

MINE THE GAP: USING RACIAL DISPARITIES TO EXPOSE AND ERADICATE RACISM

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ABSTRACT

For decades, lawyers and legal scholars have disagreed over how much resource redistribution to expect from federal courts and Congress in satisfaction of the Fourteenth Amendment’s promise of equal protection. Of particular importance to this debate and to the nation given its kaleidoscopic history of inequality, is the question of racial redistribution of resources. A key dimension of that question is whether to accept the Supreme Court’s limitation of equal protection to public actors’ disparate treatment of members of different races or instead demand constitutional remedies for the racially disparate impact of public action.

For a substantial segment of the nation’s population as well as its judiciary and legal culture, governmentally mandated redistribution, and particularly racial redistribution, of resources to remedy the disparate results of public action is anathema to our constitutional order—so much so that such redistribution may provoke violence that horribly magnifies inequality. Avoiding that prospect leads us to propose a new constitutional understanding of the relationship between disparate impact and treatment to serve as an alternative to racial redistribution—or, should our legal

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culture change sufficiently in reaction to current events, as a necessary supplement to redistribution.

While acknowledging the need to mind the racial and other gaps that public action persistently creates and tolerates, our strategy calls upon public actors and oversight bodies to mine the gaps for dispositive evidence of disparate treatment. Compared with how federal courts and our legal culture currently understand disparate treatment, our approach is more honest about the existence and meaning of centuries of unrelenting racial disparities and more insistent on transparency about why disparities keep occurring and whether they are innocent. Yet, the proposal also is moderated by its continuing prioritization of disparate treatment over disparate impact per se; by the extent to which it remains constitutionally and culturally precedented; by its objective of reform but not necessarily outright racial redistribution; and by its effort to avoid rowing upstream against the nation's individualistic current or being swept by it over treacherous and violent falls.

In offering this approach, we recognize the need constantly to calibrate the breadth of the concession being made to liberty over equality and community, in order to keep the voracious appetite of the nation's individualism from consuming all hope of equity and social solidarity among diverse populations.

* * * * *

[O]n the big unfinished goals in this country . . . broad majorities agree on the ends. That's why folks with power will keep trying to divide you over the means. That's how nothing changes. You get a system that looks out for the rich and powerful and nobody else. So expand your moral imaginations, build bridges, and grow your allies in the process of bringing about a better world.

Barack Obama

Address at the Show Me Your Walk H.B.C.U. Edition

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I. INTRODUCTION: RACIAL REFORM, REDISTRIBUTION,
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For decades, lawyers and legal scholars have disagreed over how much resource redistribution to expect from federal courts and Congress in satisfaction of the Fourteenth Amendment's promise of equal protection.¹ Of particular importance to this debate and to the nation, given its kaleidoscopic history of inequality is the question of *racial*

¹ See, e.g., Kate Andrias, *The Fortification of Inequality: Constitutional Doctrine and the Political Economy*, 93 IND. L. REV. 5, 18–23 (2018) (exploring contribution of Supreme Court's treatment of education equality to economic inequality); Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 934–43 & nn.3, 9–11, 17–20 (1983) (summarizing the debate over distributive constitutional equality doctrine); Paul Brest, *Foreword: in Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 49–52 (1976) (“[N]either the Constitution nor sound moral or political theory disfavors practices that disproportionately injure the members of racial minorities unless the disproportionate impact reflects or conduces to violations of the antidiscrimination principle.”); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 102–3 (1980) (arguing that constitutional courts should limit enforcement of equality to assuring equal access to the political process, while eschewing substantive, including redistributive, decisionmaking); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 670–96 (2014) (criticizing law's current deviation from historical understandings of “equal protection” as problematizing wealth imbalances); MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 169 (2012) (criticizing constitutional focus on distributive equality rights and calling for constitutional limits on economic regulation with redistributive effects); Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9–13 (1969) (arguing that the Fourteenth Amendment guarantees a minimum level of protection against the effects of poverty, noting Supreme Court “interventions [that] are mainly designed to move us towards a condition of economic equality”); ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 201–2 (1974) (criticizing equality notions based on end-state distribution as inconsistent with individual liberty); Suzanna Sherry, *Property Is the New Privacy: The Coming Constitutional Revolution*, 128 HARV. L. REV. 1452, 1473–75 (reviewing RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* (2014)) (calling for a more sustained response to efforts by “conservative foundationalists” to “revolutionize constitutional law” through the rigorous enforcement of anti-redistributive individual rights to property and freedom of contract and restrictions on the administrative state); GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE CLASS CONSTITUTION* 3–19, 59–110 (2017) (locating economic equality as a foundational principle of the U.S. Constitution and arguing that survival of our constitutional order requires distributive constitutional responses to widening inequality); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1067–72 (1980) (advocating judicial enforcement of substantive rights, including distributive equality rights).

redistribution of resources through affirmative action,² reparations,³ modern-day abolitionism,⁴ or the complex of actions needed so that Black lives matter.⁵ A key dimension of that question is whether to accept the Supreme Court's limitation of equal protection to public actors' disparate

² Compare *Fisher v. University of Texas*, 136 S. Ct. 2198, 2215 (2016) (discussed *infra* notes 270–275 and accompanying text), and *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (upholding the constitutionality of the University of Michigan Law School's narrowly tailored use of racial affirmative action in admissions), with *Gratz v. Bollinger*, 539 U.S. 244, 275–76 (2003) (invalidating the University of Michigan's broader use of race in undergraduate admissions).

³ See, e.g., Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC, June 2014, at <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631> [<https://perma.cc/KX2L-UWN5>] (linking slavery to ongoing racial disparities and arguing for monetary reparations for Black Americans); Nikole Hannah-Jones, *What Is Owed*, N.Y. TIMES MAG., June 29, 2020, at <https://www.nytimes.com/interactive/2020/06/24/magazine/reparations-slavery.html> [<https://perma.cc/HNQ4-RVEG>] (cataloguing the ways in which slavery, segregation, and other forms of subjugation have drastically diminished the wealth African-Americans have accumulated); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 373–88 (1987) (developing a constitutional case and procedural mechanisms for lawsuits to secure racial reparations for individuals suffering continuing economic effects of slavery); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 44 (2019) (“Slavery could not be truly and comprehensively abolished without economic redistribution”); Sheryl G. Stolberg, *At Historic Hearing, House Panel Explores Reparations*, N.Y. TIMES, June 19, 2019, at <https://www.nytimes.com/2019/06/19/us/politics/slavery-reparations-hearing.html> [<https://perma.cc/4855-2HWW>] (describing Congress's consideration of a bill exploring methods of identifying descendants of U.S. slaves for purposes of compensation); see also David Brooks, *How to Do Reparations Right*, N.Y. TIMES, June 4, 2020, <https://www.nytimes.com/2020/06/04/opinion/united-states-reparations.html> [<https://perma.cc/P8TQ-J5GM>] (arguing for reparations for Black communities, not individuals).

⁴ See, e.g., Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1172 (2015) (“Abolition aims at dramatically reducing reliance on incarceration and building the social institutions and conceptual frameworks that would render incarceration unnecessary.”); Roberts, *supra* note 3, at 7–8, 11–48 (describing “central tenets” of the movement to “abolish the prison industrial complex” as (1) the link between slavery and “today’s carceral punishment system;” (2) the use of the “criminal punishment system” to “oppress black people and other politically marginalized groups in order to maintain a racial capitalist regime;” and (3) a capacity to “imagine and build a more humane and democratic society that no longer relies on caging people to meet human needs and solve social problems”).

⁵ See, e.g., Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 426–27 (2018) (“[T]he Movement [for Black Lives] makes six major demands: an end to the war on Black people, reparations, invest-divest, economic justice, community control, and political power.”).

treatment of members of different races⁶ or instead demand constitutional remedies for the racially disparate *impact* of public action.⁷

At base, this is a debate over how U.S. law and legal thinking should prioritize and align liberty, equality, and social solidarity. Accepting liberty's primacy might imply that *only* an individual's exercises of liberty for the invidious purpose of withdrawing the liberty of another—for example, through personal or property crimes or purposeful racial discrimination—can justify state intervention to withdraw an actor's liberty by redistributing her or his property in service of equality or social stability.⁸ A number of left liberal thinkers have argued to the contrary that a constitutional commitment to the primacy of each individual's liberty to define and pursue her or his own life plan implies an affirmative communal duty—including through mandated redistribution of resources—to assure all individuals equitable access to the foundational prerequisites of liberty, such as an adequate education and some measure of bodily, economic, medical, and social security.⁹ Disciplining public action that generates disparities in access to those prerequisites by Black Americans or others who historically have been

⁶ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987); *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980); *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979); *Washington v. Davis*, 426 U.S. 229, 239 (1976); see also Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 496 (2003) (“[E]qual protection has become hostile to government action that aims to allocate goods among racial groups, even when intended to redress past discrimination.”); *The Supreme Court—Leading Cases*, 123 HARV. L. REV. 282, 283 (2009) (“Equal protection theory has long been troubled by the conflict inherent in requiring unequal treatment in order to avoid or remedy unequal result.”); THOMAS SOWELL, *DISCRIMINATION AND DISPARITIES* 23–29 (2019) (arguing that racial disparities in economic outcomes do not primarily result from discrimination and that conflating disparities with discrimination generates ineffective social policies); *infra* notes 237–266 and accompanying text (discussing potential equal-treatment objections to a constitutional focus on disparities and equal results).

⁷ See, e.g., Joseph Fishkin, *The Anti-Bottleneck Principle in Employment Discrimination Law*, 91 WASH. U. L. REV. 1429, 1435 (2014) (calling for equality doctrine targeting disparate impact to “ameliorate[] certain bottlenecks in the opportunity structure [by] forcing employers to revise certain practices in ways that promote equal opportunity”); Cedric Merlin Powell, *Harvesting New Conceptions of Equality: Opportunity, Results, and Neutrality*, 31 ST. LOUIS U. PUB. L. REV. 255, 260 (2012) (proposing a reconceptualization of current equal protection and Title VII jurisprudence “so that disproportionate impact may serve as presumptive evidence of discriminatory intent”); Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1135 (2010) (“The Roberts Court’s assault on disparate impact is disturbing because the recognition of a disparate impact cause of action seems to offer the most realistic hope of ever successfully invoking the legal system to help us overcome our cultural compulsion to discriminate against racial minorities.”).

⁸ See, e.g., EPSTEIN, *supra* note 1, at 543; NOZICK, *supra* note 1, at 167–73.

⁹ See Frank Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls’ Theory of Justice*, 121 U. PA. L. REV. 962, 969–76 (1973) (describing this aspect of Rawls’ analysis); see also BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); RONALD DWORKIN, *LIBERALISM, PUBLIC AND PRIVATE MORALITY* 113 (Stuart Hampshire ed. 1978).

denied them is one way to enforce that duty.¹⁰

The proposition that liberty implies some degree of resource equality, however, has not penetrated federal constitutional law.¹¹ On the contrary, for a substantial segment of the nation's population as well as its judiciary and legal culture, overt redistribution of any sort, and particularly racial redistribution, is fundamentally anathema to our constitutional order¹²—so much so that it may provoke violence that horribly magnifies inequality.¹³

¹⁰ See EPSTEIN, *supra* note 1, at 543; NOZICK, *supra* note 1, at 167–73.

¹¹ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 13–14 (1973) (holding that poverty is not a suspect classification for federal equal protection purposes and that, as important as public education is to the exercise of liberty, a state is not required to distribute educational funding equally to all students or in a manner that compensates for some students' economic disadvantage). As Frank Michelman put the point more generally in 1973, “the mainstream of our legal tradition” and our “legal order” generally are “noticeably lacking in norms, principles, and categories of analysis directly applicable to the evaluation of distributional outcomes.” Michelman, *supra* note 9, at 963; see also Andrias, *supra* note 1, at 11–23.

¹² On public support for individualism, see Samuel J. Abrams, *Family and Individualism: A New View of the American Dream*, AM. ENTERPRISE INST. (Apr. 24, 2019), <https://www.aei.org/politics-and-public-opinion/family-and-individualism-a-new-view-of-the-american-dream> [<https://web.archive.org/web/20200220184012/https://www.aei.org/politics-and-public-opinion/family-and-individualism-a-new-view-of-the-american-dream>] (equating the “American Dream” with ability to “live one’s life as one chooses”); David Leonhardt, *The Unique U.S. Failure to Contain Virus*, N.Y. TIMES, Aug. 7, 2020, at A1 (attributing unparalleled spread of and death toll from COVID-19 pandemic in U.S. in part to “its tradition of prioritizing individualism”); Henri C. Santos et al., *Global Increases in Individualism*, 28 PSYCH. SCI. 1228 (2017), <https://journals.sagepub.com/doi/10.1177/0956797617700622> [<https://perma.cc/QN4A-N6YH>] (tracing the recent rise of libertarian individualism in the United States and abroad). On support among federal judges, see Elliott Ash et al., *Ideas Have Consequences: The Impact of Law and Economics on American Justice* 4–7, 19–21 (ETHzurich Ctr. L. & Econ., Working Paper No. 04/2019, 2019), https://www.research-collection.ethz.ch/bitstream/handle/20.500.11850/376884/CLE_WP_2019_04.pdf [<https://perma.cc/5E86-6CTK>]. On support in U.S. legal culture, see Sherry, *supra* note 1, at 1457.

¹³ On the rising risk of white supremacist and libertarian violence in opposition to social trends making the nation more diverse and government policies making it more racially and economically equitable and promoting public over individual interests, see, e.g., ADL, *NEW HATE AND OLD: THE CHANGING FACE OF AMERICAN WHITE SUPREMACY* (2018), <https://www.adl.org/media/11894/download> [<https://perma.cc/36ZQ-LEQD>]; Lydia Bates, *Klansman Charged with Hitting Protesters with Truck in Virginia*, SO. POV. L. CTR. (June 12, 2020), <https://www.splcenter.org/hatewatch/2020/06/12/klansman-charged-hitting-protesters-truck-virginia> [<https://perma.cc/94MG-L25G>]; Janelle Bouie, *The Anti-Lockdown Protesters Have a Twisted Conception of Liberty*, N.Y. TIMES, May 8, 2020, <https://www.nytimes.com/2020/05/08/sunday-review/anti-lockdown-protesters.html> [<https://perma.cc/8HJ5-TAYN>]; Daniel L. Byman, *Riots, White Supremacy, and Accelerationism*, BROOKINGS INST. (June 2, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/06/02/riots-white-supremacy-and-accelerationism> [<https://perma.cc/TAH9-77J4>]; Elisha Fieldstadt & Ken Dilanian, *White Nationalism-Fueled Violence Is on the Rise, but FBI is*

That prospect led us to conceive a new constitutional understanding of the relationship between disparate impact and treatment to serve as an alternative to racial redistribution. We acknowledge from the start that compromising in this fashion with the nation’s settler vision of liberty is painful, given the links between that vision and antebellum Black slavery and postbellum peonage, apartheid, and prisons;¹⁴ and given the Faustian compromises that put slavery in the Constitution, spread it westward, ended Reconstruction, and contrived “separate but equal” (among so many others).¹⁵ As we eventually came to see,

Slow to Call it Domestic Terrorism, NBC NEWS (Aug. 5, 2019), <https://www.nbcnews.com/news/us-news/white-nationalism-fueled-violence-rise-fbi-slow-call-it-domestic-n1039206> [<https://perma.cc/3RTG-3E6P>]; Adeel Hassan, *Hate-Crime Violence Hits 16-Year High*, *F.B.I. Reports*, N.Y. TIMES, Nov. 12, 2019, <https://www.nytimes.com/2019/11/12/us/hate-crimes-fbi-report.html> [<https://perma.cc/W8BF-X9KS>]; Phil Helsel, *Two from White Supremacist Group Plead Guilty in Charlottesville Rally Violence*, NBC NEWS (May 3, 2019), <https://www.nbcnews.com/news/us-news/2-white-supremacist-group-plead-guilty-charlottesville-rally-violence-n1001971> [<https://perma.cc/48VC-Y4QV>]; see also Abigail Censky, *Heavily Armed Protesters Gather Again at Michigan Capitol to Decry Stay-at-Home Order*, NPR (May 14, 2020), <https://www.npr.org/2020/05/14/855918852/heavily-armed-protesters-gather-again-at-michigans-capitol-denouncing-home-order> [<https://perma.cc/A2VU-2BJJ>] (describing the reactions to stay at home orders); Jesse Wegman, *Seriously, Just Wear Your Mask*, N.Y. TIMES, July 2, 2020, <https://www.nytimes.com/2020/07/02/opinion/coronavirus-masks.html> [<https://perma.cc/NC7Z-3MPN>] (describing violent objections to an “elite” and oppressive “medical deep state” triggered by public health requirements to wear facemasks in public during the COVID-19 pandemic); *infra* note 303 and accompanying text (discussing the white supremacist and libertarian forces generating the violent January 6, 2020 assault on the nation’s Capitol).

¹⁴ For sources linking racism and over-incarceration to conceptions of liberty, individualism, and threat associated with the nation’s settler history, see e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* 20–58 (2010); Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A & M U. L. REV. 1, 45–62 (2014); Evelyn Nanako Glenn, *Settler Colonialism as Structure: A Framework for Comparative Studies of U.S. Race and Gender Formation*, 1 SOC. RACE & ETHNICITY 52, 56–57 (2015); Nikhil Pal Singh, *The Pervasive Power of the Settler Mindset*, BOSTON REV. (Nov. 25, 2019), <http://bostonreview.net/war-security-race/nikhil-pal-singh-pervasive-power-settler-mindset> [<https://perma.cc/SF6G-BV7H>] (linking “the American settler narrative” to the idea that “freedom is built upon violent elimination” of those who are different, which in its more modern forms has “yielded a multi-layered carceral geography”).

¹⁵ See, e.g., U.S. CONST. art. I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons . . . three fifths of all other Persons.”); Missouri Enabling Act of Mar. 6, 1820, Ch. 22, § 8, 3 Stat. 545, 548 (admitting Missouri as a slave state and Maine as a free state in what became known as the “Missouri Compromise”); *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (holding that enforced racial segregation, as long as it was “separate, but equal,” does not offend the Constitution), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–495 (1954); Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 122–29 (1994) (describing the Hayes-Tilden Compromise of 1877—

however, our proposal also can serve as a necessary *supplement* to racial redistribution, helping to sever those links, end the compromises, and acknowledge the countervailing potential for violence by the victims of racial subordination whose patience has run out after 400 years.¹⁶

In hopes of fending off the cataclysm these competing impulses portend, this Article suggests a new middle position. That position is different from how federal courts and our culture currently understand disparate treatment. It is more honest about the fact and meaning of centuries of unrelenting racial disparities, and more insistent on transparency about why disparities keep occurring and whether they are innocent. Our proposal, however, still prioritizes disparate treatment over disparate impact per se; still hopes to stay somewhat constitutionally and culturally precedented; still aims for reform not, necessarily, outright racial redistribution; and is still chary of rowing upstream against the nation's individualistic current or being swept by it over treacherous and violent falls. While acknowledging the need to mind the racial resource and outcome gaps that public action persistently creates and tolerates, we offer a new strategy for mining those gaps for dispositive evidence of disparate treatment. In offering this approach, we recognize the need constantly to calibrate the breadth of the concessions being made to liberty, in order to keep the voracious appetite of the nation's individualism from consuming all hope of equity and social solidarity among diverse

which ended Reconstruction and withdrew federal troops from the South in return for southern acquiescence in Rutherford B. Hayes's installation as President following the disputed 1876 election—as “nullif[ying] the Fourteenth and Fifteenth Amendments” and relinquishing federal “responsibility for the civil and political rights of the freedmen to the hands of the southern white majority”)

¹⁶ See, e.g., Victoria Bekiempis et al., ‘*Absolute Chaos*’ in *Minneapolis as Protests Grow Across U.S.*, N.Y. TIMES, May 29, 2020, <https://www.nytimes.com/2020/05/29/us/george-floyd-minneapolis-protests.html> [<https://perma.cc/7TGE-4CHD>]; Chloe Brown et al., *I’m a Black American. I Need a Gun to Feel Safe in this Country*, N.Y. TIMES, July 1, 2020, <https://www.nytimes.com/2020/07/01/opinion/black-gun-ownership.html> [<https://perma.cc/D63B-FNZP>]; Brakkton Booker et al., *Violence Erupts as Outrage over George Floyd’s Death Spills into a New Week*, NPR (June 1, 2020), <https://www.npr.org/2020/06/01/866472832/violence-escalates-as-protests-over-george-floyd-death-continue> [<https://perma.cc/C8T3-SNDT>]; Luke Mogelson, *The Heart of the Uprising in Minneapolis*, THE NEW YORKER, June 22, 2020, at <https://www.newyorker.com/magazine/2020/06/22/the-heart-of-the-uprising-in-minneapolis> [<https://perma.cc/9U9G-HXBA>]; Keeanga-Yamahtta Taylor, *Of Course There Are Protests. The State is Failing Black People*, N.Y. TIMES, May 29, 2020, <https://www.nytimes.com/2020/05/29/opinion/george-floyd-minneapolis.html> [<https://perma.cc/4UGA-E3HT>]; see also Elena Dancu, *Stanford Historian Uncovers a Grim Correlation Between Violence and Inequality Over the Millennia*, STANFORD NEWS (Jan. 24, 2017), <https://news.stanford.edu/2017/01/24/stanford-historian-uncovers-grim-correlation-violence-inequality-millennia> [<https://perma.cc/NM9Z-L8NV>] (describing the historical connection between violence and inequality in the United States).

populations.

Part II describes our proposal for disparity-driven learning and five ways it more practically and powerfully roots out racism. Part III provides examples of disparity-driven learning in action. Part IV responds to objections.

II. DISPARITY-DRIVEN DUTY TO INQUIRE

A. DUTY TO LEARN

Our starting point is a deep suspicion that disparate treatment is at work whenever an identifiable group of individuals and communities almost always finds itself negatively affected by disparate impacts across the full spectrum of social activity in which public institutions play an important part.¹⁷ As in the case of Black Americans, on whom we focus,¹⁸ the persistence of this pattern across time, space, and subject matter is constitutionally suspicious because it raises two strong inferences: (1) that public actors *willingly accept* the harmful disparities affecting the target category of people or of the social conditions that persistently generate those disparities; and (2) that these chronically disadvantageous disparities or their causal conditions are intended or at least reveal such extreme indifference to the lives of the affected people that they may as

¹⁷ For an integrated analysis of the size and direction of change in U.S. racial and ethnic gaps in employment, poverty, safety net use, housing, education, incarceration, health, earnings, wealth, and mobility, see *State of the Union 2017*, STANFORD CTR. ON POVERTY & INEQUALITY, <https://news.stanford.edu/2017/06/16/report-finds-significant-racial-ethnic-disparities> [<https://perma.cc/PU4T-PPBY>]; see also Ibram X. Kendi, *The American Nightmare*, THE ATLANTIC, June 1, 2020, at <https://www.theatlantic.com/ideas/archive/2020/06/american-nightmare/612457> [<https://perma.cc/J92E-Y6JM>] (attributing stark racial disparities in police violence and health outcomes to racism); David Leonhardt, *The Black White Wage Gap Is as Big as It Was in 1950*, N.Y. TIMES, June 25, 2020, <https://www.nytimes.com/2020/06/25/opinion/race-wage-gap.html> [<https://perma.cc/WMW7-G75P>]; Mogelson, *supra* note 16 (cataloguing racial disparities in police use of force in Minneapolis); Patrick Sharkey et al., *The Gaps Between White and Black America, in Charts*, N.Y. TIMES, June 19, 2020, <https://www.nytimes.com/interactive/2020/06/19/opinion/politics/opportunity-gaps-race-inequality.html> [<https://perma.cc/6BDD-TKTP>].

¹⁸ Much of what we say here applies as well to public action brought under suspicion by its chronically disparate impact on Native American, Latinx, economically disadvantaged, disabled, immigrant, and other historically oppressed groups. We focus on Black individuals and communities as the paradigm U.S. case.

well be intended.¹⁹

Not every disparity that fits this pattern constitutes actionable disparate treatment, however, or requires judicial scrutiny that is strict in theory and usually fatal in fact.²⁰ But as long as the disparities persist, the suspicions just noted justify a practical inquiry by the responsible public actors that either proves that neither of the two inferences applies or, instead, reveals to the world—and to the actors themselves if they previously were unconscious of it—that the disparities are purposeful or recklessly indifferent to the welfare of Black Americans. To be clear, the goal is not a world in which all individuals—or that members of privileged and suspect groups on average—have exactly the same amount of every condition and resource on which happiness can depend. The goal, instead, is a world in which there is no reason to expect that the population-wide distribution of those conditions and resources will systematically skew in a direction that correlates with attributes historically associated with bias, oppression, and deprivation.

In other words, the Equal Protection Clause's long-accepted proscription against public actors' disparate treatment of members of suspect groups,²¹ and the suspicion that such treatment accounts in significant part for historically enduring and socially pervasive patterns of disparate outcomes, should oblige public actors to be on the lookout for outcomes they generate that fit this pattern.²² When such results appear, those actors should be obliged to take responsible steps to convince themselves and the public that an inference of disparate treatment is unwarranted. We propose that they do this by experimenting with strategies for diminishing the disparities at no great expense beyond that incurred by the steps that generate the disparities.²³ If experiments

¹⁹ Cf. MODEL PENAL CODE § 210.2 (defining the most serious criminal offense—murder—by treating as equivalent the taking of life that is *purposeful*, that is *knowing* even if not intended, and that is *grossly reckless* in that the actor proceeded with an awareness of and “extreme indifference” to the high likelihood that death would result).

²⁰ See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

²¹ See, e.g., *Washington v. Davis*, 426 U.S. 229, 245–46 (1976) (ruling that racial disparities generated by neutral employment tests did not violate equal protection); *Akins v. Texas*, 325 U.S. 398, 403–04 (1945); *Strauder v. West Virginia*, 100 U.S. 303, 312 (1880) (forbidding intentional exclusion of Black Americans from jury service).

²² See Primus, *supra* note 6, at 532–36 (noting situations in which prominent racial and other disparities can signal the presence of decisional racial bias).

²³ Among other questions this Article raises without answering is the relationship between the public cost of disparity-reduction steps and the steps' status as “responsible” or not. Our initial thoughts on the matter are that:

succeed in diminishing harmful disparities affecting the target group, the resulting lower disparity levels establish a new, lower constitutional ceiling on disparities below which public action thereafter must stay in similar circumstances.²⁴ These obligations continue as long as the public action in question, to any considerable degree, extends or leaves in place disparities that fit the pattern. Importantly, the object is not, as the Supreme Court suggested might be unconstitutional in *Ricci v. DeStefano*,²⁵ for public actors to discontinue the disparity through intentionally race-based counteractive action regardless of the disparity's causes or contributions to other values, but instead to explore—to mine—the disparity for evidence one way or the other on those questions.

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- The duty to act responsibly does not end when new costs arise. The duty is, however, sensitive to the extent of and likely disparity-reduction return on investment in terms of time, money, and administrative capacity expended relative to the overall size and budget of the activity generating the disparities and the extent and number of people negatively affected by the disparities.
 - It may be responsible to explore less rather than more expensive fixes first, but the costs of the initial efforts should be discounted by reasonable estimates of the probability that broader measures will later be needed.
 - The cost of monitoring gaps and experimentation must be incurred. It can be reduced in a number of ways including by leveraging existing administrative data collection and infrastructure, building the steps into new or existing continuous improvement routines, attending to disparity reduction possibilities in devising strategies in the first place, and participating in networks of similar actors or agencies engaged in a parallel search for productive ways to reduce disparities. *See, e.g.*, Charles F. Sabel & William H. Simon, *Contextualizing Regimes: Institutionalization as a Response to the Limits of Interpretation and Policy Engineering*, 110 MICH. L. REV. 1265, 1287–91 (2012).
 - Given the potential of experimentation to generate systemic efficiencies that offset short-term costs, long-term costs should count more than short-term ones, and estimates of long-term costs should be offset by conscientiously estimated long-term gains.
 - Apart from other gains, the probable extent and presumptive importance of equity gains count heavily in the calculus.
 - These considerations may define “responsible action” equivalently to the balancing implied by middle-level equal protection scrutiny. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 671–74 (6th ed. 2019) (“Under intermediate scrutiny, a law is upheld if it is substantially related to an important government purpose. . . . The means used need not be necessary, but must have a ‘substantial relationship’ to the end being sought.”).

²⁴ In other words, there is no going back, only forward, in the race to end chronic disparities.

²⁵ *Ricci v. DeStefano*, 557 U.S. 557, 593 (2009) (invalidating under Title VII while pretermittting the constitutionality of official race-based action taken solely to keep a racial disparity from arising (discussed *infra* notes 270–272 and accompanying text)). Disparities begin, but do not end, the analysis, which then aims to understand why disparities arise. *See, e.g.*, *infra* notes 51–67 and accompanying text (noting the attention due public action affecting multiple similar sites where disparities only sometimes arise or are of different magnitude, exposing hidden influences unrelated to public need).

B. RESPONSIBLE LEARNING

What, though, if remedial steps benefiting members of the previously harmed group also benefit members of more privileged groups so that some part of the harmful gap remains? Can such steps nonetheless qualify as responsible efforts to reduce gaps? For reasons we explain in more detail below,²⁶ changes that benefit others besides Black Americans are expected and welcome as long as those steps do not compound the suspicion of disparate treatment by *disproportionately* benefiting members of the previously privileged group. In particular, steps that turn out to benefit others in addition to the target group may well qualify as responsible gap-reducing experiments if *their* disparate effects (if any) *favor* the target group, thus diminishing the preexisting gap.²⁷ Again, however, remaining gaps continue the duty to experiment.

Systematic and predictable outcome disparities for which racial bias is likely to be at least partly to blame remain the starting point for efforts to achieve equal protection. And eradication of those disparities is those efforts' long-term aim. But the *immediate* goal is a progression of forward-looking steps that demonstrably reduce suspicion of invidious motivation by disparately benefiting the people previously on the wrong end of disparities. Given the nation's history of public action with disparate effects unfavorable to Black Americans, taking actions that disparately,²⁸ even if they do not *solely*, favor them, is a sufficiently strong proxy for progress that we are prepared to treat them as presumptively constitutional.²⁹

We ground this conclusion, as well, in the practical welfare both of the longstanding victims of bias and deprivation and of the population at

²⁶ See *infra* notes 57–73 and accompanying text.

