"Schools That Shock the Conscience":

*Williams v. California* and the Struggle for Education on Equal Terms Fifty Years after

*Brown*

Jeannie Oakes and Martin Lipton†

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹

Over the past fifty years we have learned and relearned that *Brown v. Board of Education* was not a victory over institutional and structural biases and racism, but one battle in a long and continuing struggle. *Brown* remains a seminal civil rights and constitutional moment. And yet, as the case recedes into the past, we can picture the promise of educational opportunities “made available to all on equal terms” on one side of a scale of justice, balancing—but not outweighing—lingering sentiments and practices of “separate and equal.” Today, in California, *Williams v. California* provides a new window into the still-competing legacies of *Brown*, *Plessy*,² and Jim Crow.

In the spirit of *Brown*, the *Williams* plaintiffs—low-income students and students of color attending mostly segregated schools—argue that California’s state education system fails to provide them education on equal terms. The goal, however, in *Williams* is not equality through racial integration.³ Rather, the plaintiffs argue that both California’s constitution and case law require the State to provide all students with equal access to the fundamental tools of education—qualified teachers, proper instructional materials, and decent, uncrowded school facilities in which to


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3. There is considerable poignancy here, given that California schools are now among the most racially segregated in the nation. A new study by the Harvard Civil Rights Project found that, in 2001, California’s and New York’s Black students were more segregated than in other states, and California’s, New York’s and Texas’s Latinos were more segregated than in other states. GARY ORFIELD & CHUNGMEI LEE, HARVARD UNIV. CIVIL RIGHTS PROJECT, BROWN AT 50: KING’S DREAM OR PLESSY’S NIGHTMARE (2004).
To counter the plaintiffs’ claim that the State has deprived them of education on equal terms, the State’s experts marshal an argument focused on educational productivity. Asserting that the resources that the plaintiffs contend are unequal—qualified teachers, sufficient materials, and adequate facilities—can’t be proven to produce increased achievement, the State dismisses their centrality to educational opportunity. Rather, the State argues, the factors that affect achievement are local and far beyond the reach of the State. Educational quality and productivity result from decisions that are the purview of local school districts—decisions not within the proper role of State. They also assert that California’s current standards and test-based accountability policies are “state-of-the-art” state actions that will spur local school districts and communities to create good schools.  

It is striking that the plaintiffs’ arguments in Williams echo those used by attorneys Charles Houston and Thurgood Marshall in the cases leading up to Brown: schools serving different students must be equal in their provision of the basic educational conditions and resources. It was, in part, evidence of seemingly inescapable violations of Plessy’s “separate but equal” test that paved the way for the Court’s decision that segregated schools violated the equal protection provision of the Fourteenth Amendment.

Just as the plaintiffs’ claims in Williams evoke earlier demands for equal schooling, defense arguments in Williams recall the defense claims in the Brown cases and the legal theories of the pre-Brown era. Of course, the defense does not quarrel so much with the rhetorically inviolable “educational opportunity on equal terms” principle of Brown. Instead, it implicitly redefines “opportunity of an education” by shifting from an argument grounded in students’ “rights” to one of “productivity.” It narrows the meaning of “opportunity, where the state has undertaken to provide it” in ways that echo the courts’ upholding of the post-Civil War era’s Jim Crow laws. The defense arguments for local control and responsibility also call to mind cases in which the principle of states’ rights was used to trample Reconstruction initiatives aimed at ensuring Constitutional protections of civil rights.

The remaining sections of this article elaborate this argument in more detail, relying, for the most part, on the expert reports submitted by the plaintiffs and the State. Part I introduces the case and its central actors. Part II summarizes the plaintiffs’ claims and provides examples of the arguments and evidence offered in the plaintiffs’ expert reports. Part III reviews the responses made by the State’s experts to the plaintiffs’ claims and the plaintiffs’ expert reports. Part IV analyzes the dispute between the plaintiffs’ and State’s experts for what it reveals about the contested meanings of educational equality and opportunity and disagreements about

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7. See id. at 60-69.
the proper role of the State in ensuring them. Part V concludes the article with the argument that, although fifty years removed, *Williams v. California* provides sobering evidence that, while much has changed since *Brown*, the struggle for education on equal terms remains much the same.

I. WILLIAMS V. CALIFORNIA

*Williams v. State of California* was filed on May 17, 1997, the forty-sixth anniversary of the *Brown v. Board of Education* decision. In their complaint the *Williams* plaintiffs contend that they are forced to attend California public schools where qualified teachers, sufficient textbooks and supplies, and adequate facilities are so deficient as to constitute a denial of their educational rights. They claim that there is a constitutional floor, below which no California child’s education should fall, and that there exists a reasonable metric, established in California law, for establishing where that minimum threshold may be drawn. That is, whatever levels of educationally important resources that the State provides to most children, the State should provide to all children. Plaintiffs further argue that the conditions of their schools do not meet this test.

*Williams* is a class action suit, originally represented by forty-eight schools, nineteen districts and a group of plaintiff children. The plaintiff for whom the case is named is Eliezer Williams, an African-American student who, at the time of the filing, attended Luther Burbank Junior High School in San Francisco. Nearly all of the other named student plaintiffs are black, Latino or Latina, or Asian-Pacific-American, and nearly all of them attend schools with student bodies that are more than half non-white. More than three quarters attend schools where more than half of the students are eligible for free or reduced-price meals, and, in two-thirds of their schools, more than 30% of the students are still learning the English language.

The defendants are the governor of the state of California, the State Board of Education, and the superintendent of public instruction. The defendants are not represented by California’s own staff attorneys, but—at extraordinarily higher cost—by the private firm of O’Melveny and Myers. The plaintiffs are represented through the pro bono work of Morrison & Foerster, and by a group of civil rights legal advocates including the American Civil Liberties Union (ACLU) of Southern and Northern California, Public Advocates, and others.

