

A Legal Framework



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October 2011

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Providing Comprehensive Educational Opportunity to Low-Income Students

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by Michael A. Rebell

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by Michael A. Rebell and Jessica R. Wolff

This report should be cited as follows:

Rebell, M.A. (2011). *Providing comprehensive educational opportunity to low income students: A legal framework*. New York, NY: Campaign for Educational Equity, Teachers College, Columbia University.

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The Campaign for Educational Equity is funded primarily through foundation grants. The content produced and disseminated by the Campaign – or by its collaborators with funding from the Campaign – does not necessarily reflect the views of Teachers College, its trustees, administration, or faculty.



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Executive Summary

Raising academic standards and eliminating achievement gaps between advantaged and disadvantaged students are America's prime national educational goals. Current federal and state policies, however, largely ignore the fact that the childhood poverty rate in the United States is 21%, the highest in the industrialized world, and that poverty substantially impedes these children's ability to learn and to succeed in school. In addition to important school-based educational resources like effective teaching, reasonable class sizes, and up-to-date learning materials, these children need additional comprehensive services, specifically, early childhood, health, after-school and other extended learning opportunities, and family supports. These services can be provided cost-effectively, and it is vital not only to children's welfare, but also to the country's democratic future and continued economic competitiveness in the global marketplace that such comprehensive services be provided on a large scale.

This article seeks to establish a moral, statutory and constitutional basis for a right to comprehensive educational opportunity. The asserted right has firm ideological underpinnings in the "American dream" credo that affirms the competitive nature of our society, but justifies its fairness on a presumption that all children will be provided a basic education that will prepare them to go as far as their individual talents and motivation will take them. The federal No Child Left Behind Act (NCLB) implicitly establishes a statutory right to comprehensive educational opportunity through its stated goal of providing "fair, equal and substantial" educational opportunities to all children and its mandate that all children be proficient in meeting challenging state standards by 2014; in the pending reauthorization of NCLB this implicit right should be made explicit. The constitutional arguments are based on both state and federal precedents. Dozens of state courts throughout the country have held that children have a constitutional right to a "sound basic education"; some of these cases have specifically held that the state constitution imposes an obligation on the state to create an education that overcomes the effects of poverty.

The federal argument is based on an extensive consideration of a broad range of equal protection cases under all three of the Supreme Court's equal protection categories. First, probing an issue the Court left open in *San Antonio Ind't Sch. Distr. v. Rodriguez*, 411 U.S. 1 (1973); evidence and precedents from the state sound basic education cases demonstrate that that an adequate education is a necessary pre-requisite for students to exercise their free speech and voting rights; a sound basic education — and one that incorporates necessary comprehensive services — therefore, does constitute a fundamental interest under the federal constitution, a denial of which is entitled to strict scrutiny analysis. Next based on the precedent of *Plyler v. Doe*, 457 U.S. 202 (1982), failing to provide children from backgrounds of poverty a meaningful educational opportunity will "perpetuate a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare and crime," and their plight is, therefore, entitled at least to intermediate level scrutiny. Finally, even under the less demanding rational relationship standard, recent "second order" precedents indicate that the present practice of providing some, but far from all, low income students with vitally needed comprehensive services creates "two tiers" of citizens, a pattern that strongly offends the concept of equal protection.

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Introduction

Raising academic standards and eliminating the achievement gaps between advantaged and disadvantaged students are America's prime national educational goals. This policy reflects a bipartisan consensus of presidents, governors, legislators, corporate leaders, educators, and the public that has been forged over the past two decades. It responds to the need to fulfill the promise of equal educational opportunity that the United States Supreme Court declared to be the law of the land more than a half century ago. It also reflects a broad awareness that, unless our nation can provide a quality education to all of its children, America will lose its ability to compete in the global marketplace and jeopardize the continued vitality of its democratic institutions.

The childhood poverty rate in the United States, at 22%, is the highest among the wealthy industrialized nations in the world.² The impact of poverty on children's learning is profound and multidimensional. Children who grow up in poverty are much more likely than other children to experience conditions that make learning difficult and put them at risk for academic failure.³ Moreover, the longer a child is poor, the more extreme the poverty, the greater the concentration of poverty in a child's surroundings, and the younger the child, the more serious the effects on the child's potential to succeed academically.

According to a growing body of research, America will only attain its twin goals of promoting equity and preparing students to function effectively as citizens and productive workers when a concerted effort is made to eliminate the substantial socioeconomic barriers that keep many low-income children and youth from school success. To do this, all states will need to adopt a comprehensive approach to educational opportunity that ensures disadvantaged students the resources, services, and supports most critical for school success. These resources must include important school-based educational resources like high quality teaching, a rich and rigorous curriculum, adequate facilities, and sufficient, up-to-date learning materials. They must also include critical out-of-school resources in areas like early childhood education; physical and mental health care; expanded learning opportunities like extended-day, after school, and summer programs; and family engagement and support.

In enacting the No Child Left Behind Act and in substantially increasing funding for economically disadvantaged students through the American Recovery and Reinvestment Act of 2009, the federal government has made clear that it is in the nation's interest to provide meaningful educational opportunities to spur all of our children to achieve at high levels, even in times of economic downturn. Dozens of state courts in all parts of the country have held that public school children have a constitutional right to "a sound basic education" or a "thorough and efficient education" and have required states to provide the schools that low income and minority students attend sufficient resources to actualize those rights. In some cases, these courts have specifically held that the state constitution imposes an obligation on the state to create an educational system that overcomes the effects of poverty. A number of important equal protection decisions of the federal courts have also established precedents for broad-based educational opportunity claims of children from backgrounds of poverty.

The critical challenge now is to build on the moral and legal foundations established by these policies and court rulings, and to extend the policies and practices that have been developed to ensure all students sound basic educational opportunities in the K-12 classroom environment to the broader out-of-school sectors that also are vital building blocks for school success. Although the need for such a bold, comprehensive approach to educational opportunity is widely recognized, and a number of demonstration projects have

²The childhood poverty rate for the United States in 2007 was 22%, placing it last among the 24 OECD countries listed. UNICEF INNOCENTI REPORT CARD NO. 7 (2007) at p. 1.6. The childhood poverty rate is less than 4% in Denmark and Finland, the countries with the lowest rates among the rich countries in the world. *Id.*

³These issues are discussed at length in RICHARD ROTHSTEIN, CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP (2004).

shown the dramatic gains that can result from coordinated efforts to meet children's broad learning needs, there has been no broad-based initiative at the federal or state level to provide comprehensive resources and services on the scale that is needed to overcome the impact of poverty on educational opportunity.

Can we take on this challenge today when schools are reeling from the effects of extensive budget cuts and state fiscal crises that seem likely to continue for the foreseeable future? The fact is that despite the dismal near-term economic forecasts, we cannot afford not to begin to take dramatic steps to provide meaningful educational opportunities to all of our children. The current funding crisis comes at a time when the stakes for our nation as a whole are extremely high. The need for educational improvement has rarely been more critical as a larger proportion of the workforce, especially immigrants and racial minorities, comes from populations that have not fared well traditionally in education.

Simple demographic projections show that in the absence of massive educational upgrading for these groups, the overall educational attainment of the labor force will decline in the years ahead rather than remain constant or grow as those of our many economic competitors.⁴ While the United States had the highest rates of high school graduation and college attendance and completion in the past, there are at least 15 nations that surpass our attainments at present with others about to pass us according to the OECD.⁵ And, in educational achievement we rank about average or below average compared not only with other industrialized countries, but less-developed ones as well.⁶ As Robert Reich, the former Secretary of Labor recently pointed out,

[N]ot all deficits are equal. As every family knows, going into debt in order to send a child to college is fundamentally different from going into debt to take an ocean cruise. Deficits that finance investments in the nation's future are not the same as deficits that maintain the current standard of living.⁷

Moreover, budget cuts do not necessarily require service reductions; tough times provide opportunities to reconsider current practices, undertake cost-effectiveness analyses, reprioritize, and shift resources to the higher priority services. Finally, even if the full range of necessary resources cannot immediately be put into place — sound administrative practice would probably call for new programs to be phased in over time in any event — the necessary policies should be developed now so that the public and policymakers will be primed to implement them as soon as additional resources become available.⁸ The current recession will be behind us a few years hence, and extensive planning needs to begin now to prepare the way for promptly and properly implementing coordinated programs to meet children's comprehensive educational needs when additional resources do again become available.

In short, unless we confront the poverty-related factors that substantially undermine the learning potential of a growing proportion of our public school students, current achievement gaps cannot be overcome, and the national need to ensure that all students attain challenging proficiency levels will never be realized.

⁴ See, Thomas Bailey, *Implications of Educational Inequality in a Global Economy*, in CLIVE R. BELFIELD AND HENRY M. LEVIN, *THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION* (2007). Other chapters in this book provide economic data demonstrating that inequitable and inadequate education dramatically raises crime rates and health and welfare costs, denies the nation substantial tax revenues, and raises serious questions about the civic competence of the next generation to function productively in a complex democratic society.

⁵ ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *EDUCATION AT A GLANCE 2009: OECD INDICATORS 65 (2009)*, available at <http://www.oecd.org/dataoecd/41/25/43636332.pdf>

⁶ Organization for Economic Co-operation and Development, *OECD Factbook 2010: Economic, Environmental and Social Statistics*, "Educational Attainment" section, available at <http://www.oecd-ilibrary.org/content/book/factbook-2010-en>.

⁷ Robert B. Reich, *Saved by the Deficit?* N.Y. TIMES OP-ED, Oct. 9, 2008.

⁸ Perseverance in pressing the need for expanding children's rights does lead to dramatic changes in the attitudes of policymakers and the public. David Kirp summarized the rapid turnaround in attitudes toward preschool education as follows:

A third of a century ago, Richard Nixon vetoed legislation that would have underwritten child care for everyone. "No communal approaches to child rearing," Nixon vowed How times have changed. Ambitious statesmen from both sides of the political aisle ... now... see the issue as a winner — a strategy for doing well by doing good. A recent national survey found that 87 percent of the populace supports public funding to guarantee every three- and four-year-old access to a top-notch preschool.

DAVID L. KIRP, *THE SANDBOX INVESTMENT: THE PRESCHOOL MOVEMENT AND KIDS-FIRST POLITICS* 3 (2007)

To do so, we must establish the understanding that the critical resources and services that students need, both in school and out of school, to obtain a meaningful educational opportunity are part of a *right* to education and are not merely discretionary services that the state may provide to some children some of the time.

In the United States, realization of major social reform generally is accomplished through the establishment and enforcement of legal rights. As the astute French observer of American culture, Alexis de Tocqueville, noted almost 200 years ago, “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”⁹ De Tocqueville’s description continues to hold true today as we continue “to speak of what is most important to us in terms of rights and to frame nearly every social controversy as a clash of rights.”¹⁰ If a political position is perceived as a “right,” those asserting it are in an advantageous position for laying claim to societal resources and efforts to support their ends.

A “right” is an individual claim that is entitled to preference above other societal goals.¹¹ A right can be “moral” (based on a moral theory or principle) or legal (prescribed by particular laws).¹² In other words, rights may take the form of strong moral or political obligations that affect political action and social decisions, even if they are not formally articulated and enforced by the courts. In the United States, however, as de Tocqueville noted, the legal culture is so pervasive that rights, even if initially formed in the political sphere, tend eventually to be set forth in statutes or constitutions that then can be enforced by courts.

“Rights talk” is the language Americans use to focus political dialogue, galvanize social movements, and press for major reforms.¹³ If a political position is perceived as a “right,” those asserting it are in an advantageous position for laying claim to societal resources and efforts to support their ends. Much progress has been made in eliminating intentionally segregated schools, providing meaningful access to education for students with disabilities, and ameliorating inequities in state financing of education because specific rights have been articulated, acknowledged, and acted upon in each of these areas.¹⁴ The need to overcome the barriers to school success created by conditions of poverty should, therefore, now be discussed in terms of

⁹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 290 (Vintage ed., 1945) (1835).

¹⁰ MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 3-4 (1991). Glendon explains that this tendency toward legalization stems from the fact that our diverse society lacks a shared history, religion, or cultural tradition; therefore, we “look to law as an expression and carrier of the few values that are widely shared in our society: liberty, equality and the ideal of justice under law.” *Id.* at 3. Glendon is critical of these trends, which she believes squelch possibilities for community and caring. For a contrary view of the relationship between rights and community, see Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 *YALE L.J.* 1860, 1877 (1987) (arguing that rights create a more equal community that “draws those who use it inside the community, and urges the community to pay attention to the individual claimants”).

¹¹ See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977) (“Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for imposing some loss or injury upon them”); Joel Feinberg, *The Nature and Value of Rights*, in *RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY* 143, 155 (1980) (“To have a right is to have a claim against someone whose recognition as valid is called for by some set of governing rules or moral principles”); Alan Gewirth, *The Basis and Content of Human Rights*, 23 *NOMOS: HUMAN RIGHTS* 119, 120 (1967) (“A person’s rights are what belong to him as his due, what he is entitled to, hence what he can rightly demand of others”) *reprinted* in 13 *GA. L. REV.* 1142, 1150 (1979).

Rights can be expressed in both negative and positive forms. (Compare, for example, a newspaper’s right not to have its writings censored with a student’s right to an adequate education.) See Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* (1969).

¹² MARIE CONNOLLY AND TONY WARD, *MORALS, RIGHTS AND PRACTICE IN THE HUMAN SERVICES: EFFECTIVE AND FAIR DECISION-MAKING IN HEALTH, SOCIAL CARE AND CRIMINAL JUSTICE* 19 (2008). “Human rights” are an important form of moral rights which “provide a way of reaching across the divisions of country, ethnicity, gender, and conduct in a search for what is common to all people in the world.” *Id.* at 17. The contemporary concept of human rights is related to the concept of “natural rights” that is emphasized in many philosophical and religious traditions; “human rights” tend to emphasize more concrete social cultural and economic benefits. Substantial progress toward implementing basic aspects of human rights has been accomplished since human rights were codified in the Universal Declaration of Human Rights and the numerous specific international social and economic covenants that have been issued to enforce it.

¹³ See MICHAEL PARIS, *FRAMING EQUAL OPPORTUNITY: LAW AND THE POLITICS OF SCHOOL FINANCE REFORM* (2010) (describing the influence of legal language on political dialogue and political perception); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND POLITICAL CHANGE* 98–107 (1974) (discussing the relationship between legal rights and progressive social movements); Barry Friedman, *Dialogue and Judicial Review*, 91 *MICH. L. REV.* 577, 668-670 (1993) (discussing how courts synthesize and focus political debates on major issues of public policy).

¹⁴ Social change tends to occur most effectively in America when rights talk inspires coordinated action by all three branches of government. For example, the great progress toward school desegregation that was achieved in the late 1960s occurred when Congress’s enactment of Title VI of the 1964 Civil Rights Act, (42 U.S.C.A § 2000d (2000)) which authorized the termination of funding to school districts that failed to desegregate their schools, was combined with active enforcement efforts by the federal Office for Civil Rights and by assiduous efforts by federal courts throughout the South to implement the Supreme Court’s decree in *Brown v. Board of Education*. See also, MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994) (demonstrating the manner in which rights established through litigation fueled the political movement for equal pay).

a legal right that can be acknowledged and implemented by all three branches of government.

The purpose of this paper is to initiate a conversation to shift the widely acknowledged need for a comprehensive approach to overcome the socioeconomic barriers to school success from abstract academic discussions and limited pilot projects to the active policy sphere where effective comprehensive programs can be implemented on a broad scale. The use of “rights talk” can help change the perception that the status quo is unalterable and that providing *all* children meaningful educational opportunities is a utopian dream. Establishing comprehensive educational opportunity as a *right* will focus attention on the issue, enhance understanding of the importance of the claim, and encourage coordinated action to identify and deliver the resources required to meet the urgent educational needs of children from backgrounds of poverty.

The right to comprehensive educational opportunity actually has firm ideological underpinnings in America’s egalitarian traditions and its “American dream” credo. At the core of the American dream is a profound promise of equal educational opportunity, especially to those who are the descendants of the victims of slavery, and to those who have suffered from racial discrimination. Significant statutory and constitutional building blocks for constructing an explicit right to comprehensive educational opportunity have also emerged in recent years from legal developments related to state standards-based reform, the No Child Left Behind Act, state court litigations involving challenges to inequities and inadequacies in state education finance systems, and a number of important federal equal protection precedents. The discussion that follows will, therefore, discuss the right to comprehensive educational opportunity as constituting a political/moral right, a statutory right, and a constitutional right. Recognizing that establishing this right through the courts will be a lengthy process, in the last section I will also set forth some thoughts on more immediate political actions that policymakers can and should take immediately to provide meaningful educational opportunities to all students.

I. The Moral and Political Right to Comprehensive Educational Opportunity

Egalitarian values are deeply rooted in American society. The nation’s independence was announced more than two centuries ago by a declaration that “all men are created equal.” The American republic established the concept of equality as a revolutionary, democratic principle in the 18th century, and egalitarianism has remained a significant thrust of American politics ever since, as evidenced by the impact of the abolitionist movement in the 19th century and of the civil rights movement of the 20th century.

America’s egalitarian tradition coexists, however, alongside a powerful ideological commitment to classical liberalism and individualism. This orientation is reflected in the constitutional institutions of the American political system, which limit governmental authority, check and balance the powers of political institutions, and contain a strong bill of rights that assures individuals a broad sphere of independence and autonomy. The classical liberal heritage also supports the strong sense of competition and rewards for individual effort and accomplishment that are hallmarks of our free enterprise economic system.¹⁵

Although both the egalitarian and liberal individualistic strands of America’s ideological heritage contribute to the vigor of American democracy, there is at the same time an inherent conflict and tension between them. A prime mechanism for keeping these clashes in bounds, and maintaining a strong adherence to both egalitarian and liberal values in the American democratic ideology, is a widespread belief in the “American dream.”

The American dream, built on the image of boundless land and endless opportunity in a “new world,” is a promise of a “social order in which each man and each woman shall be able to attain to the fullest stature of

¹⁵ The egalitarian, classical liberal, and classical Republican strands of America’s democratic tradition are discussed in more detail in Michael A. Rebell, *Fiscal Equity Litigation and the Democratic Imperative*, 24 J. EDU. FIN. 24 (Summer 1998).

which they are innately capable, and be recognized by others for what they are, regardless of the fortuitous circumstances of birth or position.”¹⁶ Former president Bill Clinton summarized the essence of the American dream in contemporary terms as follows: “The American dream that we were raised on is a simple but powerful one — if you work hard and play by the rules you should be given a chance to go as far as your God-given ability will take you.”¹⁷

The American dream reconciles the demands of equality and rugged individualism by premising that all who come to this bountiful new world, where the titles and entrenched hierarchical orderings of the old world no longer exist, will have an equal opportunity to advance materially or to develop their potential in whatever other ways they choose, regardless of race, national origin, or religion. During the 1800s, the vast expanse of land available in the Western territories created a literal level playing field that gave everyone a roughly even start in the competitive race for personal success and advancement. But “[w]ith the closing of the frontier around the turn of the [20th] century, Americans increasingly looked to education as the primary source of opportunity.”¹⁸

The relationship between education and the American dream had originally emerged with the rapid spread of the “common schools” movement in the 19th century. As its name implies, the common school sought to educate in one setting all the children in a particular geographic area, whatever their class or ethnic background.¹⁹ Based on this heritage, schools remain today the places where “routes of access — to success, to mobility, to fulfillment of individual promise — are supposed to be actualized for all children.”²⁰ In the contemporary understanding of the American dream, the demands of egalitarianism can be met if all children are provided equal access to a public education that prepares them to compete for material reward and social advancement after they leave the halls of academia: “Once the government provides this framework, individuals are on their own, according to the ideology. ... Put more positively, it is up to individuals to go as far and as fast they can in whatever direction they choose.”²¹

Although schools today are still the prime means for attaining the American dream, it is clear that they are not succeeding in carrying out their critical role as the pathway to equal opportunity. In a recent national survey, “poor quality public education” was listed as the most significant barrier to obtaining the American dream today.²² The perception that schools in many urban and rural areas are unequal and inadequate and are not, in fact, providing a fair starting point for all children, has propelled strong reform initiatives to overcome this deficiency. The goals of the state standards movement and the federal No Child Left Behind Act (NCLB)²³ are, in essence, to validate the American dream by holding schools accountable for ensuring

¹⁶ JAMES TRUSLOW ADAMS, *THE EPIC OF AMERICA* 404 (1933).

