

**DEFINING QUALITY EDUCATION AS A GOVERNMENT  
INTEREST: THE U.S. SUPREME COURT'S REFUSAL TO "PLAY  
NICE" WITH THE EXECUTIVE BRANCH, CONGRESS, STATE  
SUPREME COURTS, AND THE COMMUNITY VOICE**

*Tiffani N. Darden*\*

*The Court's equal protection doctrine threatens No Child Left Behind's mandate to close the achievement gap and the U.S. Department of Education's renewed vigor to enforce civil rights, and the execution of many state constitutional education clauses. School districts committed to quality education must overcome the Court's severely limited tolerance for racial classifications—a challenge compounded by budget deficits, demographic shifts, requirements to use social science data, and the effects of socioeconomic status. While state and federal governing bodies have reached a consensus to improve educational quality using protected classifications, the Supreme Court's equal protection doctrine hampers achieving this goal because policy makers must work within ambiguous and conflicting boundaries. Since 2009, in response to the Court's anticlassification tenor, school districts in Washington, Louisiana, and Indiana, approved magnet school programs. However, they have scrounged for money to fund this race-neutral alternative to diversity. Last year, New Mexico passed the first Hispanic Education Act aimed to close the achievement gap between Latino students and their nonminority peers. Not long thereafter, Wake County, N.C., dismantled its socioeconomic integration policy. Applying the Court's tiered scrutiny analysis, a court may hold New Mexico's legislation unconstitutional and foreclose judicial remedies to Wake County parents opposing the board's decision. In stark contrast, the Department of Education supports New Mexico's Hispanic Education Act and publically admonished Wake County school board for its actions. In this Article I propose that the Supreme Court recognize quality education, as defined by state constitutional education clauses, to be a government interest sufficient to justify the use of protected classifications. Accepting quality education as a government interest will honor Brown v. Board of Education's antisubordination legacy, create needed continuity in education law, promote deference to local officials and the democratic process, and temper the Court's colorblind ideology.*

---

\* Thank you to Dean Joan Howarth, Associate Dean Kathleen Payne, David Thronson, Matthew Fletcher, Wendy Brown Scott, Cassandra Robertson, Danielle Holley Walker, Osamudia James, Jelani Jefferson Exum, Michael Lawrence, Kristi Bowman, Wendy Parker, and Susan Bitensky for their comments on earlier drafts. Thanks also to panel participants at the Lutie Lytle Writing Workshop, Law and Society Association, Big Ten Untenured Conference, MSU Jr. Faculty Conference, Central States Law School Association Annual Conference; insights from the Wake Forest School of Law faculty; and, finally, Cassandra Talley, Andrea Nester, and Andrew Moore for invaluable research assistance.

## TABLE OF CONTENTS

INTRODUCTION .....	663
I. PAST AND PRESENT, FEDERAL AND STATE: RECOGNIZING QUALITY EDUCATION AS A GOVERNMENT INTEREST .....	671
A. Revisiting the Roots of <i>Brown</i> from a Layman’s Perspective.....	673
1. Quality Education and the Desegregation Debates .....	673
2. Lost in Translation: Conquering Quality Education Through Judicial Interpretation and Legalese .....	676
B. The Domino Effect: How the <i>Brown</i> Decision Inspired Quality Education Goals for Other Marginalized Groups .....	679
C. Contemporary Quality Education Goals: Federal and State Stakeholders Acting on One Accord .....	682
1. Federal Stakeholders: Quality Education Through the Elementary and Secondary Education Act of 1965 .....	682
2. State Stakeholders: Quality Education Through State Constitutional Education Clauses .....	684
a. From Equity to Adequacy: The Quest for More than Equal Treatment’s Promise.....	685
b. Defining Quality Education as Government Interest Through State Constitutional Education Clauses.....	690
II. THE SUPREME COURT’S RELUCTANCE TO RECOGNIZE QUALITY EDUCATION AS A GOVERNMENT INTEREST .....	692
III. TOEING THE LINE: PROTECTED CLASSIFICATIONS, EDUCATION POLICY, AND SOCIAL SCIENCE DATA .....	695
A. The Entangled Web: Congress and States Encourage Reliance on Social Science Evidence to Inform Education Policy .....	696
1. No Child Left Behind’s Goal to Close the Achievement Gap.....	698
2. The Federal Tug-of-War over the Role of “Scientifically-based Research”—Courts v. the Executive and Legislative Branches .....	699
a. The Federal Courts and Social Science Evidence .....	700
b. Congress, the Department of Education and Social Science Evidence.....	702

c. A Doctrinal Solution .....	704
B. The Inevitability of Race in Education Reform .....	705
1. NCLB's Disaggregated Reporting Requirement...	706
2. Race and State Adequate Education Goals .....	707
C. The Cooperative Effort to Educate Latino Americans...	710
1. The Executive Branch Embraces Demographic Shifts, Community, and Local Control .....	710
2. State Officials Embrace Demographic Shifts and Community.....	711
D. Intersectionality: The Complicated Dynamics to Explaining Academic Underperformance .....	713
CONCLUSION.....	717

## INTRODUCTION

The language, standards, and knowledge base adapted to understand and communicate advancements in education policies have outpaced the federal equal protection doctrine applied to examine their constitutionality. According to most state constitutions, the government's obligation is to provide a quality, not an equal, education for all children.<sup>1</sup> Education scholars endorse the consideration of multiple traits, such as race, socioeconomic status, family educational background, and social conditions of a student population when analyzing the quality or adequacy of educational policies.<sup>2</sup>

- 
- <sup>1</sup> See Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 327 (2011) (noting that "litigants began to focus their theories of state constitutional harm on the *quality* of education in a state, rather than on its mere *equality*"); Josh Kagan, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2244 (2003) (presenting a theoretical approach to defining and measuring the vague "adequacy" standard that nearly all state constitutions require of their schools); Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE 175, 188 (Helen F. Ladd et al. eds., 1999) (noting that "the adequacy approach is . . . unlike the traditional school finance cases . . . [as] adequacy cases aren't about equality . . . [but] rather about spending what is needed"); Michael A. Rebell, *Educational Adequacy, Democracy, and the Courts*, in ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL 218 (Timothy Ready et al. eds., 2002) (reviewing the history of cases addressing inequities in state education finance systems); Regina R. Umpstead, *Determining Adequacy: How Courts Are Redefining State Responsibility for Educational Finance, Goals, and Accountability*, 2007 BYU EDUC. & L.J. 281, 298 (describing how courts strive to obtain "adequacy" or adequate educational settings for students, not "equality of educational opportunity").
- <sup>2</sup> See Tierney T. Fairchild, Commentary, *Race and Class: Separate and Not Equal*, 26 EDUC. WEEK, no.3, Sept. 2006, at 35, 35-36, available at <http://www.edweek.org/ew/articles/2006/09/13/03fairchild.h26.html> (warning that classroom inequality will continue if ra-

However, the allocation of educational resources to underprivileged students results in federal claims compartmentalized as race, gender, language, or wealth discrimination.<sup>3</sup> As school officials attempt to fulfill federal and state legislative mandates, the Supreme Court's categorical treatment of protected classifications under its current equal protection doctrine has proved and will continue to prove a stumbling block.

When applying its equal protection doctrine, the Supreme Court needs to reset its priorities. Though the Court advocates equal educational opportunity, the government interests accepted to justify policies using protected classifications ignore the socio-political and governance changes experienced since *Brown v. Board of Education* in the public education context. In light of these advances, this Article argues that an equal protection analysis of education reforms should defer to the expertise of local and state school officials. To accomplish this deference, a state's interpretation of its constitutional education clause should be recognized as an important, and even compelling, government interest, irrespective of the protected classification—race, gender, or socioeconomic status—when determining constitutionality under the federal equal protection doctrine.

Communities rely on the classroom experience—shaped by school administrators, educational experts, and teachers—to positively affect their children's life pursuits. Racial minorities and poor families have employed grassroots movements, political lobbying, and the courts to ensure their children receive a quality education. Recent reforms in New Mexico and Wake County, North Carolina, aptly illustrate the incongruence between federal equal protection doctrine and the goals of policymaking bodies.

New Mexico Governor Bill Richardson, on April 5, 2010, signed into law the Hispanic Education Act, the first education statute targeted to close the achievement gap between Latino students and their white peers.<sup>4</sup> Debates on the statute's merits held in New Mex-

---

cial discrimination is conflated with concerns related to poverty and class); Debra Viadero, *Study Probes Factors Fueling Achievement Gaps*, 23 EDUC. WEEK, no.13, Nov. 2003, at 1, 12, available at <http://www.edweek.org/ew/articles/2003/11/26/13ets.h23.html> (citing that black and Latino children are disadvantaged according to each of the fourteen research-based learning indicators compiled by the Educational Testing Service).

3 16B C.J.S. *Constitutional Law* §§ 1116–1117, 1119–1120 (2011) (reproducing the strict scrutiny, intermediate scrutiny, and rational or reasonable basis tests, and matters subject thereto).

4 “The purpose of the Hispanic Education Act is to . . . provide for the study, development and implementation of educational systems that affect the educational success of Hispanic students to close the achievement gap and increase graduation rates.” Hispanic Educa-

ico's Senate and House chambers roused visceral commentary. A state senator who opposed the legislation argued that "[i]f a program or service, or if funding, is beneficial for a high risk student who is Latino it should be available to all students, regardless of race or culture."<sup>5</sup> Another legislator accused supporters of "developing a whole new generation of racism" by singling out Latino students.<sup>6</sup> The chairwoman of the New Mexico's Senate Education Committee responded that a "[o]ne-size-fits-all [strategy] is not getting the job done, and the achievement gap keeps growing."<sup>7</sup> Other legislators expressed a similar sentiment: policies tailored to address the academic challenges uniquely experienced by Latino children were needed to resolve the achievement gap.<sup>8</sup>

Garnering much more public fanfare, on March 23, 2010, the Wake County Board of Education, by a five-to-four vote, repealed its nationally acclaimed socioeconomic integration policy.<sup>9</sup> Students will now be assigned to schools located nearest their homes.<sup>10</sup> Opponents argued that neighborhood zoning would result in racial resegregation and student bodies with disproportionately high poverty rates.<sup>11</sup> The National Association for the Advancement of Colored People's ("NAACP") state president blogged that "when children are packed into the most underfunded, most segregated, most high-poverty schools, it is nothing but a form of institutionalized child abuse."<sup>12</sup> A commentator posed the critical question: "If we're going to go back

---

tion Act, N.M. STAT. ANN. § 22-23B-2 (2010); *see also* Heather Clark, *Updated: Debate Grows Over Proposed Hispanic Education Act*, ALBUQUERQUE J., Dec. 4, 2009, <http://www.abqjournal.com/news/state/aphispaniceducationact112-04-09.htm> (highlighting the debate over the need for and funding sources of the Hispanic Education Act, which aims at closing the achievement gap between Hispanic students and their white and Asian peers).

5 Marjorie Childress, *Hispanic Education Act Targets Achievement Gap*, N.M. INDEP., Feb. 4, 2010, <http://newmexicoindependent.com/46173/hispanic-education-act-targets-achievement-gap> (internal quotation marks omitted).

6 Susan Montoya Bryan, *House Passes NM Hispanic Education Act*, KRQE NEWS 13 (Feb. 10, 2010, 9:01 PM), [http://www.krqe.com/dpp/news/politics/nm\\_legislature/house-passes-nm-hispanic-education-act](http://www.krqe.com/dpp/news/politics/nm_legislature/house-passes-nm-hispanic-education-act) (internal quotation marks omitted).

7 *Id.* (internal quotation marks omitted).

8 *See Lawmakers Debate N.M. Hispanic Education Act*, EDUC. WEEK, Feb. 18, 2010, [http://www.edweek.org/ew/articles/2010/02/18/332118nmxgrhispaniceducation\\_ap.html?r=1722260786](http://www.edweek.org/ew/articles/2010/02/18/332118nmxgrhispaniceducation_ap.html?r=1722260786) (quoting New Mexico Senate Majority Leader Michael Sanchez, who stated: "People have to acknowledge that [the achievement gap] exists. This is a start.").

9 Stacy Teicher Khadaroo, *Busing to End in Wake County, N.C. Goodbye, School Diversity?*, CHRISTIAN SCI. MONITOR, Mar. 24, 2010, <http://www.csmonitor.com/USA/Education/2010/0324/Busing-to-end-in-Wake-County-N.C.-Goodbye-school-diversity>.

10 *Id.*

11 *Id.*

12 *Id.* (internal quotation marks omitted).

to a system based on [students'] home address, how do we make sure that every single kid has access to a high-performing school?"<sup>13</sup>

Prior to the vote, Wake County's superintendent resigned, candle-light vigils and rallies ensued, and officers arrested four protestors.<sup>14</sup> Once board members voted to strike the plan, the NAACP filed a formal complaint with the Department of Education's Office of Civil Rights, prompting a federal investigation.<sup>15</sup> The complaint alleged Title VI violations because school officials no longer factored diversity into student assignments and student reassignments.<sup>16</sup> AdvancED, the accreditation body for Wake County high schools, will also conduct a special review of the board's decision.<sup>17</sup>

Imagining federal litigation, to consider the constitutionality of either the New Mexico or Wake Forest reforms, strains one's fidelity to the Supreme Court's equal protection doctrine in light of quality education goals promulgated on the state and federal levels. Under the federal equal protection doctrine, protected classifications analyzed under heightened scrutiny require state actors to provide an important or compelling government interest and an appropriately tailored means.<sup>18</sup> Racial classifications demand the most rigid stan-

<sup>13</sup> *Id.* (alteration in original) (internal quotation mark omitted).

<sup>14</sup> Thomas Goldsmith & T. Keung Hui, *School Board Sit-in Ends With Arrests*, NEWS & OBSERVER (Wake County), June 16, 2010, <http://www.newsobserver.com/2010/06/16/535233/school-board-sit-in-ends-with.html>; T. Keung Hui & Thomas Goldsmith, *Citing Conscience, Wake Schools Chief Resigns*, WAKE COUNTY NEWS & OBSERVER (Wake County), Feb. 17, 2010, [www.newsobserver.com/2010/02/17/342924/citing-conscience-schools-chief.html](http://www.newsobserver.com/2010/02/17/342924/citing-conscience-schools-chief.html).

<sup>15</sup> T. Keung Hui, Thomas Goldsmith & Mandy Locke, *Wake School Board Under Probe*, NEWS & OBSERVER (Wake County), Nov. 18, 2010, <http://www.newsobserver.com/2010/11/18/810056/wake-board-under-probe.html> [hereinafter *Wake School Board Under Probe*] ("Wake County school leaders will have to defend their student assignment and discipline policies to federal civil rights investigators responding to complaints filed by the NAACP. . . . Word of the Wake review comes . . . [after school officials] discarded socioeconomic diversity as a factor in school assignment . . ."); see also T. Keung Hui, Thomas Goldsmith & Mandy Locke, *NAACP Takes Wake to Feds—Charges Aimed at School Board*, NEWS & OBSERVER (Wake County), Sept. 26, 2010, <http://www.newsobserver.com/2010/09/26/703383/naacp-takes-wake-to-feds.html> [hereinafter *NAACP Takes Wake to Feds*] ("[T]he state NAACP has launched a far-reaching legal effort to stop the transformation of North Carolina's largest school district.").

<sup>16</sup> *NAACP Takes Wake to Feds*, *supra* note 15.

<sup>17</sup> *Wake School Board Under Probe*, *supra* note 15 ("The state NAACP is also responsible for a special review being conducted by Advancing Excellence in Education Worldwide, or AdvancED, the Georgia-based group that accredits Wake's 24 high schools.").

<sup>18</sup> *E.g.*, *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that state actions using racial and national origin classifications must be narrowly tailored to serve a compelling government interest); *Craig v. Boren*, 429 U.S. 190, 197–98 (1976) (holding that state actions using gender classifications must serve an important government interest and be substantially related to stated objective).

dard of review, a compelling interest; gender classifications require an important interest; and wealth classifications require a legitimate interest.<sup>19</sup>

In New Mexico and Wake County, North Carolina, the contested education policies invoked protected classifications known to affect academic achievement, and, in both jurisdictions, advocates on either side desire quality education for public school children. Under the Court's colorblind treatment of race and national origin classifications, applying strict scrutiny, New Mexico's endeavor to commit more resources towards one ethnic group may prove unconstitutional. However, the Hispanic Education Act contains provisions expressly advocated in the White House Initiative on Educational Excellence for Hispanics, an executive order renewed last year by President Obama after the Department of Education completed an eighteen-month tour of Latino communities around the country.<sup>20</sup> Moreover, the Hispanic Education Act's purpose mirrors the statutory purpose of No Child Left Behind's ("NCLB") Title I programs, closing the achievement gap between at-risk students and their white peers.<sup>21</sup> In Wake County, proponents for socioeconomic integration may find no relief through the federal courts because wealth discrimination receives a rational basis review. However, on January 25, 2011, Arne Duncan, the United States Secretary of Education, spoke out against the district's actions in a letter to the national press.<sup>22</sup>

---

19 *E.g., Adarand Constructors*, 515 U.S. at 227 ("[Racial] classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."); *Craig*, 429 U.S. at 197-98 ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973) (noting that for issues of wealth discrimination, the standard of review "is whether the challenged state action rationally furthers a legitimate state purpose or interest").

