regime in that it maintains the former’s focus on promoting competition, accountability, deregulation, and standardized testing, while shifting responsibility for overseeing certain measures to the states. 142

B. The Failings of Choice, Competition, and Market-Based Education Reforms

In this milieu, the original purpose of the ESEA and Brown (and of the appropriate federal role in education) has become lost. Rather than utilizing federal policy and funding to combat the true roots of educational disparity—poverty and racial discrimination—the federal role has shifted under the market model to conceal these roots. The belief has become that “effective teaching” and a business-model of public education is all

140. Id. § 2002(4)(B), 129 Stat. at 1915. Section 2002 (4)(B) provides the following:

TEACHER, PRINCIPAL, OR OTHER SCHOOL LEADER PREPARATION ACADEMY.—The term “teacher, principal, or other school leader preparation academy” means a public or other nonprofit entity, which may be an institution of higher education or an organization affiliated with an institution of higher education, that establishes an academy that will prepare teachers, principals, or other school leaders to serve in high-needs schools, and that—“(B) does not have unnecessary restrictions on the methods the academy will use to train prospective teacher, principal, or other school leader candidates, including—” (i) obligating (or prohibiting) the academy’s faculty to hold advanced degrees or conduct academic research; “(ii) restrictions related to the academy’s physical infrastructure;” (iii) restrictions related to the number of course credits required as part of the program of study; “(iv) restrictions related to the undergraduate coursework completed by teachers teaching or working on alternative certificates, licenses, or credentials, as long as such teachers have successfully passed all relevant State-approved content area examinations;” or (v) restrictions related to obtaining accreditation from an accrediting body for purposes of becoming an academy.

Id.


142. LA Times Editorial Board, Every Student Succeeds Act Fails Too Many Students (Oct. 2, 2016), available at https://www.the74million.org/article/williams-why-progressives-should-fear-conservatives-should-hate-and-obama-should-veto-the-nclb-rewrite (“Every Student Succeeds Act. . . is even more of lie [than NCLB] [in that it] is a compromise that benefits pretty much everyone but the students most in need of improved schools.”) (“What this bill doesn’t change specifically in substance it does change in rhetoric. I think if anything, this bill really takes the air out of the political footballs that have been Common Core and over-testing.”) (quoting Tamara Hiler).
that is needed to overcome generational poverty and persistent racial discrimination. Yet, it has become abundantly clear that the market strivings of federal education policy have forsaken the original promise of social equality embodied by Brown and the ESEA.

Our history demonstrates that school choice policies tend to develop as a tool to undermine Brown desegregation efforts as part of a larger effort to maintain racial inequality. While often utilizing race-neutral language such as "parental choice" and "individual freedom," modern choice policy "ha[s] the potential to perpetuate racial hierarchies" as parents make private decisions to self-segregate their children. The equity rationale of Brown and the original vision of the ESEA are simply incompatible with the market rationale of current education policy:

[It] is apparent that two distinctly different ideologies motivated the Brown decision and NCLB. For Brown a separate education could never be equal, and affirmative racial integration was necessary to provide every child with a quality education. Conversely, under NCLB the ideologies of high-stakes accountability and a market-driven approach [assume] that a separate education can be equal.

The modeling of education policy around principles of consumer choice, competition, and market-accountability have increased educational disparities along class and race lines. Since the adoption of NCLB and RTT, our public schools have become increasingly segregated by race. There is little reason to believe that rates of school segregation will decrease because of the passage of the ESSA, especially in light of its continued expansion of charter schools, deregulation, and parental choice. The choice provisions of the ESSA (and formerly of NCLB and RTT) are fueling the re-segregation of our public schools primarily because the current market-model of education policy incorrectly assumes parents (that

---

143. MICHELLE RHEE, RADICAL: FIGHTING TO PUT STUDENTS FIRST xii-xiv (2013).
145. Nichols, supra note 123, at 151-52 (noting "NCLB emerged from a decades-long conservative movement seeking to reform education using market and business models").
146. Sean F. Reardon, No Rich Child Left Behind, N.Y. TIMES (Apr. 27, 2013), available at http://opinionator.blogs.nytimes.com/2013/04/27/no-rich-child-left-behind/ (noting that "differences in educational success between high- and lower-income students have grown substantially" since the adoption of NCLB).
is, namely consumers) to be rational actors. A core principle of the market-model is that choice will foster competition amongst public schools, which then will force individual schools to improve the quality of education provided to students.\textsuperscript{148} However, it has become increasingly clear that parents tend to choose schools "with a racial profile matching their own."\textsuperscript{149} Indeed, there is evidence that the current school-choice provisions have so upset the racial balance of certain public schools as to run afoul of \textit{Brown} Court desegregation orders.\textsuperscript{150}