¹⁷ Bill Clinton, *Remarks by the President to the Annual Conference of the Democratic Leadership Council, White House*, Dec. 3, 1993. See also, CAL JILLSON, *PURSuing THE AMERICAN DREAM: OPPORTUNITY AND EXCLUSION OVER FOUR CENTURIES* xi (2004) (“Americans know instinctively what it means — a fair chance to succeed in open competition with fellow citizens for the good things of life”).

¹⁸ Isabel V. Sawhill and Daniel P. McMurrer, *American Dreams and Discontent: Beyond the Level Playing Field*, USIA, U.S. SOCIETY AND VALUES (JAN. 1997).

¹⁹ The common school “would be open to all and supported by tax funds. It would be for rich and poor alike, the equal of any private institution.” LAWRENCE CREMIN, *AMERICAN EDUCATION: THE NATIONAL EXPERIENCE* 138 (1980).

²⁰ HEATHER BETH JOHNSON, *THE AMERICAN DREAM AND THE POWER OF WEALTH: CHOOSING SCHOOLS AND INHERITING INEQUALITY IN THE LAND OF OPPORTUNITY* 172 (2006).

²¹ JENNIFER L. HOCHSCHILD AND NATHAN SCOVRONICK, *THE AMERICAN DREAM AND THE PUBLIC SCHOOLS* 10 (2003).

²² NATIONAL LEAGUE OF CITIES, *THE AMERICAN DREAM IN 2004: A SURVEY OF THE AMERICAN PEOPLE* 7 (2004). Interestingly, although many African-Americans are beginning to question the continued validity of the American dream (see JENNIFER HOCHSCHILD, *FACING UP TO THE AMERICAN DREAM: RACE, CLASS AND THE SOUL OF THE NATION* (1995)), most whites, and especially those at the top of the income scale, continue to voice allegiance to this powerful ideology. In a recent in-depth survey of the Americans’ attitudes toward the American dream:

The more privileged parents interviewed acknowledge the advantages they have received through family wealth, and acknowledge advantageous educational opportunities they are now able to pass along to their children. What is really intriguing, however, is that at the same time, these same families hold close to their hearts the idea that they have earned and deserved what they have, and they argue vehemently that their privileged positions have resulted from their individual hard work, efforts and achievements.

Johnson, *supra* note 20, at 17.

²³ 42 U.S.C.A. § 6301 (2000 & Supp. II, 2002)

that all of their students, whatever their backgrounds, graduate at high proficiency levels so that they will be adequately prepared to enter the competitive economic world and to function productively as equal citizens in a democratic society.

The education finance litigations that have been filed in state courts in 45 of the 50 states in recent decades are attempting to ensure that there is a fair funding base in all school districts to accomplish these tasks²⁴ because “[i]f education is the modern equivalent of open land in the West, then it must be widely available, at reasonable levels of quality, so that every American child has a realistic chance of fulfilling his or her dreams.”²⁵ Even if adequate resources can be assured in all of the public schools, however, the core premises of the American dream still will not be realized as long as almost a quarter of our students come to school ill-equipped to take advantage of what the schools have to offer because of the impediments to learning resulting from poverty.

President Lyndon Johnson recognized 40 years ago that

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him to the starting line of a race, and then justly believe that you have been completely fair. Thus, it is not enough just to open the gates of opportunity. All of our citizens must have the ability to walk through those gates.²⁶

To open the doors of opportunity to children who have been shackled by the burdens of poverty, the legacy of slavery, and the continuing impact of discrimination requires not only offering them adequate pedagogical services once they enter school, but also providing the additional resources and services that will allow them a meaningful opportunity to benefit from these basic educational opportunities. As Pedro Noguera put it:

As long as we are able to convince ourselves that simply providing access to education is equivalent to providing equal opportunity, we will continue to... delude ourselves with the notion that the United States is a democracy based on genuine meritocratic principles: a society where social mobility is determined by individual talent and effort. We hold on to this fantasy even as [a] quarter of the nation’s children are denied adequate educational opportunity.²⁷

Given the centrality of the American dream in our nation’s past and present political ideology, and the fact that equal educational opportunity is its core premise, students who come from backgrounds of poverty have a strong moral right to “an equal start in the race while expecting at the same time an unequal finish.”²⁸ To obtain an equal start, they need meaningful educational opportunities and the full range of resources and services that they require in order to have a fair chance to succeed in school.

Some may object that this concept of equal educational opportunity seems to have no principled stopping point for how far the state and society ought to go in leveling the playing field. But grounding a concept of equal opportunity in the premises of the American dream ideology does establish pragmatic parameters. The ideology accepts the fact that there are inherent differences in talents, skills, and motivations among individuals, and, therefore, it provides a “weak form of humane justice” that seeks to compensate those who have been short-changed by their home environment, but not those who have been shortchanged genetically.²⁹

²⁴ For a constantly updated compendium and analysis of these litigations, see the National Access Project website, maintained at Teachers College, Columbia University, at www.schoolfunding.info.

²⁵ Jillson, *supra* note 17, at 282 (emphasis added).

²⁶ LYNDON JOHNSON, *THE VANTAGE POINT: PERSPECTIVES OF THE PRESIDENCY, 1963-1969* 166 (1971).

²⁷ PEDRO NOGUERA, *CITY SCHOOLS AND THE AMERICAN DREAM: RECLAIMING THE PROMISE OF PUBLIC EDUCATION* 15 (2003).

²⁸ HERBERT CROLY, *PROMISE OF AMERICAN LIFE* 194 (1909).

²⁹ Christopher Jencks, *Whom Must We Treat Equally for Educational Opportunity to be Equal?*, 98 *ETHICS* 518 (1988). In this article, Jencks distinguishes among five variations of equal educational opportunity, which he calls democratic equality (all get precisely the same (opportunities, regardless of background or effort), moralistic justice (opportunities are accorded in accordance with effort), weak humane equality (compensatory measures are taken to compensate for home or past educational deprivations), strong humane equality (compensatory measures are taken to overcome all shortcomings, including genetic) and utilitarianism (fair competition based on current capacities and efforts, with no attempt to provide any compensation).

Furthermore, tying comprehensive educational opportunity to schooling, and more specifically to factors that directly relate to educational achievement, also focuses the field for societal responsibility for preventive or compensatory services. Although there clearly are serious political, moral, and economic arguments that can be made for eliminating the huge gaps that currently exist in our society between the haves and have-nots,³⁰ the argument here is to provide meaningful educational opportunity but not to launch an entire war on poverty. Opportunity as so defined is at the core of the American dream ideology; it partially compensates African Americans and others who have long been victims of the legacy of slavery and/or discrimination, but, at the same time, it also serves the vital national interest in preparing the growing numbers of low income and minority students who will soon constitute the majority of our public school population to become capable citizens and workers who can compete in the global economy.

Research has identified four prime areas of preventive and supportive services that relate most directly to overcoming the impediments to educational achievement imposed by the conditions of poverty. These core areas are (1) early childhood education beginning from birth that will provide the child critical language development, social and emotional development and cognitive and general knowledge, (2) routine and preventive physical and mental health care, (3) after-school, summer school and other expanded learning time programs that will both bolster academic learning and promote the child's social, emotional, and civic development, and (4) family engagement and support that will permit parents actively to foster the students' academic development. A student's right to comprehensive educational opportunity means a right of access to critical core services in each of these areas as needed to prepare him or her to be ready to learn at grade level and to maintain that capability throughout his and her schooling years. Other factors, such as parental employment, housing, and welfare policies, although of great economic and social significance,³¹ are more indirectly related to educational achievement and are not incorporated in this right.

The Campaign for Educational Equity at Teachers College, Columbia University, has commissioned a series of research papers that analyze the current state of research in each of these areas and that demonstrate a direct relationship between each of these factors and student achievement. For example, children who attend center-based preschools perform better in kindergarten when compared with peers who did not attend preschool, and these effects are larger for lower income students.³² Poor urban youth have higher rates of asthma, which results in sleep deprivation and absenteeism that adversely affects their motivation and ability to learn in school.³³ After school programs have been found to result in small, but meaningful positive affects on academic outcomes, and to significant improvements in attitudes and behaviors.³⁴ From preschool through high school, "positive family-school relationships promote information sharing, convey to children the importance of education and increase children's educational expectations and achievement."³⁵

³⁰ The ratio between compensation of the average CEO and pay of the average U.S. worker today is 319 to 1. *Executive Excess 2009*, Institute for Policy Studies, http://www.ips-dc.org/reports/executive_excess_2009. From 1996 to 2006, average worker's pay went up 7%, while CEO pay went up 45%. *EXECUTIVE EXCESS 2007: THE STAGGERING SOCIAL COST OF U.S. BUSINESS LEADERSHIP. 14TH ANNUAL CEO COMPENSATION SURVEY*, INSTITUTE FOR POLICY STUDIES, 10 http://www.ips-dc.org/reports/executive_excess_2007. Similarly, from the late 1990s to the mid-2000s, the average income of the poorest fifth of families decreased by \$459, from \$18,575 to \$18,116, while the average income of the richest 5% of families increased by \$29,042 from \$191,658 to \$220,700. CENTER ON BUDGET AND POLICY PRIORITIES, AND ECONOMIC POLICY INSTITUTE, PULLING APART: A STATE BY STATE ANALYSIS OF INCOME TRENDS, <http://www.cbpp.org/4-9-08sf.htm>. "The share of the nation's income flowing to the top 1 percent has increased sharply, rising from 9 percent in 1976 to almost 24 percent in 2010." Nicholas D. Kristof, *Our Banana Republic*, N.Y. TIMES, Nov. 6, 2010. "Not since 1928, just before the Great Depression, has the top 1 percent held such a large share of the nation's income." CENTER ON BUDGET AND POLICY PRIORITIES, OCTOBER 2008: <http://www.cbpp.org/files/3-27-08tax2.pdf>

³¹ For a discussion of the problems and reform possibilities in these areas, and the extent to which they have an impact on urban education, see JEAN ANYON, *RADICAL POSSIBILITIES: PUBLIC POLICY, URBAN EDUCATION AND A NEW SOCIAL MOVEMENT* (2005).

³² SHARON L. KAGAN, *AMERICAN EARLY CHILDHOOD EDUCATION: PREVENTING OR PERPETUATING FRAUD 7* (2009), available at http://www.equitycampaign.org/ifa/document/13797_EquityMatters_Kagan_Final.pdf.

³³ CHARLES E. BASCH, *HEALTHIER STUDENTS ARE BETTER LEARNERS: A MISSING LINK IN SCHOOL REFORMS TO CLOSE THE ACHIEVEMENT GAP 19-25* (2010), available at http://www.equitycampaign.org/ifa/document/12558_EquityMattersVol6_WebFINAL.pdf.

³⁴ MARGO GARDNER, JODIE L. ROTH AND JEANNE BROOKS-GUNN, *CAN AFTER-SCHOOL PROGRAMS HELP LEVEL THE PLAYING FIELD FOR DISADVANTAGED YOUTH? 18-23* (2009), available at http://www.equitycampaign.org/ifa/document/11242_After-school_report_10-7-09_web.pdf.

³⁵ HEATHER B. WEISS, SUZANNE M. BOUFFARD, BEATRICE L. BRIDLGLALL AND EDMUND W. GORDON, *REFRAMING FAMILY INVOLVEMENT IN EDUCATION: SUPPORTING FAMILIES TO SUPPORT EDUCATIONAL EQUITY, 21* (2009) available at http://www.equitycampaign.org/ifa/document/12018_EquityMattersVol5_Web.pdf.

If all of these resources were provided on a regular basis to disadvantaged students, in a coherent, integrated manner, as they regularly are to more advantaged students, there is no doubt that the overall impact on student learning would be even more powerful.

The Equity Campaign also commissioned a detailed cost study to determine in specific dollar terms, how much it would cost to provide sufficient, high quality services in each of these areas³⁶ to all students in New York State whose families are at or below 185% of the federal poverty standard (*i.e.*, those eligible for free and reduced price school lunches). The high quality services included adequate prenatal and obstetric care for expectant mothers; visiting nurses from the second trimester of pregnancy until the child's third birthday; visiting home literacy coaches for children ages three, four and five; parent access to continuing education; high quality early childhood care and education from age one through age four, including pre-kindergarten for three and four year olds; routine and preventive physical and mental health care through a school-based clinic from birth through age 18; high quality after-school and summer programs from age five through 18; and school-based comprehensive service coordinators from age three through high school.

The study, undertaken by education economist Richard Rothstein and his colleagues, estimated the cost of providing the full range of core high quality services in all of these areas for children at this poverty level from birth (or more precisely, from six months before birth since prenatal health services for the mother, beginning in the second trimester of pregnancy are included) through age 18.³⁷ It determined that, assuming that an average participation rate for use of these services of 75%, and that current spending on special education in programs for the disadvantaged could be reduced as the model takes effect, the average cost to provide the full range of these comprehensive services in 2010 dollars divided by the number of eligible children would be approximately \$10,100 for New York State students above current average per capita cost for K-12 education.³⁸ New York is, of course, a relatively high cost state; on average national basis the cost of providing an equivalent set of services, given the same assumptions, would be approximately \$9,000.

An additional study commissioned by the Campaign identified the amounts that presently are being spent by the federal, state, and municipal governments, as well as private philanthropy, to provide partial early childhood, health, extended learning, and family support services in New York City.³⁹ Its finding, translated into comparable average per capita terms, was that \$6,070 per child per year is already being spent to provide services that often are of questionable quality to a limited number of children in the eligible population. This figure represents approximately 53% of the cost of providing the full set of comprehensive educational services to students in New York City. Assuming that an analogous amount is being spent on partial provision of comprehensive services in New York State as a whole, one might surmise that a high quality, integrated system of comprehensive educational opportunity would require approximately \$4,750 more than we are now spending for these services; the national equivalent figure would be \$4,230.

In other words, it appears that all children at or below the free and reduced school lunch poverty level could be provided the full range of critical comprehensive services that would truly provide them a meaning-

³⁶ The specification of critical core services in each of these areas was based on a thorough analysis of necessary and effective programs in the literature, which was then vetted by a broad based task force of experts, service providers and government officials with expertise in each of these areas. For a description of this process and a listing of the members of the task force, see MICHAEL A. REBELL AND JESSICA R. WOLFF, PROVIDING COMPREHENSIVE EDUCATIONAL OPPORTUNITY TO LOW INCOME STUDENTS: A PROPOSAL FOR ESSENTIAL STANDARDS AND RESOURCES. A REPORT OF THE TASK FORCE ON COMPREHENSIVE EDUCATIONAL OPPORTUNITY (October 2011).

³⁷ RICHARD ROTHSTEIN, TAMARA WILDER AND WHITNEY ALLGOOD, PROVIDING COMPREHENSIVE EDUCATIONAL OPPORTUNITY TO LOW INCOME STUDENTS: HOW MUCH DOES IT COST? (October 2011).

³⁸ The full cost for an individual New York State child who takes advantage of all the services offered by the model would average \$13,900 per year over the 18½ year period. Reducing the high incidence of special education identification for low income students to the rate for middle class students could save an estimated average of \$380 per year, under certain assumptions. Accepting the reasonable assumption that approximately 75% (full time equivalent) students would take full advantage of the rich range of services being provided through the model brings the final total cost to \$10,104. This calculation does not take into account increases in class size and reductions in compensatory services that are currently being provided to disadvantaged students that presumably could be eliminated if the model were fully implemented.

³⁹ CLIVE BELFIELD AND EMMA GARCIA, PROVIDING COMPREHENSIVE EDUCATIONAL OPPORTUNITY TO LOW INCOME STUDENTS: HOW MUCH DOES NEW YORK CITY NOW SPEND ON CHILDREN'S SERVICES? (October 2011).

ful educational opportunity to for less than about \$4,750 per child in New York State or \$4,230 per child on a national average above what we are currently spending on K-12 education and sporadic additional services. This is not an inconsequential amount of money, especially during the current recessionary times,⁴⁰ but the critical conclusion to be drawn from this analysis is that broad based implementation of the right to comprehensive educational opportunities is a feasible proposition. Further cost analyses obviously need to be done to confirm these preliminary findings. Such analyses may, in fact, indicate that actual costs might even be lower, if they can take into account the economic efficiencies that would probably be realized by providing this full range of services in a coherent, integrated manner, and additional savings that might result from reducing other existing compensatory services that would not be necessary if children come to school ready to learn and continue to be well-equipped to learn, as the model contemplates.⁴¹

As with any right, the precise content and scope of the opportunities contemplated by the entitlement can only be identified as the concept is actually implemented and refined through legislative decisions, administrative experience, and judicial rulings. Enough credible evidence has now been accumulated on the validity, the necessity, and the feasibility of comprehensive educational opportunity, however, to begin a serious conversation about the statutory and constitutional status of this right. Such a conversation is particularly appropriate at this time because the moral legitimacy and the political imperative for implementing a right to comprehensive educational opportunity has been substantially enhanced in recent years by our society's stated commitment to overcoming existing achievement gaps and substantially improving the academic achievement of all of our students in order to meet global economic competition and to perpetuate our democratic institutions. The prime mechanism through which the federal government currently attempts to implement that commitment is the No Child Left Behind Act, which as presently constituted implicitly calls for such a right. The next section will discuss why that implied status should be developed into an explicit statutory right to comprehensive educational opportunity.

II. The Statutory Right to Comprehensive Educational Opportunity

America's historic promise of equal educational opportunity to all children is now codified at the federal level in NCLB. This extensive statute, enacted in 2001 as a lengthy set of amendments to the Elementary and Secondary Education Act of 1965 (ESEA), has two major stated purposes. The first is that "all children have a fair, equal and significant opportunity to obtain a high quality education" and the second, that all children "reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments" by 2014.⁴² Eight years have now passed since the initial implementation of this statute — that is, more than half of the time period allotted for achieving 100% proficiency — and it is clear that only minimal

⁴⁰ The full amount of funding would not, of course need to be provided in the early years. For example, if these services were to be phased in a year at a time, only the cost of prenatal care for expectant mothers in year one, only early childhood, health, and family support for infants and toddlers in years two, three, and four, etc. The full amount specified above need only be borne in year 19.

⁴¹ The Rothstein cost analysis does not take into account the further long-range economic benefits that would likely accrue to society if a full program of comprehensive educational opportunity were adopted. For example, a detailed analysis of the economic consequences of inadequate education indicated that life time loss to the country in income tax revenues and social security contributions from one age cohort of high school drop-outs is between \$58 billion and \$135 billion. Belfield and Levin, *supra*, note 4, at 117-118. In addition, each annual cohort of high school graduates is estimated to cost the nation \$23 billion in public health care funds and \$110 billion in forfeited health and longevity. *Id.* at 137; a 1% increase in the high school completion rate for men ages 20-60 would save the United States approximately \$1.4 billion per year in reduced costs to victims and to society at large from crime. *Id.* at 157; and the potential savings in public assistance costs that might be produced if all single mother dropouts completed high school would range from \$7.9 billion to \$10.8 billion per year. *Id.* at 173.