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9. *Id.* at 70.
10. *Id.*
11. Gray Davis was the governor of California at the time the suit was filed.
12. Delaine Easton was the superintendent of public instruction at the time the suit was filed.
13. Others named as counsel for the plaintiffs include attorneys from the Center for the Law in the Public Interest, Lawyers Committee on Civil Rights Under Law, Asian Pacific American Legal Center (APALC), Loyola Law School, ACLU of San Diego and Imperial Counties, Georgetown University Law Center, and the Mexican American Legal Defense and Educational Fund (MALDEF).
II

THE PLAINTIFFS’ CASE

The plaintiffs’ claims are grounded in a straightforward argument that California’s current educational system fails to fulfill its fundamental educational obligation. First, in California, education is a fundamental right that the State must provide to all students on equal terms.14 Second, the State is obligated to provide all students with the essential tools of education that it provides to most students.15 Third, because the State has a “non-delegable” duty to provide education on equal terms to all students, it must manage and oversee its schools to prevent inequalities in essential educational tools or to discover and correct inequalities that arise.16

As the Williams complaint reads, many of California’s children attend “schools that shock the conscience.”17 Although there is always room for academic and legal debates over laws, rights, philosophies, and basic learning needs, these are schools and classrooms with conditions so poor that no academic, lawyer, or politician would allow his or her own child to step foot inside them. In this case, however, Eliezer Williams and his peers attend schools without sufficient “trained teachers, necessary educational supplies, classrooms, even seats in classrooms, and facilities that meet basic health and safety standards.”18

Over and over the plaintiffs describe overcrowded schools with broken windows, falling ceiling tiles, rodent infestations, and filthy, unusable bathrooms; they describe being taught by unqualified teachers (sometimes a series of substitutes), having no textbooks to use in class or to take home, and lacking classroom equipment, and supplies. The Williams plaintiffs charge that such schools and classrooms exist in significant numbers and that they are disproportionately attended by low-income African-American and Latino students. They also charge that the State is responsible for maintaining a system of policies that allows such conditions to occur and that there exist no mechanisms to correct them.19

The expert reports filed by the plaintiffs rely on new as well as existing data and analyses, to address five questions.20

Are qualified teachers, appropriate instructional materials, and adequate school facilities essential?

Is the State currently providing them equally?

Are State policies adequate to prevent systematic inequalities in the provision of these essentials, or to discover and correct them?

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16. To make this argument, the plaintiffs argue that the California Constitution recognizes that “[a] general diffusion of knowledge and intelligence [is] ... essential to the preservation of the rights and liberties of the people.” CAL. CONST. art. IX, § 1. Because of this principle, “California has assumed specific responsibility for a statewide public education system open on equal terms to all.” Butt, 4 Cal. 4th at 680. That right to an equal education is fundamental in California. Our Supreme Court has recognized that education remains “the bright hope for entry of the poor and oppressed into the mainstream of American society.” Serrano, 5 Cal. 3d at 609; First Amended Complaint, supra note 4, at 10-11.
17. First Amended Complaint, supra note 4, at 6.
18. Id.
19. Id at 70-73.
Could the State do better?

Are there policy options that are more likely to prevent, or discover and correct, inequalities?

The plaintiffs' experts begin with California’s content standards, the accountability tests linked to these standards, and the soon-to-be-implemented requirement making the high school diploma contingent upon students passing a standards-based exit exam.21 These policies provide the basis for defining a basic California education. In addition to conditions necessary to ensure students’ basic health and safety, essential resources and conditions of schooling are those that provide students with a reasonable opportunity to learn the material included in the State’s standards.22 At a minimum, these essentials include teachers who are fully prepared to teach in California’s educational system, instructional materials for use at school and home that are aligned with the standards, and facilities that are conducive to learning.23 It is these conditions and resources, the experts argue, that the State should provide to all California students on equal terms.24 The plaintiffs do not argue that the presence of teachers, books, and decent school buildings guarantees high quality schools or high levels of student achievement; rather, they contend that without these conditions, local communities face unreasonable barriers to creating and maintaining schools capable of providing an education to which California’s students have a right.

As we describe below, the plaintiffs’ experts marshal considerable evidence that teachers, books, and facilities are essential to California education, are in short supply, and are less available to low-income students of color. They also found that these deficiencies are clustered and that their deleterious effects are compounded.25 The experts document that these conditions are widespread and exist on a scale that points to systemic problems occurring at the level of the state and to which local jurisdictions (schools and districts) could not reasonably be expected to respond.26


22. See sources cited supra note 21.


25. See Oakes (a), supra note 21.

26. See, e.g., Darling-Hammond, supra note 21; Hakuta, supra note 21; Oakes, supra note 5; Oakes (a), supra note 21; Expert Report of Jeannie Oakes, Multi-Track, Year-Round Calendar (Concept
They also report flaws in the State’s policy system underlying these shortages and inequalities.\textsuperscript{25}

\textbf{Figure 1: Students of color have more underprepared teachers}

![Bar chart showing the percentage of minority students with underprepared teachers over different years.]


\textbf{A. Inequalities in Qualified Teachers}

Approximately 45,000 teachers are working in California Schools without full preparation.\textsuperscript{28} That is, they are teaching with something less than what the State says is the minimum training necessary for full certification. Some of these teachers are classified as “interns” because they are enrolled in a teacher preparation program; some are “pre-interns,” enrolled in a program to help them pass the subject-matter exams required for entrance into an intern program.\textsuperscript{29} Others are on emergency credentials or waivers that require neither training for what they are teaching nor enrollment in a preparation program. Unqualified teachers are teaching at least a million of California’s six million students. A recent study by the Center for the Future of Teaching and Learning shows the distribution of these teachers in

\begin{itemize}
  \item 6\textsuperscript{th} and Busing to Address Overcrowding, Williams v. State, No. 312236 (Cal. Super. Ct., S.F. County, filed May 17, 2000), available at http://www.mofo.com/decentschools/expert_reports/oakes_report_3.pdf [hereinafter Oakes (c)].
\end{itemize}
California’s students. In schools where fewer than 30% of the students were minorities, only 5% of the teachers lacked a full credential; in schools attended by more than 90% minority students, more than 25% of the teachers did not have a full credential.

Our UCLA analyses illustrated these patterns in Los Angeles County. On the map below, the black dots represent schools where more than 20% of the teachers are underprepared, and the white dots where fewer than 20% of teachers are underprepared. These dots are superimposed on a base map showing the racial composition of the neighborhood in which schools are located. The patterns are clear. The schools with fewer qualified teachers are disproportionately located in neighborhoods where most residents are Latino and African-American (shown by the darker colors on the base map). These are also the lowest income neighborhoods in the county.