Parents selecting a school for their children are also influenced by "non-racial" factors not adequately captured by the market model of competition—including geography, inadequate resources, lack of motivation, and inadequate information regarding other options.\textsuperscript{151} The application of market principles to public education has failed not only due to an incorrect assumption of rational acting by consumers, but because of significant informational asymmetries between schools and parents.\textsuperscript{152}

The allure of choice as a salve for racial and social inequality in education is understandable, yet misguided. Martha Minow has written extensively on the "seductive" nature of choice, noting that choice can "imply that freedom and equality exist even when they are absent."\textsuperscript{153} Professor Minow observes "that [b]y subordinating racial and other kinds of integration to school choice, contemporary schooling policies. . . expressly elevate private preferences" which tend to "reinforce or even worsen racial separation in American schools."\textsuperscript{154} Professor John A. Powell summarizes the failings of school choice as follows:

\begin{itemize}
  \item \textsuperscript{148} No Child Left Behind Act § 1001, 115 Stat. at 1439-40 (codified at 20 U.S.C. § 6301); American Recovery and Reinvestment Act §§ 14005-6, 123 Stat. at 282-84.
  \item \textsuperscript{149} Tom Loveless & Katharyn Field, Perspectives on Charter Schools, in \textit{HANDBOOK OF RESEARCH ON SCHOOL CHOICE} 111 (2010).
  \item \textsuperscript{151} See HENIG, supra note 115, at 57.
  \item \textsuperscript{152} See Lubienski & Weitzel, supra note 147, at 367.
  \item \textsuperscript{153} Martha Minow, \textit{Confronting the Seduction of Choice: Law, Education and American Pluralism}, 120 YALE L.J. 814, 817 (2011). Professor Minow explains that "[i]n light of existing preferences and inequalities, the options of private schooling and public subsidies for school vouchers, magnet schools, and charter schools can easily undermine integration along lines of race, class, gender and disability." \textit{Id.} at 817.
  \item \textsuperscript{154} \textit{Id.} at 845; see also Rosemary C. Salomone, \textit{The Common School Before and After Brown: Democracy, Equality and the Productivity Agenda}, 120 YALE L.J. 1454, 1472-73 (2011) (noting that the focus of public education policy shifted from "racial integration and equal resources" during the post-\textit{Brown} era to accountability following NCLB).
\end{itemize}
The reality of choice is that it is a racialized system that reproduces the inequity it is supposed to address. Effective responses to persistent segregation and concentrated poverty cannot be furnished by purely individualistic solutions such as letting students choose their school one by one. The Supreme Court considered this approach after Brown and rejected it as inadequate.155

The larger problem with the market-model of public education is that it serves to normalize continued educational inequality. The existing framework purports to provide students with an equal opportunity to pursue an education from competitive options. The occurrence of educational failures within such a "neutral" market of consumer preferences can then be interpreted as owing to poor choices or personal deficit under this perspective, thereby rationalizing the persistence of racial and social educational disparities.156 Diane Ravitch concluded as follows:

The testing, accountability and choice strategies offer the illusion of change while changing nothing. They mask the inequity and injustice that are now so apparent in our social order. They do nothing to alter the status quo. They preserve the status quo. They are the status quo.157

School choice and accountability reforms, as noted, have had relatively little impact on student performance.158 The primary determinants of student success, rather, have been racial bias, family background, and socioeconomic status.159 The focus on “neoliberal solutions like NCLB,
with its emphasis on efficiency and individualism, divert attention away from the social issues that need to be solved if we are to really improve education outcomes."160 As a result, current education policy "both directly and indirectly exacerbates racial, ethnic and economic inequality in society."161 Our current approach to public education has grossly departed from the ideals and principles of racial and class equality that shaped the federal education role during the post-Brown and ESEA era. The substantive dimension of education federalism has thus wrongly shifted from ensuring racial equality in a democratic society to ensuring consumer choice in a competitive marketplace.