²⁷ Experiments that end up benefiting others equally or more than the target group are not for that reason alone ineffective. Indeed, innovations with positive general welfare effects as well as target equity effects are an intended byproduct of this approach. Such actions, however, will not exhaust and may add to the actor's duty to experiment responsibly with steps to diminish chronic disparities. The continuing duty, along with traditional subjective and objective methods of proving racial animus, moreover, should discourage strategic behavior, such as inefficiently magnifying racial disparities at the outset to facilitate the search for ameliorative steps later, or knowingly pursuing a less effective option in hopes of diverting attention from more effective ameliorative steps.

²⁸ See, e.g., RICHARD ROTHSTEIN, *THE COLOR OF LAW: THE FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (describing the racially disparate effects of a wide range of policy decisions affecting housing, education, jobs, transportation, insurance, and banking, among other forces, that shaped the current demography of American metropolitan areas).

²⁹ The validation is only presumptive, however, because conventional backward-looking constraints on disparate treatment would continue to apply.

large. If over the long haul, we want to improve the lot of people chronically harmed by bias, we must at times be willing in the short and medium term to replace *gap eradication* with progressive *outcome gains* plus *disparities in welfare gains favoring traditionally underserved populations*. Treating as constitutionally sufficient steps that over the middle term in fact benefit members of chronically disadvantaged groups and evidence a good-faith effort to diminish harmful disparities against those members acknowledges that those individuals' lot depends on two considerations: the quantity and quality of the resources and conditions associated with happiness to which they have access, *as well as* how closely those resources and conditions approximate those of those of members of more privileged groups. Our constitutional baseline acknowledges, as well, that actionable bias can be past as well as present, unconscious as well as conscious, structural as well as episodic, and objectively as well as subjectively manifested.

As long as disparities persist, officials remain obliged to explore further gap-closing measures—an obligation that is heightened when experiments enlarge rather than close gaps. Over time, therefore, gaps can be expected to close appreciably. But not every experiment that fails to close gaps is, for that reason alone, irresponsible. If failed experiments were always insufficient, actors would have little incentive to experiment. Nor would it be irresponsible for public actors to continue or extend an experimental treatment after discovering beneficial effects other than gap closure—as long as they keep looking for ways to close remaining gaps.

An important indicator that steps to diminish disparities are “responsible” is public transparency—the extent to which the actors in question acknowledge the disparities their actions generate or preserve and document the rationale and results of experiments they pursue to lessen those disparities. In turn, wide publication of such results justifies treating officials' failure to consider adopting or adapting proven disparity-reducing steps undertaken elsewhere under similar circumstances as likely irresponsible.³⁰ Beyond that, responsible experimentation requires that the actors conscientiously work to identify and test disparity-reducing steps through flexible cycles of identifying gaps, analyzing possible causes, hypothesizing and experimenting with solutions, and adjusting policies and operations based on results.³¹

³⁰ “Publicly attending” to evidently effective steps others take to reduce disparities does not require other public actors blindly to replicate the steps, or to accept the validity of the results or their applicability in different circumstances. Responsible consideration of the potential bearing of such steps on the disparities at issue is required, however.

³¹ For other explications of this standard, see Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 372, 407–16 (2007); James S. Liebman, *Perpetual Evolution: A Schools-Focused*

In some cases, irresponsibility will be clear, as when officials do not transparently monitor disparities or seek to mitigate ones they identify or fail to spread the fruits of successful experiments. In other cases, assuring that steps taken were responsible will be the work of multiple evaluators operating from different perspectives. Not least among these perspectives is officials' own sense of responsibility. Providing the transparency that is the easiest aspect of our proposal to assess will force officials to confront the racial disparities they cause and to explain and defend the ameliorative steps they undertake. If their efforts succeed, belying previously held assumptions about why disparities arise, their own cognitive and moral insights will expose the irresponsibility of tolerating disparities going forward, without outside supervision.

Courts, regulators, and public and private funders can continue their longstanding backward-looking search for subjective, causal racial animus, supplemented by the "conscientious inquiry" analysis described above. To add yet another perspective—that of the public at large—we ultimately would apply a test the Supreme Court uses to assess religious discrimination under the Establishment Clause.³² The question that test asks is whether the extent of the disparities together with the quality of the officials' past and responsive actions and inaction conveys a public message that chronic disparities of this sort are the acceptable norm. If so, the actions are irresponsible, whether or not the public officials in question believe their tolerance of existing disparities is responsible, and whether or not direct or inferential evidence of racial animus is present. If instead, the message conveyed is that chronic disparities are presumptively unacceptable and require conscientious steps to eliminate them, then the public actors are absolved from liability for now, though

Public Law Litigation for Our Day, 117 COLUM. L. REV. 2005, 2028 (2017); Charles F. Sabel & William H. Simon, *The Duty of Responsible Administration and the Problem of Police Accountability*, 33 YALE J. ON REG. 165, 207–10 (2016); Rebecca I. Yergin, Note, *Rethinking Public Education Litigation Strategy: A Duty-Based Approach to Reform*, 115 COLUM. L. REV. 1563, 1595 (2015).

Although the contemplated causal analysis may strive to be deductive, "abductive" analysis will likely be the norm. See, e.g., DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 22 (2012) ("Abductive reasoning[—]a recursive process of generating and testing hypotheses, geared toward eliminating invalid hypotheses and substantiating the correct one[—involves] a search for information, followed by its evaluation [and] drawing of correct inferences from that information. While the evaluation of the information entails logical inference, the generation of hypotheses . . . require[s] intuitive and conjectural thinking.").

³² See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310 (2000) ("[State] sponsorship of a religious message is impermissible [if] it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

their obligation to continue searching for ways to reduce disparities remains.

C. WHAT'S NEW HERE

We realize that our definition of constitutionally suspicious disparities differs more in principle than in effect from conventional definitions of suspect classifications.³³ Nor is there anything novel about reformist proposals to factor in the hidden influence of historical racism,³⁴ search for objective evidence of invidious motivation in actors' responses to disparities they may or do create,³⁵ and acknowledge the frequency with which such motivations operate unconsciously.³⁶ We also realize that these backward-looking reforms have not kept our culture and legal system from vastly underestimating and over-tolerating disparities that, however suspicious, are hard to disentangle from "neutral" explanations and to redress without arousing resentment and risking violent resistance to suspected racial redistribution. Our proposal, however, has five features that distinguish it from other reform proposals and increase

³³ See *supra* notes 17–25 and accompanying text.

³⁴ See, e.g., Michelle Alexander, *supra* note 14, at 20–58; Zinzi D Bailey et al., *Structural Racism and Health Inequities in the USA: Evidence and Interventions*, 389 LANCET 1453, 1457–58 (2017) (linking historical racial housing segregation to racialized punitive policing and both to community depletion and adverse health effects); ROTHSTEIN, *supra* note 28, at 3–176 (describing the vast wealth and other effects of federal and local segregation of housing and schools); Palma Joy Strand, & Nicholas A. Mirkey, *Racialized Tax Inequity: Wealth, Racism, and the U.S. System of Taxation*, 15 NW. J.L. & SOC. POL'Y, 265, 278–96 (2020) (highlighting tax system's entrenchment of racial advantages stemming from centuries of racial exploitation and unequal access to wealth); Nkechi Taifa, *Let's Talk About Reparations*, 10 COLUM. J. RACE & L. 1, 24–25 (2020) (highlighting federal government's role in Black Americans' historical subordination).

³⁵ See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 463–69 (1979) (relying on objective evidence of segregative intent); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–71 (1977) (recognizing the admissibility of objective evidence of racial motivation); Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1808, 1847–59 (2012) (finding support for treating willful blindness to racial impact as unlawful discrimination in courts' use of objective evidence of racial motivation).

³⁶ See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–23 (1987); Charles R. Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection"*, 40 CONN. L. REV. 931, 955–56 (2008). Compare John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RES. ORG. BEHAV. 39, 45 (2009) ("[R]esearchers have identified the existence and consequences of implicit bias through well-established methods based upon principles of cognitive psychology that have been developed in nearly a century's worth of work."), with Philip E. Tetlock & Gregory Mitchell, *Implicit Bias and Accountability Systems: What Must Organizations Do to Prevent Discrimination?*, 29 RES. ORG. Behav. 3, 4–5 (2009) (questioning research methodology used to establish implicit bias).

our confidence in its capacity to achieve equal protection.

1. Taking Seriously the Insight that Persistent Disparate Outcomes Indicate Bias that Is Deeply and Ineffably Built In

Advocates of heightened efforts to achieve racial equity rightly point out that racism is not an idiosyncratic and episodic deviation from a neutral or equitable norm.³⁷ It *is* the structured-in norm.³⁸ Making this point to support radically less tolerance for disparities, however, can obscure an important implication of the insight—that the more deeply racist structures penetrate our psyches and social systems, the harder they are to prove and purge. Purging discrimination thus will take time and grindingly hard work. It likely will require a mix of external incentives and penalties, and positively experienced internal changes in (1) mindsets and beliefs—what we are attuned to seeing and inferring, and how effectively we recognize and correct stereotyped judgments³⁹—and (2) how we organize social and productive activity.⁴⁰

Consistently with this insight, our proposal advances an understanding of equal protection as a long-haul project of habituating public actors to *notice* disparities and treat them as favorable opportunities to inquire into the beliefs, evidentiary and inferential judgments and misjudgments, and social arrangements and systems of all kinds, small and large, that generate disparities. In some cases, the obligation to identify and ameliorate disparities will quickly reveal effective alternatives.⁴¹ Other disparities will require patient inquiry across multiple experiments, with success marked by gradual decreases in disparities' frequency and magnitude.

2. Making the Mandated Inquiry Practical, Forward-looking, and Self-executing

The problem with a doctrine dependent on proof of disparate treatment is that the inquiry it imposes upon litigants and courts is

³⁷ See, e.g., sources cited *supra* notes 4, 28, 34; *infra* note 38.

³⁸ See, e.g., Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 285–91.

³⁹ See, e.g., Johnson, *Disparity Rules*, *supra* note 31, at 411–13; Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1077, 1082, 1085 (2019) (noting that even algorithmic tools run the risk of being infected by the racial presumptions and stereotypes of the officials).

⁴⁰ See, e.g., Aziz Z. Huq, *What is Discriminatory Intent?*, 103 CORNELL L. REV. 1217 (2018) (linking state actors' bias to invidious background social structures).

⁴¹ See, e.g., *infra* notes 106–117 and accompanying text.

etiological, looking backwards in time in search of two things that are notoriously hard to find:

- A public decisionmaker’s desire to treat the races differently, proved either directly through the actor’s admission or indirectly through “objective” evidence that racial animus is the only reasonable explanation for what the actor claims to have done for race-neutral reasons;⁴²
- A causal chain linking disparate outcomes to that official’s racial motivation rather than to an infinite array of other possibly causal race-neutral motivations, intervening personal and sociological forces, and discriminatory acts by private parties.⁴³

Our proposal seeks instead to explore possible links between treatments and outcomes in the same practical manner as researchers, businesses, and regulatory and social-service agencies do in their everyday work: through forward-looking experimentation in search of ways to maximize desirable and minimize untoward outcomes. Rather than looking backwards to expose and punish illicit behavior connected to harmful results, our proposal calls for the forward-looking exploration of new ways of conducting business to achieve better results. The requisite inquiry thus is not a court’s or regulatory agency’s retrospective, judgment-laden examination of the etiology of public actions affecting different groups differently that occasionally and haphazardly come to their attention. The proposal instead entails each public actor’s ongoing, self-reflective steps to acknowledge and explore ways to diminish troubling disparities that arise in the regular course of daily routines.

This approach is more practical in multiple ways. First, it is more likely to be informative because it places the focal conditions—in this case, disparities and ways of diminishing them—under self-conscious scrutiny as they occur. Regularity and simultaneity make the approach more effective than intermittently trying to ferret out easily disguisable and morally abhorrent mental states and psychologically and

⁴² See *supra* notes 6 and 35 and accompanying text.

⁴³ See, e.g., *Parents Involved v. Seattle Sch. Dist.*, 551 U.S. 701, 750 (2007) (Thomas, J., concurring) (“Although presently observed racial imbalance might result from past de jure segregation, racial imbalance can also result from any number of innocent private decisions, including voluntary housing choices.”); *McCleskey v. Kemp*, 481 U.S. 279, 298–99 (1987) (affirming Black defendant’s capital sentence despite sophisticated regression analysis with hundreds of control variables showing killings of white victims are substantially more likely to generate death sentences than otherwise-identical killings of Black victims because McCleskey could not identify a particular actor in the criminal justice process who intentionally discriminated against him).

sociologically complex causal factors after the fact. Second, it puts the responsible public actors themselves on guard for racial disparities and habituates these actors to considering ways to lessen those results. As such, it invites those same public actors to be on the look-out for new and better ways to accomplish the legitimate, socially beneficial aims they do or claim to want to achieve. Third, unlike the traditional approach to disparate treatment, which creates a huge risk of angering everyone—public officials not wanting to be accused of racism⁴⁴ and victims who rarely get redress⁴⁵—our approach has the capacity to change minds in positive ways.⁴⁶

The last-mentioned practicality is the most important. By exposing inaccurate stereotypes and other forms of unconscious racism, successful experiments to diminish disparities can help public actors better understand (1) the relevant background conditions and how they previously misapprehended them, (2) weaknesses in their decisionmaking processes, (3) why their past actions generated disparities, (4) how they can do their jobs more effectively when misapprehensions no longer divert them, and (5) how they can widen the reach of beneficial outcomes—all with positive spillover effects on their later official *and personal* actions. Even if responsible experimentation does not result in fewer disparities, or only does so at significant cost to legitimate goals, public actors still are better informed about the new experiments they remain obliged to run. And in the meantime, actors have a response to claims of racism associated with the disparity in question. Additionally, persistent racists can be identified more easily by their failure to track disparities, responsibly experiment with ways to diminish them, and scale experiments that work. Under our proposal, therefore, a lack of transparency as to the extent of the disparities, how officials monitor them, steps they do and do not take to mitigate them,

⁴⁴ See, e.g., Pedro A. Noguera, *Ties That Bind, Forces That Divide: Berkeley High School and the Challenge of Integration*, 29 U.S.F. L. REV. 719, 731 (1995) (“[F]ear of being charged with racism, whether deliberate or unconscious, is such a terrifying prospect that most whites go out of their way to avoid dealing directly with race.”).

⁴⁵ See, e.g., Stephen Rynkiewicz, *Workplace Plaintiffs Face Long Odds at Trial*, *Analytics Data Indicates*, A.B.A. J. (July 17, 2017), <https://www.abajournal.com/news/article/workplace-trial-analytics-lex-machina> [<https://perma.cc/BT4F-22AW>] (“Only 1 percent of plaintiffs who file federal job discrimination, harassment and retaliation claims win on the merits at trial, according to an analysis by the Lex Machina legal analytics firm.”); *infra* note 283.

⁴⁶ See *infra* notes 106–117, 130–141 and accompanying text (providing examples of experimentation exploding long-held myths that juveniles not appearing for court dates were guilty or absconding and that no more than 50 percent of New York City’s mainly Black and Latinx students could be expected to finish high school).

and the rationale for and rigor and results of responsive steps taken will *expose* racism—not *obscure* it as often happens now.⁴⁷

Illustrating these points, the table below compares the Supreme Court’s treatment of commonly offered objective and historical evidence that disparities are racially discriminatory with the treatment such evidence would receive under our proposal.

The evidence	Response to the evidence by . . .	
	the Court	our proposal
Officials rejected reasonable alternatives that might have reduced disparities.	Officials’ belief at the time or now that alternatives would have cost too much, had other harmful effects, or failed to diminish disparities deserves deference. ⁴⁸	Officials’ failure to try alternatives violates the duty to take responsible steps.
Officials failed to look for, discover, or consider reasonable alternatives that might have reduced disparities.	Officials had no reason to conduct such a search given the reasonableness of the action they took or its consistency with common practice. Any alternatives they might have considered would have had the same problems as noted in the cell above. ⁴⁹	Officials must try out reasonable alternatives, the results and costs of which speak for themselves. If common practice produces disparities, that is a reason to explore alternatives.
The disparity-tolerating action is one of a series stretching back years, including explicitly racist ones.	Absent a clear link between prior actions and current results, prior actions do not count, or the inference of current racism is weak. ⁵⁰ (<i>Implicitly</i> : the longer the suspicious history, the greater the social engineering backwards-looking analysis would require reluctant courts to undertake.)	The longer the history of disparities and thus the more chronic they are, the clearer is the duty to explore less disparate possibilities going forward.

⁴⁷ See, e.g., *McCleskey*, 481 U.S. at 293–97 (discussed *supra* note 43).

⁴⁸ See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66, 269–71 (1977).

⁴⁹ See, e.g., *id.* at 267–70.

⁵⁰ See, e.g., *McCleskey*, 481 U.S. at 296–98, 312–15; *City of Mobile v. Bolden*, 446 U.S. 55, 73–75 (1980) (plurality opinion).

3. Using Disparities Among Traditionally Disadvantaged Individuals as Well as Between Them and Traditionally Privileged Individuals as Evidence of Inequity

Public actors and institutions often operate across many sites, affecting multiple individuals and communities. Many, as well, engage in actions paralleling those taken by other officials and institutions under similar circumstances. Think, for example, of a state department of education interacting with multiple school districts, with each district encompassing multiple schools, each school operating multiple classrooms, and each classroom teacher interacting with multiple students over multiple years. In these situations, variation in outcomes across multiple similar sites provides naturally occurring opportunities to compare treatments based on their outcomes. Our proposal encourages public actors to use these naturally occurring conditions as experiments with steps that may aggravate or mitigate racial disparities.⁵¹ The opportunity to do so adds to our proposal's practicality, given its reliance on actions already occurring in the regular course of public activity.

Whether naturally occurring or designed in response to the obligations we propose, this kind of experimentation often will reveal outcome disparities not only between Black and White individuals within and across sites, but also between groups of Black individuals across sites.⁵² For example, it is clear that similarly situated Black and Latinx children systematically learn more and less at different schools in the same district and state, and in different districts in the state.⁵³ Under current equal protection doctrine, these differences either are irrelevant to whether

⁵¹ See *supra* note 31 (emphasizing the “abductive,” not “deductive,” nature of most such experiments, given the need to account for more than a single potentially disparity-altering difference between sites or time periods, thus making it difficult to be certain—even as much is learned—about causation).

⁵² See, e.g., studies cited *infra* notes 53, 139, 143, 150, 163, 178.

⁵³ See, e.g., CTR. FOR THE FUTURE OF ARIZ., WHY SOME SCHOOLS WITH LATINO CHILDREN BEAT THE ODDS . . . AND OTHERS DON'T 14, 18–21 (Mar. 2006), <https://morrisoninstitute.asu.edu/sites/default/files/beattheodds-someschoolswithlatinochildrendowell-somedont.pdf> [<https://perma.cc/UKA2-EVJ3>]; *Average Share of Students in “Beating the Odds” Schools for 3 Most Recent Years of Data in Math*, CTR. ON REINVENTING PUB. EDUC. [CRPE], <https://www.crpe.org/examples/four> [<https://perma.cc/9YFQ-M4DP>] (documenting outcome disparities between “beat the odds” and other public schools with large proportions of students of color and in poverty in fifty school districts nationwide; also noting disparities among those fifty school districts in the percent of students in superior schools, ranging from almost none in Raleigh, North Carolina to nearly 40 percent in Newark, New Jersey); Sean F. Reardon & Demetra Kalogrides, *The Geography of Racial/Ethnic Score Gaps*, 124 AM. J. SOC'Y 1164, 1165–66, 1181–87, 1194–96 (2019); *infra* notes 175–240 and accompanying text (discussing schools' divergent outcomes with similar children depending on their adoption of portfolio reforms and of racial integration).

discrimination accounts for Black/Latinx-White disparities or may imply that because some Black or Latinx students have thrived on the defendants' watch, the others or their families must themselves be at fault.⁵⁴ Again, uncertainty—in this case, about why Black-Black disparities occur—counts against those alleging racial bias.

Under our proposal, the onus of the ambiguity again reverses. Assume, for example, that Black children learn less on average than White children in the district, but that the Black children at School *A* learn considerably more than those at School *B*. Under our proposal, district officials are obliged to extend the positive results of their naturally occurring experiment at School *A* to the Black children at School *B*, or take other steps to diminish Black-White disparities at School *B* to at least the lesser level present at School *A*. If the Black children at both schools are situated roughly the same, and if school officials fail to take action, their bias or indifference toward the Black students at School *B* is manifest. If instead school officials discover that the Black students at the two schools are not similarly situated because of a condition at School *A* that is not present at School *B*, the officials have now isolated a condition they know is worthy of further inquiry. They remain obliged to pursue this inquiry at *both* schools as long as Black-White disparities persist. A further distinguishing feature of our proposal, therefore, is its treatment of disparities among members of underserved populations, as well as between them and more privileged populations, as actionable occasions and laboratories for improving equity.

4. Bringing Multiple Perspectives to Bear on Whether Suspicious Disparities are Purposeful or Recklessly Indifferent to Black Lives

Our approach mobilizes the learning capacities of multiple actors applying multiple standards to provide layers of internal and external accountability for conscientiously examining the defensibility or indefensibility of ongoing disparities. These include (1) the public officials themselves, based on their understanding of their job and constitutional responsibilities, informed by realities their experiments reveal; (2) the wider public's perceptions via the "message conveyance" measure of discrimination; and regulators applying both (3) traditional disparate treatment *and* (4) our new "conscientious inquiry" standards to determine whether "responsible steps" overcome suspicions generated by

⁵⁴ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 297–98 (1987) (limiting objective proof of equal protection violations to actions taken that, given their sharply monochromatic impact on—and only on—and identifiable group, manifest animus against members of that group).

chronic disparities.⁵⁵

5. Promoting Improved Outcomes for All, while Keeping General Benefits from Sufficing as a Response to Persistent Gaps

Current constitutional doctrine invites discrimination defendants to obscure racial motivation in a welter of race-neutral considerations that also may have influenced policy.⁵⁶ Our proposal again makes a virtue of what otherwise impedes the search for the truth by encouraging public actors to experiment with disparity-reduction techniques that serve multiple public purposes. The difference is that, if pursuing other purposes does not close or instead widens gaps, it will not discharge and may reinforce officials' obligation to continue exploring new gap-closing possibilities.

This feature might seem to undermine our proposal's ability to improve the lives of people who are chronically underserved. Why not instead insist upon actions with the single purpose of gap closure or at least no other purpose that might limit gap closure by simultaneously aiming to improve the lives of others? In fact, however, this feature is central to our proposal's equity and welfare effects on the chronically underserved.

For starters, we have no objection in principle to "rising tides that raise all boats,"⁵⁷ and we certainly encourage public action generating welfare gains for the chronically underserved. What we do find objectionable, however, is defending such steps on equity grounds when in fact many such efforts have the opposite, gap-increasing effect of raising the boats of the privileged vastly more than those of the

⁵⁵ See *supra* notes 17–36 and accompanying text.

⁵⁶ See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267–68 (1977) (addressing the difficulty of isolating the impact of race from the "range of considerations" typically influencing public policy).

⁵⁷ For critiques of "rising tide" justifications for public action, see, e.g., Daphne T. Greenwood & Richard P.F. Holt, *Growth, Inequality, and Negative Trickle Down*, 44 J. ECON. ISSUES 403 (2010) (rejecting "rising tide" justifications for public action); Seth Hanlon & Alexandra Thornton, *Trickle-Down Tax Cuts Don't Create Jobs*, *CTR. FOR AM. PROGRESS* (Aug. 24, 2019), <https://www.americanprogress.org/issues/economy/reports/2017/08/24/437625/trickle-tax-cuts-dont-create-jobs> [<https://perma.cc/LL85-PV7J>] ("[R]ecent history and an abundance of economic research show that trickle-down tax cuts don't create growth or jobs; they lead only to widening inequality"); Joseph E. Stiglitz, *Inequality and Economic Growth*, 86 *POL. Q.* 134 (2016) ("The trickle-down notion—along with its theoretical justification, marginal productivity theory—needs urgent rethinking.").

chronically underserved.⁵⁸ That is why we limit our invitation to all-boats-raised strategies to ones that benefit chronically underserved more than privileged populations. With that caveat, we encourage such strategies, because they are more likely to be effective over time than the single-purpose gap-closing strategies that equity proponents often prioritize.⁵⁹

We make this strong claim because, as we document below, some of the most beneficial recent reforms from the perspective of chronically underserved communities have had this quality.⁶⁰ It makes sense that they would. If as gap-closure advocates have shown, racially disparate outcomes often are motivated by unexamined and inaccurate assumptions,⁶¹ exposing the inaccuracies should lead individuals and systems long held back by their own biases to improve overall efficiency, benefiting themselves and other client populations along with those they previously underserved.⁶² This indeed is true of the “rising tide” reforms discussed below.⁶³

Going further, if as equity advocates also have shown, racial

⁵⁸ See Jonathan Rauch, *Why Prosperity Has Increased but Happiness Has Not*, N.Y. TIMES, Aug. 21, 2018, <https://www.nytimes.com/2018/08/21/opinion/happiness-inequality-prosperity-.html> [<https://perma.cc/RPD5-EZEA>] (associating uneven rise in material wellbeing in the United States with diminished happiness and optimism).

⁵⁹ On civil rights advocates’ preference for remedies “targeted” on improving the lot of particular underserved communities, see Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights after Shelby)*, 123 YALE L.J. 2838, 2852–55, 2859–62, 2865 (2014) (summarizing civil rights proponents’ concerns that pursuing “universalist” goals in service of anti-discrimination aims may weaken the practical or moral force of challenges to or be a screen for preserving discriminatory structures).

⁶⁰ See *infra* notes 74–253 and accompanying text.

⁶¹ See, e.g., Daniel Kiel, *No Caste Here? Toward a Structural Critique of American Education*, 119 PENN. ST. L. REV. 611, 624 (2015) (describing racial bias inherent in measures used to group children in tracks in schools, “[s]tructurally maintain[ing], even widen[ing], disparities in educational opportunities”); William M. Wiecek & Judy L. Hamilton, *Beyond the Civil Rights Act of 1964: Confronting Structural Racism in the Workplace*, 74 LA. L. REV. 1095, 1122 (2014) (identifying faulty assumptions about “dependability, presentability, communication skills, and work ethic” resulting in “significant racial disparities” in workplaces); Erik J. Girvan, *On Using the Psychological Science of Implicit Bias to Advance Anti-Discrimination Law*, 26 GEO. MASON U. CIV. RIGHTS L.J. 1, 35 (2015) (study revealing implicit bias at work in “teachers’ expectations for the performance of ethnic minority compared to non-minority children” in racial performance gaps on standardized tests and in other racial disparities).

⁶² See e.g., VIVIAN HUNT ET AL., MCKINSEY & CO., DELIVERING THROUGH DIVERSITY (Jan. 18, 2017), <https://www.mckinsey.com/business-functions/organization/our-insights/delivering-through-diversity> [<https://perma.cc/K46K-D46X>] (finding that companies in the United States and five other countries studied that have the most racially and culturally diverse executive teams “are 33 percent more likely to outperform their [less diverse] peers on profitability”).

⁶³ See *infra* notes 74–253 and accompanying text.

subordination is deeply built into public structures,⁶⁴ rooting it out will require deep modification of systems and structures. If undertaken wisely, modifications of this scope are likely to benefit everyone associated with the endeavor—not just those previously discriminated against—for the reasons given above and because people motivated to make changes of this magnitude are likely motivated (legally, politically, and ethically) to pursue broader benefits as well. This “renaissance effect” was central to the “systemwide” school desegregation plans of the 1970s and 1980s that most substantially closed gaps between Black and White students.⁶⁵ Examples abound of organizations using “disruptions” caused by untoward effects of their actions as an opportunity to rethink entire systems, discarding obsolete path dependencies and other time-honored inefficiencies.⁶⁶

⁶⁴ See, e.g., JOE R. FEAGIN, SYSTEMIC RACISM: A THEORY OF OPPRESSION 258–60 (2006) (describing ways in which White Americans systematically exclude Black Americans from important public institutions); Asma Husain, *Reverse Redlining and the Destruction of Minority Wealth*, MICH. J. RACE & L. (Nov. 2, 2016), <https://mjr.org/2016/11/02/reverse-redlining-and-the-destruction-of-minority-wealth> [<https://perma.cc/X4NX-JMN3>] (“Discriminatory practices in housing have long since been a factor in devaluing minority wealth.”); Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 445 (2010) (describing “structures of legal authority” that activate “assumptions about who belongs where” limiting Black individuals’ access); Kaimipono David Wenger, “*Too Big to Remedy?*” *Rethinking Mass Restitution for Slavery and Jim Crow*, 44 LOY. L.A. L. REV. 177, 183 (2010) (describing “accumulated effects of slavery, Jim Crow, residual racism, and official silence” on “subordination of the Black community”).

⁶⁵ See *infra* notes 236–242 and accompanying text.

⁶⁶ See, e.g., CHRISTOPHER K. ANSELL, PRAGMATIST DEMOCRACY: EVOLUTIONARY LEARNING AS PUBLIC PHILOSOPHY 6–7, 9–14, 47–54 (2011) (describing disruptive strategies for transforming how police departments interact with communities and how the World Health Organization handles the occasionally adverse consequences of generally beneficial public health responses to disease); Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 658, 664–68 (2003) (describing NASA’s use of the Challenger explosion to identify multiple flaws baked into its rocket-building process, improving system’s overall productivity); ARVIND SINGHAL & KAREN GREINER, USING THE POSITIVE DEVIANCE APPROACH TO REDUCE MRSA AT THE VETERANS ADMINISTRATION HEALTHCARE SYSTEM IN PITTSBURGH, in LEADING CHANGE IN HEALTHCARE: TRANSFORMING ORGANIZATIONS USING COMPLEXITY, POSITIVE PSYCHOLOGY, AND RELATIONSHIP-CENTERED-CARE 177, 181–92 (2011) (describing efforts to reduce MRSA infections at Western Pennsylvania veterans hospitals by identifying and spreading usually productive habits vis-à-vis such infections displayed by employees at all levels of the health care process, fundamentally altering the hospitals’ cultures and capacity to identify and address other health care risks); STEVEN J. SPEAR, THE HIGH VELOCITY EDGE: HOW MARKET LEADERS LEVERAGE OPERATIONAL EXCELLENCE TO BEAT THE COMPETITION 87–107 (2010) (describing how Alcoa’s mandated inquiry into reasons and solutions for injuries from production accidents revealed cures for many small defects in production processes, improving company’s safety, productivity, profitability, and capacity to address other problems such as CO₂ emissions).