⁴² *Id.* at § 6311. Although, as discussed below, it is not realistic to expect that 100% of any large cohort of students can meet truly challenging academic standards, it is reasonable to expect that all groups of children, including students from poverty backgrounds, can, if given proper services and supports, achieve at the same "world class" levels as the highest achieving groups of students in the United States or abroad. See, e.g., NATIONAL RESEARCH COUNCIL, INSTITUTE OF MEDICINE, FROM NEURON TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT (Jack P. Shonkoff & Deborah A. Phillips eds., 2000) (discussing recent brain development research indicating that experiential catalysts can positively impact brain development in the early years and throughout the life cycle); JOHN T. BRUER, SCHOOLS FOR THOUGHT; A SCIENCE OF LEARNING IN THE CLASSROOM (1993) (describing techniques of cognitive science that enable all students to develop higher order reasoning and learning skills).

progress has been made toward reaching this ambitious goal.⁴³ The major reason we are so far from reaching the proficiency targets is that, in implementing NCLB, the federal government has put the cart before the horse by stressing proficiency outcomes before it has ensured that the necessary opportunity inputs are in place.

NCLB strongly emphasizes accountability and test-score-based outcomes. The statute requires each state to develop “challenging” academic content standards, and performance or assessment standards, in reading/language arts, math, and science. Both schools and districts must demonstrate that they are making adequate yearly progress (AYP) toward proficiency for all by 2014, as reflected in regular reading, math, and science exams. These test scores are reported overall and for a number of disaggregated subgroups. If the school overall or any one of four subgroups (racial/ethnic groups, economically disadvantaged students, students with disabilities, and limited English proficient students) does not meet its improvement target, the school does not make AYP.⁴⁴ The Act prescribes specific sanctions for schools and districts that fail to meet these demanding AYP requirements; specifically, it (1) allows students to transfer out of the school, or to obtain supplemental tutoring from outside vendors, (2) it requires schools that have not met AYP over a number of years to implement corrective action plans, and if these do not work, (3) it requires them to take more radical action, such as restructuring the entire school or turning it into a charter school.⁴⁵

In contrast to these extensive accountability provisions, the only specific resource requirement in NCLB is that all students be taught by “highly qualified teachers.” The precise definition of “highly qualified” is left to the states, and, in practice, this means that teachers need merely to pass “minimum competency” state certification exams; there is no higher federal standard to ensure that teachers are capable of teaching challenging state standards to students from diverse backgrounds.⁴⁶ The statute has no provisions to ensure that schools are adequately funded and adequately equipped beyond this very basic teacher qualification requirement.

As noted above, NCLB is, in essence, the latest, expanded version of the ESEA, the major federal education funding statute that was enacted in 1965 to provide extra services for “economically disadvantaged” students. The ESEA is subject to reauthorization every five years and, as the amount of funding provided by the ESEA grew over the years, the federal government increasingly sought to develop accountability strictures to ensure that the growing federal investment would result in demonstrable improvements in student achievement. Many of NCLB’s current accountability requirements were first developed, though in less stringent form, in the predecessor statutes, especially Goals 2000 (1994)⁴⁷ and the Improving America’s Schools Act (IASA), the 1994 version of ESEA reauthorization.⁴⁸

Goals 2000 emerged from a presidential summit involving all 50 state governors and many leading corporate CEOs that was convened in 1989 to respond to widespread concerns about the quality of the education American students were receiving and their ability to compete effectively in the global economy.

⁴³ In terms of scores on the National Assessment of Educational Progress, the “Nation’s Report Card,” there has been incremental progress on 4th grade reading and math scores and in reducing achievement gaps, although the rate of gain in the years since NCLB was enacted does not exceed the general rate of progress registered in the decade before the law’s passage; at the 8th grade level, however, there has been virtually no gain in standardized reading scores. See, National Center for Education Statistics, National Assessment of Educational Progress (NAEP), various years, 1992-2009 Reading Assessments; 1990-2009 Mathematics Assessments. No state is on track to reach full proficiency by 2014. In fact, the number of schools that are failing to make “adequate yearly progress” (AYP) toward this goal is rapidly accelerating: In 2008-2009, one-third of all schools in the country failed to make AYP and in nine states and the District of Columbia more than 50% of the schools failed to meet these legally-mandated targets. Center on Educational Policy, HOW MANY SCHOOLS HAVE NOT MADE ADEQUATE YEARLY PROGRESS UNDER THE NO CHILD LEFT BEHIND ACT? (2010). It is likely that 50% of all schools nationwide will fail to make AYP by the end of the current school year.

⁴⁴ Up to 1% of all students or 10% of special education students (those with the most severe cognitive disabilities) may be exempt from the regular testing requirements, and an additional 2% of students with severe learning disabilities can now take tests specifically geared toward their abilities. There is also a “safe harbor” provision that allows a school to make AYP if it reduces the percentage of students who are not proficient by at least 10% from the previous year. This applies to the school as a whole, as well as to each subgroup.

⁴⁵ For a detailed discussion of the structure of NCLB and of the background and history of its passage, see MICHAEL A. REBELL AND JESSICA R. WOLFF, MOVING EVERY CHILD AHEAD: FROM NCLB HYPE TO MEANINGFUL EDUCATIONAL OPPORTUNITY (2009).

⁴⁶ See, *id.* at 83-89.

⁴⁷ Goals 2000: Educate America Act of 1994, Pub. L. No. 103-227, 108 Stat. 129 (codified as amended at 20 U.S.C §§ 5801-804 (2000)).

⁴⁸ Pub. L. No. 103-382, 108 Stat. 2518.

Among other things, the specific goals upon which the president, the governors, and CEOs agreed called for the United States to achieve a 90% high school graduation rate, be first in the world in math and science, and for every adult to possess the knowledge and skills necessary to compete in the global marketplace. These performance targets were accompanied by a clear recognition that to achieve these ends, substantial efforts would be required to prepare economically disadvantaged students to learn at higher levels. Thus, the first of the six goals for the coming decade announced in 1989 was that “[a]ll children will start school ready to learn.”⁴⁹

The bipartisan drafting committee that produced the original version of Goals 2000 had agreed that school readiness for all could not be achieved without a national commitment to provide specific school readiness inputs, such as “all children will have access to high-quality and developmentally appropriate preschool programs that help prepare children for school”⁵⁰ and that

[C]hildren will receive the nutrition, physical activity experiences and health care needed to arrive at school with healthy minds and bodies, and to maintain the mental alertness necessary to be prepared to learn, and the number of low-birth weight babies will be significantly reduced through enhanced prenatal health systems.⁵¹

As the politics regarding educational policy became more partisan in the early 1990s, however, these concepts were not further developed, and, in fact, no requirements concerning children’s school readiness were included in the final version of NCLB when it was enacted in 2001.

The original drafters of Goals 2000 also assumed that a commitment to provide the resources and supports necessary to give all students an opportunity to learn the challenging new standards they were advocating would be an integral part of the reforms they were proposing. A federal task force established to propose mechanisms for implementing Goals 2000 explained why “opportunity to learn” (OTL) standards must be considered a necessary part of the standards-based reform approach:

If not accompanied by measures to ensure equal opportunity to learn, national content and performance standards could help widen the achievement gap between the advantaged and the disadvantaged in our society. If national content and performance standards and assessments are not accompanied by clear school delivery standards and policy measures designed to afford all students an equal opportunity to learn, the concerns about diminished equity could easily be realized. Standards and assessments must be accompanied by policies that provide access for all students to high quality resources, including appropriate instructional materials and well-prepared teachers.⁵²

The Clinton administration’s original Goals 2000 legislative proposal responded to this recommendation by including provisions for national OTL standards that would be developed by a National Education and Standards Council. Because of strong opposition to the federal oversight and costs this might entail, the concept was watered down in the final Goals 2000 legislation enacted in 1994 to call only for “voluntary” national school delivery standards that states could choose to adopt or state opportunity to learn standards that states could voluntarily develop in conjunction with their own content and student performance standards. Even these minimal, voluntary opportunity to learn standards were revoked after the Republicans took control of Congress later that year, and no efforts were made to include any opportunity to learn standards in NCLB when it was enacted in 2001.⁵³

⁴⁹ P.J. McGUINN, NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965-2005 61-61 (2006).

⁵⁰ Goals, 2000, 1994, § 5812(1) (B) (i) (1994).

⁵¹ Goals, 2000, 1994, § 5812(1) (B) (iii) (1994).

⁵² National Council on Education Standards and Testing (NCEST), Standards Task Force, 1992, *quoted in* Linda Darling-Hammond, *Creating Standards of Practice and Delivery for Learner Centered Schools*, 4 STAN. L & POL’Y REV. 37, 38 (1993).

⁵³ See, McGuinn, *supra* note 49, at chapters 5 and 6; ELIZABETH H. DEBRAY, POLITICS, IDEOLOGY & EDUCATION: FEDERAL POLICY DURING THE CLINTON AND BUSH ADMINISTRATIONS (2006), chapter 3.

Since Congress rejected the school readiness and opportunity to learn standards in the mid-1990s, there have been no federal requirements for states to ensure adequate or equitable funding or to provide any specific substantive quality in educational resources, other than the minimal teacher certification requirements. The ESEA does provide for an education finance incentive grant that gives a slight increase in funding to states and districts that spend more state resources relative to the state's wealth on public education and that distribute that funding equitably.⁵⁴ In fiscal year 2010, however, only 20% of the formula funds were subject to this adjustment,⁵⁵ which provides a maximum 5% increase, meaning that only 1% of the total funds are subject to this equity adjustment. Thus, there is no significant federal pressure on the states to rectify the enormous disparities between schools in affluent communities and schools in low-income communities that persist in many states. NCLB's lack of emphasis on necessary resources and learning opportunities for students has, as the National Council on Education Standards and Testing Task Force predicted, significantly limited the ability of disadvantaged students to meet the challenging new state standards and has perpetuated the achievement gaps.

A few states have attempted to conduct preliminary studies of the costs of actually meeting NCLB's AYP requirements. In Ohio, for example, a study projected that the costs of the additional school-based programs required for 75% of students in kindergarten through third grade to meet the state's proficiency requirements by 2010 would be \$1.5 billion.⁵⁶ A Texas study indicated that for all districts in the state to reach the state's proficiency targets would require the state to increase its annual education spending by \$4.7 billion.⁵⁷ Although no comprehensive analysis has been undertaken of the total national cost of providing the opportunities needed to meet current ESEA goals, it is clear that the amount of increased funding (approximately \$4 billion) that Congress provided in the first few years after adopting No Child Left Behind in 2001 was insufficient to provide the level of resources that would be needed to meet the Act's rigorous requirements.

Recognizing that the federal government was not providing the level of extra funding that they needed to meet NCLB's stringent requirements, a number of school districts from various parts of the country, together with the National Education Association, sued the U.S. Secretary of Education. In *School District of Pontiac v. Secretary*,⁵⁸ they claimed that the U.S. Department of Education (USDOE) was violating the "unfunded mandate" provision of NCLB by requiring states and school districts to spend their own funds in order to achieve compliance. They also alleged that the inadequate levels of federal funding caused the low student achievement scores on standardized tests. The *en banc* panel of the Sixth Circuit Court of Appeals that heard the claim deadlocked on this issue, leaving intact the lower court's ruling that the unfunded mandate provision applied only to any additional regulatory requirements that federal officials administering the Act might add to the mandates set forth in text of the Act. The many mandates imposed by the statutory language of the Act itself must be met by the states, the court held, because at the time they agreed to accept the funds that the Act provides, the states had been put on notice by the statutory language of the obligations with which they were agreeing to abide.

As a result of the *Pontiac* litigation, it is now clear that the states are legally responsible for providing whatever additional funds may be required beyond their ESEA grants to achieve compliance with NCLB's requirements.⁵⁹ If compliance is taken seriously, the amounts involved to meet NCLB's current stringent

⁵⁴ 20 U.S.C.A. § 6337.

⁵⁵ See, FEDERAL EDUCATION BUDGET PROJECT, NO CHILD LEFT BEHIND ACT - TITLE I SCHOOL FUNDING EQUITY FACTOR *available at* <http://febp.newamerica.net/background-analysis/no-child-left-behind-act-title-i-school-funding-equity-factor>, accessed on July 22, 2010.

⁵⁶ W. Driscoll and H. Fleeter, "Projected Costs of Implementing the 'No Child Left Behind Act' in Ohio" (Ohio General Assembly, 2003).

⁵⁷ Jennifer Imazeki and Andrew Reschovsky, *Does No Child Left Behind Place a Fiscal Burden on States? Evidence From Texas*, 1 *EDU. FIN. & POL'Y* 217 (2006).

⁵⁸ 584 F.3d 253 (6th Cir. 2009), *cert. den.*, Sch. Dist of Pontiac v. Duncan, 130 S. Ct. 3383, 2010 WL 182939, 78 USLW 3447 (June 7, 2010). See also, *Connecticut v. Duncan* 612 F.3d 107 (2d Cir. 2010), 2010 WL 2736939 (July 13, 2010) (Affirming dismissal for lack of ripeness of state's claim that assessment requirements of NCLB violated the "unfunded mandate" provision of NCLB).

⁵⁹ Although the *Pontiac* decision technically applies only to one of the 12 judicial circuits in the United States, the case upheld the administrative position

requirements could be staggering. The Ohio and Texas estimates discussed above were based on interim year AYP proficiency goals and did not calculate the additional amounts that would be required to meet the mandate for 100% proficiency by 2014. Most economists believe that efforts to meet this goal would entail prohibitive levels of expenditures, especially in regard to the marginal costs of bringing the last — and most difficult — 10-15% of underachieving students to proficiency levels.

The plaintiffs in *Pontiac* were correct in arguing that requiring them to bear whatever additional costs are necessary to comply with NCLB requirements would be unreasonable. To meet the Act's stringent AYP requirements and to achieve 100% proficiency by 2014 would impose an unsustainable burden on them. On the other hand, the implication of their position that they need not expend any additional funds beyond what the federal government provides them would have been a disastrous result for children because it would have eliminated all accountability for providing them meaningful educational opportunities; as the NAACP argued in supporting the administration's position in the case, the plaintiffs' position "invites States and school districts to evade their responsibility to poor and minority students."⁶⁰

Given the impossible imbroglia created by the issues raised in the *Pontiac* case, it is not surprising that the judges had such a difficult time deciding it. What the litigation ultimately highlights is the unreasonableness of the Act itself, and the necessity to confront and correct the perverse expectations and the unworkable funding obligations it has created. The core problem is the unattainable 100% proficiency mandate that drives the inflexible AYP requirements that the states cannot actually meet and that will bankrupt most of them should they seriously strive to do so. As 2014, the target year for 100% proficiency draws near, it is clear that no one truly believes that this goal will be or can be met. Although 100% proficiency is a worthy rhetorical and motivational goal, it is simply ludicrous to impose this target as a legal *mandate* that *must* actually be attained within a few short years, as NCLB does.⁶¹

The way out of this dilemma obviously is to amend NCLB to eliminate the impossible 100% proficiency mandate and then to clarify the states' responsibilities to provide the resources necessary to meet ambitious, but attainable goals. The ESEA is, at this point, long overdue for reauthorization. Congressional consideration of revisions to the Act, which has now been initiated, provides an opportunity to maintain the commitment to meaningful educational opportunity contained in NCLB, but to rectify the mechanisms that undermine the states' ability to meet its principled goals.

The USDOE has issued an extensive "Blueprint for Reform" of the ESEA.⁶² This document proposes, among other things, that the 100% proficiency target be postponed to 2020 and that it be transformed from a legal mandate to an "ambitious goal" toward which performance can be measured.⁶³ The Blueprint does not, however, make any recommendations to ensure that states devote sufficient resources to maximize student proficiency and minimize achievement gaps by 2020.

of USDOE, which requires the states to provide whatever resources are necessary to meet the mandates of the Act. The U.S. Supreme Court, which declined to review the *Pontiac* decision, does not appear eager to reconsider that judgment. The NEA, the main moving force behind the litigation, has publicly stated that having lost this major test case, it will now seek changes in the law from Congress rather than more litigation to challenge the administration's interpretation of the existing language. Alyson Klein, *NEA Eyes Congress as High Court Refuses NCLB Case*, ED. WEEK, June 16, 2010.

⁶⁰ *Pontiac v. Sec'y*, 584 F.3d at 287.

⁶¹ For a discussion of the manner in which the unattainable 100% proficiency goal has undermined the entire structure and credibility of NCLB, see Rebell and Wolff, *supra* note 45. See also, Richard Rothstein, Rebecca Jacobsen and Tamara Wilder, "Proficiency for All — An Oxymoron," in MICHAEL A. REBELL AND JESSICA R. WOLFF, *NCLB AT THE CROSSROADS: REEXAMINING THE FEDERAL EFFORT TO CLOSE THE ACHIEVEMENT GAP* (2009) (arguing that 100% proficiency and challenging standards are inherently contradictory goals).

⁶² U.S. Department of Education, *A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT* (Mar. 2010).

⁶³ *Id.* at 9. The Department is also recommending that proficiency be assessed in accordance with rigorous standards in English language arts and mathematics that build toward college and career readiness, rather than the weak standards many states have adopted in recent years in the absence of national standards or federal mandates regarding the quality of state standards. *Id.* at 8. The Department has strongly supported, financially and otherwise, the National Governors Association for Best Practices (NGA Center) and the Council of Chief State School Officers (CCSSO), that have been designed to meet these higher standards; as of the time of this writing, the Common Core standards been adopted by 34 states and the District of Columbia. (For the current status of adoption of the standards, see <http://www.ascd.org/public-policy/common-core-standards.aspx>.)

If the 2014 full proficiency mandate is removed — as it should be — the basic theory of action of NCLB will necessarily be changed, and the federal government should exercise greater oversight regarding the resources the states are providing students to allow them to achieve its goals. Currently, the basic bargain is that in return for a modest increase in federal funding and substantial flexibility in meeting the annual and ultimate proficiency targets established in the Act, the states have agreed to be accountable for making enormous and unprecedented progress in eliminating achievement gaps and ensuring that all students will be academically proficient.⁶⁴

If Congress agrees to modify the strict accountability output measures (the 100% proficiency mandate and the demanding AYP requirements related to it), then the nature of the bargain will have changed. Since there will be no clear annual and final outcome measure, it will become more important for the federal government to oversee the quantity and the nature of the educational inputs that the states are devoting to meet the important (and feasible) goals of providing all students meaningful educational opportunities and substantially reducing the achievement gaps. In essence, the changes that the USDOE is recommending moves the theory of action back to the Goals 2000 original understanding that inputs are important and that meaningful educational opportunity can be provided to all students if clear and attainable accountability goals are delineated, and all students are provided the resources they need to accomplish them.