20 See Mary Ann Zehr, *White House Renews Attention to Hispanic Education*, 30 EDUC. WEEK, no.9, Oct. 2010, at 7, available at <http://www.edweek.org/ew/articles/2010/10/27/09hispanic-2.h30.html> ("The Obama administration has renewed its commitment to key priorities in the education of Hispanic students, including reduction of the dropout rate, improved connections between pre-K12 and postsecondary education, and passage of the 'DREAM Act,' which would provide a path to legalization of some undocumented students.").

21 Compare No Child Left Behind, 20 U.S.C. § 6301 (2006), with Hispanic Education Act, N.M. Stat. Ann. § 22-23B-2 (2010) (noting the similarities in the purposes of the federal and state education statutes).

22 *Duncan Chides Wake County for Dropping Diversity Plan*, 30 EDUC. WEEK, no.18, Jan. 2011, at 5, available at <http://www.edweek.org/ew/articles/2011/01/26/18brief-5.h30.html> ("U.S. Secretary of Education Arne Duncan has criticized a decision last year by North Carolina's largest school district to end its program of busing students to achieve socioeconomic balance.").

These scenarios accentuate the inability for federal equal protection doctrine to accommodate community interests, state and local deference, and nudging from the federal executive and legislative branches. For example, the Supreme Court's anticlassification standard may outweigh the federal legislative and executive standards leading New Mexico to create policies tailored to its constituency's needs. But how local and state officials translate federal educational priorities into policy should encounter minimal interference from federal courts. The Court's categorical treatment splits potential allies for quality education reform along race and socioeconomic lines and encourages advocates to forum shop, manipulating the equal protection doctrine's focus on identity-based categories, as opposed to focusing on quality education goals.

In addition, federal equal protection doctrine constrains school officials from developing innovative policies meant to compensate for the full range of a student's impediments. Racial and ethnic minority students, alongside a heterogeneous group of poor Americans, share a common goal: quality education in public schools. NCLB's purpose to close the achievement gap between students, and the education adequacy doctrine refined through state finance litigation light a path to redress this common issue. NCLB melds traditionally protected classes into a single group identified as disadvantaged or at-risk students. Because NCLB measures a school's success based on its ability to close the achievement gap, policymakers must account for myriad factors, including race, when crafting local and statewide education reforms.<sup>23</sup> Thus, in addition to satisfying the voting electorate by implementing policies befitting their unique demographic needs, state and local school officials must also possess a general understanding of how constitutionally protected traits intersect to affect a student's academic performance.

For decades, education scholars in law and the social sciences have observed the Supreme Court's inability to situate education law challenges, involving protected classifications, within its equal protection framework. In the interim, legal academics have diligently developed a body of scholarship for interpreting the equal protection clause that is germane to any context. In particular, scholars differentiate an antisubordination interpretation of the equal protection clause from the anticlassification application underlying the current Supreme Court's colorblind ideology. Antisubordination theory in-

---

<sup>23</sup> C. Joy Farmer, *The No Child Left Behind Act: Will It Produce a New Breed of School Financing Litigation?*, 38 COLUM. J.L. & SOC. PROBS. 443 (2005).



interprets the equal protection clause to prohibit institutional practices and behaviors that reify the once-sanctioned, inferior status of minority groups.<sup>24</sup> Professor Derrick Bell, in describing the remedial aspirations underlying the *Brown* litigation, observed “the real evil of pre-*Brown* public schools: the state-supported subordination of blacks in every aspect of the educational process.”<sup>25</sup> This subordination included “unequal and inadequate school resources and exclud[ed] black parents from meaningful participation in school policymaking . . . .”<sup>26</sup> Alternatively, anticlassification theorists deem any differential treatment based on a protected classification as presumptively unconstitutional, without regard to purpose or benefit.<sup>27</sup>

Heightened scrutiny under the Fourteenth Amendment, antisubordination ideals, and quality education pursuits under state constitutional education clauses need not be addressed in a discrete manner. In *Parents Involved in Community Schools v. Seattle School District*, the Court declined to foreclose the possibility that other government interests may be suitable for justifying the use of protected classifica-

---

24 See Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 320 (2009) (“An antisubordination approach invalidates government action that reaffirms the disadvantage of historically oppressed groups.”); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1472–73 (2004) (describing antisubordination theory as “the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups”); see also DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 162–77 (1987) (presenting a dialogue regarding the history of the Equal Protection doctrine); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10–11 (2003) (challenging “the common assumption that . . . the anticlassification principle triumphed over the antisubordination principle . . . [and] argu[ing] instead that . . . antisubordination values have shaped the historical development of anticlassification understandings”); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976) (exemplifying the manner in which the Equal Protection Clause prohibits state governments from “using race as the criterion of admission” for public services).

25 Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 5, 10 (Kimberlé Crenshaw et al. eds., 1995) [hereinafter Bell, Jr., *Serving Two Masters*].

26 *Id.*

27 Kenneth L. Marcus, *Jurisprudence of the New Anti-Semitism*, 44 WAKE FOREST L. REV. 371, 408 (2009). See generally Balkin & Siegel, *supra* note 24, at 10 (discussing the view that the Supreme Court rejected the antisubordination principle in the 1970s in favor of the anticlassification principle); Siegel, *supra* note 24, at 1472–75 (discussing the development of the anticlassification principle with respect to *Brown*).

tions.<sup>28</sup> Since the Supreme Court has yet to enunciate an exhaustive list of government interests for the heightened scrutiny of protected classifications, I argue that quality education, as interpreted under the respective state constitutional education clauses, represents a viable candidate. Derek Black has also recently argued for incorporating state constitutional standards for public education into federal law through the Fourteenth Amendment and Title I.<sup>29</sup> These litigation strategies for federal claims unify cross-jurisdictional disputes initiated for the common cause of quality education in public schools.

Under the federal equal protection doctrine, plaintiffs must employ a body of law developed to determine the constitutionality of policies invoking a discrete classification. If the Court were to recognize quality education, as defined by state constitutional education clauses, as a compelling government interest, the Court's categorical treatment would need to give way to the possibility of heterogeneous classes of plaintiffs bringing an action against the state for not fulfilling its obligation to adequately educate all children.<sup>30</sup>

In Part I, I examine quality education as a feasible and well-established (though not formally recognized) government interest under the federal equal protection doctrine. The community debates surrounding race integration, the civil rights movements for education reform instigated by other minority groups, and federal legislation justify recognizing *quality education* as a government interest. Furthermore, I argue that state constitutional education clauses, as interpreted by state supreme courts and legislatures, should guide federal courts in defining quality education. Public education falls within the purview of states' rights, and finance equity lawsuits prosecuted over the past thirty years gave most state governments occasion to define affirmative duties under their respective constitutions.<sup>31</sup>

In Part II, I discuss the Supreme Court's reluctance to acknowledge quality education as a federal constitutional goal for education

---

28 Parents Involved in Cmty. Schs. v. Seattle, 551 U.S. 701, 720 (2007) ("Without attempting in these cases to set forth all the interests a school district might assert, it suffices to note that our prior cases . . . have recognized two interests that qualify as compelling.").

29 Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1349, 1393 (2010) [hereinafter Black, *Unlocking the Power*]; Derek Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U. L. REV. 313, 363–66 (2010) [hereinafter Black, *Congressional Failure*].

30 Black, *Unlocking the Power*, *supra* note 29, at 1376.

31 See generally *Rebell*, *supra* note 1, at 239 (discussing core concepts that state courts have incorporated into their state's definition of "adequate"); *Umpstead*, *supra* note 1, at 282–83 (stating that "adequacy" decisions with respect to education are made at the state level and discussing various definitions of "adequacy").

policies invoking race, socioeconomic status, citizenship, and other classifications. I provide an overview of the Court's inability to give definitive counsel for how the *importance* of education, although not a federal right, should inform the constitutionality of education reforms involving protected classifications. I assert that the importance of education arises as a recurring theme in the education context, regardless of the protected classification. The missing link, to provide consistency with federal and state mandates, would be to incorporate this principle as a government interest. In establishing its meaning, we may draw upon the interpretation of NCLB through executive programs, legislation, and education clauses of state constitutions.

In Part III, I argue that the Supreme Court's colorblind ideology and Fourteenth Amendment doctrine, as applied to education reform, does not align with the obligation for school districts to consider social science data and protected classifications when developing programs. This obligation inheres from the interpretation of state constitutional education clauses, state legislation, and federal legislative and executive mandates. In this Part, I also highlight the pressure to implement policies specific to a state or district's demographics in light of achievement gap concerns. I review how the intersection of multiple traits affecting academic performance, such as race, gender, and socioeconomic status, are especially difficult to accommodate given the Supreme Court's categorical treatment of classifications.

#### I. PAST AND PRESENT, FEDERAL AND STATE: RECOGNIZING QUALITY EDUCATION AS A GOVERNMENT INTEREST

Under the equal protection clause, the underlying grievance expressed by plaintiffs in federal courts has always incorporated quality education as part and parcel of their equal educational opportunity argument.<sup>32</sup> In the education context, according to a majority of the

---

<sup>32</sup> See generally Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. LOUIS U. L.J. 885, 888–89 (1993) (arguing that low educational achievement among African-Americans can be attributed to the structure of school financing); Martha Minow, *After Brown: What Would Martin Luther King Say?*, 12 LEWIS & CLARK L. REV. 599, 608–09 (2008) (stating that although early efforts in the Civil Rights movement focused on integration as a means for attaining equality of education, current scholarship suggests that integration does not necessarily equate to higher quality of education for black students); see also Bell, Jr., *Serving Two Masters*, *supra* note 25, at 10 (“[C]ivil rights groups refuse to recognize what courts in [various cities] have now made obvious: where racial balance is not feasible . . . there is adequate legal precedent for court-ordered remedies that emphasize educational improvement rather than racial balance. . . . They are intended to upgrade educational quality, and like racial balance, they may have that effect. . . .”).

Supreme Court, the two government interests suitable for race-based classifications are remedying intentional discriminatory acts and creating diverse classrooms.<sup>33</sup> If we focus on the normative goals enunciated in *Brown*, these were not the only aims. The black community wanted its children to receive a quality education. The call for integrated schools provided a mere experimental solution to achieve quality education for an underserved group.<sup>34</sup>

Post-*Brown* education reforms implemented by the federal executive and legislative branches and state governments demonstrate the proper emphasis on quality education as a government interest under equal protection doctrine. Within a decade of *Brown*, the federal government entered the realm of public education governance. Congress passed legislation requiring schools to comply with *Brown*'s desegregation mandate.<sup>35</sup> In addition, Congress accepted an ambitious charge from President Lyndon B. Johnson to boost the academic achievement of all children adversely affected by impoverishment.<sup>36</sup> State supreme courts also entered the governance landscape, defining quality education with comprehensive interpretations of their respective state constitutional education clauses.<sup>37</sup>

If the Supreme Court accepted quality education as a government interest, federal courts would be guided by a wealth of defined standards from nearly every state when analyzing protected classifications.<sup>38</sup> Moreover, the federal government's involvement in public education governance would provide a unifying backdrop for these state-specific constitutional standards. The following sections describe why quality education accurately describes the community and government interests contested through federal litigation efforts and

---

33 In *Parents Involved*, a majority of the Supreme Court, recognized two compelling governmental interests: (1) "remedying the effects of past intentional discrimination" and (2) "the interest in diversity." 551 U.S. at 720–22.

34 See Carter, *supra* note 32, at 885 (stating that the promise of *Brown* has been eclipsed by the "intransigence of racism which has isolated poor African-American children in decaying cities and in substandard schools").

35 Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-1 (2006).

36 See MICHAEL A. REBELL & JESSICA R. WOLFF, MOVING EVERY CHILD AHEAD: FROM NCLB HYPE TO MEANINGFUL EDUCATIONAL OPPORTUNITY 47–48 (2008) (providing a historical description of the passage of bills by Lyndon Johnson that provided more federal funding for education); see also PATRICK J. MCGUINN, NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965–2005, at 28–33 (2006) (providing historical insight into the motives behind the creation of the Elementary and Secondary Education Act).

37 See *supra* note 1.

38 Black, *Unlocking the Power*, *supra* note 29, at 1349–50, 1399–1401.

gradually adopted through federal legislation and interpretations of state constitutional education clauses.

A. *Revisiting the Roots of Brown from a Layman's Perspective*

1. *Quality Education and the Desegregation Debates*

The black community wrangled with the benefits of desegregation long before the *Brown* litigation. The insufficient resources provided for black students in public schools, as justified through the separate but equal doctrine and pervasive prejudice, spurred a national debate. David Tyack observed that “[t]he demand for desegregation in northern cities was for most blacks a quest for equality and quality in schooling more than some vague aspiration for mixing of ethnic groups.”<sup>39</sup>

The quality education theme, and whether integrated schools may result in quality education for black students, predates the equal protection clause. In *Roberts v. City of Boston*, decided twenty years before the Fourteenth Amendment’s ratification, a family sued the Boston Public Schools system to end its segregation policy and admit their young daughter to an all-white elementary school.<sup>40</sup> The court ruled against the black family, holding that “[i]t is urged, that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law.”<sup>41</sup> Although the Roberts family embraced desegregation, its arguments before the court represented only one proposed solution to the dissatisfaction brewing in the community with regards to public education.

The *Roberts* case incited a local controversy detailed by historians Stephen and Paul Kendrick in the documentary *Sarah's Long Walk*.<sup>42</sup> This pre-Fourteenth Amendment desegregation battle resulted in a school boycott, violent community in-fighting, political activism, and

---

39 DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* 280 (1974).

40 59 Mass. (5 Cush.) 198, 198–202 (1849); see TYACK, *supra* note 39, at 113 (discussing the sentiment of the black community in Boston with respect to integration of primary schools in the 1840s); see also SHEILA CURRAN BERNARD & SARAH MONDALE, *SCHOOL: THE STORY OF AMERICAN PUBLIC EDUCATION* 44–46 (Sarah Mondale & Sarah B. Patton eds., 2001) (providing a narrative on the historical context of *Roberts*).

41 *Roberts*, 59 Mass. (5 Cush.) at 209.

42 STEPHEN KENDRICK & PAUL KENDRICK, *SARAH'S LONG WALK: THE FREE BLACKS OF BOSTON AND HOW THEIR STRUGGLE FOR EQUALITY CHANGED AMERICA* xi–xxiii (2004).

a protracted state litigation based on novel legal theories.<sup>43</sup> The integrationists, led by Benjamin Roberts, the young girl's father, and her legal representatives, adopted an equal treatment perspective inspired by the desire to alleviate the stigma associated with enrollment in inferior, separate public schools.<sup>44</sup>

In this historical narrative, the segregationist leaders, who were educated in integrated schools, argued that blacks should look internally to improve education.<sup>45</sup> They argued that "black children needed to be in their own schools; where they could be 'cheered on by the unanimous shout of encouragement of all [their] fellows with no jeers or unkindness to make heavy [their] heart.'"<sup>46</sup> Both sides petitioned the School Committee, and both sides debated their positions before the City Council.<sup>47</sup> On September 17, 1849, the disagreement between the segregationists and integrationists erupted in violence when integrationists blocked the black students who wanted to attend the segregated black school from entering the building.<sup>48</sup> The attempt to compel participation in the school boycott ignited the only black-on-black violence attributable to the desegregation issue.<sup>49</sup>

Nearly a century later, the NAACP's litigation strategy for racial equality in the mid-twentieth century stirred a similarly heated debate among civil rights all-stars. W.E.B. DuBois led the cavalry. DuBois vocally opposed the NAACP's "unmitigated" desegregation agenda.<sup>50</sup> In response to a reprimand from the NAACP for his public opposition to desegregation, DuBois resigned and reentered academia.<sup>51</sup>

Back at Atlanta University, DuBois published *Does the Negro Need Separate Schools?*, in the *Journal of Negro Education*, to elaborate on his

---

43 *Id.* at 117–40.