*Figure 2*

31. Id. These and other patterns are more fully described in Darling-Hammond, supra note 21.
32. Id.; Educational Data System, supra note 28.
D. Inequalities Converge

Notably, inequalities in students’ access to teachers, materials, and facilities converge. As the table below shows, those schools with problems in one area tend to also have problems in the others.

Where there are poor facilities, there is a greater likelihood of finding the fewest high-quality materials. These are the very schools that have the most difficulty attracting and retaining qualified teachers. Conversely, where there are teachers who have had absolutely no preparation or have not passed the subject matter test even to get an intern credential, they are more likely to be teaching without adequate textbooks and materials.

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45. See Goode, supra note 33.
46. Oakes (b), supra note 24, at 23.
47. Id. at 25.
B. Inequalities in Instructional Materials

California schools also suffer from significant shortages of instructional materials. In a 2002 survey of over 1,000 California teachers, 12% reported they lacked enough textbooks for classroom use, and a third said they did not have enough for students to take home to do homework. As with the shortages of qualified teachers, the distribution of instructional materials is unequal among schools and students. The table below shows those teachers working in schools with the highest concentrations of poor children were also most likely to have inadequate materials.

Table 1: Textbook shortages are the greatest in low-income schools

<table>
<thead>
<tr>
<th></th>
<th>Schools with the HIGHEST CalWorks Eligibility 20% of sample (n=216)</th>
<th>Schools with the LOWEST CalWorks Eligibility 20% of sample (n=217)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shortage of texts to use in class</td>
<td>12%</td>
<td>11%</td>
</tr>
<tr>
<td>Shortage of texts for students to take home</td>
<td>42%</td>
<td>27%</td>
</tr>
<tr>
<td>Textbooks and materials of only fair or poor quality</td>
<td>20%</td>
<td>9%</td>
</tr>
<tr>
<td>Textbooks with only fair or poor coverage of standards</td>
<td>21%</td>
<td>15%</td>
</tr>
</tbody>
</table>

C. Inequalities in School Facilities

California’s Proposition 13, passed in 1978, began an erosion of the educational infrastructure that, in spite of periodic attempts to patch recurring crises, continues and worsens. The 1978 “taxpayer’s revolt” decreased local tax revenues overall by 60%, by limiting the property tax rate to 1% of the assessed value and holding annual increases to 2%. It also required any new tax increases to be approved by a two-thirds majority of voters. As a consequence, the local school districts lost the capacity to generate educational funds through local taxation, and the statewide electorate has been unwilling to compensate for the loss with other types of tax-generated revenues.

California’s eroded educational infrastructure is perhaps most obvious in its overcrowded and deteriorated school buildings. Plaintiffs’ experts found that one in

35. Oakes (a), supra note 21, at 35.
36. For original table, see Oakes (a), supra note 21, at 35.
37. CAL. CONST. art. XIII.
three California students is in an overcrowded school or in a school that needs significant modernization.\textsuperscript{38} They relied, in part, on a 1996 General Accounting Office (GAO) study in determining that 42\% of California schools had at least one building in “inadequate” condition.\textsuperscript{39}

But some schools are in worse shape than others. And, although many California children suffer from poor school conditions, the plaintiffs’ school facilities are critically substandard. Their schools are demonstrably less adequate and more damaging to the students than most other schools. For example, in the teacher survey cited above, 18\% of teachers in low SES, high minority schools rated their facilities as “poor,” whereas only 4\% of the teachers in schools with few minority students rated their schools that low.\textsuperscript{40}

Perhaps nowhere is the disproportionate impact of inadequate school facilities revealed more clearly than in the data regarding overcrowding. The most overcrowded schools in the State, schools that enroll 150\% of their capacity, follow what the State calls a “Concept 6” calendar.\textsuperscript{41} This schedule cuts seventeen days from the school year in order to squeeze in three revolving tracks of students. In Los Angeles Unified School District, where nearly all of the Concept 6 schools are located, these schools have twice the percentage of Latino students as schools on regular calendars.\textsuperscript{42} All are located in low-income neighborhoods. One effort by the State to bolster schools in poor neighborhoods was to establish the Critically Overcrowded Schools Program (COSP).\textsuperscript{43} Ironically, due to a bureaucratic “catch 22,” some of the very schools the program meant to help are excluded from it. Because an over-enrolled school on a Concept 6 schedule did not have more than 150\% enrolled \textit{at any one time}, it did not qualify for the additional COSP resources.\textsuperscript{44}

The map below shows the distribution of Concept 6 and critically overcrowded schools in Los Angeles County. As with the distribution of teachers, the overcrowded schools (represented by black dots on the map) are concentrated in the neighborhoods with the highest concentration of Latino and African-American families (represented by the dark coloration on the base map).

\textsuperscript{38} Corley, \textit{ supra} note 24, at 6.
\textsuperscript{39} Id.
\textsuperscript{40} Harris, \textit{ supra} note 34.
\textsuperscript{41} Oakes (c), \textit{ supra} note 26, at 12.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
Table 2: Inequalities converge

<table>
<thead>
<tr>
<th>Overall (n=1071)</th>
<th>School staff is &gt;20% uncertified</th>
<th>Very serious teacher turnover problem</th>
<th>Teaching positions unfilled for a long time</th>
<th>A lot of trouble finding day-to-day subs</th>
</tr>
</thead>
<tbody>
<tr>
<td>100%</td>
<td>17% (n=183)</td>
<td>8% (n=87)</td>
<td>5% (n=54)</td>
<td>13% (n=138)</td>
</tr>
</tbody>
</table>

**Inadequate supply:**

- Not enough texts for class: 12% (n=1071)
- Not enough texts for home: 32% (n=183)
- Neg. availability of technology: 31% (n=87)
- Neg. quality of texts & materials: 17% (n=54)

E. Flaws in California’s Education Policies

The plaintiffs’ experts found the State’s legislation and regulations inadequate for equitable provision of basic educational tools. Further, they found serious problems with the State’s implementation and regulation of the current law. The plaintiffs’ experts noted inadequate laws, regulations, and/or implementation of policy in the following areas:

- Standards or requirements governing the provision of qualified teachers;
- Students’ access to materials, texts, equipment, supplies, and facilities;
- Resources, capacity building, and technical assistance for schools;
- Collection and analysis of data that will permit the State to monitor needs and problems regarding basic educational conditions;
- Interventions and assistance to address inadequacies and disparities when they occur.