This does not mean, however, that Congress needs to set forth at this time the kind of detailed opportunity to learn standards that it declined to include in the prior incarnations of the ESEA. Federalism concerns and the funding obligations of the states as clarified in the *Pontiac* case can both be met by revising ESEA to require the states to ensure meaningful educational opportunity for all of their students by (1) describing in the plans they develop for ESEA compliance purposes the educational programs and services that they will implement to overcome achievement gaps and substantially improve the levels of student proficiency by 2020; (2) undertaking cost analyses⁶⁵ of the resource levels that would be needed to implement these programs and services; and (3) including assurances on how the necessary resources will be provided and that they will be distributed in an equitable manner.⁶⁶

If substantial progress is to be made toward eliminating achievement gaps, the essential programs and services the states will need to implement in order to provide all students a meaningful educational must, of necessity, include not only adequate school-based resources, but also the full range of comprehensive services that students from backgrounds of poverty need to succeed. These include high quality teaching; reasonable class sizes; a full and rigorous curriculum; up-to-date libraries, laboratories, and technology; and safe school buildings — resources not reliably available in schools that serve students from low-income and minority families. In addition, as discussed in the previous section, it includes complementary, “out-of-school” supports and services in regard to early childhood, health, extended learning opportunities, and family supports that address the impact of poverty on children’s ability to succeed in school. As the original

⁶⁴ As the plurality opinion in the *Pontiac* case explained:

The basic bargain under the Act works like this. On the federal side, Congress offers to provide substantial funding to the States on an annual basis ... exercising relatively little oversight over how the funds are spent. On the State side, the states agree ... to hold themselves responsible for making adequate yearly progress in the tests of all students. In broad brush strokes, the Act thus allocates substantial federal sums to the States and the school districts and gives them substantial flexibility in deciding how and where to spend the money on various educational “inputs,” but in return, the States must achieve progress in meeting certain educational “outputs” as measured by the State’s testing benchmarks.

Pontiac v. Sec’y, *supra*, 584 F.3d at 285. (Sutton, J. concurring).

⁶⁵ Over the past few decades, cost studies have been undertaken by legislatures, state education departments, litigators and independent foundations in over 35 states. A detailed discussion of the major methodologies that have been developed for these studies, and suggestions for how they can be improved, see, Michael A. Rebell, *Professional Rigor, Public Engagement and Judicial Review: A Proposal for Enhancing the Validity of Education Adequacy Studies*, 109 TEACHERS COLLEGE RECORD 1303 (2007).

⁶⁶ The opportunity to learn standards that were the subject of political controversy in the 1990s included both resources and the “practices, and conditions necessary at each level of the education system ... to provide all students with the opportunity to learn...” (Goals 2000, 1994, §5802(7)) (emphasis added). At the time, the major concerns about federal intervention centered on the “practices and conditions.” The proposal in the text does not call for the federal government to develop a menu of preferred educational practices and mandate them on the states. Effective practices and conditions, although of critical importance to meaningful educational opportunity, by their nature are context-specific, and they should be developed by the states and local school districts.

Goals 2000 drafters explicitly recognized, if the ESEA is to succeed, substantial attention must be given to the resources and supports that students from backgrounds of poverty need in order to be “ready to learn” at grade level when they begin school and to continue to meet demanding academic expectations as they proceed through the elementary and secondary schooling years.

USDOE agrees on the importance of providing such a broad range of services. In its “Blueprint for Reform,” it states:

The students most at risk for academic failure too often attend schools and live in communities with insufficient capacity to address the range of their needs.... *Preparing students for success requires taking innovative, comprehensive approaches to meeting students’ needs*, such as rethinking the length and structure of the school day and year, so that students have the time they need to succeed and teachers have the time they need to collaborate and improve their practice. It means supporting ... environments that help all students be safe, healthy and supported in their classrooms, schools and communities; and greater opportunities to engage families in their children’s education and strengthen the role of schools as centers of communities.⁶⁷

Although the Department recognizes that preparing students for success *requires* a comprehensive approach, its actual recommendation falls short of the mark because it asks Congress only to provide competitive grants to support this aim. Since students from backgrounds of poverty in all states need such comprehensive services, Congress should require the states to offer students the full range of comprehensive services necessary to provide them a meaningful educational opportunity, and should provide additional financial support for this purpose.⁶⁸ The states should demonstrate in their compliance plans exactly how they will meet their students’ comprehensive needs. This general federal requirement would place meaningful educational opportunity needs at the top of the policy agenda and induce each state to engage educators, academics, professional organizations, school boards, community groups, and the public at large in important debates and on-going research and evaluation about the precise level and combination of services that are needed to provide all of their students with a meaningful educational opportunity. Each state would, consistent with the basic parameters of the right to comprehensive educational opportunity,⁶⁹ develop the basket of goods, services, and practices that is most consistent with its particular academic and performance standards, needs, and perspectives.

Some may object that explicit inclusion of comprehensive services is a bad bargain for the states because for a relatively small amount of federal funding, they will be accepting substantial funding obligations. As discussed in the previous section,⁷⁰ essential comprehensive services can be provided at manageable cost levels, especially if cost-effectiveness techniques are used to provide services in a coherent, integrated manner and consideration is given to the off-setting cost reductions that will flow from these reforms, and these costs would be subject to a lengthy, gradual phase-in period. In any event, from a legal point of view, states that agree to take the federal funding that is available under the Act — and all states have done so and are likely to continue to do so even if an obligation to provide a comprehensive range of services is spelled out in the statute⁷¹ — are obligated to carry out its terms, even if that means increasing their local contributions by substantial amounts:

Nothing within Spending Clause jurisprudence ... suggests that States are bound by the condi-

⁶⁷ Blueprint for Reform, *supra* note 62, at 31 (emphasis added).

⁶⁸ Even if Congress declines to provide additional financial assistance to all states to help them meet their students’ comprehensive needs, as the court in *Pontiac* made clear, the states nevertheless have a continuing obligation to do so, and Congress should spell out that responsibility in the re-authorized ESEA statute.

⁶⁹ See discussion at pp.7-8 above.

⁷⁰ See, discussion at pp.9-10 above.

⁷¹ “After all, what State in these fiscally challenging times would have the fortitude to turn down hundreds of millions of dollars in educational funding?” *Pontiac v. Sec’y*, 584 F.3d at 284 (Sutton, J. concurring). Heightened awareness of the impact of the continuing achievement gap and of its growing impact on America’s competitive standing in the global economy, may, of course, increase the pressures on the federal government to provide much more substantial financial support for these purposes.

tional grant of federal money only if the State receives or derives a certain percentage ... of its budget from federal funds. If a State wishes to receive any federal funding, it must accept the related, unambiguous conditions in their entirety.⁷²

This is standard fare with federal grant programs. For example, in accepting federal funds to support education for students with disabilities, states have, for the past two decades, obligated themselves to provide an extensive array of specific services with substantial cost implications, and to accord parents sweeping due process rights and appeal procedures to enforce their children's rights to these services.⁷³ Moreover, virtually every one of the 50 states has adopted standards-based reform and a commitment to overcome achievement gaps as its prime state educational policy, so they should be providing the resources to meet this goal in any event, and federal encouragement and any amount of federal aid that would facilitate meeting this important objective would clearly be in the state's interest.

Nor should inclusion of a requirement that states offer assurances regarding the provision of comprehensive services in their compliance plans raise any serious federalism objections. The assurances that states must currently provide under NCLB are already quite far-reaching. Among other things, each state is currently required to confirm that it has adopted challenging academic content standards in specified subjects, demonstrate that a statewide accountability system meeting specified criteria is in place, carry out specified types of assessments in certain specified grades, calculate for each school and school district, and broken down in specified subcategories, "adequate yearly progress" in relation to these test scores, and issue annual state and local report cards containing specified data.⁷⁴

In addition, local educational agencies are required to file with the state educational agency detailed plans that describe among other things, how they will conduct academic assessments, provide additional educational assistance to students needing help in meeting the State standards, coordinate programs, ensure that low-income and minority students are not taught at higher rates than other students by unqualified, out-of-field, or inexperienced teachers, and consult with teachers, principals, and parents in the development of the plan.⁷⁵ The Act also contains specific sanctions that school districts must impose on schools that fail to meet their AYP goals, including providing students the option to transfer out of schools in need of improvement, mandating that such schools spend Title I funds for tutoring by outside vendors, and for schools that have not made AYP for five years in a row, "restructuring" in the form of replacing most of the staff, converting the school into a charter school, hiring a professional management company to run the school, or having it taken over by the state.⁷⁶

Presumably, if the USDOE's proposed revisions are accepted, many of these existing requirements will be modified or eliminated. Substituting reasonable requirements for providing an appropriate range of comprehensive services would be less burdensome on local school districts than many of the existing mandates, and especially those related to the demanding AYP and assessment criteria that are most likely to be substantially revised. Indeed, the existing requirements for local school district plans already require that consideration be given to using some of the Title I funds to support preschool programs and coordinating

⁷² Charles v. Verhagen, 348 F.3d 601, 609 (7th Cir. 2003) (state obligated to adhere to federal requirements for religious observance by prison inmates, even though federal funds constituted only 1.6% of budget for correctional services); see also, Benning v. Georgia, 391 F.3d 1299 (11th Cir. 2004) (same).

⁷³ Individuals with Disabilities Education Act, 20 U.S.C. A. § 1401 et. seq. Although the IDEA authorized the federal government to pay up to 40% of the extensive costs of providing all children with disabilities a "free appropriate public education," in fact, Congress's actual appropriations have fallen far short of that mark. For many years, the federal contribution amounted to 7-8% of the overall costs of special education; in FY 2008, the federal contribution was 17.1%. See New America Foundation, Federal Education Budget Project, available at <http://febp.newamerica.net/background-analysis/individuals-disabilities-education-act-funding-distribution>.

⁷⁴ 20 U.S.C.A. § 6311. These plans must be submitted initially and then periodically revised to reflect changes in the state's strategies and programs. *Id.* at §6311 (f).

⁷⁵ 20 U.S.C.A. § 6312.

⁷⁶ 20 U.S.C.A. § 6316. Failure to meet deadlines for submitting required information may subject states to substantial withholding of federal funding. 20 U.S.C.A. § 6311 (g).

and integrating them with other school services⁷⁷ and using Title I funds to support after-school, summer and school-year extension programs.⁷⁸ The suggested changes would, in essence, be requiring all schools receiving Title I funds to *ensure* that they are making available these and other comprehensive services in a coordinated manner in order to provide all students a meaningful educational opportunity.

The USDOE should, of course, vigorously enforce students' rights to comprehensive educational opportunity under the ESEA. In reviewing the state plans, the Department should ensure that substantive steps are being taken to provide all students significant opportunities in each of the comprehensive education essential areas, in accordance with their needs. This should essentially be a process review, but one that will ensure that action is being taken in good faith to meet children's needs.⁷⁹ NCLB currently denies school children and their parents a "private right of action" that would allow them to initiate litigation on their own behalf to protect their rights under the statute.⁸⁰ In addition to explicitly acknowledging students' rights to comprehensive educational opportunity in a reauthorized ESEA, Congress should also explicitly grant students and their parents the authority to enforce this right.

III. The Constitutional Right to Comprehensive Educational Opportunity

A. Educational Adequacy

Over the past 35 years, litigations challenging the constitutionality of state education finance systems have been filed in 45 of the 50 states. The state courts became the sole forum for reviewing inequities in public education financing after the U.S. Supreme Court ruled in *San Antonio Independent School District v. Rodriguez*⁸¹ that education is not a fundamental interest under the federal constitution. Overall, plaintiffs have prevailed in 60% of these state court litigations, and, in the more recent subset of "education adequacy" cases decided since 1989, plaintiffs have won 22 of 33 (67%) of the final constitutional decisions.⁸²

The recent wave of state court cases challenging state education finance systems have been called "adequacy" cases because they are based on clauses in almost all of the state constitutions that guarantee all students some basic level of education, although they use different terms for doing so. The contemporary courts have, in essence, revived and given major significance to the long-dormant provisions that had been incorporated into state constitutions either as part of the 18th-century emphasis on the need for education to prepare new republican citizens or the mid-19th-century common school movement, the forerunner of our current public school systems, that sought to promote democracy by educating the children of the rich and the poor in one common setting.

The state defendants in many of these cases have argued that the education clauses should be interpreted to guarantee students only a "minimal" level of education. Significantly, however, the state courts that have closely reviewed students' needs for education in contemporary society, by and large, have required the state school systems to provide substantially more than a minimum level of knowledge and skills. They

⁷⁷ 20 U.S.C.A. § 1612 (b) (1) (E) and (K).

⁷⁸ 20 U.S.C.A. § 1612 (b) (1) (Q).

⁷⁹ In other words, the Department should not have authority to second guess the mechanisms that the state has chosen to use or the amounts it chooses to spend in each category as long as a credible process has been put into place to meet these needs.

⁸⁰ See, e.g., *Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199 (3d Cir. 2008) (holding that parents do not have a private right of action under NCLB); *Association of Community Organizations for Reform Now v. New York City Dept. of Educ.*, 269 F.Supp.2d 338 (S.D.N.Y. 2003).

⁸¹ 411 U.S. 1 (1973).

⁸² For a detailed overview and analysis of the state court challenges to state education finance systems, see MICHAEL A. REBELL, *COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS* (2009). For up-to-date information on the state court litigations, see National Access Network, <http://www.schoolfunding.info>.

have tended to insist that the states provide students an education that will equip them to obtain a decent job in our increasingly technologically complex society and to carry out their responsibilities as citizens in a modern democratic polity. Accordingly, many of the cases have specified that an adequate education must include, in addition to traditional reading and mathematical skills, knowledge of the physical sciences and “sufficient knowledge of economic, social and political systems to enable the student to make informed choices” as well as “sufficient knowledge of governmental processes to enable the student to understand the issues that affect his or her community, state and nation,” and “sufficient levels of academic or vocational skills to . . . compete favorably . . . in the job market.”⁸³

One of the clearest rejections of a minimalist interpretation of a state constitution adequacy clause was the 2003 decision of the New York Court of Appeals, the state’s highest court. Invalidating the intermediate appeals’ court’s ruling that the state constitution required an education that would provide students only eighth-grade-level skills, the court held that New York’s schoolchildren are constitutionally entitled to the “opportunity for a *meaningful* high school education, one which prepares them to function productively as civic participants.”⁸⁴ In doing so, the court stressed that although, in the 19th century, when the state’s adequacy clause was adopted, a sound basic education may well have consisted of an eighth- or ninth-grade education, “the definition of a sound basic education must serve the future as well as the case now before us.”⁸⁵

In focusing on the actual knowledge and skills that students need to function productively in the 21st century, some state courts have begun to recognize that students who come to school disadvantaged by the burdens of severe poverty need a more comprehensive set of services and resources in order to have a *meaningful* educational opportunity. Thus, in ordering that additional resources, beyond the level currently enjoyed by students in affluent suburbs, be provided to students in the state’s poorest urban districts, the New Jersey Supreme Court held:

This record shows that the educational needs of students in poorer urban districts vastly exceed those of others, especially those from richer districts. The difference is monumental, no matter how it is measured. Those needs go beyond educational needs; they include food, clothing and shelter, and extend to lack of close family and community ties and support, and lack of helpful role models. They include the needs that arise from a life led in an environment of violence, poverty, and despair. . . . The goal is to motivate them, to wipe out their disadvantages as much as a school district can, and to give them an educational opportunity that will enable them to use their innate ability.⁸⁶

Following up on these insights, the New Jersey Supreme Court as part of the remedy it ordered to ensure that all students receive a “thorough and efficient education” required the state to provide the low income and minority students attending the urban schools covered by its decree a range of comprehensive services, including after-school and summer supplemental programs, school based health and social services, and preschool services for children ages three and four.⁸⁷

⁸³ *Rose v. Council for Better Educ.*, 790 S.W. 2d 186 (Ky. 1989). These *Rose* standards have been explicitly adopted by courts in Massachusetts, and New Hampshire, and have substantially influenced the constitutional definitions adopted by the courts in Alabama, North Carolina and South Carolina. See, *McDuffy v. Sec’y*, 615 N.E. 2d 516, 554 (Mass., 1993); *Claremont v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997); *Alabama Opinion of the Justices*, 624 So.2d 107 (Ala. 1993); *Leandro v. State*, 488 S.E. 2d 249,255 (N.C. 1997); *Abbeville Co. Sch. Dist. v. State*, 515 S.E. 2d 535 (S.C. 1999); see also, e.g., *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170, 1186 (Kan. 1994) (Noting striking resemblance between *Rose* standards and standards enacted by the Kansas legislature).

⁸⁴ *CFE v. State of New York*, 100 N.Y.2d 893, 908 (N.Y. 2003) (emphasis added).

⁸⁵ *Id.* at 931.

⁸⁶ *Abbott v. Burke*, 575 A.2d 359, 400 (N.J. 1990).

⁸⁷ *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998).

In Kentucky, the legislature's response to the state supreme court's decision in *Rose v. Council for Better Education*⁸⁸ was a total revamping of the state's education finance system and the educational system as a whole. These reforms included the establishment of an extensive network of family resource centers designed to meet the comprehensive needs of economically disadvantaged children and their families. Located in or near elementary schools with substantial numbers of students from low-income families, family resource centers must provide after-school child care; families-in-training programs; parent-and-child education; and health services or referrals to health services.⁸⁹ The law also established a network of youth service centers. Located in or near middle and high schools with substantial numbers of students from low-income families, youth service centers must provide referrals to health and social services; employment counseling and training; summer and part-time job development; drug and alcohol counseling; and family crisis and mental health counseling.⁹⁰ In addition, the Kentucky Education Reform Act also provided a statewide early childhood education program for four year olds from low-income families and for three and four year olds with disabilities⁹¹ and requirements for extended day and summer instruction for struggling students.⁹²

More recently, Judge John P. Erlick, in finding that Washington's current education finance system is not meeting constitutional requirements, noted:

[T]he success of schools also depends on other individuals and institutions to provide the health, intellectual stimulus, and family support upon which the public school systems can build. Schools cannot and do not perform their role in a vacuum, and this is an important qualification of conclusions reached in any study of adequacy in education. And the State has met many of these challenges by providing funding for special education, ELL (English Language Learners), and for struggling students (Learning Assistance Program or "LAP"). But the State can — and must — do more. Where there is that absence of support for students outside the school, the schools are capable of compensating, given proper and adequate resources.⁹³

Other courts have focused on the importance of early childhood education for children from backgrounds of poverty, and some have begun to establish important precedents for establishing a right to comprehensive educational opportunity as an integral part of the fundamental right to an adequate education guaranteed by the state constitution. Two state courts have specifically held that students from backgrounds of poverty must be given access to early childhood services in order to exercise their constitutional right to a sound basic education.

In October 2000, trial court Judge Howard Manning ruled in North Carolina's school funding case that many disadvantaged children were unprepared for school due to the absence of pre-kindergarten opportunities and ordered the state to provide pre-kindergarten programs for all "at-risk" four-year-olds.⁹⁴ When the case reached the North Carolina Supreme Court in 2004, the court agreed with Judge Manning's holdings

⁸⁸ 790 S.W. 2d 186 (KY 1989).

⁸⁹ KRS § 156.196. See also, TENN. CODE ANN. § 49-2-115 providing school districts \$50,000 grants and authority to use additional classroom support funds to establish family resource centers "in order to coordinate state and community services to help meet the needs of families with children. Each center shall be located in or near a school." Currently, there are 104 FRCs in 82 school districts (see <http://www.tn.gov/education/earlylearning/frcs.shtml>).

⁹⁰ KRS § 156.4977.

⁹¹ KRS § 157.3175.

⁹² KRS § 158.070.