44 *Id.* at 113–16.

45 *Id.* at 118–19.

46 *Id.* at 119 (alterations in original). When Roberts made his intentions of integrating the public schools known, the community's reception ranged from apathetic to antagonistic. *Id.* at 108. Many community members predicted the poor treatment of their children by white peers. *Id.* These sentiments reflected a generational gap in attitude towards the need to integrate the city's black and white populations. *Id.* at 118. Black elders generally supported empowerment platforms, as opposed to integration. *Id.* The segregationists carried over the same mindset to school integration.

47 *Id.* at 125–26.

48 *Id.* at 132–34.

49 *Id.* at 135.

50 RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 165 (1975). As a founding member of the NAACP, respected activist, and leading scholar on black history, W.E.B. DuBois had considerable influence. His message eventually found its way into the NAACP's magazine, *The Crisis*. *Id.* at 166.

51 *Id.*

viewpoint. His reasoning for supporting quality education, rather than integration, fell neatly in line with the arguments segregationists lodged a generation earlier.<sup>52</sup> DuBois criticized the NAACP for pouring money into its litigation strategy to desegregate public schools while bypassing a strategy to equalize resource allocations between black and white schools.<sup>53</sup> He reasoned the “futile attempt to compel even by law a group to do what it is determined not to do, is a silly waste of money, time, and temper.”<sup>54</sup> He ended this essay with an infamous line that still resonates today: “[T]he Negro needs neither segregated schools nor mixed schools. What he needs is Education.”<sup>55</sup> According to DuBois, this education required blacks to “believe in their own power and ability.”<sup>56</sup>

But the desegregation movement pushed forward into the classroom. The transformation from a social movement to social reform litigation required civil rights attorneys and parents to make prognostic decisions that, in hindsight, have affected the course of education reform in ironic ways. In more recent years, with the benefit of hindsight, Professor Derrick Bell and Judge Robert L. Carter, both on the front lines at one point or another during *Brown’s* hopeful implementation, clarified the movement’s mission toward achieving quality education. Judge Robert L. Carter, a member of *Brown’s* original litigation team, reflected on the integration remedy in an essay, writing:

[W]e saw the dual school system as the key barrier to equal educational opportunity for African-Americans. With the 1954 declaration in *Brown v. Board of Education*, I believed the path was then clear for black children to receive an equal education. My confidence in the inevitability of this result now seems naive.<sup>57</sup>

Accordingly, the NAACP tabled equalization arguments because the attorneys believed that “integration was crucial to combating the generally accepted American mainstream notion that black people are educationally inferior to white people.”<sup>58</sup> Based on the slow academic progress in predominately poor black communities following *Brown*, Judge Carter concluded that “[a]lthough integration is a very important goal[,] . . . [w]hat is desperately needed is [sic] decent

---

52 *Id.* at 165–66.

53 W.E.B. DUBOIS, *Does the Negro Need Separate Schools?*, in DUBOIS ON EDUCATION 139 (Eugene F. Provenzo, Jr. ed., 2002).

54 *Id.* at 136.

55 *Id.* at 143.

56 *Id.* at 140.

57 Carter, *supra* note 32, at 885 (footnote omitted).

58 *Id.* at 889.

schools that will provide the means for a toehold on the ladder to mainstream employment.”<sup>59</sup>

In *Serving Two Masters*, Derrick Bell analyzes the misinterpretation of *Brown* by federal courts and civil rights attorneys: “[M]ost courts have come to construe *Brown v. Board of Education* as mandating ‘equal educational opportunities’ through school desegregation plans aimed at achieving racial balance, whether or not those plans will improve the education received by the children affected.”<sup>60</sup> He argues that “court orders mandating racial balance may be . . . educationally advantageous, irrelevant, or even *disadvantageous*.”<sup>61</sup> From his perspective, “civil rights lawyers continue to argue, without regard to the educational effect of such assignments, that black children are entitled to integrated schools.”<sup>62</sup> In a subsequent article, channeling DuBois’s sentiments for a new era, Bell concludes that, “effective schools for blacks must be a primary goal rather than a secondary result of integration.”<sup>63</sup>

Public interest litigation forces advocates to fit their grievances and solutions into legally cognizable claims for relief. This process is similar to foreign language translation, where a second language’s limited vernacular may cause much to be lost with regards to expressing the problem and resolving an issue. Anti-segregationist goals, couched in legally cognizable remedial terms, are not consistently deemed synonymous with quality education goals. In the next section, I briefly survey the Supreme Court’s vacillation in identifying an objective for equal educational opportunity through the desegregation cases.

## 2. *Lost in Translation: Conquering Quality Education Through Judicial Interpretation and Legalese*

The battle to define desegregation’s goals as quality education or as equal educational opportunity took form over a series of Supreme Court cases. For some Justices, the quality education goal remained exceedingly clear, while other Justices advocated for equal access to public schools. One commentator observes that, “for social scientists desegregation was a process of social change and required integration, for lawyers desegregation was a remedy, its content shaped by

---

59 *Id.* at 896.

60 Bell, Jr., *Serving Two Masters*, *supra* note 25, at 5 (footnote omitted).

61 *Id.* at 8.

62 *Id.*

63 *Id.* at 26.



the nature of the litigation process.”<sup>64</sup> Furthermore, even though the social science and judicial definitions for desegregation coincided for over two decades, these differences help us understand the “reluctance of current members of the Supreme Court to sanction race-conscious remedies which are not directly linked to issues of constitutional fault.”<sup>65</sup>

The Supreme Court candidly admitted in *Swann v. Charlotte-Mecklenburg Board of Education* that district courts “of necessity, embraced a process of ‘trial and error’ . . . .”<sup>66</sup> Accordingly, it is important to view the original arguments presented in *Brown* as a hypothesized means to the desired end of quality education.<sup>67</sup> In 1954, the *Brown* attorneys argued desegregation was the means to quality education, and the Court acquiesced, because separate-but-equal had failed black children. *Brown* sought to remedy the specific act of educating black children in segregated, inferior schools based on an unconstitutionally discriminatory social norm.<sup>68</sup> In its holding, however, the Court expressed an equal protection goal that spanned beyond racial classifications. The way subsequent Courts interpreted *Brown*’s goal directly affected the remedies available under the equal protection doctrine.

Expanding the government interests recognized to justify using protected classifications would in turn broaden the scope of remedies found constitutional under the equal protection doctrine. Throughout the desegregation cases, Supreme Court opinions implicitly acknowledged the goal of elevating educational quality provided to students, but the Justices never formed a strong consensus. In *Green*, the Court held that the duty to eliminate discrimination required judicial decrees that “so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.”<sup>69</sup> As Justice Douglas later envisioned, an integrated school system went beyond racially balanced schoolrooms to include “equality of facilities, instruction, and curriculum opportunities throughout the district.”<sup>70</sup>

---

64 Anne Richardson Oakes, *From Pedagogical Sociology to Constitutional Adjudication: The Meaning of Desegregation in Social Science Research and Law*, 14 MICH. J. RACE & L. 61, 67 (2008).

65 *Id.*

66 402 U.S. 1, 6 (1971).

67 Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1561–62 (2004).

68 *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–94 (1954).

69 *Green v. Cnty Sch. Bd.*, 391 U.S. 430, 438 n.4 (1968) (internal quotation marks omitted).

70 See *Keyes v. Sch. Dist.*, 413 U.S. 189, 226–27 (1973) (“An integrated school system does not mean . . . that every school must in fact be an integrated unit. A school which happens

Justice Marshall recycled this argument in *Milliken v. Bradley*, stating that black students “must receive ‘what *Brown II* promised them: a school system in which all vestiges of enforced racial segregation have been eliminated.’”<sup>71</sup> Some district courts embraced this message. In *Freeman v. Pitts*, the lower court considered the, “quality of education being offered to the white and black student populations” in addition to the *Green* factors.<sup>72</sup> When the case reached the Supreme Court, it accepted educational quality as a “legitimate inquiry” that “underscores the school district’s record of compliance.”<sup>73</sup>

Other members of the Court have overlooked the quality issue embedded in the desegregation arguments. A more narrow view of appropriate government interests confines policymakers to less effective means for resolving education deficiencies unique to at-risk students in their district’s population. In *Freeman*, Justice Scalia proposed that “[t]he constitutional right is equal racial access to schools, not access to racially equal schools; whatever racial imbalances such a free-choice system might produce would be the product of private forces.”<sup>74</sup> Three years later, in *Missouri v. Jenkins*, Justice Thomas accurately observed that “[t]he mere fact that a school is black does not mean that it is the product of a constitutional violation. A ‘racial imbalance does not itself establish a violation of the Constitution.’”<sup>75</sup> However, the failure to provide a quality education to a protected class, as required by state constitutions, should be a federal constitutional violation under the equal protection doctrine.

In his dissent to the Court’s most recent pronouncement on racial assignments in public education, *Parents Involved in Community Schools*,

---

to be all or predominantly white or all or predominantly black is not a ‘segregated’ school in an unconstitutional sense if the system itself is a genuinely integrated one.”).

71 *Milliken v. Bradley*, 418 U.S. 717, 798 (1974) (Marshall, J., dissenting) (citing *Wright v. Council of Emporia*, 407 U.S. 451, 463 (1972)); see also *Bd. of Educ. v. Dowell*, 498 U.S. 237, 260–61 (1991) (Marshall, J., dissenting) (defining vestiges as “any condition that is likely to convey the message of inferiority implicit in a policy of segregation”).

72 See *Freeman v. Pitts*, 503 U.S. 467, 473–74, 482–83 (1992) (arguing that “vestiges of the dual system remain in the areas of teacher and principal assignments, resource allocation, and quality of education”); *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 436 (1968) (holding that schools should consider “problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems” (internal quotation marks omitted)).

73 *Freeman*, 503 U.S. at 492.

74 *Id.* at 503 (Scalia, J., concurring).

75 *Missouri v. Jenkins*, 515 U.S. 70, 115 (1995) (Thomas, J., concurring) (quoting *United States v. Fordice*, 505 U.S. 717, 745 (1992)).

Justice Stevens noted the majority's cursory handling of *Brown's* quality education requirements. He admonished the Court's emphasis on racial classifications and argued for a more historically accurate view of the situation: the *Brown* plaintiffs sought an education for their children on par with that afforded white children—an equal education opportunity argument encompassing quality education.<sup>76</sup> Justice Stevens wrote:

There is a cruel irony in the Chief Justice's reliance on our decision in *Brown v. Board of Education* . . . . The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, the Chief Justice rewrites the history of one of this Court's most important decisions.<sup>77</sup>

The Court inconsistently focused on quality education concerns underlying equal protection challenges to desegregation policies. Advocates for other protected groups, however, latched onto this argument in proposing changes to public education. The following section exhibits how concerns held by English-language learner (“ELL”) advocates have progressed through an emphasis on quality education.

*B. The Domino Effect: How the Brown Decision Inspired Quality Education Goals for Other Marginalized Groups*

*Brown* inspired quality education movements on behalf of other identifiable groups including non-native English-speaking children, the poor, girls, and special education students. Each group has gained great benefits from the *Brown* decision. Scholars credit *Brown* for “precipitat[ing] a more assertive civil rights movement” and pushing forward the quality education agenda for other minority groups.<sup>78</sup> An education historian observed that before *Brown*, officials “often confused individual variation with gross social inequalities associated with poverty, oppression on the basis of color, or other features of the multiple subcultures of a highly plural society.”<sup>79</sup> Since *Brown*, we now understand quality education concerns encompass other races

---

<sup>76</sup> See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 798–803 (2007) (Stevens, J., dissenting) (arguing that school districts' use of racial classification in an effort to integrate “should be viewed differently” than the segregation presented in *Brown*).

<sup>77</sup> *Id.* at 798–99 (Stevens, J., dissenting) (footnote omitted) (citation omitted).

<sup>78</sup> ROBERT J. COTTROL ET AL., *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* 8 (2003) (arguing that *Brown* was a catalyst of a more aggressive civil rights movement in the 1950s and 1960s, and that the movement ultimately brought about far-reaching change in American race relations).

<sup>79</sup> TYACK, *supra* note 39, at 216.

and ethnicities, gender issues, varying learning abilities, and concentrated poverty in urban schools.

At some point, parents in most racial and ethnic minority communities protested the objectively inferior treatment of their children in the public education system. In *Lau v. Nichols*, the Supreme Court decided a class action challenging the school district's refusal to provide transition language classes to non-English-speaking Chinese students under the equal protection clause and the Civil Rights Act of 1964. Although the Court did not reach the constitutional issue, the Court unanimously decided that the Civil Rights Act's prohibition against national origin discrimination in education proscribed the district's actions.<sup>80</sup> The Court held that the "district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."<sup>81</sup> In this lawsuit, the class members did not request a specific remedy, only that school officials rectify the problem using their expertise to identify the appropriate means.<sup>82</sup>

Although advocates for ELL students initially found themselves working within the civil rights framework of desegregation cases, they eventually parted ways in achieving the same goal for their respective constituency: a quality education.<sup>83</sup> Two decades after *Lau*, educational research on the best approach to ELL programs flooded academic circles. Determining the most effective approach to educating English-language learners fractured supporters of transitional language programs.<sup>84</sup> Throughout the nation, districts implemented several variations to acclimating non-English-speaking students into the classroom.<sup>85</sup> The two dominant approaches, English immersion and bilingual education, had pervaded the divisions between interested scholars.<sup>86</sup>

---

80 *Lau v. Nichols*, 414 U.S. 563, 566 (1974).

81 *Id.* at 568 (internal quotation marks omitted).

82 *Id.* at 565.

83 Kristi L. Bowman, *Pursuing Educational Opportunities for Latino/a Students*, 88 N.C. L. REV. 911, 924–26 (2010); Rachel F. Moran, *Rethinking Race, Equality, and Liberty: The Unfulfilled Promise of Parents Involved*, 69 OHIO ST. L.J. 1321, 1358 (2008) [hereinafter Moran, *Rethinking Race*]; Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CALIF. L. REV. 1249, 1272, 1284 (1988) [hereinafter Moran, *Politics of Discretion*].

84 Moran, *Politics of Discretion*, *supra* note 83, at 1249–50 (chronicling the debates between social advocates, legislative bodies, and education regulators, for how to best incorporate ELL programs into public schools and enforce government policies).

85 *Id.*

86 *English-Language Learners*, EDUC. WEEK, Aug 4, 2004, <http://www.edweek.org/ew/issues/english-language-learners/>. English immersion teaches the English language while si-

ELL experts still debate which approach is “right” and all sides are wedded to identifying the best method for teaching English as a second language. Studies conducted to determine the best approach produce inconclusive and contradictory results, similar to studies regarding the benefits of integrated classes and the need to pump more resources into inner-city schools. Moreover, immigrant parents hold different opinions on whether their children should follow an English immersion or bilingual track in public schools. Taxpayers have weighed in, offering their opinion through state referendum: in California, Arizona, and Massachusetts, voters chose to curtail the attention and public funding allotted to English-language learning programs.<sup>87</sup>

NCLB and the Equal Educational Opportunities Act of 1974 regulate educational programs offered to English language learners. Section 1703(f) of the Equal Educational Opportunities Act requires school district to aid students in “overcom[ing] language barriers” through “appropriate action.”<sup>88</sup> Courts review challenges pursuant to this section using three factors:

1. whether the school’s program is based upon sound educational theory or principles;
2. whether the school’s program is reasonably calculated to implement the educational theory effectively; and
3. whether, after a period of time sufficient to give the program a legitimate trial, the results of the program show that language barriers are actually being overcome.<sup>89</sup>

For English-language learners, the open mandate to provide a quality education, under state and federal legislation, leaves states to implement policies that fulfill this broadly understood equal protection goal. At the end of the day, constitutional law has permitted educational experts to experiment with various methods for teaching students who may very well hold a national origin discrimination claim under the Fourteenth Amendment’s strict scrutiny analysis.

---

multaneously teaching students academic lessons. *Id.* Bilingual education, whether transitional or two-way bilingual education, teaches English and academic lessons on separate tracks. *Id.* Students may encounter English and their native language in one classroom, or they may split their day between academic lessons taught in their native language and those focused on developing their English-language skills. *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Equal Educational Opportunities Act, 20 U.S.C. § 1703(f) (2006).

<sup>89</sup> *Types of Educational Opportunities Discrimination*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/crt/about/edu/types.php> (last visited Nov. 2, 2011).