The recent enactment of the ESSA creates the possibility of further exacerbating race and class-based educational inequalities. While retaining the core principles of NCLB, the ESSA diminishes federal oversight of school performance while further expanding both consumer choice and deregulated teacher preparation programs. As Marian Wright Edelman observes, such a "gutting [of] a strong federal role in [an] education policy designed to protect [African-American and Latino] children . . . jeopardiz[es] their opportunity for a fair and adequate education."162 Civil rights groups, including the Southern Poverty Law Center and the New York chapter of the NAACP, fear that decreased "federal oversight of education will be much too weak to ensure [equal] education for Black and Latino students" in many states.163 The prominent education and urban planning researcher Gary Orfield further opines that with the ESSA "we're going to get something that's much worse [than NCLB]—a lot of federal money going out for almost no leverage for any national purpose."164 Education advocate Kalmann Hettleman similarly views the ESSA as "a massive retreat from our national interest and commitment to equal educational opportunity, especially for poor and minority children."165

---

160. David Hursh, Exacerbating Inequality: The Failed Promise of the No Child Left Behind Act, 10 RACE, ETHNICITY & EDUC. 295, 305 (2007).
161. Id. at 306; see also Minow, supra note 153, at 848 (noting that market-based education reform can "obscure[] continuing inequalities in access and need" by "convert[ing] schooling to private desires").
163. Singer, Will Every Student Succeed?, supra note 156.
164. Id.
The education federalism forged by the original ESEA and Brown envisioned federal regulation of public education to the extent necessary to promote social equality and racial integration.\(^{166}\) Such robust federal oversight was necessary in light of the historical practice of states to undermine educational opportunity for poor and minority children.\(^{167}\) The devolution of the federal role in public education following the ESSA—coupled with its continued emphasis on standardized testing, choice, and market competition—threatens to increase race- and class-based disparities in education.

IV. POSITIVE FEDERALISM AND PUBLIC EDUCATION POLICY

The divining of the appropriate federal role in public education has historically been rooted in a procedural vision of the negative limits of federal action. The discussion of education federalism, therefore, has largely focused on the degree to which federal law should influence or supersede traditional state “police powers.”\(^{168}\) While negative branches of federalism often purport to balance federal and state interests in an ideologically neutral fashion, it is clear that the federalism debate is also imbued with particular substantive conceptions of the content and preferred outcomes of permissible federal actions.

The original allocation of “police powers” to states—which established local responsibility for the health, education, and safety of residents—has long been derided as a constitutional compromise to allow states to preserve slavery and prevent racial progress.\(^{169}\) The invocation of “states’ rights” following the Brown desegregation decree is just one example of negative federalism being utilized as a tool to resist social progress.\(^{170}\) Indeed, as Professor Lisa Miller notes, “federalism in the United States was forged in part as a mechanism for accommodating slavery, and it facilitated resistance to racial progress for blacks long after the Civil

\(^{166}\) See supra Part II.

\(^{167}\) See supra Part II.


\(^{170}\) See, e.g., Minow, supra note 109, at 21; William G. Ross, Attacks on the Warren Court by State Officials: A Study of Why Court-Curbing Movements Fail, 50 Buff. L. Rev. 438, 492 (2002); Miller, supra note 169, at 807. Professor Lisa Miller explains that “[f]or much of the nation’s history, American-style federalism has allowed the national government to escape pressure and responsibility for addressing inequality and stagnation in racial progress.” Id.
Pre-war education federalism thus often strove to forestall federal intervention in state systems of racial control in an effort to preserve educational segregation and inequality.\(^{172}\)

The passage of the ESEA, in light of this history, was monumentally important in shifting the substantive dimension of education federalism. No longer was education federalism centered on preserving states’ rights to segregate disproportionately funded public schools. Rather, education federalism in the post-\textit{Brown} and ESEA era sought to utilize the federal government’s block grant powers to rectify racial and class imbalances in public education.\(^{173}\) The substantive dimension of post-\textit{Brown} education federalism, as embodied by the original vision of the ESEA, justifies federal involvement in public education when necessary to combat both poverty and racial discrimination.\(^{174}\)

The substantive dimension of modern education federalism, however, has been radically transformed through the ESSA, NCLB, and RTT policies. Federal activism in public schools is no longer justified to the extent it reduces class and racial disparities in education, but rather to the extent it promotes competition, choice, and accountability.\(^{175}\) The embrace of competitive federalism by modern education policy is misplaced from a historical perspective, and represents an unconstitutional abrogation of the federal government’s responsibility to eliminate class and racial disparities in education. The promise of \textit{Brown} and of the original purpose of the ESEA cannot be realized without a reconceptualization of education federalism as requiring positive race- and class-regarding actions by the federal government.