⁹³ *McCleary v. State of Washington*, No. 07-2-02323-2 SEA, 58-59 (Super. Ct., King Co., Feb. 4, 2010). See also, *Connecticut Coalition for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206,380 (CT, 2010), Schaller, J. concurring:

In my view, it is not sufficient for the state merely to offer an opportunity for education without regard to the circumstances of the children to whom it is offered. In other words, because an opportunity exists only when it takes into account the conditions — social, economic, and other — that realistically limit the opportunity, the educational offering must be tailored to meet the adequacy standard in the context of the social and economic conditions of the children to whom it is offered. Although no one could reasonably argue that the state is constitutionally bound to be a *guarantor* of educational, civic, or economic success, the state is bound to provide an education that is adequate given the circumstances of the children to whom it must be provided. Depending on the circumstances, an offering that would suffice in one district of the state may not suffice in another.

⁹⁴ *Hoke County Bd. of Educ. v. State*, 95 CVS 1158 (S. Ct., Oct. 2000), at 36, 43-45.

that the state was ultimately responsible “to meet the needs of ‘at-risk’ students in order for such students to avail themselves of their right to the opportunity to obtain a sound basic education,”⁹⁵ and that the State must provide services to such children “prior to their enrolling in the public schools.”⁹⁶ The court held, however, that “at this juncture” of the case, a specific remedial order for particular preschool services was “premature,” and it deferred to the expertise of the legislative and executive branches in matters of education policy to determine what types of services should be provided to at-risk students to prepare them for school.⁹⁷

In 2005, South Carolina state circuit court Judge Thomas W. Cooper, Jr., held that poverty directly causes lower student achievement and that the state constitution imposes an obligation on the state “to create an educational system that overcomes . . . the effects of poverty.”⁹⁸ The court described a “debilitating and destructive cycle” of poverty and poor academic achievement for low-income students “until some outside agency or force interrupts the sequence.” Based on expert testimony from both plaintiff and defendant witnesses, the court concluded that “it is essential to address the impact of poverty as early as possible in the lives of the children affected by it.” Therefore, the court ordered “early childhood intervention at the pre-kindergarten level and continuing through at least grade three” to minimize “the impact and the effect of poverty on the educational abilities and achievements” of children from backgrounds of poverty.⁹⁹ This case is currently on appeal before the South Carolina Supreme Court.

Two other courts have held that access to early childhood education, although not an integral part of the constitutional right to the opportunity for an adequate education, may nevertheless be constitutionally mandated as part of the remedy for the state’s failure to provide sufficient educational opportunities for students from a background of poverty. As indicated above,¹⁰⁰ the first to do so was the Supreme Court of New Jersey. In a major remedial decision it issued in *Abbott v. Burke* after finding that state was still not providing students a thorough and efficient education, the court “identified early childhood education as an essential educational program for children in the [low-wealth urban districts]” and found that “[i]ntensive pre-school and all-day kindergarten enrichment program[s are necessary] to reverse the educational disadvantage these children start out with.”¹⁰¹ Accordingly, it ordered extensive, high quality preschool services for all three and four year olds in the poor urban districts. In doing so, the court stated that provision of preschool education has “strong constitutional underpinning,” but because there were specific statutory requirements in the New Jersey education law calling for such services, the court held that it did not need to “reach the constitutional issue.”¹⁰²

In Alaska, the trial court in *Moore v. State* had initially ruled that preschool education was not an integral part of the public education system that the state must routinely provide throughout the state.¹⁰³ Nevertheless, at the remedy stage of the litigation, the court stated that its prior ruling was not intended “to exempt pre-k from being considered and used as a case- specific measure to remedy a constitutional violation.”¹⁰⁴

⁹⁵ *Hoke County Bd. of Educ. v. State*, 599 S.E. 2d 365, 392 (N.C. 2004).

⁹⁶ *Id.* at 393.

⁹⁷ *Id.* at 393-94.

⁹⁸ *Abbeville County Sch. Dist. v. State*, No. 31-0169 (S.C. Ct. Comm. Pl. Dec. 29, 2005) at 157.

⁹⁹ *Id.* at 155, 158, 160. Judge Cooper also observed that “Such early intervention not only makes educational and humanitarian sense, it also makes economic sense. The testimony in this record of experts, educators, and legislators alike is that the dollars spent in early childhood intervention are the most effective expenditures in the educational process.” *Id.* at 161.

¹⁰⁰ See discussion, *supra*, at p.19.

¹⁰¹ *Abbott v. Burke*, 693 A.2d 417, 436 (N.J. 1997) (citing National Governors’ Association, “National Education Goals,” (1990) 7, and Carnegie Corporation of New York, “Years of Promise: A Comprehensive Learning Strategy for America’s Children” (Sept. 1996), vii). The court directed the state’s education commissioner to require the 30 urban “Abbott” districts to provide half-day preschool for their three- and four-year olds and ordered the state to provide adequate funding to support these preschool programs. *Abbott v. Burke*, 710 A.2d at 463-64, 508.

¹⁰² *Abbott v. Burke*, 710 A.2d 450, 464 (N.J. 1998).

¹⁰³ *Moore v. State*, No. 3 AN-04-9756 (Super. Ct., 3rd Dist.) Decision and Order, June 27, 2007 at 177, available at www.schoolfunding.info.

¹⁰⁴ *Moore v. State*, No. 3 AN-04-9756cl, (Super. Ct., 3rd Dist.), Findings of Fact, Conclusions of Law and Order, Feb. 4, 2009 at 55, available at www.schoolfunding.info.

The court explained its reasoning as follows:

But to the extent that local conditions present unique educational problems that impair a public school's ability to provide a constitutionally adequate education, then the school district and the Department have a constitutional duty to address the educational aspects of those problems that are amenable to educational solutions. And when a local district lacks the capability to resolve these educational problems on its own, the Department's oversight duty requires it to intervene and provide assistance to the local district in a concerted effort to remedy these problems.¹⁰⁵

In its decision, the Court then found that the state's efforts to improve education in the underperforming districts that it had identified accorded "inadequate consideration of pre-Kindergarten and other intensive early learning initiatives designed to address the unique educational challenges faced by students in Alaska's chronically underperforming school districts."¹⁰⁶

Trial courts in Arkansas and Massachusetts have also held that "at-risk" children from backgrounds of poverty must be provided preschool education in order to have a "realistic opportunity to acquire the education" guaranteed by the constitution¹⁰⁷ and to be in a position to compete with their peers when they enter school.¹⁰⁸ These rulings were, however, subsequently overruled by their state supreme courts.¹⁰⁹ The high courts did not deny the value of preschool education, but they held that under constitutional separation of powers precepts it is up to the legislature to ultimately determine whether and how these services should be provided.¹¹⁰ Significantly, the special masters subsequently appointed by the Arkansas Supreme Court to enforce their adequacy ruling questioned whether the state could meet its constitutional obligation to provide students the opportunity for a "substantially equal educational opportunity... without providing pre-kindergarten for disadvantaged children."¹¹¹

As all of these examples make clear, the legal claim for preschool as an integral part of an adequate education for children from a background of poverty "is quite strong."¹¹² Courts that recognize that a right to preschool education is an integral aspect of the constitutional guarantee of an adequate education or that it is an essential part of the remedies needed to provide meaningful educational opportunity to children from backgrounds of poverty should, however, also recognize that the same arguments and justifications apply also to the essential early childhood, expanded learning, health, and family support opportunities that are needed to provide a meaningful educational opportunity to children from backgrounds of poverty. As David Kirp has noted:

Should high-quality prekindergarten take root nationwide, it will be a major step toward improving children's lives — but just a step. If the aspiration is to have a marked and sustained effect on children, especially poor children, preschool for all is much too narrow a vision. Its benefits come

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 33.

¹⁰⁷ *Hancock ex.rel. Hancock v. Driscoll*, 2004 WL 877984 at 146 n. 221 (Mass. Super. Ct., Apr. 26, 2004).

¹⁰⁸ *Lake View v. Huckabee*, 91 S.W.3d 472, 501 (Ark. 2002).

¹⁰⁹ *Id.*; *Hancock v. Driscoll*, 822 N.E. 2d 1134, 1136-1137 (Mass. 2005)

¹¹⁰ As Professor James Ryan has argued, there is a basic inconsistency in the separation of powers arguments advanced by the Arkansas and Massachusetts high courts because

If courts are willing, as they should be, to determine whether state constitutions create a right to equal or adequate educational opportunities, they must be committed to defining the content of those opportunities . . . it would be unjustified for a court to determine that the decision about this particular input (preschool) must be left to the legislature, while identifying the other inputs that must be included within any definition of the right to equal or adequate educational opportunities.

James E. Ryan, *A Constitutional Right to Preschool?* 94 CAL. L. REV. 49, 85 (2006).

¹¹¹ Special Masters Report to Supreme Court of Arkansas No. 1-846 at 10 (2004), *available* at <http://courts.state.ar.us/lake%20view/report.pdf>.

¹¹² Ryan, *supra* note 105, at 90. Ryan also notes that legal rulings that include a right to preschool as an aspect of adequate education are likely to be effective in practice because the value of preschool education is strongly supported by the social science research data, preschool is popular with the public, and a court decision can provide useful "political cover" for legislators who support the idea but are hesitant to provide the funding that is required to implement it on a broader scale. *Id.* at 87-95.

too late, since so much has already happened to children by the time they are four years old. And they end too early, because primary schools have to improve if their impact is to last.... What's more, preschool pays relatively little attention to other aspects of children's lives, like their health, and although parents' influence dwarfs that of the school, it is silent on the subject of parenting.¹¹³

B. Equal Protection

The U.S. Supreme Court considered the application of the equal protection clause of the 14th Amendment of the United States Constitution to issues of the funding of elementary and secondary education in *San Antonio Independent School District v. Rodriguez*.¹¹⁴ There, the Court upheld Texas's reliance on local property taxes to fund public education, even though that system resulted in substantial inequities in the funding of schools in property poor districts. Critical to the holding in *Rodriguez* was the application of the three-tiered approach to the levels of scrutiny that the Supreme Court utilizes in considering challenges to government actions (or inactions) under the equal protection clause. The Court's jurisprudence divides claims that a governmental agency is denying someone "equal protection of the laws" into three distinct analytic categories: those entitled to "strict scrutiny" of their claims, those entitled to an "intermediate" level of scrutiny, and, the majority of cases, which are reviewed only to determine whether there was any "rational basis" for the government's action.

"Strict scrutiny" requires the government to provide "compelling" reasons for challenged governmental actions; it is applied only in cases that involve allegations of discrimination based on race, religion, alienage or national origin or to matters that rise to the level of "fundamental interests" under the constitution such as voting rights.¹¹⁵ "Intermediate scrutiny" is applied to claims of discrimination based on gender,¹¹⁶ or illegitimacy;¹¹⁷ in cases involving this middle tier of scrutiny, the government must show that its actions are furthering "a substantial interest" of the state. Generally speaking, all other claims are reviewed under the significantly more lenient "rational basis" test, under which "a statutory classification ... must be upheld against equal protection challenge if there is any reasonably conceivable set of facts that could provide a rational basis for the classification."¹¹⁸

Needless to say, the severity of the scrutiny is directly correlated with the likelihood of a plaintiff prevailing in a particular case. For this reason, the main legal issue in the Supreme Court's consideration of the education finance claims in the *Rodriguez* case was whether the Court would include poverty as one of the "suspect classes" or education as one of the "fundamental interests" entitled to strict scrutiny review. Presumably, the substantial inequities in funding provided to students in property poor school districts would not have passed muster under the probing strict scrutiny review. After considering the issue of the proper level in great detail, the Court held, by a 5-4 majority, that "poverty" was not a "suspect class" and that education was not a "fundamental interest" under the federal constitution. The Court then applied the rational basis test and held that local control of education was a justifiable state interest, and it dismissed plaintiffs' claim.

¹¹³ Kirp, *supra* note 8, at 9-10.

¹¹⁴ 411 U.S. 1 (1973).

¹¹⁵ See, e.g. *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (striking down miscegenation statute and holding that "the Equal Protection Clause demands that racial classification... be subjected to the most rigid scrutiny"); *Graham v. Richardson*, 403 U.S. 365 (1971) (restriction on welfare benefit for aliens struck down); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (striking down poll tax); *Bullock v. Carter*, 405 U.S. 395 (1972) (invalidating filing fee requirement for primary elections). *But see* *Burdick v. Takushi*, 504 U.S. 428, 428 (holding that only "severe" restrictions to voting rights would be subject to strict scrutiny, while "reasonable, nondiscriminatory" restrictions would be held to a lower standard). In *Crawford v. Marion County Election Bd.*, 553 U.S.181 (2008), the Supreme Court applied Burdick's lower standard to uphold Indiana's voter identification law.

¹¹⁶ See, e.g., *Craig v. Boren* 429 U.S. 190 (1976) (gender-based differential in eligibility to purchase beer not substantially related to important governmental objectives); *United States v. Virginia*, 518 U.S. 515 (1996) (exclusion of women from military college struck down).

¹¹⁷ See, e.g., *Lalli v. Lalli*, 439 U.S. 259 (1958) (intermediate scrutiny applied to issues of right of illegitimate children to inherit from intestate father's estate).

¹¹⁸ *FCC v. Beach Commc'n*, 508 U.S. 307, 313 (1993).

As discussed in the previous subsection, since the Court issued this ruling in 1973, numerous state courts have examined in depth the inequities in education finance under state equal protection and adequate education clauses. There have also been important equal protection decisions of the federal courts and of the Supreme Court itself that have a bearing on the issue of equal educational opportunity. Almost four decades have now passed since the Supreme Court issued its ruling in *Rodriguez*, and, especially in light of the ensuring developments in the state courts and the lower federal courts and the major developments that have occurred in education reform at both the state and federal levels, it is time to re-examine some of the assumptions that underlay the Court's equal protection analysis as well as the significant issues that the Court specifically left open for future consideration. Doing so will demonstrate that low income and minority students should have a strong equal protection claim not only to equitable financing for school based services, but also that these students have a right to meaningful educational opportunities that necessarily include a range of comprehensive services.

A major issue in determining whether a right to comprehensive educational opportunity would be upheld by the courts is, of course, the question of which of the three basic levels of equal protection scrutiny the courts will apply. If the denial of comprehensive services is held to trigger strict scrutiny review, it is most likely that claims of the disadvantaged students will succeed. Despite the Supreme Court's holding in *Rodriguez* that strict scrutiny analysis does not apply to claims of inequitable treatment in educational funding raised by the Texas plaintiffs in 1973, I will argue that it has now become clear that the denial of vital services to disadvantaged children denies them the degree of education necessary to exercise free speech, and to capably exercise the right to vote and to develop other important citizenship skills that are "fundamental interests" under the federal constitution.

Moreover, although, generally speaking, the intermediate level of scrutiny that requires a "substantial justification" for governmental actions that deprive some people of benefits that are made available to others applies only to claims of gender discrimination and illegitimacy, deprivation of educational opportunity in certain circumstances, such as those presented here, also should entitle the affected class to heightened judicial review. Finally, even if the claims are adjudicated under the more lenient rational basis standard, I will argue that the denial of critical services to some students from backgrounds of poverty while other members of the class are accorded the services does constitute a violation of equal protection guarantees under the "rational basis" precedents.¹¹⁹

Although I believe that substantial arguments exist for recognizing a right to comprehensive educational opportunity under each of the established categories, a reconsideration of the constitutional status of educational opportunity will also demonstrate the obsolescence of the Supreme Court's wooden three-tier approach to equal protection analysis. Consideration of what constitutes a "meaningful educational opportunity," unfettered by the artificial categorical framework, would allow the courts to directly confront and apply the core principle that education "is a right that must be made available to all on equal terms."¹²⁰ Doing so would illuminate the fact that just as it is absurd to say that a law that "forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread treats them equally,"¹²¹ so it is unfair to say that a child who lacks the linguistic development, the mental alertness, and the physical well-being necessary to be ready to learn has an equal opportunity to benefit from education.

¹¹⁹ The discussion in this section focuses only on federal equal protection law. The precedents in some of the states — and especially in those that have held that education is a fundamental interest under the state constitution — may be even more supportive of a right of disadvantaged children to receive comprehensive educational services.

¹²⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

¹²¹ ANATOLE FRANCE, *THE RED LILY*, Ch. 7 (1894).

1. Strict Scrutiny

Although in *Rodriguez* the U.S. Supreme Court held that education is not a “fundamental interest” under the federal constitution, that precedent does not necessarily preclude the invocation of strict scrutiny review to the denial of comprehensive educational opportunity to disadvantaged students. The Court specifically noted in *Rodriguez* that no evidence had been presented in that case that indicated that any students were receiving an inadequate education: “The State repeatedly asserted in its briefs...that it now assures ‘every child in every school district an adequate education.’ No proof was offered at trial persuasively discrediting or refuting the State’s assertion.”¹²² Furthermore, a few years later, in *Papasan v. Allain*, the Supreme Court specifically stated that it still had not “definitively settled the question of whether a minimally adequate education is a fundamental right and whether a statute alleged to infringe that right should be accorded heightened equal protection review.”¹²³

The adequacy issue was not raised in *Rodriguez* because the plaintiffs there focused on the dollar disparities in funding between school districts and not on the adequacy issues. As discussed in the previous section, over the past three and a half decade years since the *Rodriguez* decision was issued, the adequacy issue has been extensively litigated in the state courts, and the vast majority of these courts have found that large numbers of children throughout the country are, in fact, being denied the opportunity for an adequate education. A current case involving the denial of comprehensive educational opportunity to students from backgrounds of poverty would bring the wealth of legal precedents developed in the state courts to the U.S. Court and could present the strong evidentiary justification for this claim that was lacking in *Rodriguez*.

Although, in *Rodriguez*, the Court did not focus on adequacy issues, there was a substantial colloquy among the justices that highlighted the kinds of essential knowledge and skills that the Court would likely consider to be most relevant in this regard. The Court’s consideration of the relationship between fundamental interests protected by the federal constitution and an adequate education began with Justice Marshall’s strong insistence, in his dissent, on the importance of education for the functioning of our constitutional democracy:

Education directly affects the ability of a child to exercise his First Amendment rights, both as a source and as a receiver of information and ideas, whatever interests he may pursue in life Of particular importance is the relationship between education and the political process. Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government.... Education serves the essential function of instilling in our young an understanding of and appreciation for the principles and operation of our governmental processes. Education may instill the interest and provide the tools necessary for political discourse and debate. Indeed, it has frequently been suggested that education is the dominant factor affecting political consciousness and participation.... But of most immediate and direct concern must be the demonstrated effect of education on the exercise of the franchise by the electorate. The right to vote in federal elections is conferred by Art. I, § 2, and the Seventeenth Amendment of the Constitution, and access to the state franchise has been afforded special protection because it is preservative of other basic civil and political rights....¹²⁴

¹²² 411 U.S. at 24 (footnote omitted).

¹²³ 478 U.S. 265, 285 (1986). At issue in this case was the unequal distribution of money among the state’s school districts of money in a state fund derived from the sale of state lands in the distant past. The Supreme Court denied the plaintiff school officials’ claims for equal distribution of funds in the state trust on eleventh amendment grounds, but remanded the equal protection claims for a determination on whether a rational basis existed for the state’s actions. As indicated in the quoted text, Justice White’s opinion for the Court reserved for future consideration the question of whether an alleged denial of an adequate education would involve a fundamental interest entitled to strict scrutiny review because the plaintiffs had not alleged sufficient claims to invoke such consideration in the present case.

¹²⁴ 411 U.S. at 112-114. (Marshall, J., dissenting) (citations omitted). Justice Brennan, in his dissent, explained the nexus between education and the core political values of the constitution as follows:

As my Brother MARSHALL convincingly demonstrates, our prior cases stand for the proposition that “fundamentality” is, in large measure, a function of the right’s importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed. Thus, “[a]s the nexus between the specific constitutional guarantee and the non-constitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.”