C. *Contemporary Quality Education Goals: Federal and State Stakeholders Acting on One Accord*

The standard that all children should be provided a quality education, no matter the interpretation, remains intact from *Brown*. The reality that desegregation is a fringe priority for many education policymakers along with Title I's focus on the quality problem evinces the Court's diminished current role in defining government interests—a shift in the conversation led by political leaders requires a shift in the Court's approach to the policies.<sup>90</sup> The arguments supporting the fundamentality of public education to our democratic society, the structure of education governance, and the shared vision that all children must receive a quality education suggest revisiting the government interests that federal courts recognize under heightened scrutiny.

1. *Federal Stakeholders: Quality Education Through the Elementary and Secondary Education Act of 1965*

Within the federal government, the priority given to race seems imbalanced when moving from the Supreme Court's equal protection doctrine to the federal officials setting national education goals. Since the nation's inception, its political leaders have maintained the importance of education. Congress and the Department of Education, through statutes and regulation, codified this commitment to quality education for all public school students. It requires school districts to take into account a student's race, gender, socioeconomic status, and learning abilities.

Long before the Fourteenth Amendment and the goals of racial equality, political leaders championed the importance of minimal education for citizens. Horace Mann famously proclaimed about education that “beyond all other devices of human origin, [it] is the equalizer of the conditions of men, the great balance wheel of the social machinery.”<sup>91</sup> Thomas Jefferson and his peers proposed that our democracy rested on the ability of an educated citizenry able to “understand public issues, who would elect virtuous leaders, and who would sustain the delicate balance between liberty and order in the new political system.”<sup>92</sup> According to Jefferson, these public respon-

---

<sup>90</sup> Bowman, *supra* note 83, at 950–51; Kevin Brown, *Reflections on Justice Kennedy's Opinion in Parents Involved: Why Fifty Years of Experience Shows Kennedy Is Right*, 59 S.C. L. REV. 735, 738–39 (2008).

<sup>91</sup> BERNARD & MONDALE, *supra* note 42, at 29.

<sup>92</sup> *Id.* at 13.

sibilities required the ability to read and write. Historian E.D. Hirsch supposes that Mann and Jefferson advocated in harmony for minimal education standards because “both of them disliked the idea of the family you were being born into determining how you ended up in American life.”<sup>93</sup> The national rhetoric surrounding quality education resulted in Congress imposing the obligation for states to establish free, non-sectarian public school systems as a condition of entering the Union.<sup>94</sup>

Post-*Brown* federal legislation channeled the notion that education should be considered a national priority inclusive of the poor and racial minorities.<sup>95</sup> The Johnson administration’s political agenda, known as the War on Poverty, expanded the social justice charge to public school officials: it addressed the educational deficiencies of all poor children, and it sought to improve public education for the purpose of ending poverty.<sup>96</sup> In the early 1960s, Congress attacked the poverty and race issues in the public education system through two major pieces of legislation: the Civil Rights Act of 1964 and the Elementary and Secondary Education Act of 1965 (“ESEA”).<sup>97</sup> ESEA’s original purpose sought “to strengthen and improve educational quality and educational opportunities in the Nation’s elementary and secondary schools.”<sup>98</sup> Under Title VI of the Civil Rights Act, public school programs discriminating on the basis of race, color, or national origin would jeopardize receiving federal funds, including Title I funding distributed through ESEA.<sup>99</sup>

Through NCLB, ESEA’s latest reauthorization, Congress enacted goals and accountability standards that oblige participants to act in a certain manner across all spectra of public education.<sup>100</sup> During his 2000 campaign, President George W. Bush ran on the platform that education reform is a civil rights issue and a national priority.<sup>101</sup> At the Republican Convention, he proclaimed that disparities in aca-

---

93 *Id.* at 31.

94 *Id.* at 47.

95 MCGUINN, *supra* note 36, at 31; Black, *Congressional Failure*, *supra* note 29, at 314, 336.

96 MCGUINN, *supra* note 36, at 1; TYACK, *supra* note 39, at 270.

97 TYACK, *supra* note 39, at 270.

98 Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (amended 2002); *see also* MCGUINN, *supra* note 36, at 33 (describing ESEA’s projected impact on national education policy at the time it was passed).

99 Title VI of Civil Rights Act of 1964, 42 U.S.C.A. § 2000d–2000d-1 (1965).

100 Kamina Aliya Pinder, *Federal Demand and Local Choice: Safeguarding the Notion of Federalism in Education Law and Policy*, 39 J.L. & EDUC. 1, 9 (2010) (“[T]he IASA required states receiving the ESEA Title I funds to adopt state standards and assessments aligned to measure progress toward those standards.”).

101 MCGUINN, *supra* note 36, at 157.

ademic performance were attributable to “the bigotry of low expectations.”<sup>102</sup> NCLB Title I’s Statement of Purpose reads: “to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education . . . .”<sup>103</sup> Even though the methods imposed to bring about greater equality in educating impoverished children, pursuant to NCLB, have been criticized as ineffective, the core purpose of Title I remains intact.<sup>104</sup> Moreover, NCLB, President Bush’s banner legislation, provides support for an array of education reforms that involve race, gender and wealth classifications—one classification requiring no greater amount of scrutiny than the other.

## 2. *State Stakeholders: Quality Education Through State Constitutional Education Clauses*

Local goals in educational achievement increasingly align with federal mandates to better educate disadvantaged children. To reach complete equilibrium, it is necessary to build a homogenous body of law for education experts to follow when developing policy. This section focuses on the efforts by states, through judicial precedents and legislation, to establish a quality education standard. It briefly recounts the history of education finance litigation and its semblance to the struggles for racial equality experienced in public schools through federal courts. The Article then discusses the sophistication of education reform arguments in state courts that encompass an antisubordination ideal, much different from the anticlassification standard our highest court supports.

According to the Supreme Court, “[p]roviding public schools ranks at the very apex of the function of a State.”<sup>105</sup> Public education regulation falls within the Tenth Amendment powers reserved to the states.<sup>106</sup> Nearly every state constitution includes a clause relating to the level of education to be provided to children enrolled in public schools.<sup>107</sup> And to date, forty-five states have heard cases challenging the distribution of education funds.<sup>108</sup>

---

<sup>102</sup> *Id.* at 159.

<sup>103</sup> Title I of No Child Left Behind, 20 U.S.C. §6301 (2006).

<sup>104</sup> Black, *Congressional Failure*, *supra* note 29, at 348–63.

<sup>105</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

<sup>106</sup> Charles J. Russo, *Reflections on Education as a Fundamental Human Right*, 20 *EDUC. & L.J.* 87, 88 n.4 (2010).

<sup>107</sup> *See, e.g.,* Kagan, *supra* note 1, at 2260 (“All state constitutions but one include a clause guaranteeing an adequate education . . . .”). For example, the New York state constitution requires the state legislature to “provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” N.Y. CONST. art. XI, § 1. The Massachusetts state constitution states that:



One scholar comments, “The focus on ‘adequacy’ may sound minimal, but the adequacy suits seek to raise standards, resources, and aspirations for all students and to do so in ways that reflect evolving demands on the economy and society.”<sup>109</sup> Another observes, “[I]n their broadest sense, adequacy cases go beyond [the] basic finance purpose and reformulate a state’s responsibility for and treatment of its public educational establishment, encompassing the finances, goals, and accountability for the outcomes of education.”<sup>110</sup> State constitutional education clauses are ambivalent to the protected classifications recognized under the federal equal protection doctrine; instead, they focus on what needs to be done to provide students with a certain level of education.<sup>111</sup>

In this section, I ultimately conclude that just as the Department of Education entrusts states to develop educational improvement plans for compliance with NCLB, the federal courts should recognize state constitutional standards under heightened scrutiny.

#### a. From Equity to Adequacy: The Quest for More than Equal Treatment’s Promise

Scholars describe education finance reform as undergoing three “waves” of litigation in federal and state courts.<sup>112</sup> Initially, education finance advocates embarked upon a litigation strategy based on the

---

Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education . . . it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them.

MASS. CONST. pt. 2, ch. V, § 2.

108 See *Access Quality Education: School Funding Litigation*, NAT’L EDUC. ACCESS NETWORK, <http://www.schoolfunding.info/litigation/litigation.php3> (last visited Nov. 2, 2011) (“Lawsuits challenging state methods of funding public schools have been brought in 45 of the 50 states.”).

109 Minow, *supra* note 32, at 634–35 (footnotes omitted).

110 Umpstead, *supra* note 1, at 282–83.

111 *Id.* at 286, 306, 313 (reviewing the interpretations of state supreme courts, and concluding that these constitutional provisions require public schools to perform three objectives aimed at “develop[ing] the intellectual, emotional, and moral capabilities of students as individuals, workers, and participants in our political system”).

112 See Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1152 (1995) (“Commentators note three distinct ‘waves’ of school finance court decisions.”); William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597 (1994).

same principles guiding the race integration cases.<sup>113</sup> Inspired by the state court decision, *Serrano v. Priest*, attorneys filed wealth discrimination claims in federal court arguing for equitable spending between property-rich and property-poor districts in their respective states.<sup>114</sup> In *San Antonio v. Rodriguez*, a group of parents filed a class action lawsuit against school officials challenging the state's public education financing system.<sup>115</sup> The proposed class sought remedies on behalf of "schoolchildren . . . who are members of minority groups or who are poor and reside in school districts having a low property tax base."<sup>116</sup> With desegregation becoming more of a challenge for the federal judicial system, the Court decided to pass on the opportunity to repair financial disparities in public education.<sup>117</sup> *Rodriguez* foreclosed equal protection arguments under the federal Constitution, effectively ending the first round of school finance cases.

After the defeat in *Rodriguez*, arguments presented in state courts continued to echo the equity themes previously brought in federal court.<sup>118</sup> The second wave of disputes began in New Jersey state court the same year as *Rodriguez*. For example, Education finance litigation in New Jersey, which spanned three decades, originated with the *Robinson v. Cahill* dispute.<sup>119</sup> Advocates argued that state funding systems violated equal protection and failed to meet the state's responsibility to adequately educate students. In *Robinson*, the state supreme court found violations of the state's constitutional education clause, requiring a "thorough and efficient education" be provided to students in public schools.<sup>120</sup> After years of state legislative resistance, the New

---

113 See *Rebell*, *supra* note 1, at 221–25 (describing plaintiffs' reliance on *Brown's* promise of equal educational opportunity to argue for more equitable school funding).

114 See generally *Serrano v. Priest*, 487 P.2d 1241, 1255 (Cal. 1971) (finding that the school financing system discriminates on the basis of the wealth); Minorini & Sugarman, *supra* note 1, at 183.

115 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 4–5 (1973).

116 *Id.* at 5.

117 The Court reasoned that "[s]ince the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." *Id.* at 41 (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)).

118 Minorini & Sugarman, *supra* note 1, at 183 (explaining that many state court judges were no longer persuaded by wealth discrimination after the Supreme Court's decision in *Rodriguez*).

119 See *Robinson v. Cahill*, 355 A.2d 129 (N.J. 1976) (reviewing a legal challenge to the New Jersey Public School Education Act of 1975).

120 See *id.* at 132 ("The goal of a thorough and efficient system of free public schools shall be to provide to all children of New Jersey, regardless of socioeconomic status or geographic location, the educational opportunity which will prepare them to function politically, economically and socially in a democratic society.").

Jersey court set forth explicit expectations for its public education system.<sup>121</sup> Close to one decade later, in the twentieth *Abbott* decision over a twenty-year period, the New Jersey Supreme Court declared the legislature's educational funding plan constitutional under its education clause.<sup>122</sup> Most recently, Governor Chris Christie attempted to cut the school budget by over one million dollars.<sup>123</sup> In response, the *Abbott* plaintiffs filed a motion to temporarily block the state's actions and deny monetary shortfalls in the state budget as an excuse for not fulfilling education adequacy obligations.<sup>124</sup> The court granted this motion.

Outside New Jersey, equal protection arguments received a mixed welcome in state courts. The objective comparisons between resources provided to students attending wealthier and property-poor districts resonated in some states but produced no results in others.<sup>125</sup>

Over time, finance equity advocates reoriented their rallying cry to request quality education for all public education students pursuant to state constitutional education clauses. This transition resembled the broadened goals observed in the desegregation strategy—a quantitative comparison of inputs was not enough to achieve the movement's goals.<sup>126</sup> Moreover, education finance advocates realized early on that education quality across any particular state wavered based on more than the racial composition in one's school or district. Even poor white children were not receiving the same quality education as their suburban white peers.<sup>127</sup> As Derrick Bell argues in his theory of

---

121 See *Robinson v. Cahill*, 303 A.2d 273, 295–96 (N.J. 1973) (analyzing school reform proposals and setting new requirements for standard public education).

122 See *Abbott v. Burke*, 971 A.2d 989, 1009–10 (N.J. 2009) (finding that the school funding reform act conforms with the constitutional provisions for public education).

123 See *Access Quality Education: New Jersey Litigation*, NAT'L ACCESS NETWORK, [http://www.schoolfunding.info/states/nj/lit\\_nj.php3](http://www.schoolfunding.info/states/nj/lit_nj.php3) (last visited Nov. 1, 2011) (“[I]n the Spring of 2010, newly elected governor Chris Christie and the state legislature adopted an austerity budget that cut education funding by \$1.08 billion, or 13.6%.”).

124 See *id.* (“In June 2010, the Education Law Center, on behalf of the *Abbott v. Burke* litigants, filed a motion requesting the state's high court to block implementation of the 2010–2011 budget, because it failed to fund schools at the levels required by the 2008 School Funding Reform Act (SFRA).”).

125 Minorini & Sugarman, *supra* note 1, at 190–91, 199 (explaining the different reactions to adequacy arguments in state courts).

126 *Id.* at 177 (“[E]mphasis moved away from a comparison of conventionally measured educational resources to an emphasis on ‘intangibles.’”).

127 *Id.* at 179 (arguing that differences in school quality may not have been a race question because schools in some suburbs seemed markedly superior to schools in other districts that largely enrolled white pupils).

interest convergence, the interests of poor whites and blacks are exceedingly similar.<sup>128</sup>

The third wave, known as the “adequacy movement,” began with a phenomenal state court precedent, *Rose v. Council for Better Education*.<sup>129</sup> This decision marked a transition from a fiscal equity strategy to “arguments focused on ensuring that all students have access to educational resources and opportunities adequate to achieve desired educational outcomes.”<sup>130</sup> Commentators observe that this new focus was “one rooted not so much in comparing the poor education some children obtain with the superior education of other children, but rather in comparing the inadequate education many children receive as judged by some absolute standard.”<sup>131</sup>

In *Rose*, the state supreme court served as a trailblazer for future adequacy cases by enumerating seven goals to be achieved through attaining a public education.<sup>132</sup> Moreover, the state legislature followed the court’s prescription for quality education through passage of legislation cued to the court’s formula for finance reform.<sup>133</sup> In turn, these learning goals prodded an increase in the state’s education budget. A subsequent case, *Young v. Williams*, once again challenged Kentucky’s public school budget, arguing that schools could not achieve the constitutional education goals set forth in *Rose* under funding cuts. The district judge invoked the separation of powers doctrine to dismiss the case. In this instance, plaintiffs decided not to appeal the decision.

Education finance litigation in New York also highlights the transformation in strategy from equity and adequacy arguments. In the first wave, plaintiffs filed *Levittown v. Nyquist*, challenging the funding disparities between the state’s property-rich and property-poor dis-

128 See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, *supra* note 25, at 20, 24 (“Hence, over time, all will reap the benefits from a concerted effort toward achieving racial equality.”).

129 See *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 189 (Ky. 1989) (holding that the Kentucky General Assembly had not provided for an efficient system of common schools throughout the state and that state funding of education was not adequate).

130 Minorini & Sugarman, *supra* note 1, at 175–76 (citation omitted).

131 *Id.* at 176.

132 *Rose*, 790 S.W.2d at 215–16 (“Kentucky’s *entire* system of common schools is unconstitutional.”); see *id.* at 208 (providing that education must be efficient, free, controlled and administered by the state, substantially uniform throughout the state, and equal to and for all students).

