

# CLASS IN THE CLASSROOM: POVERTY, POLICIES, AND PRACTICES IMPEDING EDUCATION

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Introduction .....	95
I. Social Science.....	101
II. The Constitutional Right to Public Education.....	109
A. Adequate and Equal Education in Theory.....	109
B. Education as Citizenship .....	114
III. The Current Landscape.....	117
A. The ESSA Thus Far.....	117
B. Assessing Select State ESSA Plans.....	121
C. Recent Education Litigation in Select States.....	122
1. New Mexico.....	123
2. North Carolina .....	123
3. California .....	124
4. Michigan .....	129
5. Mississippi .....	132
6. Pennsylvania .....	134
IV. Potential Solutions.....	135

## INTRODUCTION

The United States of America has long been known as a land of opportunity for all. Many still recognize “a pervasive ethos in America that

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there should be an equal opportunity for all regardless of race, class, or lineage, to attain whatever amount of wealth, professional prestige, and social status that our hard work and overall merit entitle us.”<sup>1</sup> While capitalism also praises “free market competition,” social justice movements and activists decry the inequalities that can result from the “meritocratic effects of intergenerational privilege.”<sup>2</sup> For this reason, some argue that equal opportunity and the United States Constitution exhort the government to provide public education as a fundamental duty, notwithstanding the decision in *San Antonio Independent School District v. Rodriguez*,<sup>3</sup> which declined to find education to be a fundamental right and held that poverty was not a suspect class triggering strict scrutiny in an Equal Protection lawsuit challenging educational inequality in a public school system.<sup>4</sup>

International human rights conventions including the United Nations Charter<sup>5</sup> and the Universal Declaration of Human Rights also provide support for public education. The Universal Declaration of Human Rights (UDHR), to which the United States is a party, includes public education as a protected human right.<sup>6</sup> Further support is found in the International Covenant on Economic, Social, and Cultural Rights, which the United States has signed but not yet ratified.<sup>7</sup>

The United States has no national education system, and its Supreme Court has not interpreted the federal Constitution to include a right to public education. Thus, any constitutional basis for the right to comprehensive educational opportunities derives from state constitutions. Ongoing tensions exist in state courts about what it means to provide “free public education.” In many states, education has been deemed to be a fundamental right or a fundamental interest, but the parameters of fulfilling that right or interest

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1. Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL’Y 45, 46 (2011).

2. *Id.* (noting that these effects “must be equalized for there to be a semblance of equal opportunity that can begin to justify unequal results and pervasive social inequality”).

3. *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

4. *Id.* at 93.

5. Imoukhuede, *supra* note 1, at 64. The U.N. charter “to which the United States is a party describe[s] the state’s duty to promote higher standards of living and other fundamental freedoms necessary for the security of human rights and fundamental freedoms.” *Id.*

6. *Id.*

7. *See* International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 14531.

remain vague.<sup>8</sup> In some states, the courts have interpreted the right to be that of an “adequate” education, while others focus on an “equal” education.<sup>9</sup> Especially since the most recent recession, a common response of state courts is to “punt” the decision to the legislative branch, which fails to correct the inequality, as recent examples in Texas, Kansas and Washington illustrate.<sup>10</sup>

Education is “unique among the constitutional rights” because, as Professor Derek Black notes, “constitutional rights, such as free speech, privacy, and Due Process are violated in particular moments in time. For the same reason, they are susceptible to narrow remedies. But education is an ongoing project that requires constant vigilance—the failure of which can span over years and decades.”<sup>11</sup>

Professor Michael Rebell<sup>12</sup> argues that the right to education is supported by U.S. Supreme Court case law, specifically *Plyler v. Doe*, which held that denying funding for undocumented students enrolled in local public schools violated the Equal Protection Clause when there was no “substantial” governmental interest for the differential treatment of undocumented and documented children.<sup>13</sup> In his view, this ruling justifies intermediate scrutiny

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8. See Derek W. Black, *Averting Educational Crisis Funding Cuts Teacher Shortages and the Dwindling Commitment to Public Education*, 94 WASH. U. L. REV. 423, 469 (2016) [hereinafter *Averting Educational Crisis*].

9. Michael R. Hilton, *Literacy, Poverty, and Brain Development: Toward a New, Place-Based Educational Intervention*, 17 U. RICH. J.L. & PUB. INT. 623, 637 (2014).

10. *Averting Educational Crisis*, *supra* note 8, at 463, 456-57, nn. 205-217 and accompanying text (noting that courts in Texas overturned favorable plaintiff decisions on separation of powers grounds; while in Kansas, after the courts struck down funding cuts as unconstitutional, the “legislatures simply ignored the courts, and later even threatened them with changed to judicial funding and appointment.” Washington’s high court held the state in contempt, and instituted a \$100,000 per day fine,” to no avail).

11. *Id.* at 469.

12. Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L. REV. 47, 52-54 (2012). Rebell’s article provides an interesting history of the stimulation of national goals through conversations beginning with the first president Bush in 1989 through the Clinton administration in 1994. The article relies mainly on No Child Left Behind and its pending reauthorization at that time. The author proposes additional reforms needed in the next reauthorization. He then goes on to analyze the right to comprehensive educational opportunities under state constitutional adequacy provisions. His article proposes interesting potential solutions, some of which will be addressed in Part V below.

13. *Plyler v. Doe*, 457 U.S. 202, 230 (1982) The Court explained the importance of literacy in finding that its deprivation required something more than a rational basis review, stating: “Illiteracy is an enduring disability. The inability to read and write will

for current public school funding differences, on the grounds that “the similarity of the situation of the children of undocumented immigrants in *Plyler* and the class of children who are educationally disadvantaged by poverty is striking.”<sup>14</sup> As the *Plyler* majority reasoned, the undocumented children who are denied access to public education will grow up to be illiterate. Similarly, he explains that children in poverty-stricken neighbors with substandard public schools will also grow up illiterate and subject to its lasting stigma, that the current system is creating a subclass of illiterate children, and that all of this is happening through no fault of the children, like those who are undocumented.<sup>15</sup> Given the recent backlash against undocumented immigrants with children approaching the United States’ southern border, there may be less support for this argument against punishing the children for the acts of their parents, but the underlying premise—that children lacking adequate educational resources will be forever disadvantaged—remains true in both contexts.

While there are strong arguments on one hand that adequate education should be the standard, and on the other hand that equal education is what *Brown v. Board of Education* requires, some scholars have argued that the standard should be a combination of the two: “equally adequate,” or “adequately equal.”<sup>16</sup> Launching from this combined approach, this article goes one step further, and advocates for the increased use of social science research and data to support education curriculum, policy, and funding allocations moving forward.

Specifically, emerging neuroscience research supports the hypothesis that children living in extreme poverty can develop pathways in their brains differently from children living in more moderate or affluent circumstances.<sup>17</sup> Those differences impact learning at the time and can have lasting impacts throughout their lives.<sup>18</sup> Professor Michael Hilton explains the possibility “that the experience of growing up in an area of concentrated

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handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.” *Id.* at 232.

14. Rebell, *supra* note 12, at 98.

15. *Id.* at 98-99.

16. Hilton, *supra* note 9, at 637.

17. *Id.* at 647.

18. *Id.* at 627-28.

poverty, with all the attendant social and environmental factors that entails, may alter the architecture of the developing brain, a fact which may be useful in advocating for new educational remedies.”<sup>19</sup> Language development can be stunted, working memory can be lower, and the system known as “executive functioning,” the ability to organize and plan ahead, also shows notable disparities based on socioeconomic status (SES).<sup>20</sup>

The diminished performance of the public schools charged with educating children exacerbates the disparities in development. If “students are at different stages of mental development, and the education is geared towards those students at the higher end of the development scale, then students who begin school with a developmental delay will be denied their right to an equal opportunity to benefit from the education provided.”<sup>21</sup> There is long-standing support, legislation, and precedent for providing additional education resources to students with physical and learning disabilities. Students suffering from long-term poverty can often be analogized to suffering from a “disability” as these students can show developmental differences in brain function. These developmental differences in impoverished students can create learning deficits that affect “an important life function,” for purposes of the Americans with Disabilities Act (ADA). As such, educational policies around additional services, funding, and reasonable accommodations for public classrooms should be directed towards impoverished children in these settings.<sup>22</sup> Congress’s quick response to individuals with disabilities provides an interesting analogy, as Professor Rebell notes:

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19. *Id.* at 647. Hilton recognizes that more research is needed but “the studies already conducted have produced results which indicate a correlation between socioeconomic background, typically determined by considering parental education and occupation, and several different brain systems which govern acquisition of information in school settings such as executive control, memory, and language systems. Essentially, socioeconomic background seems to have an effect on how the brain processes and stores information.” *Id.* Thus, this provides an opportunity for the point of distinction “not grounded in money or privilege, but actual observed differences in cognitive function and brain development.” *Id.*

20. *Id.* at 649.

21. *Id.* at 642 (defining literacy and its impact and influence by intergenerational poverty and then addressing equality litigation for educational opportunities and emerging neuroscience trends on socioeconomic status and cognitive development as well as stress and brain development).

22. As so many other articles have thoroughly explained the reach of the ADA and the Individualized Educational Plans (IEP) and programs for children with identified special needs in the public schools, this Article will simply outline the legal argument in support.

Like children with disabilities, children from backgrounds of poverty need more than mere access to public school buildings; they need special supports and services to overcome the impediments that inhibit their learning potential. Unless they receive the comprehensive certain resources they require, many of these students, like the students with disabilities before they receive benefits under the IDEA, will “sit idly in regular classrooms awaiting the time when they will be old enough to drop out.”<sup>23</sup>

Part I of this Article will begin with social science evidence to justify the combination approach of “equally adequate” education. It describes the data on the impact of SES on brain development. Part I also addresses the impacts of one’s physical environment, including the levels of poverty, crime, educational opportunity, housing, upward mobility, and stress in neighborhoods on educational outcomes. It then considers some potential counterarguments and poses questions that can guide social scientists in further research.

Part II describes the constitutional protections for education and the state court litigation around those issues, concurring with the conclusion of others who believe that the key point of the constitutional right is to provide an education sufficient to participate in democratic processes of the nation. This section addresses the constitutional arguments around education and adequacy versus equality, recent cases putting forth these arguments, and their status.

Part III briefly addresses the federal legislation, namely the No Child Left Behind Act (NCLB), which has subsequently been revised and renamed the Every Student Succeeds Act (ESSA),<sup>24</sup> and to the extent data is available, this Article will examine how ESSA is working (relative to NCLB), as well as whether it is making progress for students in states who promote either equal or adequate education. Thus far, there is little data about application because the states only recently submitted their plans,<sup>25</sup> and so this part focuses on the ESSA’s goals and shortfalls, and then looks at the plans put into place by several states. Part III will then highlight the adequacy and equality litigation currently and recently pending in selected states. The Article concludes with several proposals for future consideration by courts,

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23. Rebell, *supra* note 12, at 114 (internal citations omitted).

24. *Accountability Under Title I, Part A of the ESEA: Frequently Asked Questions*, U.S. DEPT. OF EDUC. (Jan. 2017), <https://www2.ed.gov/programs/titleiparta/esea-titleiaccountabilityfaqs.pdf> (“The ESSA prioritizes excellence and equity for all students, and recognizes the importance of supporting great educators in our nation’s schools.”).

25. *Id.* at 2.

policymakers, and legislatures.

