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# NOW CHILDREN LEARN BETTER: REVISING NCLB TO PROMOTE TEACHER EFFECTIVENESS IN STUDENT DEVELOPMENT

Chris Chambers Goodman\*

## INTRODUCTION

Public education is one of the most important services that the government provides to its people. The importance of our public education system to the lives of our citizenry and residents cannot be overstated. Yet the allocation of resources to this significant endeavor is inconsistent and often incoherent. This discord is partially attributable to the legal ruling that declined to find education to be a fundamental right under the United States Constitution.<sup>1</sup> As a result, states developed their own notions of the relative importance of public education, in their constitutions and through their case law, and found different ways to measure their success.<sup>2</sup> Acknowledging the courts' mixed effectiveness in the battle for educational equality or adequacy, Part I of this article analyzes the substantive splits in authority over whether states must provide an "adequate" public education or an "equal" public education.

The landmark legislation entitled "No Child Left Behind"<sup>3</sup> (NCLB) sought to improve the effectiveness of the public schools. However, the legislation remains a source of controversy as its reauthorization continues to stall.<sup>4</sup> Proponents identify real progress in

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<sup>1</sup> See discussion *infra* Part I.

<sup>2</sup> See discussion *infra* Part II.

<sup>3</sup> No Child Left Behind Act of 2001 (NCLB), 20 U.S.C. § 6301–6578.

<sup>4</sup> NCLB has not met its goal: that 100% of schools be proficient in reading and math by 2014. The Obama Administration has offered that if schools agree to assess

student achievement from so-called “failing schools,” while opponents accuse schools of employing a “teach to the test” mentality in order to maintain funding.<sup>5</sup> One of the more controversial implications of NCLB is the linking of teacher effectiveness to student testing outcomes.<sup>6</sup> What is missing from these debates is the importance of measuring teacher evaluations as an *input* to the education system, rather than an *output* at the conclusion of the academic term (or when the standardized test results are released).

This article then examines the particular equal protection challenge presented when ineffective teachers are disproportionately retained at the public schools whose students are largely disadvantaged, low-income, and minority. Part III highlights the issues presented in the equal protection trial that just concluded in Los Angeles County over the tension between, on the one hand, teacher tenure and reverse-seniority layoff policies, and on the other, providing equal educational opportunities, particularly for low-income and minority students in the Los Angeles Unified School District.<sup>7</sup> It is no secret that on average, students of color do not test as well as, and get lower grades than, their Anglo counterparts.<sup>8</sup> Evidence shows that there are inconsistent outcomes depending upon whether “adequate”

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teacher evaluations that include student test scores, they could ease out of NCLB’s requirements. Most states applied, and so far, 42 states, Washington, D.C., Puerto Rico, and eight districts in California have received waivers to become exempt them from NCLB. Joy Resmovits, *States Struggle To Overhaul Schools After No Child Left Behind*, HUFFINGTON POST, (Jan. 23, 2014, 10:53 AM), [http://www.huffingtonpost.com/2014/01/06/states-no-child-left-behind\\_n\\_4550203.html/](http://www.huffingtonpost.com/2014/01/06/states-no-child-left-behind_n_4550203.html/).

<sup>5</sup> See generally Amy L. Moore, *When Enough Isn’t Enough: Qualitative and Quantitative Assessments of Adequate Education in State Constitutions by State Supreme Courts*, 41 U. TOL. L. REV. 545, 560 (2010).

<sup>6</sup> *Id.*

<sup>7</sup> Vergara v. California, No. BC484642, 15 (Cal. Super. Jun. 10, 2014). See discussion *infra* Part III A. The trial judge ruled against the school district and granted a stay on June 10, 2014. .

<sup>8</sup> See William G. Bowen, *Grutter: Where Do We Go From Here? The Impact of the Supreme Court Decisions in the University of Michigan Affirmative Action Cases*, 44 J. BLACKS HIGHER EDUC. 76, 79 (2004) (reporting that underrepresented minorities do significantly less well on traditional measures for college preparation than do whites and Asians).

or “equal” education theories apply. Given proven disparities in teacher effectiveness in schools populated by minority and low-income students, Part III makes a bold proposal for revitalizing public education. This proposal combines the best of both approaches with requirements of substantive effectiveness and cultural competencies in teaching, administration, curriculum, and testing methods in high-poverty, high-minority public schools and school districts.

Part IV augments the context of the discussion to a broader consideration of existing law under the NCLB and describes the legislative roles for the re-vision and re-authorization of the NCLB into Now Children Learn Better. The Nation has tried color-coded, color-conscious, and color-blind; this article now proposes that the next approach should be “Color Fair,” which recognizes the critical importance of acknowledging and addressing the roles of race, ethnicity and poverty in evaluating student development, teacher effectiveness, and resource allocations to public elementary and secondary schools. The conclusion of this article then addresses the roles of the public, lawyers, and law schools, in helping to reach the point when we can say Now, Children Learn Better.

#### I. THE TENSION BETWEEN ADEQUACY AND EQUALITY IN STATE CONSTITUTIONS, CASES AND COURTS

All states have some constitutional provisions as to providing public education, but most do not recognize it as a fundamental right.<sup>9</sup> Only seven states have declared education to be either a fundamental right or fundamental interest;<sup>10</sup> other states find that education is a

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<sup>9</sup> See Moore, *supra* n. 5 at , 560 (2010) (demonstrating that most state equal protection claims failed just like federal equal protection claims did because since the U.S. Supreme Court declared that education was not a fundamental right and the poor were not a suspect class, the level of scrutiny applied to state actions was low, allowing states to win).

<sup>10</sup> *Id.* at 560, 573 (indicating that all fifty states’ constitutional provisions demand that states make education available to its children, however, not every state elaborates on what type of education ought to be supplied). The following seven states have declared that education is not a fundamental right: Idaho, Illinois, Indiana, Kansas, Maryland, Missouri, and New York. *Id.* at 573, n.246; see also *Id.* at 561 for a compilation of what each state’s constitutional text requires education to be: three require it to be high quality, four require it to be adequate or sufficient, nine

“paramount duty” and others identify a “qualitative right” to an education.<sup>11</sup> Whether that quality level is met is the subject of frequent and protracted litigation in many states.<sup>12</sup>

Nevertheless, in most situations, even a declaration of education as a fundamental right does not extend to funding equality,<sup>13</sup>

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require it to be suitable, fifteen require it to be uniform, twelve require it to be efficient, nine require that it be thorough, and ten require it to be general. American Jurisprudence lists seven states that have declared education to be a fundamental right. Additionally, a federal court in Utah recognized education as a fundamental right under the state constitution. *See, e.g., Meyers By and Through Meyers v. Bd. of Educ. of San Juan School Dist.*, 905 F. Supp. 1544 (D. Utah 1995) (interpreting the Utah Constitution); *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993); *Reichley by Wall v. North Penn School Dist.*, 626 A.2d 123 (1993); *Brigham v. State*, 692 A.2d 384 (1997); *Phillip Leon M. v. Greenbrier Cnty. Bd. of Educ.*, 484 S.E.2d 909 (1996); *Campbell Cnty. School Dist. v. State*, 907 P.2d 1238 (Wyo. 1995). 16A AM. JUR. 2D CONSTITUTIONAL LAW § 618. The Arizona Constitution establishes a fundamental right to education on the part of students between the ages of six and twenty-one, and state courts are free to interpret the state constitution differently from the United States Supreme Court's interpretation of the Federal Constitution. *Magyar By and Through Magyar v. Tucson Unified School Dist.*, 958 F. Supp. 1423, 1442 (D. Ariz. 1997). 16A AM. JUR. 2D CONSTITUTIONAL LAW § 618.

<sup>11</sup> *See Amici Curiae* Brief of Education Law Center and Campaign for Educational Equity in Support of Plaintiffs-Appellants at 7, *Robles-Wong vs. State of California*, No. RG 10524770, (Cal. Ct. App., 2013), *available at* [http://www.educationjustice.org/newsletters/ej\\_newsblast\\_130123\\_LinkedBrief.pdf](http://www.educationjustice.org/newsletters/ej_newsblast_130123_LinkedBrief.pdf). Florida and Washington States have identified in their constitutions that education is a “paramount duty.” On the other hand, the following states have identified a “qualitative right” to an education: Connecticut, South Dakota, Colorado, Montana, Kansas, Texas, Arkansas, New York, Wisconsin, South Carolina, Arizona, New Hampshire, North Carolina, Ohio, Vermont, Wyoming, Massachusetts, Idaho, Kentucky, West Virginia, and Washington. *Id.*

<sup>12</sup> The state cases that have litigated the appropriate quality level to educate their students include Alaska, Arizona, Arkansas, and Iowa among others. Of all the states that have undergone adequacy litigation, only Kansas has formally defined the adequate level of education under the state's constitution in terms of the state legislative standards. Aaron Y. Tang, *Broken Systems, Broken Duties: A New Theory for School Finance Litigation*, 94 MARQ. L. REV. 1195, 1198 (2011) (indicating that in California, decisions about how much money school district should receive and where that money should come from are made by the state legislature and governor as a result of Proposition 13).

<sup>13</sup> Even in those states where plaintiffs have prevailed in adequacy litigation cases, the definitions of educational adequacy have been described as very basic and loose terms, such as a “minimally adequate education” or a “sound basic education,” and

as constitutional rights do not carry with them the right to the funding necessary to exercise the right. For instance, in Minnesota, the state supreme court held that the fundamental right to education does not require an equal funding system, as long as schools receive at least a basic level of funding.<sup>14</sup> In the states where the state constitution does not protect education as a fundamental or other important right, the wealth-based disparities are even greater.<sup>15</sup> There is little effort at legislative reform in such states, and levy taxes do not violate their constitutions.<sup>16</sup>

The major focus of debate in school finance litigation<sup>17</sup> has been on three fronts. The first is whether an adequate education is

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such a standard does not include funding equality. *Id.* at 1221. Some courts' standard for adequacy is so minimal that no relief is necessary at all. *Id.* at 1217.

<sup>14</sup> *Skeen*, 505 N.W.2d at 311–12. Low-wealth suburban and rural school districts sued the Minnesota Board of Education and Commissioner of Education, alleging that the Minnesota school finance system created unconstitutional disparities in educational funding and opportunity related to property wealth. *Id.* at 301–02. The Minnesota Supreme Court, overturning the trial court's finding that Minnesota's funding system was unconstitutional, concluded that "general and uniform" in the state's education clause did not require full equalization of funding. *Id.* at 311. Any inequities that existed were not unconstitutional because the existing system met basic educational needs in all districts. *Id.* at 311. The court further held that the state's equal protection clause only requires basic funding levels, and funding disparities are only subject to rational basis review. *Id.* at 314–15.

<sup>15</sup> *See Oklahoma Educ. Assoc. v. State*, 158 P.3d 1058, 1065 (Okla. 2007) (finding challenge to sufficiency of school funding to be non-justiciable political question). Where education is declared not a right in a state or is ruled to present a non-justiciable political question, unequal and disparate education typically exists. *See Pendleton Sch. Dist. v. State*, 200 P.3d 133, 142, 145 (Or. 2009) (concluding that a 2000 amendment to the state constitution requiring budget appropriations for education to be "sufficient to ensure that the state's system of public education meets quality goals established by law" was not judicially enforceable).

<sup>16</sup> *See, e.g., Douglas Cnty. Sch. Dist. v. Heinemen*, 731 N.W.2d 164, 177 (Neb. 2007) (dismissing action brought by a consortium of rural school districts, holding it involved non-justiciable political questions). *See also King v. State*, 818 N.W.2d 1, 28–29 (Iowa 2012) (finding educational disparity is rationally related to a legitimate state interest and therefore constitutional).