Our proposal’s aspiration to use efforts to reduce chronic racial disparities as an occasion to consider how to improve overall welfare has affinities with what Professor Bagenstos calls “universalism” in civil rights enforcement. See Bagenstos, *supra* note 59, at 2842–47. The

Of course, gap-closing reforms designed to keep privileged constituencies from benefiting might violate prevailing equal protection norms and invite the zero-sum competition between social groups we hope to avoid. But even simply leaving privileged communities out of the calculus is problematic, given the likely ill-effects on the chronically underserved. Just as exposing the false assumptions that drive bias and innovatively reorganizing systems structured to subordinate groups are promising ways to improve systems' overall functioning, designing systems to help some, but not all, is a recipe for reducing efficiency and innovation while building in new constraints to success. Such strategies risk diminishing the welfare of everyone the operation touches, with the worst effects on members of chronically underserved groups, if history is any guide.⁶⁷ For like reasons, we would not prioritize reforms designed to achieve equity, but not welfare gains for Black individuals; or only welfare gains arising from more equitably distributed "positional" goods, as when White graduates' educational attainments are leveled down to position Black graduates more favorably in the competition for jobs.⁶⁸ The goal of increased equity for long-subordinated populations should encompass welfare gains as well, which we fear may not be the result of gap-closing-

difference is that Bagenstos advocates a search for across-the-board legislative protections for everyone that in the process aid victims of racial discrimination, *see id.* at 2875, while we advocate a search for practical, context-specific responses to chronic racial disparities that in the process benefit everyone affected by the actors in question.

⁶⁷ A fixation on gap-closing also might be criticized for privileging the values of advantaged populations as to what counts as merit or success, reinforcing racial biases. This criticism applies to our proposal, and to any that gives propulsive force to outcome disparities on traditional welfare metrics. If the implication of this claim is that Black Americans should content themselves with what they have that White Americans do not have and not worry about the reverse, it is troubling on its face. The more compelling implication is that the key disparity is not how much White Americans have that Black Americans do not have, but how little opportunity Black Americans have to define what they want and to work to achieve it, given how broadly White definitions dominate. Attacking *that* disparity will take even more effort than diminishing those under discussion here. Still, the effort required by our proposal affords White officials everyday experiential access to the needs and wants of Black Americans, which could make way for the deeper change.

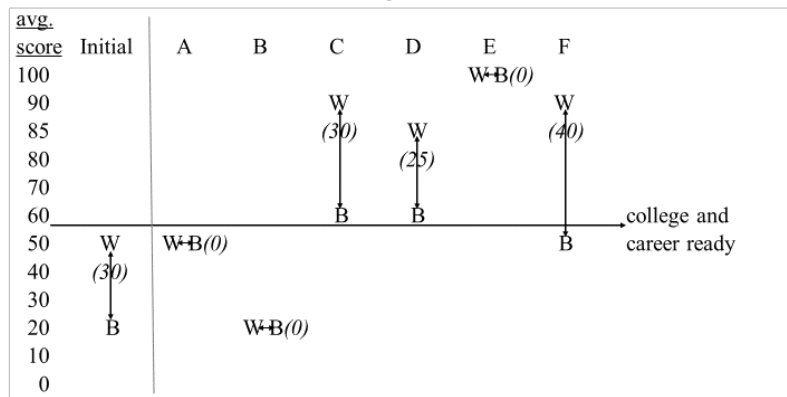
A more subtle problem is that focusing on disparities limits analysis to a small subset of the considerations that determine individuals' access to success (as when we focus on students' academic achievement, ignoring practical problem-solving ability, planning, administrative functioning, grit, and the like). Our proposal is better suited than most to respond to this problem, however, given its emphasis on context-specific inquiry into why disparities exist, which may reveal other, previously hidden disadvantages—and advantages—that traditional measures obscure.

⁶⁸ *See* William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Education Law and Policy, and Why it Matters*, 56 EMORY L.J. 545, 549 (noting the "'positional good' aspects" of education: "one person's possession of more education necessarily decreases the value of another's education," raising concerns that improving all students' achievement without diminishing existing inequality will "mak[e] some people educationally worse off").

only remedies.⁶⁹ Although we cannot prove it, we wonder whether the non-systematicity in this sense of single-purpose efforts to root out the effects of systemic racism accounts for those efforts' limited history of success.

These reflections may seem obvious, but they are not to some aspiring reformers. Over the past decade, this Article's Senior Author has asked business, education, law, and policy graduate students in an interdisciplinary class focused on public education reform to identify their preferences among four hypothetical reforms with differing distributions of positive and negative results across populations (see *Figure 1* below). By hypothesis, each reform is adopted when K–12 academic outcomes for Black students are substantially lower than for White students. Reform *A* equalizes all academic outcomes at the initial level of White students. Reform *B* equalizes all outcomes at the initial level of Black students. Reform *C* raises the outcomes of all students by an equal amount, moving Black educational attainment above the initial level of White attainment but leaving the achievement gap the same in absolute (though not proportional) terms. Reform *D* achieves the same increases as Reform *C* for Black students, while raising the outcomes of White students by a lesser absolute amount, diminishing the achievement gap in absolute and proportional terms. In Reforms *C* and *D*, therefore, welfare measured (imperfectly) by academic achievement is higher for all students as a whole, and for Black students in particular, than in Reforms *A* and *B*—and the welfare of all students measured both by academic achievement and by the absolute reduction in outcome disparities is higher than initially for all students in Reform *D*.

Figure 1



⁶⁹ For an example, see Eliza Shapiro, *\$773 Million Later, de Blasio Ends Signature Initiative to Improve Failing Schools*, N.Y. TIMES, Feb. 26, 2019, at A20 (discussed *infra* note 179).

Year in and year out, many or most students have preferred Reform *A*—and some have preferred Reform *B*—to Reforms *C* and *D*. (All prefer Reform *A* to Reform *B*, and Reform *E* to all others if it is attainable.) Preferences remain about the same when it is stipulated that the jurisdiction in question has defined the academic level reached by Black students in Reforms *C* and *D*—but not the level reached in Reforms *A* or *B*—as at or above the level needed for success in college and careers.

We acknowledge that Reforms *A* and *B* have equity gains—and welfare gains from a “positional good” standpoint⁷⁰—and that Reform *C* and *D* do not. But particularly in a knowledge economy in which the issue increasingly is not how well graduates compete with each other for jobs, but how well they compete with machines that can do the sorts of low-skill and low-analytic-capacity work that once predominated in industrial economies,⁷¹ we expect that the net result of choosing Reform *A* or *B* over Reforms *C* and *D* is a substantial welfare loss for Black students.⁷²

The greater worry, however—within the education context—is that focusing on gap closure alone will leave Black students with no achievable

⁷⁰ See *supra* note 68 (discussing positional goods).

⁷¹ For evidence that automation and artificial intelligence create high-skilled jobs even as they destroy low-skilled jobs, see e.g., *Automation and Anxiety: Will Smarter Machines Cause Mass Unemployment?*, THE ECONOMIST, June 23, 2016, at <https://www.economist.com/special-report/2016/06/23/automation-and-anxiety> [<https://perma.cc/8SB4-RMQN>]; Tamar Jacoby, *Technology Isn't a Job Killer*, WALL ST. J. (May 20, 2015), <https://www.wsj.com/articles/technology-isnt-a-job-killer-1432161213> [<https://perma.cc/KT8L-4S8A>]; ERNO LEHTINEN ET AL., UNDERSTANDING LEARNING FOR THE PROFESSIONS: HOW THEORIES OF LEARNING EXPLAIN COPING WITH RAPID CHANGE, IN INTERNATIONAL HANDBOOK OF RESEARCH IN PROFESSIONAL AND PRACTICE-BASED LEARNING 199, 201 (Stephen Billett et al. eds. 2014); *Lifelong Learning Is Becoming an Economic Imperative*, THE ECONOMIST, Jan. 12, 2017, at <https://www.economist.com/special-report/2017/01/12/lifelong-learning-is-becoming-an-economic-imperative> [<https://perma.cc/6J3S-VS6T>].

⁷² First, Black graduates in Reform *D* have acquired more knowledge and skills than those in Reform *A*, giving them access to higher education opportunities and jobs for which Black Reform *A* graduates do not qualify. With regard to those benefits, Black graduates' gains are not positional; they achieve the same additional access to benefits as White graduates with the same qualifications. Second, the value of efforts at Reform *A* have to be discounted by the probability of outcomes more like Reforms *C* or *F*. White families are unlikely to sit still even if school officials are paying little attention to their children, meaning the cost of diminished welfare gains for Black graduates may not be more, and could well be less, equity. Better, then, to combine all families' and students' motivations to improve rather than pitting them against each other. Additionally, the microeconomic importance of competitive advantages between individual workers is overstated given the macroeconomic advantages of increasing the skill level of individuals of both races. Jobs are attracted to locations with large numbers of workers with a variety of skills. As such, a Reform *D* situation in which everyone on average is better educated than in the Reform *A* situation is likely to place considerably more jobs at the disposal of Black (and White) workers than is Reform *A*, further undermining the welfare impact of the equality advantage Black students have relative to White students in Reform *A* compared to Reform *D*.

possibilities other than leveling-down à la Reform *B*, with all its attendant welfare, political, and social-conflict costs. Indeed, over decades in that context, there are no sustained examples of successful equity-plus-welfare gains of anything like the Reform *A* sort.⁷³ Since 1970, however, as we develop below, the nation has seen two roughly fifteen-year periods of equity-plus-welfare gains of the Reform *D* sort. Both suggest that systemic changes pulling all students up can improve the lot of Black students on both equity and welfare dimensions. Both also reveal the capacity of such reforms to hold the line distinguishing equity-positive Reform *D* from equity-neutral Reform *C* in ways that our proposed equal protection standard could substantially reinforce.

III. DISPARITY-DRIVEN LEARNING IN ACTION

But how is Reform *D* possible? Just as leveling-up Reform *A* may end up as leveling-down Reform *B*, might rising-tide Reform *D* end up, as rising-tide efforts so often do, as a Reform *F*, with White students gaining *more* than Black students, making escalating inequity the cost of significant welfare gains? Below, we offer several Reform *D* examples. We begin by briefly gesturing to two examples previously developed by others: efforts by retailers' to diminish service disparities affecting sight-impaired customers and employment disparities affecting aspiring women managers (Section (A)) and efforts by Congress and local agencies to diminish racial disparities in the juvenile justice system (Section (B)). We end with two public education case studies that we more fully develop and tie to experimentation ourselves: large-city portfolio reforms from the turn of the

⁷³ The closest courts have come to requiring absolute school equity are orders by a few courts, starting in California in *Serrano v. Priest*, 487 P.2d 1241, 1266 (Cal. 1971), that equalized per-capita funding across school districts. The result in California, however, according to some experts, was that the state leveled-*down* funding, shrinking the spending gaps between districts but not the achievement gaps. See Patricia F. First & Louis F. Miron, *The Social Construction of Adequacy*, 20 J.L. & Educ. 421, 428 (1991) (listing “undesirable consequences” of equalized resources distribution without also improving adequacy of resources, including “‘leveling-down’ of the acceptable minimum of educational offerings”); W. NORTON GRUBB, *THE MONEY MYTH: SCHOOL RESOURCES, OUTCOMES, AND EQUITY* 258 (2009) (tracing history of *Serrano* reforms, which were intended to “level up” funding by poor school districts but instead “level[ed] down” funding, achieving greater cross-district funding equality but no similar convergence of student outcomes). During this period, California went from being one of the nation’s top-performing to one of its lowest-performing states educationally. See Lisa Trei, *Documentary Examines How California Public Schools Fell ‘From First to Worst’*, STANFORD REP., Jan. 21, 2004 (describing Merrow Report documentary detailing “how California’s school system went from the nation’s best in the 1950s to its worst by 1994”).

current century to roughly 2015 (Section (C)) and school desegregation from 1970 to the mid-1980s (Section (D)).⁷⁴

A. DISABILITY AND EMPLOYMENT DISCRIMINATION

Starting in the mid-1990s, Lainey Feingold and the law firm of Goldstein, Borgen, Dardarian & Ho initiated a series of structured negotiations with the nation’s largest banks to develop “talking” automatic teller machines (ATMs) to overcome disparities in banking services between sighted and sight-impaired customers.⁷⁵ At a time when ATM machines and the Americans with Disabilities Act were both new, Feingold and colleagues worried that “[i]f we brought the issue to a judge, maybe the judge would say, ‘What the hell? Blind people shouldn’t go to an ATM.’”⁷⁶ So in lieu of a lawsuit, they began discussions, first with Citibank, then with Bank of America and Wells Fargo, to convince them that enhancing ATMs with text-to-speech screen readers would be good for the companies as well as for their blind customers—discussions that ultimately prompted technology that set the industry standard.⁷⁷ Subsequent negotiations with Dollar General, Target, Trader Joe’s, and other retailers led them to add braille keypads to touch-screen point-of-sale checkout devices that blind customers otherwise could not use.⁷⁸ Realizing that “[w]hen technology becomes a compliance issue, creativity is lost, our enthusiasm is lost, and things get stuck in the law office[.]”⁷⁹ Feingold directed the negotiations beyond adherence to minimum legal requirements toward ways of “integrating technology, web development and usability” that benefited businesses as well as her disabled clients.⁸⁰ Over time, Feingold convinced other companies, including Microsoft, Google, and Apple, to “embrace[] accessibility, not just to include the disabled public in products and services, but because of the many benefits of accessibility in addition to protecting civil rights,” including enhanced search engine optimization and market

⁷⁴ In presenting these reforms, we intend not to endorse them all but to illustrate how gap mining can reveal many biases and misimpressions that generate—and many ways to close—the gaps.

⁷⁵ Stephanie Francis Ward, *Legal Rebels Profile – Lainey Feingold: Negotiating Better Access for the Disabled*, A.B.A. (Sept. 20, 2017), https://www.abajournal.com/legalrebels/article/lainey_feingold_disability_law_adr [https://perma.cc/QX84-5GYC].

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

share, corporate goodwill, and other innovations in the use of digital space.⁸¹ Feingold and colleagues have also applied the approach successfully in pre- and post-litigation settlement negotiations with the Houston and San Francisco public transit agencies, Major League Baseball, Denny's, Charles Schwab, Kaiser, Anthem, and other disability-rights defendants.⁸²

Goldstein firm lawyers used similar techniques in workplace racial and gender discrimination lawsuits by developing expertise in designing settlements that comprehensively restructured hiring, promotion, and training practices to improve defendant companies' overall efficiency and profitability while increasing the number of women and people of color hired and promoted.⁸³ An example is a settlement with Home Depot of a lawsuit alleging gender discrimination in filling managerial positions.⁸⁴ Aiming to "link equity and effectiveness," lawyers on both sides designed "a new system for hiring, promotion and training" that extended to the company's personnel practices its longstanding innovative approach to "marketing practices, opening stores, [and] figuring out how to make products accessible to people."⁸⁵ Home Depot's human resources ("HR") middle managers appreciated the new system because it helped them "tap [the company's] pool of workers in a rigorous way," "fill[] jobs with the right people," streamline procedures, and reduce turnover.⁸⁶ Company leaders were so pleased with the system that they voluntarily extended it

⁸¹ Laine Feingold, *Shifting from Fear to Motivation when Talking about Digital Accessibility Law*, 24 ACCESSIBILITY (Dec. 11, 2017), <https://www.24a11y.com/2017/shifting-fear-motivation-talking-digital-accessibility-law> [<https://perma.cc/RQN7-5VBC>]; see also LAINEY FEINGOLD, STRUCTURED NEGOTIATION: A WINNING ALTERNATIVE TO LAWSUITS 25–32 (2016).

⁸² Ward, *supra* note 75; see Matthew Hirsch, *Meet Early and Settle Often*, LAW.COM (July 21, 2007), <https://www.law.com/almID/1182330351923/> [<https://perma.cc/7V6L-G5VU>]. It may seem a shame that defendants do the morally and legally right thing only upon seeing "there's something in it for us." Were that all there was to it, we still might accept that "hard reality" as a regrettable human given that we have to work around. Added to *self-interest*, however, are these defendants' newly acquired *self-awareness* of their susceptibility to false assumptions and *self-disciplining* habit of inquiring when disparities raise that possibility anew. This combination of self-interest, awareness, and discipline is just what morality and law are expected to generate in order to guide future behavior in public-regarding directions.

⁸³ See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 509–19 (2001) [hereinafter Sturm, *Second Generation*] (describing the Goldstein firm's settlement with Home Depot); Anna Oberthur, *The Justice Files: Three Legal Pros Making a Difference*, OAKLAND MAG., Dec. 1, 2007, <https://web.archive.org/web/20160328043602/http://www.oaklandmagazine.com/oakland-magazine/march-2007/the-justice-files> [<https://perma.cc/YT4H-FFCV>] (describing Goldstein's reputation as one of the nation's leading plaintiffs-side employment discrimination lawyers).

⁸⁴ Consent Decree at 32–39, *Butler v. Home Depot, Inc.*, No. C-95-2182-ST, 1997 U.S. Dist. LEXIS 16296 (N.D. Cal. 1997).

⁸⁵ Sturm, *Second Generation*, *supra* note 83, at 510–12.

⁸⁶ *Id.* at 511, 518–19.

beyond women in the geographic division governed by the consent decree, to people of color as well as women company-wide.⁸⁷ These steps helped generate 28 and 30 percent increases in the number of Home Depot minority and female managers, respectively, during the system's first few years of operation.⁸⁸ Defendant-side lawyers in the suit, likewise, offered other companies their expertise in restructuring HR practices to improve organizational efficiency and profitability while diminishing disparities in hiring and promoting women, Black, and other categories of workers.⁸⁹

Although Feingold, Goldstein, and their plaintiff- and defense-side colleagues might not describe themselves this way, they serve as disparity-reduction experimentation entrepreneurs in support of strategies like the one we propose to constitutionalize. They began by exposing disparities in access to technological conveniences and jobs affecting members of groups that are chronically disfavored by such disparities, then promoted and provided expertise in experimenting with new technologies and HR structures for overcoming the disparities in ways that enhanced overall efficiency. The experiments' success led defendant firms to extend the approach companywide, reducing disparities affecting members of other undervalued groups (as in the case of Home Depot) and led competitors to fall in line (as in the ATM example).

The retail firms behaved this way because the successful experiments exposed built-in structural conditions that generated disability-related, gender, and racial disparities for which there turned out to be no legitimate business need. This realization in turn created legal, as well as ethical and business, incentives to scale the experiments to other chronically underserved groups. By exposing false assumptions about sight-impaired individuals' inability to use technology and women's inability to serve as homebuilding experts, these structural and mindset changes spawned system-wide advances that benefited multiple constituencies—in the case of Home Depot, for example, all qualified job and promotion candidates, HR middle managers, and shareholders. Nor did extending the benefits of settlement agreements beyond the covered plaintiffs to other chronically underserved individuals keep the reforms from achieving real gap closure—at Home Depot, for example, 28 to 30 percent increases in minority and women managers in a few years. Instead, it assured that the beneficiaries of the company-wide rising tide were disproportionately women and minority managers.

⁸⁷ *Id.* at 517–19.

⁸⁸ *Id.*

⁸⁹ *See id.* at 478 n.59 (discussing presentations by Home Depot's mediation counsel “recommending Home Depot's system to [other] companies as a prototype”).

To be sure, not all of the people benefited by the Home Depot settlement were women and minority promotion candidates, nor did the remedy close all of Home Depot's gender and racial employment gaps.⁹⁰ In theory, therefore, an exclusively gap-closing remedy might have diminished chronic employment disparities more than the actual remedy did. In practice, however, it seems unlikely that limiting the settlement benefits to the plaintiff class would have generated nearly as comprehensive a set of both equity and welfare returns for the chronically subordinated groups as the actual outcomes did—not to mention the less biased and more equity-oriented mindsets the changes generated among other Home Depot constituents.

B. JUVENILE JUSTICE

A number of statutes condition federal funding for state and local public agencies on their commitment—enforceable when funding renewals are sought—to (1) track racial disparities or other questionable outcomes at each step or in each category of the agency's operations; (2) develop a plan to reduce disparities or other untoward results for each step or category; and (3) report periodically on the success of ameliorative actions taken and adjustments made when actions falter, including by comparison to reductions achieved by other funded agencies under similar circumstances. Questionable outcomes regulated by such legislation include racial disparities in spending roughly \$800 billion in federal stimulus funds in the midst of the 2009 recession,⁹¹ racial disparities in juvenile justice contact and confinement,⁹² and prison rapes.⁹³

⁹⁰ See Ross Kerber & Simon Jessop, *The Heat's on Corporate America to Reveal Racial Diversity Data*, REUTERS BUS. NEWS (July 2, 2020), <https://www.reuters.com/article/us-minneapolis-police-corporatediversity/the-heats-on-corporate-america-to-reveal-racial-diversity-data-idUSKBN2431JY> [<https://perma.cc/AC6C-XMC3>] (noting Home Depot's resistance to full disclosure of the racial and gender disparity data it provides annually to the Equal Employment Opportunity Commission); Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C.L. REV. 367, 396–7 (2008) (“Whether [Home Depot's] structural changes . . . actually accomplished the objectives of the initial lawsuit is a matter of some dispute.”).

⁹¹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 5004(g), 123 Stat. 115, 504 (codified as amended in scattered titles of the U.S.C.); see Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1368 (2012); Olatunde C.A. Johnson, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154, 200–04 (2011).

⁹² Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. § 5633(a) [hereinafter JJDAP 1974] (current version at 34 U.S.C. § 11133(a)); see, e.g., Johnson, *Disparity Rules*, *supra* note 31, at 401–06; Sabel & Simon, *Contextualizing Regimes*, *supra* note 23, at 1290.

⁹³ Prison Rape Elimination Act of 2003, *id.* §§ 15605(a)–(e).

The most widely studied of these funding regimes is the Juvenile Justice and Delinquency Prevention Act (“JJDPA”).⁹⁴ First adopted in 1974, the JJDPA allocates funds to state, local, and private juvenile justice agencies nationwide;⁹⁵ evaluates and provides technical assistance and training to federally assisted programs;⁹⁶ “establish[es] a centralized research effort on the problems of juvenile delinquency;”⁹⁷ and coordinates “the collection, preparation, and dissemination of useful data regarding the treatment and control of juvenile offenders.”⁹⁸ Extending this broad research and experimentation function from the national to the state and local levels, federal funding is predicated on the submission of plans for achieving the Act’s statutory purposes and for expanding local “research, training, and evaluation capacity.”⁹⁹

Initially, the Act directed national and local experimentation at juvenile delinquency prevention and diminishing juvenile confinement through innovative diversion programs, community-based alternatives, and school retention.¹⁰⁰ In successive amendments in 1988, 1992, 2002, and 2018, however, Congress defined reducing disproportionate minority contact and confinement (“DMC”) as another “core” requirement of the Act and put funded agencies at risk of losing a quarter of their funding if they fail to address in good faith racial disparities at all decision points in the juvenile justice continuum (for example, arrest, diversion, adjudication, and court disposition).¹⁰¹ Plans must include methods of tracking racial disparities at each decision point and disparity-reduction strategies for all points where racial disproportion is found.¹⁰² Funded agencies have broad discretion over the content of their plans, guided by federal training and the “back and forth between [funded agencies], policymakers, and advocates” that helps benchmark plan quality nationally.¹⁰³

⁹⁴ Pub. L. No. 93-415, 88 Stat. 1109 (1974) (codified at 42 U.S.C. §§ 5601–5792a).

⁹⁵ JJDPA 1974 §§ 201(a)(b), 221 (codified at 42 U.S.C. §§ 5611, 5631).

⁹⁶ *See id.* § 102(a) (codified at 42 U.S.C. § 5602) (listing the evaluation, technical assistance, training, centralized research and data dissemination, standards-generating, funding, and other purposes of the Act).

⁹⁷ *Id.*; *see* Juvenile Justice Reform Act of 2018 § 102, 34 U.S.C. § 11102 (updating the purposes of the JJDPA).

⁹⁸ JJDPA 1974, § 241(a)(f) (codified at 42 U.S.C. § 5651).

⁹⁹ *Id.* § 223(a) (codified at 42 U.S.C. § 5633).

¹⁰⁰ *Id.* §§ 223(a)(11)–(13) (codified at 42 U.S.C. §§ 5633, 5651).

¹⁰¹ *See* Johnson, *Disparity Rules*, *supra* note 31, at 407–09 (describing the 1988 through 2002 JJDPA amendments).

¹⁰² *See id.* at 409.

¹⁰³ *See id.*

Since 1992, the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative (JDAI) has supported the DMC regime and facilitated cross-agency benchmarking by connecting federally funded juvenile justice agencies in a nationwide learning network for developing and spreading effective disparity-reduction practices.¹⁰⁴ Through "peer to peer learning," networked jurisdictions share resources, receive expert advice and data, and take guidance from five "network learning labs"—four cities and one state—that the Foundation funds to disseminate findings to other jurisdictions.¹⁰⁵

Experimentation mandated and supported by JJDPA has generated many effective disparity-reduction practices.¹⁰⁶ These include small but effective changes, such as telephonic reminders of court hearings and in-community reporting centers to avoid detention orders based on juveniles' failure to appear in court or to attend meetings with probation officers.¹⁰⁷

¹⁰⁴ See Annie E. Casey Found., *What We Do*, JUVENILE DETENTION ALTERNATIVES INITIATIVE (JDAI), <https://www.aecf.org/work/juvenile-justice/jdai/> [<https://perma.cc/RXA6-GMEB>]. JDAI grew out of a 1987 foundation grant supporting interagency collaboration in Florida's Broward County to develop more objective screening procedures for detention decisions, detention alternatives, and faster case processing, enabling the county to reduce its detention population by 65 percent and save \$5 million without any sacrifice in public safety. JDAI followed in 1992, with 5 initial sites that have now grown to 300 in 39 states and the District of Columbia. See Annie E. Casey Found., *History*, JUVENILE DETENTION ALTERNATIVES INITIATIVE (JDAI), <https://www.aecf.org/work/juvenile-justice/jdai/> [<https://perma.cc/RXA6-GMEB>]; see also ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION, at 3–4 (Oct. 4, 2011), <https://www.aecf.org/resources/no-place-for-kids-full-report> [<https://perma.cc/3C3Q-DDDT>] (describing JDAI's development).

¹⁰⁵ See Annie E. Casey Found., *What We Do*, *supra* note 104; Annie E. Casey Found., *History*, *supra* note 104.

¹⁰⁶ See JUSTICE & PREVENTION RES. CTR., JUVENILE DETENTION ALTERNATIVES INITIATIVE SCALE-UP: STUDY OF FOUR STATES, at 6–8 (Feb. 28, 2019), <https://www.aecf.org/m/resourcedoc/wested-jdaiscaleup-2019.pdf> [<https://perma.cc/QE5A-WR6Y>] (outlining successful practices and outcomes in four JDAI states). See generally NAT'L COLLABORATION FOR YOUTH, BEYOND BARS (2017), <https://www.aecf.org/m/resourcedoc/NCFY-BeyondBars-2017.pdf> [<https://perma.cc/KYR2-V65Y>] (describing the "continuum of care" model and outlining how it can be implemented); DANIELLE LIPOW ET AL., LEADING WITH RACE TO REIMAGINE YOUTH JUSTICE: JDAI'S DEEP-END INITIATIVE, at 17 (2020), <https://www.aecf.org/m/resourcedoc/aecf-leadingwithracetoreimagine-2020.pdf> [<https://perma.cc/UD4F-FHPZ>] (outlining "three primary strategies to move toward the goal of safely and significantly reducing out-of-home placements and improving youth well-being, especially for youth of color: (1) race-conscious system mapping, (2) comprehensive and disaggregated data tracking and analysis and (3) targeted reforms to change policy, practice, programs and partnerships").

¹⁰⁷ See JILL WOLFSON & JOHN HUBNER, COAL. FOR JUV. JUST., UNLOCKING THE FUTURE: DETENTION REFORM IN THE JUVENILE JUSTICE SYSTEM (Paul Lawrence et al. ed., 2003), <https://www.prisonpolicy.org/scans/unlockingthefuture.pdf> [<https://perma.cc/3JVG-CAUL>] (explaining that in Cook County, Illinois, a "[a] simple automatic notification system that uses written and telephone reminders of court appearances . . . helped reduce failure-to-appear rates

They also include the replacement of racially biased standards for assessing flight and re-offense risks (for example, the minor “is a danger to others;”¹⁰⁸ “has gang associations;”¹⁰⁹ exhibits “negative attitudinal and personality traits;”¹¹⁰ or lacks “a *parent* to monitor behavior”¹¹¹ or “good family structure”¹¹²) with equally effective but less loaded standards (for example, severity of the offense;¹¹³ prior delinquency adjudications¹¹⁴ or failures to appear;¹¹⁵ or no “*adult* willing to take responsibility”¹¹⁶). Changes of this sort “may lead officials to see that assumptions that . . . formerly disposed them to detain certain categories of children more often than others—for example, that a failure to appear in court evidenced guilt, flight proneness, or irresponsibility—are wrong.”¹¹⁷

from almost 40 percent in 1994 to 11 percent [in 2003]); Sabel & Simon, *Contextualizing Regimes*, *supra* note 23, at 1289–90 (discussing evening reporting center and other neighborhood-based services).

¹⁰⁸ DAVID STEINHART, JUV. DET. ALT. INITIATIVE, ANNIE E. CASEY FOUND., JUVENILE DETENTION RISK ASSESSMENT, at 16 (2006), <https://www.aecf.org/m/resourceimg/aecf-juvenile-detention-risk-assessment-1-2006.pdf> [<https://perma.cc/D423-2WKS>].

¹⁰⁹ *Id.*

¹¹⁰ PATRICK MCCARTHY ET AL., NAT’L INST. OF JUST., THE FUTURE OF YOUTH JUSTICE: A COMMUNITY BASED ALTERNATIVE TO THE YOUTH JUSTICE MODEL, at 16 (Oct. 21, 2016), https://www.aecf.org/m/resourcedoc/NIJ-The_Future_of_Youth_Justice-10.21.16.pdf [<https://perma.cc/RF7P-2P6E>]; see Annie E. Casey Found., *No Place for Kids*, *supra* note 104, at 15 (noting that, although “[m]any youth without serious offending histories are placed into custody for repeatedly violating rules and/or behaving disrespectfully toward judges, probation officers, and other authorities,” institutional noncompliance of this sort is “not very predictive of the risk of recidivism”).