### I. SOCIAL SCIENCE

It may now seem commonplace to recognize that some people who have trouble reading have dyslexia and are not lazy or unintelligent, but simply process information differently because their brains function differently.<sup>26</sup> Studies on dyslexia have helped us to understand how brains learn and process information and language, which “has helped to improve the reading of many children, to destigmatize the difficulties they are experiencing, and to show them that needing some additional reading instruction is not at all the same thing as being unintelligent.”<sup>27</sup>

In contrast, in studies addressing “the cognitive and neural consequences of growing up in a low socioeconomic status SES environment,”<sup>28</sup> some researchers report there is a large amount of behavioral data but inadequate corresponding neural data.<sup>29</sup> Background studies repeatedly find that SES correlates with academic success. For instance, children “from low SES backgrounds perform below children from higher SES backgrounds on tests of intelligence and academic achievement. Children from low SES backgrounds are also more likely to fail courses, be placed in special education, and drop out of high school compared to high SES children.”<sup>30</sup> Summarizing findings of this research, these authors determine that “these studies present substantial evidence that the playing field is indeed unlevel.”<sup>31</sup> However, brain imaging and other physiological data has not been gathered to any significant degree to explain this correlation, particularly in the areas of identifying low SES with lower IQ.<sup>32</sup>

What we can now hypothesize, and what emerging neuroscience research

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26. See Rajeev D.S. Raizada & Mark M. Kishiyama, *Effects of Socioeconomic Status on Brain Development, and How Cognitive Neuroscience May Contribute to Levelling the Playing Field*, 4 FRONTIERS IN HUM. NEUROSCIENCE 1, 3 (2010).

27. *Id.* at 1.

28. *Id.* at 1-2 (recognizing that there is a stigma to doing such research in part because just “the less-than-distant history of academic psychology has contained some rather unsavoury [sic] episodes of seeking to attribute these difficulties to genetic inferiority. Perhaps the only upside of the relative scarcity of research on SES is that this area contains a great many interesting and potentially consequential open questions for Cognitive Neuroscience, ripe for investigation.”).

29. *Id.* at 2.

30. *Id.* at 3 (citations omitted).

31. *Id.*

32. *Id.*

demonstrates, is that there is some impact of concentrated poverty on brain development, and “the circumstances in which a child is raised can significantly inhibit that child’s educational opportunities.”<sup>33</sup> Professor Hilton describes a study in 2006 involving African-American children between the ages of 10 and 13 from low- and middle-socioeconomic backgrounds that demonstrated “differences between socioeconomic groups in the areas of working memory and cognitive control, as well as significant differences in both language and memory.”<sup>34</sup> A study from 2005 involving kindergartners of both low- and mid-socioeconomic backgrounds found that “socioeconomic background and executive function are both related to language ability, but that socioeconomic background and executive function are independent of one another.”<sup>35</sup> Additional “neurocognitive studies show a positive correlation between students’ socioeconomic background and performance of neural cognitive systems related to memory, cognitive control, and language.”<sup>36</sup> What remains to be determined is the extent to

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33. Hilton, *supra* note 9, at 624. *See generally* Daniel A. Hackman, et al., *Socioeconomic Status and the Brain: Mechanistic Insights from Human and Animal Research*, 11 NATURE REV. NEUROSCIENCE 651 (2010) [hereinafter *Socioeconomic Status and the Brain*]. Studies have previously noted health disparities between middle-income and low-income individuals and families, and general health disparities will not be the subject of this section of this Article; it will focus instead on cognitive functions.

34. Hilton, *supra* note 9, at 652 (“[I]n particular, working memory and cognitive control, both reliant on the prefrontal system, seemed more developed in children from middle socioeconomic backgrounds. Neither reward processing nor visual cognition exhibited significant differences along socioeconomic lines”).

35. *Id.* at 651-52. A third study involving first-graders in New York City schools with a range of socioeconomic backgrounds found that “language ability is of primary importance in neurocognitive functionality; controlling for language ability erases the relationship between socioeconomic background and cognitive control, and reduces the correlation between socioeconomic background and other neurocognitive systems tested.” *Id.* Hilton argues that “this result suggests a focus on improving language skills and functionality in associated neurocognitive systems reduces the impact of socioeconomic background on the overall cognitive function of children from low socioeconomic backgrounds, which could in turn reduce barriers to success in the classroom.” *Id.*

36. *Id.* at 657, 660 (“[N]euroimaging studies have revealed that different areas of the brain are active in responding to similar stimuli, with socioeconomic status correlating with the change in activity. The prevalence of stress associated with a high-poverty environment seems to be one of the primary ways in which conditions impact brain development. The result of the study suggest that the brains of children from lower socioeconomic backgrounds develop and function differently from children from middle or high socioeconomic backgrounds and so the students may not be able to take advantage of the same educational opportunities as students from higher wealth



which language can be disaggregated from SES.

Other researchers have found support for a cause and effect relationship between SES and language, noting “the largest effects of SES are on language processing, with more moderate effects on executive function—particularly on working memory and cognitive control. Additionally, some studies found moderate effects of SES on declarative memory and spatial cognition.”<sup>37</sup> Executive function helps to organize and plan, and it is especially important for resiliency when things go wrong or the unexpected occurs.<sup>38</sup>

The researchers briefly address the cause-and-effect of whether differences in brain functioning result from or cause disparities in socioeconomic status and find that “there is considerable evidence that environmental contexts exert causal influence.”<sup>39</sup> They analyze the question of whether differences in the brain lead to lower socioeconomic status, or whether lower socioeconomic status leads to disparities in brain functioning, and they cite to studies performed on twins, some of whom were separated and raised in households with different SES levels.<sup>40</sup> Those studies indicate that “the magnitude of genetic effects on IQ depends on SES, such that cognitive ability is almost entirely predicted by environmental factors at lower-SES levels.”<sup>41</sup> Thus, lower SES environments during development can magnify genetic differences and create differences even when the genetics are the same.<sup>42</sup>

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background and environment.”).

37. *Socioeconomic Status and the Brain*, *supra* note 33, at 652.

38. *Id.* (“Executive function seems to be particularly important in achieving positive life outcomes despite adversity in low—SES children and adolescents.”); *see also* Daniel A. Hackman, *Socioeconomic Status and Executive Function: Developmental Trajectories and Mediation*, 18 DEV. SCI. 686, 687 (2015) [hereinafter *Executive Function*].

39. *Socioeconomic Status and the Brain*, *supra* note 33, at 652; *see also*, Raizada & Kishiyama, *supra* note 28, at 8 (citing studies that have been reported in the news, including how greatly expanded the vocabulary of three-year-old’s is dependent on whether they come from families with professional degrees or higher education and those from families who are receiving public assistance).

40. *Socioeconomic Status and the Brain*, *supra* note 33, at 652.

41. *Id.* These studies are limited by their small sample size. For instance, if there is not a significant variation in the SES environmental levels of the two twins then environmental effects could be even underestimated. In addition, Hackman et al. note that executive functioning and that aspect of development could be more impacted by environment.

42. *See id.*

Another study was conducted of low- and mid-socioeconomic status children from public kindergartens in the city of Philadelphia.<sup>43</sup> The researchers gave children a variety of tasks to perform to test spatial reasoning, memory, language acquisition, and executive function systems as well as delay of gratification.<sup>44</sup> An analysis of the results determined that while present in multiple brain systems, “SES differences are most pronounced in the functioning of the left perisylvian/language and prefrontal/executive systems.”<sup>45</sup> The researchers recognized that they may need a larger sample size to confirm these results, and emphasized that a “great deal of research is needed to further characterize these relationships; however, many questions remain to be investigated.”<sup>46</sup>

In evaluating the effects of poverty on children’s development, it is important to consider both inputs (like genetics) and outputs (like the impact of experiences) in order to understand the developmental processes at work. For instance, “experiential canalization describes a general developmental process through which biology and typically occurring experience combine, often in ways that go largely unnoticed, to influence behavior,” which means that, as with a baby duck recognizing the call of its mother, “the wiring that underlies this behavior is malleable and that the seemingly instinctual behavior is driven as much by experience as by genes.”<sup>47</sup> The authors explain that the model requires a dual focus, “not only on the *absence* of particular types of stimulation but also on the *presence* of alternative types of stimulation that actively shape development to meet a specific set of contingencies.”<sup>48</sup> For example, an input would be the language of the mother, and output would be the vocabulary development in her children.<sup>49</sup>

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43. Kimberly G. Noble, et al., *Neurocognitive Correlates of Socioeconomic Status in Kindergarten Children*, 8 DEV. SCI. 74, 76 (2005).

44. *Id.*

45. *Id.* at 82. *But see id.* at 83 (noting that “SES does not statistically account for any variance in executive function . . . over and above that predicted by language performance,” and thus to the extent that SES has an impact on language, it may “independently [drive] executive function performance”).

46. *Id.* at 84 (noting remaining questions include explaining why SES and cognitive performance are disproportionate in the areas of language and executive function).

47. Clancy Blair & C. Cybele Raver, *Child Development in the Context of Adversity: Experimental Canalization of Brain and Behavior*, 67 AM. PSYCHOL. ASS’N 309, 309 (2012).

48. *Id.* at 310 (emphasis in original).

49. *Id.*

Stress also has an impact on neural development.<sup>50</sup> Animal studies have determined that “chronic stress in the prenatal and/or very early neonatal period has multiple negative sequelae.”<sup>51</sup> The studies demonstrate that “early stress alters gene expression and induces structural changes as well as changes in connectivity in brain areas that underlie stress response physiology.”<sup>52</sup> One of the unfortunate, or fortunate, implications of this research is that the children adapt in a way to become better at identifying stressful situations and perhaps addressing them, but “these processes, however, also increase the chances of negative interpersonal interactions and high levels of difficulty in social contacts such as school.”<sup>53</sup>

Professor Hilton also addresses stress and brain development, noting that “growing evidence suggests that chronic stress, resulting in persistently elevated levels of stress hormones, can disrupt the developing architecture of the brain,” particularly in areas that lead to “functional differences in learning, memory, and aspects of executive functioning.”<sup>54</sup> These changes can have a lasting impact and can result in a weaker foundation for learning.<sup>55</sup>

Professor Hackman and his colleagues also note that “children and adolescents from low-SES backgrounds show higher rates of depression, anxiety, attention problems and conduct disorder, and higher prevalence of internalizing (that is, depression- or anxiety-like) and externalizing (that is, aggressive and impulsive) behaviors [sic], all of which increase with the duration of impoverishment.”<sup>56</sup> Externalizing behaviors are those that are made manifest to others, such as conduct and spoken words, whereas internalizing are those that impact the individual’s emotions and feelings.

Prolonged exposure to stress is known as “toxic stress,” which may also impair memory functioning by killing neurons through over-exposure to cortisol.<sup>57</sup> As a result, “toxic stress limits the ability of the hippocampus to

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50. *Id.* at 311.

51. *Id.*

52. *Id.* at 311-12 (“[There is a] neurobiological basis for well-documented associations between poverty and child physical and psychological health and development . . .”).

53. *Id.* at 313 (proposing potential solutions through caregiving practices and processes).

54. Hilton, *supra* note 9, at 654-55.

55. *Id.* at 655.

56. *Socioeconomic Status and the Brain*, *supra* note 33, at 651.