Justice Powell, writing for the majority, accepted Justice Marshall's basic perspective. Summarizing the dissenters' arguments on this point, he stated:

Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote.... A similar line of reasoning is pursued with respect to the right to vote.... The electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed....¹²⁵

And he then indicated that he had no disagreement with this perspective, stating, "*We need not dispute any of these propositions*"¹²⁶ because the plaintiffs had not presented any evidence that any students were not receiving such an adequate education:

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.¹²⁷

In short then, a minimally adequate education for federal constitutional purposes appears to be one that provides students with the essential skills that they will need to function capably as citizens in a democratic society, and specifically as citizens who have the "reading skills and thought skills" needed for "political discourse and debate" and to "exercise intelligent use of the franchise and of the right to vote." The development of such skills would be a "fundamental interest" directly related to free speech and voting rights protected by the 1st, 14th, 15th, and 17th Amendments to the federal constitution and claims of a denial of them would, therefore, be subject to "strict scrutiny" review.

What exactly are the school-based skills that students need to learn in order to function capably as citizens in a democratic society? Although the U.S. Supreme Court has not had an opportunity to consider this issue in depth, state courts in their extensive reviews of the requirements of education adequacy clauses in state constitutions have. The inability of many state school systems to develop such skills was at the heart of the findings of many of the state courts that have held in recent years that state constitutional requirements for an adequate education were not being met.¹²⁸ A particularly probing examination of this issue was undertaken by the trial court in *CFE v. State of New York*,¹²⁹ which considered in detail students' preparation to function as capable citizens during the extensive seven-month trial that was held in that case.

In *CFE*, Justice Leland DeGrasse first instructed the parties to have their expert witnesses analyze a

Id. at 62.

¹²⁵ *Id.* at 37.

¹²⁶ *Id.* at 36 (emphasis added).

¹²⁷ *Id.* at 36-37. In upholding the rationality of the local funding component of the Texas Education Finance system, Justice Powell also noted that "*While assuring a basis [sic] education for every child in the State, it permits and encourages a large measure of participation in and control of each district's schools at the local level.*" *Id.* at 49 (emphasis added).

¹²⁸ See, e.g., *Campaign for Fiscal Equity v. State of N.Y.*, 801 N.E. 2d 326, 332 (N.Y. 2003) (State fails to afford New York City schoolchildren "the opportunity for a meaningful high school education, one which prepares them to function productively as civic participants"); *Brigham v. State*, 692 A. 2d 384,397 (Vt. 1997) (Declaring that the purpose of state's right to education clause is to keep "a democracy competitive and thriving" and to prepare students "to live in today's global marketplace"); *Rose v. Council for Better Educ.*, 790 S.W. 2d 186,212 (Ky. 1989) (an adequate education must include, *inter alia*, "sufficient knowledge of economic, social and political systems to enable the student to make informed choices" as well as "sufficient knowledge of governmental processes to enable the student to understand the issues that affect his or her community").

¹²⁹ 719 N.Y.S.2d 475 (S. Ct. N.Y. Co. 2001), *aff'd* 801 N.E. 2d 326 (NY 2003)

charter referendum proposal that was actually on the ballot in New York City at the time the trial was in progress. The specific question posed was whether graduates of New York high schools would have the skills needed to comprehend that document. The witnesses were also asked to conduct a similar analysis of the judge's charges to the jury and of certain documents put into evidence in two complex civil cases that had recently been tried in state and federal courts.

Linda Darling-Hammond, at the time a professor at Teachers College, Columbia University, was the primary expert witness for the plaintiffs on these issues. She first closely reviewed the charter revision proposal and identified the specific reading and analytical skills that an individual would need in order to understand that document. She then related these skills to particular standards set forth in the new learning standards that New York State had adopted in English literature arts, social studies, and mathematics and sciences.¹³⁰

Darling-Hammond also described the types of skills a juror would need to comprehend and apply concepts like “the preponderance of the evidence” in terms of being able to “understand how to weigh the evidence, how to decide what the preponderance of the evidence might mean, what kind of testimony is credible and how to use the evidence in drawing an opinion.”¹³¹ The specific types of skills needed to undertake this complex reasoning process are also cultivated by the state learning standards, according to Darling-Hammond.¹³² She further explained how such skills as the ability to analyze statistical tables and graphs, understand economic concepts like “opportunity costs,” and comprehend scientific studies are developed by the mathematics, science, and social studies standards.¹³³

The defendants' primary expert on the ballot comprehension issue was Christine Rossell, a political science professor from Boston University. Rossell did not testify about the specific skills a student would need to be an effective voter. Instead, she introduced polling data showing that the vast majority of American voters obtain their information from radio and television news and make up their minds on how to vote for candidates and propositions before they enter the voting booth.¹³⁴ Her implicit argument was that understanding political concepts and issues as discussed on radio and television news broadcasts does not require higher-level cognitive skills, and since most voters make up their minds without actually reading ballot propositions, the level of skills necessary to comprehend such documents is not a significant issue.

Herbert Walberg, an education professor from the University of Illinois–Chicago, also testified for the defendants in the *CFE* trial. He undertook a computerized “readability analysis” of various newspaper articles dealing with electoral issues and of some of the jury documents that had been analyzed by the plaintiffs' experts. He concluded that only a 7th or 8th grade level of reading skills was needed to comprehend these materials.¹³⁵ Walberg also indicated that dialogue among members of the jury could substitute for a lack of understanding of particular points by some of the individual jurors.¹³⁶

Overall, then, the implied premise of the defendants' position was that citizens do not actually need to function at a high level of skill, and that they need not be capable of comprehending complex written material, so long as the subjects dealt with in the material are regularly discussed in the mass media, or so long as they can obtain assistance from other citizens in carrying out their civic responsibilities. Justice DeGrasse's decision resoundingly rejected this position. He held:

¹³⁰ *Id.* Record at pp. 6484, 6489.

¹³¹ *Id.* Record at pp. 6516.

¹³² *Id.* Record at pp. 6517.

¹³³ *Id.* Record at pp. 6522-6524; 6528-6534.

¹³⁴ *Id.* Record at pp. 16874, 16878-16879, 16886, 16888-16889; Defendants' Exhibits Nos. 19290, 19293.

¹³⁵ *Id.* Record at pp. 17182-17183. The plaintiffs argued that Walberg's analysis relied on reading scales that focus on sentence length and other mechanical factors, rather than on the cognitive level of the materials being reviewed, and that by doing so he reached the implausible conclusion that the *New York Times* and the *New York Daily News* have essentially the same level of reading difficulty. *Id.* at pp. 17185, 17201, 17215.

¹³⁶ *Id.* Record at pp. 17220.

An engaged, capable voter needs the intellectual tools to evaluate complex issues, such as campaign finance reform, tax policy, and global warming, to name only a few. Ballot propositions in New York City, such as the charter reform proposal that was on the ballot in November 1999, can require a close reading and a familiarity with the structure of local government.

Similarly, a capable and productive citizen doesn't simply show up for jury service. Rather she is capable of serving impartially on trials that may require learning unfamiliar facts and concepts and new ways to communicate and reach decisions with her fellow jurors. To be sure, the jury is in some respects an anti-elitist institution where life experience and practical intelligence can be more important than formal education. Nonetheless, jurors may be called on to decide complex matters that require the verbal, reasoning, math, science, and socialization skills that should be imparted in public schools. Jurors today must determine questions of fact concerning DNA evidence, statistical analyses, and convoluted financial fraud, to name only three topics.¹³⁷

Although society may have unreflectively accepted a wide gap between its democratic ideal and the actual functioning level of its citizens in the past, now that the issue has come to the fore, it is difficult to conceive of our society knowingly perpetuating a state of affairs in which voters cannot comprehend the ballot materials about which they are voting and jurors cannot understand legal instructions or major evidentiary submissions in the cases they are deciding. In order to function productively in today's complex world, citizens need a broad range of cognitive skills that will allow them to function capably and knowledgeably, not only as voters and jurors, but also in petitioning their representatives, asserting their rights as individuals, and otherwise taking part in the broad range of interchanges and relationships involved in the concept of civic engagement.

Should the U.S. Supreme Court reconsider the adequate education issue left open by *Rodriguez*, it would need to review the kind of evidence that was presented in the *CFE* case regarding the specific skills that students need to function as capable citizens, and the skills that students are actually learning in relation to those citizenship needs. At the present time, most students from backgrounds of poverty in most states are either dropping out of school or are leaving school without achieving minimal proficiency levels in reading, mathematics, and other areas necessary to function as capable citizens.¹³⁸ When and if the Supreme Court compares the actual skills that these students have acquired by the time they leave school with the basic skills they need to function as capable citizens, there can be little doubt that the education that such students are receiving will be considered below any reasonable adequacy standard.

In short, if basic citizenship skills are at the core of the adequate education that students need to carry out the fundamental interests in free speech, voting and other core values set forth in the federal constitution, an analysis — and certainly a strict scrutiny analysis — of the educational opportunities that students from backgrounds of poverty are presently receiving in most urban and rural districts will undoubtedly convince the Court that these students are being denied a meaningful educational opportunity in viola-

¹³⁷ 719 N.Y.S.2d at 485. The Court of Appeals generally affirmed these conclusions, stating,

Based on [Walberg's] testimony, the Appellate Division concluded that the skills necessary for civic participation are imparted between the eighth and ninth grades. The trial court, by contrast, concluded that productive citizenship "means more than being qualified to vote or serve as a juror, but to do so capably and knowledgeably — to have skills appropriate to the task." We agree with the trial court that students require more than an eighth grade education to function productively as citizens, and that the mandate of the Education Article for a sound basic education should not be pegged to the eighth or ninth grade, or indeed to any particular grade level.

801 N.E. 2d at 331 (citations omitted).

¹³⁸ For example, in New York State in 2008, only 59% of black students, 57% of Latino students, and 63% of low income students graduated from high school, compared with 84% of whites and 82% of Asians. See, <http://www.emsc.nysed.gov/irts/reportcard/2009/2009statewideAOR.pdf>.

Proficiency rates for eighth grade students in New York on the state's Regents exams for 2010 in reading were 34.4% for African-American students, 36.8% for Latinos, and 39.1% for low income students, compared with 64.8% for whites and 67.9% for Asians; for eighth grade mathematics, the comparable figures were 40.9% for African-Americans, 47.3% for Latinos, and 49% for low income students, compared with 71.1 % for whites and 81.7% for Asians. See, http://www.oms.nysed.gov/press/PressConferencePresentationUPDATEDAM07_28.pdf

The statistics were similar in other states like Massachusetts where in 2008, only 23% of African Americans, 21% of Latinos and 8% of low income students were proficient in 8th grade math as assessed by the National Assessment of Educational Progress (NAEP), compared with 59% of whites and 66% of Asians. See, <http://www.doe.mass.edu/boe/annual/09.pdf>

tion of the equal protection clause of the 14th Amendment. An unwillingness to expend the funds needed to provide these students the comprehensive services they need to overcome their disadvantages would not constitute a compelling reason to deny these children their right to an adequate basic education, since both the federal and the state courts have repeatedly held that the cost factors cannot justify the denial of constitutional rights.¹³⁹

2. Intermediate Scrutiny

Although in *Rodriguez* the Supreme Court relegated claims of discrimination in education finance to minimal rational relationship review, in a later decision involving access to educational services, the Supreme Court applied the more demanding “intermediate scrutiny” test, previously applied only to gender and illegitimacy issues, to a claim of educational deprivation; the plaintiffs then prevailed. The issue in *Plyler v. Doe*¹⁴⁰ was whether children of undocumented immigrants were entitled to a free public education. The Court held that in light of the long-term implications of the denial of education to these students, the exclusion policy could not be considered constitutional unless it furthered some “substantial goal” of the state:

[This law] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.¹⁴¹

The Court then rejected each of the policy rationales put forward by the state of Texas, such as the cost to the state, the fact that many of these students may not remain permanently in the state, and an alleged negative impact on the quality of education being provided to other students, and concluded that any interest the State might have in preserving educational resources for its lawful residents was “wholly insubstantial in light of the costs involved to these children, the State, and the Nation.”¹⁴² The costs noted by the Court included “the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime.”¹⁴³

The similarity of the situation of the children of undocumented immigrants in *Plyler* and the class of children who are substantially educationally disadvantaged by the impact of concentrated poverty is striking.¹⁴⁴ These children, like the undocumented immigrant children, are not “accountable for their disabling status.” Unless they are provided the essential resources they need, many of them will be marked by “the stigma of illiteracy for the rest of their lives.” In addition, by denying many of these children access to the

¹³⁹ See, e.g., *Watson v. City of Memphis*, 373 U.S. 526, 537 (1963) (“vindication of conceded constitutional rights [to park desegregation] cannot be made dependent upon any theory that it is less expensive to deny than to afford them”); *Shapiro v. Thompson*, 394 U.S. 618, 633, (1969) (“[t]he saving of welfare costs cannot justify an otherwise invidious classification”); *Bounds v. Smith*, 430 U.S. 817, 825 (1977) (“the cost of protecting a constitutional right cannot justify its total denial”); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 392 (1992) (“financial constraints may not be used to justify the creation or perpetuation of constitutional violations...”). State supreme courts have similarly held that the “financial burden entailed in meeting [constitutionally mandated education provisions] in no way lessens the constitutional duty,” *Rose v. Council for Better Education* 790 S.W. 2d 186, 208 (KY, 1989); see also, *Kostermann v. Cuomo*, 463 N.E. 2d 588,594 (failure to provide suitable treatment to mental health patients could not be “justified by lack of staff or facilities”).

¹⁴⁰ 457 U.S. 202 (1982)

¹⁴¹ *Id.* at 223-224. Although “alienage” is a category that has traditionally invoked strict scrutiny analysis, the Court presumably did not examine the issues affecting the undocumented immigrant children in this case under that heading because the group to whom this classification applies is limited to “lawfully admitted resident alien[s].” *Application of Griffiths* 413 U.S. 717, 720 (1973).

¹⁴² *Id.* at 230

¹⁴³ *Id.*

¹⁴⁴ A substantial number of undocumented immigrant children are also part of the class of children living in conditions of poverty for whom the right to comprehensive educational opportunity is being asserted. Children of immigrants comprise more than 26% of all low-income children in the United States. http://www.nccp.org/publications/pub_657.html

basic resources and services they need, we will “foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our nation.” Present policies clearly are creating a “subclass of illiterates” that will “lack the ability to live within the structures of civic institutions” and in addition to their personal plight, lack of attention to these needs will “surely add to the problems and costs of unemployment, welfare and crime.”¹⁴⁵

The evidentiary case supporting the claims of a class of students from backgrounds of poverty would be even stronger than the case presented in *Plyler* since, as demonstrated above¹⁴⁶ extensive research has established strong links between early childhood education, expanded learning opportunities, health, and family support and successful student achievement. Accordingly, if a court analyzes the situation of economically disadvantaged students who are denied resources and services that they need to succeed with the same intermediate degree of scrutiny that the Supreme Court applied in *Plyler*, the failure to provide comprehensive educational opportunity to these students should also be invalidated.

The main rationale for the state’s failure to provide the full range of essential resources to disadvantaged children here, as in *Plyler*, is clearly the presumed high cost of doing so. The actual cost of providing the comprehensive set of resources and services these students need may not be as high as many people have presumed before analyzing the issue.¹⁴⁷ In any event, although cost is obviously a major concern for policymakers, and cost efficiency must be a priority in any practical program for providing comprehensive educational opportunity, cost per se cannot excuse the denial of a constitutional right.¹⁴⁸ Economic factors may be considered, for example, in choosing the methods used to provide meaningful access to services,¹⁴⁹ but the fact that additional state resources will have to be expended cannot be a legitimate reason for denying important constitutional benefits. The Supreme Court has not yet applied the *Plyler* standard to any other cases because, it has noted, *Plyler* involved a “unique confluence of theories and rationales.”¹⁵⁰ A number of lower federal courts, however, have determined that cases denying educational opportunities to disadvantaged children do involve the confluence of theories and rationales that justify application of *Plyler*’s intermediate scrutiny standard. For example, in *National Law Center on Homelessness v. State of New York*, the U.S. District Court for the Eastern District of New York applied the *Plyler* intermediate scrutiny standard to the circumstances of homeless children who were not receiving the same access to public school education enjoyed by other children. The Court held that the *Plyler* intermediate scrutiny standard should be applied because “the Defendants seem to be penalizing these children because of the misfortunes or the misdeeds of their parents.”¹⁵¹ Children from families living in concentrated poverty also should not be denied a meaningful educational opportunity because of circumstances created by their socioeconomic circumstances.

¹⁴⁵ Unlike the *Plyler* class, all of whom were being totally denied access to public education, some children from backgrounds of poverty are being provided some of the comprehensive services they need. (See discussion above at p. 9). The precise class for whom the *Plyler* precedent should apply is those students from backgrounds of poverty who are being systematically denied access to comprehensive resources and services that they need in order to have a meaningful opportunity to achieve educational success.

¹⁴⁶ See discussion at pp. 8–9 above.

¹⁴⁷ See Rothstein, Wilder, and Allgood, *supra* note 37.

¹⁴⁸ See cases cited *supra* note 134.

¹⁴⁹ *Bounds*, *supra* note 133, at 825. The Supreme Court in mandating pre-termination hearings for welfare recipients in *Goldberg v. Kelly*, 397 U.S. 254 (1970) stated that although all feasible steps should be taken to reduce the costs of constitutional compliance, in the end, constitutional requirements must be met:

[T]he State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities... Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State’s interest that his payments not be erroneously terminated, clearly outweighs the State’s competing concern to prevent any increase in its fiscal and administrative burdens.

¹⁵⁰ *Kadmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 459 (1988). The issue in *Kadmas* was whether parents of school children in “non-reorganized” school districts in North Dakota would be required to pay a \$97 annual transportation fee, which was waivable if a school board determined that a parent was unable to pay the fee. In *Kadmas*, the Court declined to apply *Plyler*’s intermediate scrutiny standard and utilized a minimal rational relationship analysis. In doing so, the Court noted that the user fee “will not create and perpetuate a subclass of illiterates” *Id.* at 459, indicating that disputes which do not involve substantial educational deprivation will not receive heightened scrutiny, but leaving open the question of whether the *Plyler* precedent might be relevant in a future case that does involve substantial educational deprivations.

¹⁵¹ 224 F.R.D. 314, 322 (E.D. N.Y. 2004).

Similarly, the federal Court of Appeals for the Eighth Circuit held in *Horton v. Marshall Public Schools*, a case involving the enrollment of students residing in a district with someone other than a parent or guardian that such children “are members of a “discrete class of children not accountable for their disabling status,” who, like the plaintiffs in *Plyler*, are entitled to intermediate level review.¹⁵² After closely examining and rejecting the three justifications that the defendants put forward for their policy, the court held that the policy did not further a substantial state interest.¹⁵³ Other federal courts have also applied the *Plyler* intermediate level of scrutiny in cases dealing with school-aged, pre-trial detainees who alleged that they were receiving inadequate educational services,¹⁵⁴ and to the denial of services to a child with disabilities on the grounds of residency.¹⁵⁵

3. Rational Basis Review

Should the federal courts decline to apply strict or intermediate scrutiny to a claim for access to meaningful educational opportunity by disadvantaged students, a case brought on behalf of these students should still prevail even under the less demanding rational basis standard. The traditional understanding of the rational basis standard, was that “A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.”¹⁵⁶ Since almost any governmental policy will have some plausible justification behind it, virtually every claim brought by plaintiffs would be denied. In a number of more recent cases, however, the Supreme Court has modified the traditional understanding and has struck down state actions that imposed burdens on or denied benefits to a particular group, even if there were some rational justifications for the policy at issue. I will argue, therefore, that if a similar level of modest, but serious, scrutiny is made of educational practices that deny necessary services to students from backgrounds of poverty, these practices should also be deemed unconstitutional.