133 Minorini & Sugarman, *supra* note 1, at 195 (mandating that an adequate education must provide students with seven capabilities).

tricts.<sup>134</sup> The court of appeals relied on reasoning found in *San Antonio v. Rodriguez*, that the obligation to provide a public education did not translate into an obligation to provide an equal quality education to all children.<sup>135</sup> In this holding, the court also pointed to the state's obligation to support "a sound basic education" to public school students.<sup>136</sup>

In 1993, New York plaintiffs regrouped to file a second lawsuit, *Campaign for Fiscal Equity v. State*, against the state alleging failure to comply with the state constitutional education clause.<sup>137</sup> Several years later, the plaintiffs prevailed.<sup>138</sup> In conjunction with tasking the state to improve public education, the court ordered a costing-out study to help determine what needed to be done to satisfy the state constitution's education clause.<sup>139</sup> The state's highest court upheld this ruling, and charged the state legislature with calculating the funding needed to provide a "sound basic education," allocating such funds, and implementing an accountability system.<sup>140</sup>

When the state legislature delayed in compliance, the presiding judge appointed a special master to answer the outstanding cost answers.<sup>141</sup> From this point, the state judicial, legislative, and executive branches were able to find common ground in providing additional funding and implementing an accountability system to ensure districts met the constitutional education mandate.<sup>142</sup>

---

134 *Levittown v. Nyquist*, 439 N.E.2d 359, 361–62 (N.Y. 1982) (challenging the state funding scheme as a violation of the equal protection clause and the state constitution Education Article because it results in "grossly disparate" educational opportunities in different districts in the state).

135 *Id.* at 364 (pointing out that the Supreme Court in *Rodriguez* had already rejected the plaintiffs' argument, that the disparity in per-pupil expenditure violated the Fourteenth amendment).

136 *Id.* at 369.

137 *See Campaign for Fiscal Equity v. State*, No. 111070/93, 1999 WL 34782728, at \*1 (N.Y. Sup. Ct. Oct. 18, 1999) (reviewing plaintiffs' claim that the state's school funding mechanisms caused the education afforded to students to fall below the requirements of the state constitution and discriminate against the city's minority public school students).

138 *Campaign for Fiscal Equity v. State*, 861 N.E.2d 50, 52 (N.Y. 2006) ("Mindful of the fundamental value of education in our democratic society, we agreed with plaintiffs' interpretation of the Education Article.").

139 *See generally Access Quality Education: New York*, NAT'L EDUC. ACCESS NETWORK, [http://www.schoolfunding.info/states/ny/lit\\_ny.php3](http://www.schoolfunding.info/states/ny/lit_ny.php3) (last visited on Nov. 2, 2011) (describing the orders given by the judge in *Campaign for Fiscal Equity*).

140 *Campaign for Fiscal Equity*, 861 N.E.2d at 59–61.

141 *See supra* note 139.

142 *See id.* (describing the legislature's acceptance of Governor Elliot Spitzer's 2007 funding increase).

b. Defining Quality Education as a Government Interest  
Through State Constitutional Education Clauses

Since public education is undoubtedly regarded as a local matter under state control, federal courts should incorporate the definition of quality education, defined by the respective states as a government interest justifying the use of protected classifications. As opposed to the anticlassification doctrines applied by the Supreme Court, the state constitutional interpretations act more along the lines of the antisubordination definitions argued for in interpreting the Fourteenth Amendment's equal protection clause. Whereas *Brown* "combined education with discrimination on the basis of race," the course of education adequacy reform through state courts addressed race as a component to fulfilling the state's constitutional obligation.<sup>143</sup> The goal for "high-minimum quality education for all" does "not rest on a norm of equal treatment."<sup>144</sup> And while some state courts have refused the job of defining this minimal education standard, one may find a definition through either state supreme court rulings or state legislative mandates.

Even though the phraseology used in state constitutional education clauses reads slightly differently, "[a]lmost every state constitution requires its government to institute and sustain a system of public schools."<sup>145</sup> For the instances where state courts choose not to become involved in the debate over quality education, they rely on separation of powers principles; thus, state legislatures must define educational standards and the amount of funding needed to attain these goals.<sup>146</sup> Adequacy claims impose an affirmative duty on state legislatures to create public education systems that offer minimal provisions to every child enrolled in public schools.<sup>147</sup>

Since *Brown*, education governance has experienced phenomenal changes. Whereas local districts once held great autonomy, education reforms continue to layer oversight and implementation functions between federal and state government actors. Everyone involved, except the Supreme Court, recognizes the need to take

---

143 Minorini & Sugarman, *supra* note 1, at 181.

144 *Id.* at 188 (internal quotation marks omitted).

145 Umpstead, *supra* note 1, at 288–89; *see also* Black, *Unlocking the Power*, *supra* note 29, at 1343, 1366–71.

146 Minorini & Sugarman, *supra* note 1, at 199.

147 Kagan, *supra* note 1, at 2258 ("These clauses create positive states duties (such as the legislature's obligation to provide an adequate education) . . ."); Pinder, *supra* note 100, at 8 (discussing how "adequacy returns the determination of how to improve schools to the state legislature"); Umpstead, *supra* note 1, at 286.

comprehensive stock of the systemic challenges facing public education. State constitutional provisions align more with the direction of contemporary education reform than the Supreme Court's categorical treatment of protected classifications used to determine the constitutionality of education reforms.

Through state courts, constitutional education clauses have been interpreted to adopt an antisubordination quality standard as opposed to an anticlassification colorblind ideology. The academic outcomes resulting from finance litigation are not yet clear; however, these cases do permit a space for legislatures and advocates to recreate state educational systems.<sup>148</sup> For example, in Kentucky, the financial inputs on the budgetary side were easily measured, but the governance and accountability were not aptly implemented.<sup>149</sup> After the *Abbott* litigation in New Jersey, school districts directly affected by the court's pronouncement experienced minimal gains in test scores; however, New Jersey still fairs poorly as compared to other states working to close the achievement gap.<sup>150</sup>

More politically motivated opposition also plagues the implementation of judicial standards imposed under state constitutional education clauses. In Ohio, even though the state supreme court has repeatedly found its public education system unconstitutional, the legislature refuses to act upon the pronouncements.<sup>151</sup> The most infamous state finance litigation, in New York, appeared successful, but extended debates between state and local officials regarding who should fund the reforms have delayed program implementation.<sup>152</sup> The aftermath of these cases demonstrates that a quality education focus under the law completes only one part to the reform puzzle. In Part III, I elaborate further on this idea in a discussion of race-conscious state decisions referred to as the fourth wave of finance litigation.<sup>153</sup>

---

148 Frederick M. Hess, *Adequacy Judgments and School Reform*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* 159, 161, 168 (Martin R. West & Paul E. Peterson eds., 2007).

149 *Id.* at 159, 167.

150 *Id.* at 159, 172.

151 *Id.* at 159, 178.

152 Joe Williams, *The Non-Implementation of New York's Adequacy Judgment*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY*, *supra* note 148, at 159, 211.

153 Black, *Unlocking the Power*, *supra* note 29, at 1343, 1361–75; Kristi L. Bowman, *A New Strategy for Pursuing Racial and Ethnic Equality in Public Schools*, 1 *DUKE F.L. & SOC. CHANGE* 47, 57 (2009); Kevin Randall McMillan, *The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and the Court's Lingering Institutional Concerns*, 58 *OHIO ST. L.J.* 1867, 1896–1902 (1998); Denise C. Morgan, *The New School Finance Litigation: Acknowledg-*

## II. THE SUPREME COURT'S RELUCTANCE TO RECOGNIZE QUALITY EDUCATION AS A GOVERNMENT INTEREST

*Brown* and its progeny were understood to address race integration, obscuring underlying demands for educational quality.<sup>154</sup> The Warren Court mandated the experimental remedy of desegregated schools. Although this judicial remedy could not cure the social norms that led to a dual public education system, the proposed remedy sought to resolve its harmful effects. *Brown* forced federal and state governments to rethink what provisions were needed to achieve the normative goal of quality education for all children. Although accurately described as a desegregation case, *Brown I* was more a constitutional challenge seeking quality education for black students. Over the past fifty years, as demonstrated above, federal and state government actors have adopted a quality education standard. Yet the Supreme Court remains stagnant by insisting that the invoked protected classification should gauge any degree of deference permitted to education policymakers.

The *Brown* decision hallmarked two triumphs, independent of race, in the constitutional analysis of education policies: the *Brown* attorneys successfully introduced social science evidence to help show why the Court should prohibit state-mandated segregation,<sup>155</sup> and the opinion spoke to the importance of education and the need for all American children to receive a quality education on par with one another.<sup>156</sup> In *Brown I*, the Court took a comprehensive look at the “effect” of “segregation itself on public education.”<sup>157</sup> Although not explicitly arguing education as a fundamental right, the Court exalted the status of public education. Justice Warren wrote:

---

*ing That Race Discrimination in Public Education Is More Than Just a Tort*, 96 NW. U. L. REV. 99, 165–68 (2001).

154 Pamela S. Karlan, *What Can Brown® Do For You?: Neutral Principles and the Struggle Over the Equal Protection Clause*, Lecture (Mar. 25, 2008), in 58 DUKE L.J. 1049, 1063 (2009) (explaining that *Parents Involved* cites *Brown* for the proposition that race segregation, rather than unequal educational opportunities, provides the basis for finding a constitutional violation).

155 *Brown v. Bd. of Educ. (Brown D)*, 347 U.S. 483, 495 n.11 (1954) (listing social science studies); Rachel F. Moran, *What Counts as Knowledge? A Reflection on Race, Social Science, and the Law*, 44 LAW & SOC'Y REV. 515, 517–18 (2010) [hereinafter Moran, *What Counts as Knowledge*] (describing the NAACP Legal Defense Fund's use of social science evidence).

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

157 *Id.* at 492–93 (“We must consider public education in light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.”).



[E]ducation is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.<sup>158</sup>

Despite the generalized language espoused in *Brown I*, race still enjoys an enduring omnipresence in equal protection doctrine. Although we began the pursuit of quality education with an exclusive focus on race, we now need to expand our horizons to meet the demographic challenges facing public education in today's society.

The Court's analysis involving classifications other than race acknowledged the importance of education but rejected quality education as a right guaranteed under the federal Constitution. The Court's holdings in *San Antonio v. Rodriguez* and *Plyler v. Doe*, both non-race cases decided under rational basis review, showcase these thoughts. The holdings in *Rodriguez* and *Plyler* represent the doctrinal foothold for recognizing quality education as a government interest. First, even though the opinions analyzed two distinct classifications under rational basis review, the Court reached different conclusions with regards to the rationality of state action.<sup>159</sup> Both classifications required deference to the state legislature, but the Court still engaged in a robust debate leading to opposite holdings.<sup>160</sup> If the Court incorporated quality education goals into equal protection doctrine through deference to state officials, this would in no way compromise the Court's ability to identify policies in violation of equal protection doctrine. This recognition would, however, provide an additional basis for education policymakers to realize the core goals of the civil rights agenda.

Second, the importance of education played a role in the majority and dissenting opinions for each case.<sup>161</sup> Although education's role in democratic society may not prove dispositive when determining the deference to be accorded education experts, its role no doubt exerts influence. The established importance of education, combined with the state's reserved right to control public education matters, support the leap for federal equal protection doctrine to incor-

---

158 *Id.* at 493.

159 *Plyler v. Doe*, 457 U.S. 202, 230 (1982); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29, 58–59 (1973).

160 *Plyler*, 457 U.S. at 216–18; *Rodriguez*, 411 U.S. at 55. Each opinion drew four dissenting votes.

161 *Plyler*, 457 U.S. at 222; *id.* at 234 (Blackmun, J., concurring); *id.* at 248 (Burger, J., dissenting); *Rodriguez*, 411 U.S. at 33, 71 (Marshall, J., dissenting).

porate quality education (as defined under state constitutional education clauses) as a viable government interest.

In *Rodriguez*, the Court held that there was no “right to education explicitly or implicitly guaranteed by the Constitution.”<sup>162</sup> The majority reasoned “the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State’s social and economic legislation.”<sup>163</sup>

In his dissent to *Rodriguez*, Justice Marshall argues that protecting against “[d]iscrimination in the opportunity to learn that is afforded a child must be our standard.”<sup>164</sup> He held education essential for civic participation in the political process and in the exercise of First Amendment rights.<sup>165</sup> NCLB’s standards are congruent with Justice Marshall’s thoughts on the appropriate level of equity in public education. He states:

[B]ecause some ‘adequate’ level of benefits is provided to all, [it does not mean that] discrimination in the provision of services is therefore constitutionally excusable. The Equal Protection Clause is not addressed to the minimal sufficiency but rather to the *unjustifiable inequalities of state action*. It mandates nothing less than that *all persons similarly circumstanced* shall be treated alike.<sup>166</sup>

“Similarly circumstanced” need not be defined by a single trait; as defined under NCLB, “similarly circumstanced” encompasses all disadvantaged children and their ability to perform at proficiency levels comparable to their peers. In this case, Justice Marshall reasserts his argument for a “spectrum [of standards]” based on “the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.”<sup>167</sup>

In *Plyler v. Doe*, the Court deliberated whether “Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens.”<sup>168</sup> Justice Brennan, writing for the Court, stated that “[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legisla-

162 *Rodriguez*, 411 U.S. at 33–35 (majority opinion).

163 *Id.* at 35.

164 *Id.* at 84 (Marshall, J., dissenting).

165 *Id.* at 112–13 (Marshall, J., dissenting).

166 *Id.* at 89 (Marshall, J., dissenting) (emphasis added) (internal quotation marks omitted).

167 *Id.* at 99 (Marshall, J., dissenting).

168 *Plyler v. Doe*, 457 U.S. 202, 205, 215–16 (1982) (examining laws passed by the Texas legislature withdrawing funds to support public education for students not legally residing in the country and authorizing a district to deny enrollment on the same basis).

tion.”<sup>169</sup> The law’s effect on children receiving a public education proved influential to the Court’s analysis.<sup>170</sup> The Court reasoned that education stood apart from other governmental benefits due to its role “in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child.”<sup>171</sup> Public education helps the individual, which in turn helps society. Thus, society benefits from the education of individuals participating in the economy and political process.<sup>172</sup>

ESEA solidified the government’s interest in providing quality education to disadvantaged children, which encompasses more than the color line of black and white.<sup>173</sup> Most state supreme courts have adopted this goal through interpretation of their respective constitutional education clauses.<sup>174</sup> And most recently, NCLB focuses on protected groups that have gained attention through the civil rights movement sparked by *Brown*. The next Part discusses how social science data advises education reforms supported by the federal executive and legislative branches and some state supreme courts. In light of the mutuality between law and social science research, the Supreme Court must find some space in its equal protection legal doctrines to incorporate research-based methods in the evaluation of education policies.

### III. TOEING THE LINE: PROTECTED CLASSIFICATIONS, EDUCATION POLICY, AND SOCIAL SCIENCE DATA

In addition to not recognizing a fundamental right to education, the Court also uses its activist ideology to undermine educational quality reform attempted by policy makers. In reviewing the Court’s education doctrine under the Fourteenth Amendment, the Justices seem to draw their guiding equality standard, colorblindness, from

---

<sup>169</sup> *Id.* at 213.

<sup>170</sup> *Id.* at 220–21 (arguing that children have no control over their parents’ conduct and that public education is a special governmental benefit).

<sup>171</sup> *Id.* at 221. Justice Blackmun’s concurrence echoed this sentiment, stating that “*Rodriguez* implicitly acknowledged that certain interests, though not constitutionally guaranteed, must be accorded a special place in equal protection analysis.” *Id.* at 233 (Blackmun, J., concurring).

<sup>172</sup> *Id.* at 221 (“In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”).

<sup>173</sup> FREDERICK M. HESS & MICHAEL J. PETRILLI, NO CHILD LEFT BEHIND 132 (2006).

<sup>174</sup> Kagan, *supra* note 1, at 2241–42; Rebell, *supra* note 1, at 218; Umpstead, *supra* note 1, at 282.

the aspirational goal of resolving the original discriminatory act of segregation.<sup>175</sup> The Justices conduct this analysis based on an assumption that current social norms alleviate discriminatory realities, that we have no greater understanding of the factors leading to underperformance in public schools, and that Congress has not implemented a complete overhaul of education policy. As courts move from a proscriptive to permissive role in education policy, it will require the reconsideration of federal and state roles in improving education quality and social science research regarding the accessibility of educational opportunities based on a student's diverse demographic background.

Congress and states rely on social science data to inform education reforms implemented to close the achievement gap and improve underperforming academic programs. This reliance leads policy-makers to conclude that race and other protected traits should be considered for curricula and programs developed to remove the deficiencies plaguing minority and impoverished communities.<sup>176</sup> The Court's individualistic anticlassification treatment of protected groups inhibits school officials from enacting these informed, although experimental, policies. This Part discusses the push from Congress, the Department of Education, and state courts for school officials to incorporate social science data into their reform of education policies. Based on this encouragement, I argue that race and other considerations, categorized as societal discrimination, are inevitably considered when crafting education policies for many geographical areas. Therefore, the Court's equal protection doctrine falls short in providing the deference needed for education policy-makers to fulfill their federal and state mandates of developing policies reflective of social science research while simultaneously satisfying the Court's equal protection standard.