57. See Jack P. Shonkoff, et al., *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, AM. ACAD. OF PEDIATRICS 232, 236 (2012), <http://pediatrics.aapublications.org/content/pediatrics/129/1/e232.full.pdf>.

promote contextual learning, making it more difficult to discriminate conditions for which there may be danger versus safety, as is common in posttraumatic stress disorder.”<sup>58</sup> This inhibited use of contextual cues could result in “some children appearing to be both more reactive to even mildly adverse experiences and less capable of effectively coping with future stress.”<sup>59</sup>

Some researchers have noticed a benefit from the increased stress. Increased stress interacts with the adrenaline system in ways which “may provide for more rapid learning and response to conditions of threat;” however, “in the context of low-wealth, unpredictable environments, such developments may result in increased negative interpersonal interactions and lead to difficulty in social settings like classrooms.”<sup>60</sup>

The physical environment, especially the character and economics of neighborhoods, also has an impact on stress and may have an effect on student learning as well.<sup>61</sup> In a report commissioned by the Brookings Institute, researchers explained that “because poor and minority Americans are over-represented in our most disadvantaged neighborhoods, any neighborhood effects on children may contribute to persistent disparities in overall schooling outcomes across race and class lines in the U.S.”<sup>62</sup> The report examined neighborhood correlations with outcomes of schooling and a number of studies that had been previously conducted.<sup>63</sup> It also analyzed differences in vulnerabilities across racial groups, local school data, the

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58. *Id.* (“[E]xposure to chronic stress and high levels of cortisol also inhibit neurogenesis in the hippocampus, which is believed to play an important role in the encoding of memory and other functions”).

59. *Id.* at 237-38 (discussing the long-term threats to overall health and calling for a “coordinated effort among basic scientists, pediatric subspecialists, and primary care clinicians to develop more effective strategies for addressing the origins of social class, racial, and ethnic disparities in health and development.”).

60. Hilton, *supra* note 9, at 656.

61. See JULIA BURDICK-WILL, ET AL., BROOKINGS INST, CONVERGING EVIDENCE FOR NEIGHBORHOOD EFFECTS ON CHILDREN’S TEST SCORES: AN EXPERIMENTAL, QUASI-EXPERIMENTAL, AND OBSERVATIONAL COMPARISON 2 (2010), <https://pdfs.semanticscholar.org/fbde/f14f61ab6192d943f33b2a2aba0a426fec34.pdf>.

62. *Id.*

63. *Id.* at 3-4 (“Because researchers are not always able to capture and control for all of the relevant attributes of a family that influenced neighborhood selection, estimates of neighborhood on educational outcomes may be systematically biased. Put differently, educational outcomes could vary across neighborhoods because of the different types of families living in different types of areas, rather than because of any direct causal effects of neighborhood environments on children’s outcomes.”); *id.* at 7.

racial composition of the local neighborhoods, as well as exposure to violent crime in the community.<sup>64</sup> Based on their examination of the data and recent programs, the authors explained:

[T]he evidence suggests that changing neighborhoods can improve children's achievement test scores even without changes in neighborhood racial segregation or school quality, and that even children who have already spent many years living in segregated, economically distressed and dangerous neighborhoods can experience gains in cognitive outcomes from moving.<sup>65</sup>

Other studies support this point about the dangerousness of the neighborhood impacting children's cognitive processing.<sup>66</sup>

Neighborhoods in high-poverty areas usually have impoverished schools as well. Professor Hilton uses social science data to explain how targeting

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64. *See id.* at 2; *see also id.* at 27.

65. *Id.* at 25-26 (explaining that they found moving to be inconsistent in that "moves to less distressed areas in Chicago and Baltimore improve children's test scores while that does not appear to be the case in the other three MTO sites of Boston, Los Angeles, and New York"); *id.* at 26 (noting that MTO stands for the US Department of Housing and Urban Development's Moving To Opportunity residential mobility experiment, which through a random lottery system provides housing vouchers to some of families to relocate to a low-poverty census tract when they were previously living in public housing complexes); *see id.* at 5-6 (positing that one potential explanation for this pattern could be that there are higher rates of violence in Chicago and Baltimore than in the other cities and thus the biggest neighborhood change is in exposure to violence).

66. *See e.g.*, Dana Charles McCoy, et al., *Children's Cognitive Performance and Selective Attention Following Recent Community Violence*, 56 J. HEALTH SOC. BEHAV. 1, 10 (2015) ("[C]ommunity violence does, in fact, have direct implications for children's cognitive processing in ways that may place them at significant risk of longer-term psychological difficulty. . . . "[T]hese results suggest that the physiological and mental demands of dealing with an environmental stressor may reduce children's cognitive capacity to focus on a simple task and instead lead to more automatic (i.e., faster but error-prone) task performance. Such impulsive response patterns are in line with clinical research showing short-term impairments in information processing, effortful control, and other aspects of higher-order self-regulation following trauma, and may help to explain previously observed reductions in children's academic performance and regulatory capacity following exposure to homicide.") (citations omitted); *see id.* at 15 (recognizing that the study is limited by not including the children's subjective experiences); *see id.* at 12 (noting that there are differences in children that have low anxiety and children that have high anxiety and those with high levels of anxiety "showed patterns of avoidance that may indicate deficits in coping and potentially increased risk for later mental health problems"); *see id.* at 14 (arguing this stress and stress mechanism can have a lasting impact on the children both in the educational system and their ability to cope with adult figures, as well as for the mental and emotional health throughout their lives).

additional funding to those public schools serving impoverished students would not violate the notion of equal educational opportunity, and in fact may be necessary to meet the constitutional standard.<sup>67</sup> He concludes:

If the neuroscience proves a causal link between living in concentrated poverty and brain development that in fact impair students' ability to take advantage of the educational opportunities provided, and a state is held to have an affirmative obligation to provide student [sic] with an objectively meaningful opportunity to receive the full benefits of the education provided, then it may be argued that a state has an affirmative obligation to prevent students from growing up in areas of concentrated poverty to avoid such detriments to brain development and afford them a truly equal educational opportunity.<sup>68</sup>

The author may be taking his theory too far in suggesting an affirmative obligation on the state to prevent areas of concentrated poverty, or at least prevent children from living there. Equal educational opportunity is more justly tied to the schools within those areas.<sup>69</sup> Thus, an unequal distribution of resources that provides substantially more resources to those schools in the impoverished areas may be required to fulfill the mandate of equal educational opportunities.

In an attempt to defuse some of the suspicion that may be associated with researching the impact of SES on cognitive development, some social science researchers suggest "all controversies about nature-versus-nurture may have hinged upon a distinction that is false."<sup>70</sup> These researchers argue that one's environment has a long-term impact on the way the brain changes during the learning process, and higher SES families may be more homogeneous in terms of education and background while low SES families have a greater variability.<sup>71</sup> While the genes themselves are inheritable,

the *expression* of those genes, i.e., whether those genes are turned on or off, is hugely influenced by the environment throughout life. Indeed, the activation and deactivation of genes within the nuclei

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67. Hilton, *supra* note 9, at 642 ("[U]nder current standards in many states, if the system of public instruction is able to produce students who are all, at minimum, prepared to participate at a recognized acceptable level politically, economically, and intellectually in our society, then unequal funding will not be viewed as a denial of equal educational opportunity.").

68. *Id.* at 647-48.

69. *Id.* at 640-41 (adding that districts with low-income communities are able to lose money under fiscally neutral remedies even when funding quality was achieved).

70. Raizada & Kashiyama, *supra* note 26, at 8.

71. *Id.*

of new neurons is precisely the pathway via which the environment makes long-term changes to our synapses during learning.<sup>72</sup>

If more research was done in this area specifically, more effective interventions could be developed and tested.

## II. THE CONSTITUTIONAL RIGHT TO PUBLIC EDUCATION

### A. *Adequate and Equal Education in Theory*

Each state provides a “free public education,” compelling children’s attendance for certain periods of time. While each state provides some education, there is continuing tension over whether that education is adequate and whether educational opportunities are, or should be, equal for all children within the state. Geography, property values, and census tracts play roles in the quality of public education, and the tax basis for education funding varies from year to year. But, as Professor Black explains, “if state constitutional education mandates mean anything, they mean that the quality of education a student receives is not based upon the random year in which the student was born and attended school.”<sup>73</sup> And yet, these variations have significant ramifications for educational quality. Because this is a constitutional right, and not a statutory right, “absent some compelling justification or proposed alternative solution by the state, the state cannot, as a practical matter, deny its responsibility to plan ahead.”<sup>74</sup>

For instance, Professor Black identifies how:

A localized funding system offers wealthy communities a triple advantage. First, it relieves them of the burden of financing a statewide education system. Second, wealthy communities can redistribute funds to their own schools that would otherwise have gone to support a statewide system, where as poor communities struggle to support basic programs. Third, with additional money, wealthy communities can outcompete neighboring districts for those things that matter most like quality teachers. These disparate realities reveal that the fact that state puts some funding in public education does not mean it is running a truly statewide education system. Instead, state statutes facilitate a localized education system that is anything but neutral and that systematically works to advantage and disadvantage certain communities.<sup>75</sup>

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72. *Id.*

73. *Averting Educational Crisis*, *supra* note 8, at 481.

74. *Id.*

75. Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70

He acknowledges that individual family choices and preferences also play a role also.<sup>76</sup> Professor Black provides some statistical information to support these notions. For instance, North Carolina, which had 49 percent low-income students in the 2006-2007 school year, made more than a 25 percent cut in legislative funding per pupil and then diverted much of this money to charter schools up to the year 2014.<sup>77</sup>

Since the recession, “courts have rejected school funding and quality challenges at a far higher rate.”<sup>78</sup> Professor Black warns that “unless courts re-engage and alter their approach soon, increased inequality and inadequacy may become the new norm—a norm the courts and advocates have spent decades trying to unseat.”<sup>79</sup> He suggests that policy should focus on averting future crisis and future violations because post-hoc remedies are rarely awarded.<sup>80</sup>

But adequacy in the view of Justice Liu and others, is not in opposition to equality. Often the debate is over whether state constitutions’ Equal Protection Clauses require that all students receive an “adequate” education or that all students receive an “equal” education.<sup>81</sup> However, Justice Liu posited that “adequacy is not distinct from, but rather informed by, the conditions of inequality in a given social context,” arguing that adequacy is

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STAN. L. REV. 735, 750 (2018) [hereinafter *The Constitutional Compromise*]. Professor Black further explains, “the preservation or maximization of these advantages also incentivizes advantaged districts to include and exclude certain groups of people—for the haves to keep out the have-nots. A district might, for instance, intentionally keep its boundary small and exclusive, refusing to zone in new neighborhoods or placing pressures on local housing authorities to block new residential development. The result is to shift undesirables onto other districts that are already disadvantaged, widening the gap between the districts even more. In recent years small communities have likewise sought to secede from their existing school districts to create their own smaller more privileged districts.” *Id.* at 750-51.

76. *Id.* at 751.

77. *Id.* at 754.

78. *Averting Educational Crisis*, *supra* note 8, at 427.

79. *Id.* at 427-28.

80. *Id.* at 469 (“In addition, given the nature of learning, educational harms and failures are not easily remedied after the fact. For that reason and potentially as a matter of convenience, past courts typically do almost nothing to remedy educational harms that precede litigation. Rather, the past violations serve as the basis for insisting on current constitutional compliance.”).

81. See Chris Chambers Goodman, *Now Children Learn Better: Revising No Child Left Behind to Promote Teacher Effectiveness in Student Development*, 14 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 81, 108-114, nn.97-121 (2014) (explaining the adequacy versus equality debate).



“a relational concept whose content is contingent upon social norms.”<sup>82</sup> He explains:

First, the floor of educational opportunity must be sufficiently high to ensure not bare subsistence, but the achievement of the full range of human capabilities that constitute the societal norm. Second, the notion of educational adequacy must be dynamic, evolving as social and societal norms evolve. And, third, adequacy must entail a limit to inequality, a point which the mal-distribution of educational opportunity puts too much distance between the bottom and the rest of society.<sup>83</sup>

Liu proposed that conscientious legislatures should demonstrate a commitment to educational adequacy that “would give priority to the most glaring educational needs over the workaday politics of budget wrangling and special interest accommodation. If educational adequacy for equal citizenship has constitutional stature, then legislative enactment of its essential substance must reflect something more than pedestrian political bargaining.”<sup>84</sup> He criticizes the federal role in education funding as “unguided by any determination of what resources are needed to ensure educational adequacy for equal citizenship.”<sup>85</sup>

School adequacy and equality litigation, while seeming to pursue different paths, actually reinforce one another. As Professor Weishart explains, the definition of adequacy relies upon and understanding that “a quality education is necessary to develop children’s capabilities, their positive

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82. Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L. J. 330, 346 (2006).