\textbf{A. A Positive Conception of Education Federalism}

While negative visions of federalism long have been wielded as a tool to de-legitimize federal efforts to combat racial and class inequality,\(^{176}\) federalism is more appropriately understood as empowering the federal

\footnotesize
\begin{itemize}
  \item \textsuperscript{171} Miller, supra note 169, at 806.
  \item \textsuperscript{172} See supra Part II.
  \item \textsuperscript{173} See supra Part II.
  \item \textsuperscript{174} See supra Part III.
  \item \textsuperscript{175} See supra Part III.
  \item \textsuperscript{176} Miller, supra note 169, at 806 ("American federalism limits the authority and political incentives of the central government to address a wide range of social problems that give rise to crime and diffuses political power across multiple venues, which makes it difficult for the poor and low-resources groups to access decision-making."); Kevin Brown, \textit{The Implications of the Equal Protection Clause for the Mandatory Integration of Public School Students}, 29 CONN. L. REV. 999, 1002 (1997).
\end{itemize}
government to directly respond to social inequality. Federalism should be positively conceived of as "a device for realizing the concepts of decency and fairness which are among the fundamental principles of liberty and justice lying at the base of all our civil and political institutions," rather than a negative limit on the government's ability to advance liberty.

Traditional theories of negative federalism are roundly criticized as being incoherent, indeterminate, and rights regressive. The failings of negative conceptions of federalism can be traced in part to unstable assumptions about the policy values that should inform federalism theory. Traditional theories of federalism recite a number of values that are purportedly advanced by restricting federal action: the reduction of "federal tyranny," enhancing state experimentation, improving the democratic process, advancing "liberty," and restoring the "original meaning" of the Constitution. And yet, scholars have demonstrated that limiting federal action does little to advance such policy values, and instead exacerbates social inequality. The question then becomes —what constitutional values should inform education federalism policy?

I posit, perhaps unremarkably, that the first principles of our Constitution are social equality and democratic representation. A theory of federalism should respect these overarching aspirations of our Constitution, while recognizing that positive federal action has historically been necessary to both reduce inequality and enhance the democratic process. Federalism exists for this normative purpose: to ensure equality of the people, which at times requires positive intervention from the federal government. A positive conception of federalism, then, acknowledges...
the constitutional obligation of the federal government to promote social justice and democratic fairness.\textsuperscript{185}

\textbf{B. A Positively Federalist View for Future Reauthorizations of the ESEA}

A positive conception of federalism is particularly justified when attempting to divine the appropriate federal role in public education. As discussed previously, the primary constitutional basis for federal involvement in public education is premised on the government’s responsibility to take positive action to remedy racial and class inequalities.\textsuperscript{186} The \textit{Brown} constitutional doctrine and the “War on Poverty” driven by the ESEA forged an understanding of education federalism rooted in positive social justice. It is particularly appropriate today that we restore this fundamental understanding of education federalism, given evidence of increasing racial disparities in public education and the noted failures of modern education federalism policy.

The federal guarantee of equal public education is critically important to the functioning of our democracy. As a public good, education helps our society develop those “fundamental values necessary to the transmission of our democratic society.”\textsuperscript{187} The provision of an equitable public education, devoid of identity-based disparities, is critical to provide children with “the knowledge needed to understand and participate effectively in the democratic process and to cultivate among children respect for and the ability to interact with others as beings of inherently equal moral worth.”\textsuperscript{188} Indeed, both classic and contemporary constitutional scholars argue that equal public education should be regarded as “a fundamental duty, or positive fundamental right because education is a basic human need and a constituent part of all democratic rights.”\textsuperscript{189} The need, then, for a robust application of positive education federalism principles in this context cannot be stronger.

\begin{thebibliography}{9}
\bibitem{185} See Rawls, supra note 183; see Ackerman, supra note 183.
\bibitem{186} See Part IV.
\bibitem{187} Brown, supra note 176, at 1002; see also Powell, supra note 144, at 289.
\bibitem{188} Kleven, supra note 182, at 374.
\end{thebibliography}
The purpose of this Article is not to provide specific curricular recommendations to guide the future of public education. Rather, this Article has attempted to define a new vision of positive education federalism—one that is rooted in a historical understanding of the constitutional obligation of the federal government to shape education policy goals in a manner that responds to unrelenting racial and class disparities. A few core principles regarding the substantive dimension of positive education federalism can be gleaned from this discussion:

1. First Principle: Providing an equal public education is a federal responsibility that cannot be transferred to or assumed by private market forces.