¹¹¹ WOLFSON & HUBNER, *supra* note 107, at 48–49 (emphasis added).

¹¹² *Id.* at 49.

¹¹³ See STEINHART, *supra* note 108, at 11 fig.1 (emphasizing importance of developing risk assessment instruments with a point scale based only on proven high-risk factors associated with non-appearance and dangerous behavior).

¹¹⁴ *Id.* at 11.

¹¹⁵ See, e.g., Hennepin Cnty., Minn., *Risk Assessment Instrument (RAI)*, ASSESSMENT IN JUVENILE SERVICES, <https://www.hennepin.us/-/media/hennepinus/residents/public-safety/documents/real-detention-rai.pdf> [<https://perma.cc/29XE-S68Q>].

¹¹⁶ WOLFSON & HUBNER, *supra* note 107, at 48–49 (emphasis added) (acknowledging that prior terminology “worked as a bias against minority youth” and that updated terminology takes advantage of “the strengths of extended families that often exist in minority communities”).

¹¹⁷ Liebman, *Perpetual Evolution*, *supra* note 31, at 2028. One of the most important assumptions—with severely disproportionate effects on Black and Brown children—that JDAI-supported experimentation has disproven is that substituting nonincarcerative for incarcerative responses to behaviors by youth that enmesh them in the juvenile justice system will increase rates of juvenile crime. See MCCARTHY ET AL., *supra* note 110, at 1–4 (describing misguided fears of predator juveniles that triggered vast expansion of juvenile prisons and incarcerations). Numerous disparity-reduction experiments have demonstrated the opposite to be true. See, e.g., MCCARTHY et al., *supra* note 110, at 15, 19 (reporting that as juvenile incarceration rates decreased, public safety outcomes improved in 90 percent of JDAI sites; in New York State, for example, a 65

Juvenile justice agencies' systematic experimentation with racial disparity reduction helped generate a broader result: an astonishing 61 percent decline from 1997 to 2017 in the proportion of youths in the country who were detained as a result of interactions with the juvenile justice system (dropping from 356 to 138 per 100,000 youths).¹¹⁸ Had the 1997 detention rate persisted, 68,444 more youths would have been detained in 2017.¹¹⁹ During this period, juvenile crime and recidivism rates also dropped substantially,¹²⁰ entailing overall a vast welfare gain for youth and society at large.

What about the program's equity effects? In 1997, Black youths accounted for 40 percent of all juvenile detainees; in 2017, they were 41 percent. The comparable numbers are 18 and 21 percent for Hispanic youths but 37 and 33 percent for White youths. From this perspective, there was no equity gain, as critics on both the left and right have noted.¹²¹ But

percent reduction in the number of youth in state secured facilities coincided with a 33 percent reduction in arrests for juvenile offenses; and in California, rates of youth arrest and property and violent crime dropped significantly at the same time as the state made "drastic[]" reductions in the state's incarcerated youth population (from over 10,000 to fewer than 1,000).

¹¹⁸ Data in this and the next paragraph, displayed in full in Table 1 in the Appendix, are drawn from Annie E. Casey Found., *Youth Residing in Juvenile Detention, Correctional and/or Residential Facilities by Race and Hispanic Origin in the United States*, KIDS COUNT DATA CENTER [hereinafter *Youth Residing in Juvenile Detention*], <https://datacenter.kidscount.org/data/tables/8391-youth-residing-in-juvenile-detention-correctional-and-or-residential-facilities-by-race-and-hispanic-origin#detailed/1/any/false/871,573,36,867,133,18,17,14,12,10/4038,441,1,1461,1462,1460,4157,1353/16996,17598> [<https://perma.cc/Q4Z4-6JRZ>]; ANNIE E. CASEY FOUND., REDUCING YOUTH INCARCERATION IN THE UNITED STATES (2013), <https://youthtoday.org/2013/03/kids-count-data-snapshot-youth-incarceration-in-the-united-states> [<https://perma.cc/E367-PY3K>]; see also ACT 4 JUV. JUST. WORKING GRP., THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT: A FACT BOOK, at 2, 10–11 (2007), <http://www.campaignforyouthjustice.org/Downloads/Resources/jjdpafactbook.pdf> [<http://perma.cc/BW5M-K6KE>] (discussing the JJDPa's role in reducing youth incarceration). Illustrating changes in juvenile incarceration rates and the possible effect of JJDPa are, e.g., ELEANOR HINTON HOYTT ET AL., ANNIE E. CASEY FOUND., REDUCING RACIAL DISPARITIES IN JUVENILE DETENTION, at 10, 18 (2001), http://www.justicepolicy.org/uploads/justicepolicy/documents/reducing_race.pdf [<https://perma.cc/WZB3-7QWM>]; RICHARD A. MENDEL, ANNIE E. CASEY FOUND., JUVENILE DETENTION ALTERNATIVES INITIATIVE PROGRESS REPORT 2014, at 11–20, 26 [<http://perma.cc/3SNW-QT68>] (attributing declines in juvenile incarceration in part to the foundation's partnership with the federal government to promote experimentation with detention-reduction activity).

¹¹⁹ See *Youth Residing in Juvenile Detention*, supra note 118.

¹²⁰ See MCCARTHY ET AL., supra note 110, at 1, 15 ("Ninety percent of JDAI sites reported data showing improved public-safety outcomes versus pre-JDAI.").

¹²¹ See, e.g., Eli Hager, *This Agency Tried to Fix the Race Gap in Juvenile Justice. Then Came Trump*, THE MARSHALL PROJECT (Sept. 19, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/09/19/this-agency-tried-to-fix-the-race-gap-in->

when respective declines in the detention rate for each racial category of youths are considered, the case for positive equity effects is stronger. For Black youth, the detention rate declined by 60 percent, for Hispanics by 75 percent, and for Asians by 90 percent, compared to 59 percent for Whites. Most importantly, due to the vast overrepresentation of children of color in the juvenile justice system, the 68,844 youths who would have been in custody in 2017 had 1997 detention rates persisted would likely have consisted of many more youth of color than White youth. From this latter perspective, the beneficiaries of the reform are disproportionately Black, Hispanic, and other youths of color, and the reform is a rare public initiative with beneficiaries who are disproportionately members of chronically disfavored groups.¹²²

Equally significant are the equity dividends that may be paid in the future by sensitization of adults running the system to their unconscious biases.¹²³ Indeed, lessons learned and dispositions changed through these efforts demonstrate the workability of radically decarcerative proposals for juvenile offenders,¹²⁴ and likely deserve some of the credit for juvenile

juvenile-justice-then-came-trump [https://perma.cc/6QKG-WZ8W] (discussing the Trump Administration’s justification for reducing oversight of state disparity-reduction efforts, including program’s having “fallen short” in diminishing disparities); Elizabeth N. Jones, *Disproportionate Representation of Minority Youth in the Juvenile Justice System: A Lack of Clarity and Too Much Disparity among States “Addressing” the Issue*, 16 U.C. DAVIS J. JUV. L. & POL’Y 155, 159 (2012) (claiming JJDPA’s disparity-reduction efforts have “[not] produced results of consequence”); COMM. ON ASSESSING JUV. JUST. REFORM ET AL., NAT’L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH, at 23 (Richard J. Bonnie et al. eds., 2013), http://www.nap.edu/download.php?record_id=14685#; SARAH E. REDFIELD & JASON P. NANCE, PRELIMINARY REPORT OF THE ABA SCHOOL-TO-PRISON PIPELINE TASK FORCE, at 57 (Feb. 2016), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/school_to_prison_pipeline_report.pdf [https://perma.cc/89HM-3DS8] (calling JJDPA’s disparity-reduction results “inadequate”). Cf. Sabel & Simon, *Contextualizing Regimes*, *supra* note 23, at 1288 (reporting that JDAI generated “no aggregate reduction in the disparities” but “some notable local successes” as in Santa Cruz, California where “aggregate detention and racial disparities dropped significantly”).

¹²² This distribution of JJDPA’s welfare effects on Black and Latinx youth, compared to White youth, arises only because of horrendous racial disparities in historical Black and Latinx compared to White youth detention rates. Even so, we count this as a positive equity effect, especially given that the progress achieved now points the way to a reform—*decarceration* of youth generally—that would end disparities entirely, albeit still via a “universalist,” not single (racial)-purpose, policy. See *infra* notes 123–125 and accompanying text (discussing decarceration proposal); see also *supra* note 59 (discussing “universal” reforms).

¹²³ See *supra* note 36 and accompanying text.

¹²⁴ See, e.g., Elizabeth Atuilera, *Juvenile Justice Overhaul: How the Governor’s Plan Shifts Care of Serious Offenders to Counties*, CALMATTERS (Oct. 22, 2020), <https://calmatters.org/justice/2020/10/justice-newsom-juvenile-offenders-counties> [https://perma.cc/F3NB-KHY7]; Jeremy Loudonback, *In Surprise Move, Newsom Calls for an*

justice agencies' ability to achieve dramatic decreases in juvenile detention early in the COVID-19 crisis.¹²⁵

Even without factoring in the benefits to White youth and society at large, the combined equity and associated welfare gains for communities of color from JJDPAs and JDAIs' contributions to the 20-year decline in detentions of mainly Black and Latinx youth are a net positive, if incomplete, increase in racial justice. From an equity and welfare perspective, the ongoing duty to experiment with disparity-reduction strategies is worth continuing, albeit with added pressure to diminish remaining racial disparities—exactly as Congress has applied through its 2018 revisions to the JJDPAs.¹²⁶

C. PORTFOLIO SCHOOL REFORMS

Another example are gains in student achievement following big-city “portfolio” reforms prompted in part by experimentation requirements in the No Child Left Behind Act of 2001.¹²⁷ Among others, the school districts in Baltimore, Boston, Camden, Chicago, Denver, Houston, Indianapolis, Los Angeles, Memphis, New Haven, New Orleans, New York, Newark, Oakland, and Washington, D.C. engaged in these reforms.¹²⁸

End to California's Youth Prison System, THE IMPRINT (May 14, 2020, 11:58 PM), <https://chronicleofsocialchange.org/justice/juvenile-justice-2/in-surprise-move-newsom-calls-for-an-end-to-californias-youth-prison-system/43366> [<https://perma.cc/A64C-293E>].

¹²⁵ See *At the Onset of the COVID-19 Pandemic, Dramatic and Rapid Reductions in Youth Detention*, ANNIE E. CASEY FOUND. (Apr. 23, 2020), <https://www.aecf.org/blog/at-onset-of-the-covid-19-pandemic-dramatic-and-rapid-reductions-in-youth-de> [<https://perma.cc/DKX3-HLKG>] (estimating that, at the start of the COVID 19 pandemic, national juvenile justice agencies, diminished detention rates by 24 percent in a single month).

¹²⁶ See *Five Things to Know about the New Juvenile Justice Act*, ANNIE E. CASE FOUND. (Feb. 8, 2019), <https://www.aecf.org/blog/five-things-to-know-about-the-new-juvenile-justice-act> [<https://perma.cc/926M-GWKX>] (summarizing the Juvenile Justice Reform Act of 2018, Pub. Law No. 115-385, 132 Stat. 5123, that amended the JJDPAs to require funded agencies to experiment with systems-improvement strategies to reduce disparities, “such as establishing coordinating bodies to advise states; using data to identify bias in decision making; and creating and implementing a work plan with measurable objectives to address the needs identified by the data”).

¹²⁷ No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 101, Stat. 1425 (2002) (requiring states and school districts to track racial gaps in educational outcomes and develop improvement plans to diminish them).

¹²⁸ James S. Liebman, Elizabeth Cruikshank & Christina Ma, *Governance of Steel and Kryptonite Politics in Contemporary Public Education Reform*, 69 FLA. L. REV. 365, 367–68, 387–401 (2017); PAUL HILL ET AL., CRPE, PORTFOLIO SCHOOL DISTRICTS FOR BIG CITIES: AN INTERIM REPORT (Univ. of Wash. Oct. 2009); PAUL HILL & CHRISTINE CAMPBELL, CRPE, GROWING NUMBER OF DISTRICTS SEEK BOLD CHANGE WITH PORTFOLIO STRATEGY, at 1 (Univ. of Wash. June 2011) (“New York City has become an incubator for portfolio district leadership. Today New

In many cases, change began with legislation giving mayors greater control over districts previously governed diffusely by elected school boards, central bureaucrats, community boards, area supervisors, and collective bargaining agreements.¹²⁹ Other common features included rigorous learning standards, greater autonomy for schools in deciding how to meet standards, more accountability for whether they did, closure of poor-performing schools and intentional “portfolios” of new schools, educator evaluation tied to student outcomes, and rich data and tools for diagnosing student needs and developing strategies to meet them.¹³⁰

The leading-edge reforms in New York City (the “City”) are the most widely studied.¹³¹ Starting in late 2002, after the state legislature gave the city’s mayor full control of the City school district,¹³² newly elected Mayor Michael Bloomberg and his Department of Education Chancellor Joel Klein implemented several key changes. First, they gave principals control over hiring, budget, class schedules, curriculum, and professional development, while holding them accountable for using that flexibility to find ways to increase their students’ (particularly low-performing students’) learning gains to levels equal to or better than the highest levels achieved at other schools with similar populations.¹³³ Second, they used student

Orleans, Newark, Chicago, and Baltimore are all led by people mentored by former NYC Schools Chancellor Joel Klein.”)

¹²⁹ See Liebman, Cruikshank & Ma, *supra* note 128, at 387–88 (citing sources).

¹³⁰ See *id.* at 393–94 (citing sources).

¹³¹ For comprehensive reviews of New York City’s school reforms, see ALL FOR EXCELLENT EDUC., *NEW YORK CITY’S STRATEGY FOR IMPROVING HIGH SCHOOLS* (Jan. 26, 2010), <https://all4ed.org/reports-factsheets/new-york-citys-strategy-for-improving-high-schools-an-overview> [<https://perma.cc/5GX9-P63Y>]; EDUCATION REFORM IN NEW YORK CITY: AMBITIOUS CHANGE IN THE NATION’S MOST COMPLEX SCHOOL SYSTEM (Jennifer A. O’Day et al. eds., 2011); BETH FERTIG, *WHY CAN’T U TEACH ME 2 READ? THREE STUDENTS AND A MAYOR PUT OUR SCHOOLS TO THE TEST* (2009); MICHAEL FULLAN & ALAN BOYLE, *BIG-CITY SCHOOL REFORMS: LESSONS FROM NEW YORK, TORONTO, AND LONDON*, at 21–57 (2014); Paul T. Hill, *Bloomberg’s Education Plan Is Working: Don’t Ditch It*, *THE ATLANTIC*, Oct. 22, 2013, <https://www.theatlantic.com/education/archive/2013/10/bloombergs-education-plan-is-working-dont-ditch-it/280704> [<https://perma.cc/QT8E-L23C>]; MAUREEN KELLEHER, *CTR. FOR AM. PROGRESS, NEW YORK CITY’S CHILDREN FIRST: LESSONS IN SCHOOL REFORM* (Jan. 2014); JOEL KLEIN, *LESSONS OF HOPE: HOW TO FIX OUR SCHOOLS* (2014); ERIC NADELSTERN, *10 LESSONS FROM NEW YORK CITY SCHOOLS* (2013). The Senior Author participated in the New York City reforms from 2006 to 2009 as head of the City Education Department’s Division of Accountability and Achievement Resources.

¹³² See James C. McKinley, Jr., *State Senate Passes Bill Giving Mayor Control of Schools*, *N.Y. TIMES*, June 12, 2002, at B6.

¹³³ See Hill, *supra* note 131 (noting reforms’ diminution of pre-existing “concentration of the lowest skilled teachers in schools serving poor and disadvantaged children” and per-pupil funding increase of \$5,273 for high-poverty schools versus \$3,962 for low-poverty schools); N.Y.C. INDEP. BUDGET OFF., *EXAMINING FIVE YEARS OF SCHOOL ALLOCATIONS UNDER FAIR STUDENT*

outcomes, student/parent/teacher surveys, and expert “quality reviews” of schools to (1) identify and close chronically poor-performing schools; (2) replace them with district-led or independent charter schools implementing innovative instructional models; and (3) facilitate family choice among schools.¹³⁴ Third, they increased per-pupil funding, calibrating it to differential student need and shifting hundreds of millions of dollars from the central bureaucracy to schools.¹³⁵ Fourth, they recruited more qualified teachers, placing them in lower-performing schools,¹³⁶ raising salaries substantially, and jettisoning seniority rules that previously concentrated less qualified teachers in schools with more disadvantaged students. Finally, they built educator capacity via (1) a Leadership Academy that recruited the system’s best teachers to be principals and trained them to lead high-need schools and use newly available qualitative and quantitative data to identify and respond to each student’s learning needs; and (2) a cadre of facilitators for school-based “inquiry teams” of educators who hypothesized causes of instructional failure and implemented solutions by closely observing students’ responses to different modes of instruction.¹³⁷

Each aspect of the reform promoted experimentation. Whether at the student, classroom, school, or district level, the focus was on new ways to overcome disparities between each student’s potential and actual results, between state proficiency standards and underperforming students’ results, and among racial and other categories of students.¹³⁸ By multiple outcome

FUNDING, at 6–12 (Apr. 2013), <https://www.ibo.nyc.ny.us/iboreports/fsf2013.pdf> [<https://perma.cc/6VLG-FFAS>] (documenting equalization of per-capita funding during reforms); Jill Terrieri Ramos, Poynter Inst., *Bloomberg Claims Education Gains*, POLITIFACT (Feb. 7, 2019), <https://www.politifact.com/factchecks/2019/feb/07/michael-bloomberg/bloomberg-claims-education-gains> [<https://perma.cc/FXH6-GLJT>] (verifying Michael Bloomberg’s claim to have raised teacher salaries 43 percent and more than doubled education spending).

¹³⁴ Liebman, Cruikshank & Ma, *supra* note 128, at 394–95.

¹³⁵ See N.Y.C. INDEP. BUDGET OFF., *supra* note 133, at 6–12.

¹³⁶ Lindsey Christ, *City Teachers Outperform Teachers in Rest of State*, *State Data Finds*, NY1 (Sept. 5, 2013), https://www.ny1.com/nyc/all-boroughs/archives/2013/09/05/city-teachers-outperform-teachers-in-rest-of-state--state-data-finds.NYC_188311 [<https://perma.cc/B62C-4X4P>] (reporting state teacher-quality ratings in last year of Bloomberg reforms; 11 percent of City teachers received highest ranking versus 5 percent in rest of State; 11 percent of City teachers were rated less than “effective” versus 20 percent elsewhere).

¹³⁷ Liebman, Cruikshank & Ma, *supra* note 128, at 395–97; KELLEHER, *supra* note 131, at 53 (“New York City implemented structural reforms that created more variation in school and system structure” and focused teachers on “refining their instructional practices [t]hrough collaborative . . . teams of teachers and administrators charged with identifying and addressing problems of practice.”).

¹³⁸ See Stacey Childress et al., *Managing for Results at the New York City Department of Education*, in *Education Reform in New York City*, in EDUCATION REFORM IN NEW YORK CITY:

measures, as a variety of rigorous studies reveals,¹³⁹ these reforms improved student outcomes in New York City and nationwide as other cities followed suit.

AMBITIOUS CHANGE IN THE NATION'S MOST COMPLEX SCHOOL SYSTEM, 87, 90 (Jennifer A. O'Day et al. eds., 2011) (quoting Chancellor Klein's explanation of reforms as "shift[ing] the locus of power from central office to the schools," "shift[ing] the organizational culture to a focus on results," and "build[ing] into the equation some variability in terms of problem solving at the school level and learn[ing] from it"); KELLEHER, *supra* note 131, at 1–2 ("[N]ew York City's most successful reforms created conditions that permitted school-level innovation . . ."); Hill, *supra* note 131 (describing reforms as enabling schools to "assemble a group of teachers who are united around a school mission" to "work closely with one another and with individual students to meet high academic expectations"); Liebman, Cruikshank & Ma, *supra* note 128, at 389 (describing the goal of transforming district leaders from "deciders and implementation micromanagers" into "assemblers of a 'portfolio' of differentiated schools" with flexibility, resources, data, and facilitation needed to explore effective strategies).

¹³⁹ See, e.g., Will Dobbie & Roland G. Fryer, *Are High-Quality Schools Enough to Increase Achievement among the Poor?*, 3 AM. ECON. J. APP. ECON. 158 (2011) (estimating effects on predominantly Black students of attending a set of New York City charter elementary schools as large enough to close the racial achievement gaps in math and English); Roland G. Fryer & Will Dobbie, *The Medium-Term Impacts of High-Achieving Charter Schools*, 125 J. POL. ECON. 985 (2015) (finding, by comparing academic results six years later of students who entered lottery to attend a set of New York City charter schools, that students who participated in the lottery and attended charter schools had higher academic achievement, educational attainment, and on-time-to-graduate metrics and lower rates of teenage pregnancy and incarceration than students who participated in the lottery but attended other schools); James S. Liebman & Jonah E. Rockoff, *Moving Mountains in New York City*, EDUC. WEEK, Nov. 30, 2010, at <http://www.edweek.org/ew/articles/2010/11/30/14liebman.h30.html> [<https://perma.cc/6B9M-ENVY>] ("[T]he best studies show that each of three key policies—grading schools based on student outcomes, supporting high-quality charter schools, and replacing failing schools with new ones run by empowered principals and teachers—lifted student performance."); James S. Liebman, Columbia L. Sch., Presentation at Harvard Law School Advocates for Education 2013 Annual Conference: Reforming the Governance and Accountability of the Nation's Public Schools 14, 23 (Mar. 26, 2013) (on file with authors) (showing that students on whom inquiry teams focused gained, on average, 11 percent more proficiency in math and 6 percent in English over a year than other students with similar starting points); *infra* note 143 (small high schools); *infra* note 139 (charter schools); Jonah E. Rockoff & Lesley J. Turner, *Short Run Impacts of Accountability on School Quality* (Nat'l Bureau of Econ. Rsch., Working Paper No. 14564, 2008) (using quasi-experimental analysis to find that a school's "receipt of a low grade" from New York City's school-evaluation system "significantly increased student achievement" in English and math the next year); Marcus A. Winters & Joshua M. Cowen, *Grading New York: Accountability and Student Proficiency in America's Largest School District*, 34 EDUC. EVAL. & POL'Y ANALYSIS 313 (2012) (similar); see also Howard S. Bloom et al., *Lessons for New York City's Small Schools of Choice about High School Features that Promote Graduation for Disadvantaged Students*, 39 J. POL'Y ANALYSIS & MGMT. 740 (2020) (analyzing "rich dataset based on naturally-occurring lotteries for 68 new small non-selective high schools in New York City ['SSCs']" and identifying as predictors of SSC's higher graduation rates for disadvantaged students "school leadership quality, teacher empowerment, teacher mutual support, teacher evaluation and feedback, teacher professional development, data-driven instruction, teacher/parent communication, academic rigor, personalized learning, and teacher/student respect"); JAMES J. KEMPLE, RSCH. ALL. FOR N.Y.C. SCHOOLS, THE CONDITION OF NEW YORK CITY HIGH

1. Improved Graduation and College-readiness Rates

During the early 2000s, multiple agencies tracked New York City's graduation rate using different measures. Between 1986 and 2002, across the terms of nine education chancellors,¹⁴⁰ graduation rates on the *least* rigorous measure never exceeded 51 percent, flat-lining around 46 percent until 1991 and around 50 percent until 2002. As *Figure 2* illustrates, however, between 2003 and 2013, that rate climbed 33 percent to 68. On the most rigorous, federal measure (first calculated in 1999), the pre-reform rate hovered around 37 percent. Halfway through the reform (2007), when the federal government last calculated the rate, it had risen 49 percent to 55. On New York State's (the "State's") two graduation rates (first calculated in 2005), the City's rate rose 42 percent to 66 during the remainder of the reforms; on the state's more rigorous, college-ready measure, the rate jumped 108 percent to 63.5 percent.¹⁴¹ "A major cause of these increases—

SCHOOLS, at 4 (NYU Steinhardt Mar. 2013) [hereinafter KEMPLE, NYC HIGH SCHOOLS], https://research.steinhardt.nyu.edu/scmsAdmin/media/users/sg158/PDFs/condition_nyc_hs/ConditionNYCHS.pdf [<https://perma.cc/9CAX-UDV9>] (attributing rising graduation and college-readiness rates to reforms' "systematic method for identifying and phasing out high schools that exhibit persistently low levels of performance" and replacing them with "portfolio of new smaller, mission-driven high schools," "high school choice," and "accountability system that measures and holds schools responsible for improving key outcomes").

¹⁴⁰ *New York City Schools Chancellor*, WIKIPEDIA, https://en.wikipedia.org/wiki/New_York_City_Schools_Chancellor [<https://perma.cc/K9BR-S8SS>].

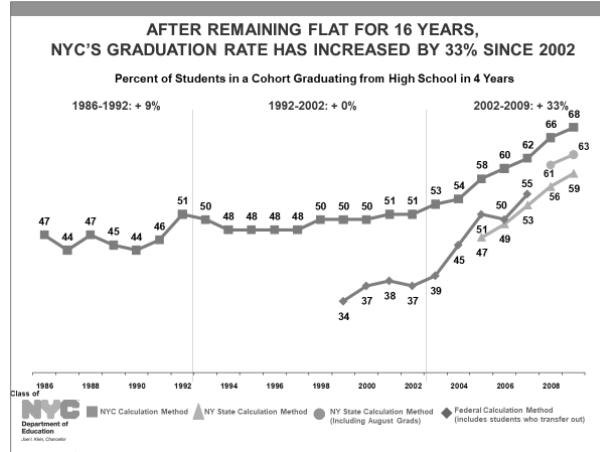
¹⁴¹ Eliza Shapiro, *Bloomberg Announces Graduation Rates Early*, POLITICO NEW YORK, Dec. 4, 2013, <https://www.politico.com/states/new-york/city-hall/story/2013/12/bloomberg-announces-graduation-rate-increase-early-009912> [<https://perma.cc/WLY7-J2AG>]; see KEMPLE, NYC HIGH SCHOOLS, *supra* note 139, at 1 (comparing New York City high schools in 1980s and 1990s, when graduation rates "hovered at or below 50 percent, nearly 20 percentage points lower than state and national averages" and when "[s]uccessive waves of ineffective reforms . . . offered little hope of improvement" to changed "high school landscape" as of 2011, with "steady improvement in student outcomes, across all groups of students" in graduation ("rates increased from 51 percent of those who entered high school in 1999 (scheduled to graduate in 2003) to 69 percent of those entering in 2007 (scheduled to graduate in 2011)"); "more students earning a Regents diploma (rather than the less demanding Local diploma)"; declines in dropout and transfer rates; and "improved" attendance, credit accumulation, rates of being on-track to graduate, and taking and passing college-reading examination); see also Hill, *supra* note 131 ("Every year [as of a decade into the reform] 18,000 [more New York City] young people graduate high school than would have been expected in 2002."); Aaron M. Pallas, *Policy Directions for K–12 Public Education in New York City*, in TOWARD A 21ST CENTURY CITY FOR ALL: PROGRESSIVE POLICIES FOR NEW YORK CITY IN 2013 AND BEYOND 1, 5 (John Mollenkopf et al. ed., 2013) [hereinafter Pallas, *Policy Directions*], https://www.gc.cuny.edu/CUNY_GC/media/CUNY-Graduate-Center/PDF/Centers/Center%20for%20Urban%20Research/Resources/21cforall_education.pdf [<https://perma.cc/9YE4-8RYU>] ("High school graduation rates have risen substantially over the past six years across all groups of students.").

which coincided with the State’s adoption of *tougher* graduation requirements¹⁴²—was the city’s closure of 140 failing high schools with graduation rates perennially below 50 and their replacement with new small high schools with above-average graduate rates.”¹⁴³

¹⁴² See KEMPLE, NYC HIGH SCHOOLS, *supra* note 139 at 2, 12 & n.4 (discussing state’s abandonment during reforms of lesser “local diploma” and requirement that graduating students qualify for more demanding “Regents” diploma).

¹⁴³ See Liebman, Cruikshank & Ma, *supra* note 128, at 397; see Hill, *supra* note 131 (“On campuses where new small schools replaced large underperforming high schools, the overall graduation rate increased from 37.9 percent to 67.7 percent . . . [while] serving [students] in poverty, with disabilities, [and] learning English”; “students who entered the new small schools with the lowest test scores benefited the most”); Leanna Stiefel, Amy Ellen Schwartz & Matthew Wiswall, *Does Small High School Reform Lift Urban Districts? Evidence from New York City*, 20 EDUC. RES. 1, 2–3, 6–10, 18 (2015), https://wagner.nyu.edu/files/faculty/publications/EDUCATIONAL_RESEARCHER-2015-Stiefel-Sch-Wis_Sm_Schools.pdf [<https://perma.cc/KDR9-KA8U>] (contrasting uneven results of small high schools elsewhere in nation and in New York City before Bloomberg reforms with substantial graduation gains across all types of high schools during New York City’s reforms; highest gains were in high schools created by the reforms, with “graduation rates roughly 13 percentage points higher than” in other schools; new small high schools’ “salutary effects on continuously operating large schools” validate City’s “portfolio” strategy combining large and small schools); REBECCA UNTERMAN & ZEEST HAIDER, MDRC, NEW YORK CITY’S SMALL SCHOOLS: A FIRST LOOK AT EFFECTS ON POSTSECONDARY PERSISTENCE AND LABOR MARKET OUTCOMES, at 1 (Apr. 2019), https://www.mdrc.org/sites/default/files/SSC-First_Look%20Brief.pdf [<https://perma.cc/WL49-FTFE>] (using “naturally occurring lotteries within New York City’s high school assignment process to rigorously study” small high schools of choice (SSCs) and finding that all types of city high schools improved during the reforms, but SSCs had larger “positive impacts on students’ secondary school and college outcomes . . . at no additional cost per graduate”; students “of all backgrounds” “who won a lottery and enrolled in an SSC . . . were 9.5 percentage points more likely to graduate from high school than those who lost a lottery and did not enroll in an SSC”). Demographic change cannot account for the City’s rising graduation rate. See Stiefel, Schwartz & Wiswall, *supra* (noting “remarkabl[e]” demographic stability in City’s student body during reform years).