A. *The Entangled Web: Congress and States Encourage Reliance on Social Science Evidence to Inform Education Policy*

Race, gender, geography, and socioeconomic status serve as proxies for identifying children with such underserved educational needs. The Court's categorical treatment of protected classifications hinders the ability of school officials to create policies tailored to their student population—an approach advocated by the federal government and state constitutional education clauses. *Brown Ps* shock value

---

<sup>175</sup> Karlan, *supra* note 154, at 1064; Robinson, *supra* note 24, at 313–25.

<sup>176</sup> Fairchild, *supra* note 2.

stems in part from the Court's activist stance against race discrimination in public education.<sup>177</sup> Then, the Supreme Court stood at the forefront of the executive branch and Congress to end segregation in public schools.<sup>178</sup> The Court filled a void during the 1950s; however, it never loosened the reins to permit experimentation with education reforms as contemplated in NCLB and state-level directives to local districts.

Congress and local school officials are expected to overcome disconnects between policy goals and reality. The explanation for disparate academic performance has shifted from overt prejudice to the residual, cumulative effects of overt and systemic prejudice. No longer are black children mandated by the state to attend poorly funded and neglected schools, immigrant children denied language transition classes, or girls limited to a "life skills" curriculum track. A more difficult issue lays on the horizon—systemic disparities, carrying no less a detrimental effect on a student's academic performance.<sup>179</sup>

Jeannie Oakes, along with her co-authors, criticized the "inequality frame" presented in *Rodriguez* for transforming potential allies into competitors by "[a]ppealing to those who have the least, along with their allies driven by justice concerns."<sup>180</sup> They explain that this advocacy model ignores the advantages gained by all through redistributing education resources.<sup>181</sup> Oakes lauds the "quality diagnostic frame" for not suggesting the diminution of funds to certain schools, especially middle-class communities that may feel threatened.<sup>182</sup> But she concludes that inequality and adequacy arguments may "offend those who are relatively better served by schools."<sup>183</sup> Instead, she argues for an expanded social justice framework that views "education as dependent upon, rather than competitive with, resources essential to

---

177 COTTROL ET AL., *supra* note 78, at 8.

178 *Id.* at 217.

179 REBELL & WOLFF, *supra* note 36, at 72–73; Jeannie Oakes et al., *Grassroots Organizing, Social Movements, and the Right to High-Quality Education*, 4 STAN. J. C.R. & C.L. 339, 365–66 (2008).

180 Oakes et al., *supra* note 179, at 365–66. The authors describe the inequality frame as "shaped in the more general struggles for civil rights and social equality, diagnoses the problem as one of unequal access to educational opportunity, and calls for redistribution and leveling." *Id.*

181 *Id.* ("The *inequality* frame is self-limiting in its reach. . . . [It] fails to challenge the logic of scarcity, [and] it seems to call for redistribution within a 'zero-sum' arena of high-quality education.")

182 *Id.* The Authors describe the quality diagnostic frame as "seek[ing] to increase material resources for all, even as it redistributes the more abstract quality of relative 'advantage.'" *Id.*

183 *Id.* at 366.

the health and well being of communities and families, and integrally connected to health care, housing, income security, public safety, environmental protection, and so on.”<sup>184</sup>

Similarly, Michael Rebell of Teachers’ College, in *Moving Every Child Ahead*, argues that “to provide a meaningful educational opportunity to at-risk children from communities of concentrated poverty, students must be provided, as needed, with specific out-of-school educational essentials.”<sup>185</sup> This external support, funded through public school budgets, includes early education, academic support, and exposure to extracurricular activities.<sup>186</sup> With the shifting demographic and push to develop innovative learning programs that close the achievement gap, it is appropriate for the Court to develop an analysis in line with what is being asked of school districts.

### 1. *No Child Left Behind’s Goal to Close the Achievement Gap*

NCLB ushered in a new era of federal involvement in K–12 public education. Under the Johnson administration, education experts measured success based on the “pace of state integration efforts and the size and distribution of school resources.”<sup>187</sup> The 1960s reform treated integration and monetary distribution as individual pieces of the puzzle to achieve quality education and economic parity. However, under NCLB, the annual yearly progress requirements merged these two quests under one mission. NCLB implemented requirements that encourage experimentation without wiping out desegregation as an educational priority, because the Civil Rights Act remained on the books.

NCLB’s overarching goal is closing the achievement gap between at-risk students and their peers.<sup>188</sup> Three explanations have been given to explain the achievement gap: first, “a lack of resources, particularly money and know-how, in needy schools;” second, “problems in society and the larger culture, especially the effects of poverty;” and, third, “a dysfunctional school culture and a lax system of governance and incentives that permits school systems to avoid making unpopular decisions, even when those are essential to improving perfor-

---

184 *Id.* at 367.

185 REBELL & WOLFF, *supra* note 36, at 72–73.

186 *Id.* at 72–73 (listing necessary out-of-school systems for at-risk students).

187 MCGUINN, *supra* note 36, at 33.

188 HESS & PETRILLI, *supra* note 173, at 21 (“NCLB advocates . . . were concerned about the nation’s ‘achievement gap’—primarily the disparity between the performance of white and Asian students, on the one hand, and African-American and Latino students, on the other.”).

mance.”<sup>189</sup> NCLB adopts the viewpoint that failures on the school and district levels explain poor student performance and strong accountability measures will incentivize schools to improve achievement levels.<sup>190</sup> Every state agreed to fulfill the accountability measures imposed under the statute’s scheme for improvement in academic performance.<sup>191</sup> Although many states have criticized NCLB’s mandates and schedule for improvement, it is still the nation’s premier education policy.

2. *The Federal Tug-of-War over the Role of “Scientifically-based Research”—Courts v. the Executive and Legislative Branches*

The social science literature available to Congress while deliberating ESEA focused heavily on how a student’s socioeconomic status might affect academic performance.<sup>192</sup> Similar to contemporary debate, scholars contested the most effective methods for educating disadvantaged children, the effects of race and socioeconomic diversity on a student’s academic performance, and the way government could best support improvements in public education.<sup>193</sup> As circumstances change, social science research tracks developments to better understand academic performance, and NCLB encourages school officials to participate in these investigations.<sup>194</sup> State courts also have relied on research-based methods to craft remedies for adequacy law-

---

189 *Id.* at 22.

190 *Id.* at 23 (“[NCLB] is premised on the notion that local education politics are fundamentally broken, and that only strong, external pressure on school systems, focused on student achievement, will produce a political dynamic that leads to school improvement.”).

191 See U.S. DEP’T OF EDUC., NO CHILD LEFT BEHIND: A ROAD MAP FOR STATE IMPLEMENTATION 3 (2005), available at <http://www2.ed.gov/admins/lead/account/roadmap/roadmap.pdf> (“Within 18 months of [NCLB’s] passage, all 50 states, the District of Columbia and Puerto Rico had submitted detailed plans for meeting NCLB’s student achievement goals.”).

192 MCGUINN, *supra* note 36, at 31–32 (“ESEA was premised on the idea that the federal government should intervene in what was increasingly seen as an education crisis among poor and minority children.”).

193 *Id.* at 31–33; REBELL & WOLFF, *supra* note 36, at 47–48.

194 Jonathan Margolin & Beth Buchler, *Critical Issue: Using Scientifically Based Research to Guide Educational Decisions*, N. CENT. REG’L EDUC. LAB., LEARNING POINT ASSOCS., [http://merainc.org/archives/past\\_conferences/fall2010/pdfs/GullenHandout1.pdf](http://merainc.org/archives/past_conferences/fall2010/pdfs/GullenHandout1.pdf) (last visited Oct. 24, 2011) (“The imperative for incorporating SBR is dictated not only by federal law, but by common sense as well. . . . [E]ducators will need to care about SBR and how it impacts success in their school. They will need to learn and understand SBR in order to improve learning in the classroom and integrate SBR into their educational modus operandi.”).

suits.<sup>195</sup> The Supreme Court, by providing greater deference to state and local school districts, could find a way to accommodate social science research without allowing trends to dictate a constitutional decision's outcome.

#### a. The Federal Courts and Social Science Evidence

In *Brown I*, the NAACP's briefs explicitly relied on social science evidence to support its arguments against segregated schools.<sup>196</sup> The Court referenced social science evidence reaching the same conclusions in a footnote of the *Brown I* opinion.<sup>197</sup> This reference to sociological studies continues to raise contentions about the validity of the research and the weight to be given social science when determining constitutional issues.<sup>198</sup>

Justice Frankfurter believed that "courts had to frankly concern themselves with considerations of good policy, considerations that should rest on the best available scientific learning."<sup>199</sup> Not every Justice shares this opinion. In *Missouri v. Jenkins*, Justice Thomas emphatically stated that social science research "cannot form the basis upon which [the Court] decide[s] matters of constitutional principle."<sup>200</sup> He went on to declare that "[t]he judiciary is fully competent to make independent determinations concerning the existence of state action without the unnecessary and misleading assistance of the social sciences."<sup>201</sup> He insisted that lower courts resist being influenced by "the easy answers of social science" and encouraged them to

---

195 *Access Quality Education: A Costing-Out Primer*, NAT'L ACCESS NETWORK (June 1, 2006), [http://www.schoolfunding.info/resource\\_center/costingoutprimer.php3](http://www.schoolfunding.info/resource_center/costingoutprimer.php3) (noting that "[a] variety of approaches for undertaking such [adequacy] studies have been used in recent years in many states . . . in some cases as part of the development of a new funding system ordered by a state court").

196 Moran, *What Counts as Knowledge*, *supra* note 155, at 517–18 (detailing the manner in which the NAACP approached the *Brown I* brief and incorporated social science evidence into its argument); *see also* KLUGER, *supra* note 50, at 315–21 (recounting the development of social science evidence and the NAACP's use of it).

197 *See Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954) (listing psychological studies).

198 Moran, *What Counts as Knowledge*, *supra* note 155, at 518 (noting that following *Brown I* "some believed that the case would usher in a new partnership between law and social science"); Michael Heise, *Judicial Decision-Making, Social Science Evidence, and Equal Educational Opportunity: Uneasy Relations and Uncertain Futures*, 31 SEATTLE U. L. REV. 863 (2008) (analyzing the contentious use of social science evidence in constitutional cases).

199 COTTROL ET AL., *supra* note 78, at 81.

200 *Missouri v. Jenkins*, 515 U.S. 70, 120 (1995) (Thomas, J., concurring).

201 *Id.* at 121.



reject “the findings, and the assumptions, of sociology and psychology at the price of constitutional principle.”<sup>202</sup>

Justice Marshall addressed similar arguments in *Rodriguez*. He did not argue directly on behalf of using social science. However, he admonished the Court’s majority for extrapolating positive assertions from inconclusive evidence. In *Rodriguez*, he contends that: “If, as the majority stresses, such authorities are uncertain as to the impact of various levels of funding on educational quality, I fail to see where it finds the expertise to divine that the particular levels of funding . . . assure an adequate educational opportunity . . . .”<sup>203</sup>

In *Parents Involved*, the Court found two voluntary desegregation plans unconstitutional.<sup>204</sup> In this case, the Court consolidated challenges brought against the Seattle School Board and Jefferson County Board of Education.<sup>205</sup> At the district court level, in the Seattle case, the trial judge identified three interests:

- (1) to promote the educational benefits of diverse school enrollments;
- (2) to reduce the potentially harmful effects of racial isolation by allowing students the opportunity to opt out of racially isolated schools; and
- (3) to make sure that racially segregated housing patterns did not prevent non-white students from having equitable access to the most popular over-subscribed schools.<sup>206</sup>

The Jefferson County Board of Education also asserted racial balance and its benefits as a compelling government interest.

The majority of the Justices supported the benefits of diversity as a compelling government interest under the strict scrutiny test.<sup>207</sup> However, Justice Thomas railed against the benefits of diversity as a compelling interest, stating that, “[s]cholars have differing opinions as to whether educational benefits arise from racial balancing.”<sup>208</sup> He further claimed that “it would leave our equal protection jurisprudence at the mercy of elected officials evaluating the evanescent views of a handful of social scientists.”<sup>209</sup> Accordingly, he concluded

202 *Id.* at 122–23.

203 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 89 (1973) (Marshall, J., dissenting).

204 *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 709–11 (2007) (“The Courts of Appeals below upheld the [student assignment] plans. We granted certiorari, and now reverse.”).

205 *Id.*

206 *Id.* at 786–87 (Kennedy, J., concurring in part and concurring in the judgment) (internal quotation marks omitted).

207 *Id.* at 803 (Breyer, J., dissenting) (“This Court has recognized that the public interests at stake in such cases are ‘compelling.’”).

208 *Id.* at 761 (Thomas, J., concurring).

209 *Id.* at 766 (Thomas, J., concurring).

“[e]ven if current social theories favor classroom racial engineering as necessary to solve the problems at hand, the Constitution enshrines principles independent of social theories.”<sup>210</sup> Justice Breyer responded directly to Justice Thomas by noting:

If we are to insist upon unanimity in the social science literature before finding a compelling interest, we might never find one. I believe only that the Constitution allows democratically elected school boards to make up their own minds as to how best to include people of all races in one America.<sup>211</sup>

Defining the role of social science data in constitutional judicial-decisionmaking continues to divide the Supreme Court and constitutional scholars. In the education context, however, school districts must incorporate social science data when developing reforms. The following sections describe the federal requirements for districts to use social science data and how the Supreme Court may accommodate such evidence when determining the constitutionality of education policies.

#### b. Congress, the Department of Education and Social Science Evidence

In the education context, the federal courts should consider social science research.<sup>212</sup> For program development, teaching assessment, and tracking school progress, NCLB requires “scientifically based research” as a guide to implementing best practices, which leaves educators to choose a preferred method.<sup>213</sup> The standard is defined as “research that involves the application of rigorous, systematic, and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs.”<sup>214</sup> For example, Section 1114 re-

<sup>210</sup> *Id.* at 780 (citation omitted) (internal quotation marks omitted).

<sup>211</sup> *Id.* at 845 (Breyer, J., dissenting).

<sup>212</sup> See HESS & PETRILLI, *supra* note 173, at 97 (“NCLB’s scientifically based research provisions were intended not to require that all educational research adopt one particular methodological approach, but that educational practice be guided by research that is rigorous and reliable.”); Danielle Holley-Walker, *Educating at the Crossroads: Parents Involved, No Child Left Behind and School Choice*, 69 OHIO ST. L.J. 911, 920 (2008) (noting that in *Parents Involved*, the Court’s plurality opinion “avoid[ed] the social science altogether” when it conflicted with school districts’ “good faith determination that there was enough evidence to support adopting a race-conscious student assignment policy”).

<sup>213</sup> See Aaron J. Saiger, *Legislating Accountability: Standards, Sanctions, and School District Reform*, 46 WM. & MARY L. REV. 1655, 1724 (2005) (internal quotation marks omitted) (“[NCLB] is . . . agnostic as to pedagogical method, with the very important exception that once districts are identified as needing improvement they must implement ‘strategies based on scientifically based research.’”).

<sup>214</sup> No Child Left Behind Act, 20 U.S.C. § 7801 (2006).

quires schools to implement “school-wide programs” based on “strategies that . . . use effective methods and instructional strategies that are based on scientifically based research that strengthen the core academic program in the school; increase the amount and quality of learning time . . .; and include strategies for meeting the educational needs of historically underserved populations.”<sup>215</sup>

The Department of Education stands in full support of the congressional mandate to rely on social science evidence when developing educational programs. The What Works Clearinghouse, operated by the Department of Education, maintains a publicly available database of scientifically based programs in effect across the country.<sup>216</sup> Additionally, President Obama’s administration implemented the Race to the Top program through the American Recovery Reinvestment Act of 2009.<sup>217</sup> School districts and schools participating in Race to the Top compete for education grants administered through the Department of Education. Although proposals need not be scientifically based for approval, the competition encourages educators to replicate programs already proven as effective.<sup>218</sup> The science-to-policy transition has undoubtedly been criticized for major programs charged to improve educational outcomes through the data; however, Congress set forth a standard that the Court should apply when assessing the credence to be given research for constitutional challenges.<sup>219</sup>

---

<sup>215</sup> *Id.* § 6314(b)(1)(B).