California policy does address all of the issues above; however, in each case policy stops short of making sure that the necessary educational opportunities actually and equitably reach the students. For example, California has fairly rigorous State policies governing teacher certification (policies that make clear the State’s conviction that well-prepared teachers are important elements of educational opportunity). But nowhere does the State require that students be taught by a fully qualified teacher. In fact, policies of the California Commission on Teacher Credentialing make it easy for local districts to hire teachers without full certification. Similarly, the State has elaborate criteria for selecting textbooks and purchasing other instructional materials, but provides few and weakly enforced

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49. Id. at 32-36.
50. Id.
51. Id.
52. Id. at 33.
policies to monitor whether materials are available to all students.\textsuperscript{54} California has stringent building codes that govern new construction. However, once a school is built, no state mechanisms ensure that buildings stay in good condition or that buildings preceding more recent codes are updated. Neither State officials nor the public can document or analyze the conditions of California schools.\textsuperscript{55} California has mechanisms for state intervention when students’ test performance falls below state-set targets—albeit far too weak to remedy most schools’ severe problems. However, there are no mechanisms to provide sanctions or help when a school falls short in providing basic resources and opportunities.\textsuperscript{56}

The plaintiffs argue that remediating the current deficiencies will require the adoption of new policies and the implementation of processes that focus specifically on remediating the disparities and deficiencies in opportunity.\textsuperscript{57} Such new policies, they argue, should provide for the following:

1. Standards for essential resources and conditions;
2. Funding based on what these essentials actually cost, with costs adjusted for the challenges faced by different students;
3. Unambiguous lines of state, regional, and district responsibility and accountability for the provision of essential resources and conditions;
4. Accountability instruments that measure and report students’ opportunities to learn (i.e., their access to essential resources and conditions) as well as their achievement; and
5. Reciprocal accountability that includes a two-way flow of information and legitimate roles for local communities, parents, and students in holding the system accountable.\textsuperscript{58}

The plaintiffs’ experts illustrate specific policies that reflect these general concepts by citing policies and practices from other states.

In sum, the Williams plaintiffs charge that California’s educational system fails to fulfill its constitutional obligation because it has not ensured that every student is provided the essential tools of education. The plaintiffs’ expert reports marshal evidence that many California students, especially low-income students and students of color, lack such educational basics as qualified teachers, appropriate instructional materials, and adequate facilities. They also argue that failures in the State’s current educational system have contributed to the shortages and disparities, in that the State lacks policies and practices that either prevent such problems from occurring or correct them when they arise. Only with such mechanisms, the plaintiffs argue, could California meet its constitutional responsibility.

Not surprisingly, the State disagrees. As Part III details, the State offers expert testimony arguing that the features of schooling about which the plaintiffs complain are not the most critical factors in educational achievement, that local conditions and decisions beyond the reach of the State are far more significant, and that the State has done all that it can to promote high quality schooling for all its students.

\textsuperscript{54} Oakes (a), supra note 21, at 59-63.
\textsuperscript{55} Oakes (b), supra note 24, at 34.
\textsuperscript{56} Mintrop, supra note 27, at 21.
\textsuperscript{57} Oakes (b), supra note 24, at 66-73.
\textsuperscript{58} Id.
III.

CALIFORNIA'S DEFENSE

The most striking feature of the State's response is that it reframes the case in quite fundamental ways. Our analysis of the State's expert reports concludes that the State is not defending California's educational system as having met basic standards of educational equality in its distribution of teachers, instructional materials, and facilities. They do not counter the plaintiffs' claim that, although the State provides most California students with these educational resources, it does not provide them to significant numbers of students—disproportionately, low-income students of color.

Turning away from the plaintiffs' assertion that students have a right to these basic tools of schooling, the State's experts argue that the issue of most concern is educational outcomes. Direct action by the State to make schools roughly equal in their conditions and resources, they claim, would not only be ineffective in increasing achievement, but such mandates might actually have the opposite effect. Characterizing the plaintiffs' call for State policies to equalize students' access to teachers, instructional materials, and facilities as a return to "failed input policies of the past," they declare the plaintiffs' case to be without merit. Then, they argue that the State's current policies of standards and test-based accountability create incentives that are the best approach for the State to take.

A. The Resources of Concern to the Plaintiffs Have Not Been Proven to Increase School Productivity.

In the view of the State's experts, a particular school resource—i.e., qualified teachers, instructional materials, and buildings—can only be considered fundamental to education (and, therefore, be a resource that should be equalized) if research using a narrow range of statistical methods (preferably, econometrics) demonstrates that the resource has an independent and positive effect on students' achievement. They argue that, absent proof that qualified teachers, textbooks or

59. See Oakes, supra note 5, at 8-13, for a full analysis of the State's expert reports. Only four of the twelve declarations summarizing the main arguments in the State's expert reports—those preceding the reports of Drs. Ballinger, Berk, Kirlin, and Rossell—include any mention of equality or inequality. Only three of those reports, Ballinger's, Rossell's, and Kirlin's, provide new analyses that attempt to show that California schools provide essential educational resources and conditions in ways that meet basic standards of equality. Despite repeated assertions that California schools are equal within acceptable and legal margins, these experts fail to provide evidence of such equality. The remaining experts relegate issues of inequality to the margins of the case or dismiss them altogether.

60. Oakes, supra note 5, at 8-13.


63. See, e.g., Hanushek, supra note 62, at 21.
decent school buildings actually cause test scores to rise, the plaintiffs' concerns about shortages and inequalities of these resources are misplaced. Their conclusion is that the plaintiffs do not and could not offer such proof. In their reading of the research, they find no evidence that school productivity is enhanced by the presence of qualified teachers, textbooks, or well-maintained and uncrowded facilities.

To support this conclusion, they draw on a tradition of research, beginning with Coleman's 1966 study, concluding that educational resources have little or no effect on students' measured achievement. It is to this tradition that State expert Erik Hanushek apparently refers when he claims the following: "[M]any of the central theories and arguments advanced [by the plaintiffs] are directly contradicted by extensive research into the determinants of students' achievement." However, they do not address any of the critiques or caveats of that work that have raised serious questions about its conclusions. Rather, by allowing only the narrowest metrics (test scores) and methods (econometrics, specifically production function analyses) as being the only scientific and methodologically sound way of judging school productivity, the State’s experts dismiss an abundance of new and prior research identifying qualified teachers, sufficient materials, and adequate facilities as essential to productive schooling.