Figure 2



New York City’s graduation gains outpaced those in other cities. In all reform years when calculated rates allow apples-to-apples comparisons, New York City’s rates began lower, ended higher, and maintained more consistent growth when compared to rates in other cities for which data are available:

Federal graduation rate, percentage-point increase 2001–2007 ¹⁴⁴				
N.Y.C	Charlotte	Chicago	Denver	Los Angeles
+16.6	-10.1	+6.6	+12.3	-5.8

New York State large city graduation rates, 2005–2013 ¹⁴⁵				
	Start / end rate	Point increase	Percent increase	Change in gap with state
New York City	43.5 / 61.3	+17.8	41%	-34%
Buffalo, Rochester, Syracuse, Yonkers	45.3 / 52.4	+7.1	16%	+20%

However defined, high school graduation enhances job prospects and other

¹⁴⁴ N.Y.C. Dep’t of Education, Panel for Educational Policy Meeting: N.Y.C. Achievement Results 16 (Aug. 16, 2010) [hereinafter Panel Presentation] (on file with authors).

¹⁴⁵ N.Y.S. Educ. Dep’t, *Graduation Rate Data—Feb. 13, 2006*, INFO. & REPORTING SERVS., <http://www.p12.nysed.gov/irs/pressRelease/20060213/cohort2000-01results.ppt> [https://perma.cc/UE84-EUKB]; N.Y.S. Ed. Dep’t, *Graduation Rate Data—June 23, 2014*, INFO. & REPORTING SERVS., <http://www.p12.nysed.gov/irs/pressRelease/20140623/2013-GradRateSlides-6-19-14.pptx> [https://perma.cc/SJW4-3Z22].

opportunities.¹⁴⁶ Still, one may wonder whether New York City's graduation rate increases reflected greater knowledge and skills. Suggesting they did are concurrent increases in the rates at which:

- Ninth graders entering high school enrolled in college four years later and persisted in college;¹⁴⁷
- High schoolers took at least one College Board Advanced Placement Exam and passed at least one;¹⁴⁸
- High school graduates met the City University of New York (CUNY) college-readiness standard, enrolled at CUNY, and entered CUNY without needing to take remedial courses.¹⁴⁹

Graduates of New York City's new small high schools had even greater gains.¹⁵⁰ Although a diploma still eludes too many City high school

¹⁴⁶ See, e.g., James J. Heckman et al., *Earnings Functions and Rate of Return*, 2 J. HUM. CAP. 1 (2008) (finding that high school graduates are employed at higher rates and earn more than students who did not graduate).

¹⁴⁷ KRISTIN BLACK & VANESSA COCA, RSCH. ALL. FOR N.Y.C. SCHOOLS, *NEW YORK CITY GOES TO COLLEGE*, at ES-iii (June 2017) (documenting rise in college-enrollment rates during reforms, from 55 percent of students starting high school in 2003 to 61 percent of those starting in 2008, and modestly higher college persistence rates).

¹⁴⁸ KELLEHER, *supra* note 131, at 6 (“Between 2002 and 2012, the number of New York City public high school students taking one or more Advanced Placement examinations has grown from 17,165 to 32,471, an increase of 89 percent [while] pass rate held steady at 56 percent”); N.Y.C. Dep’t of Educ., Division of Academics, Performance, and Support, at 9 (July 2012) (on file with authors) (documenting 9,736 AP test takers in 2002: $(.56(32,471) - 9,736)/9,736 = 87\%$ increase in students passing at least one test); see also Philissa Cramer, *Gains in City’s AP Exam Pass Rate Outpaced Participation Growth*, CHALKBEAT (Sept. 25, 2012, 4:20 PM), <https://ny.chalkbeat.org/2012/9/25/21089590/gains-in-city-s-ap-exam-pass-rate-outpaced-participation-growth> [<https://perma.cc/8EV2-GNKL>] (“[B]uck[ing] a common trend in standardized tests [that] as testing pools grow and become more diverse, average scores . . . fall, . . . [9.1 percent] more [New York City] students took [AP] exams [than year before, but] the number of students passing the exams rose by even more—12.7 percent”); KELLEHER, *supra* note 131, at 6 (noting that between 2007, when first calculated, and 2013, the number of SAT test takers in New York City public schools “increased by nearly 14 percent,” while average score “held steady as participation increased”).

¹⁴⁹ Hill, *supra* note 131 (“The percentage of [New York City] graduates who enter college [as of 2013] without needing to take remedial courses has doubled since 2001.”); N.Y.C. Dep’t of Educ., Division of Academics, Performance, and Support, at 5 (July 2012) (on file with authors) (documenting 56 percent increase in students meeting CUNY college-readiness standard from 2005 to 2011; 54 percent rise in CUNY enrollment from 2002 to 2010; and 32 percent increase in proportion of CUNY enrollees who matriculated to 4-year colleges from 2002 to 2010).

¹⁵⁰ UNTERMAN & HAIDER, *supra* note 143, at 1–2, 4 (finding that students selected by lottery to attend new small high schools of choice (SSCs) were more likely to enroll in postsecondary education, persist in college for four years, and be enrolled in postsecondary education and/or employed four years later than identical students who applied to attend but were lotteried-out of SSCs); see HOWARD S. BLOOM & REBECCA UNTERMAN, MDRC, *SUSTAINED PROGRESS: NEW*

seniors and does not assure others success in college,¹⁵¹ advances during the reform years were substantial.

2. Increased Proficiency on State Math and English Tests

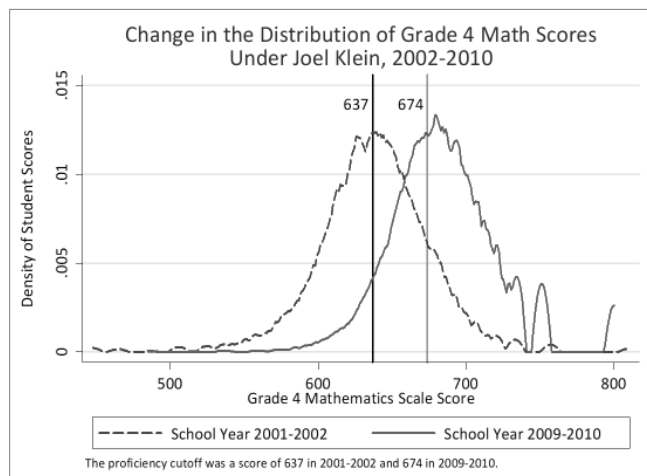
City students' gains on New York State standardized math and English assessments are another example of improvements resulting from the school reforms, despite upgrades in the rigor of state "proficiency" cut scores and in the tests themselves. From 2003 through 2010, the story is straightforward: the reforms moved the district's entire curve, as *Figure 3's* analysis of City students' fourth-grade math results in those two years shows. The same is true for eighth grade math as well as fourth and eighth grade English—encompassing all of the grades and subjects in which annual tests were given every year during the reforms.¹⁵²

FINDINGS ABOUT THE EFFECTIVENESS AND OPERATION OF SMALL PUBLIC HIGH SCHOOLS OF CHOICE IN NEW YORK CITY, at 7-8 & Tbl.2 (Aug. 2013), https://www.mdrc.org/sites/default/files/sustained_progress_FR_0.pdf [<https://perma.cc/AT3U-3Y3G>] (enrolling in an SSC increased college readiness on CUNY scale by 20 percent).

¹⁵¹ See BLACK & COCA, *supra* note 147, at 6–10.

¹⁵² Liebman & Rockoff, *supra* note 139 (“Between [2002 and 2010], New York City educators shifted the entire bell curve of state-test results decisively to the right, toward systematically greater skill in [fourth grade] math,” and “[m]uch the same is true for 8th grade math and 4th and 8th grade English.”); see Panel Presentation, *supra* note 144, at 6–8 (presenting similar graphs for other grade-subject combinations); see also KELLEHER, *supra* note 131, at 6 (finding that “[b]etween 2006 and 2009, New York City’s students showed substantial performance increases on state standardized tests”). The district confirmed that these changes reflected more learning—not easier tests—by examining whether over time, given scores on the exam in eighth grade predicted lower high school graduation rates for same students years later, and finding no appreciable diminution in the graduation probability a given eight-grade score predicted. N.Y.C. Dep’t of Educ., Overview of New York City Accountability, Results 2002–2012 (2012) (on file with authors) (finding minor score inflation for top-performing students in math and no evidence of score inflation for other students in math or any students in English).

Figure 3



In 2010, New York State raised the scores needed to demonstrate proficiency (for example, from the 637 to the 674 fourth grade math cut-score lines on *Figure 3*).¹⁵³ Then, in the last year of the Bloomberg reforms (2013), the State adopted more rigorous learning standards and exams.¹⁵⁴ These changes confound year-to-year district-specific comparisons after 2010. The best way to assess progress after 2010, therefore, is to compare rates of change in test scores in New York City with those in other districts in the state—all of which administered the same exams—while accounting for demographic differences between districts. Demographically, New York City and State students are mirror images: City schools are about 67 percent Black and Latino and 30 percent white and Asian; schools elsewhere in the State are about 30 percent Black and Latino, and 68 percent white and Asian.¹⁵⁵ Compared to their counterparts elsewhere in the State,

¹⁵³ See Jennifer Medina, *Standards Raised, More Students Fail Tests*, N.Y. TIMES, July 28, 2010, <https://www.nytimes.com/2010/07/29/education/29scores.html> [<https://perma.cc/M5UG-2J4D>].

¹⁵⁴ See Philissa Cramer, *Test Scores Fall Sharply Statewide, but NYC Fares Relatively Well*, CHALKBEAT (Aug. 7, 2013), <https://ny.chalkbeat.org/2013/8/7/21091046/test-scores-fall-sharply-statewide-but-nyc-fares-relatively-well> [<https://perma.cc/DGQ6-BZCJ>].

¹⁵⁵ See *DOE Data at a Glance*, N.Y.C. DEP'T OF EDUC., <https://www.schools.nyc.gov/about-us/reports/doe-data-at-a-glance> [<https://perma.cc/PL8N-TQKN>]; *N.Y.C. Public Schools Enrollment (2018–2019)*, DATA.NYSED.GOV, <https://data.nysed.gov/enrollment.php?year=2019&instid=7889678368> [<https://perma.cc/28Q2-Z8TQ>]; *N.Y.C. Public Schools at a Glance*, DATA.NYSED.GOV, <https://data.nysed.gov/profile.php?instid=7889678368> [<https://perma.cc/2XYP-FT9J>]; *N.Y.C. Public Schools Enrollment (2018–19)*, DATA.NYSED.GOV, <https://data.nysed.gov/enrollment.php?year=2019&instid=7889678368> [<https://perma.cc/7Q43->

City students are more likely to be disabled (1.5x), economically disadvantaged (1.67x), English Learners (2.33x), and homeless (8x)¹⁵⁶—all factors that predict lower average student outcomes in the City compared to the rest of the State, especially as tests become more difficult.¹⁵⁷ That, indeed, was the case before the reforms, when the City’s average reading and math proficiency rates across all tested grades were, respectively, 22 and 25 percentage points lower than in the rest of the State.¹⁵⁸

In 2009, six years into the reforms, however, the City’s less privileged student body was rapidly catching up to peers elsewhere in the State, cutting their proficiency gap (all tested grades) 72 percent in math (from 25 to 7 points) and 40 percent in English (from 22 to 13 percentage points).¹⁵⁹ Although new cut scores and tests after 2010 caused proficiency rates and scores to plummet statewide,¹⁶⁰ they dropped less and recovered faster in the City than elsewhere in the state—counter to what socio-economic and education-status conditions would predict.¹⁶¹ By 2013, City

LAY9]; *N.Y. State Public School Enrollment (2018–19)*, DATA.NYSED.GOV, <https://data.nysed.gov/enrollment.php?year=2019&state=yes> [<https://perma.cc/9UAV-SUST>].

¹⁵⁶ *Id.*

¹⁵⁷ *See, e.g.*, Reardon & Kalogrides, *supra* note 53, at 1166, 1170–71, 1204 (noting that nationally, factors noted in text predict weaker academic performance).

¹⁵⁸ N.Y.C. Dep’t of Educ., *A New View of New York City School Performance, 2002–2009*, at 2 (Oct. 2009) (on file with authors).

¹⁵⁹ *Id.*; *see* James Kemple, *Children First and Student Outcomes: 2003–2010*, in EDUCATION REFORM IN NEW YORK CITY AMBITIOUS CHANGE IN THE NATION’S MOST COMPLEX SCHOOL SYSTEM, 255, 270, 288 (Jennifer A. O’Day et al. eds., 2011) [hereinafter Kemple, *Student Outcomes*] (reporting rigorous regression estimates isolating test score gains attributable to City’s reforms from those predicted by preexisting trends and statewide initiatives: between 2003 and 2009, reforms generated 17 percent and 15 percent increases in fourth- and eighth-grade proficiency rates, and 16 percent and 20 percent increases in fourth- and eighth-grade math proficiency rates, beyond what otherwise would have occurred; impact of reforms “persisted and increased” during the period); Liebman & Rockoff, *supra* note 139 (“In 2002, city kids were less than half as likely as their peers elsewhere in the state to score in the top 10 percent, but four times more likely to score in the bottom 10 percent. In 2009, city kids and their state peers were equally likely to score at the top or bottom.”); Pallas, *Policy Directions*, *supra* note 141, at 3 (“[On] annual [2003–2009] state assessments in ELA and mathematics in grades 3–8, [New York City] students have performed better over time and have improved relative to other parts of the state.”).

¹⁶⁰ *See* Medina, *supra* note 153; Joel Klein, *The Good News in Lower Test Scores*, N.Y. Post, Aug. 7, 2013, <https://nypost.com/2013/08/07/the-good-news-in-lower-test-scores> [<https://perma.cc/EQ7T-4TJT>].

¹⁶¹ N.Y.C. Dep’t of Educ., 2013 New York State Common Core Test Results: New York City Grades 3–8, at 6–7 (Aug. 2013) (on file with authors); N.Y.S. Educ. Dep’t, 2013 Grades 3–8 English Language Arts and Mathematics Common Core Results, at 48, 152 (Aug. 2013) [N.Y.S. Educ. Dep’t, 2013 Grades 3–8] (on file with authors); *see* Cramer, *supra* note 154 (“The state’s first round of [more rigorous] test scores are out and they are just as low as officials warned. But there is good news for New York City: Its scores are close to the state average, and far ahead of those of other large cities.”); KELLEHER, *supra* note 131, at 10 (“[U]nder the new test, New York

students had narrowed their 2003 math and English proficiency gaps with other students in the State by, respectively, 94 percent (remaining gap 1.4 points) and 78 percent (remaining gap 4.7 points).¹⁶² Boosting the City's test score gains was its expanding cohort of charter schools, which on average substantially outscored traditional public schools both in the City and statewide.¹⁶³ Since 2013, scores have climbed statewide but New York City's scores have climbed faster, propelling its students' average proficiency rates *above* those of other students in the State in both subjects.¹⁶⁴

County-, district-, and school-level comparisons confirm the City's gains relative to the rest of the State and reveal the strength of those gains across all five City boroughs (county equivalents), including the Bronx, the

City elementary students . . . came close to the new state averages in the percentages of students proficient in math and English.”).

¹⁶² N.Y.S. Educ. Dep't, 2013 Grades 3–8, *supra* note 161, at 31, 135 (Aug. 2013) (on file with authors).

¹⁶³ CTR. FOR RSCH. ON EDUC. OUTCOMES, CHARTER SCHOOL PERFORMANCE IN NEW YORK CITY, at 7–9 (Feb. 20, 2013), <https://www.nyccharterschools.org/sites/default/files/resources/CredoReport2013.pdf> [<https://perma.cc/HU4L-JEWU>] (comparing annual student learning growth in 2007–2011 reading and math by students in New York City charter schools and in traditional public schools (“TPS”) the charter students otherwise would have attended; on average, charter students “gain[ed] an additional one month of learning in reading over their TPS counterparts per year of schooling” and “about five months of additional learning” in math); CTR. FOR RSCH. ON EDUC. OUTCOMES, NATIONAL CHARTER SCHOOL STUDY, at 29 (2013), https://credo.stanford.edu/sites/g/files/sbiybj6481/f/ness_2013_final_draft.pdf [<https://perma.cc/NT2F-CFDF>] (finding that nationally during same period, charter students in reading barely outperformed, and in math barely underperformed, matched TPS students); CTR. FOR RSCH. ON EDUC. OUTCOMES, CHARTER SCHOOL PERFORMANCE IN NEW YORK, at 42–44 (Sept. 2017), https://credo.stanford.edu/sites/g/files/sbiybj6481/f/ny_state_report_2017_06_01_final.pdf [<https://perma.cc/5NLQ-23PN>] (finding in a later study of New York State charter schools during the last two years of the Bloomberg reforms and following three years, that annual “benefits for charter students,” “mostly driven by the performance of charter schools in New York City,” were equivalent to “34 days of additional learning in reading and 63 additional days in math” compared to learning by matched TPS students); see Caroline M. Hoxby & Sonali Murarka, *Charter Schools in New York City: Who Enrolls and How They Affect Their Students' Achievement* 30–32 (Nat'l Bureau of Econ. Rsch., Working Paper No. 14852, 2009), <https://www.nber.org/papers/w14852.pdf> [<https://perma.cc/YP5G-6KV4>] (finding causal evidence that students in City charter schools outperformed statistically identical students in regular public schools in math and English).

¹⁶⁴ N.Y.S. Educ. Dep't, 2019 ELA and Math Test Results, at 10 (Aug. 2019), <http://www.nysed.gov/common/nysed/files/programs/information-reporting-services/2019-3-8-test-results-presentation.pdf> [<https://perma.cc/HSG5-QPBU>] (reporting City proficiency rates across all tested grades as 1.1 and 2 percentage points greater than in rest of state in, respectively, math and English).

State’s poorest county.¹⁶⁵ Comparing New York City to the four other densely populated cities in the State—all of which had similar score gaps relative to the State average as of 2003—tells a similar story:¹⁶⁶

Fourth Grade Scale-Score Gap with Rest of State			
	2003	2010	2013
New York City	-22	-6	-3
Buffalo, Rochester, Syracuse, Yonkers	-25	-25	-21

¹⁶⁵ New York State’s sixty-two counties range from one of the nation’s wealthiest (Westchester) to one of its poorest (Bronx). Bronx, Kings (Brooklyn), New York (Manhattan), Queens, and Richmond (Staten Island) counties comprise New York City, with median family income lower than the state average in four of the five counties (with 81 percent of the City’s students). *Top Staten Island Public Schools*, PUB. SCH. REV., <https://www.publicschoolreview.com/new-york/staten-island> [<https://perma.cc/6K3U-C84X>]; *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/newyorkcitynewyork.bronxcountybronxboroughnewyork.kingscountybrooklynboroughnewyork.newyorkcountymanhattanboroughnewyork.queenscountyqueensboroughnewyork.richmondcountystatenislandboroughnewyork/PST045219> [<https://perma.cc/36AZ-KCRA>]. In 2002, the City’s five boroughs had the bottom four, and five of the seven lowest, average fourth-grade reading proficiency levels among the sixty-two counties statewide. Jesse Margolis, *A New View of New York City School Performance, 2002–2009*, at 1 (on file with the authors). By 2009, however, Queens, Staten Island, Manhattan, and Brooklyn had leap-frogged dozens of other counties, ranking fourth, sixth, tenth, and fifteenth out of sixty-two. Bronx outperformed several counties and substantially closed the gap with other City boroughs. *Id.* The study compared counties’ actual five-year gains to gains their different starting points predicted. Outside the City, most counties’ expected and actual gains were within two points of each other, and none beat its expected average proficiency level by more than five points. In contrast, all five New York City counties “surpassed their expected gains by more than five points,” and together did so by almost nine points. *Id.* at 7–8. Controlling for lower starting positions, “New York City’s five boroughs made more progress in English and math than any other county in the state.” *Id.* at 1–8.

The State divides New York City public schools into 32 geographic school “districts” to compare them to the State’s other 656 districts. At the district level, Margolis found that, “[a]cross all grades in English and math, 27 of [the State’s] 30 most improved districts between 2002 and 2009, including the top 17, were in New York City.” *Id.* at 8. Comparing the City’s 32 districts to the 32 districts closest in size elsewhere in the State, and dividing each group into lowest, middle, and highest thirds by starting performance level, Margolis found that the City’s lower, middle, and highest-third districts beat their expected gains by, respectively, 8, 7, and 2 percentage points, while their statewide counterparts did so by only 2, 0, and .5 points. *Id.* at 8, 10.

A similar pattern characterized the school level. See KELLEHER, *supra* note 131, at 6 (“[B]y 2013, New York City was home to 22 of the 25 highest-performing schools [on state tests, compared to] none [in 2002, and] New York City’s share of the state’s lowest-performing schools shrank from 62 percent to 30 percent.”).

¹⁶⁶ Panel Presentation, *supra* note 144, at 5; see Liebman & Rockoff, *supra* note 139 (“[I]f the city’s gains were the result of easier statewide tests, we ought to have seen kids improve as much in Buffalo, Yonkers, and the rest of the state. We didn’t.”); N.Y.S. Educ. Dep’t, 2013 Grades 3–8 English Language Arts and Mathematics, at 48, 152 (Aug. 6, 2013) (on file with authors).

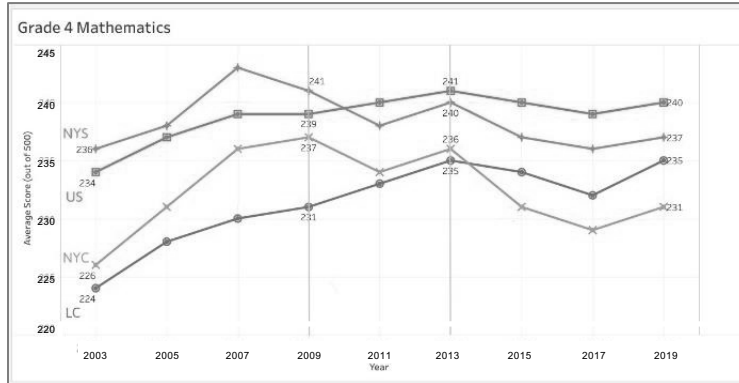
3. Gap Closure on National Tests

Every two years since 2003, New York City, along with all fifty states and a subset of other large U.S. cities (many of which adopted similar reforms), have participated in the National Assessment of Educational Progress (“NAEP”).¹⁶⁷ The NAEP’s rigorous reading and math tests, administered to representative samples of fourth and eighth graders nationwide, permit reliable cross-jurisdiction comparisons. *Figure 4* tracks average NAEP scores in fourth-grade math from 2003 (when New York City’s reforms began and it first took part in NAEP) to 2019, comparing New York City and State, all participating large city (“LC”) districts nationally, and the national public-school aggregate.¹⁶⁸

¹⁶⁷ Associating all but Charlotte among the ten 2003 NAEP cities with mayoral-control and/or portfolio reforms are Anthony Cavanna et al, *Research Matters: The Potential of the Portfolio Approach*, 63 EDUC. LEADERSHIP 89 (May 2006); HILL ET AL., *supra* note 128, at 11; WILLIAM J. MATHIS & KEVIN G. WELNER, NAT’L EDUC. POL’Y CTR., THE “PORTFOLIO” APPROACH TO SCHOOL DISTRICT GOVERNANCE, at 2 (Mar. 2016), https://nepc.colorado.edu/sites/default/files/publications/Mathis%20RBOPM-4%20Portfolio_3.pdf [<https://perma.cc/2BMF-ZMG8>]; *Frequently Asked Questions about the Portfolio Strategy*, CRPE, (2019), <https://www.crpe.org/sites/default/files/crpe-portfolio-faq-2019.pdf> [<https://perma.cc/2CBJ-43QL>]; WONG & SHEN, CTR. FOR AM. PROGRESS, MAYORAL GOVERNANCE AND STUDENT ACHIEVEMENT: HOW MAYOR-LED DISTRICTS ARE IMPROVING SCHOOL AND STUDENT PERFORMANCE, at 7–9 (Mar. 2013) [<https://perma.cc/APP2-NNRY>].

¹⁶⁸ Data in *Figure 4* and the two following tables is derived from the National Center for Education Statistics. *NAEP Data Explorer*, NAT’L CTR. FOR EDUC. STATS., <https://www.nationsreportcard.gov/ndecore/xplore/NDE> [<https://perma.cc/7TVP-GSQ8>]. The Appendix has analogous graphs for the other three NAEP grade-subject combinations. These data understate differences between New York City’s and the other jurisdictions’ rates of change because the City’s results are included in those jurisdictions’ results. See *Trial Urban District Assessment (TUDA)*, NAT’L CTR. FOR EDUC. STATS., <https://nces.ed.gov/nationsreportcard/tuda/> [<https://perma.cc/G2VG-ZUNX>] (“Results for students in the TUDA samples are also included in state and national samples with appropriate weighting.”). This is especially true for New York City/State comparisons, as the City educates about 40 percent of the State’s public school students. Compare *N.Y.C. Public Schools Enrollment (2018–19)*, *supra* note 155, with *N.Y. State Public School Enrollment (2018–19)*, *supra* note 155.

Figure 4: NAEP Scores 2003-2019



During the reform's first seven years through 2009, NAEP scores rose nationwide. But they rose faster in New York City, shrinking score gaps with New York State in all four grade-subject combinations, and with the nation in three of the four:¹⁶⁹

	Fourth Grade		Eighth Grade	
	Math	Reading	Math	Reading
Gap with Nation	-75%	-50%	-10%	+11%
Gap with New York State	-60%	-42%	-29%	-8%

New York City also increased its initially modest proficiency advantage over other large cities in the fourth-grade subjects.

In the reforms' last four years, the City's NAEP scores leveled off some, while national scores rose. The national increases were propelled in part by rapidly rising results in other large cities as they adopted reforms similar to New York City, often led by City transplants.¹⁷⁰ During this

¹⁶⁹ Between 2003 and 2009, New York City closed 64 percent of its gap with the nation in fourth grade math, 67 percent of its fourth grade reading gap, and 11 percent of its eighth grade math gap, with a 10 percent increase in its eighth grade reading gap. In the same period, the New York City/State gap closed 58 percent in fourth grade math, 30 percent in fourth grade reading, 33 percent in eighth grade math, and 8 percent in eighth grade reading. See Liebman & Rockoff, *supra* note 139 (“English and math gains by [New York City] 4th graders [from 2002 to 2009]—most of whom are poor, black, and Hispanic—are equivalent to a third of the achievement gap between minority and white students that has persisted for decades in this country.”)

¹⁷⁰ See ROBERT BALFANZ ET AL., BUILDING A GRAD NATION: PROGRESS AND CHALLENGE IN ENDING THE HIGH SCHOOL DROPOUT EPIDEMIC, at 13 (2014), http://new.every1graduates.org/wp-content/uploads/2014/04/BGN_2014_Report.pdf [<https://perma.cc/87EP-JQA7>] (crediting national high school graduation increases in part to

period, however, the City gained ground on the State in the previously lagging eighth-grade subjects as students who benefited from earlier reforms reached the higher grade.¹⁷¹

Change in New York City's NAEP Score Gaps, 2003–2013				
	Fourth Grade		Eighth Grade	
	Math	Reading	Math	Reading
Gap with Nation	-38%	-17%	0%	+11%
Gap with New York State	-60%	-33%	-43%	-23%

4. Impact on Racial Disparities

In 2013, tracking similar changes in other cities, New York City voters elected Bill de Blasio mayor on a platform of ending the Bloomberg-Klein school reforms.¹⁷² Why, if the reforms were as successful as we have suggested, were they ended? Several aspects of the reforms—closing neighborhood schools, opening charter schools, using standardized-test scores to evaluate schools and teachers—were unpopular among teachers and many, especially middle-class, voters.¹⁷³ Aggravating matters, the reformers treated policy experimentation as a technocratic exercise that engaged teachers, students, parents, and communities only as the instruments and subjects of the experiments rather than as partners in the innovations' development and evaluation—with particularly calamitous results in the case of school closures.¹⁷⁴ Overlaying these critiques, however, was another that broadened their appeal: the systemic reforms had

reforms “beg[un] in New York City”); HILL & CAMPBELL, *supra* note 128, at 1; WONG & SHEN, *supra* note 167, at 44 (noting 2003–2011 NAEP gains across mayoral-control districts). The surge in other cities' NAEP scores relative to New York City's was most notable in 2011. Compare Kemple, *Student Outcomes*, *supra* note 159, 271–74 (finding higher rates of NAEP gains in New York City than in other large cities and nationwide from 2003 to 2009), with Pallas, *Policy Directions*, *supra* note 141, at 3 (noting New York City students' “substantial increase” in NAEP 4th and 8th reading and math performance between 2003 and 2011, and that by 2011, other cities were “catching up”). Cf. Hill, *supra* note 131 (“NAEP gains [may be] more meaningful in New York than in other cities, because New York experiences more population growth among disadvantaged students than any other U.S. city and therefore must constantly make up a score deficit.”).

¹⁷¹ See Al Baker & Motoko Rich, *Small Testing Gains for City Students Continue Gradual Rise in Bloomberg Era*, N.Y. TIMES, Dec. 19, 2013, at A34 (finding “steady though incremental improvement” in NAEP scores during reform period).

¹⁷² See Liebman, Cruikshank & Ma, *supra* note 128, at 440–41 (citing sources).

¹⁷³ *Id.* at 368–71, 438–41.