<sup>17</sup> *See generally* Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495, 501 (2010) (describing the public school district funding systems as local school districts restricting their franchise to their own residents and allowing the officials selected by that limited group to tax local resources to pay for local benefits exclusively for the local students).

required under the state Constitution or other scheme.<sup>18</sup> The second is whether equality of educational resources and opportunities is required.<sup>19</sup> The third is whether the courts are the proper place to consider decisions which are sometimes deemed political questions.<sup>20</sup> These three prongs of court decisions are rife with conflicts and provide a significant opportunity for the United States Supreme Court to issue some guidance in future decisions (if it were so inclined).<sup>21</sup>

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<sup>18</sup> See Moore, *supra* note 5, at 555–56 (2010) (narrating the traditionally accepted three waves of education litigation); Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J. L. & PUB. POL’Y 569, 576–77 & 576 n.35 (2004) (documenting the first wave of school finance litigation, beginning in 1971 where the California Supreme Court held in *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), that education is a fundamental right and the state’s property-tax-based funding system violated that right, and ending in 1973 with the U.S. Supreme Court’s rejection of *Serrano* in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), holding that “[b]ecause education is not a fundamental right, property wealth is not a ‘suspect classification’ and inequalities in school spending do not violate the Federal Constitution”); Tang, *supra* note 12, at 1195 (indicating that under the adequacy theory, plaintiffs asserted that the states deny children their right to an adequate level of education as guaranteed under the education clauses in state constitutions); Laurie Reynolds, *Skybox Schools: Public Education as Private Luxury*, 82 WASH. L.Q. 755, 762–63 (herein after “Reynolds, *Skybox Schools*”) (noting that the first wave of school funding litigation “used the huge disparity between wealthy and poor school districts as the basis of a federal equal protection challenge” and the Supreme Court upheld the constitutionality of a school finance system based on local property taxes).

<sup>19</sup> See, e.g., Obhof, *supra* note 18, at 578 (narrating the second wave of school finance cases which followed *Rodriguez* and focused on the education and equal protection clauses of state constitutions, whereby the majority of state courts upheld their finance systems under the basis of protecting local control); Tang, *supra* note 12, at 1203 (indicating that equality advocates argued that education is a fundamental right under the Equal protection Clause and when subjected to strict scrutiny, unequal local property tax-based school funding systems should be struck down for lack of a compelling governmental justification); Reynolds, *Skybox Schools*, *supra* note 18 at 763 (explaining that in this second wave, under the equality theory, plaintiffs highlighting the unfairness and inequality inherent in a school system where school funds depends on the wealth of the district and its location).

<sup>20</sup> See, e.g., Obhof, *supra* note 18, at 586–89 (narrating the history of finance litigation cases in terms of courts finding educational quality to be non-justiciable).

<sup>21</sup> See generally Obhof, *supra* note 18 at 571 (noting the series of lawsuits in the past three decades brought against states and localities to increase funding for primary and secondary education). Until now, more than forty states have been involved in school finance litigation. *Id.* at 575. Twenty-four state courts of last resort have

This debate over adequacy and equality continues to hamper significant educational opportunity reform in most states.<sup>22</sup>

*A. States Promoting Adequate Education for All Rarely Meet that Standard*

While there is often overlap between the concepts of adequate public education and equal public education, it is instructive to consider the concepts separately first.<sup>23</sup> States generally define adequacy in four areas: finances, resources, opportunities and outcomes.<sup>24</sup> The adequacy arguments focus on whether specific public

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upheld their state's school funding system based on local property taxes, while seventeen have declared it unconstitutional based on their state's education clause or the equal protection clause. *Id.*

<sup>22</sup> See, e.g., Tang, *supra* note 12 at 1195 (showing that even in states that had successful adequacy and equity lawsuits, they continue to spend less than what is necessary for a quality education); Moore, *supra* note 9 at 574 (arguing that school inequalities have provided the impetus for litigation whether it is equal protection arguments or adequate arguments because the argument has only shifted); Reynolds, *supra* note 18 at 816–17 (recognizing that as school finance litigation shows no signs of slowing down, it is time to reevaluate better ways for school finance reforms); Obhof, *supra* note 18 at 580 (acknowledging that regardless of the equal or adequate litigation, school finance cases do not have to be about money in order to improve the quality of the schools in America); Bowen, *supra* note 8 at 80 (arguing that the problems are “too deep-seated” that new efforts are needed to improve the quality of public schools from poorer districts). See generally Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 183–84 (1995) (“The career of the equal educational finance movement...reflects both the power and the vulnerabilities of the rhetoric of equality in American legal and political discourse...The imperatives of equality strike deep chords in American sensibilities at the same time that they arouse deep fears and resistances.”).

<sup>23</sup> BROOKINGS INSTITUTION, *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* 31 (Martin R. West & Paul E. Peterson eds., 2007) (hereinafter “West & Peterson,”) (noting, “it is difficult to find a consistent relationship between adequacy and equity in the law [of public education]”).

<sup>24</sup> Moore, *supra* note 5, at 549. Scholars have identified four ways of measuring adequacy. The historical spending approach simply uses the amount of money spent in previous years and adjusts the amount for inflation, which is not useful if past spending was inadequate. The econometrics approach compares data on student performance with data on spending. The professional judgment approach relies on the expertise of educational professionals to deduce a model school's needs. The empirical method, the most popular, looks at successful schools to establish the cost of an education. *Id.* at 553.



schools provide a certain minimum level of educational opportunity adequate to satisfy the mandate of the state constitution or other state legislation.<sup>25</sup> Under this approach, some schools can have more and others may have less as long as the least well-off school provides an “adequate” education for its students.<sup>26</sup> Different states have different measures for adequacy, but a very minimal opportunity for education is frequently part of the standard.<sup>27</sup> Thus, adequacy must be measured in terms of some benchmark, standard, or goal.<sup>28</sup>

For instance, in *Seattle School District No. 1 v. State*, the Supreme Court of Washington held that its State Constitution required a minimum level of education, which resulted in a judicially

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<sup>25</sup> For various definitions of “educational adequacy,” see, e.g., Enrich, *supra* note 22, at 109, 112 (declaring that an adequate education requires looking at the educational services delivered to the children in disadvantaged districts and asking whether they are sufficient to satisfy the state’s constitutional standards; “the states determine a minimum funding level and then provides each district with the state funds necessary to reach that level”); Obhof, *supra* note 18, at 582-83 (defining educational adequacy as resources which are sufficient to achieve some educational result, such as a minimum passing score on a state test); Moore, *supra* note 5, at 548–49 (defining adequate education in four different arenas such as finances, resources, opportunities, and outcomes, but ultimately it “should be one that is enough for the children of America”); *Id.* at 554–55 (section II part B contains different literature definitions and diverse scholarly approaches attributed to the term adequacy).

<sup>26</sup> See Tang, *supra* note 12, at 1207 (“A situation where wealthy school districts outspend their low-income counterparts thus does not necessarily violate a state’s duty under an adequacy lawsuit as long as the low-income schools have adequate educational resource as defined by the court.”). See also Enrich, *supra* note 22, at 112 (saying that the state determines a minimum funding level and then provides each district with the funds necessary to reach that level, while local districts can chose to spend beyond such level). Under an adequacy approach, “[t]he state’s focus is not on eliminating the [disparities in property wealth] caused by varying local resources but rather on bringing all districts up to an acceptable minimum service level.” *Id.*

<sup>27</sup> The standard of adequacy is determined by each state, including the minimum funding level. See *id.* However, the constitutional language of each state does not typically specify a concrete level of action or accomplishment to satisfy an adequate education. See *id.* at 171. And “no agreement exists about what quantity of resources, or what level of attainment, is enough.” *Id.* at 171.

<sup>28</sup> Moore, *supra* note 5, at 561 (observing that “an education must be adequate to meet specified constitutional goals”). The specified goals in state constitutions vary widely, with some requiring the education to be “high quality” or “efficient” and others merely “suitable” or “uniform.” *Id.*

enforceable duty.<sup>29</sup> It took almost thirty years for the state legislature to act to enforce that duty, after the state Supreme Court once again declared the state funding system unconstitutional for failing to provide adequate resources for a “basic education” for all of the state’s children.<sup>30</sup>

Even where an adequate education is constitutionally required, there may be no recourse for inadequate funding.<sup>31</sup> Judgments in adequacy litigation now tend to focus on requiring states to spend more on education,<sup>32</sup> but even when the litigants are successful, the states still fall short of implementing the courts’ rulings. One empirical analysis evaluated adequacy studies performed in twenty-two states, and measured the dollars spent compared to the estimated cost for adequate education.<sup>33</sup> That author found that in nineteen of the

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<sup>29</sup> 585 P.2d 71, 95 (Wa. 1978). The court found that the education clause imposed a mandatory duty on the state to implement the requirements for an equal minimum and basic education according to state standards. *Id.* at 94–95.

<sup>30</sup> *McLeary v. State*, 269 P.3d 227, 258 (2012) (finding the school funding system unconstitutional because it neither determined the cost of nor provided the resources needed for a basic education for all children in the state). The court expressed that reliance on levy funding to finance basic education was unconstitutional 30 years ago in Seattle, and it was unconstitutional at the present time as well. *Id.* In response to noted deficiencies, the legislature enacted a “promising reform package” in 2009. *Id.* at 231.

<sup>31</sup> In *Davis v. State*, 804 N.W.2d 618, 623 (S.D. 2011), parents of public school children brought action against the state for a declaration that the present system of funding schools was unconstitutional. The plaintiffs were required to show a correlation between funding levels and a constitutionally adequate education, and prove that the system failed to provide school children with an education that gave them the opportunity to prepare for their future roles as citizens, participants in the political system, and competitors both economically and intellectually. *Id.* at 633–34. The court held that the state constitution’s education clause does not contemplate a system that fails to educate all children, or leaves pockets of inadequate conditions and achievement as a result of insufficient funding. *Id.* at 627. As so eloquently stated, “The genius of the poorest must have equal chance with the opportunity of the rich.” *Id.* The Davis trial court held in favor of the state, and the state Supreme Court held that “plaintiffs’ evidence raises serious questions,” but fails to prove that South Dakota students are denied an adequate and quality education. *See also* *Marrero v. State*, 709 A.2d 956, 958, 966 (Pa. Commw. Ct. 1998) (holding, in claim that Philadelphia school district was inadequately funded in violation of state education clause, that the claim presented a non-justiciable political question).

<sup>32</sup> BROOKINGS INSTITUTION, *supra* note 23, at 9.

<sup>33</sup> Tang, *supra* note 12, at 1217–18.

twenty-two states, pupil spending was less than what the adequacy study revealed to be the minimum appropriate spending.<sup>34</sup>

Notwithstanding these failures to reach a certain minimum education level, many experts agree that there is no formula for determining how much a state needs to spend to bring all students to an “adequate” achievement level because the “overall relationship between spending and achievement is notoriously weak, and most studies of the effect of court-induced equalization in specific states have found little or no impact of the new spending on student achievement.”<sup>35</sup> Thus, the efficacy of “adequacy studies” and their meaning is uncertain at best, and they are unlikely to result in substantial education improvements. Nevertheless, courts increasingly require schools to “provide their students a fair opportunity to meet the state’s own academic expectations as set forth in the state standards and general accountability requirements.”<sup>36</sup>

### *B. Other States Rarely Enforce their Equality Mandate*

Addressing the second front, some state constitutions provide a strong basis for courts to mandate equal educational opportunity. Promoting equality was the impetus for *Brown*.<sup>37</sup> The Court used the opportunity to decide that educational segregation, regardless of equality in other respects, was inherently unequal.<sup>38</sup> In California, the

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<sup>34</sup> *Id.* at 1218.

<sup>35</sup> BROOKINGS INSTITUTION, *supra* note 23, at 11, 15.

<sup>36</sup> Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 ALB. L. REV. 1855, 1868 (2011–12) (explaining that courts find that adequacy requires more than a merely minimal or basic education).

<sup>37</sup> *Brown v. Board of Education*, 347 US 483, 1265 (1954) (holding that educational opportunity is a “right which must be made available to all on equal terms”).

<sup>38</sup> *Brown*, 347 U.S. at 493 (further elaborating to separate children “from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone”).