<sup>216</sup> *About Us: What Works Clearinghouse*, INST. OF EDUC. SCIS., <http://www.ies.ed.gov/ncee/wwc/AboutUs.aspx> (last visited Oct. 24, 2011) (“[T]he What Works Clearinghouse (WWC) was created in 2002 to be a central and trusted source of scientific evidence for what works in education.”).

<sup>217</sup> See American Recovery and Reinvestment Act, §§ 14001–14013, Pub. L. No. 111-5, 123 Stat. 115, 279–286 (2009) (detailing the subsections of the American Recovery and Reinvestment Act related to the Race to the Top program).

<sup>218</sup> U.S. DEP’T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 2 (2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf> (explaining the competitive nature of Race to the Top).

<sup>219</sup> Dan Liston et al., *NCLB and Scientifically-Based Research: Opportunities Lost and Found*, 58 J. TCHR. EDUC. 99 (2007); Joseph L. Mahoney & Edward F. Zigler, *Translating Science to Policy Under the No Child Left Behind Act of 2001: Lessons From the National Evaluation of the 21st-Century Community Learning Centers*, 27 J. APPLIED DEV. PSYCHOL. 282 (2006); Alan H. Schoenfeld, *What Doesn’t Work: The Challenge and Failure of the What Works Clearinghouse to Conduct Meaningful Reviews of Studies of Mathematics Curricula*, 35 EDUC. RES. no.2, 13 (2006); Dick Schutz, *The Non-Impact of Reading First—Where to Go From Here*, TCHRS C. REC., Feb. 12, 2009.

### c. A Doctrinal Solution

The treatment of social science in the education context, as envisioned by accepting quality education to be a recognized government interest, would require federal courts to give legislative bodies deference when filtering which social science evidence should or should not inform policy decisions. This reliance on legislative deference should be distinguished from relying on the expert testimony of social scientists to sway constitutional decisions.

The *Brown* litigation strategy and the Court's opinion, unlike any previous constitutional dispute, incorporated social science as evidence to prove the plaintiffs' harm.<sup>220</sup> Thurgood Marshall, persuaded by then-attorney Robert Carter, presented Dr. Kenneth Clark's psychological studies regarding the effects of segregated schools on a black student's self-image.<sup>221</sup> Justice Warren, in footnote eleven of the *Brown* opinion, cited to several social science studies on the psychological harms resulting from segregated schooling.<sup>222</sup> The prominence of social science in *Brown* inspired much legal scholarship on the interplay between law and society when determining constitutional questions. Even *Brown* proponents questioned whether social science should have played any role in reaching an otherwise sound decision.

Rachel Moran, comparing the use of social science in *Brown* and *Parents Involved in Community Schools*, concludes that

in *Brown*, research on the inescapable harms of segregation, even in dual school systems that had equalized, was a legislative fact. It bore on the normative question at the heart of the Court's constitutional dilemma: Could separate ever be equal? In *Parents Involved in Community Schools v. Seattle School District*, studies on the benefits of diversity in elementary and secondary schools played an analogous role. This research was deployed to support a normative commitment to color consciousness, not just as a remedy for past discrimination but as a bridge to a multiracial future.<sup>223</sup>

She also observes that "[a] formalist approach requires courts to look to their judicial predecessors, not contemporary social scientists, to determine what the law should look like."<sup>224</sup>

A more general critique of social science in relation to constitutional decisions argues that "[t]he Court has (1) misused or misapplied data when it believes the data will enhance the persuasiveness of

---

<sup>220</sup> KLUGER, *supra* note 50, at 315–21.

<sup>221</sup> *Id.*

<sup>222</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954).

<sup>223</sup> Moran, *What Counts as Knowledge*, *supra* note 155, at 533 (citations omitted).

<sup>224</sup> *Id.* at 537.

its opinions; (2) ignored or rejected data despite its assertion of empirically testable statements; and (3) disparaged data when the research does not support its views. In some cases, it has done all three.”<sup>225</sup>

Under federal constitutional review, if the scientific research relied upon by either party does not meet NCLB’s standard, then the Court should not allow the evidence. Social scientists testify as trial experts, and social scientists help to inform legislative decisions. Policy decisions made on the district and state levels using scientifically-based research, as contemplated under NCLB, should be treated as though based on legislative fact. In *Turner Broadcasting System, Inc. v. Federal Communications Commission*, the Court set forth its test for determining the constitutionality of congressional statutes based on the legislature’s “predictive judgments.”<sup>226</sup> The deference given Congress leaves the Court to consider whether “in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.”<sup>227</sup> The Court concedes that the deference permitted Congress emanates from the institution being “far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.”<sup>228</sup> Moreover, the Court recognizes a “respect for [Congress’s] authority to exercise the legislative power.”<sup>229</sup> Courts should bestow this same respect on school districts that use research-based models to develop quality education programs for closing the achievement gap.

### B. *The Inevitability of Race in Education Reform*

The Court’s overemphasis on race is proving detrimental to the broader goal of quality education in the public system. The Supreme Court’s more recent precedents apply a monotone analysis to education reforms—one that is historical and that fails to recognize how other factors influence academic performance.<sup>230</sup> A cohesive framework, with an epicenter of quality education, links the purpose behind assigning tiered levels of scrutiny to varying classifications and

---

225 Donald N. Bersoff & David J. Glass, *The Not-So Weisman: The Supreme Court’s Continuing Misuse of Social Science Research*, 2 U. CHI. L. SCH. ROUNDTABLE 279, 293 (1995) (footnote omitted).

226 *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 196 (1997).

227 *Turner*, 520 U.S. at 195 (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 666 (1994)).

228 *Turner*, 520 U.S. at 195 (quoting *Turner*, 512 U.S. at 665) (internal quotations omitted).

229 *Id.* at 196.

230 See Jordan M. Steiker, *Brown’s Descendants*, 52 HOW. L.J. 583, 603 (2009) (describing recent precedential cases that uniformly agree all racial classifications are intolerable).

contemporary reform goals. A focus on quality education also allays the concerns of education policy-makers attempting to reconcile federal constitutional interpretations and myriad legislative obligations.

Resurrecting broader equality arguments will open room for educational experts to explore solutions that may be forbidden under current law. As the pre-*Brown* legal strategy unfolded in the Supreme Court, the law evolved to recognize how a state's attempt to provide objective equal resources did not wholly address more comprehensive equality goals; instead, an "intangible" component factored into satisfying the equality standards expressed in *Brown*.<sup>231</sup> Offsetting the effects of these intangible factors forces us to consider categories beyond race.

### 1. NCLB's Disaggregated Reporting Requirement

Social scientists acknowledge race, gender and socioeconomic status as inextricable factors hindering the academic performance of "disadvantaged" students.<sup>232</sup> On the other hand, the judiciary subordinates gender and socioeconomic status to race in reviewing the constitutionality of education policy.<sup>233</sup> Federal legislation places the classifications on separate planes for remedial purposes but not accountability. Federal equal protection doctrine should incorporate the state's definition of quality education as a government interest. This change will signify recognition of our broadest goal to educate all Americans with the requisite sensitivity to local circumstances.

Congress's definition of disadvantaged or at-risk children is constantly in flux for funding purposes—while the Court is stuck with race and wealth classifications. Periodically, through ESEA's legislative history, Congress has expanded the categories eligible to be considered disadvantaged under the statute. Now, under NCLB, Title I seeks to achieve its purpose by "meeting the educational needs of low-achieving children in our Nation's highest-poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children, neglected or delinquent children, and

---

<sup>231</sup> See *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950) (holding that the University of Oklahoma violated a student's equal protection rights by imposing segregated conditions under which African-American students were to receive their education); *Sweatt v. Painter*, 339 U.S. 629, 633 (1950) (discussing how the newly opened law school for African Americans in Texas did create "substantial equality in the educational opportunities offered white and Negro law students by the state").

<sup>232</sup> Robinson, *supra* note 24, at 320, 327 n.325.

<sup>233</sup> *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 710, 719 (2007); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

young children in need of reading assistance.”<sup>234</sup> The statement goes on to address the achievement gap between “minority and nonminority students, and between disadvantaged children and their more advantaged peers.”<sup>235</sup>

Prior to NCLB, state-level reforms often sought to track school performance based on the entire student population.<sup>236</sup> This method overlooked the nuances necessary to improve education for particular disadvantaged groups. As Congress moved away from simply contributing funds, it implemented statutes to prevent segregation and ensure steps were taken to provide a quality public education to all students, including racial and ethnic minorities, the impoverished, English-language learners, and the learning disabled. Under NCLB, schools must report their student population’s performance on standardized tests in the following categories: “ethnic and racial groups, low-income students, students with disabilities, and students with limited English proficiency.”<sup>237</sup>

## 2. *Race and State Adequate Education Goals*

Many scholars understand, study, and measure academic performance in elementary and secondary education based on identifiable groups. Furthermore, our approach to developing effective education reforms requires an appreciation for how protected traits intersect to affect a child’s performance in public schools. Accordingly, the Court’s antidiscrimination doctrine and discrete categorization of traits undermines the work done by education experts to tailor programs and allocate funding. By recognizing a category of at-risk students receiving subpar educational services, the Supreme Court would align its Fourteenth Amendment analysis with the challenges and expectations borne upon educators.

Under their respective state constitutional education clauses and equal protection clauses, state supreme courts have recognized the need to address racial isolation and race imbalance in public schools as a component of quality education. In *Bustop v. Board of Education of Los Angeles*, the Supreme Court gave sway to California’s interpretation of its state constitution in permitting a busing plan for Los Angeles Unified School District designed to bring about greater dese-

---

<sup>234</sup> No Child Left Behind Act, 20 U.S.C. § 6301 (2) (2006).

<sup>235</sup> *Id.* § 6301 (3).

<sup>236</sup> HESS & PETRILLI, *supra* note 173, at 35.

<sup>237</sup> *Id.* at 29, 35.

gregation.<sup>238</sup> Writing for the Court, Justice Rehnquist concluded that state courts “are free to interpret the Constitution of the State to impose more stringent restrictions on the operation of a local school board.”<sup>239</sup> He added that “[w]hile I have the gravest doubts that the Supreme Court of California was *required* by the United State Constitution to take the action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action.”<sup>240</sup>

In *Morean v. Board of Education of Montclair*, the Supreme Court of New Jersey held that a school district “need [not] close its eyes to racial imbalance in its schools which, though fortuitous in origin, presents much the same disadvantages as are presented by segregated schools.”<sup>241</sup> Citing the state’s constitution and *Brown*, the court reached this conclusion on the reasoning that New Jersey schools must “maintain a sound educational system by the furnishment of suitable school facilities and equal educational opportunities.”<sup>242</sup>

In *Citizens Against Mandatory Bussing v. Palmason*, the Washington Supreme Court allowed the school board deference in crafting a desegregation plan aimed at alleviating de facto racial discrimination in the public schools.<sup>243</sup> Similarly, in *Crawford v. Board of Education of Los Angeles*, the Supreme Court of California once again permitted the use of race under its state constitution. The court held that “public school districts bear an obligation under the state Constitution to undertake reasonably feasible steps to alleviate school segregation, regardless of the cause of such segregation.”<sup>244</sup>

Finally, in *Sheff v. O’Neill*, the Supreme Court of Connecticut considered racial isolation as an educational feature appropriate for redress under the state’s constitution.<sup>245</sup> *Sheff* marks the beginning of the proposed fourth wave of state finance litigation reform, which recognizes the need for race-conscious policies in resolving educational disparities.<sup>246</sup> Reflecting upon *Sheff*, James Ryan suggests that adequate education rights, under state constitutions, are “broad enough

<sup>238</sup> 439 U.S. 1380 (1978).

<sup>239</sup> *Id.* at 1382.

<sup>240</sup> *Id.* at 1383.

<sup>241</sup> *Morean v. Bd. of Educ. of Montclair*, 200 A.2d 97, 100 (N.J. 1964).

<sup>242</sup> *Id.*

<sup>243</sup> 495 P.2d 657, 661–62 (Wash. 1972).

<sup>244</sup> 551 P.2d 28, 42 (Cal. 1976).

<sup>245</sup> *Sheff v. O’Neill*, 678 A.2d 1267 (Conn. 1996).

<sup>246</sup> Black, *Unlocking the Power*, *supra* note 29, at 1361–75; Bowman, *supra* note 153, at 57; Farmer, *supra* note 23, at 463–64; McMillan, *supra* note 153, at 1896–1902; Morgan, *supra* note 153, at 165–68.



to encompass racial and socioeconomic integration.”<sup>247</sup> Here, the Connecticut Supreme Court recognized racial isolation as a problem linked to insufficient funding; thus, it held that these students’ suffered disparate educational opportunities.<sup>248</sup> However, race-conscious policies implemented in response to state-judicial mandates are vulnerable to attack under the federal equal protection doctrine.<sup>249</sup> Students with disabilities, language issues, poor students, and those attending schools that are racially isolated require more money to educate at an adequate level.<sup>250</sup> The Fourteenth Amendment should allow states to craft policies based on their citizens’ myriad special needs—an antisubordination framework permits the flexibility needed to assess these fluid concerns.<sup>251</sup> The Court’s equal protection doctrine may accommodate this subjectivity by recognizing quality education, as interpreted under a state’s education clause, to be a compelling government interest.

In analyzing *Brown* and subsequent desegregation cases, Reva Siegel identifies antisubordination as “the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups.”<sup>252</sup> Under an antisubordination framework, policymakers may implement race-conscious laws when necessary to redress a harm and its resulting adverse effects.<sup>253</sup> On the other hand, anticlassification theorists focus on the government category invoked by a law as opposed to the underlying harm to be redressed pursuant to the state action.<sup>254</sup> More recently, Rachel Moran has proposed that “[a]ny recognition of schools as a place to build complex, flexible, and dynamic identities has been hampered by the rigid dialectic between an anti-classification and an anti-subordination Constitution, a dialectic that in turn has reified

---

247 James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 309 (1999).

248 Goodwin Liu, *The Parted Paths of School Desegregation and School Finance Litigation*, 24 L. & INEQ. 81, 104 (2006).

249 Bowman, *supra* note 83, at 983–85; Bowman, *supra* note 153, at 63.

250 Black, *Unlocking the Power*, *supra* note 29, at 1343, 1374–75; Ryan, *supra* note 247, at 285, 296.

251 Balkin & Siegel, *supra* note 24, at 15 (stating “the practical reach of the antisubordination principle is open to debate at any given historical moment, and . . . its reach shifts over time”); *id.* at 14 (“The question of what . . . might be subordinating involves interpretive judgments about social meaning, status, and the like, each of which is plainly contestable.”).

252 Siegel, *supra* note 24, at 1472–73.

253 Moran, *Politics of Discretion*, *supra* note 83, at 1321, 1335.

254 Balkin, *supra* note 67, at 1564–65; Moran, *Politics of Discretion*, *supra* note 83, at 1334; Siegel, *supra* note 24, at 1495, 1498–99.

race.”<sup>255</sup> She suggests that, in the education context, “culture-race can create a positive, autonomous space for identity-building in a world no longer organized along oppositional, binary racial lines.”<sup>256</sup>

The federal and state governing bodies of public education recognize racial classifications as part and parcel in achieving quality education goals. The following section discusses federal executive-level and state-level initiatives to direct resources towards the quality education of Latino students. This focus emanates from the increase of Latino populations in the United States, particularly in certain geographic regions. In the United States, one in every five public school children claims a Latino background.<sup>257</sup> While opponents resist the allocation of public funds to one group, as identified by a protected classification, quality education goals require these reforms in closing the achievement gap.

### C. *The Cooperative Effort to Educate Latino Americans*

#### 1. *The Executive Branch Embraces Demographic Shifts, Community, and Local Control*

Communication between policymakers and the community remains a key component to successful reform. Professors Amanda Broun and Wendy Puriefoy argue that “inclusion of the public voice is an important element of the public engagement framework because the voice of the community has been historically excluded from the debate, resulting in reform that is rarely system-wide and even more rarely sustained.”<sup>258</sup> In *Parents Involved*, Justice Breyer opined that

the law often leaves legislatures, city councils, school boards, and voters with a broad range of choice, thereby giving “different communities” the opportunity to “try different solutions to common problems and gravitate toward those that prove most successful or seem to them best to suit their individual needs.”<sup>259</sup>

---

<sup>255</sup> Moran, *Rethinking Race*, *supra* note 83, at 1358.

<sup>256</sup> *Id.* at 1359.

<sup>257</sup> Richard Fry & Felisa Gonzales, *One-in-Five and Growing Fast: A Profile of Hispanic Public School Students*, PEW HISPANIC CTR. (Aug. 26, 2008), <http://www.pewhispanic.org/reports/report.php?ReportID=92>.