¹⁷⁴ *Id.* at 371–72, 436–41.

not solely targeted and did not fully close, the systems' racial and other outcome disparities.¹⁷⁵

The critics were right that substantial racial and other disparities remained as of 2013.¹⁷⁶ What they missed, however, is the extent to which system-wide experimentation benefited children of color and lessened previously grotesque disparities in academic achievement. Consider that two-thirds of New York State's Black and Latinx students benefited from the City's substantial reduction of its NAEP and graduation gaps with the nation, and its remarkable erasure of its achievement gap with the rest of the State, compared to only 15 percent of the State's White students.¹⁷⁷ Further, in most cases, Black and Latinx students' achievement rose more steeply than that of White students.¹⁷⁸

¹⁷⁵ See, e.g., NORM FRUCHTER ET AL., ANNEBERG INST. FOR SCH. REFORM, IS DEMOGRAPHY STILL DESTINY?, at 1 (2012), http://www.aqeny.org/wp-content/uploads/2018/04/2012_10_24-Is-demography-still-destiny.pdf [<https://perma.cc/MZQ3-SR5V>] (criticizing New York City reforms because “racial composition and average income of a student’s home neighborhood are very strong predictors of a student’s chance of graduating high school ready for college, [and] gaps between neighborhoods are enormous”); Javier Hernandez, *In Mayoral Race, Looking for Substance in Schools Conversation*, N.Y. TIMES, Aug. 8, 2013, at A13 (quoting claims by candidate to replace Mayor Bloomberg that his education reforms had “dismal” effects on students of color); Luz Yadira Herrera & Pedro Noguera, *Children First and its Impact on Latino Students in New York City*, INMOTION MAG., Sept. 7, 2013, https://inmotionmagazine.com/er13/pn_nylatinos.html [<https://perma.cc/EJK8-PG2T>] (“[D]espite the bold assertions by Mayor Bloomberg . . . , there have been no significant reduction in the achievement gap separating New York City’s African American and Latino students from White students”); Hill, *supra* note 131 (“Critics point out the remaining deficiencies of . . . schools in poor and minority areas [as] many children are still stuck in weak schools.”); KEMPLE, N.Y.C. HIGH SCHOOLS, *supra* note 139, at 19 (“[A]mong young men who entered high school in 2007, more than 70 percent of Asian and white youth graduated with a Regents Diploma, compared to 48 percent of black and Hispanic young men.”); Ramos, *supra* note 133 (noting claims of only “modest” declines in achievement gaps under Bloomberg); Shapiro, *supra* note 141 (“[C]ritics . . . have accused [Bloomberg] of overseeing a vastly unequal system, with minority students losing out on the resources their white and Asian counterparts have”); ELAINE WEISS & DON LONG, BROADER BOLDER APPROACH TO EDUC., MARKET-ORIENTED EDUCATION REFORMS’ RHETORIC TRUMPS REALITY, at 5 (Apr. 2013) <https://files.epi.org/2013/bba-rhetoric-trumps-reality.pdf> [<https://perma.cc/KJM3-K4P6>] (“[Reform] gains slightly narrowed the black-white gap in the city, but not enough to counter growing gaps in other subjects and grades.”).

¹⁷⁶ See, e.g., KEMPLE, N.Y.C. HIGH SCHOOLS, *supra* note 139, at 19 (quoted *supra* note 175).

¹⁷⁷ See *supra* note 175 and accompanying text; *N.Y. State Public School Enrollment (2017–2018)*, *supra* note 155.

¹⁷⁸ *Graduation*: N.Y.C. DEP’T OF EDUC., PRELIMINARY NEW YORK CITY GRADUATION RATES CLASS OF 2013 (Dec. 4, 2013), at 2, 5 (reporting increases in four-year graduation rates from first reform cohort (2005 graduates) to last (2013 graduates): all students, +42 percent; Asian students, +22 percent; Black students, +53 percent; Black males, +75 percent; Latinx students, +58 percent; Latinx males, +76 percent; students with disabilities, +119 percent (from 17 percent to 37 percent graduating); by 2013, the 2003 Black-White and Latinx-White gaps had narrowed 11 and 6

percentage points, respectively); *see* KEMPLE, N.Y.C. HIGH SCHOOLS, *supra* note 139, at 1–4, 15–16, 18 (finding that from 2005 to 2011, graduation rates improved at a moderately faster-than-average pace for Black and Latinx students and improved more for male students of color, economically disadvantaged students, English learners, and students with special needs; “largest improvements” were for students entering high school with “lowest relative attendance and achievement test scores from middle school”: +176 percent for students who were chronic absentees in the 8th grade, compared to +39 percent for 8th graders with 95 percent or greater attendance; and +400 percent for students with the lowest 8th grade ELA and math scores compared to +125 percent for middle-range students); *see also* BLOOM & UNTERMAN, *supra* note 150, at 1–3, 5, 10–11 (enrolling in Bloomberg-era new small high school increased four-year graduation rates by 9.5 percentage points for all students (70.4 percent compared to 60.9 percent), with largest gains by Black males (13.5 percent more likely to graduate) and Hispanic females (10.4 percent more likely)).

College readiness: *see* KELLEHER, *supra* note 131, at 6 (finding that AP pass rate for Black students rose 49 percent between 2002 and 2011, while overall pass rates were static; City’s 14 percent increase in SAT takers “was driven by more African American and Latino students taking the test”); BLACK & COCA, *supra* note 147, at ES-iii (“The largest percent increases in both high school graduation and college enrollment have been among . . . students in the poorest neighborhoods, Black and Latino students, and young men.”); Panel Presentation, *supra* note 144, at 20 (reporting 2002 to 2009 increases in city graduates’ enrollment in CUNY: Asian students, +88 percent; Black students, +44 percent; Latinx students +83 percent; White students +16 percent).

State achievement tests: Scale-score comparisons by race are available only before and after tests changed. From 2006 to 2010, Black and Latinx average math scores (all grades) rose 25 and 26 points, compared to 16 and 19 points for Asian and White students; in English, Black and Latinx scores rose 14 points, compared to 3 and 5 for Asian and White students—with declines in score gaps (all tested grades) of: 11.1 points (37 percent) Black-White English; 10.5 points (26 percent) Latinx-White English; 5.6 points (18 percent) Black-White math; and 6.5 points (22 percent) Latinx math. Panel Presentation, *supra* note 144, at 9–10. Between 2013 and 2014, the first comparison available under the new test, Black and Latinx gains in English (8.1 percent and 8.7 percent, respectively) outpaced Asian and White gains (6.4 percent and 5.9 percent), as did Black and Latinx gains in math proficiency levels (14.9 percent and 21.5 percent) versus Asian and White gains (11.8 percent, 11.1 percent)—albeit against much lower starting points for Black and Latinx than for Asian and White students. ENGAGENY, MEASURING STUDENT PROGRESS IN GRADES 3–8 ENG. LANG. ARTS & MATH, at 22, 34 (Aug. 2014), <http://www.p12.nysed.gov/irs/ela-math/2014/2014Grades3-8ELAMath-final8-13-14.pdf> [<https://perma.cc/BT66-K9N5>]; *see* Hill, *supra* note 131 (summarizing research on reforms showing that “New York City’s black and Hispanic students were 10 percentage points more likely, while white and Asian students were 5 points more likely, to be in above-average schools [in 2013] than in 2006”); Kemple, *Student Outcomes*, *supra* note 159 (showing that reforms had stronger beneficial effects on students with lower starting scores); *see also* CTR. FOR RSCH. ON EDUC. OUTCOMES, *supra* note 163, at 42–44 (finding that New York charter school students who gained most compared to matched students attending traditional public schools from 2012 to 2016 were Black students in poverty (receiving equivalent of “an additional 38 days of learning in reading and 74 days of learning in math”) and “Hispanic charter students in poverty” (receiving “an additional 68 days of learning in math”)).

NAEP outcomes: Between 2003 and 2013, average fourth grade and eighth grade math and reading scores of the City’s Asian, Black, Latinx, and White students increased in all grade/subject combinations for all populations with the exception of White students’ fourth grade reading scores, which declined a point. Asian, Black, and Latinx scores rose more than White scores in three-quarters of the grade/subject combinations. *NAEP Data Explorer*, NAT’L CTR.

Conversely, ending system-wide experimentation in favor of (since-abandoned) resource infusions targeting only the City's lowest-performing schools¹⁷⁹ has *widened* most gaps and slowed the shrinkage of others. *Figure 5* compares the first six years of the reforms, when the disparity between the City's mainly Black and Hispanic student body and public school students nationwide on fourth-grade NAEP scores *shrunk by almost two-thirds*, with the gap's *80 percent increase* in the six years since the reforms ended.¹⁸⁰ Similarly, *Figure 6* illustrates that in the reform's first six years, the City's Latinx, English Learner, and disabled students closed a quarter to over a third of their gaps with White students, only to lose that ground in the six years since the reforms ended.¹⁸¹ Students in all three categories scored the same as they did seventeen years ago, while the scores of White students and students nationally have risen.¹⁸² The story is worse for Black students, whose modest gains on White students during the reforms have given way to losses—meaning Black students' scores are now *well below* their 2003 averages.¹⁸³ Likewise, after steadily shrinking during the reforms, Black-White and Hispanic-White gaps on state achievement tests have widened since the reforms ended, as *Figure 7* illustrates.¹⁸⁴ The Black-White and Hispanic-White graduation gaps have continued to decline since the reforms ended, but the pace of improvement has declined.¹⁸⁵ As

FOR EDUC. STATS., <https://www.nationsreportcard.gov/ndecore/xplore/NDE> [<https://perma.cc/45AJ-F2TH>]; see also KELLEHER, *supra* note 131, at 9 (“NAEP performance gaps between [New York City’s] lower- and higher-income students narrowed substantially” between 2003 and 2011, dropping [47 percent] in math and [53 percent] in reading).

¹⁷⁹ Early in his tenure, Mayor de Blasio ended the systems’ “portfolio” policy of tracking learning growth at all schools and replacing weaker schools with newer stronger ones and chose instead to pour resources into a small number of the City’s lowest performing schools. Three years later, he abandoned the plan as a failure and began closing the schools. See Eliza Shapiro, *\$773 Million Later, de Blasio Ends Signature Initiative to Improve Failing Schools*, N.Y. TIMES, Feb. 26, 2019, at A20 (“Mayor Bill de Blasio is canceling one of his signature education initiatives, acknowledging that despite spending \$773 million he was unable to turn around many long-struggling public schools in three years after decades of previous interventions had also failed.”).

¹⁸⁰ NAEP Data Explorer, *supra* note 178. The data underlying *Figures 5–7* are from *id.* and are further displayed in Tables 2 and 3 in the Appendix.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ N.Y.C. Dep’t of Educ., *Test Results*, ACADEMICS, <https://infohub.nyced.org/reports/academics/test-results> [<https://perma.cc/4KCB-7N2D>]; Panel Presentation, *supra* note 144, at 10 and accompanying text. *Figure 7* covers 2004 to 2010 and 2013 to 2019. Changes in tests and how their scores were scaled between those two periods confound longitudinal comparisons. See *supra* notes 153–158 and accompanying text.

¹⁸⁵ See Rsch. All. for N.Y.C. Schools, *How Have NYC’s High School Graduation and College Enrollment Rates Changed Over Time*, SPOTLIGHT ON N.Y.C. SCHOOLS (June 28, 2019),

tempting as it was for the City to drop middle class schools out of the reforms and focus only on a small number of failing schools attended mainly by poor students of color, the results have been harmful to them.

Figure 5

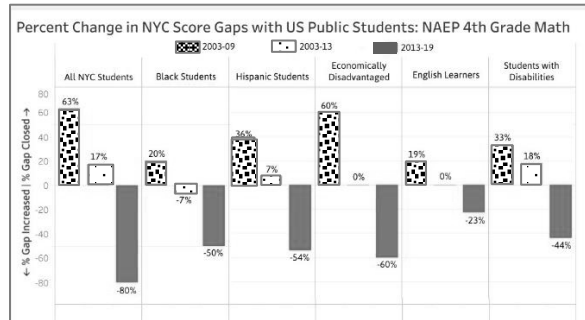
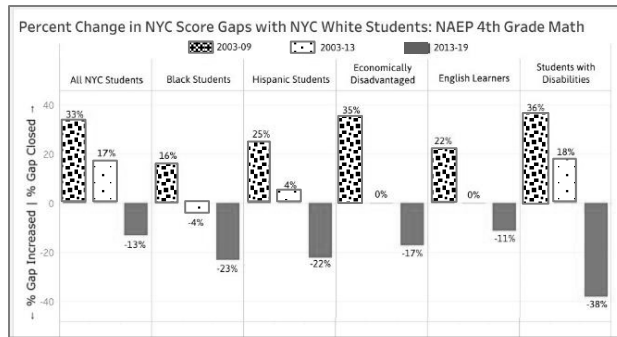


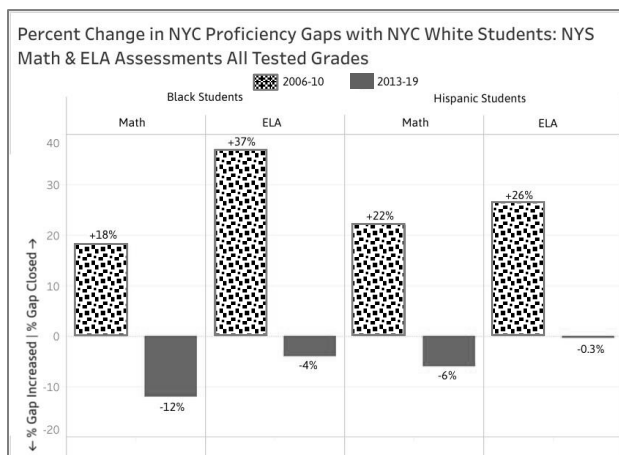
Figure 6



https://research.steinhardt.nyu.edu/site/research_alliance/2019/06/28/how-have-nycs-high-school-graduation-and-college-enrollment-rates-changed-over-time [https://perma.cc/TC4L-6PHL] (defining graduation rate as percent of entering high school students graduating four years later):

Change in N.Y.C. Graduation Gap with White Students			
Percentage Point Change [Change/Year] (Percent Change)			
Reform Phases (2004–2010, 2004–2013) vs. Post-Reform Period (2013–2019)			
	Black Students	Hispanic Students	Economically Disadvantaged Students
2004–2010	-8 [-1.33] (-33%)	-8 [-1.33] (-30%)	-6 [-1.00] (-23%)
2004–2013	-9 [-1.00] (-36%)	-10 [-1.11] (-37%)	-9 [-1.00] (-35%)
2013-2019	-3 [-0.60] (-20%)	-3 [-0.60] (-18%)	-3 [-0.60] (-18%)

Figure 7



In 1973, in refusing to recognize a constitutional right to education, the Supreme Court expressed uncertainty whether courts fairly could expect educators to close Black and Latinx achievement gaps with White students.¹⁸⁶ Might there be something about these students, their families, or their neighborhoods that render disparities inevitable? In roughly the first fifteen years of this century, countless classroom, school, and district level experiments by New York City and other large districts disproved that suggestion and validated the counter-suspicion the Court said it had no way to test: that officials perpetuate racial disparities based on the false ascription of racial limitations. There is, however, a way to test these competing suspicions by interpreting the Equal Protection Clause to require steps to *plumb the uncertainty*, exposing racial disparities supportable only based on false assumptions, benefiting Black communities more than targeted steps, and aiding the broader public as well.

D. SCHOOL DESEGREGATION 1970–1985

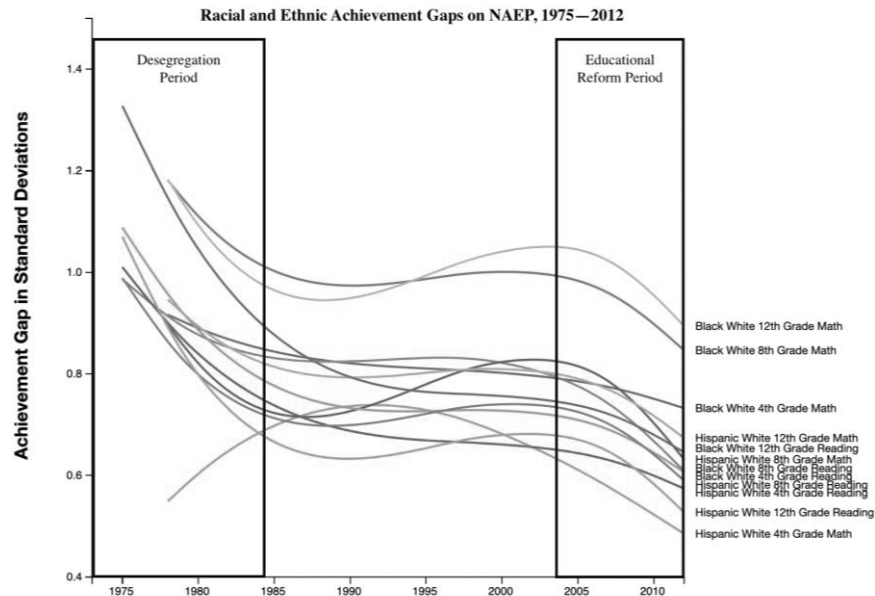
Observers often characterize the educational achievement gap as “persistent” and “fail[ing] to close,”¹⁸⁷ but as *Figure 8* illustrates, this is not

¹⁸⁶ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42–43, 56–57 (1973) (discussed *supra* note 11 and accompanying text).

¹⁸⁷ See, e.g., Eric A. Hanushek et al., *The Achievement Gap Fails to Close*, EDNEXT, Summer 2019, at <https://www.educationnext.org/achievement-gap-fails-close-half-century-testing-shows-persistent-divide> [<https://perma.cc/4K43-U4RG>] (claiming that policy failures explain why the achievement “gap [has] remained constant”); Richard Rothstein, *A Wider Lens On the Black-*

true. *Twice* over the past fifty years, the Black/White and Latinx/White NAEP gaps shrunk substantially in nearly all tested grades and subjects: from 1975 to 1985, and again from 2003 to 2011.¹⁸⁸ As a result, “black and Hispanic students today are roughly three years ahead of their parents’ generation in math” and “roughly two to three years ahead” in reading. “White students’ scores have also improved, but not by as much.”¹⁸⁹

Figure 8



Stanford Ctr. for Educ. Pol’y Analysis, *supra* note 188, at fig. 1.

White Achievement Gap, PHI DELTA KAPPAN, Oct. 2004, at 105, 106 (arguing that “persistent achievement gaps” show that school policies cannot solve problems stemming from broad social forces).

¹⁸⁸ Stanford Ctr. for Educ. Pol’y Analysis, *Racial and Ethnic Achievement Gaps*, EDUC. OPPORTUNITY MONITORING PROJECT, <https://cepa.stanford.edu/educational-opportunity-monitoring-project/achievement-gaps/race> [<https://perma.cc/UF5X-8PQ9>] (observing, based on data underlying *Figure 8*, that “white-black and white-Hispanic achievement gaps have been declining, albeit unsteadily,” “narrow[ing] sharply in the 1970s and first half of the 1980s,” then “stall[ing]” and even widening until the new century when they declined again through 2012). We adapted *Figure 8* from *id.* by adding the two labeled boxes.

¹⁸⁹ *Id.*

Causal explanations for national variations in gap change are hard to prove,¹⁹⁰ but meaningful gap closure in “experimentalist” urban school districts in the first fifteen years of the century suggests an explanation for the *later* period of declines.¹⁹¹ The *earlier* declines also coincided with a national experiment in education reform: racial integration of vast swaths of the nation’s schools, which began in earnest only in 1970, then began collapsing in the mid-1980s due to retrenchment by the Supreme Court and successive Republican administrations.¹⁹² Considerable social scientific evidence links 1970s-to-1980s racial integration to enhanced academic and life outcomes for Black, Latinx, and economically disadvantaged students.¹⁹³ More recently, Economist Rucker C. Johnson has used the “natural ‘policy lab’” provided by longitudinal data on the life experiences of Black and White adults who took part in “significant efforts to integrate schools that occurred only for about 15 years, and peaked in 1988” to draw a *causal* link between that integration and substantial improvements in Black Americans’ “achievement gaps, educational attainment, earnings, and health status.”¹⁹⁴ “[T]he longer students were exposed to integration and

¹⁹⁰ See, e.g., PAUL E. BARTON & RICHARD J. COLEY, EDUC. TESTING SERV., THE BLACK-WHITE ACHIEVEMENT GAP WHEN PROGRESS STOPPED, at 8–12, 18–29 (2010), <https://files.eric.ed.gov/fulltext/ED511548.pdf> [<https://perma.cc/67J6-TQ49>] (surveying explanations for racial achievement gaps’ 1970s to 1980s narrowing and subsequent widening).

¹⁹¹ As *Figures 4* (above), and *9–11* (Appendix) reveal, national, state, and local NAEP scores and gap closure tailed off after 2013, when many cities abandoned their education reforms. See Liebman, Cruikshank & Ma, *supra* note 128, at 440–41.

¹⁹² See *infra* notes 203–206 and accompanying text.

¹⁹³ Asked why “during the height of desegregation in the 1970s and 80s, the [NAEP] achievement gap between black and white students narrowed” more rapidly than ever before or since, Stanford sociologist Sean Reardon, *Figure 8*’s creator, said “[t]here was a lot going on [in the 1970s and 1980s]. But clearly desegregation improved outcomes for blacks, and didn’t harm them for whites.” Sarah Garland, *Was ‘Brown v. Board’ a Failure*, THE ATLANTIC, Dec. 8, 2012, <https://www.theatlantic.com/national/archive/2012/12/was-brown-v-board-a-failure/265939> [<https://perma.cc/7LVV-9P8G>]; see *The Benefits of Socioeconomically and Racially Integrated Schools and Classrooms*, CENTURY FOUND. (Apr. 29, 2019) [hereinafter CENTURY FOUND.], <https://tcf.org/content/facts/the-benefits-of-socioeconomically-and-racially-integrated-schools-and-classrooms> [<https://perma.cc/HHM8-UDM5>] (“[T]he racial achievement gap in K–12 education closed more rapidly during the peak years of school desegregation in the 1970s and 1980s than it has overall in the decades that followed—when many desegregation policies were dismantled.”).

¹⁹⁴ Rucker C. Johnson, *Why School Integration Works*, WASH. POST, May 16, 2019, <https://www.washingtonpost.com/education/2019/05/16/why-school-integration-works> [<https://perma.cc/V9BT-7HCW>]; see Rucker Johnson, *Long-run Impacts of School Desegregation and School Quality on Adult Attainments* 1, 5, 8–11, 18–26, 31, 34–37 (Nat’l Bureau of Econ. Rsch., Working Paper No. 16664, Sept. 2015) [hereinafter Johnson, *Long-run Impacts*], <https://www.nber.org/papers/w16664.pdf> [<https://perma.cc/RKP9-2DVA>], elaborated in RUCKER C. JOHNSON & ALEXANDER NAZARYAN, CHILDREN OF THE DREAM: WHY SCHOOL INTEGRATION WORKS (2019). Professor Rucker’s sophisticated causal analysis (1) leverages the

strong school funding [integration generated], the better their [gap-closing] outcomes in adulthood.”¹⁹⁵

Although the school desegregation era formally began with *Brown v. Board of Education* in 1954,¹⁹⁶ the Supreme Court’s “all deliberate speed”¹⁹⁷ temporizing permitted massive then passive resistance across the South, delaying the onset of systematic racial integration of schools there until the 1969–70 school year.¹⁹⁸ Doubts about how *Brown* applied in the North and West delayed the start of sustained court-ordered desegregation

historical “accident” that some Black and White children in K–12 schools during the 1960s to 1980s experienced, while others did not experience, court-ordered desegregation and did so for different amounts of time; (2) compares the educational, economic, and health outcomes through 2013 of those children as adults, as reported on a long-running longitudinal household survey of 5000 households; (3) controls for other potentially causal forces such as Title I funding, Head Start, introduction of kindergarten, AFDC, Medicaid, Food Stamps, Community Health Centers, and hospital desegregation; and (4) concludes that prior, less sophisticated studies typically found, but substantially understated, the positive effects of integration on Black students. See also Willis Hawley & Mark A. Smylie, *The Contribution of School Desegregation to Academic Achievement and Racial Integration, in Eliminating Racism: Profiles in Controversy* 281, 289 (P. Katz & D. Taylor eds., 1988) (“[E]ven though both massive and passive resistance have been more common than genuine efforts to make it work, school desegregation has benefited most of those who have experienced it.”); AMY STUART WELLS ET AL., CENTURY FOUND., HOW RACIALLY DIVERSE SCHOOLS AND CLASSROOMS CAN BENEFIT ALL STUDENTS, at 11–17 (Feb. 9, 2016), <https://tcf.org/content/report/how-racially-diverse-schools-and-classrooms-can-benefit-all-students> [<https://perma.cc/87M8-LEWH>] (noting that researchers were just starting to understand how to implement racial integration with the best academic and social-emotional results when desegregation efforts were reversed in the 1980s, suggesting that its benefits would have increased had integration continued).

¹⁹⁵ Johnson, *Why School Integration Works*, *supra* note 194: see Johnson, *Long-run Impacts*, *supra* note 194, at 2 (“[F]or blacks, school desegregation significantly increased both educational and occupational attainments, college quality and adult earnings, reduced the probability of incarceration, and improved adult health status [with] no [ill] effects on whites[, and those] adult attainments increased significantly with . . . the duration of desegregation exposure.”); see also *id.* at 3, 25 (“[B]lack children who were exposed to court-ordered school desegregation for the majority of their school-age years experienced significantly improved education, economic, and health outcomes in adulthood, compared with their older siblings who grew up in segregated school environments . . .”).

¹⁹⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

¹⁹⁷ *Brown v. Bd. of Educ. II*, 349 U.S. 295, 300 (1955).

¹⁹⁸ *Alexander v. Holmes Cnty. Bd. of Educ.*, 396 U.S. 19, 20 (1969) (per curiam) (ordering desegregation “forthwith”); *Carter v. W. Feliciana Parish Sch. Bd.*, 396 U.S. 290, 291 (1970) (ending era of “all deliberate speed” and ordering desegregation to commence “now”); see Robert Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 245 (1968) (noting that as of 1963–64, only 1.17 per cent of Black students in the eleven states of the old Confederacy attended schools with white students—a number that reached 2.25 percent the next year, and 6.01 percent the following year; as of 1968, *Brown* had “accomplished very little school desegregation”); James S. Liebman, *Desegregating Politics: “All-Out” School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1466 & nn.5, 6, 1586–89 (1990) (discussing massive, then passive resistance delaying desegregation for 15 years after *Brown*); Johnson, *Long-run Impacts*, *supra* note 194, at 5 (“[O]nly 6 percent of the districts that would eventually undergo court-ordered desegregation had [done so] by 1968 . . . by 1972 this rose to over 56 percent.”).

in those parts of the country until 1973.¹⁹⁹ In the early 1970s, however, school desegregation exploded nationwide.²⁰⁰ As is documented by a federal study of 125 randomly selected school districts nationwide, by 1987, federal court or administrative desegregation orders were in place in an astonishing 87 percent of school districts, and the proportion of Black students attending essentially all-minority schools had fallen from 63 to 30 percent since 1970, while the proportion of Black students in schools that were 25 to 75 percent White had grown from 17 to 44 percent.²⁰¹ As it happened, the 1987 report coincided with racial integration's apogee. Thereafter, a series of mid-1970s,²⁰² then early 1990s,²⁰³ Supreme Court decisions limiting the availability and reach of desegregation orders, coupled with the withdrawal of federal enforcement by the Reagan and Bush administrations from 1981 to 1992, spelled the end of the social experiment.²⁰⁴ As Orfield and Yun report, “[t]he percent of black students

¹⁹⁹ *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 214 (1973) (approving “all-out” school desegregation order in city where segregation had not previously been statutorily required); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) (similar).

²⁰⁰ See Liebman, *Desegregating Politics*, *supra* note 198, at 1465–70.

²⁰¹ See FINIS WELCH & AUDREY LIGHT, U.S. COMM’N ON CIV. RTS., ED-293-936, NEW EVIDENCE ON SCHOOL DESEGREGATION, at 4–8, 16–21, 40–41, 66–67 (1987); Liebman, *Desegregating Politics*, *supra* note 198, at 1466–67 nn.6, 10–11 (citing similar studies and noting criticism of the 1987 federal study for under-sampling southern rural districts, where integration rates were especially high); see also Johnson, *Long-run Impacts*, *supra* note 194, at 7 (finding that 88 percent of the Black respondents in a large national representative survey of individuals born between 1945 and 1968 that the survey “followed into adulthood grew up in a school district that was subject to a desegregation court order sometime between 1954 and 1990”).

²⁰² See *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 417 (1977) (limiting desegregation remedies to school segregation causally linked to particular, identifiable acts of intentional segregation); *Milliken v. Bradley*, 418 U.S. 717, 733, 745, 753 (1974) (barring inclusion of all-White suburbs in desegregation orders remedying statewide and local segregation of urban schools, even if necessary to provide a modicum of racial integration, if suburban districts did not themselves segregate schools).

²⁰³ Early 1990s decisions making it progressively easier for school districts under desegregation orders to be declared “unitary” and return to segregative neighborhood assignment policies include *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991); see Sean F. Reardon et al., *Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31 J. POL’Y ANALYSIS & MGMT. 876, 899–901 (2012) (finding increased school segregation in over 200 districts released from court-ordered desegregation pursuant to the cited Supreme Court decisions).

²⁰⁴ See CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* 7–10, 183–85 (2004); Liebman, *Desegregating Politics*, *supra* note 198, at 1470–73; GARY ORFIELD & SUSAN EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* xxiii (1996); GARY ORFIELD, *HARV. CIV. RTS. PROJECT, SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION* 28–31 (July 2001) (marking the years 1986–88 as the turning point from increasing to decreasing racial integration).

in majority white schools peaked in the early 1980s and declined to the levels of the 1960s by the 1996-97 school year.²⁰⁵

The evidence linking racial and economic integration to better academic and other life outcomes for Black, Latinx, and economically disadvantaged students is robust and multifaceted.²⁰⁶ Rigorously studied input and outcome effects of K-12 racial integration on Black students and of economic integration on low-income students, with no adverse effects on White students,²⁰⁷ include:

- Higher per pupil funding,²⁰⁸ lower student-teacher ratios,²⁰⁹ better teachers, facilities, and curricula,²¹⁰ higher academic expectations for students by educators

²⁰⁵ GARY ORFIELD & JOHN T. YUN, RESEGREGATION IN AMERICAN SCHOOLS 13 (Harv. Civ. Rts. Project June 1999); see Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 822-823 (2010) (describing how quickly and fully the Oklahoma City school district in *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991), racially integrated schools between 1972 and 1984, then reverted to a “large number of . . . one-race schools” when the courts declared the district unitary); Steven Rivkin, *Desegregation Since the Coleman Report*, EDNEXT, Spring 2016, <https://www.educationnext.org/desegregation-since-the-coleman-report-racial-composition-student-learning> [<https://perma.cc/2G7U-L9PQ>] (noting that the average percentage of U.S. Black students’ schoolmates who are White increased by 14 percentage points (64 percent) between 1968 and 1980 but fell by 9 percentage points (25 percent) between 1988 and 2012).

²⁰⁶ See Brief for 553 Social Scientists as Amicus Curiae Supporting Respondents at App.1-28, *Parents Involved v. Seattle Sch. Dist.* 551 U.S. 701 (2007) (No. 05-908) [hereinafter *Social Scientists’ Brief*] (comprehensively cataloguing studies); CENTURY FOUND., *supra* note 193 (reviewing later studies); Johnson, *Long-run Impacts*, *supra* note 194, at 1, 31-37 (reviewing recent studies); Liebman, *Desegregating Politics*, *supra* note 198, at 1486, 1621, 1624-30 (reviewing research as of 1990); WELLS ET AL., *supra* note 194 (reviewing literature).