State expert Margaret Raymond goes even further, subjecting the importance of teachers, instructional materials, and facilities to an impossible burden of proof. She argues that if one can find a single case where student learning occurred in the absence of resources specified in the plaintiffs’ claim, it proves their lack of centrality to education:

If the three inputs at issue in this case were essential, then it would not be the case that students and schools could overcome the odds of not having them [or] cases where students do well where the factor is scarce.

She argues further that not only must these resources matter in every case to be essential, they also must matter more than other features of schooling:

64. For example, State expert Hoxby writes, “If the State is to succeed by pursuing input policies, it must establish that the relationships between inputs and student performance are causal,” and “... the plaintiffs must demonstrate that the relationship they highlight are [sic] causal if the appropriate remedy is a series of input policies.” Hoxby, supra note 61, at 2-3.
65. See, e.g., Hanushek, supra note 59; Hoxby, supra note 61.
66. See, e.g., Hanushek, supra note 59; Hoxby, supra note 61.
68. Hanushek, supra note 62, at 1.
69. See R.J. Murnane, The Impact of School Resources on the Learning of Inner-City Children (1975) for a discussion of the methodological criticisms. See also Oakes, supra note 5, for an extensive critique of the research tradition on which the State’s experts rely.
70. See Oakes, supra note 5, for a comprehensive critique of this research tradition and the claims made by the State's experts. State experts Hanushek, Hoxby, Podgursky, Raymond, and Summers rely almost exclusively, here and elsewhere, on these analyses to examine which inputs (student inputs, family inputs, and school inputs) contribute to educational outputs, and how much each input contributes. Hoxby, in fact, argues in her report that qualitative research is not helpful for understanding the causes of achievement, implying that even rigorous anthropological and sociological studies are “anecdotal.” Hoxby also sets out criteria for “good,” “better,” and “best,” research that virtually eliminates all but econometric studies from consideration. Hoxby, supra note 61, at 2-4. Experts Rossell and educational psychologist Walberg also use them to inform their opinions in this case.
71. Raymond, supra note 61, at 6.
Even if the input standards proposed by plaintiffs do impact student achievement, the burden would still rest with them to prove that these factors were the most significant drivers of student outcomes and... that the magnitude of the effect was larger than other potential factors... [and]... that these elements are essential to all schools and to all students in the same way.72

With regard to teachers, specifically, Raymond argues, "[i]t simply cannot be the case that experienced teachers are important if it is possible to identify cases where they've not influenced the outcome of students."73 Expert Susan Phillips denies the need for students to be provided equal access to materials and facilities, stating, "[t]hough inconvenient, students can share books, use copied materials or Internet resources, wear coats in cold classrooms, or use a restroom on another floor."74 Expert Christine Rossell rejects the case for equal facilities on the grounds that variations among California's schools don't hamper student achievement.75 For example, she argues, "I have never seen a public school in California whose facilities were so bad that children could not learn in them."76

B. Productivity and Opportunity Are Locally Determined.

Rather than residing in particular resources and conditions that can be mandated by states, the key to school productivity, and, thereby, opportunity, lies in less tangible factors. For example, State experts Hanushek, Hoxby, and Raymond all theorize that productivity is a function of something ephemeral in the local conduct of schooling—processes that can't be measured. Hoxby calls it "management effect," and Raymond terms it "operational factors."77 What matters far more for students' achievement than fundamental resources, they argue, is whether administrators manage schools well (including using whatever resources they have effectively and efficiently), whether teachers use effective instructional practices, and whether parents get involved in their children's schooling. These factors, they argue, are beyond the reach of state policy.78

The State's experts further argue that even if resources do contribute to education, local management decisions rather than the state-provided resources underlie differences in achievement.79 For instance, Hanushek, focusing on adults' judgments rather than students' opportunities argues that the presence or absence of

72. Id. at 11.
73. Id. at 8.
76. Id. at 22.
77. Hoxby, supra note 61, at 27; Raymond, supra note 61, at 29.
78. Hoxby, for example, asserts that "there is no substitute for good management that takes account of local circumstances." Hoxby's advocacy for limited state involvement and privatization, as well as her assertions about the effects of "centralization," reveals her view that state involvement is destructive to good local management. Hoxby, supra note 61, at 27.
79. Id.; Raymond, supra note 61, at 29.
resources is a function of local choices:

[S]ome districts undoubtedly do not have the latest editions of some books or extra books around schools. But this may be a result of a judgment by them that gains from such expenditures are not worth the expense. Or it may be the result of some other decisions by local authorities that has nothing to do with expense. 80

In sum, the State’s experts contend that educational productivity—and, thereby, opportunity—is best achieved when highly motivated and hardworking educators, in collaboration with their local communities, have near-complete flexibility in deciding how to spend the available funds and designing their own practices.

C. The State’s Proper Role Is to Create Incentives That Boost Local Productivity.

Given their view that educational opportunities inhere in local decisions and practices, the State’s experts argue that the State should focus on schooling outcomes, rather than conditions, since an outcomes focus will prompt local educators and communities to increase educational productivity in their schools. 81 Resting on a theory of school improvement that marries marketplace economics with a reward-and-punishment-based view of motivation, they assert that the State is most likely to create the conditions for local productivity by establishing incentives (rewards, sanctions, and school choice) that will motivate educators, families, and students to overcome the obstacles to high achievement in their local context. 82

State’s experts Walberg, Hoxby, Hanushek, Raymond, and Summers all argue that the right performance incentive schemes, without the addition of new resources, will release the local creativity and effort it takes to make schools productive. 83 In his deposition testimony, for example, State expert Hanushek makes clear his preference for local decision making, in part because it is “a point where you could provide direct incentives and evaluate incentives to schools.” 84 The State’s experts favor motivational systems that reward schools for reaching student achievement goals and sanction those that fail; link educators’ hiring, promotion, and firing decisions to students’ achievement outcomes; award or deny high school diplomas to students based on their demonstrated achievement of particular outcomes; and establish choice programs that put schools at risk of losing students by allowing parents to send their children elsewhere if schools don’t perform. For