<sup>258</sup> Amanda R. Broun & Wendy D. Puriefoy, *Public Engagement in School Reform: Building Public Responsibility for Public Education*, 4 STAN. J. C.R. & C.L. 217, 242 (2008).

<sup>259</sup> *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 822 (2007) (Breyer, J., dissenting) (quoting *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 28 (1st Cir. 2005) (Boudin, C.J., concurring)).

Education reform is constantly in flux because the demographics of inner city districts and the federal influence over public education continue to change. The Civil Rights Project at the University of California reported increased suburban diversity in Indiana due to an increase in the Latino student population and first time “majority-minority” ratios in Abilene, Texas, based on an increase in Latino student enrollment.<sup>260</sup> Over an eighteen-month period, the White House conducted a listening tour around the country to develop strategies for improving public education services provided in Latino communities.<sup>261</sup> In October 2010, President Obama signed an executive order that “calls for the establishment of a presidential advisory commission on Hispanic education and a federal interagency working group on how to improve the education and lives of Latinos.”<sup>262</sup> It also aims to “support communities to share best practices in the education of Hispanic students and to strengthen public and private partnerships.”<sup>263</sup>

## 2. State Officials Embrace Demographic Shifts and Community

School officials must consider an array of characteristics and social circumstances, cued to their population, when crafting education policies.<sup>264</sup> Race will inevitably enter the equation for many states and urban districts. The Court’s current Fourteenth Amendment analysis could deter policymakers’ willingness to experiment in a reform climate that encourages innovation and a focus on particular minority groups. In *Plyler*, Justice Brennan explained that

[t]he initial discretion to determine what is “different” and what is “the same” resides in the legislature of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill.<sup>265</sup>

Local officials deserve some leeway in observing and rectifying problems in their states and districts. Following NCLB and President Obama’s lead, New Mexico’s Hispanic Education Act seeks to close the

---

260 Adai Tefera et al., *School Integration Efforts Three Years After Parents Involved*, THE CIVIL RIGHTS PROJECT (2010), <http://civilrightsproject.ucla.edu/legal-developments/court-decisions/school-integration-efforts-three-years-after-parents-involved/tefera-school-integration-three-years-after.pdf>.

261 Zehr, *supra* note 20.

262 *Id.*

263 *Id.*

264 Black, *Unlocking the Power*, *supra* note 29, at 1353–54; Bowman, *supra* note 83, at 964.

265 *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

achievement gap between Latino students and their white and Asian peers. It is the first state education legislation in the country focused exclusively on improving performance for these students.<sup>266</sup> In New Mexico, Latino students compose 56% of the public school students and only 56% graduate as compared to 71% of white students.<sup>267</sup> The Hispanic Education Act, among other features, creates a liaison to the state's public education department charged with developing policies, consulting with the districts, and communicating with an advisory council.<sup>268</sup> The statute also includes reporting requirements to track progress on closing the gap.<sup>269</sup> A spokeswoman for the New Mexico Public Education Department offers that "the main thing [the Hispanic Education Act] did was formalize community engagement and the community voice in crafting public policy."<sup>270</sup> The statute aims to improve student performance by incorporating a culturally based curriculum and increasing parent involvement.<sup>271</sup>

In *Horne v. Flores*, decided during the Supreme Court's 2009 term, parents from Arizona's Nogales School District challenged whether the state fulfilled its duty under the Equal Educational Opportunities Act, to appropriately transition Spanish-speaking students into the mainstream classroom.<sup>272</sup> The Court's decision hinged on a procedural issue, which brought to light substantive matters regarding the best approach for educating English learning students, state and local deference, and NCLB requirements. The *Horne v. Flores* litigation commenced over ten years ago. In 2000, the presiding federal district court declared that the school district's ELL program violated federal mandates due to funding deficiencies.<sup>273</sup> Several years later, the state legislature approved a funding increase.<sup>274</sup> In response, cer-

---

266 Clark, *supra* note 4.

267 Childress, *supra* note 5.

268 Bryan, *supra* note 6.

269 *Id.* ("The Public Education Department would also be required to submit an annual report on the statewide status of Hispanic education from preschool through high school."); *see also* Clark, *supra* note 4.

270 Elizabeth Piazza, *New Law Hopes to Close Achievement Gap for Hispanic Students*, THE DAILY TIMES (Farmington, N.M.), July 1, 2010, [http://www.publiceducation.org/nclb\\_articles/archive/20100701\\_New.asp](http://www.publiceducation.org/nclb_articles/archive/20100701_New.asp) (alteration in original).

271 *See, e.g.*, Clark, *supra* note 4; Heather Clark, *Richardson-Proposed Hispanic Education Act Draws Scrutiny*, SANTA FE NEW MEXICAN, Dec. 4, 2009, <http://www.santafenewmexican.com/localnews/Hispanic-Education-Act-Proposal-draws-scrutiny>.

272 129 S. Ct. 2579, 2588–89 (2009).

273 *Id.* at 2589 ("[The] defendants were violating the EEOA because the amount of funding the Sate allocated for the special needs of ELL students . . . was arbitrary and not related to the actual funding needed to cover the costs of ELL instruction in Nogales.").

274 *Id.* at 2590.

tain state actors sought a Rule 60(b)(5) motion in the district court, arguing that changes in the facts and law required it to revisit the previous judgment.<sup>275</sup> In 2009, the Supreme Court passed judgment on the motion's legitimacy.<sup>276</sup> Although not definitively deciding the motion, the Court provided invaluable insight on relevant considerations in the education context.

First, the Court determined that "appropriate action," as required in the statute, must be defined by the state as indicated in the statute.<sup>277</sup> Second, the Court concluded that the state's decision to implement an English immersion methodology over a bilingual education methodology fell within the state's discretion in light of social science research.<sup>278</sup> Third, the Court found NCLB's governance over standards for ELL education presented a "changed circumstance" under the procedural rule because it caused programmatic reforms, affected federal funding of ELL educational programs, required assessments and reports on program improvements, and demonstrated greater federal involvement in education reform.<sup>279</sup>

In *Horne v. Flores*, the Supreme Court held out a measured deference to legislative bodies. This same deference should apply to local school districts and states that are adjusting to the "changed circumstance" of closing the achievement gap between at-risk students and their peers, improving education in Latino communities, and developing research-based programs that inevitably use protected classifications.

#### *D. Intersectionality: The Complicated Dynamics to Explaining Academic Underperformance*

In lieu of federal courts controlling the boundaries for education reform, the varying educational needs based on a district's demographics support deference to local control and the incorporation of state constitutional interpretations with regards to defining a quality education. Even if local systems are broken, by expanding the constitutionality test, we recognize that many failed institutions contribute to the condition of public education. In *Rodriguez*, the Court confronted the difficulties with education quality, stating that "in view of the infinite variables affecting the educational process, [no system]

---

<sup>275</sup> *Id.* at 2591.

<sup>276</sup> *Id.* at 2606.

<sup>277</sup> *Id.* at 2597.

<sup>278</sup> *Id.* at 2600–01.

<sup>279</sup> *Id.* at 2600–04.

can . . . assure equal quality of education except in the most relative sense.”<sup>280</sup> This may be a true observation, but the Court’s categorical treatment of these “infinite variables” restricts school districts from crafting solutions that address the intersectionality of a child’s background. In the context of education, I agree that race contributes to explanations of the achievement gap, but if we were to eliminate racism today, many poor people would still exist in the United States. And, according to the research, both race and class contribute to the education problems facing public schools.

The only desegregation case that addresses the inextricable link between race and socioeconomic status is *Hobson v. Hansen*, decided in the federal district court for the District of Columbia.<sup>281</sup> The district court’s willingness to simultaneously consider both traits affecting quality education facilitated a comprehensive analysis penetrating issues not addressed under an antidiscrimination lens with tiered scrutiny levels. As the following review of Judge Skelly Wright’s opinion demonstrates, more nuanced issues related to quality education, such as tracking and housing patterns, may reveal themselves when federal courts concern themselves with more than assignment based on race. For example, Kristi Bowman proposes a multi-factor socioeconomic approach for Latino/a students which accounts for the “student’s English language speaking skills, whether English is spoken at home, and whether a student lives in public housing.”<sup>282</sup>

In *Hobson*, the parents of black and socio-economically disadvantaged children challenged the neighborhood school plan implemented by school officials in response to the Court’s ruling in *Bolling v. Sharpe*, the companion case to *Brown*.<sup>283</sup> The district court defined the issue as whether the school district “unconstitutionally deprive[d] the District’s [black] and poor public school children of their right to equal educational opportunity with the District’s white and more affluent public school children.”<sup>284</sup> In drawing connections between race and socioeconomic status, the district court acknowledged how the city’s housing patterns were changing and could be traced along racial lines; therefore, the neighborhood school policy caused the racial and socioeconomic demographics of residential areas to replicate

---

280 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973).

281 JEANNIE OAKES, *KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY* 184, 187–88 (2d ed. 2005).

282 Bowman, *supra* note 153, at 68.

283 *Hobson v. Hansen*, 269 F. Supp. 401, 405–06 (D.D.C. 1967); *see also* *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that racial segregation in District of Columbia public schools violates the Fifth Amendment).

284 *Hobson*, 269 F. Supp. at 406.

themselves in classrooms.<sup>285</sup> The court based its assessment of the urgent need for remedial action on

the degree to which the poor and the [black] must rely on the public schools in rescuing themselves from their depressed cultural and economic condition, and also our common need of the schools to serve as the public agency for neutralizing and normalizing race relations in the country. With these interests at stake, the court must ask whether the virtues stemming from the . . . [education policy] are compelling or adequate justification for the considerable evils of *de facto* segregation which adherence to this policy breeds.<sup>286</sup>

The court then went one step further to acknowledge that not only did the district's plan segregate students between schools, but the district's tracking system resegregated integrated schools by disproportionately assigning black and poor children to lower tracks.<sup>287</sup> In reviewing the track system, the district court addressed the proposition that the system adversely affects black and poor children to a greater extent than white middle-class students.<sup>288</sup> The court accepted that the track system "as presently practiced in the District of Columbia school system is a denial of equal educational opportunity to the poor and a majority of the [blacks] attending school in the nation's capital."<sup>289</sup> With this in mind, the court decided to examine the track system "in theory and in reality."<sup>290</sup> The court considered evidence showing the track system's deficiencies with respect to poor children and black students, who composed the majority demographic in the public school system under attack.<sup>291</sup> The court labeled a child's socioeconomic background as a "shorthand way of identifying those backgrounds that are more or less conducive to becoming a successful student."<sup>292</sup>

The equal protection doctrine can and should account for the myriad factors affecting students in any particular school district across the country. The Seattle School District implemented a plan that considered factors beyond the student's choice: where a student's sibling attends school, the student's race, and the school's proximity to the student's home.<sup>293</sup> Because race entered into the equation at all, the Court fixed its attention on applying its strict scru-

---

285 *Id.* at 411, 432.

286 *Id.* at 508.

287 *Id.* at 411.

288 *Id.* at 442–43.

289 *Id.* at 443.

290 *Id.*

291 *Id.* at 451.

292 *Id.* at 454.

293 *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 711–12 (2007).

tiny analysis with no regard for how the other factors considered in placing students may have affected the policy's constitutionality.<sup>294</sup> Justice Breyer observed that race "constitute[s] but one part of plans that depend primarily upon other, nonracial elements. . . . In fact, the defining feature of both plans is greater emphasis upon student choice."<sup>295</sup> Moreover, scholars following desegregation and school finance litigation trends persuasively argue for policies providing more money based on student need, even if this may require race-conscious policies, combined with renewed efforts to racially and ethnically integrate schools.<sup>296</sup> Social scientists also show that many factors play into determining a student's academic success.<sup>297</sup>

As school administrators respond to the needs unique to their locale, the Court's protected classifications mutate into something not contemplated by the discrete, insular classes identified in the *Carolene Products* and *Brown* opinions.<sup>298</sup> For example, whereas challenges to educate black male students plague many urban districts, this problem does not exist in some regions. In Appalachia, the education problem revolves around communities populated by white students. The end result may be for districts to rely less on race, opting for less effective alternatives, when correcting academic performance issues.<sup>299</sup> Some scholars suggest socioeconomic integration programs, which to this point have been immune from federal constitutional challenge but may be less effective than programs accounting for a student's race.<sup>300</sup> Moreover, socioeconomic integration encounters

---

294 *Id.* at 720–21.

295 *Id.* at 846 (Breyer, J., dissenting).

296 Liu, *supra* note 248, at 82 (discussing the Court's missed opportunity to combine desegregation and school finance issue when *Keyes* and *Rodriguez* were heard during the same term); Ryan, *supra* note 247, at 249, 255–56.

297 George Farkas, *Cognitive Skills and Noncognitive Traits and Behaviors in Stratification Processes*, 29 ANN. REV. SOC. 541 (2003); Guillermo Montt, *Cross-National Differences in Educational Achievement Inequality*, 84 SOC. EDUC. 49 (2011); Hedwig Lee, *The Effects of School Racial and Ethnic Composition on Academic Achievement During Adolescence*, 76 J. NEGRO EDUC. 154 (2007); Richard R. Pearce, *Effects of Cultural and Social Structural Factors on the Achievement of White and Chinese American Students at School Transition Points*, 43 AM. EDUC. RES. J. 75 (2006); Selcuk R. Sirin, *Socioeconomic Status and Academic Achievement: A Meta-Analytic Review of Research*, 75 REV. EDUC. RES. 417 (2005); Endya B. Stewart, *Family- and Individual-Level Predictors of Academic Success for African American Students: A Longitudinal Path Analysis Utilizing National Data*, 36 J. BLACK STUDS. 597 (2006).

298 *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1944); *see also Brown v. Bd. of Educ.*, 347 U.S. 483, 483 (1954).

299 Bowman, *supra* note 153, at 68; Minow, *supra* note 32, at 637–38; Moran, *Rethinking Race*, *supra* note 83, at 1339; Eboni S. Nelson, *The Availability and Viability of Socioeconomic Integration Post-Parents Involved*, 59 S.C. L. REV. 841, 847–48 (2008); Robinson, *supra* note 24, at 277, 336.

300 Robinson, *supra* note 24, at 336.



geographic hurdles similar to race integration within urban districts, as “14% of school districts nationwide do not have enough middle-class schools to achieve socioeconomic integration.”<sup>301</sup>

A quality education standard permits districts to tailor policies fitting their constituency, whether poor Latino students make up the majority population or impoverished white students in Appalachia need special educational programs. The flexibility to consider the whole student is an invaluable condition to successful reform.

#### CONCLUSION

In its effort to eradicate any consideration of race in educational policies, the Court is undermining federal and local efforts for educational quality. Judicial deference to educational policymakers, even when the policy is imperfect, is the best hope for achieving educational quality.

*Brown v. Board of Education* fought for quality public education. Choosing the appropriate remedy fell into the hands of federal courts due to public resistance when *Brown* outlawed a pervasive social norm. The Court made clear, however, that their remedial authority entailed restraints not applicable to state actors. Moreover, the Court also recognized that the state’s primacy over public education matters rendered the federal court’s involvement temporary. The current Court’s approach to interpreting the Fourteenth Amendment directly challenges the work of civil rights groups aspiring for an enforceable and defined quality norm. On the state level, legislation and policy incorporate the race and socioeconomic status of students in developing reform for quality education. These proxies, no matter how draconian and simplistic, account for the myriad factors recognized by social science experts as affecting a child’s academic performance, yet we are incapable of considering these characteristics under the Supreme Court’s Fourteenth Amendment analysis.

The Supreme Court, when applying its equal protection doctrine, needs to reset its priorities. Although federal courts reject quality education as a government interest sufficient to satisfy heightened scrutiny, education claims have always centered around this goal. The historical background to *Brown* reflects a community concerned about the educational opportunities provided to their children. Children enter school with the desire to learn and a naive trust in the

---

<sup>301</sup> Nancy Connelly, Note, *After PICS: Making the Case for Socioeconomic Integration*, 14 TEX. J. C.L. & C.R. 95, 111 (2008).

system to provide them a quality education. Many parents enroll their children in public school with the same degree of blind trust in the system. Public education provides a foundational staging ground to help children attain their most far-fetched dreams. The primary responsibility for ensuring such promising results rests in the hands of state legislatures and local school officials. The decision to implement education reforms, when sanctioned through state constitutional education clauses and federal legislation, must not be prevented through applying the Court's anticlassification standard for the sake of an aspirational colorblind society.