83. *Id.* at 347.

84. *Id.*

85. *Id.* at 402 (noting that “wealthy high spending states receive more Title I funds per eligible pupil than poor, low spending states” and showing examples of Massachusetts receiving more Title I funds than Alabama, and New Jersey more than Arizona).

liberties,”<sup>86</sup> and helps to promote equality,<sup>87</sup> including equal citizenship.<sup>88</sup> Equal citizenship involves an ability to exercise the right to vote and to participate in our democratic institutions, and not merely to hold a job.<sup>89</sup> This reinforcement of the interplay between adequacy and equality means they are no longer separate goals in education litigation, as “more and more, claims under state constitutional rights to education have come to demand ‘an adequate equal and equally adequate education.’ This is not a mere play on words.”<sup>90</sup> Both of these values must be addressed in considering how to improve public education.

Considering both values, in Professor Weishart’s view, requires an exploration of his theory of proportionality, starting with its origins in the Code of Hammurabi and its adoption into subsequent legal theories.<sup>91</sup> Based on Aristotle’s discussion of proportionality as “the right ratio,” which recognizes that “each person may be treated unequally (differently) in numerical terms,” Weishart argues “the distribution itself is equal in the sense that each person receives the same consideration of his needs and interests. Proportional equality is in essence, then, vertical equity or ‘adequate equality.’”<sup>92</sup>

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86. Joshua E. Weishart, *Equal Liberty in Proportion*, 59 WM. & MARY L. REV. 215, 238 (2017). Weishart proposes that state constitutional rights to education be analyzed as claims for equal liberty to provide a principled method for reconciling liberty and equality interests, arguing for a proportionality review. He continues, “[e]ven in states where courts have declined to list a particular set of capabilities, courts have defined the standard broadly to emphasize that an adequate education must enable children to be responsible citizens, productive members of the economy, or autonomous individuals. Hence, whether courts want to acknowledge it or not, children’s positive liberty interests are underwriting educational adequacy standards.” *Id.*

87. *Id.* at 239 (“Adequacy is also meant to be equality enhancing in its promotion of ‘democratic equality’ or ‘equal citizenship.’”).

88. *Id.* at 239-40 (“For adequacy theorists, then, the egalitarian aim is relational equality: to assure not that children have the *same* educational resources and opportunities, but that all children have *enough* to avoid oppression and function as equal citizens.”)

89. *Id.* at 240 (quoting Liu, *supra* note, 82, at 347) (“Consequently, the adequacy threshold ‘must be sufficiently high to ensure not bare subsistence, but the achievement of the full range of human capabilities that constitute the societal norm.’”).

90. *Id.* at 241 (quoting Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 483 (2014)).

91. *Id.* at 284-85.

92. *Id.* at 286 (internal quotations and citations omitted). Weishart describes the four possibilities of applying this sort of review, with the first being the status quo of separate analyses of adequacy and equity. The second is that adequacy and equality have

Professor Weishart then describes how proportionality may work to also address the challenge posed by the fact that equality and liberty are “two fundamentally different constitutional values” and “weighing is a form of measurement that presupposes a common unit of measure,”<sup>93</sup> and as a result they really cannot be balanced. His response to this criticism is that “just because equality and liberty cannot be weighed or balanced, strictly speaking, does not mean that they cannot enjoy some direction of fit.”<sup>94</sup>

For instance, the liberty interest “requires courts to evaluate whether the margin between vertical equity and adequacy is proportional so as to protect children from the harms of educational disparities,” and thus students receiving an “adequate” education might not actually be able to effectively compete with other students for jobs and higher education.<sup>95</sup> In such cases, “the court would require the adequacy threshold to be recalibrated to diminish the positional advantages held by children well above the threshold, and require adjustments to the distribution of educational opportunities to ensure vertical equity necessary to meet the higher thresholds.”<sup>96</sup> What is determined to be “adequate” then would not be a fixed standard, but rather calculated in relation to others to ensure more equality. He concludes with this hope “that vision of equal liberty can no longer be made to teeter on a standardless balance but must remain fixed in one proportional direction.”<sup>97</sup>

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an “inversely proportional relationship.” The third is when they have a “directly proportional relationship that can be leveled down together.” The fourth is where they have a “directly proportional, upward direction of fit.” After analyzing the first three, Weishart concludes, “the only place left for vertical equity and adequacy is to go up, together.” He then gives an example of a Kansas Supreme Court case acknowledging that the state Constitution contains both an adequacy and an equity component for education. *Id.*

93. *Id.* at 285 (quoting Brett G. Scharffs, *Adjudication and the Problems of Incommensurability*, 42 WM. & MARY L. REV. 1367, 1416 (2001)); see also *id.* at nn.395-98.

94. *Id.* at 286.

95. *Id.* at 292 (“That space would become disproportionate if, for example, children just meeting the adequacy threshold could not compete on comparable terms for admission to higher education and high-quality jobs with children soaring above the adequacy threshold. So, in addition to educational outcomes, courts assessing the proportionality of the margin between adequacy and vertical equity could also consider evidence of socio-economic mobility, college admissions, and patterns of racial and class segregation.”).

96. *Id.* at 292 (adding that “[s]uch recalibration would also ensure that adequacy remains relational, responsive to changing societal conditions and the needs of children”).

97. *Id.* at 299.

Determining the proportionate levels of educational opportunities and support services to safeguard this liberty interest adequately for students from lower SES backgrounds requires a brief detour to discuss the nature of education as citizenship.

### *B. Education as Citizenship*

In November 2006, then-law professor Goodwin Liu theorized that the Fourteenth Amendment “authorizes and obligates Congress to ensure a meaningful floor of educational opportunity throughout the nation.”<sup>98</sup> He found support for this argument in the opening words “all persons” of the Fourteenth Amendment.<sup>99</sup> To him, citizenship means “the condition of being a full member of one’s society, with membership implying an essential degree of equality,”<sup>100</sup> and it “implicates not only the civic republican values of political participation and democratic self-governance, but also the ethical values of mutual respect, personal responsibility, and equal dignity.”<sup>101</sup> While he does not suggest that economic equality is a requirement for effective citizenship, he finds an economic aspect to citizenship, stating that “[t]o be a citizen is to have a level of economic independence necessary for the meaningful exercise of civil and political freedoms and for the attainment of self-respect and the respect of others.”<sup>102</sup>

Many scholars acknowledge “a necessary connection between education and the right to vote.”<sup>103</sup> For instance, Professor Imoukhuede explains, “[d]enial of a quality education is a denial of the intellectual tools necessary for the meaningful exercise of the franchise, amounting to an effective denial of the right to vote.”<sup>104</sup> These authorities and others provide support for

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98. Liu, *supra* note 82, at 330 (explaining how the citizenship clause provided substantive guarantees that Congress is obligated to enforce).

99. U.S. CONST. amend. XIV § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States”).

100. Liu, *supra* note 83, at 341.

101. *Id.* at 342.

102. *Id.* at 343 (noting that the United States Supreme Court has recognized that education is important to social dignity and status); *see also id.* at 344-45 nn.52-54 (citing *Brown v. Bd. of Educ.*, *Wisconsin v. Yoder*, and *Plyler v. Doe*).

103. Imoukhuede, *supra* note 1, at 76 (citing *Reynolds v. Sims* to explaining that more than a basic education is required in order to make the right to vote meaningful, and *Wisconsin v. Yoder*, “the court discussed the democratic necessity of education stating that education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”).

104. *Id.* at 77.

Justice Liu's proposition: "[c]itizenship requires a threshold level of knowledge and confidence for public duties such as voting, serving on a jury, and participating in community affairs, and for the meaningful exercise of civil liberties like freedom of speech," the "content of educational adequacy follows directly from citizenship's several facets."<sup>105</sup>

As additional support for these propositions, Justice Liu describes the historical background of the Civil Rights Cases, national citizenship and the Freedmen's Bureau. In addition, he describes a bill to establish a national system of education which was presented by Representative George Hoar of Massachusetts in 1870.<sup>106</sup> The Congressperson made several arguments (which are detailed in Justice Liu's article as well as in the Congressional Globe),<sup>107</sup> which Justice Liu summarizes as follows, "[i]n the end, Hoar put the point this way: 'among the fundamental civil rights of the citizen is, by logical necessity, included the right to receive a full, free, ample education from the government, in the administration of which it is his right and his duty to take an intelligent part. We neglect our plain duty so long as we fail to secure such provision.'<sup>108</sup> While the bill ultimately failed, it became the launching point for additional bills that sought to provide federal aid for education funding.<sup>109</sup>

Other scholars agree with then-Professor Liu's assessment, and subsequent articles provide even more detail about this historical background to the readmission of southern states to the Union, and its tie to public education access. For instance, Professor Black asserts that education is an implicit right of the Fourteenth Amendment's citizenship clause and "argues that the Fourteenth Amendment prohibits states from partisan and other illegitimate manipulations of educational opportunity."<sup>110</sup> He notes that the

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105. Liu, *supra* note 82, at 345.

106. *Id.* at 375 (citing H. R. 1326, 41st Cong., 2d Sess. (1870)).

107. *Id.* at 378-80 (citing CONG. GLOBE, 41st Cong., 2d Sess. Congress app. at 479 (1870)) ("[T]he 'clear and direct' implication according to Hoar is that 'if the government cannot be administered in a constitutional way, to wit, by the intelligent voice of the people, unless that people is educated,' of direct logical necessity it becomes the constitutional duty of Congress to secure [public education]. . . . If the nation 'can call on [its citizens] to sit on its juries, to exercise offices of trust and profit, to become law-makers [sic], and assist in discharging all governmental duties,' then 'does it not impose on itself the obligation to qualify them for the work they may have to do?").

108. *Id.* at 380 (quoting CONG. GLOBE, 41st Cong., 2d Sess. app. at 479 (1870)).

109. *Id.* at 386 (emphasizing that subsequent federal aid proposals have treated support for education as part of the general operations of the national government."); *see also id.* at 381.

110. *The Constitutional Compromise, supra* note 75, at 735-36.

“twin pillars of state citizenship at the time [were] education and voting.”<sup>111</sup>

Professor Black examines the legislative history of the Reconstruction Act and notes that a prerequisite for states seeking readmission to the Union was to provide a system of public education open to all citizens, including the newly-freed slaves.<sup>112</sup> His proposition is that education is not only an inherent requisite for the remission of Southern states, but also was inherent to a Republican form of government.<sup>113</sup> He demonstrates that education clauses were included in all of the seven constitutions that were revised in order to secure a Republican form of government and guarantee admission back into the Union.<sup>114</sup> He continues:

To ensure a Republican form of government and equal citizenship, the Fourteenth Amendment demands public education from states. Yet merely mandating that states provide education is insufficient to protect the interests with which Congress and state conventions were concerned around the time the amendment was ratified. Public education itself offers states the power to both promote and undermine democracy. A state might very well manipulate educational opportunity in ways that advantage one group or another. At some point, that manipulation could undermine citizenship and a Republican form of government. Consequently, policing the process of education is as important as providing education itself, and the federal Constitution must regulate the education it compels if the provision of education is to have positive effect. To be clear, the point at which manipulation undermines citizenship and democracy implicates qualitative inquiries. The need to make those inquiries, however, is tempered by effective policing of manipulations. If the process of delivering education is fair, the substantive education can more safely be left to the democratic process.<sup>115</sup>

In exchange, the states were able to use their discretion as to how they provided this public education, within the limits of the Fourteenth Amendment such that they did not “subvert the overall democratic process or the citizenship of particular groups.”<sup>116</sup>

So what has the federal government done to address the educational disparities discussed above? The next section explores this issue.