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very

*Serrano* case made this point that equality trumps adequacy as well.<sup>39</sup> Turning to these states that focus on promoting equality, researchers note that the United States' educational funding system is "one of the *most inequitable*" in the world.<sup>40</sup> The supporters of equality expect a bit of "Robin Hood" behavior by taking from the wealthier schools to provide more to the poorer schools so that each school will be at a similar level.<sup>41</sup> By preventing any substantial deviation from the

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foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. 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.

*Id.* at 493. *Contra* Reynolds, *Skybox Schools*, *supra* note 18 at 771–72 (arguing that *Brown*'s equality declaration is "unacceptable" because reducing luxury spending on education would only increase societal welfare).

<sup>39</sup> *Serrano v. Priest*, 487 P.2d 1241, 1265 (Cal. 1971) (holding that California's education funding scheme was inadequate because it relied on property taxes which discriminated unfairly against the poor).

<sup>40</sup> Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1478 (2007) (emphasis added).

<sup>41</sup> Enrich, *supra* note 22, at 157 (defining the "Robin Hood schemes" as the achievement of equality in schools by improving the poorer districts disproportionately paid for by the wealthier districts). *Id.* at 108, 111 (referring to equality as an education of equal treatment which focuses on the disparities in schools per district, instead of the actual level of educational services provided by the districts). *See also* Reynolds, *Skybox Schools*, *supra* note 18, at 788 (using Texas' school funding formula and Vermont's original Act 60 to explain the "Robin Hood" epithet of equality arguments for education). For approaches on the educational equality arguments, *see, e.g.*, Obhof, *supra* note 18, at 574 (defining educational opportunity in terms of resource inputs such as funding levels and the number and quality of teachers, books, and other quantifiable factors); Enrich, *supra* note 22. *And see*, Tang, *supra* note 12, at 1195 (noting that under the equity theory states distribute school resources in a disparate manner that violates equal protection of the laws).

Opponents of Equality arguments mainly base their opposition on a local control justification: "When equality means my community cannot determine what resources to spend on its schools, and when equality means that my control over the quality and character of my children's education is significantly diminished, then equality may appear to be more of a menace than a goal." Enrich, *supra* note 22, at 161. Nationwide, the lowest poverty districts had almost \$1,000 more per pupil than the highest poverty districts in 2003-04. THE EDUCATION TRUST, FUNDING GAPS 2006

median level of public educational resources, the quality of the *best* schools will *decrease*.<sup>42</sup> Thus, the *average* school performance likely would *decrease* in order to bring all schools to an equal level.<sup>43</sup>

In *Brigham v. State*, Vermont students, property owners and school districts brought suit against the state, seeking a declaration that the school funding system violated their federal and state rights to education and equal protection.<sup>44</sup> In response to some of these tensions, Vermont instituted a statewide property tax to provide a

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5–6 (2006), available at

[www.edtrust.org/sites/edtrust.org/files/publications/files/FundingGap2006.pdf](http://www.edtrust.org/sites/edtrust.org/files/publications/files/FundingGap2006.pdf).

<sup>42</sup> See Enrich, *supra* note 18, at 157 (“to the extent that the financial resources of districts are equalized, the wealthier districts lose their accustomed ability to procure the best educational services for their children [and] [t]his loss is particularly evident in the competition for the best teachers and other professional staff”).

<sup>43</sup> The equalization of educational opportunity threatens the wealthy district schools’ top spot in the competition to give their students better post-school opportunities. *Id.* at 158 (explaining that “if other schools offered educations of comparable quality, the children of the wealthy districts would no longer have as much of an inside track to the highest test scores, the best colleges, and ultimately the brightest economic prospects”). There is much evidence indicating that equal services and facilities are weakly correlated with academic achievement levels: “equalization of school resources can be expected to do little to overcome the disparities in students’ capabilities that result from stubborn differences in their environment and in the capacities with which they arrive at school.” *Id.* at 150 (citing JAMES S. COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY 290–325 (1966)). Thus, if education is equalized, children from wealthy districts are likely to be demoted to mediocre educational opportunities and the children from poorer districts will face significant competitive disadvantages relative to their peers from wealthy communities. *Id.* at 181.

<sup>44</sup> *Brigham, et al. v. Vermont*, 692 A.2d 384 (Vt. 1997). On a motion for summary judgment, the Vermont Supreme Court ruled that the state’s system of school finance, “with its substantial dependence on local property taxes and resultant wide disparities in revenues available to local school districts,” deprived children of equal educational opportunity in violation of the education and “common benefit” clauses of the Vermont constitution. *Id.* at 386–87. The court stated:

[W]e are simply unable to fathom a legitimate governmental purpose to justify the gross inequities in educational opportunities evident from the record. The distribution of a resource as precious as educational opportunity may not have as its determining force the mere fortuity of a child’s residence. It requires no particular constitutional expertise to recognize the capriciousness of such a system.

*Id.* at 396. The court left the responsibility for fashioning a remedy to the legislature, which did so. *Id.* at 386. See also H. Reg. Act No. 60 (Vt. 1997), *infra* note 45.

better mechanism for equalizing school finance.<sup>45</sup> This increase in quality of the worst schools was designed in part to put students from underrepresented groups in a better environment.<sup>46</sup> Vermont thus provides one potential solution for state courts and governments to consider.<sup>47</sup> While some states like Vermont are troubled by the substantial wealth disparities, other states find them to be acceptable.<sup>48</sup>

Unfortunately, research shows that even when spending increases are mandated in equity lawsuits, they have “little or no effect on student achievement,”<sup>49</sup> and “[a]fter hundreds of studies, it is now generally recognized that *how* money is spent is much more important

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<sup>45</sup> H. Reg. Act No. 60 (Vt. 1997). See Michael A. Rebell & Jeffrey Metzler, *Rapid Response, Radical Reform: The Story of School Finance Litigation in Vermont*, 31 J.L. & EDUC. 167 (2002) (narrating the impressive story of school finance litigation in Vermont). Vermont’s Equal Education Opportunity Act of 1997, known as “Act 60,” replaced local property taxes with a uniform statewide property tax, distributing a sharing pool that required wealthy districts that chose to spend above the base block grant to share part of that excess with the poor districts. *Id.* at 180–81. See also Obhof, *supra* note 18, at 593 for a further narrative on Vermont’s Equal Educational Act.

<sup>46</sup> See Rebell & Metzler, *supra* note 45, at 168 (explaining the major purpose of Act 60 was to offset the disparity between the poor and wealthy school districts: “The goal of the law was to ‘link . . . state general aid to the provision of a good, basic education”). The following are the results of Act 60 in the state of Vermont: 229 districts received more money for their schools while only 23 received less; a poor district updated science textbooks for the first time since 1978, bought new computers and increased teachers’ salaries; a 7.5% reduction in the property tax rate became available for this poor district’s residents; by 2000, the law had eliminated the correlation between property wealth and student resources and taxpayer burden; and the student achievement gap between the poorest and richest districts had decreased. *Id.* at 181–85. See also Obhof, *supra* note 18, at 593 (describing further consequences, both positive and negative, of Act 60 in the state of Vermont).

<sup>47</sup> See Reynolds, *Skybox Schools*, *supra* note 18, at 812–13 (explaining why a statewide property tax for schools like Vermont makes sense). See also *id.* at 762 (citing an article urging the abolition of local property tax school funding and the adoption of a statewide property tax with revenues allocated on the basis of student educational needs and not on district property wealth, with states tolerating some luxury spending by wealthy districts).

<sup>48</sup> See Reynolds, *Skybox Schools*, *supra* note 18, at 758–59, 769 (indicating that widespread support defends the local districts tax funding school systems despite the unabated gap between wealthy and poor districts). See also Enrich, *supra* note 22, at 102–03 (examining the “shockingly poor” disparity between districts even in states where the courts and the legislature have undertaken efforts to equalize education).

<sup>49</sup> West & Peterson, *supra* note 23 at 78.

than *how much* money is spent.”<sup>50</sup> A more egalitarian public school system, with both equal and adequate education services actually provided and accessible may be necessary.<sup>51</sup>

### III. THE EQUAL EDUCATIONAL OPPORTUNITY CHALLENGE AND POTENTIAL SOLUTIONS IN CONTEXT: NOW CHILDREN LEARN BETTER

The California courts long have maintained that equal education does not require adequate education, quoting with approval in *Serrano II* the trial court’s announcement that “if such uniformity of treatment were to result in all children being provided a low-quality educational program, or even a clearly inadequate educational program, the California Constitution would be satisfied.”<sup>52</sup> However, there seems to be substantial disagreement about what the fundamental right to education in the state constitution means, because in a recent appellate brief, the state Attorney General asserted that it does not mean a right to an adequate education, nor does it mean a right to an equal education.<sup>53</sup> The *Vergara* case in Los Angeles Superior Court

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<sup>50</sup> *Id.* at 80.

<sup>51</sup> Accord Laurie Reynolds, *Uniformity of Taxation and the Preservation of Local Control in School Finance Reform*, 40 U.C. DAVIS. L. R 1837, 1865 (2007) (hereinafter “Reynolds, *Uniformity of Taxation*”) (illustrating how adequacy and equality can both be used to challenge the non-uniformity in public education); Moore, *supra* note 5, at 552–53, 574 (noting that equity and adequacy overlap and are linked and neither can be addressed independently of one another to provide a better education in public schools: “Whatever the state government decides to provide as part of its educational plan, it must comport with the state constitution, both for adequacy and equity”).

<sup>52</sup> *Serrano v. Priest*, 557 P.2d 929, 943 n. 28 (Cal. 1976); accord *Serrano v. Priest*, 569 P.2d 1303, 1308 n. 6 (Cal. 1977) (calling *Serrano II* trial court’s characterization correct). As Prof. Tractenberg notes, the *Serrano II* court made few references to the education clause, focusing most of its analysis on the state equal protection clause. Its most revealing reference was its rejection of adequacy. Paul L. Tractenberg, *The Refusal to Federalize the Quest for Equal Educational Opportunity, the Role of State Courts and the Impact of Different State Constitutional Theories: A Tale of Two States* 19 (Apr. 27, 2006) (unpublished paper prepared for the Rethinking Rodriguez Symposium at the Warren Institute at UC Berkeley School of Law).

<sup>53</sup> Brief of Respondent at 8–21, *Campaign for Quality Education v. California*, No. A134423–24, 2012 WL 5846476, at \*8–21 (Cal. App. 1st Dist. Oct. 18, 2012) (arguing that the state constitution does not impose upon the legislature a duty to provide an education system that meets any particular qualitative standard). This

provides an opportunity to flesh out this dispute, which may become an important mechanism for advancing equal opportunity in public primary and secondary education in the state and even the nation. The Color Fair education approach described below will bring public education to the point where all children learn better.

#### A. *Recent Litigation: Vergara v. State of California*

The *Vergara v. State of California* case, which was tried in the spring of 2014 in Los Angeles Superior Court, involves nine public school students who have sued their school districts, the state of California and the Governor on the grounds that several California Education Code statutes dealing with the employment of public school teachers violate the Equal Protection Clause of the California State Constitution.<sup>54</sup> Specifically, the children alleged that certain provisions of the Education Code, on the issues of permanent employment and dismissals of teachers violate their fundamental rights to equality in education, because low quality teachers are retained more readily in schools with larger proportions of minority and low-income students.<sup>55</sup>

The trial court determined that the plaintiffs had proven by a preponderance of the evidence that “the Challenged Statutes impose a real and appreciable impact on students’ fundamental right to equality of education and that they impose a disproportionate burden on poor and minority students,” and then found that the strict scrutiny would apply, requiring the state to provide a compelling reason to justify the

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brief notes that since the trial case was dismissed the plaintiffs have appealed and the case has been consolidated with *Robles-Wong v. State*, Case No. RG 10525770 (2013), which is currently awaiting appellate decision.