81. For example, Hanushek offers as evidence (without citation) that “past research has shown that states with a strong outcome orientation have enjoyed greater gains in student outcomes and skills than those that have ignored outcomes.” Id. at 21.
82. Id. at 18; Hoxby, supra note 61, at 4.
83. See Oakes, supra note 5, for a comprehensive discussion. See also Hanushek, supra note 62, at 10, 18; Hoxby, supra note 61, at 4, 27 (arguing that incentives promote good management—that is, the effective use of resources—thereby fixing conditions that drive good teachers away); Raymond, supra note 61, at 19-22.
example, when asked his view of “better” incentives, Hanushek explained:

I’m referring to potential ways of having people respond to student performance. So it could include rewards to teachers in schools for good performance. It could include more choice allowing parents to move away from bad schools or into good schools.85

State’s expert Walberg has also conveyed his enthusiasm and his common sense rationale in a recent chapter included in a book he edited for the Hoover Institution:

Simply publishing results appears insufficient for progress. People and groups responsible for accountability should be able to offer incentives and sanctions for performance. Praise and recognition may go a long way, but money talks. The prospect of being hanged in the morning, wrote Samuel Johnson, concentrates the mind. There is much interest in superintendent bonuses for results, “merit pay” for teachers, and even payments to students. Schools have been closed for repeated failure; more students are being held back a grade because they haven’t met standards. Schools of choice risk closing if they attract no students. Analogous thinking dominates much of the rest of society. Why not schools?86

Importantly, these experts argue that, without such schemes, additional money spent on education will be wasted.87 Even within an incentive-based system, however, the State should refrain from regulating educational resources and conditions, since doing so undermines local community control, stifles professional decision making, frustrates good managers, discourages parent involvement, depresses achievement, and provides destructive excuses for students’ low achievement—factors that inhibit school productivity.

State expert Raymond, for example, argues:

Further, plaintiffs’ proposals disenfranchise parents. By claiming to know what is best for students, plaintiffs are removing the option for parents to be co-creators of the education programs that best meet the needs of their children. Dictating rigid practices and requirements signals to parents that their role is at best secondary and that the education of their children is best left to experts.88

D. California’s Test-Based Accountability System Provides Incentives that Increase Productivity.

Following from their view that productivity results from local decisions and actions, and that incentives spur locals to make their schools productive, the State’s

85. Id. at 152.
86. Herbert J. Walberg, Principles for Accountability Designs, in SCHOOL ACCOUNTABILITY: AN ASSESSMENT BY THE KORET TASK FORCE ON K–12 EDUCATION 159 (Williamson M. Evers and Herbert J. Walberg eds., 2002).
87. Hoxby, supra note 61, at 14, 27; Raymond, supra note 61, at 21.
88. Raymond, supra note 61, at 23.
experts assert that California’s system of educational standards- and test-based accountability provides locals both the flexibility required to make schools productive and the motivation to do so. In fact, they judge California’s policy system to be a “near state of the art” approach to ensuring that all students have the educational opportunities they need most. Thus, they assert that California’s fundamental defense against the plaintiffs’ complaint is that the State is doing all that it can and should to ensure that every student has an opportunity for an education and has gone as far as a state can in order to ensure that those opportunities are, in the words of Brown, available on equal terms.

E. Disparities Are a Result of Local Failures.

Of course, the State’s experts do not claim that California students now have opportunities for education on equal terms. However, aside from a few temporary and soon-to-be-corrected problems resulting from the system’s recent implementation, the disparities among students’ educational opportunities are not matters that the State can or should correct. If the incentives accompanying California’s standards- and test-based state accountability system prove insufficient to maximize productivity—and thereby ensure students’ educational opportunities—it is local educators and/or families and communities who are responsible.

Two types of local problems are credited with inhibiting educational productivity most. First, students’ backgrounds (poverty status, family values and actions, community and neighborhood resources, values, etc.) have far greater power than schooling in determining achievement. Second, local mismanagement and weak motivation on the part of educators inhibit schools’ ability to realize the highest level of productivity possible in various communities.

State expert Anita Summers articulates the constraints that inhere in students’ backgrounds:

The set of inputs not under the control of school systems—the
family and peer group background of the student—has been clearly established as the input that has, by far, the strongest effect on student learning.... the handicaps of impoverished and uneducated backgrounds have proven to be very intractable.94

State expert Caroline Hoxby argues similarly, “In fact, the vast majority of variation in students’ achievement is explained not by their schools, but by what their parents do and how much their neighborhood supports education.”95 Hoxby supports her contention with an analysis of the determinants of twelfth graders’ achievement as measured by U.S. Department of Education’s National Education Longitudinal Study (NELS).96 She concludes from her analysis that 94% of students’ achievement at the 12th grade is a function of their family background, that their peer group accounts for another 3%.97 Together these out-of-school factors leave only 3% for anything the students have experienced at school.98

If schools enrolling similar students differ in the levels of achievement they produce, the State’s experts assert that the fault lies exclusively with unmotivated teachers or faulty local management, rather than with any inequality in basic resources or learning conditions.99 They implicitly reject the proposition that the State is ultimately responsible for ensuring that local mismanagement not abridge students’ educational rights.100


Finally, the State’s experts assert that the “democratic” processes of education policymaking (legislation, administrative regulation setting, local school boards, etc.) are the means by which the people of California should (and do) establish the educational policies they prefer. As such, they contend that the plaintiffs have no reasonable basis for bringing their complaint to the court; and they accuse the plaintiffs of attempting to subvert democracy by seeking to use the courts to install their own policy. For example, Hoxby calls the plaintiffs “audacious” because they seek to “substitute their judgement for the judgement of Californians.”101 Raymond argues:

[P]laintiffs are attempting to circumvent the normal policymaking process. Not satisfied with attempting to redefine policy through the courts, their focus on forcing upward accountability through the California Department of Education is in complete disregard for the constitutional process in California for managing policy

95. Hoxby, supra note 61, at 11.
96. Id. at 11-16.
97. Id.
98. See Oakes, supra note 5, for a full critique of Hoxby’s analysis.
99. Hoxby, supra note 61, at 6-10; Hanushek, supra note 62, at 10, 18.
100. See Oakes, supra note 5.
disputes, namely the election of the legislature and the governor.102

Finally, Rossell speculates that the plaintiffs have pursued the cases because they "do not know how to achieve the lofty goals they propose within the constraints of an open, democratic political process where many competing individuals and groups have access to government . . . ."103