The origin of the traditional extreme deference to legislative policy making was a counterreaction to the obstructionist stance of the highly conservative Supreme Court majority that had repeatedly struck down social legislation in the early New Deal period. After the furor over President Franklin D. Roosevelt’s failed “court packing” plan subsided (and Roosevelt was able to appoint several new justices),¹⁵⁷ the Court’s approach to reviewing social and economic legislation shifted from adamant opposition to extreme deference to legislative policy choices. By the 1950s, the Supreme Court’s strongly established position was that

The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.... For protection against abuses by legislatures the people must resort to the polls, not to the courts.¹⁵⁸

Although this is still the generally stated understanding of rational basis review, in recent decades, the Court has struck down a number of cases even when using this lesser standard, so much so that, as some of the justices themselves have acknowledged, the Court has, in essence, created a “second order”¹⁵⁹ rational

¹⁵² 769 F.2d 1323, 1329-1330 (8th Cir. 1985).

¹⁵³ *Id.*

¹⁵⁴ *Donnell C. v. Ill. State Bd. of Educ.*, 829 F. Supp. 1016 (N.D. Ill. 1993).

¹⁵⁵ *Sonya C. v. Ariz. Sch. For the Deaf and Blind*, 743 F. Supp 700, 712 (D. Ariz. 1990).

¹⁵⁶ *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); see also, e.g., *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 79 (1911) (“One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary”); *Morey v. Doud*, 354 U.S. 457, 465 (1957) (“The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary”).

¹⁵⁷ For discussions of Roosevelt’s abortive plan to expand the number of Supreme Court justices in order to control the ideological direction of the court, see, KEITH R. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY*, Ch. 2 (2007) and C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES*, ch. 1 (1948).

¹⁵⁸ *Williams v. Lee Optical Co.*, 348 U.S. 483, 489 (1955).

¹⁵⁹ *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 458 (1985) (Marshall, J. concurring in part and dissenting in part).

basis review. This informal “second order” rational basis review seems to consist of two subcategories. The first involves situations where the Court is concerned that Congress or a state legislative body has apparently adopted a policy out of some degree of animus to a disfavored group, but the Court is reluctant to include that group among the “suspect” categories that are entitled to strict or intermediate review. The second category of rational basis cases that have struck down social or economic legislation consists of cases that provide benefits to certain members of a group but deny the benefits without evenhanded justification to others who are similarly situated.

City of Cleburne v. Cleburne Living Center is the prime example of the group of cases that center on disfavored subgroups.¹⁶⁰ There, the Court held that a negative attitude toward the mentally retarded was not a constitutionally acceptable justification for subjecting a group home for the mentally retarded to special zoning requirements that were not imposed on boarding or lodging houses. Once that constitutionally unacceptable justification was set aside, the Court examined and quickly rejected the other purported justifications for the policy and held that there was no remaining rational basis for the zoning requirement, since the mentally retarded would not pose any real threat to the city’s legitimate interests. The Court then held that “The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”¹⁶¹

Similarly, in *Romer v. Evans*, the Court struck down a Colorado state constitutional amendment, adopted through a referendum, that prohibited all legislative, executive, and judicial actions designed to protect homosexual persons from discrimination.¹⁶² Justice Kennedy, writing for the majority, held that “[the amendment’s] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”¹⁶³ In *Romer*, as in *Cleburne Living Center*, the Court seemed determined to protect a disfavored group, but did not want to formally expand the categories of “suspect” minorities who are always entitled to strict or intermediate scrutiny to include people with disabilities or homosexuals.¹⁶⁴

A prime example of the subcategory of “second order” rational relationship cases involving the denial of benefits to some, but not all, individuals in a particular group was the Court’s 1982 decision in *Zobel v. Williams*.¹⁶⁵ This case involved a special monetary “dividend,” stemming from Alaska’s windfall oil revenues that the state granted to its residents in accordance with the number of years that each individual had lived in the state. The Court held that the state’s purported rationale, “prudent management of the fund” did not justify the substantial differences, ranging in some cases from \$50 to \$1,050, in the amounts distributed to particular individuals:

If the states can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a sliding scale based on years of residence-or even limiting access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? Could states impose different taxes based on length of residence? Alaska’s reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency. It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible.¹⁶⁶

The Court has applied this doctrine in a number of other contexts where states sought to provide greater

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 446.

¹⁶² 517 U.S. 620 (1996).

¹⁶³ *Id.* at 632.

¹⁶⁴ See also, *United States Dept. of Agriculture v. Moreno* 413 U.S. 528 (1973) (amendment to food stamp act declaring ineligible any household containing an individual who was not related to another member of the household held to violate equal protection because it singled out “hippies”).

¹⁶⁵ 457 U.S. 55 (1982).

¹⁶⁶ *Id.* at 64 (footnotes omitted).

benefits to some members of a class than to others. Thus, in *Hooper v. Bernhillo Country Assessor*,¹⁶⁷ the Supreme Court invalidated a New Mexico statute that granted a tax exemption to Vietnam veterans who lived in the state before May 8, 1976, but not to those who arrived later. The Court held that this policy had no rational relationship to the asserted objective of encouraging veterans to move to the state and that it had the effect of creating “two tiers of resident Vietnam veterans” and of creating “second class citizens.”¹⁶⁸

The denial of vital comprehensive educational services to some members of the class of disadvantaged students who are in need of such services also is apportioning benefits on an arbitrary basis and is creating “two tiers” of citizens, a pattern that strongly offends the concept of “equal protection.” Most states currently provide some amount of early childhood, extended learning, health, and family support programs and services to some of their disadvantaged students, but no state makes these resources and services available to all on equal terms. Under the established precedents, these practices should also be invalidated under “second order” rational basis review.¹⁶⁹ For example, although there has been a substantial increase in the provision of preschool services to disadvantaged students, as of 2005, nationally only 40% of three and four year olds from families with household incomes of \$20,000–30,000 were receiving these services.¹⁷⁰ In New York State, only about 40% of the one million children who need after-school services are receiving them;¹⁷¹ nationally, only 13% of children and adolescents in the lowest income quintile participate in after school programs.¹⁷² In 2007, 17.6% of children living in poverty had no health insurance coverage.¹⁷³ A recent mapping study of services currently being made available to disadvantaged students in New York City presents a graphic picture of a consistent pattern of partial availability of services in virtually every service area.¹⁷⁴

Concededly, the courts have held that not every departure from strict equality in the distribution of benefits will be considered a violation of equal protection, and “the machinery of government would not work if it were not allowed a little play in its joints.”¹⁷⁵ Presumably, fine distinctions in the amount or quality of services being provided, like minor variations in the sizes of preschool classes or in the number of hours children can attend after-school programs, would not rise to a constitutional level. Moreover, legislatures are granted a considerable degree of discretion in establishing classifications for the distribution of benefits or the imposition of regulations.¹⁷⁶ But providing extensive preschool or after-school services to half or less of the children

¹⁶⁷ 472 U.S. 612 (1985).

¹⁶⁸ *Id.* at 632. See also, e.g. *Attorney-General of New York v. Soto-Lopez*, 476 U.S. 898 (1986) (policy of denying veterans' bonus points for state employment to individuals who resided in other states when entering state service held to violate equal protection clause); *Baxstrom v. Herold*, 383 U.S. 107 (1966) (policy of granting due process review of current mental health status at the end of a term of commitment to those who had been civilly committed but not to those who had been criminally committed held to violate equal protection clause).

¹⁶⁹ “When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.” *Zobel v. Williams*, *supra*, 457 U.S. at 60.

¹⁷⁰ Kate Sheppard, *Pre-K Politics in the States A-10*, AMERICAN PROSPECT (Dec. 2007). With families with incomes under \$10,000, 52% were receiving preschool services for their three and four year olds and with families earning \$10,000- 20,000, only 49% were. By way of contrast, 68% of preschool aged children from families earning \$75,000-100,000 per year and 80% of those earning over 100% were receiving services. See also, U.S. Department of Education, National Center for Education Statistics, Early Childhood Longitudinal Study, Birth Cohort (ECLS-B), Longitudinal 9-month-Pre-School (NCES 2008-024): Table 7 (only 45% of four and five year olds in the lowest 20% of the population in terms of socioeconomic status receive either center-based or Head Start preschool services).

¹⁷¹ New York State Afterschool Network, NYSAN Policy Brief 3 (May 2008), available at http://www.nysan.org/files/2125_file_Afterschool_Funding_in_NYS_Brief3.pdf

¹⁷² MARGO GARDNER, JODIE L. ROTH, AND JEANNE BROOKS, CAN AFTER-SCHOOL PROGRAMS HELP LEVEL THE PLAYING FIELD FOR DISADVANTAGED YOUTH? 11 (Oct. 2009). A recent report by the National Center for Education Statistics based on a national sample of approximately 1800 public elementary schools in all 50 states and the District of Columbia found that most elementary school after-school programs required parents to pay fees; 38% of these programs indicated that cost to parents hindered student participation to a moderate or large extent. Of the schools that operated federally funded 21st Century Community Learning Centers, 59% did not provide transportation home for students. National Center for Education Statistics, *After-School Programs in Public Elementary Schools: First Look* (2009).

¹⁷³ U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States 24* (2007), <http://www.census.gov/prod/2008pubs/p60-235.pdf>.

¹⁷⁴ See Belfield and Levin, *supra* note 39.

¹⁷⁵ *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931).

¹⁷⁶ See, e.g. *Tigner v. Texas*, 310 U.S. 141 (1940) (upholding regulations exempting agriculture from antitrust laws applying to other industries), *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608 (1935) (upholding regulation limiting advertising by dentists but not other professionals); *In re Levy*, 345 N.E. 2d 556 (N.Y. 1976) (upholding the awarding of benefits to the blind and disabled, but not to other groups of disabled students).

who need them and totally denying any such services to the other half with precisely similar needs and who cannot be distinguished from their peers who receive the services on any rational basis whatsoever raises the level of deprivation well above the ambit of permissible variation allowed under the prior cases. As the U.S. Supreme Court stated in *Baxstrom v. Herold*, “Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made.”¹⁷⁷

Clearly, there is no rational basis for distinguishing between the low-income students who happen to receive many or all of the comprehensive services they need and those who are totally denied these extensive services.¹⁷⁸ States and localities presumably have no animus and no intent to shortchange certain disadvantaged students by denying them services that are being provided to their peers. The obvious reason that they deny important services to some of these children is that the states and localities are not willing to expend the amount of funds that would be necessary to extend benefits to all of the disadvantaged students who need them.

In *Zobel*,¹⁷⁹ however, the Supreme Court applied to the rational basis context the established doctrine¹⁸⁰ that saving money (i.e., “prudent management of the fund”) does not constitute an acceptable basis for discriminating among members of a class in terms of the amount of benefits they receive. That case, of course, involved a windfall dividend fund, and if the state were to determine that the fund would not permit maximum benefits to all, there would be no real social harm in lowering the maximum dividend amount and fairly dividing the allocations in the fund among all of the beneficiaries. A more difficult question arises when, as in the present situation, the benefit at issue involves a vital social service and the state claims that the funding available to support it is limited. Reducing benefits so all eligible students can receive some services would not be an acceptable outcome here because the result would be that no students would actually be receiving a meaningful educational opportunity. Extending the precedent of *Zobel* and the other second order rational basis cases here really means asserting that the equal protection clause requires not only that all eligible students must receive comprehensive services, but that they all must receive an adequate level of comprehensive services.

The specific question of whether the state, when providing a vital social service to some individuals must provide an adequate level of the service to all eligible individuals, was considered by the Supreme Court in *Dandridge v. Williams*.¹⁸¹ At issue there was a Maryland regulation that placed a maximum ceiling of \$250 per month on family welfare allotments, whether the family had two children or eight children. Obviously, this meant that large families were not receiving the per capita amount that the state had deemed necessary for children’s welfare in smaller families, and one could not seriously argue that economies of scale would justify capping the amount of benefits no matter how many family members would have to share the limited pot.

Dicta in this case stated that

It would be unthinkable, however, to suggest that confronted with economic strictures State government is powerless to move forward in the fields of education and social welfare with anything less than totally comprehensive programs. Such a contention would suggest that the only alternative open to the Legislature in the exercise of its policy-making responsibility, if it were to conclude that wholly free education could not be provided for all handicapped children, would be to withdraw the benefits now conferred on blind and deaf children—thus to fall back to an undifferentiated and senseless but categorically neat policy that since all could not be benefited, none would be.

The irony of this statement is that shortly after the Court ruled that private residential school maintenance payments could be provided to parents of children who are blind or deaf but be denied to parents of children with other disabling conditions, the legislature changed its policy and extended the benefit to the parents of all children with disabilities. See, *Matter of Scott K*, 400 N.Y.S. 2d 281 (Fam. Ct. N.Y. Co. 1976). Similarly, in the present situation, it is politically inconceivable that an equal protection ruling in favor of a class of low income children seeking access to comprehensive services would lead state legislatures to eliminate existing preschool programs, deny Medicaid services to all poor children, and eliminate other services now being provided to some children from backgrounds of poverty; it is much more likely that the legislative response would be to find the means to extend the benefits to all similarly situated children.

¹⁷⁷ 383 U.S. at 111.

¹⁷⁸ The “local control” rationale accepted by the Supreme Court in *Rodriguez* would not be relevant here since states and localities would continue to operate their programs, as they see fit, even if the Court should rule that the programs must be made available to all of the disadvantaged students who need them.

¹⁷⁹ 457 U.S. at 62-63.

¹⁸⁰ See references cited in note 134, *supra*.

¹⁸¹ 397 U.S. 471 (1970).

The three-judge trial court had held that this policy violated equal protection,¹⁸² but the Supreme Court reversed and upheld Maryland's maximum family welfare policy. It stated that "[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."¹⁸³ Thus, its decision allowed the state to continue to limit its total public assistance spending and to give lesser benefits to some recipients than to others.

Does *Dandridge* mean that even if the Supreme Court applied the *Zobel* precedent to the situation of students denied access to comprehensive services, it would allow a state to extend access to services in a manner that reduced program standards to inadequate levels? Not necessarily. The key distinction here is the primacy of place that education occupies as a vital public service both under federal and state constitutional law.

The central role of education for all aspects of contemporary life was strongly emphasized by the U.S. Supreme Court in *Brown v. Board of Education*:

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 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. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹⁸⁴

In *Rodriguez*, the Court specifically cited this passage from *Brown* and re-emphasized the pre-eminent position of education among the services that governments provide, even though it held in that case that importance of an activity is not dispositive of status as a "fundamental interest" for purposes of strict scrutiny analysis:

In *Brown v. Board of Education*...a unanimous Court recognized that "education is perhaps the most important function of state and local governments".... What was said there in the context of racial discrimination has lost none of its vitality with the passage of time.... This theme, expressing an abiding respect for the vital role of education in a free society, may be found in numerous opinions of Justices of this Court writing both before and after *Brown* was decided.... Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that "the grave significance of education both to the individual and to our society" cannot be doubted. But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.¹⁸⁵

The Court also expressed a concern in *Rodriguez* that designating education as a fundamental interest might create a "slippery slope" that would require extending similar favored treatment to other important

¹⁸² *Williams v. Dandridge*, 297 F. Supp 450, 458-459 (D. Md. 1968). The trial court held that this policy violated equal protection because needy children in large families were being treated differently than needy children in small families, but the court specifically declined to take a position on whether this decision meant that the state necessarily had to increase its total spending for public assistance.

¹⁸³ *Id.* at 487. In similar situations the Court had also previously held that "the existence of evils against which the law should afford protection and the relative need of different groups for that protection 'is a matter for the legislative judgment'" (*West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937)), and "Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. ... Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. ..." (*Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955)).

¹⁸⁴ 347 U.S. at 493.

¹⁸⁵ 411 U.S. at 29-30. As discussed above at pp. 25-26 above, the Court did leave open in *Rodriguez* the question of whether a denial of adequate educational opportunities that deprives students of the skills they need to exercise free speech and voting rights that are fundamental under the federal constitution would invoke strict scrutiny analysis.

social policy areas. In fact, it cited *Dandridge* in this regard and stated that, despite the obvious importance of welfare assistance which “involves the most basic economic needs of impoverished human beings,” the Court had not and would not accord fundamental interest status to social services based on their importance to society. The requisite standard would be whether or not, the benefits at issue involve “a right ... explicitly or implicitly guaranteed by the Constitution.”¹⁸⁶

Although the Court was unwilling to make distinctions among the various social services for purposes of strict scrutiny analysis in *Rodriguez*, it was willing to do so in its approach to the deprivation of educational opportunity to the undocumented immigrant children in *Plyler*. There, the Court held that, although education is not a fundamental constitutional interest, “neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.”¹⁸⁷ For these reasons, the Court in *Plyler* did apply intermediate scrutiny to issues of educational opportunity, even though such status has not been granted to welfare, housing, or other social policy areas.

Justice Blackmun, in his concurring opinion in *Plyler*, was even more specific on this point. He wrote:

Only a pedant would insist that there are *no* meaningful distinctions among the multitude of social and political interests regulated by the States, and *Rodriguez* does not stand for quite so absolute a proposition.... In my view, when the State provides an education to some and denies it to others, it immediately and inevitably creates class distinctions of a type fundamentally inconsistent with those purposes, mentioned above, of the Equal Protection Clause. Children denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve.¹⁸⁸

As discussed in the previous subsection, because denial of comprehensive services to low income children similarly places them at a “permanent and insurmountable competitive disadvantage,” their claims for comprehensive services should also be subject to intermediate level scrutiny. However, even assuming *arguendo* that the Court ultimately reserves intermediate scrutiny only for education cases that involve *Plyler*’s unique combination of educational opportunity and undocumented immigrant status, the constitutional pre-eminence of education is of sufficient import that it should be a basis for applying “second order” rational relationship scrutiny to cases that involve deprivations of meaningful educational opportunities. Without denigrating the importance of welfare, housing, or other social needs, from a constitutional perspective — and consistent with the centrality of education in the American dream ideology — education clearly does have a favored place, as the Supreme Court consistently and repeatedly emphasized in *Brown*, *Rodriguez*, and *Plyler*, and a host of other cases.¹⁸⁹

¹⁸⁶ 411 U.S. at 33. The court also emphasized in this regard its precedents that denied fundamental interest status to housing:

Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972), decided only last Term, firmly reiterates that social importance is not the critical determinant for subjecting state legislation to strict scrutiny. The complainants in that case, involving a challenge to the procedural limitations imposed on tenants in suits brought by landlords under Oregon’s Forcible Entry and Wrongful Detainer Law, urged the Court to examine the operation of the statute under ‘a more stringent standard than mere rationality.’ *Id.* at 73, 92 S.Ct. at 874. The tenants argued that the statutory limitations implicated ‘fundamental interests which are particularly important to the poor,’ such as the “need for decent shelter” and the “right to retain peaceful possession of one’s home.” *Id.* Mr. Justice White’s analysis, in his opinion for the Court is instructive:

“We do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease, without the payment of rent. . . . Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.” *Id.*, at 74, 92 S.Ct. at 874. (Emphasis added). *Id.*

¹⁸⁷ 457 U.S. at 221.

¹⁸⁸ *Id.* at 232-234 (Blackmun, J. concurring).