<sup>54</sup> *Vergara v. California*, No. BC484642, 2013 WL 6912924, at \*1 (Cal. Super. Dec. 13, 2013) (order denying summary judgment) (“Plaintiffs are minors ranging from ages 7 to 16 who attend public schools in LAUSD, OUSD, the Sequoia Union High School District, ARUSD, and the Pasadena Unified School District. Plaintiffs challenge five statutes of the Education Code as violating the Equal Protection Clause of the California Constitution”).

<sup>55</sup> *Vergara*, WL 6912924, at \*1, \*4–5 (with the trial court denying both sides motion for summary judgment because Plaintiffs’ evidence could support the following fact at trial that the Challenged Statutes results in grossly ineffective teachers obtaining and retaining permanent employment, and that grossly ineffective teachers are predominately assigned to minority and low-wealth students).



challenged statutes, and a demonstration that the distinctions in the statutes were necessary to further that compelling purpose.<sup>56</sup> On the issue of tenure, or “permanent employment” evidence showed that an inexperienced and poorly performing teacher may be offered tenure with the hope that she will improve with experience, and the trial court found that “both students and teachers are unfairly, unnecessarily, and for no legally cognizable reason (let along a compelling one), disadvantaged by the current Permanent Employment statute.”<sup>57</sup>

When a tenured teacher fails to improve, dismissal rarely results, unless or until the school district engages in a lengthy and expensive dismissal process—one which frequently costs hundreds of thousands of dollars per teacher and only rarely results in dismissals.<sup>58</sup> The trial court reasoned that the teacher dismissal statutes provided greater protection than state employment law generally, and found them to be “so complex, time consuming and expensive as to make an effective, efficient yet fair dismissal of a grossly ineffective teacher

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<sup>56</sup> *Vergara*, No. BC484642 at 8. The Plaintiffs’ arguments centered on the notion that teacher quality and effectiveness is a key factor in student success, and that low-income and minority students endure a disproportionate number of “grossly ineffective” teachers. Showing that grossly ineffective teachers are predominately assigned to minority and low-wealth students. *See, e.g., Vergara Trial Day 8, STUDENTS MATTER* (Feb. 5, 2014, 11:03 AM), [http://studentsmatter.org/ai/lec\\_event/vergara-trial-day-8/?instance\\_id](http://studentsmatter.org/ai/lec_event/vergara-trial-day-8/?instance_id). Those “grossly ineffective” teachers obtain their positions because of the “permanent employment” statute, which provides a teacher tenure after only two years on the job. *Vergara*, 2013 WL 6912924, at\*4 (explaining Plaintiffs’ argument that the Permanent Employment Statute does not permit sufficient time for school districts to evaluate teacher effectiveness before deciding whether to reelect probationary teachers as permanent employees by March 15 of their second year of probation).

<sup>57</sup> *Vergara*, No. BC484642 at 9.

<sup>58</sup> The Los Angeles Unified School District spent 3.5 million dollars trying to dismiss *seven* teachers during the decade from 2000-2010, and despite the cost in dollars and in time, the district succeeded in dismissing *only two* of those teachers. *See* Beth Barrett, *LAUSD’s Dance of The Lemons*, LAWEEKLY.COM, (Feb. 11, 2010), <http://www.laweekly.com/2010-02-11/news/lausd-s-dance-of-the-lemons> (explaining that the average cost to attempt to fire a teacher in Los Angeles is \$500,000). *See also* Katharine B. Stevens, *Firing Teachers: Mission Impossible*, NYDAILYNEWS.COM, (Feb. 17, 2014, 4:25 AM), <http://www.nydailynews.com/opinion/firing-teachers-mission-impossible-article-1.1615003> (explaining that the average cost to attempt to dismiss a “grossly ineffective” teacher in NY is \$313,000 taxpayer dollars).

illusory.”<sup>59</sup> In addition, some good teachers worsen over time, and the plaintiffs allege that the dismissal statutes prevent the prompt firing of those teachers.<sup>60</sup>

The layoff system, which has been implemented in most recent years due to budget shortfalls (whether actual or projected) contributes to this problem by forcing the layoff of the newest teachers in reverse seniority order, even for those newer teachers who are performing better than more senior experienced teachers.<sup>61</sup> Thus, when a new teacher is effective in the classroom, and can obtain early and deserved tenure after two years, she is still subject to layoff and will be laid off if the money is not available, while the ineffective but more experienced teachers remain to teach the students in the next school year.

In an interview on National Public Radio, Ted Boutros, the lawyer for the plaintiffs in *Vergara* stated that “[m]any of the “grossly ineffective teachers with seniority are shunted off to the lower income and minority districts that often are viewed as less desirable positions.”<sup>62</sup> Then, when the next round of layoffs comes, the less senior, but perhaps more effective teachers, are laid off, thus leaving a higher proportion of the ineffective teachers at the school. While

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<sup>59</sup> *Vergara*, No. BC484642 at 12-13. See *Skelly v. State Personnel Bd.*, 539 P. 2d 774, 782 (Cal. 1975) (holding that at a minimum, pre-removal safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline).

<sup>60</sup> This delay and even inability to replace ineffective teachers harms the students in those teachers’ classrooms by depriving those students of “substantially equal access to an education sufficient to equip them with the critical fundamental tools minimally necessary to compete in the economic marketplace and to participate in a democratic society.” *Vergara* First Amended Complaint at 24.

<sup>61</sup> *Vergara*, No. BC484642 at 13-14 noting “no matter how gifted the junior teacher, and no matter how grossly ineffective the senior teacher, the junior gifted one, who all parties agree is creating a positive atmosphere for his/her students, is separated from them and a senior grossly ineffective one who all parties agree is harming the students entrusted to her/him is left in place.”

<sup>62</sup> Eric Westervelt, *Teacher Job Protections vs. Students’ Education in Calif.*, NPR.ORG, (Jan. 26, 2014, 8:00 AM), <http://www.npr.org/2014/01/26/266515292/teacher-job-protections-vs-students-education-in-calif>.

budget-based layoffs also occur in schools in affluent and middle-class neighborhoods, those positions are considered by teachers to be “more desirable” and thus those schools are better able to retain the best and brightest teachers. The trial court ruled that the last in, first out (“LIFO”) procedure for teacher layoffs was unconstitutional under the Equal Protection Clause.<sup>63</sup>

The trial court found that this layoff system, in conjunction with the permanent employment tenure system, disproportionately affected high-poverty and minority students, which in turn “greatly affects the stability of the learning process to the detriment of such students.”<sup>64</sup>

Before the trial, the Plaintiffs prevailed against defense motions for summary judgment, with the court finding that a triable issue of material fact existed as to whether the challenged Education Code statutes constitute a classification against an identifiable group where they “result in the assignment of teachers to students and/or minority and low-wealth students who are thereby denied of equality of education.”<sup>65</sup> The court also ruled that because the denial impacts a

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<sup>63</sup> *Vergara*, No. BC484642 at 14. *See also*, *Vergara* First Amended Complaint at 18–19 (asserting that although wealthier schools have layoffs, minority and lower income districts are still disproportionately affected. The Permanent Employee Statute in dispute creates a seniority-based layoff system. Relevantly, junior teachers are largely placed in minority districts, which results in junior teachers being laid off first, regardless of efficacy. The results are a disproportionate effect on minority districts retaining both shunted off “grossly ineffective teachers” and a vicious re-cycling of junior teachers, some which may actually be good and effective).

<sup>64</sup> *Vergara*, No. BC484642 at 15. A Los Angeles Unified School District study concluded that when compared to Anglo students, Latino students were 68 percent more likely, and African American students were 43 percent more likely, to be taught by a teacher ranked in the bottom fifth percentile in teacher effectiveness. *See* Daniel B. Wood, *Vergara v. California: Do State Laws Protect Teacher Jobs Over Students?*, CSMONITOR.COM, (Jan. 28, 2014, 3:53 PM), <http://www.csmonitor.com/USA/Education/2014/0128/Vergara-v.-California-Do-state-laws-protect-teacher-jobs-over-students-video>.

<sup>65</sup> *Vergara*, 2013 WL 6912924, at\*7. *See Vergara* First Amended Complaint at 12–13 (noting Plaintiff’s argument that the challenged statutes comprise a statutory scheme that confers permanent employment on teachers before their effectiveness can readily be determined, makes dismissal nearly impossible or highly impractical once poor performers are identified, and, when layoffs are necessary, forces districts

fundamental right such as equality of education, disparate impact may be sufficient without a showing of discriminatory intent.<sup>66</sup> The trial court denied the motions for summary judgment/summary adjudication, noting that determining whether strict scrutiny or rational basis review was the standard would require an evaluation of the facts at trial.

Los Angeles Unified School District Superintendent John Deasy testified that “[c]ompetence is not a factor in determining layoff. A credential is.”<sup>67</sup> Expert testimony by Dr. Raj Chetty, a William Henry Bloomberg Professor of Economics at Harvard University, stated his opinion that, “seniority-based reductions in force harm minority and low-income students in particular disparately.”<sup>68</sup> Troy Christmas, Oakland School District Director of Labor Strategy testified that there are many reasons why the Oakland Unified School District has been unable to dismiss ineffective teachers, noting that “[p]rincipal among those reasons are the difficulty and expense of the processes involved.”<sup>69</sup>

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to terminate teachers based on *seniority* alone, irrespective of their teaching effectiveness).

<sup>66</sup> Vergara, 2013 WL 6912924, at\*8.

<sup>67</sup> See Students Matter, *Vergara Trial Day 2: Superintendent Deasy Testifies on Egregious Impact Challenged Statutes Have on Students*, STUDENTS MATTER, (Jan. 30, 2014, 1:33 PM), [http://studentsmatter.org/ai1ec\\_event/vergara-trial-day-2/?instance\\_id](http://studentsmatter.org/ai1ec_event/vergara-trial-day-2/?instance_id) (noting that effective teachers are inequitably distributed in LAUSD and that teachers have the potential to dramatically accelerate or impede the academic performance of their students, whether they are starting below grade level or are ready for more advanced instruction).

<sup>68</sup> See Students Matter, *Vergara Trial Day 4: Former Los Angeles Mayor Villaraigosa Voices His Support for Plaintiffs; Dr. Chetty Testifies on Long-Term Impact of Ineffective Teachers*, STUDENTS MATTER, (Jan. 30, 2014, 7:30 PM), [http://studentsmatter.org/ai1ec\\_event/vergara-trial-day-4/?instance\\_id](http://studentsmatter.org/ai1ec_event/vergara-trial-day-4/?instance_id) (“Being subject to a highly ineffective teacher for multiple years in a row would substantially reduce your chances of attending college”).

<sup>69</sup> See Students Matter, *Vergara Trial Day 5: Oakland Unified School District Director of Labor Strategy Troy Christmas Testifies About Harms Caused by Dismissal Statutes*, STUDENTS MATTER, (Feb. 3, 2014, 12:00 PM), [http://studentsmatter.org/ai1ec\\_event/vergara-trial-day-5/?instance\\_id](http://studentsmatter.org/ai1ec_event/vergara-trial-day-5/?instance_id) (“In no case have we believe[d] that had we just poured in more money, there would be substantially different results... The dismissal statutes impact who remains a teacher in OUSD and as a result of impacting who remains, has an impact on who is available to be assigned”).

The trial has also produced evidence about the assignment of “grossly ineffective teachers” to minority and lower income school districts. For instance, Dr. Thomas Kane, faculty director of the Project for Policy Innovation in Education at Harvard University, testified that “rather than assign them more effective teachers to help close the gap with white students they’re assigned less effective teachers, which results in the gap being slightly wider in the following year.”<sup>70</sup> Also, Dr. ArunRamanathan, the Executive Director of Education Trust, testified that “low-income students and African American and Latino students in Los Angeles Unified School District do not have equitable access to the district’s most effective teachers.”<sup>71</sup> The trial decision has been stayed while the defendant consider appellate options, and if the plaintiffs are successful, the case may have nationwide implications on the debates over teacher tenure and the rights to education in America.