IV.
ECHOES OF BROWN, PLESSY, AND JIM CROW

Just below the surface of the plaintiffs' and the State's arguments lie themes that recall a century of battles over the meaning of equality and the role of the state. As outlined in Part II, above, the plaintiffs take the position that opportunity resides, at a bare minimum, in students' access to decent school conditions and the basic tools required for teaching and learning what the State's content standards require for high school graduation. The plaintiffs contend that the State's role is to frame legislation and regulations that require local schools to provide these basic tools to all students, to allocate resources and build schools' capacity to comply, to monitor the opportunities that students actually experience, and to intervene when those opportunities fall below the bare minimum.104

Making this argument and marshalling the type of evidence they have, the plaintiffs follow the tradition begun in the cases leading to Brown. For example, NAACP attorney Charles Houston presented evidence in 1935 in Murray v. Pearson that the only college in which plaintiff Donald Murray could enroll—the Princess Anne Academy for Negroes—had a far less qualified faculty and inferior resources. Because these inequalities in the basic educational conditions violated the equal protection provision of the Fourteenth Amendment, Houston argued, Donald Murray should be admitted to the University of Maryland Law School.105 In 1946, Thurgood Marshall proceeded similarly in Sweatt v. Painter.106 Marshall offered evidence that the makeshift law school that Texas established for Herman Sweatt—comprised of three part-time instructors and three small basement rooms—violated Sweatt's right to an education equal to that at the University of Texas Law School. Marshall argued that Sweatt be admitted to the white campus.

Three of the four school cases that were consolidated into Brown and decided together by the Supreme Court in 1954 relied on testimony about deep inequalities in school resources and conditions. In Briggs v. Elliott, Professor Matthew Whitehead testified that his survey of Clarendon County schools for black students were cheaply built and lacked running water, indoor plumbing, and lunchrooms; the overcrowded classrooms had rough unfinished furniture; and essential instructional materials such as blackboards, charts, maps, globes, stereopticons, and more were lacking.107 In the Wilmington, Delaware case, Gebhart v. Belton, the plaintiffs offered similar evidence of inequalities as well as contending

102. Raymond, supra note 61, at 5.
103. Rossell, supra note 75, at 34.
104. Oakes (b), supra note 24.
105. KLUGER, supra note 6, at 189-93 (citing Murray v. Maryland, 182 A. 590 (1936)).
that segregation was harmful per se. The white school facilities were better built and had more space, teachers were far better educated, and the curriculum was much stronger than what was available at the Negro schools. In *Davis v. School Board of Prince Edward County*, inequality in the educational basics was also at issue. Unlike in the white schools, the facilities for black students had holes in the floor and heating problems, teachers were paid less, the curriculum was weak, and books and equipment were scarce. The Negro high school had no gymnasium, cafeteria, auditorium with seats, and lockers. Temporary buildings constructed to accommodate the growing number of students were known as "tar paper shacks."

Although the ultimate goal in all of these cases was racial integration, their arguments rested on evidence demonstrating that *Plessy*-sanctioned conditions for segregation had not been met—that schools for black and white children were unequal in their most basic features. In some respects, then, the *Williams* plaintiffs seek a remedy that hearkens to the "separate but equal" ruling in *Plessy* as much as it does to the "on equal terms" decision in *Brown*.

The State's defense in *Williams* take a very different route, but it, too, echoes earlier arguments about equality and state responsibility. As outlined in Part III, the State's experts argue that educational opportunity inheres not in the tangible resources of schooling—i.e., teacher, instructional materials, or building—but, rather, in the extent to which schools are "productive" of student achievement. The State's experts argue that State imperatives and regulations inhibit the expression of local preferences and the development of strategies that lead to productivity. It follows, they judge, that current policies of incentives and sanctions for local school performance is "near state of the art." Learning disparities that remain under such as system, the State's experts argue, are not caused by inequalities in opportunity or resources, but by disparities in students' backgrounds, parent involvement, or local management. Following from this position, the State's experts conclude that mandating equality in the basic resources and conditions that are at the heart of the plaintiffs' complaint constitutes counterproductive state intrusion into local prerogatives. Moreover, pursuing this objective in the courts constitutes an attempt to subvert the democratic process.

Just as the plaintiffs' case calls to mind the arguments and evidence employed in the cases leading to *Brown*, the State's arguments recall the claims made by those defending the pre-*Brown* school cases. In the Clarendon County, South Carolina case, for example, the defense counsel argued that the students' high truancy rate justified the large class sizes, and that the absence of running water and electricity at "colored" schools was appropriate, given the lack of utilities in the countryside where black children lived. In Wilmington, Delaware, the defense argued that the inequalities were expected, given the different communities in which

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108. KLUGER, *supra* note 6, at 423-33 (discussing Gebhart v. Belton, 91 A.2d 137 (Del. Ch. 1952)).
109. *Id.* at 458-479 (discussing *Davis v. Sch. Bd. of Prince Edwards County*, 103 F. Supp. 33 (D. Va. 1952)).
110. *Id.*
111. For example, Hanushek argues that "many of the central theories and arguments advanced [by the plaintiffs] are directly contradicted by extensive research into the determinants of students achievement" Hanushek, *supra* note 62, at 1-4.
students attended school. The superiority of white students' schools, the defense argued, "flow[ed] from living in the suburbs," in contrast to the Negroses whose misfortune it was to attend city schools. In Prince Georges County, the defense argued that academic courses weren't offered in the Negro high school because there was no demand for them, and the presiding judge suggested that the differences in teachers training and salaries weren't all that important to the quality of teaching.

The State's claim in Williams that local control would be undermined if the state mandated that all students be taught by certified teachers, have enough instructional materials to use both at school and at home, and attend schools that meet health and safety standards recalls the reasoning used by Supreme Court following the Civil War, as the South attempted to rein in Reconstruction efforts to enforce Negroses' rights as citizens. For example, in the Slaughterhouse cases of 1873 and the Civil Rights cases of 1883, the court ruled that the federal government had no power to curb most private violations of civil rights or many forms of state discrimination. It was the states, not the federal government, that had the authority to grant or withhold the right to vote, to sit on a jury, and other privileges of citizenship. Of course, in its 1896 ruling in Plessy, the Court left judgments about what constitutes separate-but-equal to the auspices of local government. Consistently, the post-Civil War courts argued that federal government intrusion would have the effect of degrading state government. In the post-Brown era, Strom Thurmond, George Wallace, and others who favored segregation also used claims of "states' rights" to oppose most efforts to achieve greater racial equality. Further, the Supreme Court's 1974 Milliken ruling echoed Plessy, in that it held that "the pursuit of desegregation and equality should cease at the point at which the struggle infringed seriously on local government control."