²⁰⁷ See Liebman, *Desegregating Politics*, *supra* note 198, at 1621 (“[N]o respectable study has ever claimed that desegregation . . . decreases the academic accomplishments of white children.”).

²⁰⁸ See Johnson, *Long-run Impacts*, *supra* note 194, at 2, 16-18 (“[A]mong blacks with 12 years of exposure [to school desegregation], average school-age per-pupil spending was 22.5 percent greater . . . than that experienced among unexposed black cohorts[, with the] large increase . . . driven solely by the infusion of state funds following the timing of court-ordered school desegregation.”).

²⁰⁹ See *id.* at 2, 17-18 (finding that class-size for Black students fell sharply following desegregation orders, with average reductions of three to four students per class two years into the process and no significant effects on class size for white students).

²¹⁰ See CENTURY FOUND., *supra* note 193, at 3 n.19 (citing studies); *Social Scientists’ Brief*, *supra* note 206, at App. 31-33 & nn.101-06 (documenting that schools with concentrations of Black and Latinx students tend to have higher-than-average teacher turnover; teachers who are less qualified, experienced, and effective; and less “viable learning communities”); WELLS ET AL., *supra* note 194, at 12 & n.46, 14 n.54 (“[I]ntegrating schools leads to more equitable access to important resources such as structural facilities, highly qualified teachers, challenging courses, private and public funding, and social and cultural capital.”) (citing sources).

and students themselves,²¹¹ increased parental involvement,²¹² and lower suspension rates;²¹³

- Enhanced academic motivation, creativity, critical thinking, and problem-solving skill (also true of White students in integrated settings);²¹⁴
- Higher IQ scores;²¹⁵
- Higher academic achievement;²¹⁶
- Lower probability of teenage pregnancy;²¹⁷
- Higher graduation rates;²¹⁸

²¹¹ See Liebman, *Desegregating Politics*, *supra* note 198, at 1625 n.675 (citing studies); WELLS ET AL., *supra* note 194 (citing studies, footnotes 48–49).

²¹² See Social Scientists' Brief, *supra* note 206, at App.27–28 & nn.88–91 (citing studies linking higher levels of racial integration of schools to higher levels of parental involvement by families of Black students, including those attending school outside their neighborhood).

²¹³ See WELLS ET AL., *supra* note 194, at 15 nn.52–53 (citing studies).

²¹⁴ See Social Scientists' Brief, *supra* note 206, at App.12–13 & nn.34–37 (“[S]tudents experiencing classroom diversity—specifically racial and ethnic diversity—‘showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills.’”).

²¹⁵ See Liebman, *Desegregating Politics*, *supra* note 198, at 1625 n.675 (citing authority).

²¹⁶ See *id.* at 1624–25 & n.675; Reardon & Kalogrides, *supra* note 53, at 1203–09 (analyzing 200 million standardized math and reading tests in thousands of school districts from 2009 to 2013, finds that school segregation is associated with wider achievement gaps and explains more of the variation in gaps than any other policy correlate); Social Scientists' Brief, *supra* note 206, at App.13–17, 37–38 & nn.38–49, 120–23 (reviewing (1) earlier studies revealing consensus that “school desegregation has a modest positive impact on the achievement of African Americans” in contrast to “[m]ost school reforms [which had] little or no effect on improving students’ outcomes” and (2) later studies with superior methodology associating racial segregation with lower achievement by Black students, which, if cumulated over years of integration could “substantial[ly]” increase Black achievement); WELLS ET AL., *supra* note 194, at 12 & nn.41–44 (“Attending racially diverse schools . . . is associated with smaller test score gaps between students of different racial backgrounds [as a result of] black and/or Hispanic student achievement increase[s].”); see also CENTURY FOUND., *supra* note 193, at 1 nn.1–2, 2 nn.7–9 (citing studies finding higher NAEP and other achievement levels and smaller achievement gaps for low-income students attending economically integrated schools than matched students attending “schools with concentrated poverty”).

²¹⁷ See Liebman, *Desegregating Politics*, *supra* note 198, at 1625–26 & n.676 (citing studies).

²¹⁸ Professor Johnson makes multiple findings of relevance here:

- “For Black students [whose graduation gap with white students, absent desegregation, was 15 percentage points], there is an immediate jump in the likelihood of graduating from high school with exposure to court-ordered desegregation, and each additional year of exposure leads to a 1.8 percentage-point increase in the likelihood of high school graduation with an additional jump for those exposed throughout their school-age years.”;
- “[Effect size is] comparable to the influence of having college-educated parents.”
- There was no significant change in White graduation rates in same schools, ruling out the influence of trends other than desegregation on rising Black attainment.

Johnson, *Long-run Impacts*, *supra* note 194, at 18–19; see Social Scientists' Brief, *supra* note 206 12, at App.20 & n.59 (“Studies find that attending desegregated schools is related to [higher likelihood of] completing high school for nonwhite students.”); see also CENTURY

- More years of completed secondary and higher education;²¹⁹
- Expanded college access, attendance, and success;²²⁰
- Higher quality of college attended;²²¹
- Higher adult earnings, occupational status, and family economic status;²²²

FOUND., *supra* note 193, at 1 & nn.4–5 (“Dropout rates are significantly higher for students in segregated, high-poverty schools than for students in integrated schools.”); WELLS ET AL., *supra* note 194, at 14 & n.51 (“During the height of desegregation in the 1970s and 1980s, dropout rates decreased for minority students, and the greatest decline in dropout rates occurred in districts with the greatest reductions in school segregation.”).

²¹⁹ See Johnson, *Long-run Impacts*, *supra* note 194, at 18–19 (“For black children, exposure to court-ordered desegregation in all 12 school-age years increases [K–12] educational attainment by roughly one year [which is] large enough to eliminate the black-white educational attainment gap [on this measure].”).

²²⁰ See CENTURY FOUND., *supra* note 193, at 1 & n.3 (“[S]tudents with similar socioeconomic backgrounds . . . at more affluent schools are 68 percent more likely to enroll at a four-year college than their peers at high-poverty schools.”); Liebman, *Desegregating Politics*, *supra* note 198, at 1626 & nn.677–82 (“[Black students] who graduate from desegregated schools (controlling for [relevant] criteria) attend college, attend four-year colleges, get high marks from their professors, graduate from college, and enter predominantly white employment settings in greater numbers than do [those] who attended segregated public schools.”); Social Scientists’ Brief, *supra* note 206, at App.20 & n.60, App.21–22 & nn.61, 65–69 (summarizing the results of two bodies of relevant research: (1) “Nonwhite students who graduate from integrated schools are more likely to have access to the social and professional networks that . . . increase[] access to professional jobs and information about college-going opportunities [and] to complete more years of education, earn higher degrees, and major in more varied occupations than graduates of all-black schools.”; (2) “Students who experienced integration prior to attending an undergraduate institution are more likely to connect positively with diverse peers in college and to exploit the academic opportunities that a diverse university can offer.”); WELLS ET AL., *supra* note 194, at 12 & n.47 (“The gap in SAT scores between black and white students is larger in segregated districts[;] change from complete segregation to complete integration in a district would reduce as much as one quarter of the SAT score disparity”).

²²¹ See Johnson, *Long-run Impacts*, *supra* note 194, at 19–20 (finding that exposure to desegregation has “large estimated effects”—increasing as years of desegregation exposure increase—on the quality of colleges Black students attend, as defined by average SAT scores of entering freshmen).

²²² Professor Johnson makes multiple findings of relevance here:

- “Adult outcomes for blacks generally improved monotonically with the number of school-age years of exposure to desegregation.”
- “[A]verage effects of a 5-year exposure to court-ordered school desegregation [include] about a 15 percent increase in wages and an increase in annual work hours of roughly 165, which combined to result in a 30 percent increase in annual earnings.”
- Exposure to integration is associated with a 5.2 point increase on the occupational prestige index (closing 17 percent of the Black-White job prestige gap), and “about [a] 25 percent increase in annual family income.”

Id. at 20–22; see Social Scientists’ Brief, *supra* note 206, at App.22–23 & nn.66–69 (discussing rigorous studies linking attendance at desegregated schools with higher wages and income and probability of a white-collar job as an adult).

- Lower poverty rates;²²³
- Lower incarceration rates;²²⁴
- Better health as an adult and longer life expectancy;²²⁵
- Increased likelihood of working, residing, and educating one's children in integrated settings (also true of White adults formerly attending integrated schools or living in neighborhoods with racially integrated schools);²²⁶ and
- More favorable views of and more positive relationships with members of other races (also true of White adults formerly attending integrated schools).²²⁷

²²³ See Johnson, *Long-run Impacts*, *supra* note 194, at 22 (associating 5-year exposure to integrated schools with “11 percentage-point decline in the annual incidence of poverty in adulthood”).

²²⁴ See *id.* at 22–24 (attending desegregated schools diminished probability of adult incarceration by 10, 15, and 22 percentage points for Black students in desegregated schools starting in, respectively, high, middle, and elementary school).

²²⁵ See *id.* at 22–23 (“[F]or blacks, adult health status improves monotonically with duration of exposure to court-ordered desegregation[, with] a 5-year exposure . . . yield[ing] an 11 percentage-point increase in the annual incidence of being in excellent/very good health”; “impact of each additional year of desegregation exposure [is] equivalent (on average) to blacks reaching a level of health deterioration about 1 year later than if that year were spent in segregated schools.”).

²²⁶ See CENTURY FOUND., *supra* note 193, at 2 n.12; JENNIFER HOCHSCHILD, *THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION* 179–85 (1984) (finding that, as of 1984, strongest support for desegregation among white Americans was among southerners whose children participated in mandatory desegregation plans); Liebman, *Desegregating Politics*, *supra* note 198, at 1622 & nn.670–71 (citing studies linking certain kinds of desegregation plans with increases in housing integration); Social Scientists’ Brief, *supra* note 206, at App.23, 25–27 & nn.70, 78–87 (citing numerous studies linking metropolitan-wide school desegregation plans to greater and more stable housing integration than in areas with little or no racial integration of schools and linking prior attendance at racially desegregated schools with increased disposition to live in racially integrated neighborhoods).

²²⁷ See CENTURY FOUND., *supra* note 193, at 2 nn.11–12 (citing studies); Liebman, *Desegregating Politics*, *supra* note 198, at 1621, 1626–27 & nn.667–68, 683–95 (“Black and white adults who previously attended desegregated elementary and secondary schools (after proper controls) seem to be less likely to express negative views about members of the other race[,] are significantly more comfortable in integrated work and social settings[, and are more likely to] live in integrated neighborhoods and [to] report having personal relationships with persons of the other race . . . than blacks and whites who went to segregated schools.”); Social Scientists’ Brief, *supra* note 207, at App.23–25 & nn.70–77 (citing studies showing that compared to Black and White individuals who attended racially segregated schools, those “who attended desegregated schools are more likely to have friends from other races, work in desegregated workplaces, live in desegregated neighborhoods, and favor desegregated schools for their own children, beyond the influence of [other relevant] characteristics”; feel “comfortable in racially diverse or predominantly white environments”; “bring fewer racial and ethnic stereotypes into the workplace”; and work productively with members of other races); WELLS ET AL., *supra* note

Given racial integration's 1970s-to-1980s reversal of manifold racial resource and outcome disparities in public education that made "separate but equal" inevitably unequal,²²⁸ court-ordered racial desegregation counts as both a grandly successful and tragically curtailed national experiment in disparity reduction. Partially to blame for its demise, court-ordered desegregation often was an old-fashioned, *bureaucratic* experiment in top-down, one-size-fits-all policymaking, in which—making matters worse—the "top" consisted not of elected officials or expert administrators but of appointed generalist judges lacking democratic legitimacy and policy competence.²²⁹ One-size remedies worked well in southern rural settings where the blatantly irrational and inequitable operation of dual school systems easily gave way to unification²³⁰ once the Supreme Court finally ordered desegregation "now."²³¹ Desegregation faltered, however, in southern cities and across the North and West, when courts encountered disparities complicated by the difficulty of disentangling the effects of public (legally exposed) and private (legally insulated) decisions about where families live and school their children. And debates ensued—admittedly beyond judges' ken²³²—over the educational efficacy and equity of policies like neighborhood schools, busing, academic tracking, teacher certification, and didactic versus flexible curricula.²³³ Uniform edicts issued from on high by non-expert judges turned out to be a poor way to conduct context-sensitive experiments in input and outcome

194, at 15 & nn. 65–67 (citing studies). Qualitative reflections by Black and White adults on the experience of attending desegregating schools and its effects on them as adults confirm the last two listed benefits of integration, see SUSAN EATON, *THE OTHER BOSTON STORY* (2001) and AMY STUART WELLS, *BOTH SIDES NOW* (2009).

²²⁸ See, e.g., *Sweatt v. Painter*, 339 U.S. 629, 634–36 (1950) (concluding that segregated public law schools could not satisfy equal protection because separate could not be equal); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (extending *Sweatt's* conclusion to K–12 schools).

²²⁹ See Liebman, *Perpetual Evolution*, *supra* note 31, at 2013–17.

²³⁰ See James S. Liebman & Charles Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 195–97 (2003) (comparing process of school desegregation in the rural South with the process required elsewhere in the nation).

²³¹ See *supra* notes 196–200 and accompanying text.

²³² *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 43–44 (1973) (expressing concern that intervention by inexperienced judges will frustrate needed policy experimentation).

²³³ See Liebman & Sabel, *supra* note 230, at 195–201 (attributing nation's retreat from *Brown* in part to inability of bureaucratic judicial remedies to provide the legitimacy, policy expertise, and flexibility needed to address local variations in racial segregation and its causes); Liebman, *Perpetual Evolution*, *supra* note 31, at 2013–24 (discussing failings of old-style—and calling for new, more flexible, context-sensitive forms of—public-law litigation).

disparity reduction across a myriad of local contexts, prompting severe backlash against court-ordered remedies.²³⁴

In one important respect, however, desegregation orders anticipated the localized experimentation this Article proposes. A subset of metropolitan-wide desegregation orders “redistribute[d] children among schools and redefined districts not as [a judicially mandated] end in itself but instead to renew the processes through which local, county, and state officials and educators interacted to administer and design schools”²³⁵ These orders—in places like Charlotte-Mecklenburg County, North Carolina; Louisville-Jefferson County, Kentucky; Nashville-Davidson County, Tennessee; Tampa-St. Petersburg (Pinellas and Hillsborough Counties) in Florida; and Wilmington-New Castle County, Delaware—“energize[d] surprising and effective” interracial “coalitions of actors, both inside and outside the schools,” which “in turn, revitalized entire regional educational systems and even the cities they straddled.”²³⁶ Reconfiguring segregated metropolitan school districts into new sets of racially mixed districts prompted the reorganized units “under the guidance of newly interlocked local, regional, and state officials and a variety of actors from the private sector” to experiment. Reconstituted districts explored new ways “to reorganize the governance, administrative, and pedagogical structures of the newly reconfigured schools and districts” into more racially integrated polities, rather than simply shoehorning integrated classrooms into otherwise fundamentally segregated school systems and communities.²³⁷ The result was what Political Scientist Jennifer Hochschild calls an “educational renaissance,” characterized by a revived administrative bureaucracy; funding increases; and “organizational, curricular, and pedagogical improvements for all students.”²³⁸

In part because many of the best desegregation plans aimed to benefit all students and the nation as a whole—diluting its focus on enhanced educational outcomes for Black children—influential Black critics advocated ending court-ordered integration in favor of creating

²³⁴ See Liebman, *Perpetual Evolution*, *supra* note 31, at 2016–17 & n.60 (citing sources).

²³⁵ Liebman & Sabel, *supra* note 230, at 200; see Hawley & Smylie, *supra* note 194, at 281, 285; Hochschild, *supra* note 226, at 26–34, 46–70; Liebman, *Desegregating Politics*, *supra* note 198, at 1447 & n.9, 1621 & n.665 (citing sources); JEFFREY A. RAFFEL, *THE POLITICS OF SCHOOL DESEGREGATION: THE METROPOLITAN REMEDY IN DELAWARE 174–95* (1980); SUBCOMM. ON CIV. & CONST. RTS. OF THE HOUSE COMM. ON THE JUDICIARY, 97TH CONG., *REP. ON SCHOOL DESEGREGATION 10* (Comm. Print 1982); Ward Sinclair, *Desegregation's Quiet Success*, WASH. POST, June 17, 1978, at A1.

²³⁶ Liebman & Sabel, *supra* note 230, at 201 n.76

²³⁷ *Id.*

²³⁸ Hochschild, *supra* note 226, at 80–82 & nn.140–44.

“model black schools.”²³⁹ This view culminated in a lawsuit by Black parents in Louisville-Jefferson County, Kentucky demanding an end to that metropolitan district’s voluntary race-based school-enrollment policy after a court declared the district free of the vestiges of legally mandated segregation.²⁴⁰ The Supreme Court decision the lawsuit triggered—the final nail in desegregation’s coffin—bars school districts not under order to remedy past discrimination from basing school assignments on race as a way to maximize integration.²⁴¹

Two especially powerful exponents of this view were Judge Robert Carter and Professor Derrick Bell, both former counsel for Black families in *Brown* and following cases. In Judge Carter’s formulation, “[w]hile we fashioned *Brown* on the theory that equal education and integrated education were one and the same, the goal was not integration but equal educational opportunity. . . . If that can be achieved without integration, *Brown* has been satisfied.”²⁴² Going further, Bell argued that white-

²³⁹ Derrick A. Bell, *Brown and the Interest-Convergence Dilemma*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 90, 98–101 (Derrick Bell ed., Tchrs. Coll. Press 1980) [hereinafter *SHADES*] (describing how the Court has increasingly erected barriers to achieving integration by focusing on reconciliation and local control); Derrick A. Bell, *A Model Alternative Desegregation Plan*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 124, 125–39 (Derrick Bell ed., Tchrs. Coll. Press 1980); see Robert Carter, *A Reassessment of Brown v. Board*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 20, 26–27 (Derrick Bell ed., Tchrs. Coll. Press 1980) (supporting alternatives to integration that could better achieve positive educational outcomes in the short run); Ronald R. Edmonds, *Effective Education for Minority Pupils: Brown Confounded or Confirmed*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 108, 109 (Derrick Bell ed., Tchrs. Coll. Press 1980); Charles Lawrence, *One More River to Cross*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 48, 49 (Derrick Bell ed., Tchrs. Coll. Press 1980); Ortiz, *The Myth of Intent in Equal Protection*, 41 *STAN. L. REV.* 1105, 1133 (1989) (describing how gains in integration could easily be lost once the Court declares a district “unitary”); see also Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 *STAN. L. REV.* 61, 62–64, 117–20 (1988) (attributing court-ordered desegregation to desire to improve U.S. standing in the world); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *MINN. L. REV.* 1049, 1067 (1978) (describing how the Court’s equal protection doctrine has legitimized racial discrimination by focusing only on formal, procedural rights—thus adopting a perpetrator perspective—rather than recognizing affirmative claims to resources or integrated classrooms); Daniel J. Monti, *Brown’s Velvet Cushion: Metropolitan Desegregation and the Politics of Illusion*, 1 *METRO. EDUC.* 52, 57–63 (1986).

²⁴⁰ See generally SARAH GARLAND, *DIVIDED WE FAIL: THE STORY OF AN AFRICAN-AMERICAN COMMUNITY THAT ENDED THE ERA OF SCHOOL DESEGREGATION* (2013) (describing Black Louisville families’ opposition to voluntary integration because it did not assure equal outcomes or control over their children’s education).

²⁴¹ See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709–11 (2007) (overturning voluntary integration plans in Seattle and Louisville that occasionally assigned children to schools based on their race to achieve racial integration).

²⁴² Carter, *supra* note 239, at 27.

dominated courts had intentionally elided *Brown*'s promise of improved educational opportunity for Black children into a requirement of racially integrated schools because the latter more fully converged with White interests.²⁴³ Bell criticized orders “balancing the student and teacher populations by race in each school, eliminating one-race schools, redrawing school attendance lines, and transporting students to achieve racial balance” for having only “debatable” educational benefits and for not “guarantee[ing] black children better schooling than they received in the pre-*Brown* era” or protecting them from “discriminatory policies. . . , the loss of black faculty and administrators, suspensions and expulsions at much higher rates than white students, and varying forms of racial harassment.”²⁴⁴ Bell believed that generously funding model all-Black schools would more effectively eliminate those disparities than funneling resources into schools serving White students as well.²⁴⁵

With the exception of charter and similarly empowered schools in cities that included them in their early 2000s portfolios of new educational models,²⁴⁶ there is no systematic evidence that predominantly Black and Latino schools have diminished racial disparities or improved Black educational and life outcomes at anything like the rates at which 1970–1985 racial integration did. Instead, there is tragically uniform evidence that the large and growing set of all-minority public schools that the demise of both fifteen-year experiments left in their wake are disastrous drags on the life chances of Black and Latino youth.²⁴⁷

The connection between the two reforms has not gone unnoticed, but ironically it has been drawn by opponents of both who criticize both for forsaking Black communities in service of more broad-gauged improvements. At the tail end of the second reform period, for example,

²⁴³ Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 530–31 (1980) (footnotes omitted).

²⁴⁴ *Id.* at 531.

²⁴⁵ *See id.*; Bell, *A Model Alternative Desegregation Plan*, *supra* note 239, at 124, 125–39; COMM. ON POL'Y FOR RACIAL JUST. ET AL., VISIONS OF A BETTER WAY: A BLACK APPRAISAL OF PUBLIC SCHOOLING 37 (Joint Ctr. for Pol. Stud. 1989); Cong. of Racial Equal., *A Proposal for Community School Districts*, in THE GREAT SCHOOL BUS CONTROVERSY 311, 311–12 (Nicolaus Mills ed., 1973); THOMAS SOWELL, BLACK EDUCATION: MYTHS AND TRAGEDIES 259–63 (1972). *See generally* W.E.B. DuBois, *Does the Negro Need Separate Schools*, 4 J. NEGRO EDUC. 328 (1935).

²⁴⁶ *See supra* note 131–137 and accompanying text.

²⁴⁷ *See authority cited supra* notes 157, 217. As the example of charter schools associated with the early 2000s reforms illustrates, *see supra* notes 139, 163, students at predominantly Black schools can learn and thrive, and the deep-seated and invisible racism our proposal aims to surface and expel largely explains why they do not do so more often. The question raised here, however, is how most effectively to eradicate racism and its disparate effects and—to date—the single-purpose remedy of Black schools created for their own sake (which, as thus described, exclude most successful charter schools) have not generally done so.

Journalist Sarah Garland, author of a sympathetic account of the Black Louisville parents whose lawsuit brought desegregation down, said she was struck, as [she] listened to [Louisville parents'] criticisms of busing, at how similar their complaints were to the frustrations with the current set of education reforms: the charter schools and accountability systems that replaced desegregation. As the era of desegregation ended, black communities across the nation were once again facing unilateral school closings and mass firings of black teachers. Many felt disenfranchised, and wondered whether reformers cared about their own vision for their children's education.²⁴⁸

We, too, have criticized the cavalier ways in which advocates and courts in the earlier period and reform technocrats in the later period conducted their experimentation—typified by the dismissal of Black teachers in the earlier case, and the closure of valued neighborhood schools by later reformers.²⁴⁹ Participatory voids in the experimental processes at work violated fundamental democratic norms and sapped the power of the experiments for lack of guidance from the Black and Brown communities that know best what their children need and how these systems currently fall short.²⁵⁰

But it is a tragic irony that both reforms were shut down just as practitioners had begun to fill the reforms' democratic gaps,²⁵¹ developing what by now is a robust body of knowledge about why broad participation and Black leadership matter and how to achieve them.²⁵² Most importantly, this crucial and correctable weakness is not a function of failing to focus on

²⁴⁸ Sarah Garland, *Why Some Black Families Led the Charge Against School Desegregation*, WASH. POST, Feb. 7 2013, <https://www.washingtonpost.com/news/answer-sheet/wp/2013/02/07/why-some-black-families-led-the-charge-against-school-desegregation> [<https://perma.cc/4NB3-6Y95>]. Diane Ravitch is another school-desegregation and portfolio-reform skeptic. See, e.g., Diane Ravitch, *Desegregation: Varieties of Meaning*, in SHADES, *supra* note 239, at 30, 38–46; Diane Ravitch, *Jan Resseger: The Tragedy of "Portfolio Districts"*, DIANE RAVITCH'S BLOG (Nov. 26, 2019), <https://dianeravitch.net/2019/11/26/jan-resseger-the-tragedy-of-portfolio-districts> [<https://perma.cc/V45V-Y9UC>].

²⁴⁹ See Klein, *supra* note 131, at 197–212 (describing debates with the senior author of this Article over whether and how to engage communities in designing and implementing school reforms); Liebman, Cruikshank & Ma, *supra* note 128, at 438–43 (criticizing New York City reforms for leaving communities of color and teachers out of the experimentation process); Liebman, *Perpetual Evolution*, *supra* note 31, at 2103–18 (criticizing bureaucratic public-law education-reform litigation of the 1960s to 1980s).

²⁵⁰ See WELLS ET AL., *supra* note 194, at 11–15; Liebman, Cruikshank & Ma, *supra* note 128, at 441–43.

²⁵¹ See Liebman, Cruikshank & Ma, *supra* note 128, at 441–43; WELLS ET AL., *supra* note 194, at 11–15.

²⁵² See Liebman, Cruikshank & Ma, *supra* note 128, at 446–63.

disparities alone in favor of systemic experimentation—a strategy that, against all odds, has moderated disparities more than any others. On the contrary, disparities have given way most substantially when court orders place White and Black families in “ethical situations,” through which the coincident wellbeing of their children has motivated collaborative experimentation to improve the learning and life chances of both groups of children.²⁵³

IV. OBJECTIONS

This Section briefly responds to anticipated objections to our proposal, starting with the most obvious: the proposal is legally unprecedented and not something the current Supreme Court is likely to substitute for its longstanding prioritization of racial motivation over disparity in equal protection analysis.²⁵⁴ Our immediate audience, however, is not the Supreme Court but the burgeoning set of public and private organizations nationwide expressing readiness to address rampant, long-ignored racial disparities in their operations.²⁵⁵ In different ways, they too are obliged by the Fourteenth Amendment to pursue equal protection, to acknowledge the unfinished racial struggle animating the Amendment, and to recognize the proven power of evolving social practices and norms to compel the Supreme Court to abandon other tragically misbegotten interpretations of the Amendment.²⁵⁶

²⁵³ See Liebman, *Desegregating Politics*, *supra*, note 198, at 1609–14.

²⁵⁴ See generally *Washington v. Davis*, 425 U.S. 229 (1976) (ruling that proof of discriminatory purpose—not disparate impact—is required to establish an equal protection violation).

²⁵⁵ See, e.g., Caitlin Dickerson, *Minnesotans Wary of Privilege Fight Habit of Calling the Police*, N.Y. TIMES, June 26, 2020, at A1; David Folkenflik, *Debate Over Racial Justice Coverage Roils ‘N.Y. Times’, ‘Philadelphia Inquirer’*, NPR (June 5, 2020), <https://www.npr.org/2020/06/05/870920623/debate-over-racial-justice-coverage-roils-n-y-times-philadelphia-inquirer> [https://perma.cc/GX3H-WK2K]; Amy Harmon et al., *An Awakening in America Is Prying at Racism’s Grip*, N.Y. TIMES, June 14, 2020, at A1; Tiffany Hsu, *Advertisers Grapple With Race and Economic Uncertainty*, N.Y. TIMES, June 27, 2020, at B5; Mitch Landrieu, *The Price We Have Paid for Not Confronting Racism*, N.Y. TIMES, June 3, 2020, <https://www.nytimes.com/2020/06/03/opinion/george-floyd-protest-racism.html> [https://perma.cc/LW4S-SLEU]; Dennis Overbye, *No Classes, No Meetings, No Reports: To Battle Racism, Scientists Halt Science for a Day*, N.Y. TIMES, June 11, 2020, at A23; Karen Weise, *Race Issues Grow Louder At Amazon*, N.Y. TIMES, June 25, 2020, at B1.

²⁵⁶ See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944), *overruled by Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018); *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954); *The Slaughter-House Cases*, 93 U.S. (16 Wall.) 36

That said, our examples above illustrate the proposal's many *statutory* precedents for requiring or incentivizing experimentation with disparity or other kinds of harm-reduction. Those precedents demonstrate our proposal's consistency with Congress's exercise of *its* responsibility to apply the Fourteenth Amendment²⁵⁷ and our proposal's workability as a form of judicially and administratively enforced legal compulsion to reduce disparities. Among others,²⁵⁸ these precedents include the Juvenile Justice and Delinquency Prevention Act,²⁵⁹ Prison Rape Elimination Act of 2003,²⁶⁰ American Recovery and Reinvestment Act of 2009,²⁶¹ Americans with Disabilities Act of 1990,²⁶² Individuals with Disabilities Education Act (IDEA),²⁶³ No Child Left Behind Act²⁶⁴ and superseding Every Student Succeeds Act,²⁶⁵ Title VII of the Civil Rights Act of 1964,²⁶⁶ Age

(1873), *criticized by* Akhil R. Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 123 n.327 (2000) ("Virtually no serious modern scholar—left, right, and center—thinks that [*Slaughter-House Cases*] is a plausible reading of the [Fourteenth] Amendment.").

²⁵⁷ U.S. Const., amend. XIV, § 5.

²⁵⁸ See Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 71 n.53 (2011) (citing statutes).

²⁵⁹ 42 U.S.C. § 5633(a) (1972) (current version at 34 U.S.C. § 11133(a)) (discussed *supra* notes 92–103 and accompanying text).

²⁶⁰ *Id.* §§ 15605(a)–(e); see Charles F. Sabel & William H. Simon, *Democratic Experimentalism*, in SEARCHING FOR CONTEMPORARY LEGAL THOUGHT 477, 484–85 (Justin Desautels-Stein & Christopher Tomlins eds., 2017) (discussing Prison Rape Elimination Act of 2003); *supra* note 93 and accompanying text.

²⁶¹ Pub. L. No. 111-5, § 5004(g), 123 Stat. 115, 504 (2009) (codified as amended in scattered titles of the U.S.C.) (discussed in sources cited *supra* note 91).

²⁶² Pub. L. No. 101-336, § 102(b)(5)(A), 104 Stat. 327, 332 (1990) (codified as amended at 42 U.S.C. § 12112(b)(5)(A)); Sabel & Simon, *Democratic Experimentalism*, *supra* note 258 (discussing the Americans with Disabilities Act of 1990); see *supra* notes 75–82 and accompanying text (exemplifying the Act's experimentalist application).