*B. The New NCLB—Now Children Learn Better: The Basics of Color Fair Education*

Students of majority race and middle class cultures are well enough served in their public schools, but those in majority-minority schools with high poverty are not. A different approach can augment their collective chances for success. Teachers who begin with an expectation that all students are capable of achieving academically take the first step ahead in promoting quality education for all. Teachers who do not develop an achievement mentality for their students, who are lulled by the seniority and tenure system into setting a low achievement bar for all of their students, leave their students more than two steps behind. The Color Fair system recognizes that schools and teachers must devote attention to the new and diverse learning needs of their students and prepare students from the

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<sup>70</sup> Howard Blume, *White Students Get Better Teachers in L.A., Researcher Testifies*, L.A. TIMES, (Feb. 7, 2014, 6:39 PM), <http://www.latimes.com/local/lanow/la-me-ln-unequal-teaching-in-la-20140207,0,3465389.story#axzz2u7aUvVSz>.

<sup>71</sup> CARRIE HAHNEL & ORVILLE JACKSON, *LEARNING DENIED: THE CASE FOR EQUITABLE ACCESS TO EFFECTIVE TEACHING IN CALIFORNIA’S LARGEST SCHOOL DISTRICT*, 2 (2012), *available at* <http://studentsmatter.org/wp-content/uploads/2012/04/ETW-Learning-Denied-Report1.pdf> (noting that quality-blind teacher layoffs in 2009 resulted in the removal of dozens of high value-added teachers from the highest need schools).

beginning for academic achievement and lifelong learning.<sup>72</sup> The Color Fair education approach promotes equity in attitude toward the learning potential of all students, combined with equity in resource allocation to produce equity in successful assessment measures.

### 1. Expanding the Three R's to Include Other Crucial Skills Development

State courts generally agree that the skills essential to a basic quality education by the end of high school are more than the three r's: reading, 'ritin' and 'rithmetic, and include those skills necessary to "function productively as capable voters, jurors and civic participants in a democratic society and to compete effectively in the twenty-first century global economy."<sup>73</sup> State courts have found that these skills include: (1) sufficient English language reading writing and speaking, as well as fundamentals of math and physical science "to enable them to function in a complex and rapidly changing society;" (2) sufficient fundamental knowledge of social studies, "to enable them to make informed choices with regard to issues that affect them personally or affect their communities, states and nation;" (3) "sufficient intellectual tools to evaluate complex issues and sufficient social and

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<sup>72</sup> See generally Am Bar Ass'n Presidential Advisory Council on Diversity in the Profession, *Collaborating to Expand the Pipeline* at 10 (2006) (hereinafter "Pipeline Report"), available at <http://apps.americanbar.org/op/pipelineconf/PipelinePostReport.pdf> (suggesting a pipeline plan that prepares students from the beginning to broaden diversity in the legal profession):

We are obligated to make a strong investment in the education of children of color... This investment must be made at the elementary school, middle school, high school, and college levels, in order to ensure the matriculation of academically prepared students of color into law school, and ultimately, the profession. In short, we must increase the flow of diverse students into the legal profession's pipeline and patch its pervasive leaks that impede the access of students of color.

See generally Tang, *supra* note 12, at 1212 ("what counts as a quality education . . . is a dynamic concept that changes over time as new economic realities and technological developments influence our society . . . [T]herefore, school finance litigation must adapt and evolve with changing notions of educational quality to ensure that children have access to an education that will prepare them for the future").

<sup>73</sup> Rebell, *supra* note 40, at 1515 (explaining a consensus of state court opinions).

communication skills to work well with others and communicate ideas to a group;” and (4) “sufficient academic and vocational skills to enable them to compete on an equal basis with others in further formal education or gainful employment in contemporary society.”<sup>74</sup>

But this is more than the three R’s. To be more specific, crucial skills for an actually adequate education at the primary school level should include: managing relations with others; becoming active and responsible members of their community; appreciating diversity; conflict resolution;<sup>75</sup> developing a basis for forming self; developing attention skills and study practices; learning that it is important to please the teacher (and how to do so);<sup>76</sup> progressive improvement on standardized tests;<sup>77</sup> and the key skills of mastering the basics of subjects such as reading, and math, with exposure to writing, science, social science, literature, history, and the fine arts.<sup>78</sup>

At the secondary education level, such additional skills as the following should be nurtured: continued progress in all of the above primary skills; writing style, diction and vocabulary; reading vocabulary, volume and speed; numerical complexity/equations; scientific method; practicing sports and music and other creative

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<sup>74</sup> *Id.* at 1515–16. See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989) (outlining seven skills that schools must impart on students). According to Rebell, the *Rose* concepts have essentially been adopted by high courts in five states: Alabama, Massachusetts, New Hampshire, North Carolina, and South Carolina. Michael Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.–C.L. L. REV. 83 at n.143 (2012).

<sup>75</sup> Tiffany J. Hunter, *Creating a Culture of Peace in the Elementary Classroom*, 74 J. ADVENTIST EDUC. 21–23 (2008), available at <http://education.gc.adventist.org/jae>. See also Justin R. E. Rawana et al., *The Application of a Strength-Based Approach of Students’ Behaviours to the Development of a Character Education Curriculum for Elementary and Secondary Schools*, 45 J. EDUC. THOUGHT 127 (Autumn 2011).

<sup>76</sup> Lynn E. Pelco & Evelyn Reed-Victor, *Self-Regulation and Learning-Related Social Skills: Intervention Ideas for Elementary School Students*, 51 PREVENTING SCH. FAILURE 36, 37–39 (Spring 2007).

<sup>77</sup> See Douglas N. Harris & Tim R. Sass, *Teacher Training, Teacher Quality And Student Achievement*, 95 J. PUB. ECON. 798, 802 (2011).

<sup>78</sup> See Kathleen Kennedy Manzo, *Learning Essentials*, EDUC. WEEK., May 21, 2008, at 23, available at <http://www.edweek.org/ew/articles/2008/05/21/38coreknowledge.h27.html>.

arts;<sup>79</sup> leadership and team-building skills, both in academic and extracurricular settings;<sup>80</sup> learning such subjects as civics<sup>81</sup> and geography;<sup>82</sup> engaging in public service; developing cultural competence; and understanding globalization.<sup>83</sup> All of these critical skills can be developed and evaluated in the classroom environment.

Unlike the outcomes in some states which have upheld equality in education standards,<sup>84</sup> Color Fair education does not reduce the level of academic achievement of some students in order to level the playing field. By focusing on the development of crucial skills, by raising the opportunities for, and consequentially the achievement levels of, the lowest performing students, no student will be worse off, and all will be better off<sup>85</sup> as the overall academic success of the student body rises. When many at the bottom of the class are raised to a higher achievement level, the entire class can move forward at a

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<sup>79</sup> These and other often extra-curricular programs have been cut in many high poverty schools, and more may be cut due to the punishments in the NCLB. See Damon T. Hewitt, *Reauthorize, Revise, and Remember: Refocusing the No Child Left Behind Act to Fulfill Brown's Promise*, 30 YALE L. & POL'Y REV. 169, 187 (2011). See also Regina R. Umpstead & Elizabeth Kirby, *Reauthorization Revisited: Framing the Recommendations for the Elementary and Secondary Educ. Act's Reauthorization in Light of No Child Left Behind's Implementation Challenges*, 276 ED. LAW REP. 1, 16 (March 29, 2012) (noting research that school curriculums have narrowed since the passage of NCLB).

<sup>80</sup> Alf Lizzio, Neil Dempster & Regan Neumann, *Pathways to Formal and Informal Student Leadership: The Influence of Peer and Teacher-Student Relationships and Level of School Identification on Students' Motivations*, 14 INT'L J. LEADERSHIP EDUC. THEORY & PRAC. 85 (2011).

<sup>81</sup> Richard G. Niemi & Julia Smith, *Enrollments in High School Gov't Classes: Are We Short-Changing Both Citizenship and Pol. Sci. Training?*, 34 POL. SCI. & POLITICS 281, 281-83 (June 2001).

<sup>82</sup> Mark W. Patterson, Kay Reeve, & Dan Page, *Integrating Geographic Information Systems into the Secondary Curricula*, 102 J. GEOGRAPHY 275 (Nov/Dec 2003).

<sup>83</sup> Nel Noddings, *What Does It Mean to Educate the WHOLE CHILD?*, 63 EDUC. LEADERSHIP. 8, 11 (2005)

<sup>84</sup> See Enrich, *supra* note 22, at 102-03 (examining the continued "shockingly poor" disparity between districts even in states where the courts and the legislature have undertaken efforts to equalize education); Reynolds, *Skybox Schools* at 755 (noting that notwithstanding the many statutory amendments and increased state funding for public schools, the disproportionate gap between poor and rich districts remains).

<sup>85</sup> On the other hand, sole equality approaches to public schools demand leveling by requiring "that the worst off be placed on the same footing as the best off..." Enrich, *supra* note 22, at 168.



more rigorous pace for all.<sup>86</sup> This utilitarian approach to primary and secondary education permits greater control at the classroom level, where the teachers spend their time and energy.

How can schools districts accomplish this overall gain? By changing the mechanism of teacher tenure and evaluation so that teacher effectiveness rather than student standardized test performance is a measure of success, and a motivator for success for public school students.

## 2. Fostering Equity in Teacher Effectiveness, Attitudes and Expectations

Teachers must have the academic background and training<sup>87</sup> to substantively teach the crucial skills identified above, as well as the skills to effectively convey material to a diverse group of students, which also requires some level of “cultural competence.”<sup>88</sup> The Color Fair education approach can be applied only by teachers and administrators who are trained to recognize and repel the stereotypes and generalizations based on race and class that expect, predict, and even promote academic failures in certain groups of students. For instance, rote memorization and repetition, often a hallmark of the NCLB’s “teaching to the test,” may work for some students and some

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<sup>86</sup> Phyllis Glassman & Robert J. Roelle, *Singling Black Boys to Close the Gaps*, 64 SCH. ADMIN. 26 (2007).

<sup>87</sup> Studies have shown that the lowest performing schools tend to have less experienced and thus lower paid teachers, explaining some of the funding inequities within school districts. Ross Rubenstein et al., *Rethinking the Intradistrict Distribution of School Inputs to Disadvantaged Students* 7 (April 27, 2006) (unpublished paper prepared for the Rethinking Rodriguez Symposium at the Warren Institute at UC Berkeley School of Law). More experienced teachers typically have more choice as to which school they can work at under collective bargaining agreements and/or district personnel policies, and they tend to choose higher performing schools with lesser concentrations of poor and minority students. *See Id* at 9, 21.

<sup>88</sup> Anita F. Hill, *A History of Hollow Promises: How Choice Jurisprudence Fails to Achieve Educational Equality*, 12 MICH. J. RACE & L. 107, 151–52 (2006) (“Simply defined, cultural competence is the ability of teachers to understand their students’ culture and incorporate it into the lessons and learning in a class. Culture impacts our view of the world and implicates the deep structures of knowing, understanding, acting, and being in it”) (internal citations and quotations omitted).

subjects, but should not be the primary method of “teaching” in high minority, high poverty classrooms.<sup>89</sup> Discussions and critical thinking must be modeled at the primary school level if there is any hope of teaching these skills in secondary school and beyond. Teachers must be trained to be effective in these areas, and schools must make stronger efforts to retain those who are effective—even at the expense of more experienced but less effective teachers—if all children are to have equal or adequate educational opportunities.

It is no secret that students in majority-minority schools perform worse and have fewer educational opportunities to excel than those in majority-majority schools.<sup>90</sup> Teachers have lower expectations for their students when the seniority system sets a low bar for quality in public education, and that bar is particularly low in minority and impoverished areas, thus failing to provide equal educational opportunities for all.<sup>91</sup> The Color Fair education approach takes this unfortunate reality as the starting point for measuring progress and potential. Expecting students to excel, despite their circumstances, can become a self-fulfilling prophecy as much as expecting them to fail can be.<sup>92</sup> Education experts continue to test theories of how best to teach students from diverse groups, with an understanding of their race and culture. Those research results will form the basis for additional details for implementing the Color Fair education approach.