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111. *Id.* at 741.

112. *Id.* at 741-42.

113. *Id.* at 764-65.

114. *Id.* at 783.

115. *Id.* at 806-07.

116. *Id.* at 745.

## III. THE CURRENT LANDSCAPE

A. *The ESSA Thus Far*

The Every Student Succeeds Act is distinguishable from No Child Left Behind in several ways. First, it may be the “first federal education law to define the term ‘evidence-based,’ and to distinguish between activities with ‘strong,’ ‘moderate,’ and ‘promising’ support based on the strength of existing research.”<sup>117</sup> The goal seems to be to identify which ideas for improving educational outcomes are at least “promising,” and then use federal funding to pay to implement those promising, moderate, or strong ideas, rather than weak or untested ideas. In order to determine which ideas are at least “promising,” the ESSA requires evidence from a “correlational study that makes statistical corrections for selection bias” in order to have their plans approved by the Department of Education.<sup>118</sup>

Second, the ESSA law is more flexible than No Child Left Behind, and allows states to “use a portion of their federal funds to pay for the ongoing evaluation of untested programs,”<sup>119</sup> thus increasing the ability of states to move ideas from the untested into the promising or above category. In terms of funding, the ESSA gives more discretion to states on how they spend existing funds, although there is some criticism that more could be done to reallocate funds to the neediest schools.<sup>120</sup>

Third, in the academic standards category, the ESSA attempts “to manage a middle ground” between two extremes, as the NCLB did not define what constituted “challenging standards” while the ESSA does; however, the ESSA only requires the state to assure the Department of Education “that their standards are challenging,” as opposed to the Department making its own finding.<sup>121</sup>

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117. Martin R. West, *From Evidence-Based Programs to an Evidence Based System: Opportunities Under the Every Student Succeeds Act*, BROOKINGS INST. (Feb. 5, 2016), <https://www.brookings.edu/research/from-evidence-based-programs-to-an-evidence-based-system-opportunities-under-the-every-student-succeeds-act/>.

118. *Id.* One thing that is different about ESSA is that it requires schools using federal funds to pay for interventions in low-performing schools to identify “activities that meet at least the promising standard.” *Id.*

119. *Id.*

120. Derek W. Black, *Abandoning the Federal Role in Education: Every Student Succeeds Act*, 105 CALIF. L. REV. 1309, 1339 (2017) [hereinafter *Abandoning the Federal Role*] (“Congress, however, forwent the opportunity to finally fix the Elementary and Secondary Education Act’s funding formulas and ensure that the neediest schools and the students receive the most money.”).

121. *Id.* at 1332-33.

Fourth, on the issue of testing and accountability, Professor Black notes that test results “remain a mandatory factor, but one a state can minimize” because they are but one factor among many.<sup>122</sup> He recognizes that the ESSA requires that test results, graduation rates, student growth in elementary through middle school, and “English-language proficiency” be assigned “substantial weight.”<sup>123</sup> This burden is easily met, as long as all of these factors together constitute a much greater weight than the other optional factors, which still may be included but might dilute the importance of test scores as a factor.<sup>124</sup>

Fifth, the mechanisms triggering intervention in low-performing schools are quite different under the ESSA. For instance, it takes four years before an intervention is required,<sup>125</sup> and “the nature of the intervention is left to the states’ discretion.”<sup>126</sup> Each state has to develop a plan to explain how it will hold schools responsible, rather than having a federal structure as in No Child Left Behind.<sup>127</sup> According to a recent Brookings Institute study, “California’s plan for improving low-performing schools essentially is *we got this*.”<sup>128</sup> Mr. Dynarski laments the fact that most of the plans indicated they would perform some sort of needs assessment and a root cause analysis but “not one of the ten plans offered an example of how that process might yield evidence-based interventions that schools could implement.”<sup>129</sup> On the positive side, five states, including Michigan, “indicated they would set up ‘clearinghouses’ or listings of interventions that have been vetted for evidence of their effectiveness.”<sup>130</sup> Another article notes that chronic absenteeism is “by far the most popular non-academic indicator” in the

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122. *Id.*

123. *Id.* at 1333.

124. *Id.* at 1333-34.

125. *Id.* at 1334-35. It is required only in schools “that fail to meet the locally developed improvement plan for four years,” and that are “performing in the bottom 5 percent and high schools with graduation rates below 66 percent.” *Id.* at 1334-35.

126. *See id.* at 1334-35.

127. *See* Mark Dynarski, *State Plans Under the Every Student Succeeds Act: Where is the Research?*, BROOKINGS at 1.2 (Nov. 2, 2017), <https://www.brookings.edu/research/state-plans-under-the-every-student-succeeds-act-where-is-the-research/> (explaining the author’s sample of ten states to show their how they implement K-12 enrollment plans).

128. *Id.*

129. *Id.*

130. *Id.*



recently submitted ESSA plans.<sup>131</sup> Chronic absenteeism is defined in many, but not all states, as missing 10 percent or more of the school year, which seems to be a tipping point for greater problems.<sup>132</sup>

Some say that federal policy undermines the notion of equal educational opportunities and has taken an increasingly “hands-off” approach to ensuring states provide adequate education.<sup>133</sup> On the issue of federal power, Professor Black notes that the statutory framework “suggests the Secretary [of Education] has no power unless the Act expressly provides otherwise.”<sup>134</sup> The Secretary “is prohibited from reviewing or requesting changes to a state’s academic standards,” and not surprisingly, the Act “directs the Secretary to take steps to reduce the size of the Department once it completes the initial task required to implement the ESSA.”<sup>135</sup>

In summary, Professor Black notes three basic flaws in the ESSA.<sup>136</sup> First, states maintain greater discretion in creating and setting goals for evaluating school performance; second, there are no specific remedies or interventions for when the schools underperform relative to their own measures; and third, the ESSA undermines past efforts to ensure “equal access to resources,”<sup>137</sup> by increasingly taking a “hands-off” approach as to ensure states provide adequate education.<sup>138</sup> The powers of the Secretary of Education are reduced to whatever is expressly stated in the ESSA,<sup>139</sup> and the Secretary’s staff is expected to be reduced as well.<sup>140</sup> Professor Black notes that the ESSA essentially “abandons both inputs and outputs as levers for equality,” and instead,

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131. Elissa Nadworny, *Most States Plan to Use Student Absences to Measure School Success*, NPR (Sep. 26, 2017), <https://www.npr.org/sections/ed/2017/09/26/550686419/majority-of-states-plan-to-use-chronic-absence-to-measure-schools-success>.

132. *Id.*

133. *Abandoning the Federal Role*, *supra* note 120, at 1331-32.

134. *Id.* at 1337.

135. *Id.* at 1337-38.

136. *Id.* at 1313.

137. *Id.* at 1313.

138. *See, e.g., id.* at 1312 (“[T]he ESSA reverses the federal role in education and returned nearly full discretion to the states.”).

139. *Id.* at 1337. Professor Black notes that the statutory framework “suggests the Secretary [of Education] has no power unless the Act expressly provides otherwise.” *Id.*

140. *Id.* at 1337-38. The Secretary “is prohibited from reviewing or requesting changes to states’ academic standards,” and not surprisingly, the ESSA also “directs the Secretary to take steps to reduce the size of the Department to complete the initial task required to implement the ESSA.” *Id.* at 1337-38.

The ESSA undermines its own *raison d'être*: improving education for low-income students by providing federal resources where states fall short. In place of this historical premise, the ESSA provides that states should decide the level of resources students receive and the standards to which they aspire. It removes the federal government from education at the cost of equal education for low-income students.<sup>141</sup>

Professor Black proposes several steps to remedy these flaws and promote what he believes is the essential mission of the ESSA.<sup>142</sup> First, he suggests that the Act should be written to “mandate that states fund schools serving predominantly low-income students at a level equal to or higher than other schools, and in the long term . . . mandate that they fund such schools at proportionately higher levels.”<sup>143</sup> His second remedy is that the federal government “substantially increase its own funding for low income students . . . from the current \$15 billion to \$45 billion.”<sup>144</sup> The third solution that he proposes is to make a large investment in preschool education in the short term.<sup>145</sup>

Teacher quality remains an issue, and the ESSA seems to exacerbate existing disparities. Teachers account for “roughly 80 percent of state and local education budgets,”<sup>146</sup> and “the sad reality . . . is that students attending predominantly poor and minority schools are assigned to novice, unqualified, and ‘out-of-field’ teachers at twice the rate of students in low poverty schools and predominately white schools.”<sup>147</sup> Some districts like the Los Angeles Unified School District are facing teacher shortages; after shrinking the workforce during the recession, the district is having trouble filling the vacancies and keeping up with credentialing new teachers at the rate that other teachers are leaving.<sup>148</sup> Despite this crisis, Professor Black points out that

[T]he ESSA’s only substantive teacher requirement is that states ensure teachers are certified. However, that certification is the equivalent of the bare minimum to enter the classroom, not an aspirational quality standard. In this respect, the ESSA does no

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141. *Id.* at 1314.

142. *Id.* at 1315.

143. *Id.*

144. *Id.* at 1315-16.

145. *Id.* at 1316-1317.

146. *The Constitutional Compromise*, *supra* note 75, at 441.

147. *Id.* at 442, 445.

148. *Id.* at 443.

more than require states to follow the same type of certification processes they have followed for decades—processes that have yet to effectively ensure equal access to quality teaching. The ESSA arguably takes a step backward on this score. By sanctioning “alternative certification” and fast-track “educator preparation programs,” the Act in effect, authorizes and encourages states to dip below traditional certification qualification processes. In short, under the ESSA, a certified teacher is anyone the state certifies to teach.<sup>149</sup>

The next section provides a brief analysis of the ESSA plans that several states have submitted.

### *B. Assessing Select State ESSA Plans*

Bellwether Education Partners assessed California’s draft ESSA plan and noted that it has “identified a high-quality set of accountability indicators that will measure student performance against college-and career-readiness benchmarks,” and also that it made use of stakeholder feedback in developing its plan.<sup>150</sup> This report identified several weaknesses with California’s plan including the dashboard accountability system; the problem with this system is that “it is unclear how it will be measured and incorporated into an overall measure of school quality.”<sup>151</sup> Secondly, “the current method of measuring growth does not actually capture individual students’ improvement over time. Instead, it only tracks year-over-year changes at the *school* level which is susceptible to differences in the student population enrolled in a given school in a given year.”<sup>152</sup> It is also not clear how subgroup performances within schools would be factored into the school ratings.<sup>153</sup>

The Bellwether evaluation of Michigan’s ESSA plan counts among the plan’s strengths “the inclusion of science and social studies assessments in the accountability system and an indicator that measures student time with fine arts, music, [physical education,] and access to library specialists.”<sup>154</sup>

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149. *Abandoning the Federal Role*, *supra* note 120, at 1336.

150. BELLWEATHER EDUCATION PARTNERS, AN INDEPENDENT REVIEW OF CALIFORNIA’S DRAFT ESSA PLAN 1 (2017), [https://bellwethereducation.org/sites/default/files/BW\\_ESSA\\_Pre-Review\\_CA\\_Final\\_0.pdf](https://bellwethereducation.org/sites/default/files/BW_ESSA_Pre-Review_CA_Final_0.pdf)

151. *Id.* at 2.