²⁶³ 20 U.S.C. § 1400 (2018); see *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988, 999 (2017) (interpreting *id.*); Liebman, *Perpetual Evolution*, *supra* note 31, at 2029–30 (discussing 20 U.S.C. § 1400 and *Andrew*).

²⁶⁴ See, e.g., Liebman & Sabel, *supra* note 230, at 213–66 & n.214 (discussing effective experimentation in the shadow of NCLB by Kentucky, North Carolina, and Texas).

²⁶⁵ See, e.g., *Redesigning High Schools to Support Their Communities in the 21st Century*, CROSS STATE HIGH SCH. REDESIGN COLLABORATIVE, <https://www.hsredesign.org> [<https://perma.cc/M7SM-AAJT>] (describing joint steps by Illinois, Louisiana, Massachusetts, Mississippi, New Mexico, New York, Ohio, and Johns Hopkins University "to use The Every Student Succeeds Act (ESSA) to enable struggling high schools in high-needs communities to reinvent themselves").

²⁶⁶ 42 U.S.C. § 2000e-2(a) (2018). See James S. Liebman & Michael Mbikiwa, *Every Dollar Counts: In Defense of the Obama Department of Education's "Supplement Not Supplant" Proposal*, 117 COLUM. L. REV. FORUM (2017), <https://columbialawreview.org/content/every-dollar-counts-in-defense-of-the-obama-department-of-educations-supplement-not-supplant-proposal> [<https://perma.cc/LKW8-XC6V>] (discussing experimentalist nature of Title VII); *supra*

Discrimination in Employment Act of 1967,²⁶⁷ and Fair Housing Act of 1968.²⁶⁸

In fact, the Supreme Court itself adopted an experimentalist interpretation of the Equal Protection Clause in *Fisher v University of Texas*.²⁶⁹ There, the Court upheld the University of Texas’s (“UT’s”) race-conscious college admissions policy precisely because UT had engaged in responsible policy experimentation to show both that the forms of educational diversity it was pursuing were of compelling importance, and that its race-conscious steps were as limited as they could be and still serve that goal.²⁷⁰ Analogous to our proposal, the Court’s ruling made clear that, as long as UT continued to take constitutionally questionable action—in that case, factoring race into admissions—it had a duty to continue experimenting with ways to increase the benefits and limit the constitutional risks incurred.²⁷¹ As we have summarized elsewhere, Justice Kennedy’s majority opinion “provides a case study” of public actors’ constitutionally sufficient experimentation with ways to minimize constitutional risks and of how a constitutional court can review such action to assure that experimentation was responsible.²⁷²

notes 83–90 and accompanying text (providing an example of Title VII’s experimentalist application).

²⁶⁷ Age Discrimination in Employment Act § 4(a), 29 U.S.C. § 623(a) (2018); *see* *Smith v. City of Jackson*, 544 U.S. 228, 235 (2005) (plurality opinion) (interpreting *id.*); *Smith*, 544 U.S. at 243–47 (Scalia, J., concurring in part and concurring in the judgment); Liebman & Mbikiwa, *supra* note 266 (discussing Age Discrimination in Employment Act).

²⁶⁸ Civil Rights Act Title VIII § 804(a), 42 U.S.C. § 3604(a); *Tex. Dep’t of Hous. & Cmty. Aff. v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2516–22 (2015) (interpreting *id.*); *see* Liebman & Mbikiwa, *supra* note 266 (analyzing Title VIII).

²⁶⁹ *See, e.g.*, *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2209–10 (2016).

²⁷⁰ *Id.* at 2205, 2209–13.

²⁷¹ *Id.* at 2210:

Through regular evaluation of data and consideration of student experience, the University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest. . . . The type of data collected, and manner in which it is considered, will have a significant bearing on how the University must shape its admissions policy to satisfy strict scrutiny in years to come.

²⁷² Liebman, *Perpetual Evolution*, *supra* note 31, at 2033 (quoting *id.* at 2205, 2209–13) (footnotes omitted):

As summarized by the Court, UT’s process provides a case study in evolutionary learning. UT began by testing race-neutral admissions Only after “[n]one of these efforts succeeded” and “a reasonable determination was made that the University had not yet attained its goals” did UT embark on a “significant evolution” of a race-conscious policy. To learn iteratively what was possible, UT experimented with different types of

That said, even apart from *Fisher*'s 5-4 instability on a changing Court, it by no means compels the changes in equal protection jurisprudence we advocate. Its focus on subjective racial motivation, side-lining of racial disparities, and treatment of affirmative action as the constitutional risk that *Fisher* calls for experimentation to mitigate all reinforce doctrinal dispositions our proposal questions. Indeed, affirming prior caselaw, *Fisher* expressly rejects racial-disparity reduction as a valid reason for race-conscious college admissions.²⁷³ Still, given *Fisher*'s manifest effect of facilitating disparity reduction in college-going in Texas,²⁷⁴ and its instantiation of legally mandated and reviewable experimentation as a way to allay forbidden discrimination, *Fisher* could yet help motivate the Court to catch up with realities on the ground demanding steps to reduce racial disparity.

At the ready—once the Court is—are a variety of established constitutional doctrines with affinities to our proposal. These include:

- The Court's acceptance of "objective evidence" of racial motivation, including officials' refusal to consider less racially disparate alternatives or to implement them once they prove themselves;²⁷⁵
- Burden-shifting devices requiring defendants charged with discrimination to reveal what they know about racial disparities they generated at places and times not too distant from those plaintiffs have shown to be discriminatory;²⁷⁶
- Middle-level equal-protection scrutiny imposing modest duties of inquiry in the face of suspicious

diversity the university might try to achieve and different steps for achieving them, using "the experience the school has accumulated and the data it has gathered since the adoption of its admissions plan" to make "periodic reassessment[s] of the constitutionality, and efficacy, of its admissions program" and provide a "reasoned, principled explanation" of actions it took at each step.

²⁷³ *Fisher*, 136 S. Ct. at 2210–11 (citing prior cases).

²⁷⁴ See *Fisher*, 136 S. Ct. at 2225–28 (Alito, J., dissenting) (arguing that disparity reduction, not diversity, motivated UT's plan and the majority opinion).

²⁷⁵ See *supra* notes 48–50.

²⁷⁶ In school desegregation cases, proof of an intent to segregate children by race at a particular school or point in time generates a presumption that racial segregation arising elsewhere or at another time in the same district is also racially motivated absent proof to the contrary by the defendant. See, e.g., *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537–40 (1979); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 211–12 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971).

- mistreatment of disfavored minorities;²⁷⁷
- “Reckless indifference” and “message conveyance” standards calling into question officials’ ongoing tolerance of constitutionally suspicious harms;²⁷⁸
- Penalty default rules incentivizing officials to search for better ways to reduce constitutional harms than those the Court itself has identified;²⁷⁹ and
- Numerous lower-court institutional-reform decrees, some affirmed by the Supreme Court, adopting experimentalist remedies for equal protection and other constitutional violations by police, prisons, mental-health facilities, and child-welfare agencies.²⁸⁰

A second objection arises from a brewing debate over Title VII of the 1964 Civil Rights Act, one of our proposal’s statutory analogies.²⁸¹ Consider three crude visions of how Title VII’s disparate-impact provisions operate. A neutral layperson might argue that Title VII bars employers from using practices to hire, promote, or fire people that generate racially disparate outcomes unless they had a good business reason for the practice.²⁸² A left-leaning skeptic might say Title VII validates any disparity-creating employment practice for which someone can dream up a non-racial explanation after the fact that is not facially false or irrational,

²⁷⁷ *E.g.*, *Plyler v. Doe*, 457 U.S. 202, 224 (1982); Liebman, *Perpetual Evolution*, *supra* note 31, at 2040–41 (discussing *Plyler*).

²⁷⁸ *See* Liebman, *Perpetual Evolution*, *supra* note 31, at 2040 & n.183 (citing Supreme Court cases).

²⁷⁹ *See* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 459–65 (1998) (discussing judicially created penalty default rules that officials can avoid by experimenting with better routes to the same objective); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 792 (2006) (advocating penalty default rules to “encourage legislative protection of constitutional interests”).

²⁸⁰ *See* Liebman, *Perpetual Evolution*, *supra* note 31, at 2030–31 & nn.134–40 (citing cases and supporting analyses).

²⁸¹ *See* Kenneth L. Marcus, *The War between Disparate Impact and Equal Protection*, 2008–09 CATO SUP. CT. REV. 53, 55–56, 72–73 (arguing that Title VII’s disparate impact rules and other facially neutral but potentially racially redistributive actions such as Texas’ “ten percent plan” for admitting students to public colleges in order, by indirection, to increase minority enrollment are unconstitutional); Mark Tushnet, *How the Supreme Court’s Ruling on Ricci v. DeStefano Hints at Trouble Ahead*, DISSENT, July 12, 3009, https://www.dissentmagazine.org/online_articles/how-the-supreme-courts-ruling-on-ricci-v-destefano-hints-at-trouble-ahead [<https://perma.cc/BF8D-EKKH>] (noting potential “constitutional problem” with Title VII identified by legal academics and conservative publicists).

²⁸² *See generally, e.g.*, BARBARA T. LINDEMANN ET AL., EMPLOYMENT DISCRIMINATION LAW (6th ed. 2020) (providing black-letter definition of Title VII’s disparate impact standard).

rendering the law a nullity.²⁸³ Right-leaning skeptics might describe it as the federal government “mandating” employers to do what the Equal Protection Clause forbids the government to do directly—“discriminate on the basis of race” by forcing employers to give people jobs because of their race not their qualifications.

The quotations in the last-mentioned view are from Justice Scalia’s concurrence in *Ricci v. DeStefano*, which in his view prophesied “the evil day on which the Court will have to confront the question” whether Title VII’s disparate-impact provisions are consistent with equal protection.²⁸⁴ Justice Scalia was clearly attracted to the third view of Title VII, describing it as “a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes.”²⁸⁵ Justice Scalia acknowledged, however, a fourth, less crude interpretation of the statute: “as simply an evidentiary tool used to identify genuine, intentional discrimination—to ‘smoke out,’ as it were, disparate treatment”—which, he said, could “defend the law” against constitutional attack if it actually worked that way (which he doubted).²⁸⁶

By “requiring” officials in every case to “evaluate the racial outcomes of their policies,” our proposal might seem to step directly into the constitutional trap Scalia has set. Our proposal, however, escapes the trap’s second prong. Rather than requiring officials “to make decisions based on (because of) . . . racial outcomes,” our approach uses mandated evaluation of disparities and experiments to “smoke out” and *avoid* the stereotypes and conscious or unconscious biases that otherwise would *lead* to decisions “based on (because of)” false beliefs about race. As between decisions about which chronic racial disparities create real doubt as to their racial motivation, and decisions using inquiry and learning to *replace* doubt and *reveal* race-neutral—often generally beneficial—practices, there is no reason why the Equal Protection Clause should opt for ignorance and constitutional doubt.

A third objection is a pragmatic version of the second. The proposal is impractical, given the high cost of disparity-reducing experimentation, legal exposure when experiments fail or are found to be insufficient, and

²⁸³ See, e.g., Linda Lye, *Title VII’s Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMPL. & LAB. L. 315, 317, 319 (1998) (arguing that the “business necessity” rule is too weak and undermines the goal of prohibiting discriminatory practices); Rynkiewicz, *supra* note 45; Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win*, 61 LA. L. REV. 555, 563–64 (2001) (noting tendency of courts to accept even dubious non-racial explanations for racially suspicious outcomes).

²⁸⁴ *Ricci v. DeStefano*, 557 U.S. 557, 591 (2009) (Scalia, J., concurring).

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 595 (quoting Primus, *supra* note 6, at 498–99, 520).

steps to avoid those ills by bestowing benefits on undeserving people so disparities disappear. Of course, if racial gaps do close, and if the agency and its other stakeholders are not harmed or are benefited, net cost is not a problem. Nor would compelling officials to take *known* steps to diminish disparities at no cost to the public interest fall afoul of traditional equal protection analysis, because doing so “smokes out” false assumptions or biases that drove preexisting disparities. Additionally, given the breadth of existing gaps, taking truly damaging steps to close them completely, with no real hope of improving the public good—at the expense of constituents previously benefited by disparities—will not likely be a price that officials are willing or able to pay in response to the incentives our proposal would create.

The real question, then, is whether the equity and welfare benefits to Black Americans of efforts to “smoke out” any biases underlying the latest iteration of chronic disparities, plus the public benefits that conscientious experimentation typically seeks and often discovers, plus greater certainty as to whether racial bias is at play, outweigh the cost of experiments that do not diminish racial disparities or improve the public good. Given our limitation on the obligation to experiment with steps that do not unduly burden the public fisc, and given our preference for doing *something* to try to diminish or better understand suspicious disparities over legal rules that justify doing *nothing* as such disparities mount, we assess the balance as favoring benefits over costs. Given our hope to change action on the ground before changing the Supreme Court’s mind, we have no doubt that our proposal is a worthy experiment in its own right, which we commend²⁸⁷ to actors interested in minimizing racial disparities. Overtime, we expect our proposal will generate more examples of equity and welfare benefits exceeding harms that dispel practical worries.

Still, one might worry about the difficulty of determining whether experimentation that fails for now to close gaps entirely—as often will occur—was sufficiently conscientious to pass muster. Even if it is sensible for large federal departments with performance management expertise in setting and measuring the effectiveness of strategies, effective disparity-reduction experimentation may not seem realistic for many modest local agencies—for example, the nation’s thousands of school districts with only a few administrators. Consider, though, the classic justification for so thoroughly decentralizing U.S. public education, juvenile and criminal

²⁸⁷ See Kimberly Austin et al., *The Ruling that Got Race All Wrong: Time to Undo* Washington vs. Davis, N.Y. DAILY NEWS, June 17, 2020, <https://www.nydailynews.com/opinion/ny-oped-the-ruling-that-got-race-terribly-wrong-20200617-xmxmkjvetzh3vm3vxidm76obqq-story.html> [<https://web.archive.org/web/20201208074325/https://www.nydailynews.com/opinion/ny-oped-the-ruling-that-got-race-terribly-wrong-20200617-xmxmkjvetzh3vm3vxidm76obqq-story.html>].

justice, and many other public activities: the ability it gives localities to address problems in local context.²⁸⁸ Rather than imposing novel requirements, therefore, our proposal calls on local public actors to apply their ingenuity to closing the many local opportunities for racial discrimination. As our examples reveal, moreover, local education, juvenile justice, and other agencies have willingly accepted similar statutory obligations in order to qualify for coveted federal funding. And by comparing experimentation steps and success levels of comparably situated local actors, federal and state funds-dispersing and oversight agencies, support organizations, and practitioners' networks have learned to recognize more and less conscientious experimentation in widely varying contexts.²⁸⁹ Courts can do the same—as some already do in enforcing bans on workplace sexual harassment, disability discrimination, and racial and gender-based bias.²⁹⁰ Here, again, constitutional courts trailing behind longstanding practice in analogous contexts have plenty of experience on which to draw in developing disparity-reduction standards and reviewing experiments by a multiplicity of public actors.

These responses to objections from the right side of the political spectrum invite more troubling ones from the left. Braiding them into one, the objection is that, “we have tried all this before at a variety of sub-constitutional levels, and we are still awash in racial disparity.” Experimentation or not, chronically underserved populations are likely to remain in that position because of a poisonous mix of (1) malevolently

²⁸⁸ See, e.g., *Rodriguez v. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49–50 (1973) (declining to interpret the Equal Protection Clause to regulate the fairness of differential state funding of school districts for fear of interfering with state legislatures' and school districts' capacity to “tailor” policy experimentation and actions “to local needs”); Jennifer DeBoer, *Centralization and Decentralization in American Education Policy*, 87 PEABODY J. EDUC. 510 (2010); Goodwin Liu, Brown, Bollinger, and Beyond, 47 HOW. L.J. 705, 718 (2004) (documenting Supreme Court's reliance on the importance of local control of schooling in resisting constitutional “claims of equal educational opportunity”).

²⁸⁹ Discussing government and private-sector practices in various contexts that gradually improve public safety and service delivery by comparing and benchmarking the quality and effectiveness of plans or other steps local entities take under similar circumstances to reduce harms or achieve public objectives are, e.g., Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 L. & SOC. REV. 691, 693–700 (2003) (food and workplace safety; pollution prevention); Bradley Karkkainen, *After Backyard Environmentalism*, 44 AM. BEHAV. SCI. 690, 694–703 (2000) (toxic chemicals reduction, Chesapeake Bay pollution control, protection of endangered species' habitats); Helen F. Ladd, *Education Inspectorate System in the Netherlands and New Zealand: A Policy Note*, 5 ED. FIN. & POL'Y 378, 378–83 (2010) (public school improvement); Joseph V. Rees, *Hostages of Each Other* 94–127 (1994) (regulation of nuclear power generation); Sabel & Simon, *Contextualizing Regimes*, *supra* note 23, at 1290, 1278–97 (avoiding leafy green contamination, racial discrimination in juvenile justice administration, dolphins kills in commercial tuna fishing).

²⁹⁰ See, e.g., Brandon L. Garrett & James S. Liebman, *Experimentalist Equal Protection*, 22 YALE L. & POL'Y REV. 261, 314–16 (2004); Sturm, *Second Generation*, *supra* note 83, at 480–84.

chosen, assiduously concealed, discrimination; (2) unconscious bias perpetrators are unlikely to surrender even when publicly exposed; (3) sprawling wealth effects of 400 years of slavery, segregation, and economic subjugation that exponentially multiply disparities in a capitalist environment in which wealth-determined choices are the principal distributional mechanism;²⁹¹ and (4) the “positional” fact as to some White privileges and widespread beliefs as to other such privileges that the perquisites of happiness are finite, so your gain is my loss.²⁹² Under these circumstances, the objection goes, it is both morally imperative and practically necessary to risk lost generalized benefits, social conflict, and a probability of cataclysmic failure by insisting on reparative, racially redistributive gap closure *now*. Black communities have no time left to waste.

All of us must make our own decisions about how much risk we, our families, and communities can reasonably be asked to take—and how much our uniquely, fragilely diverse polity can stand. But even under the most favorable scenario, racially reparative justice will get us only so far. The chances of full financial racial repair are uncertain at best, given reasonable estimates that we would have to multiply Black Americans’ existing wealth by a factor of from ten to one hundred to pull them even with White Americans²⁹³—not to mention the large additional amounts needed to account for administrative imperfection in distributing large amounts of money to millions of individuals in ways that benefit them over the long haul. And even if all preexisting material gaps could be back-filled, discriminatory muscle memory aggravated by animosities provoked by a bitter reparations fight will likely cause new disparities to arise. Because disparities will continue to arise, any sensible reparative regime will have to be backstopped by a duty on officials’ part not to take back with the right hand what the left hand has given. Either way, therefore—pre-, post-, or in lieu of, reparations—we will need to keep doing what we can to identify and alter the racist habits, institutional muscle memory, embedded wealth inequities, and shortsightedness that are the legacy of centuries of racial subjugation. Perhaps the best solution is a blend of the two, offering

²⁹¹ See *supra* notes 2–5, 17, 157, 217 (citing sources).

²⁹² See *supra* note 67 (discussing zero-sum positional inequity).

²⁹³ See Hannah-Jones, *supra* note 3 (“The average black family with children holds just one cent [worth] of wealth for every dollar that the average white family with children holds.”); Michael W. Kraus et al., *The Misperception of Racial Economic Inequality*, 14 J. PERSPECTIVES PSYCH. SCI., Sept. 2019, at 1, 5–6 (finding that Black households hold \$10 in wealth for every \$100 held by White households and that disparity increases as Black income (as opposed to wealth) increases).

reparations in the form of preferences for participation in or subsidies to expand official disparity-reduction experiments.²⁹⁴

As for past experimentation failing to end disparities, the key questions are how fully, quickly, and instead of (or alongside) what other steps we should expect experimentation to work? As incomplete as the results of disparity-reduction experimentation have been even in the favorable examples we feature, such steps have outperformed more direct efforts to the substantial benefit of Black and other chronically underserved populations and the public at large.²⁹⁵ Results would have been even better, but for the premature truncation of some of the efforts in the wake of initially ragged implementation (the downfall of both school improvement strategies we highlight²⁹⁶); weak enforcement mechanisms (a problem in the juvenile justice context that a recent statutory revision aims to cure²⁹⁷); and a tendency to forsake ongoing experimentation in favor of mandates to spread initially effective strategies in context-insensitive ways.

Illustrating the last-mentioned stumbling block to effective experimentation and an important way around it is New York City's 1990s experimentalist policing reforms, which gave way in the 2000s to a disastrous, disparity-ignoring obsession with one strategy—stop and frisk—until an experimentalist judge ordered police to include disparity-reduction as a goal of future crime-reduction experimentation.²⁹⁸ Following the lead of that judge's decision and recognizing a generalized constitutional duty of disparity-reduction experimentation that is privately enforceable could bolster enforcement rigor, as long as it retained context-sensitive flexibility. A best-case scenario, then, might be disparity-reducing experimentation as a backstop or implementation mechanism for reparations; robust public participation in experimentation to increase public patience and acceptance as experimentation improves;²⁹⁹ and improved enforceability through the proposal's adoption as an appropriate interpretation of the Equal Protection Clause with a Section 1983 private right of action.³⁰⁰

²⁹⁴ Cf. David Brooks, *The Case for Reparations*, N.Y. TIMES, Mar. 8, 2020, at A29.

²⁹⁵ See *supra* notes 83–254 and accompanying text.

²⁹⁶ See *supra* notes 172–185, 203–206, 229–235 and accompanying text.

²⁹⁷ See *supra* note 126 and accompanying text.

²⁹⁸ See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 685–86 (S.D.N.Y. 2013); Sabel & Simon, *Duty of Responsible Administration*, *supra* note 31, at 183–84.

²⁹⁹ See Liebman, Cruikshank & Ma, *supra* note 128, at 446–47, 450–58 (discussing ways to engage the public and build confidence in structured policy experimentation).

³⁰⁰ 42 U.S.C. § 1983 (2018).

V. CONCLUSION AND POSTSCRIPT

We began drafting this Article in late 2019. At the time, we imagined Armageddon coming from a White revanchist right inflamed by calls for racial redistribution, and we embarked on a last-ditch search for a reformist middle ground.

We finished drafting the Article in early summer 2020, soon after Minneapolis police officers—enacting another of countless acts of racially disparate official violence against the nation’s Black people—killed George Floyd.³⁰¹ By then, we could as easily see the reckoning coming from a Black-mobilized left, out of impatience with a 400-year wait for justice, and we began looking to and beyond racial reparations. As puzzled readers may have discerned, our perspectives changed along with tectonic shifts that Floyd’s death provoked in the nation’s struggle to understand racial (in)justice.

As the Article was being edited, a racist and revanchist mob assaulted the nation’s Capitol, elevating still more our fears for a nation in need of deep and inevitably disorienting change and for the safety of the intended beneficiaries of such change.³⁰² President Biden’s effort

³⁰¹ In the case of police violence, disparities are counted in Black lives lost. As shocking as it (finally) was to the national conscience, George Floyd’s death is only one of many. In naming him, we remember and honor others, known and unknown. See, e.g., Mike Baker et al., *Three Words. 70 Cases. The Tragic History of ‘I Can’t Breathe’*, N.Y. TIMES, June 29, 2020, <https://www.nytimes.com/interactive/2020/06/28/us/i-cant-breathe-police-arrest.html> [<https://perma.cc/FLP6-YFRG>]; Richard A. Oppel Jr. & Lazaro Gamio, *Minneapolis Police Use Force Against Black People at 7 Times the Rate of Whites*, N.Y. TIMES, June 3, 2020, <https://www.nytimes.com/interactive/2020/06/03/us/minneapolis-police-use-of-force.html> [<https://perma.cc/L4WA-2HF8>]; Richard A. Oppel Jr. & Derrick Bryson Taylor, *Here’s What You Need to Know About Breonna Taylor’s Death*, N.Y. TIMES, July 31, 2020, <https://www.nytimes.com/article/breonna-taylor-police.html> [<https://perma.cc/XC9Z-4RV6>].

³⁰² Connecting the January 6, 2021 assault on the Capitol by supporters of President Trump both to the nation’s history of violently enforced racist hierarchy and to current desires to preserve it are, e.g., Elizabeth Dias, *Extremism from Whites Has Strong Roots in U.S.*, N.Y. TIMES, Feb. 8, 2021, at A11; Emmanuel Felton, *Black Police Officers Describe the Racist Attacks they Faced as they Protected the Capitol*, BUZZFEEDNEWS (Jan. 9, 2021, 4:32 PM), <https://www.buzzfeednews.com/article/emmanuelfelton/black-capitol-police-racism-mob> [<https://perma.cc/XE9Q-HUYQ>]; Averi Harper, *Capitol Attack Conjures American Legacy of Racial Violence*, ABC NEWS, Jan. 19, 2021; Aaron Morrison, *Analysis: A Race War Evident Long Before the Capitol Siege*, AP NEWS (Feb. 6, 2021), <https://apnews.com/article/donald-trump-us-news-race-and-ethnicity-conspiracy-theories-philanthropy-f8f793b94b0dd7e8ec62957dcb53d8> [<https://perma.cc/76SL-PEYL>]; Brent Staples, *The Myth of American Innocence: The Capitol Attack Shows the Danger of Forgetting America’s History*, N.Y. TIMES, Jan. 10, 2021, at SR8; Brandon Tensely, *The US Capitol Attack Fits into the History of White Backlash*, CNNPOLITICS (Jan. 13, 2021), <https://www.cnn.com/2021/01/13/politics/capitol-mob-white-backlash-history/index.html> [<https://perma.cc/JNC8-2KL4>].

soon after to restore a semblance of racial equanimity provides only modest solace.³⁰³

Uncertain of the nation's evolving, or dissolving, center of gravity on race, we have left in place our fluctuating guesses about the social realities that will determine whether our proposal for a constitutional regime of determined, public-regarding learning from the chronic racial disparities to which George Floyd's death testifies goes too far or not nearly far enough.

³⁰³ Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

VI. APPENDIX

Table 1: Juvenile Detention Rates and Numbers 1997–2017

	1997		
	detention rate	detained (#)	detained (%)
Total	356	105,055	100
White	201	39,445	37
Black	968	41,896	40
Hispanic	468	19,322	18
Am. Ind.	490	1,615	2
Asian, P.I.	195	2,215	2

	2017						
	detention rate	detained (#)	detained (%)	drop-in rate (%)	youth population	detained @ '97 rate	fewer detained
Total	138	43,580	100	61	31,579,710	112,424	68,844
White	83	14,215	33	59	17,126,506	34,424	20,209
Black	383	17,841	41	60	4,658,225	45,092	27,251
Hispanic	118	9,161	21	75	7,763,559	36,333	27,172
Am. Ind.	235	752	2	48	320,000	1,568	816
Asian, P.I.	19	361	1	90	1,900,000	3,705	3,344

Table 2: Average NAEP Scale Scores – Fourth Grade Math – N.Y.C. and National Public Students

	All	White	Black	Hispanic	FRPL	SWD	ELL	Nat'l Public
2003	226	244	219	220	224	205	208	234
2009	236	248	227	230	235	223	220	239
2013	236	251	225	228	231	219	215	241
2019	231	248	216	220	224	204	208	240

Table 3: Percent Change in N.Y.C. Achievement Score Gaps on NAEP Fourth Grade Math; Reform Phases 2003–09 & 2003–13 vs. Post-Reform Period 2013–19

	All Students	Black Students	Hispanic Students	Economically Disadvantaged	Students with Disabilities	English Learners
Gap with N.Y.C. White Students						
2003–09	-33%	-16%	-25%	-35%	-36%	-22%
2003–13	-17%	+4%	-4%	--	-18%	--
2013–19	+13%	+23%	+22%	+17%	+38%	+11%
Gap with All U.S. Public School Students						
2003–09	-63%	-20%	-36%	-60%	-33%	-19%
2003–13	-17%	+7%	-7%	--	-18%	--
2013–19	+80%	+50%	+54%	+60%	+44%	+23%

Figure 9: NAEP Scores 2003-2019

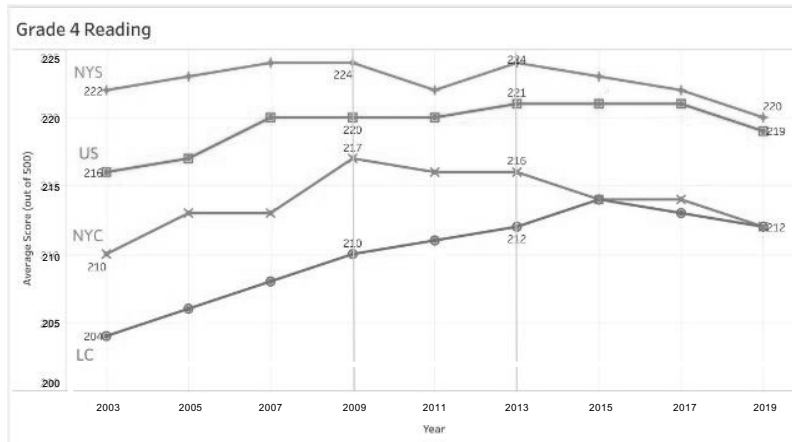


Figure 10: NAEP Scores 2003-2019

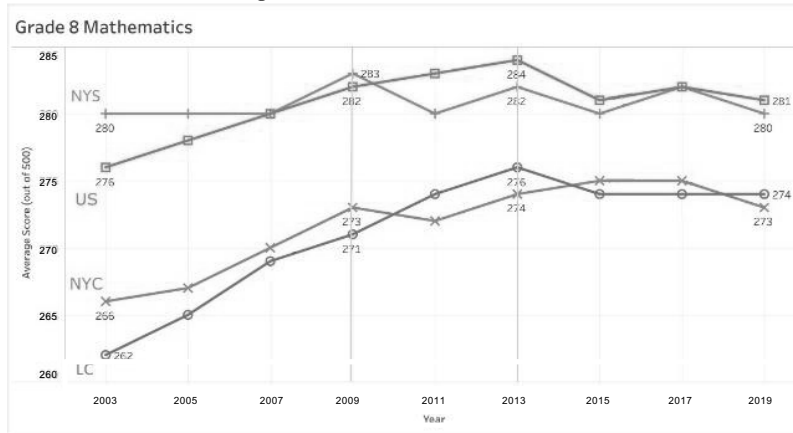


Figure 11: NAEP Scores 2003-2019