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<sup>89</sup> Some scholars argue that students in high-poverty schools are taught differently than their wealthier counterparts in the suburbs, with high-poverty schools emphasizing rote memorization and tightly scripted classes. See Charles R. Lawrence III, *Who Is the Child Left Behind?: The Racial Meaning of the New School Reform*, 39 SUFFOLK U. L. REV. 699, 712–15 (2006). “Knowledge and skills leading to social power and reward are taught to advantaged social groups but are withheld from the working class and poor . . . . [T]he working classes [are taught] docility and obedience, the managerial classes [taught] initiative and personal assertiveness.” *Id.* at 713.

<sup>90</sup> Oscar Jimenez-Castellanos, *Relationship Between Educational Resources and School Achievement: A Mixed Method Intra-District Analysis*, 42 URB. REV. 351, 351–52 (2010).

<sup>91</sup> *Vergara* First Amended Complaint at 21–22 (also noting that the challenged Statutes have a disparate impact on minority and economically disadvantaged students, infringing on their fundamental right to education to a greater degree than other students in California).

<sup>92</sup> Chris Chambers Goodman & Sarah E. Redfield, *A Teacher Who Looks Like Me*, 27 ST. JOHN’S J. C.R. & ECON. DEV. 105 (2013).

But, unlike under the No Child Left Behind Act,<sup>93</sup> it must not be and cannot be all about testing. Minority students perform in the aggregate worse on standardized tests and confidence diminishes with each iteration.<sup>94</sup> While the testing regime may be here to stay, motivations in the scoring regime can be a palatable option for change. One solution may be scoring tests based on the district or even school, rather than state- or nation-wide, which can show progress (though not in an absolute sense once in college with others from different schools and districts). Then teachers could be effective within their realm, judged by the same inputs, rather than being let go because they were not able to mold superstars out of students who had previously been repeatedly denied access to effective teachers.

### 3. Melding the Adequacy and Equality Approaches

The Color Fair education approach acknowledges the validity of both the adequacy and equality arguments that have dominated the education discourse in the past few decades. In line with the adequacy advocates, the Color Fair approach seeks to bring all students up to a baseline of academic achievement. While not every student can excel, it is likely that all can improve. The equality aspect relates to funding,

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<sup>93</sup> Secretary of Education Arne Duncan has echoed the criticism of many experts that NCLB is encouraging states to dumb down standardized tests and narrow their curriculums to avoid sanctions under the act. See Emmanuel Touhey, *Education Secretary: 'No Child Left Behind' Has Led to a 'Dumbing Down'*, THE HILL (January 28, 2011, 7:47 PM), <http://thehill.com/blogs/congress-blog/the-administration/140977-interview-with-education-secretary-arne-duncan#ixzz2b7cy36hr>; see also James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 944 (arguing NCLB creates a perverse incentive for states to water down standardized tests so they do not risk sanctions under the law); Adam Lichtenheld, Opinion, *Bush Education Policy Leaving Many Behind*, BADGER HERALD, Apr. 26, 2006, [http://badgerherald.com/oped/2006/04/26/bush-education-polic/#.U2MA\\_a1dVoU](http://badgerherald.com/oped/2006/04/26/bush-education-polic/#.U2MA_a1dVoU) (discussing the inadequacies of the NCLB); Moore, *supra* note 9, at 546 (stating that the NCLB has shown few positive results).

<sup>94</sup> See Dana N. Thompson Dorsey, *Accessing the Legal Playing Field: Examining the Race-Conscious Affirmative Action Legal Debate Through the Eyes of the Council of Legal Education Opportunity (Cleo) Program*, 16 TEX. WESLEYAN L. REV. 645, 676 (2010) (noting that summer institutes have provided preparation for so many successful lawyers and offered opportunities to those minority students who may have been otherwise considered “under-qualified” for law school because of lack of access to the best schools and low standardized test scores).

in terms of equality of *funding outcomes* rather than *funding inputs*, and thus diverges from the traditional approach of equality theorists. Explained simply, funding outcomes are the “bang for the buck,” rather than the total dollars expended. Thus, an inefficient school or district gets less “bang for the buck” and therefore may need to spend more money initially as it also spends those funds more wisely to have an “equal funding outcome” with a more efficient school or district. The most financially stressed schools and districts are in high poverty and high minority populations. By providing additional resources and opportunities for those schools and school children who need them, on a sliding scale according to their need, this approach to equality has a better chance of raising the academic performance of the neediest students to the “adequate” baseline level.

One way to make education spending more effective might be to focus on “vertical equity,” as one scholar notes, which is a hybrid of adequacy and equity litigation, and recognizes that some children are more expensive to educate than other children, and therefore need to be provided more funding for an equitable outcome.<sup>95</sup> For instance, children who have been enrolled in underperforming schools for their entire educational careers may need additional resources to bring their education levels up to their peers from different schools. Thus, schools or districts with a large number of underperforming students may need a greater resource allocation than a straightforward equality principle would permit. Similarly, schools with a larger percentage of special needs children will require a greater resource allocation.<sup>96</sup>

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<sup>95</sup> See Reynolds, *Uniformity of Taxation supra* note 51 at 1861. Prof. Reynolds traces the failures of equality and adequacy theories advanced in school finance litigation, and proposes a hybrid theory that, like the adequacy theory, is based on state constitutional guarantees of a free public education. *Id.* at 1861–62. Similar to the equality theory, vertical equity looks at whether students with similar needs have access to roughly equal educational opportunities in any public school in the state. *Id.* at 1862. Given the focus on equality of opportunity rather than equality of inputs, vertical equity recognizes that some students, such as disabled students, require more spending, and does not challenge existing school finance schemes based on local property taxes, given the powerful political resistance of suburban voters. *Id.* at 1853. Vertical equity promises to alleviate disparities in educational opportunities without triggering the political resistance that has doomed previous reform efforts. *Id.*

<sup>96</sup> Although, the increase in funding for special needs and special education children arguably has detracted from the funding for the education of children who do not

One advantage of this approach is that an equal funding mandate is easier to measure to evaluate whether the allocations actually are equal. Another advantage is that letting the schools and districts allocate their equal funds in unequal ways on a per student or as needed basis, would provide the best mechanism for ensuring that the money is spent in a way that maximizes educational outcomes. Identifying *how* the money should be spent as noted above is better than focusing on *how much* money is spent.

#### IV. REFORMING PUBLIC EDUCATION (AGAIN)

If educational parity is a political question, then the political realm is the avenue for decision making, and the Legislatures would be the starting point. States vary widely on what a fundamental right to education means under state law, as well as what is required for adequacy or equality, as the case may be. The main legislative role will be to establish national benchmarks that are less rigid and more meaningful than those of the No Child Left Behind Act, and to provide additional or more effectively allocated funding support to the expanded education services.

##### A. *The Benefits and Burdens of Existing Law: No Child Left Behind*

A national benchmark approach was taken in 2001 when Congress enacted the No Child Left Behind Act, with its quality assessments to measure adequacy at the urging of President Bush.<sup>97</sup> NCLB instituted a number of requirements, beginning with standardized testing in reading and math for grades three through eight, and continuing with re-setting content and performance standards with a goal of 100% proficiency in reading and math at

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have special needs. See Rebell, *supra* note 40, at 1482 (noting that while real education spending increased per pupil from 1967–1991, the percentage of education funding devoted to special education quadrupled during this time period, while the percentage for general education funds diminished by 25%).

<sup>97</sup> NCLB was passed with President Bush's active support. Lizette Alvarado, *House Votes for New Testing to Hold Schools Accountable*, N.Y. TIMES, May 23, 2001, <http://www.nytimes.com/2001/05/24/us/house-votes-for-new-testing-to-hold-schools-accountable.html?gwh=4CCAECBAAC62F7057FD9AD394027FC91>.

grade level for all students by 2014.<sup>98</sup> The NCLB also had specific mandates for Title I schools, which applies to 58% of all public schools.<sup>99</sup> Those mandates include sanctions for the failure to meet Adequate Yearly progress (“AYP”) in test scores for all sub-groups, compelling veteran teachers to justify their qualifications and preventing hiring of teachers who are not “highly qualified.”<sup>100</sup> These mandates proved unrealistic and unworkable, and by June 2013 the U.S. Department of Education had approved waiver requests on the benchmarks for 43 states plus the District of Columbia and Puerto Rico.<sup>101</sup>

While NCLB has been up for reauthorization since 2007, the House and Senate recently put forward dramatically different versions of a reauthorization bill, which was not reconciled prior to the August 2013 summer recess.<sup>102</sup> Much of the current controversy settles around

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<sup>98</sup> 20 U.S.C.A. § 6311 et seq. (2006).

<sup>99</sup> U.S. DEP’T OF EDUC., FACT SHEET ON TITLE I, PART A (2002), *available at* [www2.ed.gov/rschstat/eval/disadv/title1-factsheet.doc](http://www2.ed.gov/rschstat/eval/disadv/title1-factsheet.doc). Title I of the Elementary and Secondary Education Act, now known as NCLB, is a voluntary program, with aid distributed to schools based on complex formulas that into account the poverty level of the student body and other factors. For an explanation and critique of Title I funding formulas, *see* RAEGEN T. MILLER, SECRET RECIPES REVEALED: DEMYSTIFYING TITLE I, PART A FUNDING FORMULAS 1 (2009), *available at* [http://www.americanprogress.org/wp-content/uploads/issues/2009/08/pdf/title\\_one.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2009/08/pdf/title_one.pdf). “Title I schools” are schools that accept Title I funds, and are therefore required to comply with the requirements of the NCLB. *See* U.S. DEP’T OF EDUC., THE IMPACT OF THE NEW TITLE I REQUIREMENTS ON CHARTER SCHOOLS 1 (2004), *available at* <http://www2.ed.gov/policy/elsec/guid/charterguidance03.doc>

<sup>100</sup> Ryan, *supra* note 93, at 939 (citing studies showing how test scores affect local property values, thus creating another political incentive for school boards to oppose pupil transfers from poor and minority districts).

<sup>101</sup> Elementary & Secondary Edu., *ESEA Flexibility*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> (last visited June 17, 2014). California declined to seek the waivers given teacher opposition to value-added teacher evaluations (a condition the administration has required for the waivers), however, individual school districts have the option of seeking waivers. Evan Halper, *California Holds Out Against Obama’s Education Vision*, L.A. TIMES, July 15, 2013, <http://articles.latimes.com/2013/jul/15/nation/la-na-education-clash-20130715>.

<sup>102</sup> The House passed its bill in July 2013, while the Senate bill, which passed committee, did not get a floor vote before the August recess. Political observers doubt the two parties will reach an agreement on reauthorization this year. *See, e.g.,*

whether the federal government should be involved in education at all, instead of over what that role should be. For instance, the Republican Party is divided between those who believe that the federal government should hold schools accountable in exchange for Title I funding, and those who do not believe there should be so many (or any) “strings” attached to the money. At the school and district level, criticisms are leveled at the assessment effect of “teaching to the test,” as well as the link between teacher evaluations and student performance.<sup>103</sup> Recently, schools and districts are criticizing the new common core standards, which are more rigorous than prior standards, as negatively impacting test scores.<sup>104</sup>

Supporters of the existing NCLB regime note its successes in increasing Title I spending to schools,<sup>105</sup> in requiring accountability for discrepancies in test scores when broken down by race and ethnic group,<sup>106</sup> and for directing more resources towards lower performing students of all groups. The accountability reckoning is another point of praise for NCLB, because it provides an escape mechanism for children in failing schools, by permitting them to transfer to another

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Alyson Klein, *Dueling Visions in Congress on NCLB Renewal*, EDUC. WEEK, July 10, 2013, at 27, available at

<http://www.edweek.org/ew/articles/2013/07/10/36policy.h32.html>; Joy Resmovits, *No Child Left Behind Rewrite Debated In The House, But Bill Has No Future*, THE HUFFINGTON POST (July 19, 2013, 12:16 PM), [http://www.huffingtonpost.com/2013/07/18/no-child-left-behind-rewrite\\_n\\_3619780.html](http://www.huffingtonpost.com/2013/07/18/no-child-left-behind-rewrite_n_3619780.html).