152. *Id.* (emphasis in original).

153. *Id.*

154. BELLWEATHER EDUCATION PARTNERS, AN INDEPENDENT REVIEW OF ESSA STATE PLANS: MICHIGAN 2 (2017), <https://bellwethereducation.org/sites/default/files/>

Its biggest weaknesses are that it is “incomplete and provides insufficient details to adequately review,” and “is missing key elements that are required in order for the state to receive federal education funding.”<sup>155</sup>

The Mississippi evaluation by Bellwether finds several strengths, including “a strong focus on raising student achievement and accelerating college and career readiness,” through setting “ambitious goals.”<sup>156</sup> The grading system is clear and easy to understand (A through F), and “calls for a reassessment of these thresholds in the future to ensure the rigor of the school grades.”<sup>157</sup> They also include elements aimed at boosting performance in science and social studies.<sup>158</sup> The report also finds, as to low performing schools, the Mississippi proposal has a “rigorous intervention” program that will “enable the lowest-performing schools to receive the attention and support needed to improve.”<sup>159</sup> The biggest critique of the Mississippi plan is that it “does not directly include subgroup performance in its A-F school grades,” and could also “have benefited from the exclusion of a non-test-based indicator for elementary/middle schools, such as chronic absenteeism,”<sup>160</sup> which many state plans are addressing.<sup>161</sup>

The next section examines the recent education litigation in some of these states.

### C. Recent Education Litigation in Select States

One author identifies three “waves” of school finance litigation, starting with *Brown v. Board of Education* and *San Antonio Independent School District v. Rodriguez*,<sup>162</sup> and suggests that we may be experiencing the beginning of a “fourth wave” because some recent cases “seek to address the deeper roots of inequitable opportunities connected to race, language, and ethnicity in addition to more traditional claims focused on high needs

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Bellwether\_ESSA\_PlanReview\_MI\_Final.pdf

155. *Id.*

156. BELLWETHER EDUCATION PARTNERS, AN INDEPENDENT REVIEW OF ESSA STATE PLANS: MISSISSIPPI 2 (2017), [https://bellwethereducation.org/sites/default/files/Bellwether\\_ESSA\\_PlanReview\\_MS\\_Final.pdf](https://bellwethereducation.org/sites/default/files/Bellwether_ESSA_PlanReview_MS_Final.pdf).

157. *Id.*

158. *Id.* at 5.

159. *Id.* at 2.

160. *Id.*

161. *Id.* at 3.

162. David G. Hinojosa, “Race-Conscious” School Finance Litigation: Is a Fourth Wave Emerging?, 50 U. RICH. L. REV. 869, 871-72 (2016). This article examines two current cases, *Martinez v. New Mexico* and *Silver v. Halifax County School Bd. Assoc.*

students.”<sup>163</sup> Cases in North Carolina and New Mexico provide two examples of seeking to “make greater returns” than the limited results that so many of the equality- or adequacy-based school finance litigation in the past have achieved.<sup>164</sup> California cases provide some more detailed analysis of the impact of teachers in impoverished school districts and show the difficulty, even after a win in the trial court, of pursuing educational remedies.<sup>165</sup> Cases in Michigan and Mississippi demonstrate the difficulty in bringing adequacy and equality challenges in the trial courts, and a case in Pennsylvania provides a ray of hope.<sup>166</sup>

### 1. *New Mexico*

In *Martinez v. New Mexico*, *Latinx* and Native American parents assert that their children are deprived of a uniform and sufficient education because their schools lack adequate and necessary resources and the curricula do not include “multiculturalism and bilingualism into the basic fabric of a sufficient education.”<sup>167</sup> The New Mexico public school system is 60 percent *Latinx*, 25 percent Caucasian, 10 percent Native American, 2 percent African-American, and 1 percent Asian Pacific Islander, and the plaintiffs assert a 10 percent additional financial allocation for at-risk students is arbitrary and far too low.<sup>168</sup> The plaintiffs also argue on behalf of students with disabilities, which constitute approximately 14% of the population.<sup>169</sup>

### 2. *North Carolina*

In *Silver v. Halifax County*, plaintiffs sued due to the disparate resource

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163. *Id.* at 874-75.

164. *Id.* at 871.

165. See generally *Vergara v. State*, 209 Cal. Rptr. 3d 532, 542 (Cal. Ct. App. 2016) (noting that teacher effectiveness has long-term impacts on student outcomes); *Campaign for Quality Educ. v. State*, 246 Cal. App. 4th 896, 909-10 (2016) (holding that there is no right to a certain quality of education under the California Constitution).

166. *Mot. to Vacate at, 1, Williams v. Bryant*, No. 3:17-cv-404, 2017 WL 2255288 (S.D. Miss. May 23, 2018) (arguing that the court improperly dismissed a complaint based on inadequate education in Mississippi); *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414, 457, 463 (Pa. 2017) (holding that plaintiffs’ claims under the Pennsylvania Constitution’s Education and Equal Protection Clauses were justiciable); see also *Detroit Students to Appeal Decision Denying Right of Access to Literacy and a Basic Education*, PUBLIC COUNSEL (July 2, 2018), <http://www.publiccounsel.org/stories?id=0254> [hereinafter *Detroit Students*].

167. Hinojosa, *supra* note 162, at 876-77.

168. *Id.* at 879.

169. *Id.* at 879.

allocation between two overwhelmingly African-American districts and one majority white district. Plaintiffs' allegations include that the majority white district drew its boundaries "during the Jim Crow era in 1907 to include areas outside the city limits which were (then and now) majority-white neighborhoods, while excluding at least three majority-African-American neighborhoods located within the city limits."<sup>170</sup> The plaintiffs assert there is a racial stigma that results from this structure.<sup>171</sup> The school board moved to dismiss the complaint and the court granted that motion.<sup>172</sup> This decision was later affirmed by the Supreme Court of North Carolina.<sup>173</sup>

### 3. *California*

California considered the adequacy and equality arguments described above, and similar questions, in the case of *Vergara v. State of California*. There, the plaintiffs alleged that certain employment provisions for public school teachers violated the Equal Protection Clause of the California Constitution, specifically by retaining more inexperienced and low quality teachers in schools with greater proportions of low income and minority students.<sup>174</sup> After a full trial, the court determined that the Education Code statutes impacted the children's fundamental right to equality of education and disproportionately burdened minority and poor students, but that decision was stayed while the defendants appealed, and the appellate court reversed the judgment in April 2016.<sup>175</sup> The appellate court had concerns about the identified groups of students who were allegedly denied equal protection because of the challenged statutes.<sup>176</sup>

The plaintiff students were divided into two groups; Group One plaintiffs were those who "received a lesser education than students not assigned to grossly ineffective teachers."<sup>177</sup> The Group Two plaintiffs included minority and economically disadvantaged students whose schools "have more than their proportionate share of grossly ineffective teachers, making assignment to a grossly ineffective teacher more likely for a poor and/or minority

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170. *Id.* at 886.

171. *Id.*

172. *Id.* at 890.

173. *Silver v. Halifax Cty. Bd. Of Comm'rs*, No. 338A17 (N.C. Dec. 21, 2018).

174. *Vergara v. State of California*, 209 Cal. Rptr. 3d 532, 649 (Cal. App. Dep't Super. Ct. Dec. 13, 2013).

175. *Id.* at 538, 558.

176. *Id.* at 553-57.

177. *Id.* at 540.

student.”<sup>178</sup> At trial, numerous witnesses “testified that highly ineffective teachers impede a child’s access to reasonable education. Furthermore, although a host of factors, including child poverty and safety, affect student achievement, teachers nevertheless have a highly important and significant impact on student learning.”<sup>179</sup>

The appellate court reasoned that, because the plaintiffs’ challenge is a facial challenge to the constitutionality of the subject statutes under the Education Code, there was no violation unless the violation “flows inevitably from the statute, not the actions of the people implementing it.”<sup>180</sup> The court concluded that “it is clear that the challenged statutes here, by only their text, do not inevitably cause poor and minority students to receive an unequal, deficient education. With respect to students, the challenged statutes do not differentiate by any distinguishing characteristic, including race or wealth.”<sup>181</sup>

The court provided a bit of hope to the plaintiffs by stating that the plaintiffs *may* have been able to prove that *any* implementation of the statutes would inevitably result in higher percentages of grossly ineffective teachers being sent to low income and minority schools, but “no such showing was made.”<sup>182</sup> Instead, the evidence at trial firmly demonstrated that staffing decisions, including teacher assignments, are made by administrators, and that the process is guided by teacher preference, district policies, and collective-bargaining agreements.”<sup>183</sup>

The court also found that one necessary requisite to an Equal Protection violation is “a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.”<sup>184</sup> The court rejected the plaintiffs’ argument that when a fundamental right is at issue there need not be any identifiable group, noting that “indeed, every Equal Protection case based on the infringement of a fundamental right has involved a class identified by some characteristic other than asserted

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178. *Id.*

179. *Id.* at 543.

180. *Id.* at 555 (internal citations omitted).

181. *Id.*

182. *Id.* at 555-56.

183. *Id.* at 556. The statutes themselves do not specifically instruct the administrators where to transfer or how to assign teachers and therefore a facial challenge would not succeed. The court discussed evidence of the unfortunate “dance of the lemons,” where the principals engage in negotiations to move their poorest performing teachers out of their own schools and into other schools elsewhere in the district. *Id.* at 544, 557.

184. *Id.* at 551 (quoting *Cooley v. Sup. Ct.*, 29 Cal. 4th 228, 253 (2002)).

harm.”<sup>185</sup> Here, the court found that the two groups were distinguishable in only one respect—those “unlucky” students whose constitutional rights were violated and the other students whose rights were not violated.<sup>186</sup>

The court explained that the challenged statutes do not specify which students would be the “unlucky ones,” and that under plaintiffs’ Group One theory, an unlucky subset of students will inevitably be assigned to grossly ineffective teachers. The chances this will happen to any individual student, however, is random, as the challenged statutes do not make any one student more likely to be assigned to a grossly ineffective teacher than any other student.<sup>187</sup>

What the appellate court failed to address is why this so-called “random assortment” of students ends up being predominantly low-income and minority.<sup>188</sup> On the issue of the high number of inexperienced teachers and the higher number of layoffs at low income and minority schools, the court lamented the resulting “deplorable staffing decisions,”<sup>189</sup> but found that the statutes were not the cause.<sup>190</sup>

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185. *Id.* at 554.

186. *Id.* at 553 The Court explained, “here, the unlucky subset is not an identifiable class of persons sufficient to maintain an equal protection challenge,” as Group One students are defined as those who are assigned to grossly ineffective teachers. *Id.* The court continued, “such a circular premise is an insufficient basis for a proper equal protection claim. To avoid this circularity, a group must be identifiable by a shared trait other than the violation of the fundamental right.” *Id.*

187. *Id.* at 554. The court went on to explain, “[t]hus, the unlucky subset is nothing more than a random assortment of students. Moreover, because [according to the trial court’s findings] approximately 1 to 3 percent of California teachers are grossly ineffective, a student in the unlucky subset one year will likely not be the next year, meaning that the group is subject to constant flux. The claimed unlucky subset, therefore, is not an identifiable class sufficient to maintain an Equal Protection claim, and the judgment, insofar as it is based on plaintiffs’ Group 1 theory, cannot be affirmed.” *Id.*

188. *Id.* at 556. The court did recognize that “according to trial testimony, some principals rid their schools of highly ineffective teachers by transferring them to other schools, often too low-income schools. This phenomenon is extremely troubling and should not be allowed to occur, but it does not inevitably flow from the challenged statutes, and therefore cannot provide the basis for a facial challenge to the statutes.” *Id.*

189. *Id.* at 557 (“[T]he evidence also revealed deplorable staffing decisions made by some local administrators that have a deleterious impact on poor and minority students in California’s public schools.”).