¹⁸⁹ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (“Providing public schools stands at the very apex of the function of a state”); *Abington School Dist. v. Schempp*, 374 U.S. 203, 230, (1963) (Brennan, J. concurring) (“Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government”); *People of State of Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 212, (1948) (Frankfurter, J., concurring) (the public schools are “perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people”); *Meyer v. Nebraska*, 262 U.S. 390, (1923) (“The American people have always regarded education and the acquisition of knowledge as matters of supreme importance which should be diligently promoted.”)

The pre-eminent position of education in most state constitutions, as emphasized in many of the state court education adequacy decisions, provides a further strong rationale for holding that for equal protection purposes all eligible students must receive comprehensive services. Providing a sound basic education has been held to be an affirmative obligation of the state government in most states, and in many states it is the only social service for which the state has an affirmative constitutional obligation.¹⁹⁰

Moreover, if second order rational basis analysis is applied to a claim for comprehensive educational opportunity, the courts should not countenance the possibility of providing a reduced level of benefits for all of the members of the class, as was possible with the windfall dividends for Alaska residents that was at issue in *Zobel*. Educational benefits are not “windfalls”; they are vital services that children must receive in order that they “may reasonably be expected to succeed in life.”¹⁹¹ Thus, if a court determines that it is a denial of equal educational opportunity to deprive some eligible children of early childhood, extended day, or other comprehensive services that are being provided to other children in similar circumstances, the remedy necessarily must be to provide all eligible children an adequate level of services. In other words, once it is determined that all children are entitled to a piece of the pie, in order to maintain meaningful educational opportunities, the pie necessarily will need to be expanded and not simply cut into smaller slices.

The discussion in this section has argued that valid grounds exist under each of the established tripartite equal protection standards to hold that the failure to provide students from backgrounds of poverty with the comprehensive services they need to obtain a meaningful educational opportunity violates the equal protection clause of the federal constitution. In each of the categories, strict scrutiny, intermediate scrutiny and second order rational relationship, I have set forth plausible arguments for extending specific case precedents. Although reasonable counterarguments obviously exist for each of the positions I have espoused, the fact that credible legal arguments can be made for asserting a right to comprehensive educational opportunity in each of the established equal protection categories demonstrates both the artificiality of the tripartite distinctions and the weight of the justifications for applying the core equity principle of equal protection to students who are being denied meaningful educational opportunities.

In the past, many of the Supreme Court justices themselves have pointed out the artificiality of the Court’s existing tripartite approach to equal protection analysis and have argued that the degree of severity of the court’s scrutiny should vary with the significance of the issues presented.¹⁹² Perhaps close consideration by the Supreme Court of the fundamental inequity of patterns of resource allocation that perpetuate substantial denials of meaningful educational opportunity to millions of poor and minority students will provide a catalyst for finally dismantling these artificial analytic categories. Final resolution of these issues through the courts and, ultimately, by the U.S. Supreme Court will, of course, be a lengthy process. But implementation of the types of reforms called for by this equal protection analysis need not await the outcome of extensive judicial review. The public officials who have declared educational proficiency and elimination of achievement gaps to be the central educational policy of the federal and state governments have the ability — and the responsibility — to adhere to these equal protection principles, even if the courts have not yet clearly ordered them to do so. The next section will discuss why this is so.

¹⁹⁰ The Vermont Supreme Court described the significance of the constitutional pre-eminence of education as follows:

The important point is ... that education was the only governmental service considered worthy of constitutional status. The framers were not unaware of other public needs.... Indeed, many essential governmental services such as welfare, police and fire protection, transportation, and sanitation receive no mention whatsoever in our Constitution. Only one governmental service — public education — has ever been accorded constitutional status in Vermont.

Brigham v. State, 692 A. 2d 384, 397 (Vt. 1997).

¹⁹¹ *Brown v. Board of Education*, 447 U.S. at 93.

¹⁹² See, e.g., *Richardson v. Belcher*, 404 U.S. 78, 90 (1971) (Marshall, J. dissenting); *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 451 (1985) (Stevens, J and Burger, C.J. concurring); *Craig v. Boren*, 429 U.S. 190, 220-221 (1976) (Rehnquist, J. dissenting). For a detailed discussion of Justice Marshall’s position on this issue, see MARK V. TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT 1961-1991*, 98-103 (1997).

IV. Implementing the Right to Comprehensive Educational Opportunity

Recognition and implementation of the right to comprehensive educational opportunity need not and should not be seen as the exclusive domain of the courts. Political advocacy for inclusion of comprehensive educational opportunity in the ESEA reauthorization should be phrased in “rights talk” and accompanied by an on-going campaign to convince executive and legislative officials at both the state and federal levels of their own responsibility to acknowledge and act on students’ constitutional right to comprehensive educational opportunities.¹⁹³ A growing number of constitutional scholars have recognized in recent years that Congress and the president, as well as state legislatures and governors, regularly engage in a substantial process of constitutional interpretation that is distinguishable from the process of constitutional interpretation carried out by the courts. These scholars have argued that the constitution imposes affirmative obligations upon both the legislative and executive branches of government and that “[T]he constitution is aimed at everyone, not simply the judges. Its broad phrases should play a role with legislatures, executive officials and ordinary citizens as well.”¹⁹⁴ Although there is disagreement regarding the extent to which legislatures and executive agencies can make constitutional decisions that conflict with specific court decisions, there is broad agreement that the legislative and executive branches can and should act to enforce constitutional mandates in areas where the courts have not ruled or will not rule.¹⁹⁵ As Laurence Tribe has put it:

[F]ederal judges are not the only officials sworn to uphold the Constitution. The President and Congress, as well as the governments of the states and their political subdivisions are equally obliged to serve constitutional values and, therefore, to make good on the promise of the Civil War amendments when institutional concerns stop the judiciary from enforcing the norms contained in those amendments to their conceptual limits.¹⁹⁶

Implementation of a right to comprehensive educational opportunity can best be effectuated through a cooperative, functional separation of powers involvement of all three branches of the government at both the federal and the state levels.¹⁹⁷ The rapid breakthrough in acknowledgment and enforcement of the rights of people with disabilities was, in fact, effectuated largely by such cooperative, functional interchanges between the Congress and most of the state legislatures and the lower federal courts, without any conclusive declaration or mandate from the U.S. Supreme Court. In the early 1970s, two lower federal courts held trials on the issue of whether students with disabilities had an affirmative right to extensive educational services

¹⁹³ The president might galvanize the seemingly interminable congressional delays in acting on ESEA reauthorization (which should have been completed in 2007) by responding to the constitutional issue left open by the *Rodriguez* decision and declaring that in order to function productively as capable citizens in the 21st century, students need the comprehensive range of skills identified in many of the state education adequacy cases and in the task force reports that identified the services students from backgrounds of poverty need to be ready to learn. ESEA should respond to these needs by filling out its current framework to implement that right.

¹⁹⁴ CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* 9 (1993). See also, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (arguing that the people and their legislative representatives, and not only the courts, have authority to interpret the U.S. Constitution); LOUIS FISHER, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985) (arguing that Congress can perform an essential, broad, and ongoing role in shaping the meaning of the Constitution); Goodwin Liu, *Education, Equality and National Citizenship*, 116 YALE L.J. 330 (2006) (arguing for congressional recognition of a constitutional right to national citizenship).

¹⁹⁵ See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (arguing that legislative and executive branches should in many situations reconsider constitutional positions articulated by the courts); KEITH WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999); LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* 64-84 (1988) (discussing methods used by the Supreme Court to sidestep sensitive issues or to allow the other branches to reenter the field and make adjustments or revisions to court doctrines); James E. Fleming, *The Constitution Outside the Courts*, 86 CORNELL L. REV. 215, 242 (2000) (distinguishing between “the partial, judicially enforceable Constitution and the whole Constitution, which is binding outside the courts upon legislatures, executive officials and citizens generally...”).

¹⁹⁶ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1513, (2d ed., 1988); see also, e.g., LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2004) (arguing that institutional limitations compel courts to “underenforce” the Constitution and that the other branches have an obligation to complete enforcement on questions involving choices of strategy and responsibility that are properly in their institutional domain); Lawrence G. Sager, *Courting Disaster*, 73 FORDHAM L. REV. 1361, 1368-69 (2005) (“The political question doctrine, the under enforcement thesis, and the phenomenon of judicial deference all depend upon and fortify the license of non-judicial actors to apply the Constitution more stringently than would the Court”).

¹⁹⁷ See, *COURTS AND KIDS*, *supra* note 82, for a discussion of the comparative institutional advantages of each of the branches of government and the need for a cooperative, functional separation of powers approach to accomplish major social reform.

to meet their individual needs, but those cases were quickly settled and never reached the federal courts of appeal or the U.S. Supreme Court.¹⁹⁸ What happened instead is that Congress quickly responded to the concerns of advocates for the disabled and recognized the rights of students with disabilities to appropriate educational services by enacting the Education of all Handicapped Children's Act (EHA),¹⁹⁹ now known as the Individuals with Disabilities Education Act,²⁰⁰ (IDEA) and the Rehabilitation Act of 1974,²⁰¹ even though no court had ordered them to do so, and no court had clearly articulated the substance of any constitutional right in this area.²⁰²

Passage of the EHA under these circumstances has two major implications for present purposes. First, the fact that Congress and the state legislatures were willing to recognize a new constitutional right for a large cohort of students with disabilities, without any binding judicial mandate to do so, creates a significant precedent for Congress and state legislatures to recognize and implement a similar right to comprehensive educational opportunity for economically disadvantaged students.²⁰³ In its current version, the IDEA, the law now provides extensive procedural and substantive rights to almost six million students, constituting more than 9% of all six through 21 year olds in the United States.²⁰⁴ The extra costs to the federal and state governments and local school districts of providing these benefits is approximately \$63 billion per year, or approximately \$10,500 per child per year.²⁰⁵

Second, the fact that Congress and the state legislatures have recognized that these students have a right not merely to access to public education, but to receive "a free appropriate public education that emphasizes special education and related services designed to meet their unique needs"²⁰⁶ has major implications for considering the highly analogous individual needs of economically disadvantaged children. As with children with disabilities, affording children from backgrounds of poverty merely the right to enter public school buildings, without providing them the special supports and services they need to overcome the impediments that inhibit their learning potential is to deprive them of an adequate or appropriate educational opportunity. Without the comprehensive resources they need, many of these students, like students with disabilities before they received extensive benefits provided under the IDEA, will "sit... idly in regular classrooms awaiting the time when they [will be] old enough to drop out."²⁰⁷

¹⁹⁸ *Mills v. Board of Education*, 348 F. Supp. 866 (D. D.C. 1972) and *Pennsylvania Ass'n. for Retarded Children (PARC) v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F. Supp. 279 (E.D. Pa. 1972). The plaintiffs in these cases challenged statutes in the District of Columbia and in Pennsylvania that denied students with developmental disabilities, emotional disabilities and other disabilities the right to attend public schools. Both sets of defendants entered into consent decrees that recognized a right to equal educational opportunity for the disabled and provided the plaintiff classes with extensive procedural and substantive rights. These consent decrees applied only in Pennsylvania and the District of Columbia. No court decree obligated Congress and the state legislatures in the other 49 states to recognize these rights, and it was far from clear at the time that the U.S. Supreme Court, which had just decided the *Rodriguez* case, would have recognized a far-reaching new right in this area. To this day, the U.S. Supreme Court has never mandated or even considered a constitutional right to suitable educational opportunities for students with disabilities.

¹⁹⁹ P.L. 94-142.

²⁰⁰ 20 U.S.C.A. 1401 et seq.

²⁰¹ 29 U.S.C.A. § 504. In 1990, Congress also enacted the American with Disabilities Act, 42 U.S.C.A. § 12111 et seq., which extends the broad-based anti-discrimination precepts of the Civil Rights Act of 1964 to all persons with disabilities.

²⁰² Congress was, however, directly influenced by the *Mills* and *PARC* decisions in its drafting of the original statute. Both of these district court cases had held that handicapped children had a right to "an adequate, publicly supported education" and the cases set forth extensive procedures to be followed in formulating personalized educational programs for handicapped children. See *Mills*, 348 F. Supp. at 878-883; 334 F. Supp. at 1258-1267; *PARC*, 343 F. Supp. at 303-306. The Senate Report which accompanied the 1974 statute acknowledged that the Act "incorporated the major principles of the right to education cases." S. Rep. at 8, U.S. Code Cong. & Admin. News 1975 at 1432. Those principles in turn became the basis of the IDEA, which itself was designed to effectuate the purposes of the 1974 statute. H. R. Rep. at 5. *Rowley v. Bd. of Educ.*, 458 U.S. 176, 193-194 (1982).

²⁰³ Congress and many state legislatures have also enacted statutes that recognize and implement a right to meaningful educational opportunity for students with limited English proficiency. See §601 of the Civil Rights Act of 1964, 42 U.S.C. s 2000d, and its implementing regulations, Equal Educational Opportunity Act, 20 U.S.C.A. § 1703 (requiring educational agencies to take appropriate action to overcome language barriers that impede equal participation by students in their instructional programs.) The Supreme Court has relied on these statutes and regulations in enforcing these rights, and it has explicitly declined to reach the question of whether there is a constitutional basis for the students' claims. *Lau v. Nicols*, 414 U.S. 563, 566 (1974).

²⁰⁴ U.S. Department of Education, 27th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, 2005, Vol. 1 at 28.

²⁰⁵ See <http://www.ed.gov/about/overview/budget/statetables/09stbypogram.pdf> federal funds. Total figure calculated on extrapolation from 17% federal share.

²⁰⁶ 20 U.S.C. § 1400 (d) (1) (A).

²⁰⁷ H. R. Rep., at 2, cited in *Rowley*, *supra* note 182, at 191.

It is illogical and inequitable for Congress and the state legislatures to provide students disadvantaged by physical, mental, and emotional disabilities with “*special education and related services designed to meet their unique needs*,” while refusing to provide analogous services to meet the unique needs of students who are educationally disadvantaged by poverty. The array of services guaranteed to students with disabilities include, among other things, “speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, [and] social work services....”²⁰⁸ These are clearly parallel and in many cases exceed the range of comprehensive services needed by students with economic disadvantages.²⁰⁹

V. Conclusion

The federal government and each of the states have determined that it is vital to our national interest in remaining competitive in the global economy, and in preparing all of our students to be capable citizens in the 21st century, to eliminate current achievement gaps and to expect all students to become proficient in meeting challenging academic standards. The nation’s egalitarian heritage and its oft-stated commitments to equal educational opportunity, as well as specific statutory mandates and constitutional precedents, entitle students from backgrounds of poverty to the essential services and resources they need to meet these expectations. “Essential” resources for these students include both school-based categories like effective teachers and small class sizes, as well as vital “out-of-school” categories like early childhood education; extended-day, after school, and summer programs; as well as health and family support services.

Many states have already recognized the importance of taking bold new steps to coordinate the services provided by all of the state agencies that relate to children’s needs, develop a common set of outcomes, and collaboratively implement plans to improve children’s welfare and educational attainment.²¹⁰ In at least 16 states, governors have created state-level “Children’s Cabinets,” which are collaborative governance structures that seek to promote coordination across state agencies and improve the well-being of children and families.²¹¹ The federal government currently has in place at least 363 programs, across seven agencies, that deal with the comprehensive needs of children.²¹²

²⁰⁸ 20 U.S.C.A. § 1401 (26). School districts must also provide students with disabilities “an individualized educational program” (IEP) which sets forth the specific programs and services that are needed to meet the individualized need of the child (20 U.S.C.A §§ 1413 (A) (11); 1414 (a)(5)) and their parents are accorded extensive due process rights to ensure that all necessary services are included in the IEP and that they are appropriately provided. U.S.C.A §§ 1414, 1415.

²⁰⁹ Providing such services to students with severe disabilities can in many cases cost enormous sums. See, e.g., *Lawrence Township Bd. of Educ. v. New Jersey*, 417 F. 3d 368 (3d Cir 2005) (School district expended \$235, 367 for education of autistic student); *Missouri Dep’t. of Elementary and Secondary Educ. v. Springfield R-12 Sch. Dist.*, 358 F. 3d 992 (8th Cir. 2004). (State responsible for ensuring payment of \$175,363 for residential placement for blind and deaf child); *Clevenger v. Oak Ridge Sch. Bd.*, 744 F. 2d 514, 517 (6th Cir. 1984) (school board held liable for residential program costing \$88,000. per year in 1984 dollars.)

Note also that there are no means tests under the IDEA for the extensive services now provided to students with disabilities, and students from middle class and high income families enjoy these benefits to the same extent — and arguably, because of the advocacy skills and resources of their parents, to a greater extent — as low income children. Although from a political point of view extension of benefits to middle and upper income students undoubtedly helped obtain congressional passage of the Act, the fact that substantial resources are expended on the disabled, regardless of means, while only meager resources are provided for necessary comprehensive educational services to millions of low income students clearly raises troublesome moral and equitable issues.

²¹⁰ For example, Arizona’s Five Keys to Success Program seeks to ensure that all youth in the state are prepared to work, contribute and succeed in the 21st century by creating five cross-cutting supportive environments. A description of this program is available at <http://forumforyouthinvestment.org/node/240>. Similarly, Iowa’s Youth Development Strategic Plan 2007-2010 seeks to foster collaborative relationships among youth serving systems at the state and local levels to implement a vision of ensuring that all youth have safe and supportive families, schools and communities, are healthy and socially competent, successful in school and are prepared for a productive adulthood; a description of this program is available at <http://www.iowaworkforce.org/files/ICYD.pdf>. The “Children’s Plan” for improving the social and emotional development of children and their families adopted by nine child-serving agencies in New York State, available at <http://www.omh.state.ny.us/omhweb/engage/>.

²¹¹ NATIONAL GOVERNORS’ ASSOCIATION, CENTER FOR BEST PRACTICES, A GOVERNOR’S GUIDE TO CHILDREN’S CABINETS (2004). See also, KAREN PITTMAN, ELIZABETH GAINES, IAN FAIGLEY, STATE CHILDREN’S CABINETS AND COUNCILS: GETTING RESULTS FOR CHILDREN AND YOUTH (2007).

²¹² BELLA ROSENBERG WITH CHRISTOPHER T. CROSS, SHARON G. DEICH AND AMY R. COX, PROMOTING A COMPREHENSIVE APPROACH TO EDUCATIONAL OPPORTUNITY: A PILOT INVENTORY OF EDUCATION-RELATED FEDERAL PROGRAMS FOR CHILDREN AND YOUTH (Cross & Joftus, 2009), available at http://www.edstrategies.net/files/C&J_Fed_Prog_Inventory_Report_10-02-25.pdf. The authors of this report note at page 5 that

These efforts have created positive visions and structures for providing comprehensive services to children, and recent studies have shown that these services can be provided in an efficient, cost-effective manner. But more definitive actions need to be taken to organize and expand the existing programs into a coherent national strategy for meeting the comprehensive educational needs of *all* children. This means that the federal government and each of the states must recognize that access to vital services is not a benefit that can be doled out to some children as resources and the political climate permit, but rather such access on a consistent and systematic basis is a *right* of all children that is mandated by solid moral, statutory, and constitutional imperatives.

[D]espite the ongoing debate about whether or not schools alone can level the playing field, the federal government has long been engaged in a schools-plus approach. Indeed, as our pilot inventory strongly indicates, almost every federal agency now contains some program — and often a number of overlapping ones — directed at one or another key component of children’s educational development, starting at conception. Yet, as our still unrealized goal of equal educational opportunity suggests, those parts are not adding up to a coherent and effective response to the needs of children.