<sup>103</sup> See, e.g., Editorial, *The Trouble with Teaching to the Test*, CHICAGO SUN-TIMES, August 6, 2013, <http://www.suntimes.com/opinions/21763012-474/editorial-the-trouble-with-teaching-to-the-test.html>.

<sup>104</sup> See, e.g., Teresa Watanabe, *California Sees a Surprise Drop in Student Test Scores*, L.A. TIMES, August 8, 2013, <http://www.latimes.com/news/local/la-me-test-scores-20130809,0,5883250.story>.

<sup>105</sup> Title I spending rose significantly in the 2000s, from \$7.9 billion in 2000 to \$12.7 billion by 2005, a nearly 61 percent increase. U.S. DEP’T OF EDUC., EDUCATION DEPARTMENT BUDGET BY MAJOR PROGRAM 7-9 (October 30, 2013), available at <http://www2.ed.gov/about/overview/budget/history/edhistory.pdf>. Despite the historic increase in funding, NCLB was never fully funded by Congressional Republicans and President Bush. Indeed, funding in 2004 fell \$8 billion short of what was authorized by the act, prompting criticism from Democrats. See Lawrence, *supra* note 89, at 704.

<sup>106</sup> Even critics laud the act’s goal of eliminating the achievement gap between white and minority students. See, e.g., Lawrence, *supra* note 89, at 700–01.

school with transportation costs to be borne by the failing school's district.<sup>107</sup> This transfer option can have the effect of integrating schools, to the extent that students of color leave failing schools and transfer to more non-failing schools, which may be in more affluent, and more Anglo, parts of town.<sup>108</sup>

Opponents of NCLB come from several different perspectives. In addition to those who believe the federal government should not play a role in education, there are those who advocate abolishing the Department of Education in its entirety.<sup>109</sup> Some criticize the notion of "teaching to the test" and the potential "dumbing-down" of the curriculum that can result.<sup>110</sup> Others note that the school choice/transfer option does little to increase a student's academic opportunities when the transfer must be within the same school district, which is likely to have many of the same problems as the failing school.<sup>111</sup> Still others claim that the school choice provisions

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<sup>107</sup> See James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1719, 1723 (2003) (noting that the entity which received funding under Title I, typically a district, has responsibilities under NCLB which include the cost of transporting these transferring students). Even though NCLB enhanced the federal government's role in education, some conservatives supported it because of its school choice provisions and the chance it could promote market-like competition among schools. See, e.g., Herbert J. Walberg, *Competition Among Schools Benefit All Students*, THE HEARTLAND INSTITUTE (Nov. 1, 2003), <http://news.heartland.org/newspaper-article/2003/11/01/competition-among-schools-benefits-all-students>.

<sup>108</sup> See Liebman & Sobol, *supra* note 107, at 1728 n. 93.

<sup>109</sup> Halimah Abdulla, *Rand Paul's Idea to Kill Education Agency Would Hurt Poor the Most*, LEXINGTON HERALD-LEADER, Sep. 21, 2010, <http://www.mcclatchydc.com/2010/09/21/100917/rand-pauls-idea-to-kill-education.html#ixzz10Bij4Ome>.

<sup>110</sup> CENTER ON EDUCATION POLICY, NCLB YEAR 5: CHOICES, CHANGES, AND CHALLENGES: CURRICULUM AND INSTRUCTION IN THE NCLB ERA 1–2 (December 2007), available at [http://www.cep-dc.org/cfcontent\\_file.cfm?Attachment=McMurrer%5FFullReport%5FCurricAndInstruccion%5F072407%2Epdf](http://www.cep-dc.org/cfcontent_file.cfm?Attachment=McMurrer%5FFullReport%5FCurricAndInstruccion%5F072407%2Epdf).

<sup>111</sup> See Lawrence, *supra* note 89, at 708 (noting that "where the entire district is resource-poor, as is most often the case, the choices are few or none, often meaning over an hour's ride to a school that is barely better than the one the child has escaped"). For example, in Chicago, 19,000 children applied for transfers and only 1,100 were approved because of lack of capacity. *Id.* In Los Angeles, where tens of thousands were eligible, there were only 229 transfers. *Id.* "Schools that have



actually increase racial segregation<sup>112</sup> because of the “white flight” that results from transfer efforts,<sup>113</sup> as well as the move to charter schools that remain largely minority.<sup>114</sup> The burden on teachers, whose job security is directly impacted by their students’ test scores, leads to a lower quality work force, with so-called “better” teachers moving away from failing schools,<sup>115</sup> as if teachers at failing schools were deliberately failing their students.<sup>116</sup> By focusing solely on testing,

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struggled to improve and barely meet the Act’s improvement goals are now faced with ballooning class sizes sure to drive them below the failing mark next year.” *Id.*

<sup>112</sup> See Robert A. Garda, Jr., *Coming Full Circle: The Journey from Separate but Equal to Separate and Unequal Schools*, 2 DUKE J. CONST. L. & PUB. POL’Y 1, 77 (2007) (observing that the “normal outcomes of markets when applied to a racially stratified society is a perpetuation of racial stratification”). Other critics note that school choice provisions require active and involved parents to truly create competition among schools, and there is often a shortage of such parents at poorly performing schools. This is a crucial problem, which the government is not well-suited to remedy. Thus “the most vulnerable children [are placed] at an even greater disadvantage by simply abandoning them to failing schools.” Martha Minow, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 281 (1999).

<sup>113</sup> For example, among the schools required to offer choice in 2002, 80% of the students were from minority groups and 62% of students were from low-income families, compared to 46% minorities and 49% low-income students in schools not required to offer choice. Hill, *supra* note 88, at 146–47.

<sup>114</sup> NCLB encourages charters as a school choice option. But because the charter schools draw only students from within the same district, they do not lead to more integration and often exacerbate de facto segregation. For example, one study found “[t]he percentage of black students attending charters was nearly twice the proportion of black students enrolled in public schools.” Leland Ware & Cara Robinson, *Charters, Choice, and Resegregation*, 11 DEL. L. REV. 1, 4–5 (2009) (internal citation omitted). Indeed, “seventy percent of the black charter students were enrolled in schools in which ninety to one hundred percent of the students were racial minorities. This compared to thirty-four percent of black students who attended non-charter public schools with a ninety to one hundred percent minority student population.” *Id.* at 5.

<sup>115</sup> Prof. Ryan argues that teachers who have options are unlikely to work at schools facing sanctions under No Child Left Behind, thereby exacerbating inequities between poor urban schools and wealthier suburban schools. Ryan, *supra* note 93, at 975. Numerous studies show that teacher quality has a significant effect on student achievement, and largely minority schools already struggle to retain staff. *Id.* at 971, 974.

<sup>116</sup> Prof. Lawrence questions the NCLB’s implicit assumption “that teachers [in failing schools] know perfectly well what to do and how to do it, but for some perverse reason resist doing so.” Lawrence, *supra* note 89, at 704 (citation omitted). “The Act treats schools as if they were fast food establishments where you could

accountability and transfers, and declining to address educational segregation by racial, ethnic, and socio-economic status, No Child Left Behind misses an important opportunity to actually improve education for all.<sup>117</sup>

Some scholars question the market-based assumptions of No Child Left Behind and school choice advocates, arguing that competition offers false hope to the urban poor and will doom inner city public schools by draining away scarce resources.<sup>118</sup> These critics actually underestimate the problem with school choice theory: school failure is not some unintended by-product of school choice, but the very mechanism by which it attempts to create “incentives” for school improvement. Competition in education creates a self-fulfilling prophecy, setting up failing schools for failure.<sup>119</sup> School choice not only accepts that *some* schools will fail,<sup>120</sup> it guarantees such

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measure progress by monthly increments in the number of burgers sold.” *Id.* at 704–05 (citation omitted).

<sup>117</sup> For a discussion of studies showing that minority students perform better in integrated schools, with no detriment to white student performance, see Garda, *supra* note 112, at 42–43; James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2104–07 (2002) (citing several studies, including the influential Coleman report of 1966, supporting this conclusion). As Ryan and Heise note, scholars have several theories for why poor students of all races perform better in middle class schools, chief among them peer influence. *Id.* at 2104.

<sup>118</sup> See, e.g., Minow, *supra* note 112, at 266–68; James S. Liebman, *Voice, Not Choice*, 101 YALE L.J. 259, 277–92 (1991) (reviewing John E. Chubb & Terry M. Moe, *Politics, Markets, and America’s Schools* (1990)). I am indebted to research assistant Brandon Ortiz for suggesting and developing this argument

<sup>119</sup> See, e.g., Minow, *supra* note 112, at 266–67. Far from creating true competition, No Child Left Behind’s punitive sanctions amount to a type of government interference that would be unthinkable in the private sector. When a company is nearing bankruptcy, for example, the corporate tax code does not suddenly hike its tax rates to “hold it accountable” for failure. Actually, the tax code does just the opposite, with the lowest earning companies paying less in taxes than the highest earning. Nobody on either end of the political spectrum advocates government action to “finish off” dying companies for the greater economic good, but that is essentially what school choice and accountability advocates support for schools.

<sup>120</sup> School choice theory crumbles in the absence of school failure, because free markets simply do not work without failure. In market competition, some competitors thrive and others die. The long-term benefits of innovation and improved efficiency are considered to be worth the short-term social cost of the failed business ventures, which are inevitable in market capitalism. Indeed, free-

failure.<sup>121</sup> With few exceptions, these failed schools will be predominantly poor and minority. Others note that vouchers would be a preferable alternative, because failing schools would actually fail, thus leaving the better schools for all students.

The harm inflicted by school choice is by design, as it is a necessary, foreseeable, and inevitable consequence of school choice. It is difficult to reconcile such “failure-by-design” with the affirmative obligation each state’s education clause imposes on state governments,<sup>122</sup> although the failing schools are already failing in this obligation. A child’s constitutional right should not be sacrificed on the hypothetical chance that doing so now will improve schools in the future.

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market libertarians actually see business failures as a positive good, as it leads to a more efficient allocation of capital. *See, e.g.,* Dwight R. Lee & Richard B.

McKenzie, *Economic Success Depends on Constant Failure*, CATO INSTITUTE, <http://www.cato.org/publications/commentary/economic-success-depends-constant-failure> (last visited April 24, 2014) (opining “[e]conomic failure is to the economy what physical pain is to the body. No one enjoys pain, but without it the body would lack the information needed to maintain its health”). Libertarians, of course, conveniently refrain from celebrating failure when they pitch voucher and choice schemes.

<sup>121</sup> Creative destruction may be good for markets, but it is devastating for children. As students leave “failing schools” for other schools, they bring tax dollars with them, starving an already struggling school of resources, and saddling it with the least motivated and most disruptive students. Minow, *supra* note 107, at 280–81. Unlike in a true market setting, school failures are decidedly not a positive good. It denies children their state constitutional right to an education. Theoretically, these failed schools will close and free up resources for more effective schools. This may (but probably will not) improve education in the long run. But it does not change the fact that a group of children was denied an education during their most formative years because the state “abandon[ed] them to failing schools.” *Id.* The choice of transferring to another school is no substitute for the right to an education, as it depends on motivated and informed parents for it to be realized. *Id.* at 281. “The consequences of these choices are not the same as the consequences of choices about what kind of bicycle or dishwasher to buy.” *Id.* at 269. Just as the right to a fair trial cannot be conditioned on the competence of the accused’s counsel, a state constitutional right to an education cannot, and should not, be conditioned on the competence and motivation of one’s parents.

<sup>122</sup> Rebell, *supra* note 36, at 1871.