190. *Id.* (“[A]gain, while plaintiffs identified a troubling problem, they have not properly targeted the cause. The challenged statutes do not inevitably lead to the assignment of more inexperienced teachers to schools serving poor and minority children. Rather, assignments are made by administrators and are heavily influenced by teacher preference and collective-bargaining agreement”).



After the appellate court's ruling, a petition was filed in the Supreme Court of California and that petition for review was denied. Three judges felt that the petition should be granted and Justice Liu<sup>191</sup> and Justice Cuéllar, both of whom are former professors, wrote opinions dissenting from the denial.<sup>192</sup> While Justice Liu did not take issue with the treatment of the Group Two category, he found a likely error in the Court of Appeal's determination that Group One was not an identifiable class sufficient to support an Equal Protection challenge.<sup>193</sup> He lamented the court's denial of this petition and another petition in *Campaign for Quality Education v. California*,<sup>194</sup> on the same day noting that,

[B]oth cases ultimately present the same basic issue: whether the education clauses of our state constitution guarantee a minimum level of quality below which our public schools cannot be permitted to fall. This issue is surely one of the most consequential to the future of California.<sup>195</sup>

Justice Cuéllar's dissent focused on the undue burden to fundamental interests, noting that the Court of Appeal appeared to conflate two analyses by requiring a classification in addition to an infringement on a fundamental right.<sup>196</sup> He also reasoned that randomness does not excuse otherwise infringing government conduct.<sup>197</sup> While Justice Cuéllar acknowledged that

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191. *Id.* at 558. Justice Liu wrote the article cited above before he joined the court.

192. *Id.* at 558-59 (Liu, J., concurring) (“[B]ecause the questions presented have obvious statewide importance, and because they involve a significant legal issue on which the Court of Appeal likely erred, this [court] should grant review. The trial court found, and the Court of Appeal did not dispute, that the evidence in this case demonstrates serious harms. The nine schoolchildren who brought this action, along with the millions of children whose educational opportunities are affected every day by the challenge statutes, deserve to have their claims heard by the state’s highest court.”).

193. *Id.* at 560 (Liu, J., concurring).

194. *See generally* *Campaign for Quality Educ. v. Cal.*, 246 Cal. App. 4th 896 (Cal. Ct. App. 2016).

195. Vergara, 209 Cal. Rptr. 3d at 563 (Liu, J., concurring).

196. *Id.* at 566 (Cuéllar, J., dissenting) (“[T]he Court of Appeal failed to appreciate the distinction we have drawn between claims involving a fundamental interest and those centered on a suspect class. To state a fundamental interest claim sounding in Equal Protection, the alleged disparate treatment need not be focused on a suspect class. When a fundamental interest is at stake, the sole preliminary inquiry is whether the challenged law has a real and appreciable impact on the exercise of that interest. If it does, the law will be invalidated unless the state can show it is necessary to achieve a compelling government interest.”).

197. *Id.* at 566-67 (Cuéllar, J., dissenting) (contending that the randomness of the teacher and student assignment does not save the infringement on the right nor is it

sometimes arbitrariness can render a government decision legitimate, he recognized a limitation that “where an appreciable burden results—thereby infringing a fundamental right—arbitrariness seems a poor foundation on which to buttress the argument that the resulting situation is one that should not substantially concern us.”<sup>198</sup>

One important point of Justice Cuéllar’s dissent is that the Court of Appeal applied a more stringent standard as to the facial constitutional challenge by requiring proof that in *every* application the challenged statute must necessarily infringe on the constitutional right, rather than showing that the infringement occurs “in the vast majority of the law’s applications.”<sup>199</sup> At the trial level, “the evidence ‘shock[e]d the conscience,’” and Justice Cuéllar concluded it is “those staggering failures that threaten to turn the right to education for California school children into an empty promise. Knowing the difference is as fundamental as education itself. Which is why I would grant review.”<sup>200</sup>

The other denial of certiorari case<sup>201</sup> involved an appellate court ruling that the California Constitution does not provide “for a [sic] education of ‘some quality’ that may be judicially enforced by appellants,” even though they recognized that “there can be no doubt that the fundamental right to a public school education is firmly rooted in California law.”<sup>202</sup> The appellants argued for an implicit right to education of some quality, but the court concluded it is “not at liberty to infer the existence of a constitutional right based on well-established principles of constitutional interpretation that counsel otherwise.”<sup>203</sup>

In addition, the court rejected the appellants’ secondary argument that the

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grounds to deny any protection challenge, and noting that his “doubts are grave about whether one could articulate a reasonable understanding of fundamental rights under the California Constitution that would contenance the imposition of material burdens on those rights without strict scrutiny or even the opportunity for judicial review under any standard, so long as those burdens were imposed largely at random”).

198. *Id.* at 567 (Cuéllar, J. dissenting).

199. *Id.* at 568-69 (Cuéllar, J., dissenting) (“[W]hat determines instead whether plaintiffs have succeeded in making such a challenge is whether they must prove the constitutional conflict in all of the statute’s applications, or in just the great majority of them. This is precisely the uncertainty we could have clarified by granting review”).

200. *Id.* at 570 (Cuéllar, J., dissenting)..

201. *See generally* Campaign for Quality Educ. v. California, 246 Cal. App. 4th 896 (Cal. Ct. App. 2016).

202. *Id.* at 906.

203. *Id.* at 909.

legislature' allocation of funds violated the Constitution as unequal, finding that the appellants "cannot show that the constitutional provisions they invoke restrict legislative discretion in allocating funds for the education of public school children."<sup>204</sup> The court reasoned that allowing a judicial remedy for the inequalities of public education would interfere in the legislature's political decisions on funding priorities.<sup>205</sup>

When the California Supreme Court denied the petition for review, Justices Liu and Cuéllar again filed dissenting statements.<sup>206</sup> Justice Liu asserted that "because this case presents unsettled questions of the utmost importance to our state and to and its school children, the petition before us readily meets our criteria for review."<sup>207</sup> Harkening back to the notion of education as a prerequisite to meaningful citizenship described in Part II.B., Justice Cuéllar also dissented on the grounds that "meaningful access to public education is foundational not only to economic opportunity for millions of students, but to our shared civic life. But what good are such judicial exhortations [asserting the fundamental right to education] if that right has no meaningful content?"<sup>208</sup>

#### 4. *Michigan*

On the issue of adequate and equal education, recent Michigan cases addressed involved how disproportionate literacy rates may violate students' civil rights.<sup>209</sup> Public Counsel, a public interest firm, filed a class action complaint in September 2016 against the Governor of Michigan, the Board of Education, and the Superintendent of Public Education, among others, alleging violations of 42 U.S.C. § 1983, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, discrimination on the basis of race and violations of Title VI of the Civil Rights Act, seeking

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204. *Id.* at 912.

205. *Id.* at 914-16.

206. *Id.* at 935.

207. *Id.* at 935 (Liu, J., dissenting).

208. *Id.* at 928, 933, 935 (Cuéllar, J., dissenting) ("It is especially important for California's highest court to speak on this issue. Our state educates one-eighth of all public school students in the country . . . . Many of those kids who come from low-income families find themselves concentrated in particular schools or districts that, despite the best intentions, fail to deliver an education remotely worthy of the students they are serving. These realities make it all the more critical that the representative branches play a crucial role that belongs to them, but with greater clarity about the scope of the right to education—clarity only this court can provide.").

209. Complaint at 1-2, Gary B. v. Richard Snyder, 329 F. Supp. 3d 344 (E.D. Mich. Sept. 13, 2016) (No. 2:16-cv-13292).

declaratory and injunctive relief.<sup>210</sup> The complaint detailed inadequacies and disparities between the predominantly white school districts and the predominantly African-American school districts in Detroit, Michigan.<sup>211</sup>

The Eastern District of Michigan determined that the defendants were proper parties,<sup>212</sup> and were not immune under the Eleventh Amendment.<sup>213</sup> In addition, the court found that the plaintiffs satisfied all of the elements for standing,<sup>214</sup> and rejected the defendant's argument that res judicata barred the litigation.<sup>215</sup> Even so, the court granted the defendants' motion to dismiss the case.<sup>216</sup>

In addressing the constitutional questions, the court performed a brief historical evaluation of the state education funding mechanism cases decided by United States Supreme Court.<sup>217</sup> The District Court concluded, "Supreme Court has neither confirmed nor denied that access to literacy is [sic] a fundamental right. The court must therefore cautiously take up the task."<sup>218</sup> The court then recognized the reluctance to expand substantive Due Process rights, noting that "even when the Supreme Court has ventured to recognize a right as fundamental, it has typically limited them to 'negative rights'—i.e., the right to be free from restraint or barrier."<sup>219</sup>

The court then analyzed how this case could be viewed as either a positive right or negative right case and while the complaint used language of negative rights the court found that

[T]he relief sought is exclusively positive in nature: Plaintiffs believe that Defendants must implement "evidence-based programs for literacy instruction and intervention," universally screen students for literacy problems, and establish an accountability system, to name a few . . . . In sum, the Complaint points exclusively to a positive-right argument: Plaintiffs are entitled to a minimum level of instruction on learning to read, yet the state, vis-

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210. *Id.* at 123.

211. *Id.* at 50.

212. Gary B. v. Snyder, 313 F. Supp. 3d 852, 862 (E.D. Mich. 2018).

213. *Id.* at 866.

214. *Id.* at 863-65.

215. *Id.* at 867.

216. *Id.* at 877.

217. *Id.* at 868-70.

218. *Id.* at 871.

219. *Id.* at 872 (citing *Deshaney v. Winnebago City Dep't. of Soc. Servs.*, 489 US 189, 195-96 (1989)).

à-vis Defendants, has failed to give it to them.<sup>220</sup>

The court recognized that literacy is greatly important, “but these those points do not necessarily make access to literacy a fundamental right.”<sup>221</sup> The court noted “[t]he history evinces a deep American commitment to education, but runs counter to the notion that ordered society demands that the state provide one. The conclusion that education is not a fundamental right is arguably implicit even in *Brown v. Board of Education*,” noting that it is only “where the state has undertaken to provide it” that it must be available on equal terms.<sup>222</sup> In effect, the court was relying on the idea that equality and adequacy are separate issues.

The court explained that state courts, when they do find a right to a minimum level of education, do so based on state constitutions “and Michigan has not even found that.”<sup>223</sup> Michigan’s state constitution contains no right to education. The court mused, “does the Due Process Clause demand that a State affirmatively provide each child with a defined, minimum level of education by which the child can attain literacy? Based on the foregoing analysis, the answer to the question is no.”<sup>224</sup> Without a fundamental right to education in the state constitution, the court found that there was no federal constitutional right either, and thus no relief would be appropriate.<sup>225</sup>

Next, the court addressed the Equal Protection argument that the plaintiffs are denied the fundamental right of access to literacy by intentional discrimination based on race.<sup>226</sup> The court understood that Michigan schools as a whole would not be the proper comparative group, and found that the plaintiffs here did not pick the right comparative group, as all students within the Detroit School District are similarly denied the educational opportunities.<sup>227</sup> Because access to literacy, the court held, is not a fundamental right, then there is no equal protection claim “on the basis of burdening a fundamental right.”<sup>228</sup>

The court also found there was no specific targeting of a suspect class

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220. *Id.* at 873.