The overarching conclusion of this Article is that ESSA, NCLB, and RTT unconstitutionally transfer federal responsibility for positively eliminating racial and class inequality in public education to private market forces under the auspices of competitive federalism. This reading of the federal role in public education is ahistorical and undermines the core principles of equality informing Brown-era education federalism.

2. Second Principle: Positive federal action is justifiable in public education when necessary to rectify historical patterns of racial and class oppression.

It follows from the first principle that positive federal intervention in public education is justified when employed to directly respond to our unbroken history of racial and class disparities in educational outcomes. The original vision of the ESEA and Brown anticipated future positive efforts by the federal government to wield its block grant powers to actively dismantle old systems of oppression. The current statutory framework has abandoned this vision of equality in its misguided pursuit to harness the market forces of consumer choice, accountability, and competition to limit the federal role in education.

190. See, e.g., RAVITCH, supra note 112; see, e.g., RAVITCH, REIGN OF ERROR, supra note 120; Kay Brilliant, NEA's Response to Race to the Top, NAT'L EDUC. ASS'N (Aug. 21, 2008), available at http://www.nea.org/home/35447.htm.
191. See supra Part III.
192. See supra Part III.
193. See supra Part II.
194. See supra Part III.
3. Third Principle: Our education federalism must acknowledge that racial discrimination and class oppression are the true roots of current educational disparities.

Third, it is of the utmost importance that our education federalism fully acknowledge the historical and continuing causes of education disparities: racial discrimination and poverty. The race and class-based roots of educational inequality are well-known and well-documented, and our education federalism can no longer hide behind the veil of ignorance provided by ESSA, NCLB, and RTT. Far from acknowledging the reality of educational disparities, our current competitive federalist framework for education actively attempts to conceal these roots, with the spurious promise that the free market principles of choice, accountability, and competition will eventually equalize education. Modeling our education federalism around such race and class “neutral” market principles have led to a deepening of the crisis while allowing society to ignore the ways in which privilege shapes outcomes.

4. Fourth Principle: Our education federalism must strive to promote racial and class integration.

Finally, any equality-based vision of education federalism must promote the social integration of our public schools. The current competitive conception of education policy has failed those “faces at the bottom of [the] well” and led to a rampant racial re-segregation of our schools. This failure evinces a lack of faith and duty in fulfilling the original integrationist goals of Brown and the ESEA. Therefore, a positive theory of education federalism must promote federal efforts to integrate our public schools.

These core principles, on a theory of positive education federalism, can be used to inform future reauthorizations of the ESEA. While this Article does not attempt to advance specific changes in statutory law, it has attempted to redefine the substantive dimension of our education federalism in a manner that restores our faith in Brown, the ESEA, and the promise of racial and class equality.

195. See supra Part II.
196. See supra Part II & Part III.
197. See supra Part III.
198. See supra Part III.
199. See Bell, supra note 3.
200. See supra Part III.
CONCLUSION

The neoliberal vision of education federalism embodied by ESSA, NCLB, and RTT has improperly shifted the federal government's role in public education from one of promoting desegregation and social equality to one of promoting market efficiency through the artifices of competition, choice, and accountability. This deflection of moral responsibility for class and racial inequality is tied to a larger process of post-racialism and "post-oppression," whereby seemingly "neutral" market solutions are seen as sufficient to promote equality in a liberal democracy. There is, after all, a comforting allure to believing that social inequality is non-systemic, and thus avoiding the cognitive dissonance (and structural upheaval) that comes from confronting our continuing legacy of racial and class privilege.

Allowing the "invisible hand" of the market to sort educational outcomes under the guise of "competition," "choice," and "accountability," however, has led to a deepening of the crisis confronting our public schools. The federal role in public education has been reduced to incentivizing reform centered around market principles, rather than promoting desegregation and the equality envisioned by Brown and the original ESEA. "Our federalism" demands more than this. The substantive dimension of education federalism, as constitutionalized by Brown and framed by the original ESEA, must be restored in our public education policy. The adoption of a positive conception of the federal role in public education to frame future policy discussions can put us once again on the path towards achieving equality of educational outcome for all students.