The Williams defense is also not the first to claim that the courts are being used to circumvent the will of the people. A California Municipal Court judge ruled in 1884 that both State law and the Fourteenth Amendment required that Chinese-American child, Mamie Tape, be admitted to the local public school. Outraged that the courts had ruled in a way that "meets the disapproval of nearly every citizen," the local Superintendent appealed the case to the State Supreme Court. More than a half century later, in the 1947 Mendez case, arguments for the primacy of majoritarian sentiments and actions confronted the court again. Although the California Court of Appeals ordered the desegregation of the Westminster schools, it ruled on narrow grounds. Westminster had violated the Fourteenth Amendment, not because segregation itself was unconstitutional, but because California had no law permitting segregated Mexican schools. The court refrained from ruling on "separate but equal" per se, since, in Judge Stevens's opinion, "We are not tempted by the

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113. Id. at 423-33 (discussing Gebhart, 91 A.2d 137).
114. Id. at 488-89 (discussing Davis, 103 F. Supp. 337).
116. KLUGER, supra note 6, at 56-58, 65-66 (discussing the Slaughterhouse Cases, 83 U.S. 36 (1872) and the Civil Rights Cases, 109 U.S. 3 (1883)).
117. Id.
siren who calls to us that the sometimes slow and tedious ways of democratic legislation is [sic] no longer respected in a progressive society.”

Surely, *Williams v. California* provides sobering evidence that, although much has changed since *Brown*, much of the underlying reasoning and prejudicial logic that shapes law and legislation remain the same.

V.

**BROWN’S UNANSWERED QUESTION: SHOULD THE STATE UNDERTAKE TO CORRECT INHERENTLY UNEQUAL EDUCATION?**

Fifty years after *Brown*, the plaintiffs’ complaint in *Williams* is fundamentally a *Plessy* complaint: our separate schools are unequal. More than a century after *Plessy*, the *Williams* defense recapitulates arguments that bolstered segregated and inferior schools and Jim Crow laws more generally.

However, *Williams* is not merely a recapitulation of the pre-*Brown* arguments over equality and the reach of the courts. It is also profoundly reflective of the nation’s response to *Brown*. Since *Milliken* in 1974, the federal courts’ trends have been decidedly unsupportive of desegregation and state courts somewhat more favorable to resource and adequacy cases. So, although racial segregation may well be at the root of the inequalities that plague California schools, the failure of the state to provide all students with the basic tools of education might be a more compelling leading argument than racial inequality. That racial segregation is not the issue at hand speaks loudly to the legal reversals and profound social disappointments of the past fifty years.

Given the undisputed low attainments of Latino and African-American students—popularly known as the “achievement gap”—the State’s argument that it should focus on schooling outcomes, rather than on resources, is attractive to many. Yet, the State’s arguments ignore (or dismiss) the massive amount of empirical evidence that teachers, instructional materials, and facilities matter to learning and achievement. It also ignores the more fundamental issues of the case—the right of each California child to an education equal to that of his or her peers.

In *Williams*, the State’s experts ride the retreat from the principle that the courts and central government must guarantee educational equality. They also move away from the idea that education is an opportunity that the state should “undertake to provide.” For these experts, our nation’s schooling problems—including those raised by the plaintiffs—inhere in government’s backing of a non-competitive, monopolistic, education system. Moreover, government’s proactive attention to inequalities per se will only make things worse.

Before and since *Brown*, people (researchers, politicians, legal scholars, attorneys) have constructed powerful arguments for a very limited governmental role in guaranteeing equal access to opportunities and civic participation. We should not be surprised to see these arguments raised by the particular experts the State has selected to support its defense.

In other writings, as detailed below, several of the State’s experts have

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120. *Id.* at 129-130 (quoting *Mendez v. Westminster Sch. Dist.*, 161 F.2d 774, 779-81 (9th Cir. 1947)).

121. See *Oakes* (b), *supra* note 24, for a review of this evidence.
questioned the viability of state-provided education per se, preferring privatized, market-based approaches to education to traditional forms of public schooling. The line of reasoning offered by the State’s experts in Williams echoes arguments they have made elsewhere for government deregulation and privatization as promising education reforms.\(^2\)

The following three statements from State experts Hoxby, Hanushek, and Walberg, for example, are sobering expressions of those defending those who lead California’s public schools.

[R]ising spending has not brought higher student performance; students from disadvantaged backgrounds . . . have not benefited as much as was hoped from the increased spending on their schooling. . . . The remedy that best suits both these concerns is categorical (that is, means tested and disability tested) vouchers for public and, possibly, private schools.\(^3\)

“State governments also need to make substantial changes in their role in education . . . should [states] feel the need to intervene, it should be through providing more alternatives to nonperforming school districts, such as extensive choice or voucher opportunities.”\(^4\)

Other countries provide much better accountability. While making goals clear, they allow parental choice of privately and publicly governed schools, both publicly financed. Competition encourages educators to identify the best practices and helps parents choose the best schools. We spend public funds only on public schools, which limits most parents to the beggar’s choice of only a single school, which has little incentive to improve since its customers have nowhere else to go.\(^5\)

Might we fairly assume that the State’s defense in Williams, as reflected in the reports and judgments of these experts, represents the State’s official education stance, attitudes, interpretations, and policies? That the State is willing to redefine opportunity and equality around a single metric—an achievement test score? That California’s governor and State education leaders are content to allow the State’s increasingly segregated schools to remain unequal on the most fundamental features of schooling? That it considers test-based incentives a democratic, constitutional, and educational tool to counter the clear differential treatments received by different groups of students? That California is willing to abandon the promise of Brown? So


123. Hoxby, supra note 122, at 51-72.

124. Hanushek, supra note 122, at 296-316.

far, at least, the State has not rejected this defense and all that it implies for the future of public schooling.
REKINDLING BROWN: 6 AFR.-AM. L. & POL'Y REP. 177 11 ASIAN L.J. 259
15 BERKELEY LA RAZA L.J. 50 19 BERKELEY WOMEN'S L.J. 378  CALIF. L. REV.