221. *Id.*

222. *Id.* at 874 (citing *Brown v. Bd. of Educ.*, 347 US 483, 493 (1954)).

223. *Id.* at 876.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 875-76.

because there was no evidence of schools with other racial makeups being treated differently.<sup>229</sup> Finally, the court concluded that rational basis is a “forgiving standard,” but the plaintiffs’ mere statement that the defendants cannot meet that test, without any evidence to support irrationality, fails to state a claim.<sup>230</sup> Therefore, the case was dismissed with prejudice.<sup>231</sup> The students and their parents planned to appeal the ruling to the Sixth Circuit Court of Appeals, according to the Public Counsel website.<sup>232</sup>

### 5. *Mississippi*

In the Mississippi case of *Indigo Williams v. Phil Bryant*, the defendants are the Governor of Mississippi, as well as other state officials and representatives from the Board of Education.<sup>233</sup> It was filed in May 2017 in the United States District Court for the Southern District of Mississippi.<sup>234</sup> The case involved four African-American mothers suing the state for denying equal educational opportunity to their children by failing to maintain a “uniform system of free public schools.”<sup>235</sup> The complaint detailed the role of education in readmission to the union after the Civil War for many Southern states and alleged that the state Constitution was required to be amended both to provide a republican form of government, but also to ensure that students would not be deprived of education rights and privileges by the state.<sup>236</sup>

The complaint also detailed the disparities in percentages of students proficient in math, percentages of teachers in the first year of teaching, and percentages of students proficient in reading in disparate districts, which were largely distinguished based on the percentage of ethnic and racial minorities in those districts.<sup>237</sup> The trial court dismissed the complaint.<sup>238</sup> The parties are now seeking leave to either have the final judgment vacated and the state’s motion to dismiss denied or change the dismissal with

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229. *Id.*

230. *Id.* at 876-77.

231. *Id.* at 877.

232. *Detroit Students*, *supra* note 166.

233. *See* Compl. at 1, *Williams v. Bryant*, No. 3:17-cv-00404, 2017 WL 225288 (S.D. Miss. May 23, 2017).

234. *Id.*

235. *See id.* at 1.

236. *See id.* at 1-22.

237. *See id.* at 26.

238. *Williams v. Bryant*, No. 3:17-cv-404, 2017 WL 2255288 , at \*8-9 (S.D. Miss. May 23, 2018).

prejudice to a dismissal without prejudice.<sup>239</sup> A supporting declaration<sup>240</sup> notes that by the early 1900's,

Mississippi spent ten times more per white student than black student. African Americans' school year revolved around cultivating and harvesting cotton. Black schoolhouses were dilapidated facilities. In 1946, only one in ten school-age black child was enrolled [in] Mississippi's public schools. The post-1890 devolution of black education can be traced directly to the 1890 Constitution.<sup>241</sup>

Mississippi, like some other states, ignored even *Plessy*'s mandate as the history of the segregated and unequal school systems recognizes. As a result, schools in low income districts are more likely to perform worse on average than those in high income districts. One scholar noted:

Particularly in Mississippi . . . these school districts can often be traced back to being predominantly black or white, with districts that consist of a majority of African-American students performing worse on average. In fact, only one predominantly black school

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239. Motion to Vacate at 5, *Williams v. Bryant*, No. 3:17-cv-404, 2017 WL 2255288 (S.D. Miss. May 23, 2018).

240. See Declaration of Professor Vernon Burton at 1, 4-15, *Williams v. Bryant*, No. 3:17-cv-404, 2017 WL 2255288 (S.D. Miss. May 23, 2017) (discussing how education was fundamental to a republican form of government and central to restructuring Southern society, and providing a brief overview of southern school systems during the Reconstruction, including details about the Mississippi State Constitutional Convention from 1868 and the opening of public schools in October 1870).

241. *Id.* at 17; see also Drew Hall, *The Mississippi Adequate Education Program: An Overview and Policy Proposal*, 8-13 (May 2018) (unpublished B.A. thesis, University of Mississippi) (on file with the Sally McDonnell Barksdale Honors College, University of Mississippi). Mississippi passed the adequate education program in 1997 and "aimed to eliminate disparities between school districts by requiring each district to provide a portion of the base fund while the state covered the rest. The local contribution could not exceed 27 percent of the overall program cost, and the state would provide the remaining 73 percent for each district." *Id.* Mississippi did these calculations every four years but the calculations did not solve the disparities problem, and twenty-one school districts challenged the calculations in the Mississippi Supreme Court in February 2017. The issue seems to be that the state provides the 73% to each District, regardless of how much that District can afford, and the Districts have discretion to either set their tax base so that they get the remaining 27 percent, or they can use another formula of 28 mills, which is the dollar amount of school district taxes per \$1000 value. Thus, the richer districts opt to use the 28 mills formula which means they get more than 27 percent needed for their schools and therefore their schools are funded at a higher rate. The author cites counties with lower property values so the 28 mill value is less than 27 percent, and another with a higher property value so that the 28 mill calculation resulted in 15 million additional dollars for that school district. *Id.*

district in the state achieved an “A” rating in 2016: the Clinton School District, located in the Jackson area. Clinton could also be considered an outlier due to the city’s 14.3 percent poverty rate compared to the state average of 20.8 percent.<sup>242</sup>

#### 6. *Pennsylvania*

The Supreme Court of Pennsylvania decided *William Penn School District v. Pennsylvania Department of Education* on September 28, 2017.<sup>243</sup> In doing so, the court reversed a decision by the intermediate court and held that whether the Commonwealth’s system of funding public education violated its state constitutional education clause and equal protection clauses were two justiciable claims.<sup>244</sup> Recognizing that the courts must be involved in disputes that interpret the laws of the Commonwealth as part of their constitutional duty, the court did not shy away from facing head-on the criticism of this being a political question.<sup>245</sup> The court then examined the textual commitment, the judicially manageable standards, and initial policy determinations, and held that “petitioners’ claims cannot be dismissed as non-justiciable.”<sup>246</sup> The court then addressed the Equal Protection Clause and noted that

“Whether Petitioners’ Equal Protection Claims are viewed as intertwined with their Education Clause claim or assessed independently, those claims are not subject to judicial abstention under the political question doctrine. It remains for petitioners to substantiate and elucidate the classification issue and to establish the nature of the right to education, if any, to determine what standard of review the lower court must employ to evaluate their

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242. Hall, *supra* note 241, at 22; *see also id.* at 28-29 (noting that several ballot measures were proposed, neither of which passed, which would have altered the state constitutional guarantee from adequate and efficient to effective); *id.* at 40 (providing some potential solutions for Mississippi, including advocating for abolishing the 27 percent rule in mandating full funding through a slightly revised ballot measure, and noting that, because the state has been unsuccessful in raising the 73 percent promised to each district, the state lacks funding and accountability to make a difference given that the legislature “has made the decision not to raise taxes in order to cover this discrepancy”).

243. *See generally* William Penn Sch. Dist. v. Pa. Dep’t of Educ., 170 A.3d 414, 414 (Pa. 2017).

244. *Id.* at 414.

245. *Id.* at 438 (suggesting that the Pennsylvania Supreme Court make decisions regardless of the political outcome).

246. *Id.* at 456-57 (explaining that the Court made its decision because of policy determinations and judicially manageable standards).



challenge. But Petitioners are entitled to the opportunity to do so.”<sup>247</sup>

Hope remains.

#### IV. POTENTIAL SOLUTIONS

As the social science evidence indicates, more research needs to be done to better understand the impact of poverty on student learning, and “the investigation of SES and neural development is a promising area of study that, by delineating environmental influences on individual differences in neurodevelopment, can refine strategies to address SES-related disparities.”<sup>248</sup> The case law provides some opportunities in a few states to explore the parameters of the right to education in ways that may focus more resources on impoverished public school students.

In the meantime, there are a number of potential interventions that may alleviate the problem of inadequate and unequal public education for our most impoverished students. Access to quality preschool services is one option that has been widely praised.<sup>249</sup>

Increasing the level of cognitive stimulation in the home is an important intervention.<sup>250</sup> For students suffering from the impacts of stress on their learning environments, one recommendation is to develop “positive feedback loops,” based on evidence that “small interventions can have large effects if they induce enduring changes in mindset.”<sup>251</sup> These effects are supported by current research about developing a “growth mindset” where improvement is seen as a possibility, in contrast to a “set mindset” that innate abilities govern success or failure.<sup>252</sup>

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247. *Id.* at 464 (determining what the petitioners must prove in order to establish the nature of the right to education).

248. *Socioeconomic Status and the Brain*, *supra* note 33, at 7.

249. *See* Rebell, *supra* note 14, at 104. Rebell notes that although there have been greater resources towards preschool services for educationally disadvantaged students, only 40 percent as of 2005 “of three-year-olds and four-year-olds from families with household incomes between \$20,000 and \$30,000 receiv[e] the services nationally.” *Id.*

250. *Socioeconomic Status and the Brain*, *supra* note 33, at 652 (“Until now, interventions have been targeted at changing SES directly by increasing family income, influencing the putative mediators of SES effects, such as parenting style, and influencing academic achievement and psychopathology through direct interventions, including educational or treatment programmes [sic] targeted at low-SES communities.”).

251. Raizada & Kashiyama, *supra* note 26, at 6-7.

252. *Id.* at 7.

Other options for further exploration include making greater efforts to diversify the teacher force to provide more males and women of color in the classroom. The majority of public school teachers are white, non-Hispanic women,<sup>253</sup> and they become early role models for male and female students alike. Revising policies, like those upheld in *Vergara* in California, which granted tenure after as little as two years of teaching, could make room for diversifying the teaching force by gender and race, thus adding males and women of color to the classroom.

Recent strikes in several states over teacher salaries have highlighted the pay equity issues in jobs that are predominately held by women. If classroom teaching becomes a job that men and women are pursuing in roughly the same numbers, and schools seek to diversify the gender composition of the teaching ranks, they may need to raise salaries for new recruits. Pay equity legislation and resulting case law may then require that the salaries for existing female teachers be raised as well. This competition between (and eventually among) the genders as well as the more equitable distribution of positions will strengthen the abilities of public schools to better serve all of their students.

Another idea is to have a state cabinet-level group focused on children holistically, in each of the fifty states, such as the “Children’s Cabinet” to focus interdisciplinary resolution of the problems of educational equity and adequacy claims.<sup>254</sup>

Fulfilling the promise of equal educational opportunity, and ensuring that poverty, policies, and practices stop impeding meaningful educational reforms will require significant commitments by federal, state, and local governments, as well as other stakeholders. The nation and each individual state have a substantial interest in preparing our low-income students to participate effectively in our democracy and exercise their rights as citizens.

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253. SOHEYLA TAIE ET AL., NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEPT. OF EDUC., CHARACTERISTICS OF PUBLIC ELEMENTARY AND SECONDARY SCHOOL TEACHERS IN THE UNITED STATES: RESULTS FROM THE 2015–16 NATIONAL TEACHER AND PRINCIPAL SURVEY: FIRST LOOK, 3 (2018), <https://files.eric.ed.gov/fulltext/ED575193.pdf>.

254. Rebell, *supra* note 12, at 110-11. Rebell notes, “[i]n at least 16 states, governors have created state-level ‘Children’s Cabinets,’ which are collaborative governance structures that seek to promote coordination across state agencies and improve the well-being of children and families.” *Id.* at 110. He also says that legal advocacy and litigation “should be accompanied by political advocacy for the inclusion of comprehensive educational opportunity in the pending ESSA reauthorization and by an ongoing political initiative to convince executive and legislative officials, at both the state and federal levels, that they are responsible for acknowledging and acting on students’ constitutional right to comprehensive educational opportunities.” *Id.*