*B. Implementing Color Fair Education: Now Children Can Learn*

A federal legislative mandate that promoted Color Fair education, while securing the adequacy and equity levels, would be the first step to improving public education in a way that avoids school failures and prepares for the sunset of affirmative action. For instance, following the vertical equity approach described in Part III.B.3above, the reauthorization legislation can increase levels of Title I funding to bring schools closer to funding equilibrium between poorer and wealthier districts.<sup>123</sup> Though politically unpalatable, redrawing school district lines to provide for substantial socio-economic diversity within districts and within actual schools would be another way to promote the equalization of resources across schools and districts.<sup>124</sup>

Increasing the transfer opportunities to include inter-district transfers could help more students to attend better schools, although the Court has rejected this option in the past.<sup>125</sup> Making the legislation more transparent and easily understood by all would be another important step toward greater success.<sup>126</sup> Outcome measures that more states are able to achieve within the time frames, rather than those that result in waivers granted to all but seven of the states, would be another way to increase the effectiveness of the legislation.<sup>127</sup> More realistic measures would also help to ensure that individual schools, not merely districts, are getting the resources they need,<sup>128</sup> and that the allocation is based on their students' actual needs.<sup>129</sup>

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<sup>123</sup> Changes to Title I's complicated funding formulas may also be necessary to eliminate illogical variances in how Title I funds are distributed. See Miller, *supra* note 99, at 3-4.

<sup>124</sup> Saiger, *supra* note 17, at 495.

<sup>125</sup> See, e.g., Milliken v. Bradley, 418 U.S. 717, 745 (1974).

<sup>126</sup> Alan Bersin, et al., *Getting Beyond the Facts: Reforming California School Finance*, WARREN INST.U.C. BERKELEY SCH.L. ISSUE BRIEF, April 2008, at 1, 5-6 available at <http://www.law.berkeley.edu/files/GBTfissuebriefFINAL.pdf>.

<sup>127</sup> Rebell, *supra* note 32, at 1960.

<sup>128</sup> Rubenstein, et al., *supra* note 87, at 7 (stating studies have shown that the lowest performing schools tend to have less experienced and thus lower paid teachers, explaining some of the funding inequities within school districts); *Id.* at 11 (explaining more experienced teachers typically have more choice as to which school they can work at under collective bargaining agreements and/or district

As a corollary to Congressional reauthorization with revisions, the Legislature should implement a program of coordinated out of school services that are essential to success for students in school, at both the primary and secondary levels. In this way, the legislature could support Color Fair education by providing more social services to the most vulnerable student populations. Those services include health and nutrition programs,<sup>130</sup> after school programs and extra-curricular activities like clubs and sports teams,<sup>131</sup> which are important as much for the purpose of keeping the children in a healthy and safe environment as for the purpose of augmenting their intellectual education. In addition, other services, such as parental education, abuse prevention, counseling for attendance as well as academics, and medical and psychological support, will help to ensure that the students can take full advantage of their increasing educational opportunities.<sup>132</sup> While providing these services would require substantial political support that may not yet be forthcoming, the state legislatures may be a better mechanism for these service mandates,

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personnel policies, and they tend to choose higher performing schools with lesser concentrations of poor and minority students).

<sup>129</sup> Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 332–33, n.4& 6 (2006) (citing studies showing that differences in spending between states account for two-thirds of nationwide inequality in school spending).

<sup>130</sup> Hewitt, *supra* note 79, at 188 (arguing states need to allocate more resources to impoverished school districts “to ensure that interventions such as basic health screening and nutritional programs are available to all children. High-quality early childhood education, full-day prekindergarten, and full-day kindergarten—perhaps the most fundamental set of programs—must also be provided so that children enter school ready to learn.”).

<sup>131</sup> Howard T. Everson & Roger E. Millsap, *Beyond Individual Differences: Exploring School Effects on SAT Scores*, College Board Research Report No. 2004-3, College Board, 8–9, 15 (2004), available at <http://research.collegeboard.org/sites/default/files/publications/2012/7/researchreport-2004-3-exploring-school-effects-sat-scores.pdf> (noting the positive correlation between students involved in extracurricular activities and test scores); Herbert W. Marsh & Sabina Kleitman, *Extracurricular School Activities: The Good, the Bad, and the Nonlinear*, 72 HARV. EDUC. REV. 464, 507–08 (2002); Steven J. Danish, Tanya Forneris & Ian Wallace, *Sport-Based Life Skills Programming in the Schools*, 21J.APPLIED SCH. PSYCH., SEPT. 2008, at 41, 43, 46 (Sept. 2008).

<sup>132</sup> Rebell *supra* note 40, at 1520–21. The Harlem Children’s Zone, for example, provides these services at 15 community centers serving more than 13,000 adults and children.

and having a shared approach to improving education nationwide would provide more opportunities for success.<sup>133</sup>

## II. CONCLUSION

Returning to a goal of integration, rather than just anti-discrimination and local control, may be essential to providing truly meaningful educational opportunities to all.<sup>134</sup> Given the past (and continuing) hostility to integration,<sup>135</sup> the best alternative is the Color Fair education approach this article describes—an education system that focuses on culturally competent teachers modifying the testing regimes and lesson plans in ways to promote confidence and inclusive excellence in academic achievement by minority and socio-economically disadvantaged students. With a starting point of equity in attitude, which finds that all children can improve academically regardless of prior challenges and obstacles, coupled with the benefit of equity in resource outcomes that provide not merely the funding but also the time and talents to support high quality education, more equitable success eventually will result.<sup>136</sup> Those better prepared and better educated students can enter the pipeline from a more competitive position, and lay the groundwork for retaining places for diverse students in higher education.<sup>137</sup>

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<sup>133</sup> Hewitt, *supra* note 79, at 179 (arguing “the districts and states in which the schools are situated should also be held accountable as a step toward building a shared sense of obligation, urgency, and accomplishment”).

<sup>134</sup> Rebell, *supra* note 36, at 1521–22.

<sup>135</sup> John Eligon, *In Missouri, Race Complicates a Transfer to Better Schools*, N.Y. TIMES, July 31, 2013, at A10, available at [http://www.nytimes.com/2013/08/01/us/in-missouri-race-complicates-a-transfer-to-better-schools.html?pagewanted=all&\\_r=](http://www.nytimes.com/2013/08/01/us/in-missouri-race-complicates-a-transfer-to-better-schools.html?pagewanted=all&_r=) (describing suburban parent opposition to transfers into suburban districts from the urban St. Louis school district).

<sup>136</sup> *Accord Pipeline Report*, *supra* note 72, at 17 (recommending the building of skills similar to this article from the K-12 level to the college level in order to broaden the pipeline of diversity in the legal profession).

<sup>137</sup> See generally Christine C. Goodman, *A Modest Proposal in Deference to Diversity*, 23 NAT’L. BLACK L.J. 1, 4–5, 23 (2011) (calling for participating law schools to experiment in a measure that determines whether it is time for affirmative action to end, and with the information acquired, we can “better prepare our law schools for the impending sunset”). In the meantime, “[a]ccess is continued by maintaining affirmative action programs.” *Id.* at 19.

For the Color Fair education proposal to succeed, it must take root from a heightened perspective of what meets the standard of adequate educational preparation for the masses of society. Reducing testing standards for all has not served the nation well, and thus the minimalist “adequacy” standard applied in some states and through the No Child Left Behind legislation must be augmented to ensure a quality education.<sup>138</sup> If the voters recognize this, their representatives in Congress may try to make necessary adjustments to No Child Left Behind so that it lives up to the promise of its title.

The stakeholders include attorneys. Law schools, lawyers, and judges all have roles in implementing Color Fair education.<sup>139</sup> Individual lawyers can bring lawsuits to obtain equal resources.<sup>140</sup> Public interest law firms can work on this issue from the policy and litigation perspectives.<sup>141</sup> Educating members of school boards, along with parents, teachers and principals will be another necessary first step to mobilizing the forces to implement Color Fair education.

Law Firms, Law Departments, and Bar Associations can partner with primary and secondary schools through legal academies, or law magnet programs, through mentoring, junior and senior high school mock trial, and Adopt-a-Classroom programs, which have been

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<sup>138</sup> Tang, *supra* note 12, at 1217. Even in those states where plaintiffs have prevailed in adequacy litigation cases, the definitions of educational adequacy have been described very basic and loose, such as a “minimally adequate education” or a “sound basic education”); *Id.* (Some courts’ standard for adequacy is so minimal that no relief is necessary at all for that state); *Id.* at 1214 (And quite a few other states have actually established “middling expectations” for what the students in their states should be expected to learn).

<sup>139</sup> See generally Pipeline Report, *supra* note 12, at 7, (suggesting how lawyers and educators across America can take steps to ensure the diversity in future generations of lawyers).

<sup>140</sup> *Cf.*, e.g., Cedar Rapids Cmty Sch. Dist. v. Garret F., 526 U.S. 66, 68–69, 79 (1999)(holding that the Individuals with Disabilities Education Act requires schools to provide nursing services if necessary for a disabled child to receive an education).

<sup>141</sup> See, e.g., *Judge Approves Landmark Settlement to Protect Education Rights*, PUBLIC COUNSEL, <http://www.publiccounsel.org/stories?id=0039> (last visited April 24, 2014) (detailing settlement with Los Angeles Unified School District over lawsuit alleging that teacher layoffs disproportionately affected minority schools violated the Equal Protection Clause) And yet, the *Vergara* case, discussed in Part III above, addresses this very issue.

successfully implemented in several major cities.<sup>142</sup> Judicial officers can participate as well, in the classroom teaching about fairness (through the Constitutional Rights Foundation in Los Angeles, and Days of Dialogue),<sup>143</sup> as well as in the courtroom, by making decisions to lead to Color Fair action in school districts, and thereby reducing socio-economic barriers to equal education.

Law Schools can play a large role, by providing student interns and clerks to help attorneys guard these rights by bringing lawsuits, to mentor, and to coach mock trial. Law school faculty and students can pair up with judges and lawyers in the classroom, and provide academic advising, counseling and test preparation support to community college students and others who are closer to the joint of the law school admissions pipeline.

Only a significant disruption in how the public conceives of public education and the unfairness of public educational inequalities can bring forward the social movement that could potentially develop into legal change. Separation by law has been outlawed, but separation in practice persists. It may be that education can no longer stand on its own as a substantive right in times of resource scarcity. Color Fair education may provide the disruption necessary for a broader social change mandate in the public education realm.

Color Fair education promotes the democratic goal of equal educational opportunities<sup>144</sup> at the time when it first matters, in early

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<sup>142</sup> See generally Sarah E. Redfield, et al., *THE EDUCATION PIPELINE TO THE PROFESSIONS: PROGRAMS THAT WORK TO INCREASE DIVERSITY* 3–5 Sarah E. Redfield, ed., (2012)(detailing law-themed pipeline programs from pre-Kindergarten through college).

<sup>143</sup> The Constitutional Rights Foundation educates youth about civic engagement, democracy, and constitutional rights through various programs, including a mock trial program. See CONSTITUTIONAL RIGHTS FOUNDATION, [www.crf-usa.org](http://www.crf-usa.org) (last visited Apr. 24, 2014). Days of Dialogue, which was created after the racially-divisive O.J. Simpson verdict, hosts town halls and civic forums addressing community issues. See DAYS OF DIALOGUE, [www.daysofdialogue.org](http://www.daysofdialogue.org) (last visited Apr. 24, 2014).

<sup>144</sup> See generally Saiger, *supra* note 17, at 521–22 (explaining the importance of education for a democracy).

For democracies...education is the means by which societies guarantee and reproduce their civil character...[This is because] democratic citizens must have...instilled in them democratic character. And to



primary and secondary education. With the implementation of Color Fair Education, the nation may once again be able to say, “Now, children learn better.”

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become democratic citizens, children must be given the personal interest in social relationships and control, and the habits of mind which secure social changes without introducing disorder. Furthermore, in order to teach democratic governance, we govern education democratically. We do democracy in order to teach democracy, and teach democracy in order to do democracy. *Id.*